

Klock, Joseph P., Jr., Co-Arbitrator, Dissenting¹

I concur in portion of the majority's findings, but dissent from others. I have arranged my opinion in the chronological order of the Award, dealing first with procedural matters having to do with the consideration of late-filed materials and then proceeding to the issues of subject matter jurisdiction, admissibility of claims, and rulings on the merits.

Procedural Matters

The majority deals first with the issue of the "late-filing" of the counter-memorial by the Respondent. The majority concludes that that issue is "governed by the ICSID Arbitration Rules in force since April 10, 2006 . . ." Award at ¶ 263, citing Section 1.1 of the Procedural Order No. 1. However, I must disagree with the majority regarding the refusal to consider the late-filed materials by the Claimant. For the same reasons as set forth in Award at ¶¶ 265-66, I conclude that the Supplemental Evidence filed by SyC likewise ought be considered by the Panel since at the time it was submitted, no award had been issued and the failure to consider it "would deny access to justice" in favor of "procedural formalities." *Id* at ¶ 266. The difference between four minutes and months is not significant in this analysis; the question is whether the materials could be considered before an Award was issued.

This is further supported by the fact that the evidentiary submission has the effect of further emphasizing the procedural roadblocks which Costa Rica continues to throw in the path of a legitimate rate- setting sought by SyC, which directly impacts the damage calculations of its case. As the majority has failed to indicate how the consideration of this material creates any kind of prejudice, I can see no reason to adopt a different rule regarding this waiver of

¹ All references to the majority award will be referred to as "Award ¶__." All short forms set forth in the *Glossary Of Abbreviations And Terms Used* as set forth in Award at pages 5-8 will be employed.

procedural rules as was adopted regarding the late-filing by Respondent of its materials earlier in the case.

Analysis Of The Tribunal

With respect to the decision of the Panel, set forth in Award at ¶358, I concur in part and dissent in part. I join with President Von Webeser in finding that there is subject matter jurisdiction of this claim, but reject the view that subject matter jurisdiction may only be bottomed upon the theory of the joint identity of SyC and Riteve. I also concur in the split of ISLIC tribunal costs between the parties, but would adjudicate the claim on the merits, which the majority has refused to do and would award attorney's fees to SyC. I dissent from the conclusions and findings in Award at ¶358 (b)-(c).

Subject Matter Jurisdiction

It is clear that the Panel has subject matter jurisdiction over this dispute since the very nature of the dispute runs to the central issue of compensation by the foreign investor under the Contract. I agree with President Von Webeser that this Panel does have subject matter jurisdiction over the claims of SyC in this matter under the doctrine of *ratione materiae* and disagree with Arbitrator Silva Romero that there is no subject matter jurisdiction over SyC's claims as explained in Award at ¶ 287. I also dissent from the view of both of my esteemed colleagues that an alternative basis of subject matter jurisdiction, in which they both join, is predicated upon or dependent upon SyC and Riteve being "considered as a single entity in this

matter.” Award at ¶ 287. Thus, there appears to be a split of 2-1 on each subject matter jurisdictional finding.²

In determining subject matter jurisdiction, the Contract language controls, so long as the fundamental “case and controversy” requirements of Article 25(1) are met. As all four Article 25(1) requirements are present and as the Contract clearly invites the claim the Panel has subject matter jurisdiction over the dispute and is thus able to consider the claims on their merits. Unless a party waives its rights to adjudication or the Treaty imposes a restriction or curtailment of the exercise of subject matter jurisdiction, then the ISLIC Panel has subject matter jurisdiction.

Whether any particular remedy is available is a different question than whether the ISLIC Panel has subject matter jurisdiction. As there is subject matter jurisdiction over the parties and the dispute, and since the Contract and the Treaty allow recovery and adjudication based upon the dispute, as it does, then the Panel has the ability and duty to entertain that dispute without resort to the claim-busting “single identity” jurisdictional argument.³

The majority correctly finds that

the protection of Article III.2 of the Treaty goes beyond the simple direct contractual relationship between the investor and the host State, because such provision establishes that the State shall comply with the obligations undertaken “...related to investments by investors of the other Contracting Party ...”. Such drafting is sufficiently broad to interpret that the

² While the difference may not seem significant if there is a majority vote that subject matter jurisdiction exists under any theory that is not predicated upon the “single entity analysis,” then the majority errs in failing to consider the damage claims on the merits and allows it to indulge the dogged refusal of Costa Rica to allow a rate setting after 13 years which is the building block for SyC’s damage claim.

