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Part III The Initiation of the Arbitration and the Identification and Clarification of the Issues Presented, Ch.14 Objections to the Jurisdiction of the Arbitral Tribunal

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1. Introduction

During an arbitration proceeding, particularly at the outset, several issues, often termed objections, can arise in connection with pleas as to the jurisdiction of the arbitral tribunal. Article 23 of the UNCITRAL Rules addresses these issues rather fully.[1] Article 23(1) addresses the extent of the power of the arbitral tribunal to rule on its own jurisdiction, including the separability of the arbitration clause from the contract in dispute. Article 23(2) addresses when the parties should raise pleas as to jurisdiction and the arbitral tribunal's discretion to consider late pleas, while Article 23(3) addresses the arbitral tribunal's discretion to rule on a plea as a preliminary question or in an award on the merits and to continue the proceedings in the event of a pending challenge to its jurisdiction in a local court.

(p. 450) 2. Objections to Jurisdiction—Article 23

A. Text of the 2010 UNCITRAL Rule[2]

Article 23 of the 2010 UNCITRAL Rules provides:

> 1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of

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the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

B. Commentary

(1) The power of the tribunal to determine its own jurisdiction—Article 23(1)

The first sentence of Article 23(1) states the principle of Kompetenz-Kompetenz: the arbitral tribunal has authority to "rule on its own jurisdiction."[3] Incorporating the principle of (p. 451) Kompetenz-Kompetenz into the UNCITRAL Rules is critical to the efficient conduct of the arbitration. As noted by leading commentators, "The concept is important in practice because without it a party could stall the arbitration at any time merely by raising a jurisdictional objection that could then only be resolved in possibly lengthy court proceedings."[4] The language of Article 23(1) was modeled virtually verbatim after Article 16(1) of the UNCITRAL Model Arbitration Law.[5]

The Working Group that revised the UNCITRAL Rules intended that Article 23(1) state clearly that the arbitral tribunal has authority to decide issues concerning its jurisdiction *sua sponte*—that is, in the absence of an objection by a party. Article 21(1) of the 1976 UNCITRAL Rules contained a narrower formulation of the rule that granted the arbitral tribunal the power to rule on "*objections* that it has jurisdiction."[6] The Working Group chose to revise the rule to track the language of Article 16(1) of the Model Arbitration Law in order to clarify that the arbitral tribunal's powers include the authority both to "raise and decide upon issues regarding the existence and scope of its own jurisdiction."[7]

An arbitral tribunal will likely need to rule on its jurisdiction *sua sponte* only in rare instances. The Working Group identified two such situations: first, where a party that might otherwise have raised an objection has not participated in the proceedings and, second, where a party that might otherwise have raised an objection is unaware of a complex jurisdictional issue, eg, the arbitrability of a competition issue.[8] In these instances, where a disputing party is unable to protect the integrity of the arbitral process and, in turn, the validity of the award against possible future challenges, the arbitral tribunal has the power under Article 23(1), and arguably the duty under the Rules, to do so.[9] More typically, however, the arbitral tribunal will apply its powers under Article 23(1) in response to an objection raised by a party.

While Article 23(1) expressly identifies only one example of an arbitral tribunal's authority to resolve objections raised by a party—the power to rule on "objections with respect to the existence and validity of the arbitration agreement"—clearly its power is more extensive. Article 23(2), for example, refers broadly to the parties' rights to raise any "plea that (p.

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452) the arbitral tribunal does not have jurisdiction" or that "the arbitral tribunal is exceeding the scope of its authority."

The *travaux préparatoires* of corresponding Article 21(2) of the 1976 UNCITRAL Rules further confirm this conclusion. Original Article 21(2) established the arbitral tribunal's power to rule on "objections to its jurisdiction, including objections with respect to the existence and validity of the arbitration clause or the separate arbitration agreement." The commentary accompanying the preliminary draft of original Article 21(1) indicated that although the "second clause [of this paragraph] might be deemed to be covered by the more general first clause … it does not seem advisable to leave any doubt on this point and, consequently, the second clause is added in the interest of clarity."[10] The commentary also makes clear that original Article 21(1) "is designed to cover all objections to the jurisdiction of the arbitrators, irrespective of the grounds for and the extent of, such objections."[11] Article 23(1) should be understood to have the same extensive coverage.

In sum, the scope of substantive application of Article 23(1) is comparable to that of Article 21(1) of the 1976 UNCITRAL Rules. Notably, the Working Group, in deciding that substantial revision of the 1976 rule was not necessary, confirmed its understanding that:

> the general power of the arbitral tribunal, referred to in paragraph (1), to decide upon its jurisdiction should be interpreted as including the power of the arbitral tribunal to decide upon the admissibility of the parties' claims or, more generally to exercise its own jurisdiction [and that the provision] applied also to the objections made by a party that the tribunal should not exercise its jurisdiction to examine a claim on the merits.[12]
>
> While the scope of the tribunal's authority under Article 23(1) to resolve a wide array of jurisdictional questions has not changed, under the 2010 Rules the tribunal now has express authority to address these questions *sua sponte*.

The arbitral tribunal's powers under Article 23(1) are subject to any mandatory requirements of the governing law.[13] Thus, although the arbitral tribunal has the power under Article 23(1) to determine its own jurisdiction, in many jurisdictions a local court may have the final word on the matter. For example, any awards of the arbitral tribunal might be subject to challenge under the applicable law, whether in set-aside or enforcement proceedings, for excess of jurisdiction.[14]

(p. 453) (2) Objections to the existence or validity of the contract of which the arbitration agreement is a part and the doctrine of separability—Article 23(1)

Article 23(1) adopts the widely accepted view that the arbitration clause is an agreement separate from the contract in which it is contained.[15] In the ordinary course of international commercial arbitration, the "contract" refers to the contract under dispute, whereas "arbitration clause" refers to the arbitration clause which confers jurisdiction. The doctrine of separability resolves the conundrum perceived by some of how a tribunal possesses jurisdiction when the arbitration clause that allegedly confers jurisdiction is part of a contract that is allegedly null.[16] As stated by Sanders, the doctrine of separability "reflects the view that the arbitration clause, although contained in, and forming a part of, the contract, is in reality an agreement distinct from the contract itself, having as its object the submission to arbitration of disputes arising from or relating to the contractual relationship."[17]

The doctrine of separability may be "considered to conform with the underlying intention of the parties" and consequently means that "a decision by the arbitrators that a contract is null and void will not affect the validity of the arbitration clause in that contract and will not undermine the competence of the arbitrators to make that decision."[18] Toward the same end, the UNCITRAL model arbitration clause provides that "[a]ny dispute, controversy or

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claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration …"[19]

(p. 454) Furthermore, the separation of the arbitration clause from the contract places the question of the validity of the contract outside court control under most national laws inasmuch as the validity of the contract in such a case does not involve a decision as to the competence of the arbitrators.[20]

The doctrine of separability is incorporated into other leading arbitral rules[21] and has been endorsed by many municipal systems of law.[22] The inclusion of this provision in the 1976 UNCITRAL Rules was not a contested matter among the original drafters. In revising the Rules, the Working Group's primary focus was to harmonize the texts of Article 23(1) and Article 16(1) of the Model Law, which are now virtually identical, save for two differences.

