

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

PNG SUSTAINABLE DEVELOPMENT PROGRAM LTD.

Claimant

and

INDEPENDENT STATE OF PAPUA NEW GUINEA

Respondent

(ICSID Case No. ARB/13/33)

AWARD

Members of the Tribunal

Mr. Gary Born, President of the Tribunal
The Honourable Justice Duncan Kerr, Chev LH, Arbitrator
Dr. Michael Pryles, Arbitrator

Secretary of the Tribunal

Ms. Geraldine R. Fischer
Mr. Monty Taylor (until 23 March 2015)

Assistant to the Tribunal

Ms. Valeriya Kirsey

Date of dispatch to the Parties: 5 May 2015

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TABLE OF ABBREVIATIONS

Objections to Jurisdiction	Respondent’s Objections to Jurisdiction under Rule 41(1) of the ICSID Arbitration Rules, dated 15 October 2014
Response on Jurisdiction	Claimant’s Response to State’s Objections on Jurisdiction, dated 29 October 2014
Reply on Jurisdiction	Respondent’s Reply to Claimant’s Response to Respondent’s Objections to Jurisdiction under ICSID Arbitration Rule 41(1), dated 7 November 2014
Rejoinder on Jurisdiction	Claimant’s Rejoinder on Jurisdiction, dated 14 November 2014
BHP	BHP Minerals Holdings Pty Ltd.
BHPB	BHP Billiton Ltd.
Dolzer Report	Expert Opinion of Professor Dr. Dr. Rudolf Dolzer, submitted with the Respondent’s Objections to Jurisdiction
Griffin Report	Expert Report of Mr. John Griffin QC, submitted with the Respondent’s Objections to Jurisdiction
Griffin II Report	Reply Expert Report by Mr. John Griffin QC, submitted with the Respondent’s Reply on Jurisdiction
IDCA	PNG Investment Disputes Convention Act 1978
IPA	PNG Investment Promotion Act 1992
M&A	Memorandum and Articles of Association of the Claimant, PNGSDP
Mine	Ok Tedi Mine, open pit copper and gold mine in the Western Province of Papua New Guinea
Ninth Supplemental Agreement Act	Mining (Ok Tedi Mine Continuation Ninth Supplemental Agreement) Act 2001
OTML	Ok Tedi Mining Limited
PNG Companies Act	PNG Companies Act 1997
PNGSDP	PNG Sustainable Development Ltd., or the Claimant
Program Rules	The “New Rules of PNGSDP,” Schedule to the M&A
Tenth Supplemental Act	Mining (Ok Tedi Tenth Supplemental Agreement) Act 2013
Webb Report	Expert Opinion of Mr. Ron Webb SC, submitted with the Claimant’s Response on Jurisdiction
Webb II Report	Second Expert Opinion of Mr. Ron Webb SC, submitted with the Claimant’s Rejoinder on Jurisdiction

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I. INTRODUCTION

1. This Award sets out the Tribunal’s reasons and the Tribunal’s decision on the Respondent’s Objections to Jurisdiction under Rule 41(1) of the ICSID Arbitration Rules.

A. The Parties

1. The Claimant

2. PNG Sustainable Development Program Ltd., the Claimant (also referred to as “PNGSDP”), is a company limited by guarantee and incorporated under the laws of Singapore. The Claimant is represented in this arbitration by Mr. Nish Shetty, Mr. Paul Sandosham, Ms. Joan Lim, Mr. Matthew Brown, Ms. Yvette Anthony and Ms. Vinita Varghese of Clifford Chance Pte. Ltd., Mr. Audley Sheppard of Clifford Chance LLP, and Dr. Romesh Weeramantry and Dr. Sam Luttrell of Clifford Chance. Professor James Crawford AC SC and Mr. Cameron Miles also appeared on behalf of the Claimant at the Hearing on Jurisdiction on 29-30 November 2014.

2. The Respondent

3. The Independent State of Papua New Guinea, the Respondent (also referred to as “PNG”), is represented in this arbitration by Mr. Alvin Yeo SC, Ms. Joy Tan, Ms. Swee Yen Koh, Ms. Wendy Lin, Mr. Jared Chen, Mr. Yin Juon Qiang, Ms. Monica WY Chong, and Mr. Ahmad Firdaus bin Daud of WongPartnership LLP.

B. Procedural History

4. On 17 October 2013, the Claimant filed a request for arbitration dated 10 October 2013 against the Respondent (the “Request for Arbitration”) with the International Centre for Settlement of Investment Disputes (“ICSID”).
5. On 20 December 2013, the Secretary-General of ICSID registered the Request for Arbitration, as supplemented by the Claimant’s letters of 8 November, 22 November, and 10 December 2013, in accordance with Article 36 of the ICSID Convention and so notified

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- the Parties. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention.
6. On 20 February 2014, the Claimant informed ICSID that it opted for the formula provided by Article 37(2)(b) of the ICSID Convention for the method of constituting the arbitral tribunal.
 7. In the result, the Tribunal was composed of Mr. Gary Born, a national of the United States of the America, President, appointed by agreement of the Parties; Dr. Michael Pryles, a national of Australia, appointed by the Claimant; and the Honourable Justice Duncan Kerr, Chev LH, a national of Australia, appointed by the Respondent.
 8. On 17 June 2014, the Secretary-General, in accordance with Rule 6 of the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr. Monty Taylor, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. Ms. Valeriya Kirsey was designated to serve as the Assistant to the Tribunal on 23 June 2014. On 24 March 2015, Ms. Geraldine Fischer, ICSID Legal Counsel, replaced Mr. Monty Taylor as Secretary of the Tribunal.
 9. The first session of the Tribunal was held by telephone conference-call on 25 July 2014. The Tribunal subsequently issued its Procedural Order No. 1 on 7 August 2014.
 10. In its Procedural Order No. 1, issued after consultation with the Parties, the Tribunal decided that the question of jurisdiction would be determined as a preliminary issue, and the hearing on jurisdiction would take place over two days prior to 31 December 2014.¹

¹ See Procedural Order No. 1, dated 7 August 2014, at para. 16.

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11. On 11 September 2014, after consulting with the Parties, the Tribunal established that the hearing on jurisdiction would take place in Singapore on 29-30 November 2014, and set out a proposed timetable for the exchange of submissions on jurisdiction, which it subsequently confirmed.
12. A hearing on the Respondent's Preliminary Objections Under Rule 41(5) of the ICSID Arbitration Rules took place at Maxwell Chambers in Singapore on 10 October 2014. (The Tribunal's Decision on those objections was issued to the Parties on 28 October 2014.)
13. On 15 October 2014, the Respondent filed its Objections to Jurisdiction under ICSID Arbitration Rule 41(1) ("Objections to Jurisdiction") with the accompanying Expert Opinion of Professor Dr. Rudolf Dolzer, Expert Report of Mr. John Griffin QC and exhibits.
14. On 29 October 2014,² the Claimant submitted its Response to State's Objections on Jurisdiction ("Response on Jurisdiction") with the accompanying Expert Report of Mr. Ron Webb QC and exhibits.
15. On 7 November 2014, the Respondent filed its Reply to the Claimant's Response to the Respondent's Objections to Jurisdiction under ICSID Arbitration Rule 41(1) ("Reply on Jurisdiction") with the accompanying Second Witness Statement of Mr. Daniel Rolpagarea, the Reply Expert Report of Mr. John A. Griffin QC and exhibits.
16. On 14 November 2014, the Claimant submitted its Rejoinder on Jurisdiction with the accompanying Second Expert Report of Mr. Ron Webb SC and exhibits.
17. On 26 November 2014, as agreed by the Parties, the President of the Tribunal, acting on behalf of the Tribunal, held the pre-hearing organizational meeting with the Parties. Later on the same day, Mr. Monty Taylor circulated a copy of the minutes of the meeting to all participants.

² More precisely, the Claimant filed its submission at 1:51 am Singapore time on 30 October 2014.

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18. On 27 November 2014, the Tribunal confirmed the timetable and time allocation for the two days of the hearing on jurisdiction to be held on 29 and 30 November 2014.
19. In accordance with the Tribunal's directions, the hearing on jurisdiction took place at Maxwell Chambers in Singapore on 29-30 November 2014. In addition to all the Members of the Tribunal, the Acting Secretary of the Tribunal (Ms. Geraldine Fischer), the Tribunal Assistant and the court reporters, attending the hearing were:

For the Claimant:

Counsel

Professor James Crawford AC SC

Mr. Cameron Miles

Mr. Nish Shetty Clifford Chance

Mr. Paul Sandosham Clifford Chance

Dr. Romesh Weeramantry Clifford Chance

Dr. Sam Luttrell Clifford Chance

Mr. Mathew Brown Clifford Chance

Ms. Yvette Anthony Clifford Chance

Ms. Vinita Varghese Clifford Chance

Parties

Mr. Andrew Lind Gadens Lawyers

For the Respondent:

Counsel

Mr. Alvin Yeo SC WongPartnership LLP

Ms. Joy Tan WongPartnership LLP

Ms. Koh Swee Yen WongPartnership LLP

Ms. Wendy Lin WongPartnership LLP

Ms. Monica WY Chong WongPartnership LLP

Mr. Jared Chen WongPartnership LLP

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20. A verbatim transcript of the oral hearing was prepared by Merrill Corporation.³ The transcript was issued to all participants on 29 and 30 November 2014 for Day 1 and Day 2 (respectively) of the hearing.
21. On 10 December 2014, the Respondent and the Claimant submitted their respective Lists of References referred to at the close of the hearing on jurisdiction. The Claimant also provided a copy of the extract from *Brownlie's Principles of Public International Law* referred to at the hearing.
22. On 15 December 2014, the Claimant wrote to the Tribunal with comments on the Respondent's *Chronology of Amendments Made to the Claimant's M&A* distributed by the Respondent's counsel at the hearing on jurisdiction.
23. On 16 December 2014, Mr. Monty Taylor of ICSID sent the audio recording of the hearing on jurisdiction to the Members of the Tribunal, the Tribunal Assistant and the Parties.
24. On 18 December 2014, Merrill Corporation circulated an errata sheet pertaining to the transcripts of the hearing on jurisdiction.
25. On 21 January 2015, the Tribunal rendered its Decision on the Claimant's Request for Provisional Measures.
26. On 5 February 2015, the Tribunal invited the Parties to inform the Tribunal, by no later than 12 February 2015, of their positions with respect to the form of the costs submissions and their length.
27. On 12 February 2015, the Parties informed the Tribunal of their agreement to exchange submissions on costs with accompanying costs statements on 5 March 2015 (at 6:00 pm) and reply submissions on 13 March 2015 (at 6:00 pm). The Parties confirmed that they had agreed on a 5-page limit for each submission (excluding costs statements).

³ The references to the daily transcript ("DT") will be in the following format: DT(Day1).[page].[line]. or DT(Day2).[page].[line].

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28. On 5 March 2015, the Parties filed their respective Submissions on Costs with the accompanying Costs Statements and authorities.
29. On 13 March 2015, the Parties filed their Reply Costs Submissions with the accompanying legal authorities.

II. THE PARTIES' DISPUTE

30. This proceeding concerns the Claimant's alleged investment in an open pit copper and gold mine in the Star Mountains of the Western Province of PNG (the "Ok Tedi mine"). As set out in the Request for Arbitration, PNGSDP owns a majority shareholding (*i.e.*, 63.4146%) in Ok Tedi Mining Ltd. ("OTML"), a PNG-incorporated company.⁴ OTML's rights to the Ok Tedi mine are set out in Special Mining Lease No. 1 (the "Special Mining Lease"). The Special Mining Lease is the primary asset of OTML.⁵
31. The Request for Arbitration provides details on the history of the Ok Tedi mine and on how the Claimant was incorporated and came to own its shares in OTML.⁶ These facts are summarised below.
32. In 2001, BHP Minerals Holdings Pty Ltd. ("BHP," a subsidiary of BHP Billiton Ltd. ("BHP Billiton") (the former shareholder and operator of OTML)) transferred all of its ordinary shares in OTML to the Claimant.⁷ This transfer was intended to entrust an independent, foreign-registered company with the management of the development of the Ok Tedi mine (through OTML) and the use of its earnings from the mine to promote sustainable development within PNG and to advance the general welfare of the people of PNG, particularly those of the Western Province where the Ok Tedi mine is located.⁸ In connection with the transfer, a charge was created over the Claimant's shares in OTML

⁴ Request for Arbitration, at para. 16.

⁵ Request for Arbitration, at para. 25.

⁶ Request for Arbitration, at paras. 9-15.

⁷ Request for Arbitration, at paras. 13-14.

⁸ Request for Arbitration, at para. 13.

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(the “Charge”), by way of a Security Deed dated 7 February 2002 (the “Security Deed”) and a Security Trust Deed dated 7 February 2002 (the “Security Trust Deed”), and a mortgage was created over the Claimant’s shares in OTML (the “Mortgage”), by way of an Equitable Mortgage of Shares dated 7 February 2002 (the “Equitable Mortgage of Shares”).⁹

33. Following a selective share buyback in January 2011, the Claimant and the Respondent have respectively held 63.4146% and 36.5853% of issued ordinary shares in OTML.¹⁰
34. The Claimant was incorporated in Singapore on 20 October 2001.¹¹ It is a company limited by guarantee (as distinguished from share capital) and governed by its Memorandum and Articles of Association (the “Memorandum and Articles of Association” or “M&A”).¹² The M&A annex a set of Program Rules (the “Program Rules”) which deal principally with how earnings are to be applied for the purposes of fund management, transparency and accountability.¹³
35. Since its establishment in 2001, the Claimant has financed and overseen several development and environmental projects. It has financed these projects, and carried out the functions for which it was established, by taking its annual dividends from OTML and (in accordance with the Program Rules) putting them into low-risk investments in international markets to establish two funds: a short-term fund (the “Development Fund”) and a Long Term Fund (the “LTF”).¹⁴
36. On 13 September 2013, the Respondent adopted the Mining (Ok Tedi Tenth Supplemental Agreement) Act 2013 (the “Tenth Supplemental Act”), along with the Mining (Ok Tedi Mine Continuation) (Ninth Supplemental Agreement) (Amendment) Act 2013.¹⁵

⁹ Request for Arbitration, at para. 14.

¹⁰ Request for Arbitration, at para. 15.

¹¹ Request for Arbitration, at para. 18.

¹² Request for Arbitration, at para. 18.

¹³ Request for Arbitration, at para. 18.

¹⁴ Request for Arbitration, at para. 20.

¹⁵ Request for Arbitration, at para. 35.

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According to the Claimant, among other things, the Tenth Supplemental Act purports to cancel the shares held by the Claimant in OTML.¹⁶ Section 4 provides, in the relevant part, as follows:

4. Shareholders of OTML

(1) On the coming into operation of this Act –

(a) all ordinary shares held by PNGSDP in the share capital of OTML shall be cancelled and cease to exist; and

(b) 122,200,000 new, fully paid ordinary shares in the share capital of OTML free of any encumbrance, charge or equitable interest shall be issued to the State.¹⁷

37. Sections 4(5) and 4(6) of the Tenth Supplemental Act provide:

(5) All references to PNGSDP in the constitution of OTML and in the Fifth Restated Shareholders Agreement shall, on and from the coming into operation of this Act, be read and construed as a reference to the State.

(6) On and from the coming into operation of this Act, the Charge is void and of no legal effect and shall not create any interest of any nature whatsoever in any share of OTML.¹⁸

38. Section 6 of the Tenth Supplemental Act provides:

Notwithstanding anything to the contrary in any Act, the State has all necessary powers to restructure PNGSDP and its operations to ensure that PNGSDP applies its funds for the exclusive benefit of the people of the Western Province.¹⁹

¹⁶ Request for Arbitration, at para. 36.

¹⁷ Request for Arbitration, at para. 36.

¹⁸ Request for Arbitration, at para. 39.

¹⁹ Request for Arbitration, at para. 40.

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39. According to the Claimant, the Respondent, “through its instrumentalities and entities for which it is responsible, has mounted a concerted campaign against the Claimant and its investments, culminating in the cancellation of the Claimant’s shares in OTML.”²⁰
40. In its Request for Arbitration, the Claimant claims that the enactment of the Tenth Supplemental Act amounts to a breach of the prohibition against unlawful expropriation,²¹ and the Respondent has not yet made “any proposal to compensate the Claimant adequately in respect of the effects of the Tenth Supplemental Act.”²² The Claimant further claims that the conduct of the Respondent has amounted to violations of other guarantees and standards of treatment that must be accorded by the Respondent to foreign investors, including: (i) the fair and equitable treatment standard; (ii) guarantee of free repatriation of returns on investments; (iii) specific undertakings given to the Claimant (*i.e.*, the umbrella clause); (iv) the full protection and security standard; (v) the rule against arbitrary, discriminatory or unreasonable measures; (vi) national treatment guarantee; and (vii) the rule of free entry and sojourn of personnel.²³
41. The Claimant argues that each of the jurisdictional requirements set forth in Article 25 of the ICSID Convention is satisfied in this case.²⁴ In particular, the Claimant argues that the “consent in writing” requirement of Article 25 “was satisfied”²⁵ because:
- a. “[e]ither on its own, or when read in conjunction with Section 2 of the IDCA, Section 39 of the IPA constitutes a standing offer by the Respondent to arbitrate investment disputes at ICSID;”²⁶ and

²⁰ Request for Arbitration, at para. 24.

²¹ Request for Arbitration, at para. 54.

²² Request for Arbitration, at para. 38.

²³ Request for Arbitration, at para. 55.

²⁴ Request for Arbitration, at paras. 61, *et seq.*

²⁵ Request for Arbitration, at para. 69.

²⁶ Request for Arbitration, at para. 67.

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- b. the Claimant “has already accepted the standing offer made by the Respondent in Section 39 of the IPA (and Section 2 of the IDCA) to refer the dispute that has arisen out of the Claimant’s investments to the jurisdiction of ICSID.”²⁷

III. KEY LEGAL PROVISIONS

A. ICSID Convention

42. The relevant provisions of the ICSID Convention that are at issue at this stage of the present case are set forth below.
43. Article 41 of the Convention reads:
- (1) The Tribunal shall be the judge of its own competence.
 - (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.
44. Article 25 of the ICSID Convention provides in relevant parts:
- (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
 - (2) ‘National of another Contracting State’ means:

²⁷ Request for Arbitration, at para. 68. *See also* Letter to the Prime Minister of PNG from the Chairman of the Claimant (26 September 2013), **Exhibit CE-15**.

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- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) ...

- (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

B. Relevant Provisions of the PNG Law

45. The relevant provisions of the PNG law that are at issue at the present stage of this case are summarized below.

46. **Article 39 of the IPA** reads:

39. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES.

The Investment Disputes Convention Act 1978, implementing the International Convention on the Settlement of Investment Disputes

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between States and Nationals of Other States, applies, according to its terms, to disputes arising out of foreign investment.

47. **Article 2 of the IDCA** reads:

2. CLASSES OF DISPUTES WHICH MAY BE REFERRED TO THE JURISDICTION OF THE CENTRE.

A dispute shall not be referred to the Centre unless the dispute is fundamental to the investment itself.

48. **Article 37(1) of the IPA** reads:

37. INVESTMENT GUARANTEES.

(1) The provisions of this section shall apply to a foreign investor except where treatment more favourable to the foreign investor is accorded under any bilateral or multilateral agreement to which the State is a party.

IV. THE PARTIES' SUBMISSIONS ON JURISDICTION

A. The Respondent's Objections to Jurisdiction

49. In its Objections to Jurisdiction, the Respondent advances a number of arguments as to why this Tribunal does not have jurisdiction to decide the Parties' dispute. These objections have three principal themes: (a) the Respondent has not given its consent in writing to refer the dispute to ICSID; (b) the Claimant does not satisfy the requirements of a "foreign investor" and a "foreign investment" within the meaning of the IPA and the ICSID Convention (the objections under (a) and (b) together "**Article 25(1) Objections**")²⁸; and (c) Article 37 of the IPA is not an MFN clause, and therefore the Tribunal does not have jurisdiction in respect of the claims and reliefs as set out in

²⁸ See, e.g., Objections to Jurisdiction, at paras. 2-3.

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paragraphs 73(ii) to 73(x) of the Claimant’s Request for Arbitration (the “**MFN Objection**”).²⁹

50. With regard to the Article 25(1) Objections, the Respondent states that “[a]s *each* of these gateway elements in Article 25(1) must exist to trigger ICSID’s jurisdiction, the establishment of *any* of those grounds would *per se* be sufficient to bring these proceedings to an end.”³⁰

1. The State Has Not Consented to Submit to ICSID Jurisdiction

51. The Respondent disagrees with the Claimant’s case on consent as set out in paragraphs 67-68 of the Request for Arbitration.³¹ The Respondent argues that:

a. “whether under PNG or international law (both of which are relevant, given the ‘hybrid’ nature of the provisions, which are rooted in the national legal order, but have effects extending out on to the international plane), it is clear that neither Section 39 nor Section 2 provides the ‘consent in writing’ necessary for ICSID’s jurisdiction over the matter;”³² and

²⁹ See, e.g., Objections to Jurisdiction, at para. 5.

³⁰ Objections to Jurisdiction, at para. 4.

³¹ In its Request for Arbitration, the Claimant states that:

Either on its own, or when read in conjunction with Section 2 of the IDCA, Section 39 of the IPA constitutes a standing offer by the [State] to arbitrate investment disputes at ICSID. There is nothing in either provision to posit (or even *suggest*) any condition to the [State’s] consent to ICSID arbitration, and certainly not any requirement that a separate *ad hoc* agreement to arbitrate be entered into with the investor. Notably, neither [provision] contains any equivalent of the words ‘if it so provides’ that caused the ICSID tribunals in *Conoco Phillips v Venezuela* and *Cemex v Venezuela* to find that Article 22 of the Venezuelan *Investment Law* did not constitute a standing offer to arbitrate. The Claimant’s case is more akin to that which led the ICSID tribunal in *SPP v Egypt* to make a positive finding on jurisdiction. Indeed, from a mere comparison in the IPA and the IDCA, it is plain that the Claimant’s case on jurisdiction is markedly *stronger* than that which was successfully made by the claimant in SPP. The Claimant has already accepted the standing offer made by the [State] in Section 39 of the IPA (and Section 2 of the IDCA) to refer the dispute that has arisen out of the Claimant’s investments to the jurisdiction of ICSID. Request for Arbitration, at paras. 67-68 (emphasis added).

³² Objections to Jurisdiction, at para. 23.

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b. “regardless of whether a literal, contextual or purposive interpretation is taken of Section 39 and Section 2, no ‘consent in writing’ necessary for ICSID’s jurisdiction over the matter may be construed from either Section 39 or Section 2.”³³

a) Textual (or literal) interpretation of Section 39 and Section 2

52. **First**, the Respondent contends that the text of Section 39 of the IPA and Section 2 of the IDCA “leave no doubt that the State has not consented to ICSID arbitration.”³⁴ According to the Respondent, a literal interpretation of the IPA and IDCA is warranted under both PNG law and international law, and requires the Tribunal “to look at the grammatical and ordinary meaning of the words,” unless that analysis leads to “absurdity, or any repugnance or inconsistency” (PNG law), or where the text is not clear (international law).³⁵

53. Turning to **the text of Section 39 of the IPA**, the Respondent argues that the provision simply refers to the IDCA and “confirms that the IDCA continues to apply as it stood, ‘according to its terms’.”³⁶ According to the Respondent:

From the grammatical and ordinary sense of the words used in Section 39, it seeks to confirm the State’s intention to abide by the IDCA which applies ‘according to its terms’, hence clarifying that the IDCA extends to ‘disputes arising out of foreign investment’. The wording of Section 39 is clear, and it does not create any new obligations for the State. This reading does not give rise to any absurdity, repugnance or inconsistency, and should therefore be strictly adhered to.³⁷

54. The Respondent then draws a parallel with Article 22 of the Venezuelan Investment law and observes that at least 6 awards rendered by ICSID tribunals (the “Venezuela Cases”³⁸)

³³ Objections to Jurisdiction, at para. 24.

³⁴ Objections to Jurisdiction, at Heading (i) on p. 9.

³⁵ Objections to Jurisdiction, at para. 28.

³⁶ Objections to Jurisdiction, at para. 29. (citing Dolzer Report at paras. 61-63).

³⁷ Objections to Jurisdiction, at para. 29.