³ Just as obviously, the Treaty has the ability to restrict the types of claims that can be brought and to recognize the existence of a waiver to press claims, which can be relied upon by either the complaining or defending party. I disagree with the majority that any waiver occurred here or that the Treaty procedural rules were not properly followed.

obligations contracted by Costa Rica with Riteve, a company controlled by the Claimant and created exclusively to hold the rights of the Contract, are included under the scope of protection of the Treaty. As a result, the Tribunal has jurisdiction *ratione materiae* over the dispute.

Award at ¶287. However, the majority then states that Co-Arbitrator Silva Romero does not believe that subject matter jurisdiction would apply in the absence of a direct contractual privity between Costa Rica and the foreign investor. Co-Arbitrator Silva Romero chooses a very narrow interpretation of subject matter jurisdiction, choosing not to extend the basis of jurisdiction to other than direct contracting parties, basically a standing issue.

President Von Webeser's interpretation of the *ratione materiae* jurisdictional principle is in the mainstream of current jurisprudence and also within the clear language of article III.2 of the Treaty, which contemplates an investor being able to put forth a claim when its investment is included within the corporate holding of an entity in which it is investing. I join with him in finding that subject matter jurisdiction exists to extend subject matter jurisdiction to SyC whose actionable claim is presented through its investment in Riteve.

President Von Webeser and Co-Arbitrator Silva Romero then go on to agree, however, on an alternate basis of subject matter jurisdiction, which is that the co-identity of SyC and Riteve is sufficient to afford subject matter jurisdiction, but that unnecessary and unsupported (by the Record) steps lead both to conclude, incorrectly, that any claims brought by SyC must be ruled inadmissible because Riteve (and thus SyC) have submitted those claims to local tribunals and thus have selected a road which waives SyC's right to arbitration here. The reasoning appears to be that since SyC owns 55 percent of Riteve and has the power to appoint three of five directors, it is, in effect the same person as Riteve, and anything that Riteve does, is imputed wholly to SyC, a conclusion that is not supported by the Record.

There Is No Record Showing That SyC Is The Alter Ego Of Riteve And That The Acts Of One Are The Acts of The Other

The majority's conclusion that Riteve and SyC are alter egos one of the other has no record support. The fact that SyC owns 55 percent of Riteve's stock and appoints three board members of its board out of five members does not make one the alter ego of the other. There is no evidence presented in the record by Respondent to support the contention that SyC has the right to ignore the rights of a local partner or superimpose its unilateral wishes regarding the operation of a business venture over those of Riteve's minority shareholders, and the majority's blanket conclusion that it does is without record support, other than the majority's interpretation of various corporate records and what it views as generally-accepted corporate jurisprudence, which is not an acceptable substitute for proof. See ¶¶325-28

Moreover, as the majority cites generally-understood principles to support some of its conclusions, are we not to take notice of the reality of international investment in local enterprises which frequently involves the presence of local partners? Are we also not to accept the fact that while local partners may be inclined to invest with majority foreigners, that they necessarily abandon their own rights? Is there any basis to support the view that SyC's arbitral rights and remedies under the Treaty forecloses the minority rights of Riteve shareholders?

That is not supported by the record and was not raised as a defense. If that were either the fact or mandated by local law, the burden was on the Respondent to bring those matters forward by proof. There is therefore no acceptable basis to conclude that SyC and Riteve share a common identity such that SyC has the ability to ignore the wishes and directions of the Riteve minority shareholders, and that Riteve is therefore precluded from seeking relief under local law.

Thus, the reasoning of the majority that is predicated upon the unity of interest of SyC and Riteve as defeating SyC's claim is not supportable and surely cannot be employed a basis to justify a refusal to hear the claim on the merits. Moreover, the further conclusion of the majority that the host state did not intend to allow SyC to pursue its own claims without respect to Riteve's actions (See ¶290) is likewise not supported by record evidence and therefore not susceptible to binding acceptance

I agree with President Von Webeser that subject matter jurisdiction *ratione materiae* exists here predicated upon the Treaty language and its umbrella clause and disagree with my two colleagues that there is subject matter jurisdiction predicated upon the common identity of SyC and Riteve. Because I find there to exist subject matter jurisdiction without respect to the common identity theory of subject matter jurisdiction, I dissent and do not agree with the conclusion set forth in ¶291 as to the inadmissibility of "all the claims asserted by SyC" *Id.*