The first difference reflects a substantive change. The third sentence of the Model Law (and the third sentence of original Article 21(2)) states that an arbitration clause is not automatically invalid when the arbitral tribunal determines the contract is "null and void." By contrast, the third sentence of Article 23(1) includes only the word "null," thus omitting the words "and void." The change was made because the phrase "null and void" was believed to be too narrow to capture all relevant situations in which the contract might be defective, such as where a contract had expired with the passage of time.[23] A proposal to add the language "non-existent or invalid" was made, but rejected, because those terms would be incompatible with the approach of some legal systems.[24] The term "null" by itself was ultimately believed to be of sufficient breadth to cover all relevant situations, including where the contract was "null, void, non-existent, invalid or non-effective."[25]

The second difference between Article 23(1) and Article 16(1) of the Model Law is stylistic. The phrase "*ipso jure*" in the third sentence of Article 16(1) of the Model Law (and the third sentence of original Article 21(2)) was replaced by its English translation "automatically" in the third sentence of Article 23(1) in the interests of simplifying the Rules.[26]

Two additional proposals considered by the Working Group inform the meaning of Article 23(1). The first proposal was to add the words "or legal instrument" after the word "contract" in the second and third sentences of Article 23(1). With this change, the doctrine of separability would apply in situations where a "legal instrument," other than a contract, was deemed to be defective. Proponents of the proposal believed it was consistent with the aim of expanding the scope of application of the Rules to non-contractual disputes (p. 455) and, specifically, to disputes arising under international investment treaties.[27] The consensus of the Working Group was that the proposal could not be adopted because the Rules were not meant to regulate matters of public international law, particularly given that the doctrine of separability was "not necessarily recognized in the context of international treaties."[28]

(3) When objections should be raised—Article 23(2)

Article 23(2) places respective time limitations on a party's ability to raise a plea that "the arbitral tribunal does not have jurisdiction" or that "the arbitral tribunal is exceeding the scope of its authority." The former type of plea must be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off,[29] whereas the latter must be raised "as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings." The aim of these time limitations is to ensure that any objections to the arbitral tribunal's jurisdiction are raised without delay.[30] Article 23(2) tracks the language of Article 16(2) of the Model Law verbatim. Similar provisions are contained in other arbitration procedure codes.[31]

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The two types of plea are to be raised under different circumstances. A plea that “the arbitral tribunal does not have jurisdiction” must be raised by the time a particular pleading is submitted, ie, the statement of defence or a reply to a counterclaim or a set-off claim, indicating that the plea will likely arise in response to an assertion by one party in its submission that the arbitral tribunal has jurisdiction over a particular claim or matter. The circumstances in which a plea will arise that the “the arbitral tribunal is exceeding the scope of its authority” are less apparent from the text of Article 23(2). The negotiating history of Article 16(2) of the Model Law from which the rule derives suggests that this type of plea may be appropriate where the arbitral tribunal has indicated it may exceed the scope of its jurisdiction, such as by requesting or examining evidence relating to a matter outside its scope of authority.[32]

The strict time limits established by Article 23(2) are tempered by the arbitral tribunal's discretion to “admit a later plea if it considers the delay justified.” The Rules do not enumerate the circumstances under which a delay is justified. While corresponding Article 21(3) of the 1976 UNCITRAL Rules ultimately did not contain the same moderating language, a preliminary draft of the article provided: “Where delay in raising a plea of incompetence is justified under the circumstances, the arbitrators may declare the plea admissible.”[33] According to the commentary accompanying the revised draft, this sentence meant that “the arbitrators may admit a plea … if the delay was justified under the circumstances.”[34](p. 456) For example, “a plea based on facts newly discovered” might be admitted despite being raised late.[35]

UNCITRAL delegates were split, however, as to the need for the sentence regarding the arbitral tribunal's discretion. One representative stated that objections to jurisdiction “should be raised as early as possible and considered no later than the statement of claim or the statement of defence.”[36] Another representative felt that the second sentence was unnecessary “since such a question could be left to the discretion of the tribunal.”[37] A third representative felt that the second sentence was of a “special character and should be retained.”[38] The Conference later adopted the report of a special drafting group,[39] recommending that the second sentence be deleted because it was unnecessary, since original Article 20 (now Article 22) provides for possible amendment of a claim or defence and original Article 15(1) (now Article 17(1)) states “the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.”[40] The last sentence of Article 23(2) thus expressly states what was previously only implicit under the 1976 UNCITRAL Rules: that the arbitral tribunal has discretion in limited circumstances to admit justifiably late pleas, such as due to the discovery of new evidence.[41]

Article 23(2) also provides that a party is not precluded from making a plea that the arbitral tribunal lacks jurisdiction “by the fact that it has appointed, or participated in the appointment of, an arbitrator.” The negotiating history of the identical sentence in Article 16(2) of the Model Law explains: “Thus, if, despite [a party's] objections, he prefers not to remain passive but to take part in, and exert influence on, the constitution of the arbitral tribunal, which would eventually rule on his objections, he need not make a reservation, as would be necessary under some national laws for excluding the effect of waiver or submission.”[42]

Finally, if a party fails to raise a plea as to the arbitral tribunal's jurisdiction within the appropriate time limit, and the arbitral tribunal chooses not to consider the late plea, the party is generally precluded from raising the objection during the remainder of the arbitral proceedings.[43] The extent to which the party may raise the objection in post-award proceedings, such as set-aside and enforcement proceedings, is determined by the applicable law.[44]

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(p. 457) (4) When objections should be ruled upon—Article 23(3)

Article 23(3) addresses when the arbitral tribunal should rule upon preliminary questions concerning jurisdiction.[45] On the one hand, early resolution of significant preliminary issues may yield substantial savings to the parties by either deciding the case or narrowing the scope of the dispute.[46] On the other hand, preliminary hearings to decide frivolously raised objections to jurisdiction constitute an abuse of process that is costly to all parties.[47] Article 23(3) balances these competing interests by giving the tribunal discretion to rule on such pleas either "as a preliminary question or in an award on the merits."[48] This provision of Article 23(3) is modeled after the first sentence of Article 16(3) of the Model Law. The negotiating history of the Model Law indicates a preference for preliminary treatment of jurisdictional issues "to avoid possible waste of time and costs," while recognizing that "where the question of jurisdiction is intertwined with the substantive issue, it may be appropriate to combine the ruling on jurisdiction with a party or complete decision on the merits of the case."[49]

The degree of delay involved in ruling on a jurisdictional objection as a preliminary matter turns a great deal upon whether the tribunal interprets Article 17(3) as giving each party a right to a hearing in the case of such a preliminary ruling. During discussions of corresponding Article 21(4) of the 1976 UNCITRAL Rules some delegates stated that a hearing would not be necessary under these circumstances. The delegate from Sierra Leone, for example, stated "It should be quite clear that the question of jurisdiction was a preliminary question which must be decided *prior to* the hearing."[50] Likewise, Sanders in his commentary to the revised draft of original Article 21(4) stated that objections to jurisdiction were "procedural matters," a characterization which, as stated in the commentary herein accompanying Article 17(3),[51] may indicate there is no absolute right to a hearing on such questions.