³⁸ *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011 (“*Brandes v. Venezuela*”), **Exhibit RL-47**; *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010 (“*CEMEX v. Venezuela*”), **Exhibit CA-2**; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30,

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have “unanimously found” that this provision of assertedly similar national investment legislation contained no consent in writing.³⁹ According to the Respondent, Section 39 “presents an even less compelling case of ‘consent in writing’” than the Venezuelan Investment law provision, because “it does not directly refer to the ICSID Convention (it refers only to the IDCA) and contains no mandatory language (c.f. ‘shall be submitted to international arbitration’ in Art 22 Venezuelan Law).”⁴⁰

55. Further, the Respondent rejects the Claimant’s assertion that its case on consent based on Section 39 “is akin to (or, in fact, ‘stronger’ than) that in *SPP v Egypt* case,”⁴¹ for the following reasons:

- a. the “mandatory and hierarchic sequence of dispute settlement procedures’ in Art 8 Egypt Law is absent in Section 39;”⁴²
- b. unlike the Egyptian investment law provision, the IDCA does not refer to the ICSID Convention;⁴³
- c. the “key plank of the reasoning in *SPP v Egypt* was based upon the application of the *effet utile* principle,”⁴⁴ which “is now no longer taken into account in interpreting a

Decision on Jurisdiction and the Merits, 3 September 2013, (“*ConocoPhillips v. Venezuela*”), **Exhibit CA-1**; *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction, 10 June 2010 (“*Mobil v. Venezuela*”), **Exhibit RL-4**; *OPIC Karimun Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award, 28 May 2013, **Exhibit RL-50**; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013 (“*Tidewater v. Venezuela*”), **Exhibit RL-52**.

³⁹ See Objections to Jurisdiction, at paras. 30-31.

⁴⁰ Objections to Jurisdiction, at para. 32.

⁴¹ Objections to Jurisdiction, at para. 33.

⁴² Objections to Jurisdiction, at para. 34.

⁴³ See Objections to Jurisdiction, at para. 34. The Respondent cites to the *Inceysa v. El Salvador* award as authority for the proposition that national investment legislation does not constitute consent in writing where it does not “mention expressly the jurisdiction of ICSID...” Objections to Jurisdiction, at para. 35 (citing *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, **Exhibit RL-48**).

⁴⁴ Objections to Jurisdiction, at para. 36.

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- state's unilateral declarations, including its domestic legislation," as opposed to treaties;⁴⁵
- d. in any event, such legislative provisions as Section 39 "could serve useful purposes, e.g., to recall and confirm the state's commitments under ICSID or to 'clear the way for the State to conclude specific types of dispute resolution agreement, without internal issues such as *ultra vires* arising, and as such ... [provide] a degree of certainty for investors'."⁴⁶
56. The Respondent submits that the Tribunal's finding of consent must be guided by the principles that a State's consent in writing must be "***clear and unambiguous***" in order to confer jurisdiction on an international tribunal" and "a state's unilateral assumption of obligations is '*not lightly to be presumed*', especially considering that a sovereign state by consenting to arbitration under ICSID is submitting itself to an external adjudicative body."⁴⁷ The Respondent concludes that there is no consent to arbitrate on a literal interpretation of the text of Section 39.⁴⁸
57. Turning to ***the text of Section 2 of the IDCA***, the Respondent submits that "[n]othing in the text of Section 2 compels the State to submit investment disputes (which the investors wish to so refer) to ICSID arbitration;" to the contrary, Section 2 is assertedly phrased in "purely negative terms" and "contains the *opposite* of an offer to arbitrate," because "it precludes the option of arbitration for disputes which are not '*fundamental to the investment*'."⁴⁹

⁴⁵ Objections to Jurisdiction, at para. 37. On this point, the Respondent cites to *Mobil v. Venezuela* and *CEMEX v. Venezuela*. See Objections to Jurisdiction, at paras. 37-38 (citing *Mobil v. Venezuela*, at paras. 118-119, **Exhibit RL-4**; and *CEMEX v. Venezuela*, at paras. 110-112, **Exhibit CA-2**).

⁴⁶ Objections to Jurisdiction, at para. 39.

⁴⁷ Objections to Jurisdiction, at para. 41.

⁴⁸ See Objections to Jurisdiction, at para. 42.

⁴⁹ Objections to Jurisdiction, at para. 43. The Respondent adds that "[a]s far as disputes fundamental to the investment are concerned, Section 2 is *silent*, and neither grants nor denies the option to arbitrate under ICSID." Objections to Jurisdiction, at para. 43.

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58. Quoting from the transcript of the 10 October 2014 hearing on the Respondent’s Rule 41(5) Application, the Respondent notes that the Claimant “itself ‘*readily acknowledges*’ that ‘*neither the IDCA generally nor Section 2 specifically, constitutes consent of the [State] per se*,’” and that the Claimant acknowledged that it did not suggest that “*the IDCA somehow represents the consent that is necessary*”⁵⁰ According to the Respondent, it follows from those statements that “**the Claimant is left to argue that Section 39 on its own represented the necessary ‘consent’ to ICSID arbitration.**”⁵¹
59. The Respondent argues that reading the PNG’s consent into Section 39 “would lead to absurd results,” including: (i) the Respondent being held to have effectively “extend[ed] an offer to arbitrate under ICSID, even to investors who are ineligible under the ICSID Convention,” which the Respondent “could not ... have intended,”⁵² (ii) inconsistency with the limitations on ICSID jurisdiction set forth in the Japan-PNG BIT,⁵³ and (iii) “[i]nsofar as the Claimant has had to rely on ‘*according to its terms*’ in Section 39 to circumscribe the availability of arbitration under the ICSID Convention to Contracting States to the ICSID Convention (to seek to ‘cure’ the absurdity that would otherwise result from its construction of Section 39), such resort only served to illustrate the limiting effect of those words, which must similarly apply to the requirement of consent under Article 25(1) (which is absent in Section 39).”⁵⁴
- b) Contextual interpretation of Section 39 and Section 2
60. **Second**, the Respondent argues that the context of Section 39 and Section 2 confirm that the Respondent has not consented to ICSID arbitration.⁵⁵

⁵⁰ Objections to Jurisdiction, at para. 44.

⁵¹ Objections to Jurisdiction, at para. 44.

⁵² Objections to Jurisdiction, at para. 45(a).

⁵³ See Objections to Jurisdiction, at para. 45(b).

⁵⁴ Objections to Jurisdiction, at para. 45(c).

⁵⁵ See Objections to Jurisdiction, at Heading (ii) on p. 17, paras. 47, *et seq.*

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61. For **Section 39 of the IPA**, the Respondent contends that “the scheme of the IPA and location of Section 39 within it” show that there is no consent to ICSID arbitration by the Respondent.⁵⁶ The contextual elements relied upon by the Respondent include:
- a. The IPA’s purposes listed in Section 1, Part 1 of the IPA – which do not include creation of new jurisdictional rights for foreign investors.
 - b. Unlike Sections 37 and 38 of the IPA, which use the word “*shall*” to indicate “the creation of new rights for foreign investors,”⁵⁷ “[s]uch wording is noticeably absent in Section 39;” rather, the wording of Section 39 indicates that “no additional right, *e.g.*, consent to arbitration, was conferred by way of Section 39.”⁵⁸
 - c. The provisions of the Respondent’s BITs concluded prior to and around the time the IPA was enacted⁵⁹ contain language that stands “in stark contrast with the wording of Section 39”⁶⁰ and “clearly and unequivocally contain[] ‘*consent in writing*’ to ICSID arbitration;”⁶¹ these provisions show that the Respondent “clearly knows how to express its consent (if any) clearly and unambiguously.”⁶² This was not done in the IPA – which assertedly indicates that the “consent in writing” was “*deliberately* not provided.”⁶³
62. For **Section 2 of the IDCA**, the Respondent contends that the “scheme of the IDCA” similarly confirms that Section 2 did not contain the Respondent’s “consent in writing.”⁶⁴ The Respondent relies on the following arguments:

⁵⁶ Objections to Jurisdiction, at para. 47.

⁵⁷ See Objections to Jurisdiction, at paras. 48-51.

⁵⁸ Objections to Jurisdiction, at para. 52.

⁵⁹ The Respondent cites to the UK-PNG BIT, the PNG-PRC BIT and the Japan-PNG BIT. See Objections to Jurisdiction, at paras. 53-54.

⁶⁰ Objections to Jurisdiction, at para. 55.

⁶¹ Objections to Jurisdiction, at para. 53.

⁶² Objections to Jurisdiction, at para. 56.

⁶³ Objections to Jurisdiction, at para. 56.

⁶⁴ See Objections to Jurisdiction, at paras. 57 *et seq.*

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- a. The IDCA's title indicates that the Act "was meant simply 'to implement the [ICSID Convention]'," which Convention in turn requires the "consent in writing" under its Article 25(1).⁶⁵
 - b. The definition of the term "disputes" used in Section 2 also supposedly shows that Section 2 "remains *subject* to the '*consent in writing*' requirement in Article 25(1)."⁶⁶
 - c) Purposive interpretation of Section 39 and Section 2
63. **Third**, the Respondent argues that the purposive interpretation of Section 39 and Section 2 confirms that the Respondent has not consented to ICSID jurisdiction.⁶⁷
64. For the IPA, the Respondent relies on the following arguments:
- a. The purposes of the IPA set forth in the Act do not include creation of "new jurisdictional rights for 'foreign investors', beyond that available under the IDCA."⁶⁸
 - b. The Hansard for the Investment Promotion Authority Bill 1991 (the "IPA Bill Hansard") is "silent on any intention to accord new jurisdictional rights in respect of ICSID arbitration to foreign investors" under the IPA.⁶⁹
65. For the IDCA, the Respondent states that its purpose "is to give effect to the ICSID Convention in the domestic legal order of the State,"⁷⁰ and relies on:
- a. the record of the Second Reading of the IDCA Bill 1978;⁷¹

⁶⁵ Objections to Jurisdiction, at para. 58.

⁶⁶ Objections to Jurisdiction, at para. 59.

⁶⁷ See Objections to Jurisdiction, at para. 60.

⁶⁸ Objections to Jurisdiction, at paras. 61-62.

⁶⁹ Objections to Jurisdiction, at para. 63. See also Second Reading of the Investment Promotion Authority Bill 1991, at pp. 45-46, **Exhibit RE-16**; Griffin Report, at para. 39.

⁷⁰ Objections to Jurisdiction, at para. 64.

⁷¹ See Objections to Jurisdiction, at para. 64. The Respondent quotes the statements of the Minister for Foreign Affairs and Trade, Mr. Ebia Olewale, from the record of the Second Reading, which, in the relevant part, read: "*Papua New Guinea requires that [ICSID] may have jurisdiction only over those disputes which are fundamental to the investment itself. ... Jurisdiction is ceded to the centre ... provided that consent in writing has been given.*" Objections to Jurisdiction, at para. 64; Second Reading of the IDCA Bill 1978, **Exhibit RE-15**.

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- b. the Respondent's notification filed on 14 September 1978 (the "1978 Notification") informing ICSID and Contracting Parties that the Respondent "wished to exclude certain types of disputes from ICSID's jurisdiction" and stating that PNG "will only consider submitting those disputes to the Centre which are fundamental to the investment itself;"⁷² in this regard, the Respondent maintains that the 1978 Notification "did not contain any consent to arbitrate any class of dispute;"⁷³ and
- c. the function of Section 2 – *i.e.*, to serve "as a reflection of the 1978 Notification on the domestic plane," which implies that Section 2 "cannot be construed as itself providing any such consent."⁷⁴

* * *

66. In summary, the Respondent's submissions to the Tribunal are summarized as follows:

- a. Section 2, which is subject to Article 25(1), clearly requires a further '*consent in writing*', and does not constitute consent *per se* – this is readily conceded by the Claimant...;
- b. Section 39, which merely states that the IDCA '*applies, according to its terms*', refers back to the IDCA, and is therefore also subject to the same requirement;
- c. While the phrase '*according to its terms*' is akin to '*according to the terms of the respective treaty or agreement, if it so provides*' in Art 22 Venezuelan Law (which has been found not to constitute consent), Section 39 presents an even less compelling case for '*consent*' as Section 39 does not contain any mandatory language and does not directly refer to the ICSID Convention (as opposed to the IDCA);
- d. Section 39 cannot be compared with Art 8 Egypt Law, which contained mandatory and hierarchic sequence of dispute settlement procedures and express reference to arbitration under ICSID, all of

⁷² Objections to Jurisdiction, at para. 65; Notification by Papua New Guinea Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to ICSID (14 Sept. 1978), **Exhibit RL-15**.

⁷³ Objections to Jurisdiction, at paras. 66-67.

⁷⁴ Objections to Jurisdiction, at para. 68.

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which are absent in Section 39 (in any event, the reasoning in *SPP v Egypt* is less persuasive than the reasoning in the Venezuelan cases interpreting Art 22 Venezuelan Law, and not consonant with current construction of international obligations);

e. The context and purpose of Section 39 (and Section 2) support the literal interpretation that Section 39 cannot constitute consent to arbitrate under ICSID;

f. Section 39 (whether on its own, or when read in conjunction with Section 2) therefore does *not* constitute a standing offer by the State to arbitrate disputes before ICSID; and

g. There was therefore no ‘*standing offer*’ for the Claimant to accept.⁷⁵

2. The Claimant Is Not a Private Investor That Can Avail Itself of ICSID Jurisdiction

67. The second argument put forward by the Respondent is that, even if the Claimant overcomes the “consent in writing” hurdle, the Claimant has failed “to show that it is a *foreign investor* protected under the ICSID Convention,” and that “there is a dispute arising out of a *foreign investment* both under the IPA and the ICSID Convention.”⁷⁶

a) The Claimant is not a “foreign investor” and its assets are not “foreign investment(s)” as defined in the IPA

68. The Respondent argues that, whether on literal or purposive interpretation of the definitions of “foreign investor” and “foreign investment” in Section 3 of the IPA, the Claimant and its assets “clearly fall outside” these definitions.⁷⁷ Because the Claimant has not given any consideration⁷⁸ for the shares in OTML received from BHP, the Claimant neither “*ma[d]e or propose[d] to make an investment*” in PNG, nor ‘*stimulated*’ foreign investment into

⁷⁵ Objections to Jurisdiction, at para. 70.

⁷⁶ Objections to Jurisdiction, at paras. 71-72.

⁷⁷ Objections to Jurisdiction, at paras. 74-76.

⁷⁸ The Respondent relies on Mr. Griffin QC’s report to support this argument. See Objections to Jurisdiction, at para. 77; Griffin Report, at paras. 80-83.

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PNG, “*via its receipt of the Gifted Shares (which were gifted to it to be held and used solely for the benefit of the People [of PNG]).*”⁷⁹

69. The Respondent adds that the issuance of certificates to the Claimant under the PNG Companies Act and Section 25 of the IPA does not address “the issue of whether the Claimant is a ‘*foreign investor*’ or has made any ‘*foreign investment*’ in PNG.”⁸⁰ According to Mr. Griffin QC, these certificates alone “*are not conclusive evidence ... as to the Claimant’s (or any other entity’s) status as a ‘foreign investor’ under the 1992 IPA.*”⁸¹

b) The Claimant is not a private foreign investor under the ICSID Convention

(1) There is no “investment” under Article 25(1)

70. **First**, the Respondent contends that because the transfer of the Gifted Shares to the Claimant was made for “zero consideration,” there is no “investment” under Article 25(1) of the ICSID Convention.⁸²

71. Relying on the *Phoenix Action v. Czech Republic* test for finding an “investment” within the meaning of Article 25(1)⁸³ and citing to *Caratube v. Kazakhstan*,⁸⁴ the Respondent submits that the Gifted Shares “clearly do not qualify as ‘*investments*’” under Article 25(1). The Respondent points out that the Claimant’s role “was *not* that of an investor making contribution, undertaking risks and reaping profits, but as ‘*a trust company*’ / ‘*a pure development agency and funds manager*’ of the Gifted Shares and the dividends flowing therefrom,” and its only mission was to ensure that the latter are “spent wisely on

⁷⁹ Objections to Jurisdiction, at para. 76.

⁸⁰ Objections to Jurisdiction, at para. 78.

⁸¹ Objections to Jurisdiction, at para. 78 (quoting from Griffin Report, at para. 87).

⁸² Objections to Jurisdiction, at para. 79.

⁸³ See Objections to Jurisdiction, at paras. 80, 83 (citing *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, **Exhibit RL-51**).

⁸⁴ The Respondent relies on the decision in *Caratube v. Kazakhstan* for the proposition that “ICSID tribunals have ... viewed with suspicion purported ‘*investments*’ which involve no or nominal monetary consideration.” Objections to Jurisdiction, at para. 84 (citing *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, at paras. 433-435, **Exhibit RL-3**).

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sustainable development of PNG, in particular the Western Province, for the benefit of the People, and without any benefit to itself / its members or any foreign persons / entities.”⁸⁵

72. Similarly, Professor Dolzer opines that the Claimant’s shareholding in OTML “does not show the features of a typical ‘investment’;” rather, it is “a very special *gift*” that the Claimant “administers for the welfare of the people of Papua New Guinea, not for its own benefit.”⁸⁶

73. According to the Respondent, because the Gifted Shares are not “investments” protected under the IPA and the ICSID Convention, the rights and interests that stem from the Gifted Shares and are set out in paragraph 53 of the Request for Arbitration also cannot constitute “investments.”⁸⁷

(2) The Claimant is not “a national of another Contracting State”

74. **Second**, the Respondent argues that the Claimant is not “a national of another Contracting State” within the meaning of Article 25(1) of the ICSID Convention because:

while the Claimant is, in form, a Singaporean entity by virtue of its place of incorporation, it is in substance and reality (and in the Claimant’s own words) a ‘*Papua New Guinean institution*’ set up with the sole mission supporting sustainable development programs for the benefit of the people of PNG (*i.e.*, the Claimant is not ‘*foreign*’).⁸⁸

75. While recognizing that Article 25(2)(b) of the ICSID Convention primarily chooses the place of incorporation as the criterion for establishing the nationality of legal entities, the Respondent argues that “the formal ‘place of incorporation test’ must often make way for

⁸⁵ Objections to Jurisdiction, at para. 86.

⁸⁶ Objections to Jurisdiction, at para. 87 (quoting from Dolzer Report, at paras. 140-142).

⁸⁷ Objections to Jurisdiction, at para. 89.

⁸⁸ Objections to Jurisdiction, at para. 90.

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a more pragmatic/‘substance-over-form’ approach to enable tribunals to determine the reality of an entity’s relationship to a state.”⁸⁹

76. According to the Respondent, in this case the Tribunal should “take into account the indicia of factors which show, without a doubt, that the Claimant, is in truth and substance, a PNG entity.”⁹⁰ Among these factors, the Respondent cites:

- a. the creation of the Claimant through a PNG legislation (the Ninth Supplemental Act) for the purpose of promoting sustainable development and advancing the welfare of the PNG People;
- b. the Claimant’s income and property that are capable of being applied “solely for the promotion” of the Claimant’s objects set forth in the M&A;
- c. the requirement that, upon winding up, the Claimant’s assets “be given or transferred to another institution of a charitable or public character” with similar objects;
- d. incorporation of the Claimant in Singapore “to obtain tax benefits;” and
- e. the Claimant’s “self-identity” which is “clearly Papua New Guinean.”⁹¹

77. The Respondent concludes that finding jurisdiction in this case “would be tantamount to allowing (what is in substance) a *Papua New Guinean national* to pursue international arbitration against its own government.”⁹²

⁸⁹ Objections to Jurisdiction, at paras. 91-96. The Respondent namely criticizes the majority decision in *Tokios Tokelès v. Ukraine* for unduly applying the criterion of the place of incorporation. Objections to Jurisdiction, at para. 97 (discussing *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (“*Tokios*”), **Exhibit RL-6**). See also Objections to Jurisdiction, at para. 98 (citing Dolzer Report, at paras. 103-104 that explains the *Tokios* majority decision “has no bearing upon the present case”). The Respondent further distinguishes this case from the *Tokios* decision. See Objections to Jurisdiction, at para. 101.

⁹⁰ Objections to Jurisdiction, at para. 97.

⁹¹ Objections to Jurisdiction, at para. 99.

⁹² Objections to Jurisdiction, at para. 100.

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- (3) The Claimant discharges an essentially public function and is not a private investor

78. **Third**, the Respondent argues that the Claimant is not “a *private* investor who is entitled to have recourse under the ICSID Convention.”⁹³
79. The Respondent cites Professor Dolzer’s Report and maintains that the requirement of “private” foreign investor “is alluded to in the ICSID Convention” and “stems from the basic purpose of the investment arbitration regime.”⁹⁴ In particular, Professor Dolzer opines that “an ICSID Tribunal will have to decline jurisdiction in case it finds that two parties assimilated with a State, are before it, which seek to resolve a dispute.”⁹⁵
80. The Respondent then relies on the “*Broches test*” for the proposition that wholly or partially state-controlled companies may participate in ICSID arbitrations, unless they are “acting as an agent for the government or discharging an essentially governmental function.”⁹⁶
81. According to the Respondent, the background to the Claimant’s incorporation, its objectives and functions “clearly suggests that it is not ‘*private*’ in nature, but discharges ‘*an essentially governmental function*’,”⁹⁷ because it is “***not motivated by profit in the ordinary sense of a pure commercial entity would be***” and it is a “***trustee-style not-for-profit company, holding the Gifted Shares on behalf of the People.***”⁹⁸
82. The Respondent further relies on Professor Dolzer’s opinion that:

Looking at all the[] features of the Claimant in conjunction, it is my view that the predominant conceptual characteristics are those which point in the direction of a public, and not as a private company. The legal framework adopted by Papua New Guinea and

⁹³ Objections to Jurisdiction, at para. 102.

⁹⁴ Objections to Jurisdiction, at para. 103.

⁹⁵ Dolzer Report, at para. 113. *See also* Dolzer Report, at paras. 110-112; Objections to Jurisdiction, at para. 103.

⁹⁶ Objections to Jurisdiction, at para. 104.

⁹⁷ Objections to Jurisdiction, at para. 105.

⁹⁸ Objections to Jurisdiction, at para. 105.

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the M&A of the Claimant place it outside of the circle of entities covered by the ICSID Convention.⁹⁹

3. The MFN Objection: Section 37(1) of the IPA Is Not an MFN Clause

83. The Respondent requests that the Tribunal “decline jurisdiction for various claims/reliefs which are predicated on the Claimant’s unsustainable argument that Section 37(1) of the IPA is a Most-Favoured-Nation (‘MFN’) clause.”¹⁰⁰

84. The Respondent argues that, even if the Article 25(1) requirements of the ICSID Convention were satisfied, the Tribunal’s jurisdiction “would in any event be confined to the claims arising under the IPA ... as Section 37(1) of the IPA (“**Section 37(1)**”) is *not* an MFN Clause that would allow the Claimant (the putative investor) to benefit from more favourable treatment available in the Listed BITs.”¹⁰¹

85. **First**, the Respondent maintains that:

Section 37(1) simply states that ‘*a foreign investor*’ shall be entitled to the benefits set out under Sections 37(2) and 37(5) of the IPA, unless ‘the foreign investor’ – *i.e.*, the same foreign investor – is accorded more favourable treatment under any other bilateral or multilateral agreement to which the State is a party, in which case, the more favourable treatment will prevail over the rights under the IPA.¹⁰²

86. The Respondent argues that Section 37(1) does not have “the typical construct of an MFN clause,” which ““extends the better treatment granted to a ***third State or its nationals***’ to the beneficiary state in question.”¹⁰³ The Respondent adds that the “basic premise” of an MFN clause is that the granting State undertakes to “treat investors (within a certain sphere) equally” and hence agrees to grant those rights or treatment to “all investors that are entitled

⁹⁹ Objections to Jurisdiction, at para. 106 (citing Dolzer Report, at para. 135). *See also* Dolzer Report, at paras. 123-135.

¹⁰⁰ Objections to Jurisdiction, at para. 5.

¹⁰¹ Objections to Jurisdiction, at para. 108.

¹⁰² Objections to Jurisdiction, at para. 109.

¹⁰³ Objections to Jurisdiction, at para. 110.

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to such MFN treatment.”¹⁰⁴ And to create such obligations, the language of the MFN provisions must be “clear and unequivocal as to the obligations that are to be created.”¹⁰⁵ The Respondent concludes that, because Section 37(1) does not even refer to any “third state,” it is not an MFN clause.¹⁰⁶

87. **Second**, the Respondent relies on Commentary to Article 4 of the ILC’s Draft Articles on Most-Favoured-Nation Clauses in support for its proposition that “MFN clauses involve the giving of inter-State undertakings, which are typically synallagmatic.”¹⁰⁷ The Respondent notes that Section 37(1) would make “a most exceptional” MFN clause because it is “a unilateral domestic legislative provision addressing (not States, but) foreign investors.”¹⁰⁸
88. **Third**, the Respondent argues that, if Section 37(1) were to be compared with the MFN clauses of the BITs relied upon by the Claimant in its Request for Arbitration, it would be obvious that Section 37(1) is not an MFN clause.¹⁰⁹ Rather, according to the Respondent, Section 37(1) is more akin to a “savings” clause or a “clause for the preservation of rights.”¹¹⁰ The Respondent also denies that various domestic legislative provisions cited by the Claimant as purportedly containing MFN provisions are indeed MFN clauses; even if they were, “it does not follow that the *differently-worded* Section 37(1)” is an MFN clause.¹¹¹

* * *

89. Accordingly, the Respondent requests that the Tribunal:

¹⁰⁴ Objections to Jurisdiction, at para. 110.