Admissibility

The majority chooses to avoid any consideration of SyC's claim presented based upon its conclusion that it can refuse to admit evidence of claims and proof that are predicated upon the refusal of Costa Rica to allow a rate to be adjusted, which is the center point of compensation in the Contract.⁴ While the concept of admissibility has some standing in arbitral jurisprudence, the fact is that the concept is not included within the ICSID rules but mainly has to do with the timing of claims as opposed to the disposition with prejudice of claims, and barring some clear showing that a remedy is waived, surely cannot be used as a convenient procedural block to considering a claim. To describe reliance on admissibility as the basis of

⁴ This theory is used to dismiss four of SyC's claims; the other four are rejected due to claimed failure to notify. CITES

denying SyC's claim is to overbear the thinnest of reeds. Yet, that is precisely what the majority has done, in effect allowing its concept of inadmissibility to rise to and be enforced with the same dignity as a subject matter jurisdictional bar.

As a starting point, the majority looks to its co-identity finding for SyC and Riteve, then finds that since Riteve has sought local tribunal review, that SyC has elected to abandon its rights for international arbitration of its claims, in favor of a fruitless 13 year march through the Costa Rican justice system. Alternatively, they claim that even if such action did not constitute a waiver or as otherwise inadmissible, Riteve/SyC's failure to terminate all proceedings in local tribunals bars the admissibility of SyC's claim here.

I respectfully believe that this chain of reasoning is incorrect for a number of reasons:

First, as previously discussed, Riteve and SyC cannot be viewed as being identical.

Secondly, even if they were identical, the applications by Riteve to local tribunals did not and do not constitute an attempt to litigate the same issues that are presented here.

Even If SyC and Riteve Are Viewed As Identical, The Resort To Tribunals Below Does Not Constitute A Submission Of The Claim Before ICSID To Those Tribunals

The majority spends some not insignificant time discussing the distinctions between subject matter jurisdiction and admissibility, gracing the concept of admissibility with powers magnified beyond which either ICSID's rules (which do not mention admissibility) or the majority view of opinion-writers. However, whether it is based upon admissibility bars or waiver, it is clear that an investor cannot bring the same claim to a local tribunal and to an ICSID arbitration panel unless there is a written or contractual basis to do so. It is equally clear that SyC has not done so.

I do not believe that the steps taken by Riteve constitute an election by SyC to submit its damage claims to Costa Rican courts. This is based upon two factors, first resort to rate setting was required before any damage claim could be made by SyC, since rate-making in the first instance is not subject to the Treaty arbitration. Second, relief on the merits was never granted at any level, and to this day, 13 years later, there has still not been a new rate reviewed or set.

Third, I do not find that the “fork in the road” doctrine bars SyC’s claim or that SyC elected to waive its arbitral remedies. While resort to precedent frequently is mandated or even desirable, reference to the plain language of the Treaty here makes it clear that even when resort is had to “competent courts of the Party in whose territory the investment was made,” the Party “may, in addition, resort to the arbitral tribunals referred to in this article, if such national court has not issued a judgment.” And, even then, resort to the arbitral remedy is also available in the investor adopts “any measures that are required for the purpose of permanently desisting from the court case then underway.” BIT art. XI.

Here, over the past dozen or so years, SyC and Riteve have only resorted to Costa Rican tribunals in their fruitless attempts to have the government-controlled entities publish and then apply a methodology which would have allowed for the agreed-upon adjustment of rates. The continual refusal of Costa Rica and its state-controlled entities to do so fully supports, as does SyC’s evidence, the grounds which Claimant claims as set forth at ¶ 342 a-d. The fact is that no Costa Rican tribunal has ruled on the merits of the SyC claim. They have not even gotten to the point of publishing revised rates. In light of the actions taken by the Costa Rican tribunals, where it seems they have not even yet warmed-up to the various barriers to rate-making that they may have in store, it is clear that no ruling has been made on the merits and that the

requirement of some sort of more formal notice of abandonment over and above the bloodied path of failure so far endured by Riteve would be unnecessary and fruitless.

