

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited**

**v.**

**Republic of Serbia**

**(ICSID Case No. ARB/18/8)**

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**PROCEDURAL ORDER NO. 5**

***Members of the Tribunal***

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal

Mr. Baiju S. Vasani, Arbitrator

Prof. Marcelo G. Kohen, Arbitrator

***Secretary of the Tribunal***

Ms. Anna Toubiana

***Assistant to the Tribunal***

Mr. Rahul Donde

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**29 August 2019**

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## **I. PROCEDURAL BACKGROUND**

1. On 12 February 2019, the ICSID Secretariat, acting on behalf of the Tribunal, sent the Parties Procedural Order No. 2 (“**PO 2**”) containing a draft Transparency Order and draft Transparency Rules, and invited the Parties’ comments by 22 February 2019. In PO 2, the Tribunal had proposed to apply transparency rules to this arbitration in conformity with the provisions of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, 2015 (the “**Canada-Serbia BIT**”), the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, 2005 (the “**Cyprus-Serbia BIT**”) as well as the applicable rules in the ICSID framework and seeking guidance from the UNCITRAL Rules on Transparency (the “**UNCITRAL Transparency Rules**”) where the three previous sets of rules provide no directions.
2. In response, the Claimants advised the Tribunal on 12 February 2019 that they had no comments on the Transparency Order. By contrast, the Respondent reiterated its earlier position on the transparency regime applicable in this proceeding and proposed a few modifications to the draft Transparency Order.
3. On 5 March 2019, the Tribunal advised the Parties that, on the basis of the record at the time, it was unable to determine whether claims arising under the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments (the “**Canada-Serbia BIT**”) and the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments (the “**Cyprus-Serbia BIT**”) were distinct such that claims under one Treaty could be separated from claims under the other. Accordingly, the Tribunal reserved its decision on the applicable transparency regime(s) until after the filing of the Respondent’s Counter-Memorial.

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4. On 19 April 2019, the Respondent filed its Counter-Memorial. It advanced several preliminary objections under the Canada-Serbia BIT and the Cyprus-Serbia BIT, requesting the Tribunal to bifurcate the proceedings to address those objections.
5. On 26 April 2019, the Tribunal gave the Parties the opportunity to submit any further comments on the transparency regime(s) applicable in this proceeding by 3 May 2019.
6. On 30 April 2019, the Respondent advised the Tribunal that it “[would] not be making any further comments in addition to those previously made.”
7. On 3 May 2019, the Claimants reiterated their earlier position, insisting that the Transparency Order should apply to all claims raised in this arbitration, including the claims under the Cyprus-Serbia BIT.
8. Accordingly, the Tribunal must now determine the transparency rules that govern these proceedings.

## **II. THE PARTIES’ POSITIONS**

### **A. Claimants’ Position**

9. The Claimants made submissions on the transparency regime applicable in this proceeding (i) in its comments of 20 November 2018 on draft Procedural Order No. 1; (ii) at the first procedural session of 23 November 2018; (iii) in its comments on the draft Transparency Order of 22 February 2019; and (iv) in its communication of 3 May 2019.
10. The Claimants note that this arbitration has been initiated under the Canada-Serbia BIT and Cyprus-Serbia BIT. While the former imposes certain transparency requirements, the latter is silent on the issue. In the circumstances, so say the Claimants, the arbitration must be conducted in compliance with the transparency requirements of the Canada-Serbia BIT, the silence of the Cyprus-Serbia BIT not ruling out transparency. Other ICSID tribunals faced with similar circumstances had adopted the same approach.