¹⁰⁵ Objections to Jurisdiction, at para. 110.

¹⁰⁶ Objections to Jurisdiction, at para. 111.

¹⁰⁷ Objections to Jurisdiction, at para. 112.

¹⁰⁸ Objections to Jurisdiction, at para. 113.

¹⁰⁹ Objections to Jurisdiction, at para. 114 (quoting the language of the MFN clauses of the UK-PNG BIT, PNG-Germany BIT, Australia-PNG BIT and China-PNG BIT, all of which contain the words “any third State.”) *See* Objections to Jurisdiction, at para. 114(a)-(d). *See* UK-PNG BIT, at Art. 3 Exhibit CL-9; PNG-Germany BIT, at Art.3, Exhibit CL-7; Australia-PNG BIT, Exhibit CL-8; and China-PNG BIT, Exhibit CL-10.

¹¹⁰ Objections to Jurisdiction, at para. 115.

¹¹¹ Objections to Jurisdiction, at para. 117.

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- a. decline jurisdiction as the State has not consented to submit to ICSID's jurisdiction under Article 25(1);
- b. decline jurisdiction as there is '*no dispute arising ... out of an investment*' under Article 25(1);
- c. decline jurisdiction as the Claimant is not '*a national of another Contracting State*' under Article 25(1);
- d. alternatively, decline jurisdiction in respect of the claims and reliefs not arising under the IPA, by dismissing or striking out paragraphs 73(ii) to 73(x) of the RFA and the relevant paragraphs of the RFA that refer to such reliefs, as reflected in Annex 1 to the State's Preliminary Objections;
- e. order costs in favour of the State; and
- f. order such other and further relief as may be deemed just and appropriate in the circumstances.¹¹²

B. The Claimant's Response on Jurisdiction

90. In its Response, the Claimant argues that "this case is about intent – an essential element no matter what interpretive methodology is applied by the Tribunal,"¹¹³ *i.e.*, intent of the Respondent behind its national investment legislation.
91. Although the Claimant has presented its arguments on jurisdiction in a different sequence from the Respondent, the Tribunal summarizes the Claimant's arguments in the order of the Respondent's objections, for clarity and ease of reading.

1. Consent

92. The Claimant states that this case is "now about the meaning of five words: '*applies, according to its terms*'."¹¹⁴ The Claimant first sets out what it calls the applicable

¹¹² Objections to Jurisdiction, at para. 119.

¹¹³ Response on Jurisdiction, at para. 1.

¹¹⁴ Response on Jurisdiction, at para. 126.

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“interpretive regimes,” before analyzing Section 39 in light of these principles of interpretation.

a) Interpretive Regimes – the Options

93. The Claimant notes that the Parties are in agreement that Section 39 “is a unilateral declaration, and that some mix of national and international law governs its interpretation.”¹¹⁵ However, the Claimant criticizes the Respondent’s approach to interpretation, stating that it is “neither correct nor appropriate as a matter of international law.”¹¹⁶

94. The Claimant instead argues that the correct approach to the interpretation of Section 39 is that adopted in *SPP v. Egypt* (including the *effet utile* principle).¹¹⁷ It then goes on to state that, even if the Tribunal does not follow *SPP v. Egypt*, on any view, a “quasi-Vienna” approach is warranted for interpretation of unilateral declarations of the State (which enables to bring in additional interpretive factors, including “good faith, the object and purpose of the declaration, the wider circumstances in which the declaration was made, and any subsequent conduct by the State that may indicate the meaning of the text of the declaration”).¹¹⁸

(1) The *SPP* approach

95. The Claimant discusses the *SPP v. Egypt* decision, and, *inter alia*:

a. quotes the key interpretive principle from paragraph 63 of this decision, as follows:

jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and

¹¹⁵ Response on Jurisdiction, at para. 130.

¹¹⁶ Response on Jurisdiction, at para. 132.

¹¹⁷ See Response on Jurisdiction, at paras. 132-134.

¹¹⁸ See Response on Jurisdiction, at paras. 135-136. The Claimant notes that “by asking the Tribunal to prefer the ILC Guiding Principles over *SPP*, the State does itself a net harm: while it may avoid *effet utile*, it places its declaration in an interpretive matrix in which good faith and intent are of paramount importance, and subsequent practice is also given a high value.” Response on Jurisdiction, at para. 137.

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jurisdiction will be found to exist if – but only if – the force of the arguments militating in favour of it is preponderant.¹¹⁹

- b. notes the *SPP* tribunal’s literal analysis of Article 8 of the Egypt Law,¹²⁰ including the mandatory character of the word “*shall*” in that provision and the “sequence of dispute settlement procedures” in that provision “impl[ying] a hierarchy of schemes, such that a procedure could only be resorted to where those methods higher in the hierarchy were not available;”¹²¹
- c. notes the *SPP* tribunal’s articulation of the *effet utile* principle: “a legal text should be interpreted in such a way that a reason and meaning can be attributed to every word in the text;”¹²²
- d. emphasizes the *SPP* tribunal’s interpretation of the words “*where it [i.e., the ICSID Convention] applies*” as referring to the jurisdictional requirements of Article 25 of the ICSID Convention and its conclusion that the “consent required under Article 25 of the Convention was generated by the wording of Article 8 itself;” the Claimant notes that Section 39 of the IPA “works the same way;”¹²³
- e. discusses the *SPP* tribunal’s analysis of legislative history of the Egyptian Investment Law, noting that the evidence presented by Egypt in that case was, as in this case, minimal, and that the tribunal refused to draw inferences from “what was *not* said” in the legislative history;¹²⁴

¹¹⁹ *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, at para. 63 Decision on Jurisdiction, 14 April 1988 (“*SPP v. Egypt*”), **Exhibit CA-3**. See Response on Jurisdiction, at para. 140.

¹²⁰ Article 8 of the Egyptian Law No. 43 of 1974 read: “Investment Disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of agreements in force between the Arab Republic of Egypt and the investor’s home country, or within the framework of the Convention for the Settlement of International Disputes between the State and nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such law applies.” See *SPP v. Egypt*, at para. 71, **Exhibit CA-3**; Response on Jurisdiction, at para. 138.

¹²¹ Response on Jurisdiction, at para. 141.

¹²² *SPP v. Egypt*, at para. 94, **Exhibit CA-3**; Response on Jurisdiction, at para. 142.

¹²³ Response on Jurisdiction, at para. 143.

¹²⁴ Response on Jurisdiction, at para. 144.

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- f. points out the importance that the *SPP* tribunal attached to the “intention of the Egyptian government” at the time the investment law was enacted, including the government’s policy aimed at attracting investment and the conclusion of subsequent BITs;¹²⁵ and
 - g. observes that the *SPP* tribunal “took note of official investment promotion literature” when interpreting the national investment legislation, and held that the State’s pronouncements “confirm[ed] the conclusion already reached by the Tribunal ... that Article 8 does not require a further *ad hoc* expression of consent to establish the jurisdiction’ of ICSID.”¹²⁶
96. The Claimant states that the *SPP* decision was “frontier theory”¹²⁷ at the time it was rendered, and that it was the first case that recognized “arbitration without privity.”¹²⁸ According to the Claimant, by asking the Tribunal to disregard *SPP*, the Respondent is asking the Tribunal “to disregard a decision that not only changed the way consent is understood in investor-State arbitration, but which laid down principles that have enabled the development of the very treaty network on which modern international investment law increasingly depends.”¹²⁹

(2) The approach in the Venezuela Cases

97. The Claimant points out the Respondent’s reliance on the Venezuela cases (as “setting out the appropriate interpretive methodology”) that dealt with the interpretation of Article 22 of the Venezuelan investment legislation.¹³⁰ With regard to these cases, the Claimant states that:
- a. these cases are distinguishable from the present case because (i) the legislative history of Section 39 and the intent that it reveals is “quite different” from that of Article 22

¹²⁵ Response on Jurisdiction, at para. 145.

¹²⁶ Response on Jurisdiction, at para. 146 (quoting *SPP v. Egypt*, at para. 116, **Exhibit CA-3**).

¹²⁷ Response on Jurisdiction, at para. 149.

¹²⁸ Response on Jurisdiction, at para. 148.

¹²⁹ Response on Jurisdiction, at para. 149.

¹³⁰ Response on Jurisdiction, at paras. 151-152.

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- of the Venezuelan Investment Law;¹³¹ and (ii) the text of Section 39 is “very different” from the Venezuelan law, which includes the words “*if it so provides*” that are conditional in nature and “create a condition that is incapable of being satisfied;”¹³²
- b. in *Mobil v. Venezuela* and *CEMEX v. Venezuela*, the tribunals declared that they would “abandon any application of domestic principles of statutory interpretation and treat Article 22 as a unilateral declaration under international law,”¹³³ whereas the tribunals in *Tidewater v. Venezuela* and *Brandes v. Venezuela* departed from this approach in that they took into account both the national legal order – in which the national legislative act is “rooted” – and the principles of international law;¹³⁴
- c. hence, it is not “generally accepted” that the ICJ jurisprudence on interpretation of unilateral declarations under Article 36(2) of its Statute applies *ipso facto* to the interpretation of legislation for the purposes of Article 25(1) of the ICSID Convention, nor that “*effet utile* is inapplicable when the interpretive exercise is conducted this way....”¹³⁵
98. The Claimant argues that the Tribunal has a choice between “a purely internationalist (ICJ) methodology, or a hybrid methodology that takes into account the fact that [Section 39] is rooted in the domestic legal order of the State.”¹³⁶ According to the Claimant, the latter is

¹³¹ Article 22 of the Venezuelan Decree with Force of Law No. 356 on the Promotion and Protection of Investments of 3 October 1999 read: “Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion or protection of investments, or disputes to which are applicable the provision of the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or the Convention on the Settlement of Investment Disputes between States and National of other States (ICSID), shall be submitted to international arbitration according to the terms of the respective treaty or agreement, *if it so provides*, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.” *Mobil v. Venezuela*, at para. 68, **Exhibit RL-4** (emphasis added); Response on Jurisdiction, at para. 152.

¹³² Response on Jurisdiction, at para. 153.

¹³³ Response on Jurisdiction, at para. 154 (citing *Mobil v. Venezuela*, at paras. 79-85, **Exhibit RL-4**, and *Cemex v. Venezuela*, at para. 79, **Exhibit CA-2**).

¹³⁴ Response on Jurisdiction, at para. 155 (citing *Tidewater v. Venezuela*, at para. 86, **Exhibit RL-52**, and *Brandes v. Venezuela*, at para. 36, **Exhibit CA-40**). The Claimant also cites *Zhinvali v. Georgia* for a similar proposition. See Response on Jurisdiction, at para. 156 (citing *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No ARB/00/1, Award, 24 January 2003 (“*Zhinvali v. Georgia*”), **Exhibit CA-41**).

¹³⁵ Response on Jurisdiction, at para. 157.

¹³⁶ Response on Jurisdiction, at para. 158.

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“clearly preferable” because national legislation “ought not be considered as a purely international gesture,” but requires “at least *some* consideration of domestic rules of interpretation, provided they do not conflict with interpretive principles of international law.”¹³⁷ The Claimant concludes that common canons of statutory construction – such as *effet utile* – must therefore be taken into account.¹³⁸

(3) The public international law approach

99. The Claimant then discusses the international law principles applicable to the interpretation of the scope of unilateral declarations and its two main sources – *i.e.*, the ICJ jurisprudence and the ILC Guiding Principles.¹³⁹ In particular, the Claimant notes that the “analogical application of [Article 31 of] the Vienna Convention to unilateral declarations” has been recognized in several decisions of the ICJ (*e.g.*, the *Fisheries Jurisdiction* decision, in which the ICJ “described a system whereby the ordinary rules of treaty interpretation apply *mutatis mutandis* to unilateral declarations”¹⁴⁰); despite this, the Claimant argues, the Respondent does not address this issue.¹⁴¹
100. According to the Claimant, the differences between application of Article 31 to a treaty provision and application of “its adapted variant to a unilateral act” stem from the focus on the “subjective intention of the declarant as *sole author*, as reflected in the text of the declaration itself.”¹⁴² With the application of Article 31 of the Vienna Convention come other additional factors to be taken into account in the process of interpretation, including “interpretation in good faith, the context of the initial agreement, subsequent agreement, *subsequent* practice, and other relevant rules of international law.”¹⁴³ The Claimant

¹³⁷ Response on Jurisdiction, at para. 159.

¹³⁸ See Response on Jurisdiction, at para. 161.

¹³⁹ See Response on Jurisdiction, at paras. 163-188.

¹⁴⁰ Response on Jurisdiction, at para. 170.

¹⁴¹ Response on Jurisdiction, at paras. 168-170.

¹⁴² Response on Jurisdiction, at para. 172.

¹⁴³ Response on Jurisdiction, at para. 173. The Claimant states that, “[w]hen the Vienna Convention is applied by analogy to unilateral declarations, the result is a complex act of interpretation,” and quotes from the ICJ *Fisheries Jurisdiction* decision: “... The intention of a ... State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of the evidence regarding the circumstances

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contends in particular that *subsequent practice* “may readily be seen to give insight into what a State actually intended, and what it thought the legal effect of its action was, at the time at which the relevant declaration was made.”¹⁴⁴

101. The Claimant further argues that the restrictive presumption that governs the interpretation of a State’s unilateral declarations under international law (including as set out in ILC Guiding Principle 7) should not apply where the State’s “unilateral acts are formulated in the framework and on the basis of a treaty, such as the ICSID Convention.”¹⁴⁵ On this issue, the Claimant disagrees with Professor Dolzer’s “*restrictive approach*” requiring that consent be “*clear and unambiguous*,”¹⁴⁶ and rejects ILC Guiding Principle 7 as a plausible rule of interpretation of Section 39 of the IPA.¹⁴⁷
102. The Claimant concludes that, if the Tribunal decides to treat Section 39 of the IPA and Section 2 of the IDCA as unilateral declarations under international law, “the applicable law is that adopted by the ICJ with respect to unilateral acts in connection with treaty frameworks,” and the appropriate interpretive methodology is “to adapt Article 31 of the Vienna Convention for use in the context of a single declarant.”¹⁴⁸
103. By way of summary, the Claimant synthesizes the two possible interpretive options available to the Tribunal under international law,¹⁴⁹ contending that both approaches are similar and that the “delta” between them is “narrow.”¹⁵⁰ The Claimant states that:

of its preparation and the purposes intended to be served.” Response on Jurisdiction, at para. 174 (quoting *Fisheries Jurisdiction Case (Spain v. Canada)*, at p. 454, **Exhibit CA-37**).

¹⁴⁴ Response on Jurisdiction, at para. 176. See also Response on Jurisdiction, at para. 177.

¹⁴⁵ Response on Jurisdiction, at paras. 178-182 (quoting *Mobil v. Venezuela*, at paras. 87-90, **Exhibit RL-4**).

¹⁴⁶ See Response on Jurisdiction, at para. 183 (discussing Dolzer Report, at paras. 25-27). The Claimant quotes from paragraph 27 of Professor Dolzer’s Report, which reads: “[W]hile a long line of decisions has assumed that such declarations have to be interpreted neither restrictively, nor expansively, but rather objectively and in good faith, following a ruling in *SPP v. Egypt*, it will be noted that recent jurisprudence has required that consent must be *clear and unambiguous*, thus effectively adopting what amounts to a *restrictive approach*.” Dolzer Report, at para. 27.

¹⁴⁷ See Response on Jurisdiction, at para. 184.

¹⁴⁸ Response on Jurisdiction, at para. 186.

¹⁴⁹ See Response on Jurisdiction, at para. 187.

¹⁵⁰ Response on Jurisdiction, at para. 188. The Claimant notes that the common requirements under both interpretive schemes include: “*both* require that first the words of the declaration be read in a natural and reasonable way; *both* require that due regard be paid to the intention of the State that made the declaration; *both* require that the declaration

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[O]ption one is the ICSID-specific, neutral (neither expansive nor restrictive) approach developed in *SPP* and followed in certain of the Venezuela cases; option two is the method applied by the ICJ in the *Fisheries Jurisdiction* case ..., which is ‘Vienna by analogy’ – that is, to interpret IPA Section 39 by analogy with VCLT Article 31, tailored to reflect the fact that the State is the sole author of the instrument in question (rather than a co-author of a treaty), without bringing to bear any particular interpretive presumption and with a particular focus on the intent of the State, good faith and subsequent State practice.¹⁵¹

104. In sum, according to the Claimant, the choice for the Tribunal is between an ICSID-specific method developed by *SPP* and succeeding authorities, on the one hand, and a method developed by the ICJ in the State-to-State context, on the other hand.¹⁵²

(4) The role of national law

105. On the issue of what role the national law should play in interpretation, the Claimant submits that “the application of national law is subject to the ultimate control of international law.”¹⁵³
106. The Claimant argues that PNG statutory interpretation principles are “essentially English” and “the sources of the underlying law of the State include English common law as it was immediately before the date on which PNG became independent.”¹⁵⁴ The Claimant further contends that PNG law bears “little” differences from the general principles of statutory interpretation under international law,¹⁵⁵ and highlights the following rules of interpretation:
- a. headings can be taken into account under PNG law, as confirmed by Mr Griffin QC in his Report;¹⁵⁶ the Claimant notes that the heading of Section 39 reads “*International*

be interpreted in good faith; *both* require that regard be had to the context of the declaration; and *both* allow for the subsequent practice of declarant State to be taken into account.” Response on Jurisdiction, at para. 188.

¹⁵¹ Response on Jurisdiction, at para. 187.

¹⁵² See Response on Jurisdiction, at para. 188.

¹⁵³ Response on Jurisdiction, at para. 190.

¹⁵⁴ Response on Jurisdiction, at para. 192 (citing to Griffin Report, at paras. 20-21).

¹⁵⁵ See Response on Jurisdiction, at paras. 191, 193.

¹⁵⁶ See Response on Jurisdiction, at para. 193; Griffin Report, at para. 47.

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Centre for Settlement of Investment Disputes,” and that “this is the State identifying the body to which it is prepared to submit disputes, in a law that implements (and has annexed to it) the Convention under which that body operates;”¹⁵⁷

- b. PNG law contains an equivalent of *effet utile*, resulting from Section 190(4) of the PNG Constitution (which requires that “statutory provisions be given a ‘*fair, large and liberal*’ construction and interpretation”¹⁵⁸), supplemented by a well-established principle of common law that “a PNG court is not at liberty to consider any word or sentence of a statute to be superfluous or insignificant; in other words, the rule is that every provision of a written law has useful work to do;”¹⁵⁹
- c. when interpreting PNG statutes, a court “must also have adequate regard to the social purpose and development goals of particular legislation;”¹⁶⁰ and
- d. when interpreting PNG law, a court “must consider which of the competing interpretations will result in the dispensation of justice.”¹⁶¹

b) Interpreting Section 39 of the IPA

107. The Claimant then addresses the interpretation of Section 39 of the IPA, stating that the “core interpretive task” for the Tribunal is “to ascertain the meaning and effect of the words ‘*applies, according to its terms*’.”¹⁶² The Claimant refers to the conclusion in Webb Report that “when IPA Section 39 is construed in accordance with PNG rules of statutory interpretation, it is an offer to arbitrate,”¹⁶³ and turns to the analysis under the *SPP* and “quasi-Vienna” approaches.¹⁶⁴

¹⁵⁷ Response on Jurisdiction, at para. 193.

¹⁵⁸ Response on Jurisdiction, at para. 194.

¹⁵⁹ Response on Jurisdiction, at para. 194. *See also* Response on Jurisdiction, at paras. 195-196.

¹⁶⁰ Response on Jurisdiction, at para. 197.

¹⁶¹ Response on Jurisdiction, at para. 199.

¹⁶² Response on Jurisdiction, at para. 200.

¹⁶³ Response on Jurisdiction, at para. 202. *See also* Webb Report, at para. 62.

¹⁶⁴ Response on Jurisdiction, at paras. 203 *et seq.*

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(1) Applying the *SPP* approach

108. Referring to the *SPP* principle that “jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith,”¹⁶⁵ the Claimant argues that:

“[I]nterpreted objectively and in good faith, Section 39 of the IPA is, at its most basic level, a deliberate statement by the State that disputes arising out of foreign investment are subject to resolution in accordance with the ICSID Convention”¹⁶⁶

109. **First**, the Claimant addresses the meaning of the words “*applies, according to its terms,*” arguing that:

- a. the word “*applies*” in Section 39 is “used to declare the present, practical operation of the IDCA (and the ICSID Convention) to disputes arising out of foreign investment covered by the IPA;”¹⁶⁷
- b. the comma separating the words “*applies*” and “*according to its terms*” indicates their two distinct functions: the word “*applies*” has an “*independent* function – it declares the State’s consent,” whereas the words “*according to its terms*” are “cross-referential and fundamentally concerned with ... ensuring that the *scope* of the State’s consent is limited according to the terms of IDCA Section 2” (*i.e.*, to disputes that are fundamental to investment itself);¹⁶⁸
- c. the word “*terms*” encompasses “all of the articles of the ICSID Convention,” including Article 25’s requirement of consent in writing, which is satisfied by preceding the word “*applies*”;¹⁶⁹

¹⁶⁵ Response on Jurisdiction, at para. 203 (quoting *SPP v. Egypt*, at para. 63, **Exhibit CA-3**).

¹⁶⁶ Response on Jurisdiction, at para. 204.

¹⁶⁷ Response on Jurisdiction, at para. 207 (citing Webb Report, at para. 53).

¹⁶⁸ Response on Jurisdiction, at para. 208.

¹⁶⁹ Response on Jurisdiction, at para. 209.

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- d. Section 2 of the IDCA “comes into equation” through the words “*according to its terms,*” and the heading of that section contains permissive language – “*may be referred to the Centre.*”¹⁷⁰
110. According to the Claimant, the effect of Section 39 of the IPA and Section 2 of the IDCA is that the reader understands that “provided my dispute is fundamental to my investment, I *may* refer it to the Centre.”¹⁷¹
111. The Claimant criticizes the Respondent’s interpretation of Section 39 for:
- a. “simply making a factual statement” and notes, quoting from Webb Report, that that interpretation would mean that “[i]t would be a statement that a law that applies, applies.”¹⁷²
- b. doing violence to the wording of the provision itself, because “not only does it introduce a new requirement (*i.e.* the need for a subsequent agreement on ICSID arbitration), but it also changes the provision (particularly the key word ‘*applies*’) from the present imperative to the future conditional (*i.e.* the IDCA *will* apply, according to its terms, but only if the State agrees);”¹⁷³
- c. giving a “disproportionate effect” to the words “*according to its terms*” compared to the word “*applies,*” the point of difference between the Parties being whether “the word ‘*applies*’ closes the loop (the State’s textual case) or whether it is an end of a line that leads to ICSID Convention (the Claimant’s case).”¹⁷⁴
112. **Second**, the Claimant considers Section 39 in its context and submits that:
- a. Section 39 is part of the “*Investment Guarantees*” set out in Part V of the IPA and is styled as “an *operative guarantee* of investment protection;” the “right of neutral,

¹⁷⁰ Response on Jurisdiction, at para. 210.

¹⁷¹ Response on Jurisdiction, at para. 211.

¹⁷² Response on Jurisdiction, at paras. 212-213. *See also* Webb Report, at para. 43.

¹⁷³ Response on Jurisdiction, at para. 215.

¹⁷⁴ Response on Jurisdiction, at para. 216.

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international adjudication that IPA Section 39 provides is the means by which the investor can enforce the substantive ‘*investment guarantees*’ given to it under Part V of the Act;”¹⁷⁵

- b. the legislative history of the IPA supports the Claimant’s case on the intent behind Section 39 of the IPA because it shows that:
 - i. There was an earlier 1991 version of the IPA setting out the Respondent’s standing offer to arbitrate that the final text of the IPA (1992) sought to improve and replace.¹⁷⁶ In particular, Article 39(1)(a) of the 1991 version of the IPA contained the Respondent’s “standing offer to arbitrate (at ICSID) only disputes that concern the ‘*interpretation or application*’ of the IPA (in other words, ‘no dollars’ disputes),” and stated that “for ‘*disputes arising out of the activities [of a foreign] enterprise*’, an arbitration agreement is required.”¹⁷⁷ According to the Claimant, because the purpose of the 1992 Act was to “*improve*” the 1991 text,¹⁷⁸ the current Section 39 shows that the Respondent “made a conscious decision to broaden the scope of IPA Section 39 and make it more attractive to foreign investors by declaring that the IDCA (and with it the ICSID Convention) *applies* to foreign investment disputes, rather than just disputes about the ‘*interpretation or application*’ of the IPA.”¹⁷⁹

¹⁷⁵ Response on Jurisdiction, at para. 219.

¹⁷⁶ See Response on Jurisdiction, at paras. 223-224(a). The Claimant points out that the Respondent has not produced the 1991 version of the IPA and invites the Tribunal to “draw an adverse inference” against the Respondent on the basis of this failure to produce. Response on Jurisdiction, at para. 233. See also Response on Jurisdiction, at para. 224(a).