The suggestion that SyC or Riteve had an obligation to do more to “definitively withdraw from a proceeding” that had reached its own conclusion without an adjudication makes no sense. Obviously, the purpose of this provision of the Treaty was to prevent a party from having two simultaneous suits pending in different fora, which was not the case here.⁵

Riteve’s actions in attempting to seek rate changes was done before the only tribunals where it could be done, and despite years of litigation, was unable to secure a rate adjustment, but more importantly, its request for a rate adjustment do not appear to have ever been denied. They just always seem to file it in the wrong place, at the wrong time, or based upon the wrong theory. Thus, SyC’s claim for money damages is left unaddressed and intact even if one were to indulge the incorrect alter ego theory of the majority.

Seeking a rate adjustment from local authorities through the offices of an entity in which one’s investment is housed does not constitute an election to waive arbitral claims for substantial money damages for the almost comical refusal of the Costa Rican authorities to respect the contractual rights of Riteve and the investment rights of SyC.

However, even if there were an identity of some of the interest between Riteve and SyC, the umbrella clause of this Treaty creates an avenue for claim recovery. It is clear that the jurisprudence cited by the majority regarding the inability of a foreign investor to have two bites at an apple is certainly an acceptable statement of the law, but that is not what we are faced with in this case.

This case does not involve a frustrated litigant unhappy with the rejection of its relief in a local court who decides to try for a second bite at the apple. It deals with a protected Treaty party which is unable to have its local investment vehicle take the preliminary steps essential for it to make its damage claims. If, at some point over the 13 years that this dispute has been in existence, that the Costa Rican authorities had set a rate for the services being performed, then an issue might have arisen as to where and how many times a claim might be made based upon the rate set. But, the rate was never set, with the process ping-ponging up and down judicial and administrative paths.

I do not believe that the SyC ever submitted its claims to a Costa Rican court or tribunal, or that Riteve's resort to what it thought to be the properly-constituted authorities for rate-setting compromised or limited SyC's Treaty claims. Moreover, as the record reflects, the various local tribunals never did set any rate, but rather dismissed all attempts to do so under various legal and procedural theories. It was only after Riteve had pursued unsuccessfully its rights to have its rates adjusted, that SyC brought this claim against Costa Rica for the deprivation of its Treaty rights.

Moreover, had SyC initiated the arbitration proceeding before Riteve had sought an adjustment to its rate, would not the panel majority and Costa Rica have taken the position that the Treaty did not provide a mechanism for establishing a rate and that any such application would have been premature? Compare this situation to the facts of *Alex Genin* (ICSID Case No. ARB/99/2, Award June 25, 2001 §330. Award at ¶ 302 n.440, which the majority cites as support for its view. The issue there was not the establishment of a rate, which was within the province of the regulatory powers of the foreign state, but rather a "dispute settlement

procedure.” Here, the efforts at the local level were to set a rate, which was a prerequisite to a calculation of damages, that is, if the case had not become moot by Claimant’s entitlements being satisfied.

But, the majority did leave certain claims open in the arbitral forum, but then excluded the admission of any evidence of the absence of rate setting, which, of course, leads inescapably to the conclusion that no relief is available since without evidence of what Riteve should have been paid, there is no way of calculating the remedy that SyC is entitled to receive. But, to exclude the entitlement and absence of rate setting for what is, in effect, a completely regulated function in Costa Rica makes no sense, and without an indication of what the rates are and without pursuit of rate adjustment, there can be no case made for a damages claim.

Surely, no rational person would suggest that an ICSID arbitral panel would determine the appropriate rates that should be set for services and then use that as a measure for calculating damages. But, to reach the conclusion that the majority has reached, that is precisely the rationale that must be employed. Award at ¶¶ 330-31. Then, after disallowing rate setting in the local tribunals, the majority then leaves four areas for damages consideration that make no sense if rate-setting is excluded. Award at ¶ 334.

While the majority also seems to believe that the matters submitted to the local tribunals by Riteve are the same as SyC’s claims here, that is not true, as SyC is seeking damages for the loss of the value of its investment, not Riteve’s losses.

Finally, there is the matter of the so-called late-filed claims. ¶334. A fair reading of those claims makes it clear that they fall into the category of further proof of the actions and systematic frustrations enjoyed at the hands of the Costa Rican authorities, as opposed to some

type of new, distinct claims that would create surprise for Costa Rica. Thus, I do not see how Costa Rica is prejudiced by their insertion in these proceedings and how it could claim any prejudice by its failure to receive a six month notice regarding them.

