

Dissenting Opinion of Judge Eiriksson

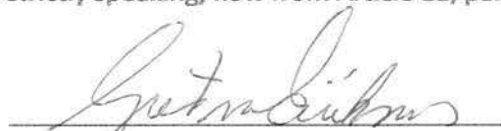
I agree with the decision of the Arbitral Tribunal that the Preliminary Objections of the Russian Federation should be dealt with in a preliminary phase. Accordingly, the proceedings will be bifurcated. If, in the preliminary phase, the Arbitral Tribunal, in accordance with Article 11, paragraph 7, of its Rules of Procedure, rejects all of the Preliminary Objections, or decides that one or more of them does not possess an exclusively preliminary character, there will be a second phase, dealing with the merits and any Preliminary Objection which the Arbitral Tribunal shall have determined does not possess an exclusively preliminary character.

Yet, I have dissented from the Order because I do not share the reasons behind the decision, as reflected in operative paragraph 1, to the effect that the Tribunal has decided that the Preliminary Objections shall be addressed in a preliminary phase because they “appear at this stage to be of a character that justifies having them examined in a preliminary phase”.

My reasons for dissenting are twofold.

First, I do not consider that the Arbitral Tribunal is entitled, under Article 11, paragraph 3, of its Rules of Procedure, to rule on the suitability of a Preliminary Objection (the Arbitral Tribunal uses “of a character that justifies”) to be addressed in a preliminary phase. Had the Arbitral Tribunal adopted the wording in the comparable provision of the Rules of the International Tribunal for the Law of the Sea, the possibility of making such an assessment would not have arisen. Instead, the Arbitral Tribunal, in adopting Article 11, paragraph 3, of its Rules of Procedure, opened up the possibility of foregoing a preliminary phase of its proceedings if it should determine that a Preliminary Objection does not possess an exclusively preliminary character and should be ruled upon in conjunction with the merits. This right of action is, however, a very constrained one and would certainly not extend to assessing the suitability or otherwise of preliminary proceedings in a given case, including on the basis of policy, efficiency or other considerations. Indeed, I would suggest, it might not be straightforward to make such a determination without the full arguments set out in a hearing. It would seem to me that the Arbitral Tribunal should make such a determination only when there can be no absolutely no doubt, in the minds of the members of the Arbitral Tribunal, that a Preliminary Objection does not possess an exclusively preliminary character.

Second, the Arbitral Tribunal has in fact made no such determination, despite having had the benefit of learned arguments of the Parties. The Arbitral Tribunal should, therefore, in my view, merely have stated that not having made such a determination, it would address the Preliminary Objections in a preliminary phase. As we are reminded in operative paragraph 4 of the Order, it remains open to the Arbitral Tribunal to declare in its award in the preliminary phase that one or more of the Preliminary Objections does not possess an exclusively preliminary character, in which case it shall be ruled on in conjunction with the merits (although this does not, strictly speaking, flow from Article 11, paragraph 3).



Judge Gudmundur Eiriksson

Member of the Arbitral Tribunal