¹⁷⁷ Response on Jurisdiction, at para. 229 (quoting from Section 39 of the 1991 IPA Act, **Exhibit CL-51**).

¹⁷⁸ Response on Jurisdiction, at para. 230. See also Second Reading of the IPA Bill 1991, at p. 45 (recording the PNG Minister for Trade and Industry’s statements that the 1992 IPA was meant “to incorporate ... improvements” to the 1991 bill and “replace and repeal the previous Act.”), Second Reading of the IPA Bill 1991, **Exhibit RE-16**.

¹⁷⁹ Response on Jurisdiction, at para. 230. The Claimant also argues that “the 1991 text shows that the State was intending to make an offer of ICSID arbitration in the IPA – on further consideration, the Government realised the offer it made in the 1991 form of the IPA was not good enough to give foreign investors real comfort, and so it took steps to improve the offer in the 1992 revision of the IPA.” Response on Jurisdiction, at para. 231.

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- ii. “[T]he IPA was passed with the general intention of promoting PNG as a destination for foreign investment.”¹⁸⁰
 - iii. “[T]he IPA was drafted with the *specific* intention of satisfying certain conditions that attached to the World Bank’s ‘Structural Adjustment Loan’ to the State.”¹⁸¹
- c. The history of passing of the IPA is “fundamentally different” from that at issue in the Venezuelan cases, because PNG has not had any record of hostility to ICSID arbitration and therefore did not need to “*affirm its commitment to ICSID*” in passing the IPA.¹⁸²
113. **Third**, the Claimant looks at the Respondent’s “*subsequent practice*” – *i.e.*, “the investment promotion activities that the State and its agencies have conducted since the declaration was made” in the IPA, and in particular the official investment promotion literature¹⁸³ -- and claims that it is “damning.”¹⁸⁴ The Claimant primarily focuses on the statements on the Investment Promotion Authority’s website,¹⁸⁵ before and after the filing of the Request for Arbitration,¹⁸⁶ and on the PNG Embassy to the Americas website,¹⁸⁷ and argues that:
- a. the original version of the website of the Investment Promotion Authority before the filing of the Request for Arbitration¹⁸⁸ left “no doubt in the reader’s mind: if you invest

¹⁸⁰ Response on Jurisdiction, at para. 224(b).

¹⁸¹ Response on Jurisdiction, at para. 224(c). *See also* Response on Jurisdiction, at paras. 225-227.

¹⁸² *See* Response on Jurisdiction, at paras. 235-239.

¹⁸³ Response on Jurisdiction, at para. 241.

¹⁸⁴ Response on Jurisdiction, at para. 258.

¹⁸⁵ *See* Response on Jurisdiction, at paras. 242-244.

¹⁸⁶ *See* Response on Jurisdiction, at paras. 244-251; Screenshot of Investment Promotion Authority Website (October 2013), **Exhibit CE-17** and Screenshot of Investment Promotion Authority website (June 2014), **Exhibit CE-18**.

¹⁸⁷ *See* Response on Jurisdiction, at paras. 254-255; Screenshot of Website to PNG Embassy to the Americas (October 2014), **Exhibit CE-21**.

¹⁸⁸ *See* Screenshot of Investment Promotion Authority Website (October 2013), **Exhibit CE-17** (“Investment disputes can be settled through diplomatic channels or through the use of local remedies before having such matters adjudicated at the International Centre for the Settlement of Investment Disputes or through another appropriate tribunal of which Papua New Guinea [sic] is a member.”).

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- in PNG, and a dispute arises in relation to your investment, your dispute *can be adjudicated at ICSID*.”¹⁸⁹
- b. the modified version of that website after the filing of the Request for Arbitration¹⁹⁰ and the publication of the *OPIC Karimun v. Venezuela* decision still does not help the Respondent, and it should be understood as meaning that “if you invest in PNG, and a dispute arises in relation to your investment, the IPA allows you to start ICSID arbitration against the State.”¹⁹¹
114. The Claimant also mentions the Ninth Supplemental Act and states that the Respondent could have – but has not – excluded Part V of the IPA from application to the Claimant, as it did with Section 32 of the IPA.¹⁹²
115. **Finally**, the Claimant turns to *effet utile* and explains that although “intent and good faith come first,”¹⁹³ *effet utile* serves to “exclude interpretations which would render the text meaningless, when a meaningful interpretation is possible’.”¹⁹⁴ With regard to the Venezuela decisions, the Claimant notes that, “[f]ar from expressing any principled rejection of *effet utile*, these tribunals either applied the rule to confirm their textual conclusions or considered that its application was unnecessary due to the wording of the national law provision in question.”¹⁹⁵
116. The Claimant submits that the result of the application of *effet utile* in this case is two-fold:

¹⁸⁹ Response on Jurisdiction, at para. 245.

¹⁹⁰ See Screenshot of Investment Promotion Authority Website (June 2014), **Exhibit CE-18** (“International Centre for Settlement of Investment Disputes. Section 39 of the [IPA] seeks to encourage greater flows of international investment by providing facilities for the conciliation and arbitration of disputes between government and foreign investors.”). The Claimant invites the Tribunal to draw adverse inference from the “corrective action that State has taken on these websites, that inference being that the State knew the earlier version of the Investment Promotion Authority website was harmful to its case on consent in this arbitration.” Response on Jurisdiction, at para. 251.

¹⁹¹ Response on Jurisdiction, at para. 252.

¹⁹² See Response on Jurisdiction, at paras. 259-261.

¹⁹³ Response on Jurisdiction, at para. 263.

¹⁹⁴ Response on Jurisdiction, at para. 264 (quoting *CEMEX v. Venezuela*, at para. 14, **Exhibit CA-2**).

¹⁹⁵ Response on Jurisdiction, at para. 267.

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- a. “it triggers the actual application of the ICSID Convention to this dispute;” and
- b. it requires the Tribunal “to dismiss the State’s argument that [Section 39] merely serves to affirm the State’s commitment to the ICSID system,” which has already been affirmed twice – when the Respondent ratified the ICSID Convention, and when the Respondent passed the IDCA, “which implemented the Convention locally.”¹⁹⁶

(2) Applying a quasi-Vienna approach

117. Turning to the alternative interpretive approach – *i.e.*, interpreting the declaration in Section 39 using Article 31 of the Vienna Convention by analogy¹⁹⁷ – the Claimant submits that, under the quasi-Vienna approach:
- a. the *SPP* analysis also applies to determining the ordinary meaning of the word “*applies*”;¹⁹⁸
 - b. also allows the Tribunal to take into account the Respondent’s subsequent practice, including the websites;¹⁹⁹
 - c. the “emphasis is placed on the context of the declaration,” including the 1991 IPA and the purposes of the final 1992 IPA, which context “*must* inform the interpretation of the IPA Section 39;”²⁰⁰ this means that the Tribunal “can use the stated object and purpose of the IPA to confirm the ordinary meaning of the term ‘*applies*’” in Section 39, and should be guided by the context in resolving “any uncertainties that it considers exist in [the IPA’s] wording;”²⁰¹

¹⁹⁶ Response on Jurisdiction, at para. 268.

¹⁹⁷ See Response on Jurisdiction, at paras. 269-272.

¹⁹⁸ Response on Jurisdiction, at para. 273.

¹⁹⁹ See Response on Jurisdiction, at para. 274.

²⁰⁰ Response on Jurisdiction, at paras. 275-276.

²⁰¹ Response on Jurisdiction, at paras. 277-278.

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- d. PNG’s BITs relied upon by the Respondent are irrelevant to the extent that they are not “of similar vintage to IPA,” and even where they are, they bear “no evidentiary value” of the Respondent’s subjective intent.²⁰²
118. The Claimant concludes that, “even on the quasi-Vienna reading that the State asks the Tribunal to prefer, consent is established.”²⁰³
- c) Additional principles bearing on the operation of Section 39 of the IPA
119. The Claimant invokes two other rules and maxims – *i.e.*, *contra venire factum proprium*²⁰⁴ and *contra proferentem*.
120. Considering the former, the Claimant argues that in this case the Respondent “cannot deny that the ICSID Convention applies to this dispute, and it cannot deny that it has, through its declaration in [Section 39 of the IPA], given (and intended to give) the consent that is necessary for this to occur.”²⁰⁵ According to the Claimant, it “relied” on Section 39 and on being deemed a “foreign enterprise” for the purposes of the IPA in making its investment.²⁰⁶
121. Considering the latter, the Claimant argues that any doubts whether Section 39 contains the Respondent’s consent should be resolved against the State as the drafter of its legislation²⁰⁷ (clarifying that this rule does not apply if the Tribunal selects the quasi-Vienna approach²⁰⁸).

²⁰² See Response on Jurisdiction, at paras. 279-284.

²⁰³ Response on Jurisdiction, at para. 285.

²⁰⁴ See Response on Jurisdiction, at paras. 287-293.

²⁰⁵ Response on Jurisdiction, at para. 292.

²⁰⁶ Response on Jurisdiction, at para. 293.

²⁰⁷ See Response on Jurisdiction, at para. 294.

²⁰⁸ See Response on Jurisdiction, at para. 295.

Award

2. “Investor” and “Investment”

122. In its Response, the Claimant notes that the Respondent’s Objections “conflate two independent criteria: jurisdiction *rationae personae* and jurisdiction *rationae materiae*.”²⁰⁹ The Claimant first addresses the Tribunal’s jurisdiction *ratione personae* and the Respondent’s assertions relating to the Claimant not being a “private” investor and a “foreign” investor. The Claimant then addresses the Tribunal’s jurisdiction *ratione materiae* and the Respondent’s assertions that the Claimant has not made an “investment” in the PNG.

a) Jurisdiction *ratione personae*

(1) “Private” investor

123. **First**, the Claimant submits that there is no “explicit jurisdictional requirement that investors must be ‘private’, let alone any requirement as to ‘private investments’” under Article 25 of the ICSID Convention,²¹⁰ and there is no legal basis for implying one.²¹¹

124. Even if there was such a requirement, the Claimant would “clearly satisfy” it, under all three tests – *i.e.*, the Broches Test,²¹² the Structural Test²¹³ and the Functional Test²¹⁴ – or

²⁰⁹ Response on Jurisdiction, at para. 21.

²¹⁰ Response on Jurisdiction, at para. 26.

²¹¹ See Response on Jurisdiction, at paras. 28-31.

²¹² According to the Claimant, the “Broches Test” provides that “a company that combines capital from private and government sources and state-controlled corporations may be investors in ICSID arbitrations unless it is ‘acting as an agent for the government or discharging an essentially government function’.” Response on Jurisdiction, at para. 32(a) (citing C. Schreuer, *The ICSID Convention: A Commentary*, 2nd ed., CUP (2009), at p. 161, para. 271, **Exhibit CL-32**).

²¹³ According to the Claimant, the “Structural Test” “involves an assessment of whether the entity in question – by reference to the laws relating to its organisation and regulating its activities – is established by law as a government entity.” Response on Jurisdiction, at para. 32(b), citing *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 9 November 2000 (“*Maffezini*”), at paras. 47-48, **Exhibit CA-17**.

²¹⁴ The Claimant defines the “Functional Test” “is concerned with determining ‘whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial.’” Response on Jurisdiction, at para. 32(c) (citing *Maffezini*, at para. 52, **Exhibit CA-17**).

Award

any combination thereof.²¹⁵ The Claimant argues that the Claimant “is private”²¹⁶ under all three tests, because:

- a. the Claimant is “certainly not acting as agent for the government, nor can it be said to be discharging an essentially governmental function;”²¹⁷
- b. structurally, the Claimant is the “opposite of a government entity” because its constitution “shows a design that was intended to prevent government control, rather than enable it;”²¹⁸ and
- c. the Claimant cannot be considered a government entity “from a functional view,” given that it (a) “uses the dividend stream received from the operation of the Mine for specified purposes, for the benefit of the people of PNG and of the Western Province in particular,” and (b) “performs activities in a commercial capacity” and the “vast majority of the Claimant’s assets today are managed by fund managers whose instructions are to make profits.”²¹⁹

125. The Claimant further contends that, even if it were a charity as the Respondent contends (and it is not²²⁰), it should not be denied protection under the IPA or the ICSID Convention.²²¹ The Claimant also emphasizes that, whatever the lay statements made by the Claimant’s officers, “the legal truth remains: the Claimant is a company incorporated in *Singapore*.”²²²

126. Finally, the Claimant notes that Professor Dolzer “cannot offer any conclusive view on whether the Claimant is a ‘*public investor*’,”²²³ and cites to Professor Dolzer’s statement

²¹⁵ See Response on Jurisdiction, at paras. 31-33.

²¹⁶ Response on Jurisdiction, at para. 38.

²¹⁷ Response on Jurisdiction, at para. 34.

²¹⁸ Response on Jurisdiction, at paras. 35-36.

²¹⁹ Response on Jurisdiction, at para. 37.

²²⁰ See Response on Jurisdiction, at paras. 39-40.

²²¹ See Response on Jurisdiction, at para. 41.

²²² Response on Jurisdiction, at para. 43.

²²³ Response on Jurisdiction, at para. 45.

Award

that “[t]rue enough, the Claimant in our case is placed into a unique legal setting which does not fall into any traditional category of a private or public company.”²²⁴

(2) Foreign investor

127. **Second**, the Claimant submits that it is a foreign investor both within the meaning of the ICSID Convention and PNG law.²²⁵
128. The Claimant argues that it satisfies the requirement of a “national of another Contracting State” under Article 25(1) because it is a Singapore national – specifically, a company limited by guarantee incorporated in Singapore under the Singapore Companies Act.²²⁶ In this regard, the Claimant states that the Respondent’s position that “the people of PNG in fact own the Claimant” is “untenable, factually and legally,”²²⁷ and the Respondent wrongly asserts that the Claimant was incorporated in Singapore for tax reasons.²²⁸
129. According to the Claimant, **under international law**, “the nationality of a corporation is taken to be the place of incorporation unless an applicable treaty imposes another rule,”²²⁹ and piercing of the corporate veil must be “exceptional, and [is] only to be allowed in extreme cases such as fraud and malfeasance.”²³⁰ The Claimant points out that modern international investment law authorities “respect corporate personality and the freedom of corporate entities to organise themselves in ways that allow them to take advantage of the modern system of international investment protection,”²³¹ and discusses several decisions

²²⁴ See Response on Jurisdiction, at para. 45 (citing Dolzer Report, at para. 123)

²²⁵ See Response on Jurisdiction, at para. 72.

²²⁶ See Response on Jurisdiction, at paras. 47-49.

²²⁷ Response on Jurisdiction, at para. 65.

²²⁸ See Response on Jurisdiction, at para. 66.

²²⁹ Response on Jurisdiction, at para. 51.

²³⁰ Response on Jurisdiction, at paras. 53-54. The Claimant cites to the ICJ decision in *Barcelona Traction* in support of this proposition. See Response on Jurisdiction, at para. 54 (citing *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Judgment, ICJ Reports 1970, **Exhibit CA-18**).

²³¹ Response on Jurisdiction, at para. 58.

Award

that have refused to pierce the corporate veil and applied the criterion of the place of incorporation.²³²

130. The Claimant further argues that the Claimant also qualifies as a “foreign investor” *under PNG law*,²³³ because the Claimant is a “foreign enterprise” and a “foreign investor” within the meaning of Article 3(1) of the IPA.²³⁴ The Claimant notes, *inter alia*, that has been granted the certificate to carry on business in PNG as a “foreign enterprise” by the Respondent, certified as a “foreign enterprise” by the Investment Promotion Authority, and issued a certificate of registration by the Registrar of Companies as an “*overseas company* under the *PNG Companies Act 1997*.”²³⁵

b) Jurisdiction *ratione materiae*

131. The Claimant submits that jurisdiction *ratione materiae* is to be determined through a two-step approach which requires the Tribunal to consider: (a) “whether each of the investments falls within the definition of ‘investment’ in Section 3 of the IPA;” and (b) “whether each of the relevant instruments is an ‘*investment*’ within the meaning of Article 25 of the ICSID Convention.”²³⁶

²³² See Response on Jurisdiction, at paras. 59-62 (citing *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, **Exhibit RL-6**; *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005 (“*Aguas del Tunari*”), **Exhibit CA-25**; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 Award, 7 July 2004 (“*Soufraki v. Egypt*”), **Exhibit CA-26**; and *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008 (“*Victor Pey Casado v. Chile*”), **Exhibit CA-27**).

²³³ See Response on Jurisdiction, at para. 67.

²³⁴ See Response on Jurisdiction, at paras. 68-72.

²³⁵ Response on Jurisdiction, at paras. 69, 71.

²³⁶ Response on Jurisdiction, at para. 74. The Claimant relies on the annulment decision in *Malaysian Historical Salvors v. The Government of Malaysia* as “leading authority on this two-step approach.” Response on Jurisdiction, at paras. 75-76 (citing *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10 Decision on the Application for Annulment, 16 April 2009 (“*Malaysian Historical Salvors*”), **Exhibit CA-8**).

Award

(1) The first step: “investment” under the IPA

132. The Claimant refers to the “broad”²³⁷ definition of “foreign investment” in Section 3(1) of the IPA, and notes that it requires an “investment by a non-citizen.”²³⁸ According to the Claimant, its “investments” falling under the definition in Section 3(1) of the IPA include:
- a. its shares in OTML that the Claimant owned until the Respondent “cancelled” them in the Tenth Supplemental Act;
 - b. the “claim to money and/or a claim to performance having a financial value that the Claimant has as a result of its rights under the OTML Shareholders Agreement;”
 - c. the “claim to money and/or a claim to performance having a financial value that the Claimant has as a result of its rights under the Security Deed, Security Trust Deed and Equitable Mortgage of Shares;”
 - d. its “proportionate interest in the concession held by OTML to exploit the natural resources at Ok Tedi (conferred by Special Mining Lease No. 1).”²³⁹
133. The Claimant argues that the Respondent does not dispute that the IPA’s broad definition of “investment” covers the above categories;²⁴⁰ rather, the Respondent’s focus is on “the way the Claimant became the owner of them,” and in particular the fact that the Claimant received its shares in OTML as a “*gift*.”²⁴¹ According to the Claimant, the broad definition of “investment” in Section 3 of the IPA “imposes no limitation on how the relevant asset is to be acquired, let alone how returns from it are to be spent (the latter exposing the absurdity of the [Respondent’s] ‘charity’ objection),”²⁴² and “it is irrelevant how the

²³⁷ Response on Jurisdiction, at para. 77.

²³⁸ See Response on Jurisdiction, at paras. 77-78.

²³⁹ Response on Jurisdiction, at para. 79.

²⁴⁰ Response on Jurisdiction, at para. 80.

²⁴¹ See Response on Jurisdiction, at para. 81.

²⁴² Response on Jurisdiction, at para. 82.

Award

Claimant came to own them.”²⁴³ The Claimant concludes that it “clears ‘step one’ [of the analysis] with *multiple* investments.”²⁴⁴

(2) The second step: “investment” under the ICSID Convention

134. With respect to the second limb of the analysis, the Claimant notes that Article 25 of the ICSID Convention does not define or qualify the term “investment,” and that there is no “express requirement” that an investment “have any minimum economic value, any particular duration or origin, belong or relate to a particular class of investment activity or that it be made through any particular investment structure or vehicle.”²⁴⁵
135. The Claimant argues that, by providing no definition for the term “investment” in Article 25, the Convention’s drafters intended to leave that task to the Contracting States.²⁴⁶ The Claimant reminds that the Respondent has availed itself of the Article 25(4) mechanism under the Convention in its 1978 Notification declaring that it would only consider submitting to ICSID disputes that are “fundamental to the investment itself,” and the operative part of that notification is included in Section 2 of the IDCA.²⁴⁷
136. According to the Claimant, it follows from the broad definition of “investment” in Section 3 of the IPA – which “controls the meaning of the term ‘*investment*’ in Article 25 of the ICSID Convention” – and Section 2 of the IDCA that the “only condition relating to the State’s offer to arbitrate is that ... the dispute must be *‘fundamental to the investment itself’*.”²⁴⁸ The Claimant notes that this dispute “clearly is” “fundamental to the investment itself.”²⁴⁹

²⁴³ Response on Jurisdiction, at para. 83.

²⁴⁴ Response on Jurisdiction, at para. 83.

²⁴⁵ Response on Jurisdiction, at para. 84. *See also* Response on Jurisdiction, at paras. 85-86.

²⁴⁶ *See* Response on Jurisdiction, at para. 87.

²⁴⁷ Response on Jurisdiction, at paras. 88-89.

²⁴⁸ Response on Jurisdiction, at para. 90.

²⁴⁹ Response on Jurisdiction, at para. 90.

Award

137. The Claimant notes that this case “involves GDP-changing, long-term investments” relating to the operation of the mine that “has historically been a critical contributor to [the Respondent’s] Treasury and its economic development,”²⁵⁰ that is “far removed from ... simple sales transactions” which would not fall within the definition of “investment” under the ICSID Convention.²⁵¹
138. The Claimant further states that the *Phoenix Action* decision cited by the Respondent is irrelevant, and, even if it were relevant, the Claimant’s investments would “match all six of the indicators of an ‘investment’ identified by the *Phoenix Action* tribunal.”²⁵² In particular, the Claimant argues that “the contribution in money or other assets is composed of both BHPB’s initial contribution establishing Ok Tedi and the Claimant’s subsequent contributions to develop the mine and contribute towards economic development in PNG.”²⁵³ The Claimant claims that it also satisfies the requirement that “the investment make a contribution to the economic development of the host state” applied in some decisions, and contends that that requirement “is not necessarily limited to measureable monetary contributions.”²⁵⁴

(3) No “investment” because the OTML shares were gifted

139. The Claimant argues that the Respondent’s assertion that the Claimant is not entitled to protection under the IPA or the ICSID Convention because it received the OTML shares as a gift is “simply not true.”²⁵⁵ The Claimant submits that “significant consideration was provided by the Claimant to BHPB in exchange for the shares,”²⁵⁶ including through “broad indemnities” provided by the Claimant as “*consideration*” for the OTML shares,²⁵⁷

²⁵⁰ Response on Jurisdiction, at para. 92.

²⁵¹ Response on Jurisdiction, at paras. 91-92.

²⁵² Response on Jurisdiction, at paras. 95-104. The Claimant identifies the following six elements of the *Phoenix Action* test: “(1) a contribution in money or other assets; (2) a certain duration; (3) an element of risk; (4) an operation made in order to develop an economic activity in the host State; (5) assets invested in accordance with the laws of the host State; and (6) assets invested *bona fide*.” Response on Jurisdiction, at para. 97.

²⁵³ Response on Jurisdiction, at para. 99.

²⁵⁴ Response on Jurisdiction, at paras. 105-107.

²⁵⁵ Response on Jurisdiction, at para. 109.

²⁵⁶ Response on Jurisdiction, at para. 110.

²⁵⁷ See Response on Jurisdiction, at paras. 113-115.

Award

and foregone dividends invested into the buy-back of OTML shares from Inmet Mining Corporation (“Inmet”) in 2011.²⁵⁸ The Claimant also asserts that sufficient consideration was provided under the law of the State of Victoria (Australia) which governs the Master Agreement.²⁵⁹

140. Further, the Claimant contends that the case at hand is far removed from *Caratube v. Kazakhstan* where two of the key factors – *i.e.*, “a contribution to the claimant company and the assumption of risk” – were found to be absent,²⁶⁰ and draws a parallel with the *Victor Pey Casado v. Chile* award, in which the tribunal held that “as long as the share transfer was valid (which it was), that was sufficient to constitute an investment.”²⁶¹
141. Finally, the Claimant argues that, even if the transfer of OTML shares to the Claimant were considered a “*gift*,” the Claimant could still bring an ICSID claim because “the rights attaching to those shares (including rights under the ICSID Convention) at the time they were transferred passed as a bundle to the transferee,” the Claimant.²⁶²

3. MFN Objection

142. In response to the Respondent’s MFN Objection, the Claimant submits that it is entitled to rely on Section 37(1) of the IPA as an MFN clause and that the plain meaning of this clause is that “the investment guarantees given by the State in the IPA apply to a foreign investor, unless more favourable treatment is accorded under any bilateral investment treaty to which the State is a party.”²⁶³
143. The Claimant rejects the Respondent’s reading of Section 37(1) and argues that:

²⁵⁸ See Response on Jurisdiction, at para. 116.

²⁵⁹ See Response on Jurisdiction, at para. 120.

²⁶⁰ Response on Jurisdiction, at para. 118.

²⁶¹ Response on Jurisdiction, at para. 119.

²⁶² Response on Jurisdiction, at para. 121. See also Response on Jurisdiction, at paras. 122-123 (citing *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008 (“*African Holding Company v. Congo*”), **Exhibit CA-30**; and *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 Decision on Jurisdiction, 27 April 2006 (“*El Paso v. Argentina*”), **Exhibit CA-31**).