In analyzing this matter, it is impossible to ignore the fact that Costa Rica has doggedly refused to allow SyC to have any benefit from its investment enterprise in Costa Rica save its original deal,⁶ despite the fact that it has contractual rights to have its compensation adjusted. Rather than encouraging an enterprise which apparently has been very successful and which has bestowed a great public service on the country, the government at every level has frustrated SyC and Riteve at every step of the way, and by the latest post-trial submission from SyC, appears dedicated to continue the path that does nothing more than to enrich lawyers and experts, while ignoring the relief that SyC is due.

This panel member concludes that subject matter jurisdiction over the claim exists, that SyC has separate rights to recover distinct from those of Riteve under the Treaty, that no election has been made to waive rights under the Treaty by SyC pursuant to the fork in the road doctrine, and that the umbrella clause identified by the majority provides specific remedies to SyC that are not barred by applications for regulatory relief and which have been properly followed by SyC, which is entitled to have this Panel consider its claims on the merits. And, in the absence of rate-setting by Costa Rican tribunals, this Panel should calculate fair and appropriate rates under local law and then use these calculations to award judgment for SyC.

⁶ Interestingly, almost mocking SyC, Costa Rica does suggest that as long as SyC has not suffered any losses, “the Contract is Still in balance” and therefore SyC is not entitled to any further award. Award at ¶ 260, citing Post Hearing Brief of Costa Rica §178, quoting Transcript, Day 2 (ESP) Cross-examination of José Luis López at 122.

CONCLUSION

I believe that the record presented demonstrates that SyC was deprived of the Treaty benefits that it had contracted-for and is entitled to recover damages for the entire period complained-of. In light of the fact that the regulatory authorities have not seen fit during the initial period complained-of to set rates, damages would require that the Panel consider appropriate rates and then measure such rates against the various limiting factors proposed by Costa Rica if applicable.

I would also award counsel fees to the Claimant for the costs of these proceedings, but agree with the majority that the effort and case put forward by both sides is such that the cost if the proceedings should be borne by each as decided by the majority.

POST HEARING PROCEEDINGS

The period that followed the hearing was delayed by the embarrassing and unnecessary issues caused by the change in employment of the Panel secretary and other issues related to the impartiality of the panel. I choose not to add any further comment to the issue of the secretary's employment, but do wish to address the issue of the constitution of the panel and the issues of conflict and impartiality.

However, as far as the impartiality of the panel is concerned, I believe that ICSID should more carefully consider the issue of panel selection. It has been a privilege to serve under the leadership of Dr. Von Webeser, who is, without question, a very talented, knowledgeable, and wise judicial officer, who has borne a lion's share of effort in these proceedings. However, the arrangement whereby two of the panel members are selected by the parties to the agreement creates an uncomfortable aura of conflict which permeates, in my view, the proceedings. It

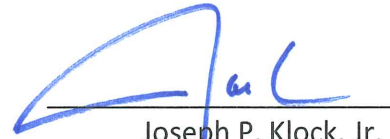
creates a true ethical burden on these other two parties to separate themselves from the interest of those who have selected them to serve. I know that I have worked hard to neutralize this factor as I am sure my esteemed colleague, Co-Arbitrator Silva Romero, has done.

However, the dignity and integrity of an ICSID proceeding would be much better served by the selection of panelists from lists where the selection is made wholly by ICSID and where careful screening is done to make sure that any selected panelists do not have conflicts, not only real conflicts which should be identified in the screening process done, but perceived conflicts as well, either by issue or relationship. It ill-behooves ICSID to have anyone unfairly suggest that it is a club where the result can be influenced by relationships that exist by those who serve variously as advocates or arbitrators.

Composition Of The Panel. This panel was assembled in accordance with the terms of the agreement between the parties, with one panelist appointed by each of the parties and the third, by the Chair of ICSID. To the extent that ICSID has the ability to direct the composition of panels that are to arbitrate its claims, I believe that it should consider prohibiting this arrangement. Of the three of us, the only panelist who did not have an inherent conflict was Dr. Von Webeser, and I know that both of the remaining two of us were honored to serve under his chairmanship. He also was the only panelist who did not labor under any type of conflict burden.

However, as someone who has served on a number of arbitral panels, I find an appointment by a party of a judge to rule on the party's claim creates an unnecessary barrier to pure objectivity, except in situations where a high degree of technical or scientific skill and knowledge of a discipline is needed. That clearly is not the case in terms of a contract dispute. If

the desire is to have three judges decide an issue, then there should be three completely impartial judges appointed, judges who are no related to the parties or to their counsel. Those procedures were not in effect in this case, and if they were, perhaps the painful process of reviewing conflict could have been avoided.



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