(p. 458) The above discussion points to efficiency as the prime factor in determining whether a tribunal should rule on objections concerning jurisdiction as a preliminary matter or in an award on the merits. Any decision, therefore, must consider the substantiality of the objection, the cost in time and money to the parties of such a preliminary ruling (eg whether such a ruling would entail written filings or an oral hearing),[52] and the practicality of bifurcating the proceedings to address jurisdiction preliminarily, especially where jurisdictional issues are intertwined with the merits.[53]

Finally, the second sentence of Article 23(3) recognizes that the arbitral tribunal's power to rule on its own jurisdiction may be subject to varying degrees of judicial control, depending on the governing law. Article 16(3) of the Model Law, for example, provides: "If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the [applicable local] court … decide the matter, which decision shall be subject to no appeal."[54] The last sentence of Article 23(3) grants the arbitral tribunal discretion, subject to the governing law, to decide whether to continue with the arbitral proceedings and make an award, "pending challenge to its jurisdiction before a court." An arbitral tribunal's decision in this regard should weigh considerations of efficiency and fairness.

(5) Comparison to the 1976 UNCITRAL Rules

Article 23 tracks more closely the language of Article 16 of the Model Arbitration Law and thus differs in structure and content, but not in overall purpose, from Article 21 of the 1976 UNCITRAL Rules.

Article 23(1) articulates a broader rule with respect to the arbitral tribunal's powers to "rule on its own jurisdiction," as opposed to ruling only on "objections that it has no jurisdiction." In practice, however, this difference may be immaterial, since an arbitral tribunal's power to determine its own competence is widely accepted as inherent, even if not expressly stated in the Rules. In addition, the provisions of original Article 21(2) on the

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doctrine of separability have been incorporated into revised Article 23(1) with only one substantive change: the words “null and void” used in original Article 21(2) and Article 16(1) of the Model Law are replaced with the word “null.” As discussed above, the reason for the change was that some legal systems did not recognize the concept of a “void” contract. If the parties contemplate arbitration subject to such a legal system, they may wish to modify original Article 21(2) accordingly.

Article 23(2) retains the same time limits as original Article 21(3) for raising pleas that the tribunal lacks jurisdiction. However, it now recognizes that pleas concerning the arbitral tribunal's lack of jurisdiction may be applicable in response to claims for the purpose of (p. 459) a set-off. In that situation, like the situation involving counterclaims, a party must make its plea no later than in the response to the claim for a set-off. Article 23(2) adds the rule, derived from Article 16(2) of the Model Law, that a party is not precluded from raising a plea that the arbitral tribunal lacks jurisdiction, even if it has appointed or is participating in the appointment of an arbitrator. In addition, revised Article 23(2) establishes a new time limit for pleas that the arbitral tribunal is exceeding its jurisdiction. Finally, Article 23(3) now states expressly what was implied in original Article 21(3): that the arbitral tribunal has discretion to consider late objections.

Article 23(3) also replaces the express encouragement in original Article 21(4) that the arbitral tribunal “should” rule on a plea that it lacks jurisdiction as a “preliminary matter” with a more neutral rule: the arbitral tribunal may rule on such a plea “as a preliminary question or in an award on the merits.” However, the same policy of ensuring a fair and efficient arbitration that underpins both the 1976 and 2010 UNCITRAL Rules would minimize any textual differences in practice. Finally, Article 23(3) adds the rule that the arbitral tribunal has discretion to continue the arbitral proceedings and make an award, despite a pending challenge to its jurisdiction before a local court.

C. Extracts from the Practice of Investment Tribunals

CME Czech Republic BV and *Czech Republic*, Partial Award (September 13, 2001) (*Ad Hoc* Proceeding, 1976 UNCITRAL Rules, Netherlands-Czech Republic BIT), at 99–100, reprinted in (2002) 14(3) World Trade & Arb Materials 109, 207–08:

> **378**. The Respondent, for the first time at the Stockholm hearing, expressed its view that the investment of the Claimant in the Czech Republic within the meaning of the Treaty was (only) made when it purchased in 1997 the CNTS shares held by CME Media Enterprises B.V. The Respondent, in respect to this investment of the Claimant in the Czech Republic, expressly did not raise the defence of lack of jurisdiction. The Respondent is, however, of the opinion that Claimant's investment in 1997 limits timewise the Claimant's claim in substance which, therefore, will be dealt with hereafter when dealing with the merits of the Claim.
>
> **379**. Any possible defence in respect to lack of jurisdiction related to the Claimant's acquisition of the CNTS shares in 1997, therefore, must be deemed as waived. That also would be consistent with Rule 21.3 of the [1976] UNCITRAL Rules, according to which objections in respect to jurisdiction must have been made in the Statement of Defence.
>
> **380**. The Arbitral Tribunal considered whether (by disregarding the Respondent's waiver of a defence of lack of jurisdiction in respect to the 1997 share acquisition), the Tribunal is obligated ex officio to decide on this subject. The majority of the Tribunal is of the opinion that, disregarding possible Czech national law requirements, the clear provision of the [1976] UNCITRAL Rules must supersede national law, if deviating. According to the [1976] UNCITRAL Rules, a defence of jurisdiction is deemed to be waived, if not raised in time. This concept derives from the assumption that defences on jurisdiction can be waived by the Parties, with the

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consequence that a Tribunal is not able to set aside or disregard a Party's waiver in respect to the defence of lack of jurisdiction.

381. Therefore, the Respondent's argument that the investment of the Claimant in the Czech Republic was not made until May 21, 1997 must be dealt with by the Tribunal in accordance with the Respondent's express pleadings as a substantive defence, not as a defence to jurisdiction.

Methanex Corp and *United States of America*, Partial Award on Jurisdiction (August 7, 2002) (ICSID administered, 1976 UNCITRAL Rules, NAFTA Chapter Eleven), at 37 (footnote omitted), reprinted in (2002) 14(6) World Trade & Arb Materials 109, 146, 186, 188–89:

86: (p. 460) … Third, even if it qualified as a jurisdictional challenge (which in our view, it does not), its legal merits are so intertwined with factual issues arising from Methanex's case that we would have been minded, as a matter of discretion, to join that challenge to the merits under Article 21(4) of the [1976] UNCITRAL Arbitration Rules.

…

160. Article 21(4) of the [1976] UNCITRAL Arbitration Rules requires the arbitration tribunal, in general, to rule on a jurisdictional question; and indeed this is the procedure which has so far been followed in these arbitration proceedings. If the Tribunal has no jurisdiction, a decision to that effect could save the Disputing Parties much time and cost. However, as Article 21(4) also provides, the tribunal "*may proceed with the arbitration and rule on such a plea in their final award*". The discretion whether to choose the general or the exceptional procedure lies with the arbitration tribunal; and the exercise of that discretion is not confined to economic factors: e.g. where jurisdictional issues are intertwined with the merits, it may be impossible or impractical to decide the former without also hearing argument and evidence on the latter. In these proceedings, two factors have influenced us in selecting the exceptional procedure.

161. *Fresh Pleading:* First, the effect of the Tribunal's decision on Article 1101(1) NAFTA in this Award will require Methanex to re-plead its case in a fresh Statement of Claim.

…

167. *Evidence:* The second reason is, in our view conclusive. The necessary analysis relating to the credibility of Methanex's allegations remains incomplete without receiving at least some evidence from the Disputing Parties on the assumed, but disputed, facts and factual inferences. This part of the USA's jurisdictional challenge depends critically on issues which are intimately linked to the factual merits of Methanex's case. In our view, it is not appropriate to decide these issues without hearing evidence from Methanex and the USA. In short, the Tribunal cannot continue what has become an impossible forensic exercise, composing a jigsaw of assumed facts and inferences with too many missing and incomplete pieces. These difficulties could be resolved with relative ease at an evidential hearing.