²⁶³ Response on Jurisdiction, at paras. 306-307.

Award

The word ‘*any*’ shows that Section 37(1) cannot have been intended to have the restricted operation the State suggests. The more natural reading, in the Claimant’s submission, is that the class of BITs to which Section 37(1) applies is not limited by the nationality of the investor. Rather, Section 37(1) is intended to ensure that IPA-covered investors enjoy the same benefits provided by any BIT the State has signed.²⁶⁴

144. The Claimant contends that the flaw in the Respondent’s reasoning is manifest, as Section 37(1) “is not an article of a treaty between two states,” but a unilateral instrument, a “section of national law to which there is no sovereign counter-party;” therefore, this provision could not refer to a “third state.”²⁶⁵ According to the Claimant, the Respondent’s submissions are based on treaty-focused authorities and are therefore “misconceived.”²⁶⁶ The Claimant also argues that MFN provisions like Section 37(1) of the IPA are “not at all unusual” and cites the examples of Albania, Uzbekistan and Kazakhstan.²⁶⁷
145. Finally, the Claimant argues that, in its investment promotion literature, the Respondent “itself has *unequivocally* said that Section 37(1) is an MFN clause,”²⁶⁸ and refers to excerpts from the Investment Promotion Authority website before and after the filing of the Request for Arbitration,²⁶⁹ as well as excerpts from websites of the PNG High Commission in Australia and the PNG Embassy to Americas.²⁷⁰ The Respondent concludes that there is “no doubt that the State intended to extend MFN treatment to the Claimant through IPA Section 37(1).”²⁷¹

* * *

146. Accordingly, the Claimant requests that the Tribunal issue a decision under Rule 41(1):

²⁶⁴ Response on Jurisdiction, at para. 310.

²⁶⁵ Response on Jurisdiction, at paras. 311-312.

²⁶⁶ Response on Jurisdiction, at para. 313.

²⁶⁷ Response on Jurisdiction, at para. 315.

²⁶⁸ Response on Jurisdiction, at para. 316.

²⁶⁹ See Response on Jurisdiction, at paras. 317-318.

²⁷⁰ See Response on Jurisdiction, at para. 319.

²⁷¹ Response on Jurisdiction, at para. 320.

Award

- a. dismissing the Objection in full;
- b. affirming that the Tribunal has jurisdiction over this Dispute; and
- c. ordering the State to pay the legal costs incurred by the Claimant in relation to the Objection.²⁷²

C. *The Respondent's Reply on Jurisdiction*

147. In its Reply, the Respondent reiterates its position set out in its Objections and makes the following additional observations.

1. The State has not consented to ICSID jurisdiction

148. The Respondent notes that the Claimant has “maintain[ed] its concession that Section 2 of the IDCA ... is ‘*not ... the offer itself*’,” and that the Claimant’s case on consent “must therefore rest on Section 39 of the IPA.”²⁷³ The Respondent submits that the Claimant has not established that Section 39 of the IPA constitutes the State’s “consent in writing.”²⁷⁴

a) Approach to interpretation

149. The Respondent argues that the Claimant’s two interpretive approaches articulated in its Response on Jurisdiction do “not in fact diverge much from the approach” set forth in Professor Dolzer’s Report,²⁷⁵ *i.e.*:

- a. the wording should be considered “first and foremost,” as read “in a *natural and reasonable* manner;”²⁷⁶

²⁷² Response on Jurisdiction, at para. 322.

²⁷³ Reply on Jurisdiction, at para. 3.

²⁷⁴ Reply on Jurisdiction, at para. 4.

²⁷⁵ Reply on Jurisdiction, at para. 8.

²⁷⁶ Reply on Jurisdiction, at para. 8(a). *See also* Dolzer Report, at paras. 42-43.

Award

- b. the “*intention underlying these provisions*” should be considered as “may be drawn from the text of the provisions, their context and the circumstances of their preparation and the purposes intended to be served;”²⁷⁷
- c. “[a]ny offer to arbitrate must be *clearly and unambiguously* expressed, and *doubt shall be resolved against the finding of jurisdiction.*”²⁷⁸

- b) The text of Section 39 and Section 2 leave no doubt that the State has not consented to ICSID arbitration
 - (1) It is clear from the grammatical and ordinary meaning of the text of Section 39 that the State has not consented to ICSID arbitration

150. The Respondent reiterates the arguments set forth in its Objections to Jurisdiction and notes in addition that:

- a. “the Claimant accepts that Section 39 is subject, in relation to the question of the State’s consent, to the terms set out in Section 2 and Article 25(1);”²⁷⁹
- b. the Claimant does not dispute²⁸⁰ and Webb Report accepts that “Section 39 imports **all** the provisions of the IDCA (including Section 2) and the ICSID Convention (including Article 25(1)) ... and Section 2 (imported into Section 39) covers **only** disputes within Article 25(1) of the ICSID Convention, **and** which are ‘*fundamental*’ in the required sense;”²⁸¹ in its Reply Report, Mr. Griffin QC adds that “the ‘whole of the provisions’ of the [ICSID Convention] must include th[e] ‘*consent in writing*’ requirement;”²⁸²
- c. the Claimant’s reading of the words “*applies, according to its terms*” is circular and “only serves to illustrate the hopelessness of the Claimant’s attempt to overcome the

²⁷⁷ Reply on Jurisdiction, at para. 8(b). See also Dolzer Report, at paras. 42-43.

²⁷⁸ Reply on Jurisdiction, at para. 8(c). See also Dolzer Report, at paras. 24-26; **Exhibit RL-19**.

²⁷⁹ Reply on Jurisdiction, at para. 10.

²⁸⁰ See Reply on Jurisdiction, at para. 12.

²⁸¹ Reply on Jurisdiction, at paras. 12-13.

²⁸² Griffin II Report, at para. 20. See also Reply on Jurisdiction, at para. 14.

Award

- clear and unambiguous wording of Section 39” – *i.e.*, “in relation to the question of the State’s consent, the terms of Section 2 and Article 25(1) apply, according to their terms, to ‘*disputes arising out of foreign investment*’;”²⁸³
- d. given that “it is clear from the grammatical and ordinary meaning” of the text in Section 39 that the Respondent “has not provided its ‘*consent in writing*’,” the Tribunal “should be slow to depart from the same;”²⁸⁴ the plain and ordinary meaning of Section 39 “does not lead to any absurdity;”²⁸⁵
- e. in response to the Claimant’s arguments regarding Professor Dolzer’s “restrictive approach” requiring that “any offer to arbitrate must be clearly and unambiguously expressed,”²⁸⁶ the Respondent claims that these “do not ... assist the Claimant in establishing the neutral [*i.e.*, *SPP*] approach as the ‘*correct approach*’;”²⁸⁷
- f. because the text of Section 39 is “clear and unambiguous” and leaves “no doubt that no standing offer to arbitrate” was made by the Respondent, it assertedly does not matter in practice whether “restrictive, expansive or objective interpretation should be adopted.”²⁸⁸

(2) The headings of Section 2 and Section 39 lend no assistance to the Claimant

151. The Respondent states that the Claimant’s reliance on the word “*may*” in Section 2’s heading is “a *non sequitur*,” given the Claimant’s concession that Section 2 is “***not ... the offer itself***.”²⁸⁹ In any event, the word “*may*” without more does not assist the Claimant, because:

²⁸³ Reply on Jurisdiction, at para. 17. *See also* Reply on Jurisdiction, at paras. 16, 18-19.

²⁸⁴ Reply on Jurisdiction, at para. 22. *See also* Reply on Jurisdiction, at paras. 23-26.

²⁸⁵ Reply on Jurisdiction, at para. 27.

²⁸⁶ Reply on Jurisdiction, at para. 28.

²⁸⁷ Reply on Jurisdiction, at para. 29. In particular, the Respondent reminds that the *SPP v. Egypt* tribunal also made clear that “jurisdiction will be found to exist ***if – but only if – the force of the arguments militating in favour of it is preponderant***.” Reply on Jurisdiction, at para. 29(c) (quoting *SPP v. Egypt*, at para. 63, **Exhibit CA-3**).

²⁸⁸ Reply on Jurisdiction, at para. 30 (citing Dolzer Report, at paras. 66-67).

²⁸⁹ Reply on Jurisdiction, at para. 31.

Award

- a. Mr. Webb accepts that the word “may” in Section 2 means “*the State* may consent” to ICSID arbitration, and does not say that the “option lies only with the investor;”²⁹⁰
- b. in interpreting the word “may,” the Claimant fails to appreciate that the “interpretation of any dispute resolution clause depends on the specific wording and context in question;”²⁹¹
- c. the reliance on the heading of Section 2 also “adds nothing to the analysis,” because it “says nothing (in itself) about the conditions under which the State has agreed to ICSID arbitration.”²⁹²

(3) The grammatical and ordinary meaning of Section 39 does not offend the principle of *effet utile*

152. The Respondent states that, even if *effet utile* did apply (which the Respondent denies²⁹³), Section 39 would not be “*a provision without content.*”²⁹⁴ The Respondent reiterates that such provisions “serve meaningful purposes,”²⁹⁵ as explained in Professor Dolzer’s Report,²⁹⁶ including that of “promoting and facilitating foreign investment by reaffirming the State’s commitment to the ICSID Convention.”²⁹⁷

c) The context of Section 39 and Section 2 confirm that the State has not consented to ICSID arbitration

153. The Respondent observes that the Claimant does not address its argument relating to the mandatory language (“shall”) in Sections 37 and 38, as distinct from Section 39.²⁹⁸ The Respondent adds that, even if Section 39 were an “*investment guarantee*” as the Claimant

²⁹⁰ Reply on Jurisdiction, at para. 32.

²⁹¹ Reply on Jurisdiction, at para. 33. *See also* Reply on Jurisdiction, at para. 34.

²⁹² Reply on Jurisdiction, at para. 35. The Respondent argues that “any other interpretation would mean that any signatory to the ICSID Convention (which establishes the Centre) must be taken to have agreed to ICSID arbitration, which is of course incorrect.” Reply on Jurisdiction, at para. 35.

²⁹³ *See* Reply on Jurisdiction, at para. 37.

²⁹⁴ Reply on Jurisdiction, at para. 38.

²⁹⁵ Reply on Jurisdiction, at para. 38.

²⁹⁶ *See* Dolzer Report, at paras. 47-48.

²⁹⁷ Reply on Jurisdiction, at para. 39.

²⁹⁸ *See* Reply on Jurisdiction, at paras. 40-41.

Award

contends, its scope would be governed by Section 2 and Article 25(1) – *i.e.*, “it guarantees the application of the IDCA (implementing the ICSID Convention), according to its terms, to ‘*disputes arising out of foreign investment*’.”²⁹⁹

d) The purpose of Section 39 and Section 2 confirm that the State has not consented to ICSID arbitration

(1) Section 39 Draft does not assist in the interpretation of Section 39 and if anything, supports the State’s position

154. With regard to the 1991 IPA relied upon by the Claimant, the Respondent notes that:

a. the 1991 bill was “prepared under considerable time constraints,” was affected by “legal and technical ambiguities” and “never came into force;”³⁰⁰

b. the 1991 bill “is not a valid aid to interpreting the IPA, and little (if any) reliance should be placed on it;”³⁰¹

c. the 1991 draft version of Section 39 “does **not** (contrary to the Claimant’s contention) constitute any standing offer to ICSID arbitration” for “no dollars” disputes,³⁰² because:

i. it is unclear what the term “this code” (which the Claimant replaced with the words “the IPA”) refers to in Section 39(1)(a);³⁰³

ii. it is Section 39(2) which “provides the dispute resolution mechanism applicable to enterprises certified under Part IV such as the Claimant,” not Section 39(1)(a) which refers to “foreign nationals”;³⁰⁴

²⁹⁹ Reply on Jurisdiction, at para. 42.

³⁰⁰ Reply on Jurisdiction, at para. 47.

³⁰¹ Reply on Jurisdiction, at para. 48 (citing to Griffin II Report, at para. 36).

³⁰² Reply on Jurisdiction, at para. 50.

³⁰³ Reply on Jurisdiction, at para. 50(a)-(b).

³⁰⁴ Reply on Jurisdiction, at para. 50(c).

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- iii. Mr Webb accepts that the draft Section 39(2) “is not a standing offer to arbitrate;”³⁰⁵
 - d. the Hansard of the 1991 bill makes it clear that Section 39 of that bill “does **not** constitute any standing offer to ICSID arbitration,” because:
 - i. the Hansard shows that the focus of the 1991 IPA bill was “on the establishment of the Investment Promotion Authority;”³⁰⁶ and
 - ii. there is no mention in the Hansard of the State “seeking to promote and facilitate investment in PNG, by agreeing in advance to arbitrate investment disputes generally at ICSID;”³⁰⁷
 - e. even if the draft Section 39(1)(a) constituted a standing offer to refer “no dollars” disputes to ICSID arbitration, the State “chose to depart from the wording used” in the 1991 draft in the final version of Section 39;³⁰⁸ that departure “in itself, clearly indicates that the State did not intend, by way of Section 39, to provide any standing offer to submit investment disputes to ICSID arbitration”³⁰⁹ – rather than broaden the scope of Section 39, as the Claimant suggests;³¹⁰
 - f. the foregoing analysis is assertedly supported by the Hansard of the 1992 IPA, because, *inter alia*, the Hansard makes “no mention of any alleged decision to ‘*broaden the scope of [Section 39]*’, after the Government had (allegedly) realised that the Section 39 Draft ‘*was not good enough to give foreign investors real comfort*’.”³¹¹
155. The Respondent concludes that the 1991 IPA was not produced because “the Section 39 Draft does not assist in the interpretation of Section 39 (if anything it assists the State) –

³⁰⁵ Reply on Jurisdiction, at para. 50(d) (citing to Webb Report, at para. 57).

³⁰⁶ Reply on Jurisdiction, at para. 51.

³⁰⁷ Reply on Jurisdiction, at para. 52.

³⁰⁸ Reply on Jurisdiction, at para. 54.

³⁰⁹ Reply on Jurisdiction, at para. 54.

³¹⁰ See Reply on Jurisdiction, at paras. 56-57.

³¹¹ Reply on Jurisdiction, at para. 58(b).

Award

the old 1991 IPA Bill was never brought into force; the wording of the Section 39 Draft is ambiguous and does not in any event amount to any standing offer to arbitrate; moreover, Section 39 now stands in radically different form.”³¹²

(2) Legislative history and purpose also supports the State’s position

156. The Respondent submits that, contrary to the Claimant’s assertions, giving the advance consent to arbitrate at ICSID was not part of the World Bank structural adjustment loan requirements; rather, the issue was the replacement of the old NIDA with the Investment Promotion Authority.³¹³ The Respondent adds that, “while it is true that one of the stated purposes of the IPA is to promote and facilitate investment (both domestic and foreign) in PNG, and for that purpose, to establish the Investment Promotion Authority, it does not follow therefore that Section 39 must amount to a standing offer” to arbitrate.³¹⁴

157. Further, the Respondent states that the Claimant is wrong in asserting that PNG “did not need to ‘*affirm its commitment to ICSID*’” in the IPA.³¹⁵ The Respondent argues that the context in which the IPA was adopted indicates such need existed, namely because “the State was not particularly welcoming of foreign investment after Independence; and the IPA was therefore just a step towards the ‘opening up’ of its economy.”³¹⁶

158. In response to the Claimant’s reliance on the investment promotion material, the Respondent notes that:

- a. such materials “**cannot, on their own, confer ‘consent in writing’**,” as recognized in *SPP v. Egypt*,³¹⁷

³¹² Reply on Jurisdiction, at para. 59.

³¹³ See Reply on Jurisdiction, at paras. 60-66.

³¹⁴ Reply on Jurisdiction, at para. 67. See also Reply on Jurisdiction, at paras. 68-69.

³¹⁵ Reply on Jurisdiction, at paras. 70-71.

³¹⁶ See Reply on Jurisdiction, at para. 73.

³¹⁷ Reply on Jurisdiction, at para. 79.

Award

- b. because Section 39 does not contain “consent in writing,” there is no consent for the promotional material to “confirm” in this case;³¹⁸
- c. the pre-RFA statement on the Investment Promotion Authority’s website (the “**2013 IPA website statement**”) “cannot ... be construed as reflecting the State’s ‘consent’ to ICSID arbitration;”³¹⁹
- d. there is “nothing sinister about the amendment to the 2013 IPA website statement,” which was made on 18 November 2013 “as part of the launch by the Investment Promotion Authority of its new website;”³²⁰
- e. the new text of the statements on the IPA website “does *not* ... indicate any consent by the State to ICSID arbitration;”³²¹
- f. the statement on the website of the PNG Embassy to the Americas “does not assist the Claimant” but rather the Respondent because “it reflects the language in the old Section 2” requiring investors to “first exhaust diplomatic channels and local remedies.”³²²

2. The Claimant is not a private foreign investor that can avail itself of ICSID arbitration

- a) The Claimant is not a “foreign investor” and its assets are not “foreign investment(s)” as defined in the IPA

159. The Respondent contends that the Claimant (including in Webb Report) has not dealt with the argument that the Claimant is not a “*foreign investor*” under the IPA because “it has not made (or proposed to make) any investment in PNG.”³²³ According to the Respondent, the Claimant has not made such an investment because:

³¹⁸ Reply on Jurisdiction, at para. 80.

³¹⁹ Reply on Jurisdiction, at para. 81.

³²⁰ Reply on Jurisdiction, at para. 82.

³²¹ Reply on Jurisdiction, at para. 83.

³²² Reply on Jurisdiction, at para. 84.

³²³ Reply on Jurisdiction, at para. 86.

Award

While a ‘*foreign investment*’ may have been made in the past by BHP, there was no **further** investment made by the **exit** of BHP and the gifting of its shares to the Claimant, to **hold and use for the sole benefit of the People**.³²⁴

160. The Respondent further argues that the Claimant’s status as “*foreign enterprise*” does not *per se* inform its status as a “*foreign investor*” under the IPA,³²⁵ and the Claimant’s Section 25 Certificate supports the Respondent’s position that “the Gifted Shares ... cannot be considered to be a ‘*foreign investment*’” by the Claimant.³²⁶
161. Finally, the Respondent submits that the Claimant’s reliance on its “development programs / projects” in PNG “is misconceived,” because they “do **not** form part of the ‘*investments*’ which the Claimant claims it is seeking” to protect in this arbitration.³²⁷
- b) The Claimant is not a private foreign investor under the ICSID Convention
- (1) There is no “investment” under Article 25(1)
162. The Respondent argues that the Claimant’s reliance on the annulment decision in *Malaysia Historical Salvors v. Malaysia* is misconceived,³²⁸ and that the Claimant does not satisfy the “criteria” or “hallmarks” for an investment.³²⁹
163. **First**, the Respondent states that it was **BHP**, rather than the Claimant, that made the contributions cited by the Claimant.³³⁰ According to the Respondent, the only other consideration – *i.e.*, the indemnities agreed to by the Claimant – has been mischaracterized by the Claimant³³¹ and does not constitute “consideration” for the Gifted Shares.³³²

³²⁴ Reply on Jurisdiction, at para. 88.

³²⁵ See Reply on Jurisdiction, at paras. 89-92.

³²⁶ Reply on Jurisdiction, at para. 94.

³²⁷ Reply on Jurisdiction, at para. 95.

³²⁸ See Reply on Jurisdiction, at paras. 97-98.

³²⁹ See Reply on Jurisdiction, at paras. 99, *et seq.*

³³⁰ See Reply on Jurisdiction, at para. 100.

³³¹ See Reply on Jurisdiction, at paras. 102-103.

³³² See Reply on Jurisdiction, at para. 102(d).

Award

164. **Second**, the Respondent asserts that the other “criteria” for an “investment” are also not satisfied, including because:
- a. the Claimant’s reliance on OTML’s mining activities is “misplaced” because the Claimant’s approved activity in PNG “is not mining but ‘community development’;”³³³
 - b. the Claimant’s reliance on its “development programs / projects in PNG” is also “misplaced,” because the Claimant does not seek to protect these programs or projects in this arbitration, which the Claimant “in any event unilaterally terminated in October 2013.”³³⁴
165. **Finally**, the Respondent argues that none of the authorities relied upon by the Claimant support its case that “it can rely on BHP’s initial contributions to say the Gifted Shares are an ‘investment’.”³³⁵
- (2) The Claimant is not “a national of another Contracting State”
166. The Respondent argues that authorities relied upon by the Claimant as part of its arguments on the place of incorporation were cited out of context³³⁶ or from another international law regime (e.g., the ICJ *Barcelona Traction* decision that is specific to diplomatic protection).³³⁷
167. The Respondent further notes that:
- a. using the *Barcelona Traction* terms, the Claimant “cannot be said to have any such ‘genuine’ / ‘close and permanent’ connection or ‘manifold’ links with Singapore – its only connection with Singapore is the fact of its incorporation here and as a result, that

³³³ Reply on Jurisdiction, at para. 104.

³³⁴ Reply on Jurisdiction, at para. 104.

³³⁵ Reply on Jurisdiction, at para. 105. See also Reply on Jurisdiction, at paras. 106-108 (discussing *Victor Pey Casado v. Chile*, *African Holding Company v. Congo* and *El Paso v. Argentina*).

³³⁶ See Reply on Jurisdiction, at para. 110.

³³⁷ See Reply on Jurisdiction, at paras. 111-115.

Award

- 1 (out of 7) of its directors is a Singaporean;” rather, these connection and links are with PNG (including the Claimant’s head office and tax obligations);³³⁸
- b. the Claimant’s attempts to distance itself from its strong links with PNG “do not ... take the Claimant’s case any further,”³³⁹ because:
- i. “the Claimant’s members cannot be said to have any interest in the Claimant’s assets; rather such assets are held by the Claimant for the sole benefit of the People;”³⁴⁰ and
 - ii. Professor Garnaut’s statements in the Claimant’s 2002 Annual Report that Singapore was chosen as the place of incorporation because “this allows the Long Term Fund to be invested on profitable investments anywhere in the world without attracting any taxation in Singapore or anywhere else.”³⁴¹
168. Finally, the Respondent argues that the Claimant’s reliance on *Tokios Tokelès v. Ukraine*, *Aguas del Tunari v. Bolivia*, *Soufraki v. Egypt* and *Victor Pey Casado v. Chile* is also misplaced.³⁴²
- (3) The Claimant discharges an essentially public function and is not a private investor
169. **First**, the Respondent reiterates that “the requirement that the claimant is a ‘private’ investor follows from the international arbitration regime being designed generally for the protection of private investors, as opposed to states acting as investors ...” and “ought to be uncontroversial.”³⁴³
170. **Second**, the Respondent argues that there are no three approaches, as stated by the Claimant, but rather “a single set of guidelines (*i.e.*, the ‘Broches test’),” whereas

³³⁸ Reply on Jurisdiction, at paras. 116-117.

³³⁹ Reply on Jurisdiction, at para. 118.

³⁴⁰ Reply on Jurisdiction, at para. 119.

³⁴¹ Reply on Jurisdiction, at para. 120.

³⁴² See Reply on Jurisdiction, at para. 122.

³⁴³ Reply on Jurisdiction, at para. 124.

Award

“references to ‘*functional*’ and ‘*structural*’ points of views are but approaches for the application of the *Broches* test.”³⁴⁴ The Respondent then reiterates its arguments in its Objections that the Claimant discharges “an essentially governmental function,” and in addition relies on several public “admissions” by Sir Mekere that the Claimant “has been ‘*doing the Government’s job*’.”³⁴⁵

3. MFN Objection

171. The Respondent argues that the Claimant makes “no new points” on the Section 37(1) issue and that Mr. Webb “completely sidesteps” the “most hotly-contested issue between the parties” – *i.e.*, “whether the second reference to ‘*foreign investor*’ in Section 37(1) has a different meaning from the first immediately preceding it.”³⁴⁶
172. The Respondent further argues that the websites referred to by the Claimant in its MFN arguments “should not be given any weight” because they “cannot transform Section 37(1) into something it is not by overriding the plain wording of Section 37(1).”³⁴⁷ Finally, the Respondent claims that the Claimant’s references to other national legislation “are irrelevant to showing the PNG Parliament’s intentions.”³⁴⁸

D. *The Claimant’s Rejoinder on Jurisdiction*

173. In its Rejoinder, the Claimant contends that the Respondent “has done little to advance the debate on jurisdiction” in its Reply and states that the Claimant “will not address all of the points” made by the Respondent.³⁴⁹

³⁴⁴ Reply on Jurisdiction, at para. 125.

³⁴⁵ Reply on Jurisdiction, at para. 126.

³⁴⁶ Reply on Jurisdiction, at para. 127. The Respondent clarifies that this issue is whether “the second reference to ‘*foreign investor*’ mean ‘*the same foreign investor*’” (the Respondent’s case), or “*any other foreign investor*” (the Claimant’s case). Reply on Jurisdiction, at para. 127. See also Reply on Jurisdiction, at paras. 128-130.