11. The Claimants further submit that the facts and legal arguments supporting the claims brought under the Cyprus-Serbia BIT are “largely the same”<sup>1</sup> as those supporting the claims under the Canada-Serbia BIT. In the circumstances, it would be “very difficult”<sup>2</sup> if not “outright impossible”<sup>3</sup> and “uneconomical”<sup>4</sup> to separate the few parts of the Parties’ submissions on jurisdiction and the merits relating exclusively to the claims under the Cyprus-Serbia BIT from the transparency regime proposed by the Tribunal in the draft Transparency Order. In fact, the Respondent has itself recognized that it would not be “practically possible”<sup>5</sup> to apply different transparency regimes depending on the applicable Treaty. Moreover, the Counter-Memorial “confirms that an overwhelming majority of the Parties’ submissions relate to factual and legal arguments relevant for the claims and defenses under both BITs.”<sup>6</sup>
12. The Claimants submit further that having agreed to a transparency regime under one treaty, there is no reason for the Respondent to object to the application of the same regime to another treaty, especially when the latter is silent on the issue. The only Party that could have a legitimate objection to the application of the transparency provisions of the Canada-Serbia BIT to the Cyprus-Serbia BIT is the Cypriot claimant, *i.e.* Claimant 6, which does not object.
13. Finally, the Claimants submit that important policy reasons underlie transparency in investment arbitration, which policies the Tribunal should promote.

#### **B. Respondent’s Position**

14. The Respondent made submissions on the transparency regime applicable in this proceeding (i) in its comments of 20 November 2018 on draft Procedural Order No. 1; (ii) at the first

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<sup>1</sup> Claimants’ communication of 22 February 2019, page 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Claimants’ communication of 3 May 2019, page 2.

<sup>5</sup> Claimants’ communication of 22 February 2019, page 2.

<sup>6</sup> Claimants’ communication of 3 May 2019, page 2.

- procedural session of 23 November 2018; (iii) in its comments on the draft Transparency Order of 22 February 2019; and (iv) in a communication of 30 April 2019.
15. The Respondent opposes the application of the transparency provisions of the Canada-Serbia BIT to the entire proceeding. It argues that, as the Cyprus-Serbia BIT contains no transparency rules, the ICSID Convention and the Arbitration Rules must govern. Those instruments do not provide for a presumption of transparency and require, for instance, the consent of all disputing parties for the publication of the award. It was the Claimants' choice to initiate this arbitration under two different treaties and they cannot now insist that one treaty trumps the other. On this basis, the Respondent proposes certain modifications to the draft Transparency Order.<sup>7</sup>
  16. The Respondent further submits that it is possible that the Tribunal sustains the Respondent's jurisdictional objections in respect of the Canada-Serbia BIT. If so, this proceeding would proceed solely on the basis of the Cyprus-Serbia BIT, in which case there would be no need for a Transparency Order as the transparency provisions of the ICSID Convention and Arbitration Rules would apply.
  17. The Respondent also contends that Article 31(1) of the Canada-Serbia BIT allows the disputing parties in an arbitration under that treaty to agree not to make the documents in the arbitration publicly available. The Respondent therefore agrees to the publication of the award in this arbitration, provided that the Claimants agree that the "'case file' (Tribunal's orders, written pleadings, transcripts, exhibits and other documents, letters, emails etc.)" will not be published.
  18. In conclusion, the Respondent observes that the Claimants have provided no real reason for making the record of this arbitration public. It also asserts that applying the transparency

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<sup>7</sup> Respondent's communication of 22 February 2019, paragraph 3 ("paragraph 4 is amended to read as follows: 'As a result of the foregoing, Article 48(5) of the ICSID Convention and Rule 32(2) and 48(4) of the ICSID Arbitration Rules do not apply in this proceeding, unless it deals solely with the claims under the Cyprus-Serbia BIT. In the latter case, the provisions of the ICSID Convention and Arbitration Rules shall apply to the exclusion of the transparency rules outlined in this Transparency Order and Annex thereto.'") (emphasis in original).

requirements of the Canada-Serbia BIT to the entire arbitration would impose a significant burden on the Parties in terms of time and cost.

### **III. ANALYSIS**

19. As recounted above, the Tribunal sent the Parties a draft Transparency Order appending draft Transparency Rules on 12 February 2019. The Respondent proposed certain modifications to the Order, insisting that the transparency provisions of the ICSID Convention and Arbitration Rules “be reflected in the Transparency Order and transparency rules, which should strive to achieve a fair balance between two BITs governing the present arbitration.”<sup>8</sup> In effect, the Respondent suggests the application of two different transparency regimes in this arbitration, one dealing with claims under the Canada-Serbia BIT and the other with claims under the Cyprus-Serbia BIT. The Claimants oppose this position and submit that the draft Transparency Order “should apply to all claims raised in this arbitration, including the claims under the Cyprus-Serbia BIT.”<sup>9</sup>