Glamis Gold Ltd and *United States of America*, Procedural Order 2 (May 31, 2005) (ICSID administered, 1976 UNCITRAL Rules, NAFTA Chapter Eleven), at 2–3:

9. Article 21(4) [of the 1976 UNCITRAL Rules] establishes a presumption in favor of the tribunal preliminarily considering objections to jurisdiction. Simultaneously, however, Article 21(4) does not require that pleas as to jurisdiction must be ruled on

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as preliminary questions. The choice not to do so is left to the tribunal's discretion. [citation omitted]

…

11. In examining the drafting history of Article 21(4) of the [1976] UNCITRAL Rules, the Tribunal finds that the primary motive for the creation of a presumption in favor of the preliminary consideration of a jurisdictional objection was to ensure efficiency in the proceedings. Importantly, the Tribunal reads the presumption in favor of preliminarily considering an objection to jurisdiction as an instruction to the Tribunal and clearly not as an absolute right of the requesting party.

12. This Tribunal in examining the various sources finds that Article 21(4) [of the 1976 UNCITRAL Rules] contains a three fold test.

a. First, in considering a request for the preliminary consideration of an objection to jurisdiction, the tribunal should take the claim as it is alleged by Claimant.

b. Second, the "plea" must be one that goes to the "jurisdiction" of the tribunal over the claim. For example, the presumption in Article 21(4) would not apply to a request to bifurcate the proceedings between a liability phase and a damages phase. Likewise, Article 21(4) would not apply to a request that the Tribunal first consider whether the actions complained of were the cause of the loss, even though such a determination might be efficient overall for the proceedings. The Tribunal does not mean to suggest that such a (p. 461) request can not be made to the Tribunal under, for example, Article 15(1), but rather seeks to emphasize that the presumption in favor of bifurcation contained in Article 21(4) extends only to pleas as to the jurisdiction of the tribunal.

c. Third, if an objection is raised to the jurisdiction of the tribunal and a request is made by either party that the objection be considered as a preliminary matter, the tribunal should do so. The tribunal may decline to do so when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, *inter alia*, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost. [citation omitted]

Methanex Corp and *United States of America*, Award (August 3, 2005) (ICSID administered, 1976 UNCITRAL Rules, NAFTA Chapter Eleven), Part II, Chapter C, at 5–7:

15. By order of 2nd June 2003, the Tribunal decided not to rule as a preliminary question on the USA's extant jurisdictional challenges. It decided following Methanex's proposal and pursuant to the exceptional procedure set out in Article 21(4), second sentence, of the [1976] UNCITRAL Rules to join all such jurisdictional challenges to the merits of the dispute and to proceed to a main hearing to address all such issues, excluding issues of quantum (which, if appropriate, were to be addressed at a subsequent hearing).

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16. The Tribunal's order by letter of 2nd June 2003 is set out in full below:

The Tribunal has now concluded its deliberations on the future form of these arbitration proceedings under Article 21 of the [1976] UNCITRAL Arbitration Rules; and I set out the Tribunal's decision below:

In Paragraphs 166 to 168 of the Partial Award of August 2002 (page 70), the Tribunal indicated that the resumption of the jurisdictional stage after Methanex's fresh pleading was not an attractive option; the USA's jurisdictional challenges depended on issues intimately linked to the merits of Methanex's case; and there was a forensic need for an evidential hearing, at least in part. Nonetheless, the Tribunal was concerned to identify one or more threshold or other determinative issues on which limited testimony could be adduced at that evidential hearing, without proceeding necessarily to a full hearing of all factual and expert witnesses.

Following Methanex's fresh pleading and materials served in January 2003, the USA requested an evidential hearing limited to the issue of discriminatory "intent", namely whether California intended the relevant measures to address suppliers to MTBE producers, such as Methanex. … The USA submitted that such an evidential hearing would be appropriate for two principal reasons. (i) it would be the most efficient way for the Tribunal to proceed, given that it would not require the Tribunal at this stage to consider the bulky scientific evidence adduced by Methanex on the MTBE ban or the relative merits of MTBE and ethanol and (ii), by reference to the "general" approach required by Article 21(4) of the [1976] UNCITRAL Arbitration Rules, the Tribunal should rule on the USA's jurisdictional challenges as a preliminary question before holding any full hearing on the merits. On this approach, the USA proposed a procedure leading to an oral hearing in September 2003, lasting not more than three days. Methanex opposed the USA's application in its written and oral submissions. In summary, Methanex contended that the most efficient way to proceed would be a full hearing on the merits, with the Tribunal ruling on the USA's jurisdictional challenges in its final award. On this approach, Methanex proposed an evidential hearing of indeterminate length (but roughly estimated at eight days), originally (p. 462) suggested for January 2004 but on further reflection at the procedural meeting, two or more months later.

The choice for the Tribunal and the Disputing Parties is stark; the practical difference is significant; and whilst the choice is not complicated, the decision for the Tribunal was particularly difficult in this arbitration. After much consideration, given in particular the new shape of Methanex's pleaded case, we have decided broadly in favour of the procedure suggested by Methanex, subject to certain important explanations. Accordingly, the Tribunal decides not to rule as a preliminary question on the USA's extant jurisdictional challenges but, pursuant to the exceptional procedure set out in Article 21(4), second sentence, of the [1976] UNCITRAL Arbitration Rules, to join all such jurisdictional challenges to the merits of the dispute and to proceed to a main hearing currently intended to address all such issues (excluding issues of quantum), resulting in an award in which the Tribunal may rule on both jurisdictional and merit issues. This procedure requires the following time-table: [Timetable omitted].

See also *Canfor Corp,* et al and *United States of America*, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings (January 23, 2004) (ICSID administered, 1976 UNCITRAL Rules, NAFTA Chapter Eleven), paras 46–48, reprinted in Chapter 13, section 3(C).

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Canfor Corp, Tembec, Termination Forest Products Ltd and *United States of America*, Order of the Consolidated Tribunal (September 7, 2005) (footnotes omitted) (ICSID administered, 1976 UNCITRAL Rules, NAFTA Chapter Eleven), at 38–39:

> **97**. Article 1126(2) provides that the Tribunal may issue an order to "assume jurisdiction over" all or part of the claims, or one or more claims, that have been submitted to arbitration under Article 1120. Article 1126(8) provides in turn: "A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction." The meaning of the term "jurisdiction" in those provisions is examined below in the context of various arguments made with respect to that term.
>
> **98**. It is argued that this working in Article 1126 means that an Article 1126 Tribunal cannot decide on objections to jurisdiction and, in the alternative, that, if a party requests consolidation, it waives the right to object to jurisdiction. The Consolidation Tribunal disagrees with those arguments for the following reasons.
>
> **100**. In the case of an order for consolidation under Article 1126(2), the term "assume jurisdiction" in Article 1126(2) and (8) means nothing else than that the Article 1126 Tribunal takes over the proceedings, in the capacity of an arbitral tribunal, to hear and to determine the disputes from the respective Article 1120 Tribunals. That action is of a procedurally administrative nature, in which two or more arbitral tribunals are replaced by one arbitral tribunal with respect to the same dispute.
>
> **101**. The assumption of jurisdiction in such a context does not have any relevance for the question of whether the jurisdiction of the Article 1120 Tribunals or of the Article 1126 Tribunal is justified. That question has to be addressed in context of Article 21 of the [1976] UNCITRAL Rules, either by the Article or, if the proceedings of the Article 1120 Tribunal have not reached the stage of a ruling on a plea as to jurisdiction by the Article 1126 Tribunal. A request under Article 1126, therefore, cannot be considered a waiver of the right to object to the jurisdiction of an arbitral tribunal, whether it be the Article 1120 one or the Article 1126 one, to hear and to determine a dispute.
>
> **102**. For the same reasons, the Consolidation Tribunal rejects the argument that having submitted its statement of defence in *Canfor* and *Tembec* without raising any objection to the Article 1120 Tribunals' jurisdiction based on Article 1126, the United States' plea that the jurisdiction over the Claimants' claim properly lies within the Article 1126 Tribunal is untimely under the [1976] UNCITRAL Arbitration Rules. The invocation by a disputing (p. 463) party of Article 1126 is not, by the ordinary meaning of its terms, a jurisdictional objection to an Article 1120 Tribunal. The issue of whether to consolidate is, as such, separate and apart from the issue jurisdiction.
>
> **103**. A different question is whether a party can no longer raise a plea as to the jurisdiction in the Article 1126 proceedings if it has not timely raised such a plea in the Article 1120 arbitration. According to Article 21(3) of the [1976] UNCITRAL Arbitration Rules, the plea should have been raised not later than in the statement of defence. Although Article 1126 of the NAFTA (and the [1976] UNCITRAL Rules for that matter) are silent on this different question, the Consolidation Tribunal is of the opinion that this question must in principle be answered in the affirmative. Thus, if a party has failed to raise the pleas as to jurisdiction in the Article 1120 arbitration at the latest in the statement of defence (assuming that the Article 1120

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arbitration has reached that stage), a party is in principle barred from raising the pleas in the consolidation proceedings.

D. Extracts from the Practice of the Iran–US Claims Tribunal

(1) Tribunal Rules (1983), Article 21(1)

Concurring and Dissenting Opinions of Howard M Holtzmann with respect to Interlocutory Awards on Jurisdiction in Nine Cases containing various Forum Selection Clauses, (November 5, 1982) at 20, n 26, reprinted in 1 Iran-US CTR 284, 294 (1981–82):

> Arbitral tribunals typically rule on whether they have jurisdiction. Indeed, this Tribunal's own rules—and the [1976] UNCITRAL Arbitration Rules on which they are based in accordance with the Claims Settlement Declaration—provide that the Tribunal shall have power to rule on the question of its own jurisdiction.

(2) Tribunal Rules (1983), Article 21(2)

Minutes of the 51st Full Tribunal Meeting of the Iran–US Claims Tribunal (May 14, 1982):

> During a discussion of Article 21(2), several members expressed views concerning the observation of the Government of Iran (page 4 of its letter) that it “cannot agree to Article 21(2), providing that an arbitration clause may remain valid despite the nullity of the contract.” By 5 votes in favour to 1 against, with 2 abstentions, the Tribunal decided to maintain Article 21(2), and Article 21 of the [1976] UNCITRAL Rules as a whole, unchanged.

Concurring and Dissenting Opinions of Howard M Holtzmann with respect to Interlocutory Awards on Jurisdiction in Nine Cases Containing Various Forum Selection Clauses (November 5, 1982) at 16–17 (citation omitted):

> The enforceability of the forum selection clause is typically determined separately from the contract in which it is contained arbitration clauses—which are one kind of forum selection clause—are recognized in international law to be separate from the contract in which they are included. This international principle is reflected in the [1976] UNCITRAL Arbitration Rules … Article 21, paragraph 2. … So widespread is the doctrine of the independence of forum selection clauses that Sanders refers to it as “this famous question of separability” and notes that it “has given rise to many decisions in several countries” supporting this concept.

Dissenting and Concurring Opinion of Richard M Mosk on the Issues of Jurisdiction (November 5, 1982) at 6–7, reprinted in 1 Iran-US CTR 305, 308 (1981–82):

> Indeed, the Tribunal Rules themselves provide that an arbitration clause, which is a type of forum-selection clause, remains “binding” after the contract obligations have been breached or found invalid, [1983] Tribunal Rule 21, paragraph 2, thus, in effect, rendering such a clause separable from the contract.

(p. 464) (3) Tribunal Rules (1983), Article 21(3)

Chevron Research Co and *National Iranian Oil Co*, Case No 19, Chamber One, Order of November 19, 1982; *Sea-Land Service, Inc* and *Islamic Republic of Iran*, Case No 33, Chamber One, Order of November 19, 1982:

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> The Statement of Defense filed by the Respondent does not raise any plea that the Tribunal does not have jurisdiction because Claimant has not produced evidence of its United States nationality. This issue was raised for the first time almost eight months later during the course of the Pre-Hearing conference. The objection was made without any evidence or reason being given which is sufficient to raise a substantial doubt as to Claimant's nationality. In these circumstances, the Tribunal finds that the objections to the Claimant's nationality have not been timely raised in accordance with Article 21, paragraph 3, of the [1983] Provisionally Adopted Tribunal Rules ….

(4) Tribunal Rules (1983), Article 21(4)

Concurring and Dissenting Opinions of Howard M Holtzmann with respect to Interlocutory Awards on Jurisdiction in Nine Cases containing Various Forum Selection Clauses (November 5, 1982) at 2, reprinted in 1 Iran-US CTR 284–85 (1981–82):

> The Tribunal determined to consider and decide this threshold issue [effect of forum selection clauses] in accordance with procedure contemplated in the [1983] Provisionally Adopted Tribunal Rules … Article 21, Paragraph 4.

Starrett-Housing Corp and *Islamic Republic of Iran*, Interlocutory Award No ITL 32–24–1 (December 21, 1983), Dissenting Opinion of Mahmoud Kashani (September 13, 1984) at 23, reprinted in 7 Iran-US CTR 119, 135–36 (1984-III):

> In the Interlocutory Award, the majority has been content to deny Shah Goli's standing to bring claim before this Tribunal, but states, in an ambiguous and incomprehensible manner, that Shah Goli—through the Claimants—has *locus standi* in this case. I fail to comprehend just how, if Shah Goli has no legal standing, its lack of standing can be changed, "through the Claimants," to possession of standing, or just how this would result in bringing about the Tribunal's jurisdiction. This is some sort of acrobatics, and the Chamber must consider the issue of its nonjurisdiction as a preliminary issue in accordance with Article 21, paragraph 4 of the [1976] UNCITRAL Rules as soon as possible, so as to take a decision as to its lack of jurisdiction before burdening the Parties with any further trouble and expense.