³⁴⁷ Reply on Jurisdiction, at para. 131.

³⁴⁸ Reply on Jurisdiction, at para. 132.

³⁴⁹ Rejoinder on Jurisdiction, at para. 4.

Award

1. Consent

174. **First**, the Claimant addresses the issue of interpretive principles to be applied.
175. The Claimant notes that, in its Reply, the Respondent has “fundamentally mischaracterized (or perhaps misunderstood)” the Claimant’s submissions with respect to “the applicable law, for the interpretation of IPA Section 39.”³⁵⁰ In further support of its case on the importance of the *SPP v. Egypt* decision, the Claimant cites the recent *Interocean* decision on preliminary objections,³⁵¹ noting that the decision “is by far the most recent ‘*subsequent jurisprudential development*’ in the field of consent through host State law, and it unequivocally confirms the persuasive status of *SPP*.”³⁵²
176. Turning to the *effet utile* principle, the Claimant argues that the Respondent “misunderstands” this principle.³⁵³ The Claimant contends that “effective interpretation is not expansive interpretation;” rather, “*effet utile* engages so as to ensure that the provision is capable of meaningful operation: whether that particular operation is expansive or restrictive is another matter entirely (and not a matter controlled by *effet utile*).”³⁵⁴ Accordingly, the Claimant submits that Section 39 should “be permitted to operate in such a way that it is not a mere absurdity or surplusage.”³⁵⁵
177. The Claimant then turns to the Respondent’s submission that, when interpreting Section 39, any doubts should be resolved “*against the finding of jurisdiction*,”³⁵⁶ or the “*in dubio mitius* principle.”³⁵⁷ According to the Claimant, the Respondent applies the *in dubio mitius* principle in its “substantive facet” – namely, “in cases of jurisdictional doubt, an international tribunal should decline to hear a dispute out of deference to State sovereignty;

³⁵⁰ Rejoinder on Jurisdiction, at para. 9.

³⁵¹ See Rejoinder on Jurisdiction, at paras. 14-16 (citing *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on Preliminary Objections, 29 October 2014 (“*Interocean*”), **Exhibit CA-51**)).

³⁵² Rejoinder on Jurisdiction, at para. 17.

³⁵³ Rejoinder on Jurisdiction, at para. 19.

³⁵⁴ Rejoinder on Jurisdiction, at paras. 19-20.

³⁵⁵ Rejoinder on Jurisdiction, at para. 21.

³⁵⁶ Rejoinder on Jurisdiction, at para. 22.

³⁵⁷ Rejoinder on Jurisdiction, at paras. 2, 22.

Award

in other words, there should be a presumption against jurisdiction.”³⁵⁸ The Claimant argues that this “substantive form of the principle is truly a relic of a bygone age.”³⁵⁹

178. The Claimant submits that, if any interpretive presumption were to be applied, “it should be a bias or presumption that favours the purpose of the IPA, which is investment promotion;” however, the Claimant’s preference is “for a neutral reading,” with no particular bias or presumption.³⁶⁰
179. **Second**, the Claimant turns to the interpretation of Section 39. Responding to certain assertions by the Respondent, the Claimant clarifies, in particular, the following points:
- a. “[t]he Claimant’s position is that the ‘*consent in writing*’ term of the ICSID Convention is satisfied by the word ‘*applies*’;”³⁶¹ the “consent in writing” requirement “is not imported by the word ‘*applies*’, but is instead one of the suite of terms imported by the words that follow it (‘*according to its terms*’);”³⁶²
 - b. the Claimant disputes paragraph 20 of the Respondent’s Reply and states that the Claimant’s case is that, “in the form of [Section 39], the State *has* given separate and subsequent consent to IDCA Section 2;”³⁶³ and
 - c. the Claimant disputes paragraph 32 of the Respondent’s Reply and notes that it “has never said the investor has any option under IDCA Section 2” and has “conceded from the outset that IDCA Section 2 is not an offer, but rather a general condition to subsequent offers (of which IPA Section 39 is one).”³⁶⁴
180. Turning to the purpose and effect of the Respondent’s declaration in Section 39, the Claimant notes that the Respondent “continues to argue that [Section 39] serves the purpose

³⁵⁸ Rejoinder on Jurisdiction, at para. 23.

³⁵⁹ Rejoinder on Jurisdiction, at para. 23. *See also* Rejoinder on Jurisdiction, at paras. 24-27.

³⁶⁰ Rejoinder on Jurisdiction, at para. 28.

³⁶¹ Rejoinder on Jurisdiction, at para. 34.

³⁶² Rejoinder on Jurisdiction, at para. 35.

³⁶³ Rejoinder on Jurisdiction, at para. 39.

³⁶⁴ Rejoinder on Jurisdiction, at para. 41.

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of ‘reaffirming the State’s commitment to the ICSID Convention’ and ‘clearing the way’ for it to enter into arbitration agreements.”³⁶⁵ The Claimant submits that “neither of these alleged purposes is convincing – first because there was no need for the provision to do either of these things, and secondly, because there is no evidence that either was what the State intended.”³⁶⁶

181. The Claimant further discusses the 1991 IPA and argues that:

- a. if the 1991 draft supported the Respondent’s case, the Respondent “would have produced it itself” in the previous stages of this arbitration;³⁶⁷
- b. “it is plainly irrelevant” that the 1991 draft “was never brought into force,” because it is part of the legislative history that is “unquestionably admissible as evidence of the State’s intent as a declarant” under international law;³⁶⁸
- c. with the exception of the term “code,” the text of the draft Section 39 in the 1991 IPA is not ambiguous, but rather “precise and formulaic;”³⁶⁹ and
- d. Section 39(1)(a) of the 1991 IPA is, “on any view, a standing offer to arbitrate – just not a very attractive one.”³⁷⁰

182. The Claimant then turns to the Hansard of the 1992 IPA and rejects the Respondent’s request that the Tribunal draw inferences from its silence on Section 39.³⁷¹ The Claimant notes that the Hansard of the 1991 IPA is also silent on Section 39, although, on the Claimant’s case, Section 39(1)(a) of the 1991 IPA “*unquestionably* contained a standing offer to arbitrate at ICSID.”³⁷² Citing Webb II Report, the Claimant claims that the silence in the Hansard is “at least neutral on the question of interpretation,” or even “tends to point

³⁶⁵ Rejoinder on Jurisdiction, at para. 42.

³⁶⁶ Rejoinder on Jurisdiction, at para. 43. *See also* Rejoinder on Jurisdiction, at paras. 44-52.

³⁶⁷ Rejoinder on Jurisdiction, at para. 55.

³⁶⁸ Rejoinder on Jurisdiction, at para. 56.

³⁶⁹ Rejoinder on Jurisdiction, at para. 57.

³⁷⁰ Rejoinder on Jurisdiction, at para. 58.

³⁷¹ *See* Rejoinder on Jurisdiction, at para. 61.

³⁷² Rejoinder on Jurisdiction, at para. 62.

Award

away” from the Respondent’s submissions because Section 39(1)(a) “did contain a standing offer to arbitrate.”³⁷³

183. The Claimant further contends that Mr. Griffin’s conclusion in his second report – *i.e.*, that the amendment of Section 39 in the 1992 IPA “is a clear indication that the Respondent had no intention, by way of Section 39, to provide any standing offer to submit any investment disputes to ICSID arbitration”³⁷⁴ – is “plainly misconceived.”³⁷⁵
184. Finally, with regard to the Claimant’s reliance on the Respondent’s official investment promotion literature, the Claimant states that it “is simply asking the Tribunal to treat the statements of the Investment Promotion Authority and the State’s High Commissions as evidence that confirms the State’s intention was to make an offer to arbitrate in the IPA.”³⁷⁶

2. “Investor” and “Investment”

185. The Claimant contends that, as before, the Respondent continues to conflate jurisdiction *ratione personae* and jurisdiction *ratione materiae*.³⁷⁷

a) Jurisdiction *ratione personae*

186. **First**, on the issue of “private” investor, the Claimant contends that the Respondent’s argument that the Claimant is performing “non-profit” or “non-private” functions, and therefore is supposedly not a “typical” foreign investor, is “unsupported by the text and *travaux* of the ICSID Convention” and “is at odds with international case law.”³⁷⁸ The Claimant also argues, in particular, that evidence at Exhibits DR-16 and RE-20 relied upon by the Respondent “is not evidence of government function, but rather proof that the Claimant is fully independent of the State.”³⁷⁹

³⁷³ Rejoinder on Jurisdiction, at para. 63 (quoting from Webb II Report, at para. 32).

³⁷⁴ Rejoinder on Jurisdiction, at para. 65 (quoting Griffin II Report, at para. 45).

³⁷⁵ Rejoinder on Jurisdiction, at para. 67.

³⁷⁶ Rejoinder on Jurisdiction, at para. 68.

³⁷⁷ See Rejoinder on Jurisdiction, at para. 71.

³⁷⁸ Rejoinder on Jurisdiction, at para. 74.

³⁷⁹ Rejoinder on Jurisdiction, at para. 75.

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187. **Second**, on the issue of “foreign” investor, the Claimant submits that the Respondent “still attempts to pierce the corporate veil of the Claimant”³⁸⁰ for which there is “simply no legal or factual basis” in this case.³⁸¹ The Claimant argues, in particular, the *Barcelona Traction* “has assumed a status independent of the diplomatic-protection context in which it was originally enunciated,”³⁸² as evidenced by recent awards.³⁸³
188. The Claimant adds that “the State consciously defined the term ‘foreign investor’ in the IPA without any denial-of-benefits conditions or nexus qualifications” and it has “no basis” to raise those issues now.³⁸⁴ Finally, the Claimant argues that the Respondent’s denial that the Claimant is a foreign entity, after granting the Claimant the certificates as a “foreign enterprise,” is the Respondent “arguing contrary to its own deeds,” which international law does not allow (*allegans contraria non est audiendus*).³⁸⁵

b) Jurisdiction *ratione materiae*

189. The Claimant continues to argue that it has made an investment in PNG, both under the IPA and the ICSID Convention, and contends that:
- a. Section 3(1) of the IPA defines the term “investment” in “what are, on any view, broad terms;”³⁸⁶
 - b. the Respondent seeks to “impose *ex post* (or, at best, imply) ... a requirement of consideration,”³⁸⁷ which is problematic because:

³⁸⁰ Rejoinder on Jurisdiction, at para. 79.

³⁸¹ Rejoinder on Jurisdiction, at para. 80.

³⁸² Rejoinder on Jurisdiction, at para. 81.

³⁸³ Rejoinder on Jurisdiction, at para. 82 (citing *Tokios*). See also Rejoinder on Jurisdiction, at para. 83 (citing *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (“*ADC v. Hungary*”), **Exhibit CA-24**, and *Rompotrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, **Exhibit CA-22**, as authorities that have followed the majority decision in *Tokios*).

³⁸⁴ Rejoinder on Jurisdiction, at para. 84.

³⁸⁵ Rejoinder on Jurisdiction, at para. 85.

³⁸⁶ Rejoinder on Jurisdiction, at para. 89.

³⁸⁷ Rejoinder on Jurisdiction, at para. 90.

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- i. it conflates the ICSID Convention ‘investment’ indicator of ‘contribution’ with the private (contract) law notion of ‘consideration’;³⁸⁸
- ii. the fact that the Respondent intended to define the term “investment” in “broad terms, without any general requirement of ‘consideration’” is supported by Section 3(1)’s list of qualifying assets which extends both to “private law instruments (such as shares and contracts) and instruments and rights emanating from public law, such as ‘*business and analogous concessions conferred by law*’;³⁸⁹ even if the OTML shares were a “gift” – which the Claimant denies – that would not change the analysis;³⁹⁰
- iii. it is a basic property law and international investment law principle that the effect of the transfer of BHPB’s shares in OTML to the Claimant under the 2001 Master Agreement “was that all rights attaching to those shares, including rights under the IPA, were transferred as a bundle to the Claimant.”³⁹¹

3. MFN

190. The Claimant contends, without repeating its arguments, that it is relying on the official investment promotion literature not to “*transform Section 37(1) into something it is not,*” as the Respondent contends, but rather “to prove that the State intended IPA Section 37(1) to confer MFN treatment.”³⁹²

³⁸⁸ Rejoinder on Jurisdiction, at para. 91.

³⁸⁹ Rejoinder on Jurisdiction, at para. 92.

³⁹⁰ Rejoinder on Jurisdiction, at para. 93.

³⁹¹ Rejoinder on Jurisdiction, at para. 94. *See also* Rejoinder on Jurisdiction, at para. 95.

³⁹² Rejoinder on Jurisdiction, at para. 96.

Award

E. *The Parties' Submissions at the Hearing on Jurisdiction*

1. The Respondent's Submissions

a) Consent

191. At the hearing, the Respondent's counsel first addressed the rules of interpretation, before setting out the Respondent's position on the interpretation of Section 39 of the IPA and Section 2 of the IDCA.

(1) Rules of interpretation

192. The Respondent reiterated its position that the rules of interpretation articulated by Professor Dolzer should apply,³⁹³ and noted that there is not "a lot of difference" between these rules and the two interpretive schemes articulated by the Claimant,³⁹⁴ save for the principle that "doubt shall be resolved against the finding of jurisdiction."³⁹⁵ According to the Respondent, the *SPP v. Egypt* decision supports the Respondent's position that consent is "not something certainly to be lightly inferred or presumed, but ... it has to be clearly shown, not necessarily with taking a restrictive approach."³⁹⁶ The Respondent's counsel added that "[t]hat's why we say essentially both schemes or approaches require the consent to be clearly shown."³⁹⁷

193. The Respondent further noted that the distinction between the Parties "in terms of the restrictive approach" is Professor Dolzer's view, in reliance on ILC Guiding Principle 7, that "the approach to unilateral declarations should be restrictive."³⁹⁸ The Respondent accepted that Section 39 of the IPA was "a unilateral declaration"³⁹⁹ and explained that it was not "only meant to convey information to domestic authorities; rather, it is to those who would read this and, hence, this would include foreign investors."⁴⁰⁰ The Respondent

³⁹³ See DT(Day1).2.24-5.11.

³⁹⁴ See DT(Day1).4.02-05.

³⁹⁵ See DT(Day1).5.06-21.

³⁹⁶ DT(Day1).7.08-11. See also Respondent's discussion of the *Conoco Phillips* case, at DT(Day1).7.12-8.08.

³⁹⁷ DT(Day1).8.09-10.

³⁹⁸ DT(Day1).8.11-18.

³⁹⁹ DT(Day1).9.21-22.

⁴⁰⁰ DT(Day1).11.12-16.

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referred to Professor Dolzer’s position that this declaration “is of a hybrid nature because being a national law, but intended to operate, to an extent, on the international plane, the approach should be a mix of both national and international law principles.”⁴⁰¹

194. The Respondent reiterated its position that, “even on the common ground between us on the principles of interpretation, consent is not clearly shown. It is not shown at all.”⁴⁰²

(2) Interpretation of Section 39 of the IPA and Section 2 IDCA

195. The Respondent addressed the interpretation of the relevant provisions of PNG law “at three levels” – the text, the context (“including the circumstances leading to the preparation of the relevant provisions”) and the purpose.⁴⁰³

(a) Textual interpretation

196. **First**, turning to Section 2 of the IDCA, the Respondent stated that it is “common ground that this [provision] does not constitute the consent in writing in itself.”⁴⁰⁴ According to the Respondent, Section 2 does not “create[] any additional rights or take[] away any rights in terms of what the notification serves,” and although “[t]here was no need for section 2” because there was the 1978 Notification, the Respondent “thought it useful to reflect it here.”⁴⁰⁵
197. Regarding the title of Section 2 itself (“Classes of Disputes which May Be Referred to the Jurisdiction of the Centre”), the Respondent stated that it sought “to define or narrow the type of disputes that may be referred” to ICSID, provided that “all the requirements have been fulfilled,” and was therefore “still subject to this consent in writing being provided.”⁴⁰⁶ On the significance of the word “may” in Section 2’s heading, the Respondent noted that it should be read “in contra-distinction to ‘shall’, [and] generally

⁴⁰¹ DT(Day1).11.16-20.

⁴⁰² DT(Day1).8.23-25.

⁴⁰³ DT(Day1).12.12-21.

⁴⁰⁴ DT(Day1).14.11-13.

⁴⁰⁵ DT(Day1).16.01-07.

⁴⁰⁶ DT(Day1).15.04-10.

Award

it's not mandatory,"⁴⁰⁷ and reiterated that it did not remove the requirement of consent in writing but rather defined "in a negative way" what could not "go up for ICSID arbitration."⁴⁰⁸

198. **Second**, turning to Section 39 of the IPA, the Respondent argued that the words "applies, according to its terms" meant the following:

Essentially, what it provides to disputes arising out of foreign investment, is that the IDCA applies according to these terms. What is sought to be applied is the Act, not the convention. The words 'implementing the convention' appear to be descriptive of what the IDCA did. What section 39 does is apply the Act according to its terms.⁴⁰⁹

199. The Respondent argued that, "[a]pplying that natural and ordinary meaning, according to its terms means all its terms, not some of the terms or all but one of the terms or part of the terms; nothing more and nothing less."⁴¹⁰
200. The Respondent contrasted Section 39 with the national legislation in *SPP v. Egypt* and the Venezuela Cases, which legislation "referred to the convention rather than the Act itself, or the Act implementing it," and noted that "it might be a step or half a step closer to saying consent could apply, if it was talking in terms of the convention applying directly."⁴¹¹
201. Addressing the Claimant's arguments on construction of "applies" and "according to its terms" as having two distinct functions,⁴¹² the Respondent contended that "that is an artificial way of construing it."⁴¹³ According to the Respondent, "the claimant's submission does involve [the Tribunal] either construing this, not in a natural and ordinary

⁴⁰⁷ DT(Day1).16.24-25.

⁴⁰⁸ DT(Day1).17.16-18.

⁴⁰⁹ DT(Day1).20.19-21.01.

⁴¹⁰ DT(Day1).22.14-17. *See also* DT(Day2).31.15-18.

⁴¹¹ DT(Day1).21.23-22.05. *See also* DT(Day1).34.09-13 (Mr. Yeo: "... Just as I've said, if the reference was to the convention rather than act, perhaps an argument, you might be getting a step closer to saying that that is the standing offer to consent, the use of the use of more mandatory language like 'shall'.").

⁴¹² *See* DT(Day1).30.03-09.

⁴¹³ DT(Day1).30.12. *See also* DT(Day2).31.12-14 (Mr. Yeo: "I submit to the tribunal that to read 'applies' and 'according to its terms' disjunctively is not natural or reasonable.").

Award

way, but in a very contrived and artificial way or, indeed, to rewrite it.”⁴¹⁴ The Respondent stated that the Tribunal can “construe [this provision] as best it can to prevent an absurdity or an empty form, but [the Tribunal] still can’t rewrite it.”⁴¹⁵

202. According to the Respondent, the expression “applies, according to its terms” “should be construed together ... [and] ‘according to its terms’ governs or limits the application,” which “includes the consent in writing” and “the issue about nationals of contracting states.”⁴¹⁶ Overall, the meaning that the Respondent attaches to Section 39 is that:

it is reaffirming Papua New Guinea’s commitment to ICSID and clarifying or informing foreign investors, or those who make foreign investment, if there’s a difference, that ICSID arbitration may be available.⁴¹⁷

203. The Respondent finally noted that, “reading section 39 in conjunction with section 2 ... still wouldn’t provide that consent.”⁴¹⁸ According to the Respondent, what Section 39 “simply says is the IDCA applies according to its terms,” and “takes you back to the IDCA and if the IDCA didn’t provide the consent, then section 39, read on its own, or with it, can’t do more than that.”⁴¹⁹
204. In sum, the Respondent’s case, this does not “come[] any way close to clear and unambiguous or to the force of arguments militating in favour of jurisdiction being preponderant....”⁴²⁰

⁴¹⁴ DT(Day1).40.18-21.

⁴¹⁵ DT(Day1).40.15-17.

⁴¹⁶ DT(Day1).30.13-19.

⁴¹⁷ DT(Day1).32.13-17.

⁴¹⁸ DT(Day1).22.21-22.

⁴¹⁹ DT(Day1).38.11-16. *See also* DT(Day1).45.22-24 (Mr. Yeo: “If the IDCA didn’t provide the consent, then merely applying it to disputes arising out of foreign investment doesn’t achieve that effect.”); DT(Day1).45.18-47.20.

⁴²⁰ DT(Day1).46.11-14.

Award

(b) Context and purpose

205. **First**, the Respondent noted that Section 37 and Section 39 of the IPA refer to “foreign investor” and “foreign investment,” respectively,⁴²¹ which under the definitions in the IPA, both “are not restricted to nationals of contracting state; they apply to any investment, it appears, by someone who is not a citizen.”⁴²² According to the Respondent, Section 37 sets out “substantive rights, and they’re given to a wider group of people, foreign investors, and there’s no limitation that that can only be enforced through ICSID arbitration.”⁴²³
206. The Respondent submitted that there was nothing to suggest that substantive rights under Section 37, framed in mandatory terms,⁴²⁴ could not be enforced other than through ICSID, by “bring[ing] an action in the courts or perhaps some other court;”⁴²⁵ further, “because it’s available to all foreign investors, not just nationals of contracting states, certainly those nationals who are from states who are not contracting states to the ICSID convention, would have to find another way to enforce them.”⁴²⁶
207. The Respondent pointed out that “the language that is employed in section 39 is markedly different from what appears in sections 37 and 38.”⁴²⁷ According to the Respondent, “[w]hile section 39 appears in Part V,” it does not appear “from the text or the context that 39 is necessarily linked to 37 and 38” and it is not “the means by which you enforce sections 37 and 38.”⁴²⁸
208. **Second**, turning to the legislative history of the IPA and the IDCA, the Respondent made the following observations:

⁴²¹ See DT(Day1).26.21-28:02.

⁴²² DT(Day1).28:07-10.

⁴²³ DT(Day1).31.09-13.

⁴²⁴ See, e.g., DT(Day1).33.04-06 (Mr. Yeo: “Rather than futurity, I considered that ‘shall’ simply, in its mandatory form, was saying, ‘We are conferring substantive rights.’”).

⁴²⁵ DT(Day1).28.24-29.05.

⁴²⁶ DT(Day1).29.06-10.

⁴²⁷ DT(Day1).31.22-24.

⁴²⁸ DT(Day2).35.20-36.04.

Award

- a. with regard to the Hansard of the 1991 IPA, the Respondent noted that it made clear that the “wider context and purpose of the IPA” was “to introduce the authority, the IPA, the authority, to replace the NIDA, which was seen as being very cumbersome;”⁴²⁹
- b. with regard to the 1991 Act, the Respondent argued that it “affords [the Tribunal] no guidance in terms of construing the current IPA”⁴³⁰ and that “there are considerable difficulties in interpreting [sections] 39(1) and 39(2)” of the 1991 IPA⁴³¹ in the manner suggested by the Claimant.⁴³² In particular, the Respondent criticized the Claimant’s position that the 1992 IPA’s effort “improve” the 1991 IPA (as stated in the Hansard of the 1992 IPA) “means improve from the perspective of foreign investors, not from the state”⁴³³ and argued that the improvement may also be seen from the perspective of the State.⁴³⁴ The Respondent noted that, when passing legislation, the States look to advance their own interests;⁴³⁵ for example, it may be in the State’s interest to grant consent in a bilateral treaty in exchange for “something tangible in return.”⁴³⁶ The Respondent also stated that the “reference in Hansard was to improving the legislation or to improve the bill,” to make it clearer, rather than “to improve the offer” as the Claimant suggested.⁴³⁷
- c. turning to the Hansard of the 1992 IPA, the Respondent submitted that it reflects the improvements made compared to the 1991 version, including the simplification of the certification procedures for foreign investors and strengthening of “investment guarantees for foreign investors.”⁴³⁸ The Respondent emphasized that “there’s nothing here about ICSID arbitration, consent to jurisdiction or advance consent;” rather, the

⁴²⁹ DT(Day1).56.21-24. *See also* DT(Day1).71.01-72.08.

⁴³⁰ DT(Day1).59.19-20.

⁴³¹ DT(Day1).62.11-14. *See also* DT(Day1).62.14-64.05.

⁴³² DT(Day1).67.13-14.

⁴³³ DT(Day1).68.11-14.

⁴³⁴ *See* DT(Day1).06-19.

⁴³⁵ DT(Day1).14-18.

⁴³⁶ DT(Day1).68.19-69.05.

⁴³⁷ DT(Day2).46.01-05.

⁴³⁸ *See* DT(Day1).73.19-74.22.