#### **A. Canada-Serbia BIT**

20. The Tribunal recalls that the Canada-Serbia BIT that applies to Claimants 1 to 5 contains transparency provisions on the publication of the award (Article 31(1)), the access to the arbitration record (Article 31(1)), and the publicity of the hearings (Article 31(2)). These provisions are mandatory and bind the Tribunal; they read as follows:

#### **“ARTICLE 31**

##### **Public Access to Hearings and Documents**

1. A Tribunal award under this Section shall be publicly available, subject to the redaction of confidential information. All other documents submitted to, or issued by, the Tribunal shall be

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<sup>8</sup> *Id.*, paragraph 2.

<sup>9</sup> Claimants’ communication of 22 February 2019, page 2.

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publicly available unless the disputing parties otherwise agree, subject to the redaction of confidential information.

2. Hearings held under this Section shall be open to the public. The Tribunal may hold portions of hearings *in camera* to the extent necessary to ensure the protection of confidential information.
  3. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in those documents.
  4. The Parties may share with officials of their respective national and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Section, but they shall ensure that those persons protect the confidential information in those documents.
  5. If a Tribunal's order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information prevails. However, the Party should try to apply its law on access to information so as to protect information that the Tribunal's order has designated as confidential."
21. The Tribunal notes that the draft Transparency Rules are in conformity with these treaty rules, and that none of the Parties raises an objection in this respect.
22. More specifically, in connection with the arbitration case record, Article 31(1) of the Canada-Serbia BIT provides that it will be made public, unless all disputing parties agree otherwise. Here, Claimants 1-5 insist on the publication of the case record of the arbitration. The Tribunal understands that the Respondent does not dispute this position in relation to the claims under the Canada-Serbia BIT. Indeed, the Respondent does not object to the draft Transparency Rules in this connection.

**B. Canada-Cyprus BIT**

23. The situation is different in relation to the Serbia-Cyprus BIT, which governs in relation to Claimant 6. Here, as mentioned, the Respondent contends that the transparency regime of the Canada-Serbia BIT cannot be applied to proceedings under the Cyprus-Serbia BIT. Therefore, it proposes to modify the draft Transparency Rules.
24. In terms of legal framework, the Tribunal starts by noting that the Cyprus-Serbia BIT contains no rules on transparency. In other words, it neither mandates nor prohibits transparency. As for the ICSID Convention and the ICSID Arbitration Rules, they contain only limited rules on transparency/publicity. These rules deal with the publication of the award,<sup>10</sup> which essentially requires the Parties' consent; the publicity of the hearings,<sup>11</sup> which also are subordinated to consent; and the non-disputing party submissions,<sup>12</sup> which are admissible provided they meet certain requirements.
25. Here, albeit conditionally, the Respondent has agreed to the publication of the award.<sup>13</sup> It has also agreed to a public hearing.<sup>14</sup> As for non-disputing party submissions, they are foreseen in the ICSID Arbitration Rules and the draft Transparency Rules do not modify the ICSID regulations, which continue to apply. Thus, on these matters, there is no dispute and the provisions of the draft Transparency Rules can apply in respect of claims under the Cyprus-Serbia BIT.

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<sup>10</sup> Article 48(5), ICSID Convention; Rule 48(4), ICSID Arbitration Rules.

<sup>11</sup> Rule 32(2), ICSID Arbitration Rules.

<sup>12</sup> Rule 37(2), ICSID Arbitration Rules.

<sup>13</sup> Respondent's comments of 20 November 2018 on draft Procedural Order No. 1, paragraph 26.1 ("Respondent agrees that the award be published subject to Claimants' agreement that the case file (documents, pleadings etc.) shall not be published.").

<sup>14</sup> Audio recording of the first procedural session of 23 November 2018 [56:30-57:05] ("[Respondent:] Respondent would be prepared to accept what it accepted in the treaty that is that the hearing be public. But again, we think that the case file should not be public, and we think that paragraph 1 second sentence would also allow us to keep the transcripts of the hearing from being public. So, we accept that the hearing is open, but the documents, transcripts and other parts of the case file shall remain not in public [*sic*].").