Ghaffari and *Islamic Republic of Iran*, Case No 968, Chamber Two, Order of February 2, 1988, Dissenting Opinion of Judge Khalilian (February 10, 1988), reprinted in 18 Iran-US CTR 79 (1988-I):

> The above-mentioned Order represents a deviation from the practice adopted by all three Chambers of the Tribunal following the Decision in Case No A-18. In claims brought by dual nationals, it has always been the practice of the Tribunal to begin by taking up as a preliminary matter the issue of the claimant's dominant nationality, and on principle to refrain from entering into merits.
>
> Such a practice carries a special weight and authority, for two reasons. *Firstly*, in adopting this practice, the Tribunal has demonstrated that by following a general rule in international proceedings—namely the necessity of separating preliminary objections from the merits—it saves the parties from making an unnecessary waste of energy, time and expense. *Secondly*, the practice can be regarded as an interpretive policy as regards the Decision in Case No A-18 with respect to the

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adjudicative process in related cases, so that any deviation therefrom can also be deemed to constitute a breach of the spirit of the Full Tribunal's Decision.

(p. 465) For the foregoing reasons, I dissent to the Order in question. These two points are elaborated on as follows:

(a) The principle of the necessity of two-stage proceedings

The basis for the necessity to separate proceedings on jurisdictional objections as an important preliminary issue in the claims of dual nationals may be found, first of all, in the Rules of this very Tribunal where, as a general and peremptory rule, Article 21.4 [of the 1983 Tribunal Rules] provides as follows:

In general, the arbitral tribunal *should* rule on a plea concerning its jurisdiction as a preliminary question … (emphasis added)

This Article states that it is incumbent upon the Tribunal to make a preliminary examination of jurisdictional pleas. Although the Tribunal has also been given the option of joining the merits to the justifiable grounds, since it constitutes a deviation from the aforementioned principle. Otherwise, the Tribunal may not, arbitrarily and without justification, depart from the rule set forth in the beginning of Article 21.4 [of the 1983 Tribunal Rules], a rule which reflects an international practice in proceedings and whose rationale is well stated by Mani, as follows:

It is not difficult to perceive the rationale of the concept. In the first place, it is in the interest of sound administration of justice, that, a tribunal should, before first examining the rights or interests in dispute, satisfy itself that there exist no legal obstacle paralysing the action … Fifth, the party has a right to have its claim recognized by a competent tribunal, *the other party has an equal right to see that it is not unnecessarily dragged into an international litigation before a tribunal before which the claim is either non-receivable or otherwise barred. Moreover, preliminary objection procedure demonstrates that the basis of international jurisdiction is the sovereign consent of States*. (emphasis added) Mani, *International Adjudication*, 1980, at 123–4. *See also:* Sir G Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986 vol. II, at 758.

Moreover, the Tribunal's practice in numerous other instances, particularly in cases involving a “forum selection clause,” confirms its respect for the said principle.

(b) The policy of the three Chambers towards interpretation of Decision No 32-A18-FT

The practice adopted by the three Chambers in dealing with the issue of the dominant nationality of Iranians who have brought claim against their Government may be regarded as an interpretative policy which reflects the spirit of the Full Tribunal's Decision in Case No A-18. Chamber Three states this fact very clearly and unambiguously in its Orders issued in Cases Nos 12756 (Doc. No 24) and 213 (Doc. No 64), as follows:

The Tribunal notes that the Full Tribunal in the abovementioned Decision held that “it has jurisdiction over claims against Iran by dual Iran-US nationals when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States.

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> *In previous cases the Tribunal has interpreted this Decision to imply that the issue of the Claimant's nationality should be determined as a preliminary matter.* (emphasis added)
>
> It can thus be easily understood that establishing the dominant nationality of such Iranian claimants is, in the opinion of the Full Tribunal, at least as important as determining its jurisdiction in cases involving a “forum selection clause.” Therefore, in implementation of the procedural principle set forth in Article 21.4, this matter should certainly be taken up as a preliminary issue and separated from the merits.
>
> It is also worth noting that Chamber Two has to date adhered to this same practice. Thus, for instance, in Case No 385, after it was learned that the shareholders in the claimant company were Iranian nationals, the Chamber issued an Order wherein it stated that:
>
> … the Tribunal agrees [with Respondents] that this Case raises questions concerning the U.S. nationality of the Claimant in view of the alleged dual nationality of the shareholders, and therefore (p. 466) decides to determine as a preliminary matter, the issue of Claimant's nationality. (Doc. No 138)
>
> In Case No 298 too, Chamber Two, in expressly relying on and quoting from the Decision Case No A-18, proceeded on the basis of this same separation of jurisdiction from the merits and as already observed, all three Chambers have consistently followed this established policy.

Bank Markazi Iran and *Federal Reserve Bank of New York*, Award No 595–823–3 (November 16, 1999), Dissenting Opinion of Mohsen Aghahosseini (June 13, 2000), at 26:

> Our own Tribunal Rules prescribe a more flexible approach. As indicated in Article 21(4) [of the 1983 Tribunal Rules], there is no strict requirement to suspend the proceedings on the merits before deciding the issue of jurisdiction, though this is recommended:
>
> In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.[46]
>
> [Footnote] 46. In fact, the Tribunal has at times suspended the proceedings on the merits, especially when there has been a request to that effect. Thus, this very Chamber has stated, in respect of Article 21(4) of the [1983] Tribunal Rules, that: “The intention of this provision is to relieve both the Tribunal and the Parties from the burden of further pleadings and expenses involved in pursuing the claim, since, if the Tribunal determines that it lacks jurisdiction, it will not be required to rule on the merits of the claim. The Tribunal therefore concludes that it is appropriate to decide the issue as preliminary matter …” Doc. No 23 in Case No 11429, Chamber Three.

Islamic Republic of Iran and *United States of America* (Case No B1), Award No ITL 83-B1-FT (September 9, 2004):

> 140. Iran also contends that the Tribunal is without jurisdiction to entertain the Counter-claim in this Case. In this connection, Iran maintains that the United States has not established that the Counter-claim was outstanding on 19 January 1981 and that the Counter-claim does not arise out of the same

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contracts as Iran's claims in Case No B1. Iran also argues that the Counter-claim is not cognizable.

141. In accordance with its powers under Article 21(4) of the [1983] Tribunal Rules, the Tribunal decides to join to the merits the issues of whether it has jurisdiction over the Counter-claim in the present Case, and of whether the Counter-claim is cognizable. In light of the above, the Tribunal need not decide now whether its jurisdiction over the Counter-claim would be limited to a set-off: that issue is also joined to the merits.

Footnotes:

[1] Similar provisions are found in other arbitral rules. 2012 ICC Rules, art 6(3); 2009 ICDR Rules, art 15; 2006 ICSID Additional Facility Rules, Rule 45(1); 1998 LCIA Rules, art 23(1); 2012 Swiss International Arbitration Rules, art 21.