Award

strengthening of the “investment guarantees... so as to cover ‘*all* foreign investors’,” without limitation to national of Contracting States.⁴³⁹

d. with regard to the various Hansards of the IDCA, the Respondent stated that:

- i. the Hansard of the 1978 IDCA indicated that, “at least as far as the government was concerned, the IDCA bill, being enacted in 1978, didn’t itself constitute the consent,” and that consent in writing was required;⁴⁴⁰ and
- ii. the Hansard of the 1982 amendment to the IDCA similarly shows that “there was no attempt to say [that the Respondent is] providing the consent in writing to ICSID;” rather, the focus of the debate was to eliminate the requirement of exhaustion of local remedies which was reflected in “the sole change made in 1982” – *i.e.*, removal of the part of the provision “about local and diplomatic remedies.”⁴⁴¹

209. **Third**, the Respondent referred to the examples of BITs which it had entered into as alleged evidence of knowledge how to give its consent to arbitration. The Respondent reiterated that these treaties show that, if the Respondent “wanted to consent to ICSID arbitration, [it] certainly knew how to do so and had done so previously in clear, unequivocal terms.”⁴⁴²

210. **Fourth**, the Respondent submitted that the statements on the websites – that are in many ways inaccurate⁴⁴³ – should not be considered by the Tribunal in resolving the interpretive dilemma, because the websites are not “subsequent practice falling within article 31 of the

⁴³⁹ DT(Day1).74.15-22 (emphasis added).

⁴⁴⁰ DT(Day2).38.18-39.06.

⁴⁴¹ DT(Day2).40.08-17.

⁴⁴² DT(Day1).76.03-06.

⁴⁴³ See DT(Day2).12.13-14.18 (the Respondent’s counsel pointed out that the IPA website contains inaccuracies, including an outdated reference to exhaustion of local remedies: “If the tribunal notes, it’s still talking about diplomatic channels or local remedies before the matter can go to ICSID. ... The reference to ‘diplomatic channels’ or ‘use of local remedies’ is actually a reference back to the original IDCA before the 1982 amendment. In terms of reflecting the position post-1982, it’s simply wrong.”).

Award

- VCLT.”⁴⁴⁴ According to the Respondent, the investment promotion literature can only be “informative,” but cannot “change the rights of the statute.”⁴⁴⁵
211. The Respondent further contrasted the websites relied upon by the Claimant with the circumstances in *Planet Mining v. Republic of Indonesia*. The Respondent noted that these circumstances were different from the present case because they did not involve “some general statement on a website, but a very specific document pertaining to that enterprise which was also copied to the highest authority” of the host State.⁴⁴⁶
212. **Fifth**, regarding the purpose of the IPA and Section 39, the Respondent accepted that the purpose of the IPA “was to promote foreign investment in Papua New Guinea,”⁴⁴⁷ but noted that “there are a number of degrees in terms of how attractive you seek to make yourself.”⁴⁴⁸ According to the Respondent, the IPA was “largely about setting-up the investment promotion agency”⁴⁴⁹ and “streamlining the procedures for making investments which were previously considered to be very cumbersome under the predecessor agency.”⁴⁵⁰
213. With regard to the purpose of Section 39 itself, the Respondent submitted that, within the wider context of the IPA, Section 39 “does serve a purpose to tell investors that ICSID arbitration may be available;”⁴⁵¹ “there is a purpose in putting everything in one statute, so that parties reading it can be made aware of it.”⁴⁵² The Respondent noted that:

looked at in the wider purpose or streamlining procedures for foreign investment, [Section 39] would have value, it would have purpose to inform foreign investors, to reaffirm the commitment to

⁴⁴⁴ DT(Day2).10.06-08.

⁴⁴⁵ DT(Day2).5.15-17.

⁴⁴⁶ DT(Day2).3.07-23.

⁴⁴⁷ DT(Day1).36.20-23.

⁴⁴⁸ DT(Day1).37.04-06.

⁴⁴⁹ DT(Day1).37.04-08. *See also* DT(Day1).50.01-21.

⁴⁵⁰ DT(Day1).50.23-25.

⁴⁵¹ DT(Day1).35.07-11.

⁴⁵² DT(Day1).35.15-17.

Award

ICSID arbitration and to inform them that this may be available for disputes arising out of foreign investment.⁴⁵³

214. The Respondent argued that Section 39 is “not an absurdity or an empty form,” because it “does have a meaning and purpose.”⁴⁵⁴ In any event, “you can’t just on that purpose alone, of promoting foreign investment, rewrite this provision or read in words that aren’t there.”⁴⁵⁵
215. *Finally*, the Respondent noted that, “if you look at the context of the IPA and the purpose that it was trying to serve, that the meaning we have advanced fits within that context and purpose and, to us, is congruent and consistent with the words actually used.”⁴⁵⁶

* * *

216. The Respondent concluded its submissions on consent as follows:

In conclusion ... adopting what is common between the two interpretive approaches, you start with the words. And the words are clear and refer you back to the act and all its terms, or subject to its terms; no more, no less.

If section 2 of the IDCA doesn’t provide the consent, section 39 doesn’t take you further. Within the wider context of the IPA and the purpose of promoting foreign investment, we say this meaning makes sense and has purpose and effect. Remember that *effet utile*, if it applies, requires you to find that the meaning we put forward is an absurdity and an empty form. Even then, it doesn’t say you can rewrite the provision. It says you do your utmost to prevent this absurdity from occurring.

⁴⁵³ DT(Day1).77.02-08. *See also* DT(Day1).82.16-21; DT(Day2)35.05-08 (“[T]here is a real purpose served in the international plane to reaffirm your commitment to the ICSID Convention and to clarify and inform that it may be available.”).

⁴⁵⁴ DT(Day1).85.11-12.

⁴⁵⁵ DT(Day1).37.22-24. *See also* DT(Day1).85.12-86.03; DT(Day2).30.06-08 (“What you can’t do is focus on the purpose and then try to drag up those words to fit that purpose.”); DT(Day2).37.06-10 (“[T]here is at least more than one meaning ... that would fit within that purpose. That’s why you can’t just look at the purpose and say that from that I divine the meaning without having a strong regard to the words.”).

⁴⁵⁶ DT(Day1).86.05-09.

Award

This is not an absurdity or an empty form, it serves a purpose. Maybe not the purpose the claimant wants to serve, but it serves a purpose nonetheless. So at the end of the day, we are saying it is clear that the consent in writing requirement isn't fulfilled.⁴⁵⁷

b) "Investor" and "Investment"

217. The Respondent underscored the "very unique set of facts" in this case and summarized the relevant facts, the Ninth Supplemental Act and the Claimant's M&A⁴⁵⁸ to "help [the Tribunal] understand the animal that is the Claimant."⁴⁵⁹ The Respondent argued that "this unique set of facts takes them outside the realm of the sort of private foreign investment that was meant to have disputes adjudicated through the ICSID arbitration."⁴⁶⁰

218. In particular,⁴⁶¹ the Respondent:

- a. accepted that the place of incorporation of the Claimant is Singapore, but argued that "beyond that factor, ... everything else points to Papua New Guinea,"⁴⁶² according to the Respondent, the Claimant is "in substance ... a PNG institution, albeit incorporated in Singapore;"⁴⁶³
- b. clarified that it was "not talking about nominal consideration" but rather about "zero consideration that came out from the claimants;"⁴⁶⁴
- c. stated that the Claimant's "purposes are all public and charitable;"⁴⁶⁵

⁴⁵⁷ DT(Day2).50.22-51.16.

⁴⁵⁸ See DT(Day1).90-107. The Respondent noted in passing, without going into the merits of the claims, that the Respondent disputes that there had been an expropriation. See DT(Day1).102.12-13.

⁴⁵⁹ DT(Day1).99.15-16.

⁴⁶⁰ DT(Day1).107.16-20.

⁴⁶¹ The Respondent elsewhere also stated that the purpose of the Claimant's certification as a "foreign enterprise" under Section 25 of the IPA "is to carry on business in the country, and that's why I say it doesn't correlate to investment in the context of the ICSID convention" (DT(Day1).51.24-52.05), and that the fact that the Claimant did not avail itself of the exemption under Section 26 of the IPA did not mean that "they are not a charitable or public-purpose type of company." (DT(Day1).52.06-22).

⁴⁶² DT(Day1).110.10-12.

⁴⁶³ DT(Day1).107.07-09. See also DT(Day2).28.05-09.

⁴⁶⁴ DT(Day1).108.03-05.

⁴⁶⁵ DT(Day1).109.11.

Award

d. distinguished this case from the facts and circumstances in other investor-State cases.⁴⁶⁶

c) MFN

219. On interpretation of Section 37(1) of the IPA, the Respondent reiterated its written submissions and summarized its position as follows:

The reference to ‘the foreign investor’... must be the same one. ... We say our construction is consistent and congruent with the wording of section 37, because the reference to ‘the foreign investor’ in the second line must mean the same one in the first line. I accept the word ‘same’ isn’t there, but I’m saying that’s the meaning of ‘the’. The claimant’s construction would require you to read ‘the foreign investor’ to mean ‘any other foreign investor’ because, essentially, it’s someone other than the one in the first line, and we say that does considerable violence to the language.⁴⁶⁷

220. The Respondent further contended that Section 37(1)’s “reference to ‘any treaty’ to which the state is a party is qualified by the words in the second line of ‘the investor’. In other words, the treaty that’s being referred to needs to be with a state of which the investor is a national.”⁴⁶⁸

2. The Claimant’s Submissions

a) Consent

221. The Claimant’s counsel approached the interpretation of Section 39 from the perspective of a potential foreign investor looking at the IPA.⁴⁶⁹ The Claimant pointed out the circularity of the provisions of Section 39 and stated that “[i]t needs to be interpreted, in particular the word ‘applies’;⁴⁷⁰ “[e]lliptical provisions require interpretation; they don’t necessarily require rewriting.”⁴⁷¹

⁴⁶⁶ See DT(Day1).107-110.

⁴⁶⁷ DT(Day1).111.06-24.

⁴⁶⁸ DT(Day2).1.14-20.

⁴⁶⁹ See DT(Day1).118.11-119.04.

⁴⁷⁰ See DT(Day1).119.05-120.04.

⁴⁷¹ DT(Day1).124.11-12.

Award

222. The Claimant defined the Tribunal's task in this case as follows:

[T]he question is whether what you are asked to do, having regard to the interpretive methods available to a Papua New Guinea court ..., falls within the interpretive mandate of the tribunal or falls outside the interpretive mandate of the tribunal so that you have to hold up your hands and say, 'There's nothing to be done. The hole can't be fixed', despite the fact that there was an evident intention to give investment guarantees, which included reference to ICSID.⁴⁷²

223. The Claimant summarized its interpretive approach as follows:

[T]he question is the application of a domestic law which relates to an international treaty. And, therefore, the parties are agreed that you refer both to international law and to Papua New Guinea law in determining the questions arising.

We rely on Papua New Guinea law because of its strong emphasis on object and purpose in relation to a phrase which is equivocal. We rely on international law as supporting the idea of investment arbitration on the basis of a good faith commitment by the state.⁴⁷³

224. According to the Claimant, the word "applies" in the context of the IPA's purpose is that "it is open consent to arbitration under the convention in cases where the substantive requirements of the convention are met."⁴⁷⁴ The Claimant noted that interpretation of Section 39 "involves very careful appreciation of the facts,"⁴⁷⁵ and argued that "the idea that there is in principle a view of restrictive interpretation, a document of statements or propositions in legislation made with a view to attracting foreign investment, is frankly passé."⁴⁷⁶

⁴⁷² DT(Day1).125.01-11.

⁴⁷³ DT(Day1).156.13-22.

⁴⁷⁴ DT(Day1).120.11-14.

⁴⁷⁵ DT(Day1).122.08-09

⁴⁷⁶ DT(Day1).122.12-15.

Award

225. **First**, the Claimant discussed the legislative history of the IDCA and described what the Claimant’s counsel characterized as “the trend of the PNG legislation ... to expand access to an arbitration, with a view to attracting investment.”⁴⁷⁷
- a. The Claimant referred to the original version of the IDCA, noting that it implemented the ICSID Convention “in a very comprehensive way,” was “carefully drafted” and annexed the Convention itself.⁴⁷⁸ The Claimant submitted that, throughout the revisions to the IDCA, “there was a progression towards consent over the three pieces of legislation.”⁴⁷⁹
 - b. the Claimant referred to the Hansard of the IDCA Amendment Act 1982⁴⁸⁰ and noted that the sentence stating “[t]he bill will remove from the Act a provision requiring all domestic remedies to be exhausted before this bill can be referred to ICSID” contained a mistake and should instead read “before a dispute under the convention can be referred to ICSID.”⁴⁸¹ According to the Claimant, by removing the requirement to exhaust local remedies before bringing a dispute to ICSID, the 1982 amendment “did take Papua New Guinea quite a long way down the line to an agreement to arbitrate” because “it got rid of a major obstacle to foreign investment, which is the local remedies rule ... ;⁴⁸²
 - c. the Claimant stated that:

We’re told by counsel for the respondent that all of this was simply intended to open the door to ICSID, but the door was already wide open insofar as they would have it open, because it was already fully agreed by 1982 that the ICSID arbitration was the best method of

⁴⁷⁷ DT(Day1).144.21-23. The Claimant stated that the Respondent “has not been entirely helpful in producing the language of the legislation” and that the Claimant had to find and produce the Hansards and the 1991 IPA itself; “to the extent that a government seeks to rely upon the terms of its legislation in front of the tribunal, it has an obligation to the tribunal to be candid and productive in relation to the content of that legislation, which it has not been.” DT(Day2).57.24-58.04, 58.17-22.

⁴⁷⁸ DT(Day1).126.02-09.

⁴⁷⁹ DT(Day1).128.23-24. *See also* DT(Day1).128.25-130.08.

⁴⁸⁰ Hansard extracts in respect of the IDCA Amendment Act 1982, **Exhibit CL-15**.

⁴⁸¹ DT(Day1).130.09-21.

⁴⁸² DT(Day1).131.23-132.06.

Award

resolving investment disputes. It would be a work of supererogation for Parliament in 1991 and 1992 to say, again, ICSID is the best method. We say that you are entitled to take into account the progressions in the legislations, it's [sic] public documents which led to the position of 1992.⁴⁸³

The Claimant argued that “when parliament in two tries in 1991 and 1992 enacted legislation which is capable of a broader interpretation, having regard to the object and purpose of that legislation, that is the right interpretation to give to it.”⁴⁸⁴ The Claimant stated, however, that it did not suggest that Section 2 of the IDCA, as amended in 1982, “constituted an open offer” to arbitrate.⁴⁸⁵

d. the Claimant turned to the 1991 IPA and argued that Section 39(1) “indisputably” contained “an offer to arbitrate a certain class of cases”⁴⁸⁶ which “wasn’t drafted by a neophyte.”⁴⁸⁷ Looking at Section 39(1), the Claimant stated that the reference to the term “code” meant “as a minimum, [that] it applies to the code of investment, substantive investment guarantees in section 37, and quite possibly to other provisions of the Act as well.”⁴⁸⁸ The Claimant added that “it is as clear as the night follows the day that [section] 39(2) is subject to a subsequent agreement to arbitrate and [section 39(1)] is not.”⁴⁸⁹ The Claimant concluded on this point that “in this legislation, unproclaimed, PNG took the next step and offered arbitration for an uncertain but real class of cases involving investment guarantees.”⁴⁹⁰

e. in relation to the Hansard of the 1991 IPA, the Claimant argued that the creation of the Investment Promotion Agency was not “the only piece” in this Act.⁴⁹¹ According to

⁴⁸³ DT(Day1).132.07-17. *See also* DT(Day1).133.05-13.

⁴⁸⁴ DT(Day1).133.09-13.

⁴⁸⁵ DT(Day1).133.20-21.

⁴⁸⁶ DT(Day1).133.12-16.

⁴⁸⁷ DT(Day1).138.06.

⁴⁸⁸ DT(Day1).138.14-17. *See also* DT(Day1).140.11-13 (Prof. Crawford: “what is indisputable is that section 39(1), whatever it extends to, and however far it extends, is an offer to arbitrate.”).

⁴⁸⁹ DT(Day1).140.18-20.

⁴⁹⁰ DT(Day1).140.24-141.02.

⁴⁹¹ DT(Day1).141.20-23.

Award

the Claimant, although it is true that governments “only legislate in their own interests,” in this case there was “a relatively weak government rich in natural resources which desperately wanted to attract inward foreign investment.”⁴⁹² The Claimant added that, although there is a “vacuum” in the parliamentary debate on the issue of ICSID arbitration, it could be because this issue was “passed as a technicality.”⁴⁹³

- f. according to the Claimant, if the 1992 IPA were interpreted as the Respondent suggests, it would have been “a significant step backwards from a consent to arbitrate matters related to the interpretation or application of the Act to a refusal to arbitrate matters relating to interpretation or application of the Act.”⁴⁹⁴ The Claimant added that:

There was nothing that the Papua New Guinea parliament could have done after 1982 that would have made Papua New Guinea more available to ICSID than the expression of a consent to arbitrate. Nothing more was required.

...

In the context of the notion of ... the application of a treaty provision, in the context of an act which is intended to facilitate investment and to encourage investment, in the context of a legal system where purpose of interpretation is more supportive and more supported than it is in the classic common law tradition ... [,] we say that the right interpretation is that when it is said that the convention was to apply, that meant that the convention was to apply as a method of the resolution of disputes.⁴⁹⁵

- g. looking at the Hansard of the 1992 Act, the Claimant noted that the reference to that Act’s purpose to “improve” the previous 1991 version could mean “an improvement from the point of view of the aims which [the Minister] articulated, which included to

⁴⁹² DT(Day1).142.03-10. The Claimant subsequently noted that “in capital-importing jurisdictions with weak domestic institutions, especially those which are highly reliant on mineral exports, investment guarantees are of extreme importance. And in making decisions about very substantial upfront investments, or further investments, investors look to see what guarantees are on offer. Guarantees provided by domestic courts ... are not regarded as satisfactory or sufficient.” DT(Day2).61.22-62.05.

⁴⁹³ DT(Day1).143.13-15.

⁴⁹⁴ DT(Day1).145.24-146.03.

⁴⁹⁵ DT(Day1).146.12-147.03.

Award

promote private sector investment as well as meet conditions set under the World Bank structural adjustment loan.”⁴⁹⁶

226. **Second**, the Claimant addressed the interpretation of Section 39 of the 1992 IPA and:

- a. stated that its position was that Section 39 “imports the amended 1978 Act, including section 2 in its amended formulation, and that it deems that section 2 is satisfied for disputes arising out of the investment guarantees;”⁴⁹⁷
- b. cited the *Interocean v. Nigeria* case, in which the tribunal found that the word “apply” was “sufficient to constitute consent in advance,” albeit applying a different legislative provision;⁴⁹⁸
- c. contended that “[i]f the effect of applying the limitation [that a normative instrument is subject to] is that the document fails to have any operation at all, as the reference to the rules in *Interocean* would have had if it had been taken literally, then you’ve got to modify the interpretation of the word ‘applies’ accordingly;”⁴⁹⁹
- d. argued that:

the reference to ‘in its own terms’, with commas before and after, is simply making it clear ... that the convention is still the convention and still is subject to limitations in the convention. We say that that is itself subject to the qualification that the convention is made to apply as guarantee, which without consent it would not be. So the minimum application that the convention has to have in order not simply to be part of PNG law but to be applicable to the dispute is that PNG has consented to the dispute.⁵⁰⁰

- e. taking Section 39 in its context, argued that the “investment guarantees provided for in section 37 of the 1992 Act would be of very limited value, and, indeed, ultimately

⁴⁹⁶ DT(Day1).148.15-18.

⁴⁹⁷ DT(Day2).67.12-16.

⁴⁹⁸ See DT(Day2).62.06-19.

⁴⁹⁹ DT(Day2).70.14-19.

⁵⁰⁰ DT(Day2).70.20-71.05.

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perhaps of no value at all, unless they're underpinned by the further investment guarantee arbitration.”⁵⁰¹ The Claimant added that “it’s not the case that section 39 is an afterthought in the provision, only section 37 and 38 of which constitute investment guarantees;” rather, it was “intended as part of a section, we say a code, dealing with investment guarantees.”⁵⁰² According to the Claimant, if Section 39 had said what the Respondent said it means, “it wouldn’t be an investment guarantee,” but would instead “deter investment and defeat the object and purposes of the [IPA].”⁵⁰³

227. The Claimant submitted that there were “five interpretive conclusions available to the tribunal” in relation to Section 39, including:⁵⁰⁴
- a. “what it does is simply to reaffirm the availability of ICSID if the parties agree” – in which case this would be an (unnecessary) fourth reaffirmation of its commitment to ICSID by the Respondent, following the ratification of the ICSID Convention, the 1978 IDCA and the 1982 amendment to the IDCA;⁵⁰⁵
 - b. it is a “domestic confirmation of the position of ICSID within the PNG legal system, in effect confirming the force and effect of the 1978 Act;” according to the Claimant, in a dualist PNG legal system, the 1978 IDCA, as implementing legislation, “did everything it needed to do to give effect to ICSID” and nothing further was required;⁵⁰⁶
 - c. Section 39 “clears the way for reference to ICSID, but there’s no evidence that there was any legal impediment once the 1982 amendment had removed the requirement of domestic remedies;”⁵⁰⁷ according to the Claimant, this “clear the way” interpretation is therefore “redundant;”⁵⁰⁸

⁵⁰¹ DT(Day2).63.11-18.

⁵⁰² DT(Day2).63.19-24.

⁵⁰³ DT(Day2).64.17-25.

⁵⁰⁴ DT(Day2).83.01-02.

⁵⁰⁵ DT(Day2).83.05-23.

⁵⁰⁶ DT(Day2).84.03-07.

⁵⁰⁷ DT(Day2).84.14-17.

⁵⁰⁸ DT(Day2).85.13-14.

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- d. “all section 39 did was to refer back to a 1978 Act, already part of the law of Papua New Guinea, and say that the Act applied,” and that “it was not a guarantee but the contingent possibility of a guarantee;”⁵⁰⁹ according to the Claimant, this interpretation advanced by the Respondent “is inconsistent with the object and purpose of the legislation, ... is not required by the terms of section 39” and is “an example of redundancy, if not absurdity;”⁵¹⁰
- e. Section 39 “expressed an intention to extend investment guarantees, ... because that was what parliament intended to do as the minister said in introducing the legislation,”⁵¹¹ and the intention “achieved, albeit elliptically,” in the 1992 IPA was “to extend and not reduce the guarantee.”⁵¹² This is the interpretation favoured by the Claimant.
228. **Third**, the Claimant further argued that, when one faces an “elliptical piece of legislation,” it is a matter of “preponderance of the arguments,” and in this case “the preponderance of arguments favours our view of the position, rather than Papua New Guinea’s view of the position....”⁵¹³ The Claimant also stated that, “[i]f the position is that the legislation is open to more than one interpretation ... we say that the purpose of interpretation in the context of the legislation ... directed at the outside and intended to have beneficial effects, that interpretation is to be preferred.”⁵¹⁴
229. The Claimant submitted that, in this case, its interpretation of Section 39 “is more than just a possible scenario; it is the more likely scenario,”⁵¹⁵ or “it’s not simply a possible interpretation; it’s the better interpretation.”⁵¹⁶

⁵⁰⁹ DT(Day2).87.10-17.

⁵¹⁰ DT(Day2).87.18-21.

⁵¹¹ DT(Day2).87.24-88.05.

⁵¹² DT(Day2).89.15-16.

⁵¹³ DT(Day1).150.20-22.

⁵¹⁴ DT(Day2).65.24-66.06.

⁵¹⁵ DT(Day1).151.13-14.

⁵¹⁶ DT(Day1).151.23-25. *See also* DT(Day1).151.15-24.

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230. **Finally**, on the issue of websites, the Claimant noted that it did not suggest, “in the context of the interpretation of domestic legislation, ... that the practice of administrative agencies is determinative” because “[i]t’s a matter of law, and not a matter of what may be misguided appreciations;” however, “[i]t’s nonetheless relevant, and similar conduct has been treated as relevant in other cases.”⁵¹⁷ According to the Claimant, “the conduct of the competent authority under the relevant legislation in giving effect to that legislation can be taken into account.”⁵¹⁸

231. The Claimant stated that, bearing in mind Sections 6 and 7 of the IPA setting out the functions of the Investment Promotion Authority:

[I]t was within the scope of the statutory mandate of the IPA to do what it did on its website, and that in doing so, it was acting as an organ of the state in PNG within its authority and the exercise of its competence, and what it did was to be taken seriously.⁵¹⁹

232. Given its authority as the “competent body in respect of investment,” “it is highly relevant what [the Investment Promotion Authority] thought the legislation meant and what it announced the legislation meant in its public pronouncements.”⁵²⁰

233. Turning to the language on the website statements (pre-RFA),⁵²¹ the Claimant reiterated that the use of the word “can” should be understood as “it is accessible to the investor,” rather than “it’s open to PNG to agree subsequently to settlement of disputes”⁵²² According to the Claimant:

⁵¹⁷ DT(Day1).153.09-14.

⁵¹⁸ DT(Day2).74.14-17.

⁵¹⁹ DT(Day2).75.01-06.

⁵²⁰ DT(Day2).77.01-10.