26. Accordingly, there only remains a disagreement on the disclosure of the record of the proceedings. As just mentioned, there are no rules governing this issue in the relevant treaties and arbitration rules, namely the Cyprus-Serbia BIT and ICSID Convention and Rules, nor have the Parties to the arbitration reached an *ad hoc* procedural agreement on this issue.
27. Absent an agreement between the disputing parties, matters of procedure are within the powers of the Tribunal pursuant to Article 44 of the ICSID Convention, and there is no doubt that issues of transparency and confidentiality are matters of procedure. The Tribunal therefore has the power to determine whether to allow the disclosure of the record in respect of the claims brought under the Cyprus-Serbia BIT.
28. Having pondered the pros and cons, the Tribunal comes to the conclusion that it is appropriate to do so for the following main reasons (in no specific order):
- (i) The first reason refers to procedural economy and the Tribunal's duty to conduct this arbitration in an efficient manner, both in terms of time and costs. While it is true that the Claimants initiated this arbitration through a single request for arbitration under two different Treaties, the Tribunal, having now seen the first round of pleadings, particularly those of the Respondent, finds that it would be highly inefficient, causing increased costs and likely delays, to seek to separate the submissions dealing with the claims of Claimants 1 to 5 from those of Claimant 6. Indeed, it appears that the same factual matrix and the same legal arguments are at issue in respect of the claims under the Cyprus-Serbia BIT as of those under the Canada-Serbia BIT;
  - (a) While the Respondent has naturally raised different jurisdictional objections under each Treaty, it also objects to the jurisdiction of the Tribunal on the basis of the ICSID Convention.<sup>15</sup> These objections would affect claims arising under

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<sup>15</sup> See, for instance, Counter-Memorial, Section III(E) ("Claimants do not meet jurisdictional requirements under the ICSID Convention").

both BITs and the Respondent has not made separate submissions under each Treaty;

- (b) The Parties' submissions on attribution would equally affect claims under the Cyprus-Serbia BIT as well as claims under the Canada-Serbia BIT. Here again, the Respondent has not made separate submissions on attribution;<sup>16</sup>
  - (c) Neither Party has distinguished facts relevant to the merits of the dispute under the Cyprus-Serbia BIT from facts pertinent under the other Treaty. The Respondent provides one general statement for the claims under both Treaties<sup>17</sup> and then expounds its submissions on liability<sup>18</sup> and on quantum<sup>19</sup> without segregating the facts supporting the claims made under the Cyprus-Serbia BIT from those under the Canada-Serbia BIT;
  - (d) As a result, it appears highly uneconomical and inefficient to separate the parts of the record that fall under the Cyprus-Serbia BIT from the rest. In fact, the Respondent agrees that it would not be "practically possible".<sup>20</sup> But even if it were, it would serve no meaningful purpose, as the information and documents in the record would be published under the Canada-Serbia BIT and little would be gained by maintaining the same facts as confidential in respect of the Cyprus-Serbia BIT.
- (ii) As a further reason, the Tribunal must give meaning to both Treaties in accordance with the principle of *effet utile*. Since the Cyprus-Serbia BIT is silent about

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<sup>16</sup> Counter-Memorial, Section IV ("Attribution").

<sup>17</sup> Counter-Memorial, Section II ("Statement of Facts").

<sup>18</sup> Counter-Memorial, Section V ("No Violation of Serbia's Obligations under the Treaties").

<sup>19</sup> Counter-Memorial, Section VI ("The Issue of Compensation").

<sup>20</sup> Audio recording of the first procedural session of 23 November 2018 [57:33-58:39] ("[President:] Would it be possible that the information relating more specifically to the Serbia-Cyprus BIT be considered confidential [...] provided of course it can be separated and would only deal with the Serbia-Cyprus BIT and not with both BITs? [...] [Respondent:] From a practical side and having read the Claimants' request for arbitration, and having been acquainted with the file, I don't really think that is practically possible.").

transparency and the Tribunal has the power to rule on this issue, and since there is no conflict between the two BITs, it makes sense to apply a transparency rule to the claims under the Cyprus-Serbia BIT that is identical to the one expressly set forth in the Canada-Serbia BIT;<sup>21</sup>