[2] Corresponding Article 21 of the 1976 UNCITRAL Rules provides:

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence, or with respect to a counter-claim, in the reply to the counter-claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

[3] The power of tribunals to determine their own jurisdiction is widely accepted. See, eg, G Born, *International Commercial Arbitration* (2009) 853; N Blackaby and C Partasides with A Redfern and M Hunter with, *Redfern and Hunter on International Arbitration*, (5th edn 2009) 346; 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter “Washington Convention”), art 41(1) (“The Tribunal shall be the judge of its own competence.”). When such power is not expressly provided for, it is generally thought to exist as an inherent power of the tribunal. See generally I Shihata, *The Power of the International Court to Determine Its Own Jurisdiction* (1965) 47. See also H Arfazadeh, *Ordre public et arbitrage international à l’épreuve de la mondialisation* (2005) 46–8. Numerous UNCITRAL tribunals have acknowledged such power. See *Larsen* and *Hawaiian Kingdom*, Procedural Order No 3 (July 17, 2000), para 7 (quoted at para 6.2. of the Award (2001)), 119 Intl L Rep 566; *Encana Corp* and *Republic of Ecuador*, Partial Award on Jurisdiction (February 27, 2004), (LCIA administered, 1976 UNCITRAL Rules, Canada-Ecuador BIT), at 8, para 13; *Eastern Sugar BV* and *Czech Republic*, Partial Award (March 27, 2007), (SCC administered, 1976 UNCITRAL Rules, Netherlands-Czech Republic BIT), at 23, para 116; *Austrian Airlines* and

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Slovak Republic, Final Award (October 9, 2009), (PCA administered, 1976 UNCITRAL Rules, Austria-Czech/Slovak BIT), at 30, para 117.

4 H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 479.

5 The original inspiration for Article 23(1) and its predecessor, Article 21(1) of the 1976 UNCITRAL Rules, however, was Article 41(1) of the 1965 ICSID Convention. See *Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules*, UNCITRAL, 8th Session, UN Doc A/CN.9/97 (1974), reprinted in (1975) VI UNCITRAL Ybk 163, 174.

6 Emphasis added. Paulsson and Petrocholis observed that a literal interpretation of the provision would preclude the arbitral tribunal from acting *sua sponte*, a limitation that did not reflect modern arbitration practice. See J Paulsson and G Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, Report to UNCITRAL Secretariat, at 92, para 169 (2006).

7 *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Fifth Session* (Vienna, September 11–15, 2006), UNCITRAL, 40th Session, UN Doc A/CN.9/614, at 21, para 97 (2007).

Article 16(1) of the Model Law on which Article 23(1) is modeled should be interpreted similarly. See *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (August 21, 1985), UN Doc. A/40/17, para 150 ("[T]he arbitral tribunal could decide on its own motion if there were doubts or questions as to its jurisdiction, including the issue of arbitrability.").

8 UNCITRAL, 40th Session, UN Doc A/CN.9/614, n 7, at 21, para 97.

9 Note, however, one commentator's concerns, presumably in the context of an absence of express authority, that a *sua sponte* jurisidictional decision by an arbitral tribunal would be "a serious violation of the parties' procedural rights." G Born, *International Commercial Arbitration*, n 3, 998.

10 *Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules*, UNCITRAL, 8th Session, UN Doc A/CN.9/97 (1974), reprinted in (1975) VI UNCITRAL Ybk 163, 174.

11 *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules*, UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1 (1975), reprinted in (1976) VII UNCITRAL Ybk 166, 174.

12 *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fiftieth Session* (New York, February 9–13, 2009), UNCITRAL, 42nd Session, UN Doc A/CN.9/669, at 10, para 39 (2009).

13 The original drafters of the 1976 UNCITRAL Rules debated whether to state this fact expressly. Some delegates believed a rule on Kompetence-Kompetence "could mislead parties, because questions as to the competence and jurisdiction of arbitrators were ultimately a matter for the courts to settle in accordance with the *lex fori*." *Report of the United Nations Commission on International Trade Law*, 8th Session, Summary of Discussion of the Preliminary Draft, UN Doc A/10017, para 141 (1975), reprinted in (1975) VI UNCITRAL Ybk 24, 38. They proposed including a provision to indicate that original Article 21(1) was subject to the limitations of the law applicable to the arbitration proceedings. *Summary Record of the 8th Meeting of the Committee of the Whole (II)*, UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.8, at 3–4, paras 13–25 (1976). However, this proposal was rejected as all of the rules were subject to national law and the insertion of such a provision in only this article would "give rise to an *argumentum a contrario*" elsewhere. Para 28. Therefore it was instead agreed that a general reference to the

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applicability of national law to all the Rules should be made. Para 28. See Chapter 2, section 2 on Article 1(2).

[14] See P Sanders, "Procedures and Practices under the UNCITRAL Rules," (1979) 27 American J Comparative L 453, 461–2 ("Although the arbitrators may rule on their own competence, courts have the final word."); N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration*, n 3, 354. See also Chapter 2, this volume.

[15] See G Born, *International Commercial Arbitration*, n 3, 350, 397. See also rules of procedure cited in n 1.

[16] See E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 213:

> If [the arbitrators] find the main contract to be ineffective, with on the principle of competence-competence they would have no option but to decline jurisdiction. However, the principle of autonomy [also known as separability] enables arbitrators to declare the main contract ineffective without necessarily concluding that the arbitration agreement is likewise ineffective and therefore declining jurisdiction. In other words, the decision of an arbitrator to retain jurisdiction and then declare a disputed contract ineffective must be founded on the principle of autonomy, and not solely on the "competence-competence" rule.

But see G Born, *International Commercial Arbitration*, n 3, 402–3:

> [T]he separability presumption does not in fact explain the competence-competence doctrine. Although the competence-competence doctrine arises from the same basic objectives as the separability presumption … it is not logically dependent upon, nor explicable by reference to, the separability presumption Rather, the competence-competence doctrine permits an arbitral tribunal to consider and decide upon its own jurisdiction even where the existence or validity of an arbitration agreement … is disputed.

Although decisions of the Iran–US Claims Tribunal cited Article 21(2) of the 1976 UNCITRAL Rules with approval, the relevance of the Article to that Tribunal is somewhat curious. The Iran–US Claims Tribunal is a permanent tribunal, whose jurisdiction derives from the Algiers Declarations, and not from a clause of a contract in dispute before the Tribunal. The Algiers Declarations provide, however, that a certain type of forum selection clause in a disputed contract would oust the Tribunal of jurisdiction over "claims arising under" that contract. Article II, paragraph 1, of the Claims Settlement Declaration. In this curiously reversed manner, Article 21(2) became relevant to the Tribunal. This relevance, however, was by analogy, rather than by direct application, since the Algiers Declarations conferred jurisdiction generally leaving no jurisdictional conundrum to resolve. Thus, Judges Holtzmann and Mosk properly cited to Article 21(2) as support for the doctrine of separability generally rather than as a rule directly applicable to the issue presented. *Forum Selection Claims Cases* (1983 Tribunal Rules), reprinted in section 2(D)(2).

[17] *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules*, UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1 (1975), reprinted in (1976) VII UNCITRAL Ybk 166, 174.

[18] *Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules*, UNCITRAL, 8th Session, UN Doc A/CN.9/97 (1974), reprinted in (1975) VI UNCITRAL Ybk 163, 175. The members of the Iran-US Claims Tribunal endorsed this principle in the early

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history of the Tribunal. See *Minutes of the 51st Full Tribunal Meeting*, reprinted in section 2(D)(2).

[19] See Chapter 2, section 2(A).

[20] See P Sanders, “Procedures and Practices under the UNCITRAL Rules,” n 14, 461, 463. Some national laws might nonetheless subject the issue of the validity of the contract to court control.

[21] See n 1. See generally P Sanders, “La separabilité la clause compromissoire,” in *Liber Amicorum for Frédéric Eisemann* (1978).