- (iii) To avoid any misunderstanding, the Tribunal does not propose to apply the transparency regime of one treaty to claims arising under another treaty. Transparency in respect of the claims under the Canada-Serbia BIT is governed by the express provisions of that treaty. Transparency in respect of the claims under the Cyprus-Serbia BIT is governed, in the silence of the Treaty, in part by the agreement of the disputing parties and in part by the decision of the Tribunal taken in the exercise of its procedural powers;
- (iv) The conclusion reached by the Tribunal is in line with the approach which another ICSID tribunal adopted when faced with two treaties one of which imposed transparency requirements and the other was silent on the issue;<sup>22</sup>
- (v) The Tribunal's conclusion is further corroborated by the strong trend in favor of transparency in investor-state dispute settlement, which trend is for instance manifest in the UNCITRAL Transparency Rules (the use of which is not limited to UNCITRAL arbitrations) and the Resolution adopted by the General Assembly of the UN recommending the use of such rules.<sup>23</sup>

### **C. Conclusion**

29. As a result of the foregoing discussion, the Tribunal comes to the conclusion that, while derived from different legal bases, the rules that will govern transparency in this arbitration

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<sup>21</sup> Another ICSID tribunal adopted the same approach when faced with two treaties one of which imposed transparency requirements and the other was silent on the issue. See Exh. CLA-58, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 2 of 16 April 2015.

<sup>22</sup> *Id.*

<sup>23</sup> Resolution adopted by the UN General Assembly on 16 December 2013.

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end up being identical for claims under both BITs. These rules are provided in the Transparency Rules, which are attached hereto as Annex A and form an integral part of this Order.

30. For the sake of clarity, the Tribunal has merged the essential content of the draft Transparency Order which was circulated as Annex A to PO 2 on 12 February 2019. In the final version of the Transparency Rules, it has also made some adjustments compared to that draft to facilitate the understanding and practical operation.
31. Finally, for the submissions that have already been filed, the time limit provided in paragraph 16 of the Transparency Rules shall run from the issuance of the present Order.

**IV. ORDER**

32. For the reasons set forth above, the Tribunal:
- (i) Directs that this arbitration be conducted under the Transparency Rules attached hereto as Annex A;
  - (ii) Directs that, for submissions already filed, the time limit set in paragraph 16 of the Transparency Rules shall run from the date of issuance of the present Order.
33. Prof. Kohen's dissent is appended.

On behalf of the Tribunal,

[signed]

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Professor Gabrielle Kaufmann-Kohler  
President of the Tribunal

## **ANNEX A**

### **TRANSPARENCY RULES**

#### **I. Discretion and Authority of the Tribunal**

1. The arbitral tribunal shall have the power to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the Parties if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.
2. Where these Rules provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:
  - a. The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and
  - b. The Parties' interest in a fair and efficient resolution of their dispute.
3. These Rules shall not affect any authority that the arbitral tribunal may otherwise have to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.
4. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

#### **II. Applicable Instrument in case of Conflict**

5. These Rules shall supplement any applicable arbitration rules. Where there is a conflict between these Rules and the applicable arbitration rules, these Rules shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules

and the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, the provisions of the treaty shall prevail.

6. Article 48(5) of the ICSID Convention and Rules 32(2) and 48(4) of the ICSID Arbitration Rules shall not apply to proceedings before this Tribunal.
7. Where these Rules are in conflict with a provision of the law applicable to the arbitration from which the Parties cannot derogate, that provision shall prevail.

### **III. Publication of Documents**

8. Subject to Section V, the following documents shall be made available to the public: the Claimants' request for arbitration, the Claimants' memorial, the Respondent's counter-memorial and any further written statements or written submissions by any disputing party; a list of all exhibits to the aforesaid documents and to expert reports and witness statements, if such list has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaties and by third persons, transcripts of hearings, where available; and orders, decisions and award of the arbitral tribunal.
9. Subject to Section V, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person made to the ICSID Secretariat.
10. Subject to Section V, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the Parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 8 or 9 above. This may include, for example, making such documents available for consultations at a specified location.

11. The documents to be made available to the public pursuant to paragraphs 8 and 9 shall be communicated by the arbitral tribunal to the Repository referred to in Section VI as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential information prescribed in Section V. The Repository shall make all documents available to the public in a timely manner, in the form and in the language in which it receives them.
12. Any administrative costs of making documents under this Section available to a person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the Repository (on the ICSID website), shall fall under ICSID Administrative and Financial Regulation 15.

#### **IV. Hearings**

13. The following logistical arrangements will be made to facilitate public access to the hearings:
  - (i) The hearings will be broadcast and made publicly accessible by video link on the ICSID website. An audio-video recording will also be made of hearings. For logistical reasons, physical attendance at the hearings by third persons will not be permitted.
  - (ii) In order to protect potential confidential information, the broadcast will be delayed by 30 minutes.
  - (iii) At any time during the hearings, a Party may request that a part of the hearing be held in private and that confidential information be excluded from the video transmission. To the extent possible, a Party shall inform the Tribunal before raising topics where confidential information could reasonably be expected to arise. The Tribunal will then consult the Parties. Such consultations shall be held *in camera* and the transcript shall be marked “confidential”. After consultation with the Parties, the Tribunal will decide whether to exclude the information in question from the broadcast and whether the relevant portion of the transcript shall be marked “confidential”. The transcript made public by the Repository shall redact those portions of the hearing marked “confidential.”

- (iv) The ICSID Secretariat will make the necessary technical arrangements to broadcast the hearings through video link.

**V. Exceptions to transparency**

*A. Confidential information*

14. Confidential information, as defined in paragraph 15 and as identified pursuant to the arrangements referred to in paragraphs 16 and 17, shall not be made available to the public.
15. Confidential information consists of:
- a. Confidential business information;
  - b. Information that is deemed confidential under the Canada-Serbia BIT;
  - c. Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or
  - d. Information the disclosure of which would impede law enforcement.
16. A Party, non-disputing party, or third person shall give notice within 15 days from the filing of a document mentioned in Section III that it seeks protection for confidential information in that document. In the absence of such notice, the Tribunal will authorize the publication by the Repository.

17. A notice seeking protection for confidential information made in accordance with the preceding paragraph shall specifically identify the part (or parts) of the document sought to be designated as confidential and explain the reasons for confidentiality.
18. The other Parties may make reasoned objections to the requested protection within 15 days from receipt of the notice. Absent such an objection, the Tribunal will authorize the publication by the Repository.
19. In the event of an objection, the Tribunal will decide whether the information identified is to be treated as confidential. In the affirmative, the Party, non-disputing party or third person who had filed the protected document shall provide a redacted version within 15 days of the Tribunal's decision. The Tribunal will thereafter transmit that document to the Repository for publication.
20. Where the arbitral tribunal determines that the identified information is not confidential, the disputing party, non-disputing party or third person who introduced the document into the record shall be permitted to withdraw all or part of the document from the record within 15 days of the Tribunal's decision.
21. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

*B. Integrity of the arbitral process*

22. Information shall not be made available to the public pursuant to these Rules where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 22.
23. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the Parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity

of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for Parties or members of the arbitral tribunal, or in comparably exceptional circumstances.

## **VI. Repository of Published Information**

24. ICSID shall act as Repository of published information. The following rules shall apply in connection with the Repository:
- (i) The Tribunal will be responsible for submitting the documents for publication (in redacted form if applicable) to the Repository.
  - (ii) The Secretary of the Tribunal will receive the documents from the Tribunal and ensure publication in searchable electronic format (.pdf format).
  - (iii) The Repository will publish information and documents in the form and language in which it receives it.
  - (iv) The Tribunal will communicate with the Repository in English.
  - (v) The Tribunal will be released of its responsibility under the Transparency Rules and this Order upon completion of its mandate under the ICSID Convention and Arbitration Rules, it being specified that such mandate extends to any interpretation or revision proceedings.
  - (vi) Upon completion of this arbitration, video recordings of hearings, and all documents referred to in Section III above shall continue to be made available to the public on the ICSID website in accordance with ICSID's usual practice.