[22] See, eg, England: *Harbour Assurance Co. (UK) Ltd v Kansas General Intl Insurance Co Ltd* [1992] 1 Lloyd's Rep. 81, 92–3 (QB); France: Judgment of May 7, 1963, Ets Raumond Gosset v Carapelli, JCP G 1963, II, 13, para 405 (French Cour de cassation civ le); French New Code of Civil Procedure, Article 1442; Germany: *Judgment of 27 February 1970*, 6 *Arbitration Intl* 79 (1990) (German Bundesgerichtshof); Switzerland: Swiss Law on Private International Law, Articles 178(2) and (3); United States: *Prima Paint Corporation v Flood and Conklin Manufacturing Co*, 388 US 395 (1967); *Buckeye Check Cashing Inc v Cardegna*, 546 US 440 (2006).

[23] UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 12, at 10–11, para 40. Some argued that the phrase “null and void” should be replaced with the words “non-existent or invalid,” but it was noted that those words would give rise to particular difficulties in some legal systems.

[24] UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 12, at 10–11, paras 40–41. Some in favor of the phrase “null and void” noted that the inclusion of this phrase in the New York Convention and Article 16(1) of the Model Law had not given rise to problems in practice. Paras 40–41.

[25] UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 12, at 11, para 42.

[26] UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 12, at 11, para 44.

[27] UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 12, at 9–10, para 36.

[28] UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 12, at 10, para 37.

[29] See, eg, *Chevron Research Co* (1983 Tribunal Rules), reprinted in section 2(D)(3).

[30] *Report of the Secretary-General: Analytical Commentary on Draft Text of Model Law on International Commercial Arbitration* (March 25, 1985), UN Doc. A/CN.9/264, at 38, para 4.

[31] See n 1.

[32] See *Report if the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (August 21, 1985), UN Doc A/40/17, para 155

[33] *Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules*, UNCITRAL, 8th Session, UN Doc A/CN.9/97 (1974), reprinted in (1975) VI UNCITRAL Ybk 163, 174 (Draft Article 18(2)).

[34] *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules*, UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1 (1975), reprinted in (1976) VII UNCITRAL Ybk 166, 174.

[35] *Report of the Secretary-General*, n 33.

[36] *Summary Record of the 8th Meeting of the Committee of the Whole (II)*, UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.8, at 5, para 30 (1976) (Comment by Mr Dey, India).

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[37] UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.8, n 36, at 4, para 27 (Comment by Mr Pirrung, Federal Republic of Germany).

[38] UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.8, n 36, at 5, para 29 (Comment by Mr Lebedev, USSR).

[39] See *Report of the Drafting Group on articles 20 and 21 (United Kingdom and USSR)*, UN Doc A/CN.9/IX/C.2/CRP.16..

[40] See *Report of the UN Commission on International Trade Law on the Work of its Ninth Session*, UN GAOR, 31st Session, Supp No 17, UN Doc A/31/17, para 108 (1976), reprinted in (1976) VII UNCITRAL Ybk 66, 74.

[41] Note also that the same provision in Article 16(1) of the Model Law has been interpreted as allowing the arbitral tribunal to consider a late plea based on "public policy, including admissibility." H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, n 4, 483.

[42] *Report of the Secretary-General: Analytical Commentary on Draft Text of Model Law on International Commercial Arbitration* (March 25, 1985), UN Doc A/CN.9/264, at 38, para 6.

[43] See, eg, *CME Czech Republic* (1976 Rules), and *Canfor Corp* (1976 Rules), para 103, both reprinted in section 2(C).

[44] Holtzmann and Neuhaus, for example, argue that a failure to raise a timely objection under Article 16 (1) of the Model Law, typically bars a party from raising the objection in post-award proceedings, except where issues of public policy, including arbitrability are concerned. H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, n 4, 483.

[45] On what constitutes a question concerning jurisdiction for purposes of corresponding Article 21(4) of the 1976 UNCITRAL Rules, see *Methanex Corp* (1976 Rules), Partial Award, para 86, reprinted in section 2(C). For a discussion of the meaning of "jurisdiction" in this context of a request to consolidate NAFTA Chapter Eleven proceedings under the 1976 UNCITRAL Rules, see *Canfor Corp* (1976 Rules), reprinted in section 2(C).

[46] This point was raised in discussions regarding the 1976 UNCITRAL Rules. The representative of Nigeria, for example, argued "that pleas as to the arbitrator's jurisdiction should be decided as a preliminary question, not during the final award; if the arbitrators ultimately decided that they did not have jurisdiction, unnecessary expenses would have been incurred." UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.8, n 36, at 5, para 32 (Comment by Mrs Oyekunle, Nigeria).

At the Iran-US Claims Tribunal, the question of a dual national claimant's dominant and effective nationality was a significant preliminary issue that was often resolved before addressing the merits. See *Ghaffari* (1983 Tribunal Rules), Dissenting Opinion of Judge Khalilian, reprinted in section 2(D)(4).

[47] In drafting the 1976 UNCITRAL Rules, Mexico's representative voiced the opposing concern that parties "might insist on an immediate ruling merely in order to delay the proceedings." UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.8, n 36, at 5, para 37 (Comment by Mr Mantilla-Molina, Mexico).

[48] As discussed in section 2(B)(4), the text of Article 23(3) eliminates the presumption in favor of preliminary treatment of jurisdictional objections previously found in corresponding Article 21(4) of the 1976 UNCITRAL Rules. As Castello observes, the presumption, in fact, may decrease arbitral efficiency "if jurisdictional objections have no merit" or "even where jurisdictional objections had merit, … they overlap significantly with the merits of the case."

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J Castello, "Unveiling the 2010 UNCITRAL Arbitration Rules," (May/Oct 2010) 65 Dispute Resolution J 21,152–3.

49 *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Report by the Secretary-General*, UNCITRAL, 18th Session, UN Doc A/CN. 9/264, at 40, para 11 (1985). See also H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, n 4, 510–11.

50 UNCITRAL, 9th Session, UN Doc A/CN.9/9/C.2/SR.8, n 36, at 5, para 35 (Comment by Mr Boston, Sierra Leone) (emphasis added.)

51 See Chapter 2.

52 See *Bank Markazi Iran*, Dissenting Opinion of Judge Aghahosseini (1983 Tribunal Rules); *Starrett-Housing Corp*, Dissenting opinion of Judge Kashani (1983 Tribunal Rules); both reprinted in section 2(D)(4).

53 For decisions on bifurcation, see *Iran* and *United States,* Case No B1 (1983 Tribunal Rules), reprinted in section 2(D)(4). See also *Methanex Corp* (1976 Rules), Partial Award and Final Award; *Canfor Corp* (1976 Rules); and *Glamis Gold Ltd* (1976 Rules); all reprinted in section 2(C).

54 National approaches vary. See G Born, *International Commercial Arbitration*, n 3, 971 (observing that "national approaches range across a spectrum, with French, Hong Kong and Indian courts permitting very limited interlocutory judicial consideration of any jurisdiction objections (typically on a *prima facie* basis); US, English, and Canadian courts, as well as the UNCITRAL Model Law, permitting full interlocutory judicial consideration in some, but not all, cases, depending upon the nature of the jurisdictional objection and considerations of efficiency and fairness; and Swedish and Chinese courts permitting full interlocutory judicial consideration of jurisdictional issues in almost all circumstances"); J Barcelo, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective," (2003) 36 Vanderbilt J Transnatl L 1115, 1124–36.

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