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**v.**

**Republic of Serbia**

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**PROCEDURAL ORDER NO. 5**

**DISSENTING OPINION OF PROFESSOR MARCELO G. KOHEN**

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**29 August 2019**

1. I deeply regret needing to append this statement of dissent for a rather narrow question, which nevertheless raises a fundamental issue for international arbitration.
2. The case, as initiated by the Claimants, involves the application of the Canada-Serbia BIT to five of six Claimants, while for the remaining one (Claimant 6, Sembi Investment Limited, hereinafter “**Sembi**”) it is the Cyprus-Serbia BIT that is applicable. The two BITs do not coincide in matters of publicity. I agreed to propose to the Parties a uniform system of transparency with the understanding that everything that would not be agreed upon should be governed by the applicable rules of each BIT and those of the ICSID Convention and Rules. The Parties agreed on a substantive number of issues.<sup>1</sup> The applicability of the transparency rules of the Canada-Serbia BIT to the first five Claimants has been out of discussion. The Respondent accepted, with respect to Sembi, the publication of the award and the public nature of the hearings. This acceptance constitutes the basis for its implementation. The Parties’ disagreement was limited to the question of the disclosure of the record of the entire proceeding with regard to Sembi.
3. I do believe that the Tribunal has to apply the transparency rules of the Canada-Serbia BIT to the Canadian Claimants in full. But I do not believe that we can extend this treatment to Sembi.
4. The majority contends that, since the Serbia-Cyprus BIT does not contain any provision on transparency, “it neither mandates nor prohibits transparency”.<sup>2</sup> This is a curious reasoning. It supposes the existence of a legal gap. This is a reversal of a basic foundation of international law, particularly in the field of international arbitration. State consent is required when there is no other source of obligation. In this field, a State is not obliged to do anything if it has not consented thereto. The so-called principle of freedom (the “**Lotus principle**” as it is known in public international law)<sup>3</sup> by virtue of which what is not prohibited is permitted, certainly applies to the conduct of States. It does not apply to arbitral tribunals. To impose on States to explicitly reject a given pattern of conduct so as

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<sup>1</sup> PO No. 5, paragraph 25.

<sup>2</sup> PO No. 5, paragraph 24.

<sup>3</sup> The Case of the S.S. “Lotus”, P.C.I.J. Series A No. 10, pp. 20-21.

not to be obliged to conform to it is the exact opposite of the principle of freedom and has no ground in the existing international legal system. Furthermore, it has not been invoked that the publicity of the record of arbitral proceedings is an existing rule of general customary law. One of the elements that distinguish arbitration from the permanent international judiciary is the essentially private character of the former, unless otherwise decided by the parties. With respect to permanent international judiciary bodies, the matter is explicitly addressed in the relevant instruments. While for some human rights courts, States have accepted in the relevant convention the publicity of the documentation submitted during the procedure,<sup>4</sup> for other international courts and tribunals, the possibility to render the written procedure public is explicitly mentioned in the Rules, after having heard the views of the parties and not before the opening of the oral phase.<sup>5</sup> Within the WTO dispute settlement system, confidentiality is the rule.<sup>6</sup> It is clear that the ICSID Convention and Rules do not contain a documentation publicity regime.

5. The Tribunal does not have the power to impose on a State something to which it has not consented. In other words, what States have not consented to cannot be imposed on them under the pretence that they have not excluded it. Limitations to sovereignty cannot be interpreted extensively. In order to have the transparency regime agreed between Serbia

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<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Article 40(2): “Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.” In the Inter-American system, the matter is covered in the Rules of the Court: Inter-American Court of Human Rights, Rules of Procedure, Article 32(1)(b): “The Court shall make public: [...] documents from the case file, except those considered unsuitable for publication”. No rule relating to the publicity of the records of the cases is found in the relevant instruments of the African Court of Human and Peoples’ Rights. In the African Court’s practice, the records are not public.

<sup>5</sup> International Court of Justice, Rules of Court, Article 53(2): “The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings”. International Tribunal for the Law of the Sea, Rules, Article 67(2): “Copies of the pleadings and documents annexed thereto shall be made accessible to the public on the opening of the oral proceedings, or earlier if the Tribunal or the President if the Tribunal is not sitting so decides after ascertaining the views of the parties”.

<sup>6</sup> World Trade Organization, Dispute Settlement Understanding, Article 18(2): “Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.”

and Canada applied to the Cypriot investor in the absence of a transparency rule in the Cyprus-Serbia BIT, the Tribunal needs the agreement of Serbia.

6. My distinguished colleagues tried to solve this crucial problem by considering that “there is no doubt that issues of transparency and confidentiality are matters of procedure,”<sup>7</sup> and that consequently, the Tribunal has the power to decide upon them on the basis of Article 44 of the ICSID Convention. I strongly disagree. Confidentiality and transparency are not “matters of procedure” for which Article 44 of the ICSID Convention would be applicable, thus leaving the Tribunal with entire freedom to decide in case nothing is mentioned in the Convention, in the Rules, in the applicable BIT or in case there is no agreement between the parties. In my view, matters of procedure concern pleadings, evidence, time limits, form of decisions, but not the confidentiality and transparency of the procedure itself.
7. The fact that the manner in which the record of the hearings shall be kept is a matter discussed in the preliminary procedural consultation with the parties does not transform it into a matter of procedure on which the tribunal has the freedom to decide. This is the moment in which, beyond what is provided in the relevant instruments, an agreement of the parties can be reached (or not).
8. The path followed by the majority is a dangerous precedent of enlargement of the powers of ICSID arbitral tribunals beyond what has been agreed by the authors of the Convention. Even assuming that publicity would be a procedural issue and that there would be a lacuna, the Tribunal could not fill the gap by going beyond the basic framework of the applicable treaties and one of the foundations of its very existence: consent. If the relevant applicable BIT is silent, the rules of the ICSID Convention apply. And the ICSID Convention neither provides for the publicity of the records of the proceedings without the consent of the parties, nor authorises the tribunals to decide so.
9. If the position of the majority were true, then the ICSID Convention and Rules would have adopted the strange policy that, in order to have the award published and conduct public

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<sup>7</sup> PO No. 5, paragraph 27.

oral hearings, the consent of the parties is explicitly required,<sup>8</sup> while for the publicity of the record of the case, it would be up to tribunals to decide.

10. The majority insists upon efficiency in order to justify its choice. I am aware that it will be complicated to make a distinction and apply some publicity rules to Claimants 1-5 and others to Sembi. But it has been the Claimants' choice to initiate a single proceeding under two different BITs. The Parties made their choice. It is for the Parties to undergo the actual or potential consequences of this choice. The Tribunal cannot impose the burden of a regime to which the Respondent has not consented simply because of the Claimants' choice. As I indicated in my statement of dissent to Procedural Order No. 3, efficiency cannot be achieved at the price of disregarding consent. I also have to recall that the Respondent raised a preliminary objection to jurisdiction *ratione personae* over Sembi and my colleagues decided not to bifurcate.<sup>9</sup> In other words, the Respondent is compelled to discuss the merits of Sembi's claim and to render public the documentation concerning its claim while it is possible that the Tribunal does not have jurisdiction to deal with it.
11. I have my own views about the need for transparency in international arbitration in general and in international investment arbitration in particular. I am aware of some current trends in this regard, in particular some proposals aiming at modifying the existing ICSID Arbitration Rules in order to include the publicity of the record of the cases under certain conditions.<sup>10</sup> Obviously, the Tribunal cannot decide *sub specie legis ferendae*. Parties may have good or bad reasons not to wish to render the record public. In the context of this arbitration, the question is not for me to analyse whether or not the Respondent should have accepted to extend the transparency regime adopted in the Canada-Serbia BIT to the Cyprus-Serbia BIT. The task of the arbitrator is to exercise his/her jurisdiction within the strict limits of the consent given by the Parties.
12. In deciding to apply to the arbitral relationship between Serbia and Sembi a publicity rule to which neither Serbia nor Cyprus have consented in their BIT or in the ICSID

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<sup>8</sup> ICSID Convention, Article 48 (5); ICSID Arbitral Rules, Article 32 (2).

<sup>9</sup> Cf. PO No. 3 and Dissenting Opinion of Professor Marcelo G. Kohen.

<sup>10</sup> See ICSID, Proposal for Amendment of the ICSID Rules, Working Paper 3, August 2019, Rule 63, p. 350.

Convention—the only basis of jurisdiction for that relationship—the Tribunal has exceeded its powers.

[signed]

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Professor Marcelo G. Kohen