⁵²¹ The Claimant noted that it would “rely exclusively” on the website of the Investment Promotion Authority because the latter “was in a special position by virtue of the legislation itself.” DT(Day2).60.04-12.

⁵²² DT(Day1).156.07-11. *See also* DT(Day2).80.01-17 (“[I]f I tell you a dispute can be settled by reference to ICSID, I don’t mean that it’s theoretically possible that it could be settled by reference to ICSID, I mean that ICSID is available for the settlement of that dispute. ... We say it reflects an understanding by the IPA that investment disputes can be settled by reference to the centre; not in the theoretical sense that it’s possible that PNG would subsequently agree but in the operational sense that the investor can refer to ICSID.”).

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- a. “the situation is that the competent authority regarded the relevant provision of its act, the act which it administered, as having that effect, and we rely on that as confirmation that that’s what the words mean;”⁵²³ and
- b. “[t]his was not merely promotional material, it’s not merely blurb; it’s a statement by an official agency authorised to make it as to what the position is.”⁵²⁴

b) “Investor” and “Investment”

(1) Investor

234. **First**, the Claimant submitted that it is “untenable to argue that [the] Claimant is not a Singaporean corporation.”⁵²⁵
235. The Claimant argued that Professor Dolzer “grossly exaggerates the availability of piercing the corporate veil in the context of general and international law.”⁵²⁶ According to the Claimant, “in practice, it’s extremely rare,”⁵²⁷ and “the basic proposition ... is that a company has the nationality of the state where it is incorporated,” with one exception – *i.e.*, “where the incorporation is being used as a vehicle for fraud or is completely artificial.”⁵²⁸
236. In this case, the Claimant noted that “[t]here’s no question of any concealment ... [or] of any surreptitious change in nationality;” rather, the Claimant “was established with the full consent and acceptance of the Papua New Guinean government,” “as a vehicle for the holding of these shares in the circumstances where the existence of a vehicle outside Papua New Guinea was a key element of the overall arrangement.”⁵²⁹

⁵²³ DT(Day2).81.01-05.

⁵²⁴ DT(Day2).81.17-19.

⁵²⁵ DT(Day1).165.03-04.

⁵²⁶ DT(Day1).163.14-16.

⁵²⁷ DT(Day1).163.20.

⁵²⁸ DT(Day1).164.04-09.

⁵²⁹ DT(Day1).165.08-13.

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237. **Second**, the Claimant contended that the Respondent’s argument that the Claimant is not a private company but rather a “state-controlled” corporation “is based on a fundamentally flawed factual assertion.”⁵³⁰ The Claimant argued that the *Broches* test was not satisfied, because the Claimant “is not owned by the state, either wholly or partially, and it’s not controlled by the state.”⁵³¹ The Claimant added that, even on the Respondent’s best case, all that it can say is that it has “joint oversight rights with BHP over this company,” which does not raise the “question of control in any form, even on their best case.”⁵³²
238. The Claimant noted that sustainable development was not the sole purpose of the Claimant, as the Respondent suggests, but “one of the purposes.”⁵³³ According to the Claimant, one of its other purposes was “to ensure that any indemnity that needs to be satisfied for environmental claims is, in fact, satisfied.”⁵³⁴ Moreover, the Claimant noted that the breadth of the definition of the term “investor” under the IPA suggests that “the mere fact that a company like the claimant is engaged in sustainable development ... does not disqualify it from being an investor for the purposes of either the IPA or the ICSID.”⁵³⁵
239. The Claimant added that the Respondent’s trust argument did not take it anywhere, because, even taking the Respondent’s case at its highest, “what that means is that the trustee has taken on this investment from BHP and is managing it; it’s not the state. The trustee is not the state.”⁵³⁶

(2) Investment

240. The Claimant reiterated its written submissions and concluded that, on its case, the Claimant’s investment falls within the definition of the term in the IPA⁵³⁷ and also satisfies all possible criteria for definition of “investment” under the ICSID Convention – whether

⁵³⁰ DT(Day1).169.16-17.

⁵³¹ DT(Day1).169.18-20.

⁵³² DT(Day1).170.15-171.05.

⁵³³ DT(Day1).172.23-173.03.

⁵³⁴ DT(Day1).175.24-176.01.

⁵³⁵ DT(Day1).179.05-08.

⁵³⁶ DT(Day1).176.17-20.

⁵³⁷ See DT(Day1).188.08-18.

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one looks at *Phoenix Action, Malaysian Salvors* or *Salini* tests.⁵³⁸ The Claimant also argued that there was no requirement of “consideration;” even if there were, the Claimant has given such consideration.⁵³⁹

c) MFN

241. The Claimant referred to its written submissions on the issue. In addition, the Claimant argued that the word “any” in Section 37(1) “makes the class of instruments referred to treaties unlimited, ... unlimited by nationality.”⁵⁴⁰

V. THE TRIBUNAL’S REASONS

242. According to well-established principles of international arbitration and Article 41(1) of the ICSID Convention, this Tribunal is “the judge of its own competence.”⁵⁴¹ This basic rule of competence-competence applies to all international tribunals and is confirmed by Article 41(1). Neither Party disputes the Tribunal’s competence in this regard.

243. In determining its competence to decide on the present dispute, the Tribunal applies the requirements of the ICSID Convention, including the jurisdictional requirements set out in Article 25(1), the instrument of consent and the relevant principles of international law, as articulated below. According to Article 25(1) of the ICSID Convention, the jurisdiction of the Centre – and of this Tribunal – “shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another

⁵³⁸ DT(Day1).181.16-20. See DT(Day1).181-186 (discussion of criteria of duration, risk, contribution to the economic development of the State, assets invested bona fide, etc.).

⁵³⁹ See DT(Day1).186.19-188.07.

⁵⁴⁰ DT(Day1).189.11-16. See also DT(Day1).178.13-15 (stating that the Claimant gave consideration for the transfer of the OMTL shares “via the indemnities.”).

⁵⁴¹ ICSID Convention, at Article 41(1). See above at para. 43. See also *Mobil v. Venezuela*, at para. 74 (The tribunal is the “judge of its own competence,” and “[i]t is so whatever the basis of that competence, including a unilateral offer made in the Host State’s legislation and subsequently accepted by the investor.”), **Exhibit RL-4**.

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Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”⁵⁴²

244. The requirement of “consent in writing” is correctly termed the “cornerstone of the jurisdiction of the Centre.”⁵⁴³ It is well-established that this requirement is not satisfied merely by a State’s ratification of the ICSID Convention or by a notification under Article 25(4) of the ICSID Convention that the Contracting States may choose to make.⁵⁴⁴ In particular, the preamble to the ICSID Convention makes clear that “no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.”⁵⁴⁵
245. Although the ICSID Convention does not precisely define the form in which consent to the Centre’s jurisdiction must be expressed, beyond the statement that consent must be “in writing,” it is well-established that such consent can be given in advance of any dispute, and that consent may be expressed in multiple forms, including through domestic investment legislation.⁵⁴⁶ According to the Report of the Executive Directors of the World Bank:

Consent of the parties must exist when the Centre is seized ... but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, *a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre*, and

⁵⁴² ICSID Convention, at Article 25(1).

⁵⁴³ The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, at para. 23, **Exhibit RL-18**.

⁵⁴⁴ See ICSID Convention, Preamble, at para. 7; C. Schreuer *et al.*, *The ICSID Convention: A Commentary*, 2nd ed., CUP (2009), at para. 374 (“The fact that the host State and the investor’s State of nationality have ratified the Convention will not suffice.”), **Exhibit RL-11**; *SPP v. Egypt*, at para. 62, **Exhibit CA-3**.

⁵⁴⁵ ICSID Convention, Preamble, at para. 7.

⁵⁴⁶ See, e.g., *Mobil v. Venezuela*, at paras. 64, 86, **Exhibit RL-4**.

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the investor might give his consent by accepting the offer in writing.⁵⁴⁷

246. It is thus well-established that a State can make a standing offer to arbitrate in its domestic investment legislation, which an investor can accept by bringing the dispute to ICSID.⁵⁴⁸ Although agreements to arbitrate in investment contracts, or offers to arbitrate in bilateral (and multilateral) investment treaties may be more frequently encountered, there is no question but that a binding agreement to arbitrate may be derived from national legislation.
247. The Parties largely agree on the foregoing principles. However, the Parties disagree as to whether the relevant PNG investment legislation, at issue in this case, does in fact contain a standing offer to arbitrate by the Respondent, sufficient to give rise here to a binding agreement to arbitrate.⁵⁴⁹
248. In its Request for Arbitration, and as detailed above, the Claimant argues that “[e]ither on its own, or when read in conjunction with Section 2 of the IDCA, Section 39 of the IPA constitutes a standing offer by the Respondent to arbitrate investment disputes at ICSID.”⁵⁵⁰ In contrast, in its Objections to Jurisdiction, the Respondent contends that Section 39 of the IPA, on its own or read in conjunction with Section 2 of the IDCA, does not constitute a standing offer to arbitrate by the Respondent necessary to establish the Tribunal’s jurisdiction in this case.⁵⁵¹

⁵⁴⁷ The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, at para. 24, **Exhibit RL-18** (emphasis added). *See also SPP v. Egypt* award, at paras. 70, 101 (“The Convention does not prescribe any particular form for the consent, nor does it require that consent be given on a case-by-case basis.”), **Exhibit CA-3**; *CEMEX v. Venezuela*, at para. 58, **Exhibit CA-2**.

⁵⁴⁸ *See, e.g., C. Schreuer et al., The ICSID Convention: A Commentary*, 2nd ed., CUP (2009), at para. 378 (“Consent may also result from a unilateral offer by the host State, expressed in its legislation or in a treaty, which is subsequently accepted by the investor.”), **Exhibit RL-11**. The Claimant purports to have expressed its consent to submit the dispute to ICSID arbitration in a letter from Sir Mekere Morauta to the Prime Minister of PNG dated 26 September 2013. *See* Request for Arbitration, at para. 69; Letter to the Prime Minister of PNG from the Chairman of the Claimant (26 September 2013), **Exhibit CE-15**.

⁵⁴⁹ *See above* at paras. 41, 51-66, 92-121, 148-158, 174-184, 191-216, 221-233.

⁵⁵⁰ Request for Arbitration, at para. 67; *see above* at para. 41.

⁵⁵¹ *See above* at paras. 51-66.

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249. The Parties made thorough submissions both on the principles of construction to be applied to Section 39 of the IPA and Section 2 of the IDCA, and on the proper interpretation of these statutory provisions. The Tribunal first addresses the principles that apply to the construction of the relevant PNG investment legislation provisions, before turning to the interpretation of those provisions.

A. *Principles Governing Interpretation of Domestic Investment Legislation*

250. The Parties are in (apparent) disagreement on the basic approach to construction of PNG investment legislation that is alleged to contain the Respondent's standing offer to arbitrate.

251. The Respondent argues for a restrictive approach and submits that a State's consent in writing must be "clear and unambiguous" in order to confer jurisdiction on an international tribunal," and that "a state's unilateral assumption of obligations is 'not lightly to be presumed', especially considering that a sovereign state by consenting to arbitration under ICSID is submitting itself to an external adjudicative body."⁵⁵²

252. The Claimant, in turn, submits that the correct approach to interpretation of Section 39 is that adopted in *SPP v. Egypt* (including the *effet utile* principle), which essentially requires that jurisdictional instruments be interpreted "neither restrictively nor expansively, but rather objectively and in good faith"⁵⁵³ Alternatively, the Claimant submits that the Tribunal should apply what it terms a "quasi-Vienna" approach to the interpretation of the Respondent's unilateral declaration made in its domestic investment legislation at issue in this case.⁵⁵⁴

253. In the Tribunal's view, it is well-settled, for good reason, that there is no presumption against the finding of jurisdiction under the ICSID Convention, and no heightened requirement of proof of an agreement to arbitrate. Jurisdictional instruments, whether investment contracts, treaties or legislation, must be interpreted objectively and neutrally,

⁵⁵² Objections to Jurisdiction, at para. 41. *See above* at para. 56.

⁵⁵³ *See above* at paras. 95-96.

⁵⁵⁴ *See above* at paras. 99-104, 117-118.

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and not either expansively or restrictively. The Tribunal adopts the principle set out in the *SPP* decision on jurisdiction that:

[J]urisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favor of it is preponderant.⁵⁵⁵

The Tribunal also agrees with the *Amco Asia v. Indonesia* tribunal’s statement that “a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*.”⁵⁵⁶

254. The Tribunal disagrees with the view of the Respondent’s legal expert that “[a]ny offer to arbitrate must be *clearly and unambiguously* expressed, and *doubt shall be resolved against the finding of jurisdiction*.”⁵⁵⁷ It is the Claimant’s burden to prove that the Respondent has given its consent within the meaning of Article 25 of the ICSID Convention, but there is no requirement that the offer to arbitrate be “clearly and unambiguously” expressed, or that doubts must be “resolved against the finding of jurisdiction.”
255. There is no reason, or justification, to adopt presumptions against (or in favor of) a State’s submission to ICSID jurisdiction: the issue is rather to be approached objectively and neutrally, aiming to ascertain the true intentions of the relevant party (or parties) in a particular instrument. Where relevant, the standard of proof is generally held to be a preponderance of the evidence or a balance of probabilities.

⁵⁵⁵ *SPP v. Egypt*, at para. 63, **Exhibit CA-3**.

⁵⁵⁶ *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, reprinted in 23 ILM 351 (1984), at p. 359, **Annex 14 to Dolzer Report** (also quoted in, e.g., Carolyn B. Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes*, 6(2) ICSID Review 462 (1991), at p. 465, **Exhibit RL-10**). The *Amco* tribunal also noted that “any convention, including conventions to arbitrate, should be construed in good faith, that it to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.” *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, reprinted in 23 ILM 351 (1984), at p. 359, **Annex 14 to Dolzer Report**.

⁵⁵⁷ Dolzer Report, at para. 49.

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256. The Tribunal agrees with the *ConocoPhillips* tribunal that “[t]he necessary consent is not to be presumed.”⁵⁵⁸ Conversely, however, the lack of consent is also not to be presumed. The finding of consent is a matter of interpretation of the relevant provision, objectively and in good faith, applying all relevant principles of interpretation.
257. It is sometimes suggested that States should be presumed not to have compromised their sovereignty by submitting to the Centre’s jurisdiction.⁵⁵⁹ It is at least equally true, however, that States should be presumed to desire the effective and just resolution of international investment disputes, in a manner that enhances the prospects for foreign investment and confidence in the rule of law. In the Tribunal’s view, these various considerations are best reflected in a neutral, objective approach towards jurisdictional objections, without preconceived preferences in one direction or the other, consistent with the substantial weight of authority on the issue.⁵⁶⁰ As the Claimant noted in its Rejoinder

⁵⁵⁸ *ConocoPhillips v. Venezuela*, at para. 254, **Exhibit CA-1**. The same tribunal said that, with respect to jurisdiction, its “approach should be cautious.” *ConocoPhillips v. Venezuela*, at para. 254, **Exhibit CA-1**. The Tribunal does not accept this. The proper approach is neither aggressive nor cautious, but objective and neutral.

⁵⁵⁹ See, e.g., Carolyn B. Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes*, 6(2) ICSID Review 462 (1991), at p. 465, **Exhibit RL-10** (the author summarizes Indonesia’s arguments in *Amco Asia v. Indonesia*, ICSID Case No. ARB/81/1, p. 358, as follows: “The Government further suggested that consent to ICSID arbitration by a State should be construed restrictively since it constituted a limitation of the State’s sovereignty.”); Dugan *et al.*, *Investor-State Arbitration*, Oxford (2008), at p. 219 (“The requirement of consent to arbitral jurisdiction in the context of investor-state arbitration is also a corollary of the principle that ‘there is no power superior to the states which can force a judge upon them’. There is nothing to preclude states from voluntarily submitting a dispute to a court or tribunal, however, and nothing can prevent them from making that submission irrevocable. A fundamental element of state sovereignty is the state’s ability voluntarily to limit its own sovereignty.”), **Exhibit RL-69**.

In this arbitration, the Respondent argues that consent is “‘not lightly to be presumed,’ *especially considering that a sovereign state by consenting to arbitration under ICSID is submitting itself to an external adjudicative body...*” Objections to Jurisdiction, at para. 41 (emphasis added). Similarly, Professor Dolzer states that “applying ILC Principle 7 in the present context is also consistent with the view that *when states make statements by which their freedom of action is to be limited, a restrictive interpretation is called for*, especially where the declaration is expressed *erga omnes*.” Dolzer Report, at para. 26 (emphasis added).

⁵⁶⁰ See, e.g., *Mondev Int’l Ltd v. United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, at para. 43 (“In the Tribunal’s view, *there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties*. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law.”), **Exhibit CA-58** (emphasis added); *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No ARB/02/03, Decision on Jurisdiction, 21 October 2005, at para. 91 (“[T]he Vienna Convention represents a move away from the canons of interpretation previously common in treaty interpretation and which erroneously persist in various international decisions today. For example, the Vienna Convention does not mention the canon that treaties are to be construed narrowly, a canon that presumes States can not have intended to restrict their range of action.”),

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on Jurisdiction, “[i]n investment arbitration, both the interpretive and substantive facets of in dubio mitius have been consistently rejected in favour of a neutral (neither restrictive nor expansive) approach.”⁵⁶¹ The Tribunal agrees with this statement.

Exhibit CA-25; *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, at paras. 176 (“To avoid engaging in a partial or subjective analysis, it has been established that any analysis of jurisdiction must be made with meticulous care, without starting from presumptions in favor or against the jurisdiction of the Centre. Any presumption would corrupt the analysis and would unduly limit or expand the original consent given by the parties.”) and 191 (“[W]hen analyzing the scope of consent, for this purpose it is necessary to apply the principles of good faith, identification of the will of the parties and absence of a presumption in favor or against consent.”), **Exhibit RL-48 and Annex 22 to Dolzer Report; *Ethyl Corporation v. Canada***, Decision on Jurisdiction, 24 June 1998, (1998) 38 ILM 708, at para. 55 (“The Tribunal considers it appropriate first to dispense with any notion that Section B of Chapter 11 [of NAFTA] is to be construed ‘strictly’. The erstwhile notion that ‘in case of doubt a limitation of sovereignty must be construed restrictively’ has long since been displaced by Articles 31 and 32 of the Vienna Convention.”), **Exhibit CA-55; *Siemens AG v. Argentine Republic***, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, at para. 81 (“The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention.”), **Exhibit CA-57; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America***, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2001, at para. 51 (“[W]e do not accept the Respondent’s submission that NAFTA is to be understood in accordance with the principle that treaties are to be interpreted in deference to the sovereignty of states. ... NAFTA is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose....”), **Exhibit CA-56; *CSOB v. Slovak Republic***, Decision on Objections to Jurisdiction, 24 May 1999 (“*CSOB v. Slovak Republic*”), at para. 34 (“In determining how to interpret agreements to arbitrate under the ICSID Convention, the Tribunal is guided by an ICSID decision which held that ‘a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties Moreover, ... any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.’ (citing *Amco Asia et al. v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 23 I.L.M. 359 (1984)), **Annex 20 to Dolzer Report; *Daimler Financial Services AG v. Argentine Republic***, Award, 22 August 2012, at para. 172 (“In interpreting dispute resolution provisions in BITs – just as with any other treaty provision – the ultimate goal is to determine what the contracting parties actually consented to. Thus, the fact that dispute resolution clauses should be construed neither liberally nor restrictively does not authorize international tribunals to interpret such clauses in a manner which exceeds the consent of the contracting parties as expressed in the text. To go beyond those bounds would be an act *ultra vires*.”), Annex 7 to the Claimant’s Submission on Costs, 5 March 2015. The Tribunal has found no authority in related fields to cause it to doubt the conclusions in these decisions. See, e.g., *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 2009 ICJ Rep. 213, at para. 48 (“[T]he Court is not convinced by Nicaragua’s argument that Costa Rica’s right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua ... While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e., in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.”).

⁵⁶¹ Claimant’s Rejoinder on Jurisdiction, at para. 27.

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258. Both Parties concur that Section 39 is a unilateral declaration and that both international law and PNG law are relevant to the interpretation of Section 39 of the IPA.⁵⁶² The Claimant argues that “some mix of national and international law governs [Section 39’s] interpretation,”⁵⁶³ while the Respondent accepts that this unilateral declaration “is of a hybrid nature because being a national law, but intended to operate, to an extent, on the international plane, the approach should be a mix of both national and international law principles.”⁵⁶⁴
259. The Tribunal notes that several arbitral tribunals have previously addressed, with varying results, the issue of what set of interpretive rules applies to the construction of domestic investment legislation that is said to contain a standing offer to arbitrate to foreign investors.⁵⁶⁵ The approach taken by those tribunals has ranged from the application of “general principles of statutory interpretation,” taking into account both “relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations,” to the application of international law without any reservation, to the application of domestic law “subject to ultimate governance by international law.”⁵⁶⁶
260. In *SPP v. Egypt*, the ICSID tribunal formulated the issue, and its preferred approach, as follows:

[T]he jurisdictional issue in this case involves more than interpretation of municipal legislation. The issue is whether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty. Resolution of this issue involves both statutory interpretation and treaty interpretation. Also, to the extent that Article 8 is alleged to be a unilateral

⁵⁶² See above, e.g., at paras. 52, 93-94, 105-106.

⁵⁶³ Response on Jurisdiction, at para. 130. See above at para. 93.

⁵⁶⁴ DT(Day1).11.16-20. See above at para. 193.

⁵⁶⁵ See *CEMEX v. Venezuela*, at paras. 72-79, **Exhibit CA-2** (citing, in particular, *SPP v. Egypt*, *CSOB v. Slovak Republic*, *Zhinvali v. Georgia*); *Mobil v. Venezuela*, at paras. 77-85 (“Legislation and more generally unilateral acts by which a State consents to ICSID jurisdiction must be considered as standing offers to foreign investors under the ICSID Convention. Those unilateral acts must accordingly be interpreted according to the ICSID Convention itself and to the rules of international law governing unilateral declarations of States.”), **Exhibit RL-4**.

⁵⁶⁶ See *Mobil v. Venezuela*, at paras. 82, 85 (regarding *SPP v. Egypt*, *CSOB v. Slovak Republic* and *Zhinvali v. Georgia*, respectively), **Exhibit RL-4**.

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declaration of acceptance of the Centre's jurisdiction, subject to reciprocal acceptance by a national of another Contracting State, the Tribunal must also consider certain aspects of international law governing unilateral juridical acts.⁵⁶⁷

261. Accordingly, the *SPP* tribunal applied the following principle of interpretation:

[I]n deciding whether in the circumstances of the present case Law No. 43 constitutes consent to the Centre's jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations.⁵⁶⁸

262. Another example is the arbitral tribunal's decision in *CEMEX v. Venezuela*, holding that:

Unilateral acts by which a State consents to ICSID jurisdiction are standing offers made by a sovereign State to foreign investors under the ICSID Convention. Such offers could be incorporated into domestic legislation or not. But, whatever may be their form, they must be interpreted according to the ICSID Convention and to the principles of international law governing unilateral declarations of States.⁵⁶⁹

263. Similarly, in *Mobil v. Venezuela*, the tribunal decided that:

It is on the basis of th[e] rules of international law governing the interpretation of unilateral acts formulated within the framework and on the basis of a treaty that this Tribunal will now proceed to the interpretation of Article 22 of the [Venezuelan] Investment Law.

The Tribunal must add that the fact that domestic law and the international law of treaties are not controlling or dispositive does not mean that they should be completely ignored:

(i)... when tribunals interpret unilateral acts, they must have due regard to the intention of the State having formulated such acts. In this respect domestic law may play a useful role.

(ii) Although the law of the treaties as codified in the Vienna Convention is not relevant in the interpretation of unilateral acts, the

⁵⁶⁷ *SPP v. Egypt*, at para. 61, **Exhibit CA-3**.

⁵⁶⁸ *SPP v. Egypt*, at para. 61, **Exhibit CA-3**.

⁵⁶⁹ *CEMEX v. Venezuela*, at para. 79, **Exhibit CA-2**.

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provisions of that Convention may ‘apply analogously to the extent compatible with the *sui generis* character’ of unilateral acts.⁵⁷⁰

264. The Tribunal is of the view that, where national investment legislation is claimed to contain a standing offer to arbitrate under an international instrument, such as the ICSID Convention, that provision constitutes a unilateral declaration made by a State that is rooted in the national legal order of that State, but that also (assertedly) produces effects under international law. To use the words of the *SPP* tribunal, unlike a treaty, Section 39 of the IPA “is not the result of negotiations between two or more States, but rather the result of a unilateral act by a single State.”⁵⁷¹
265. In this regard, the Tribunal concludes that such legislative provisions are of a “hybrid” nature. As a consequence, interpretation of those provisions must also be approached from a hybrid perspective, taking into account both that State’s domestic law on statutory construction and international law. Where the principles of interpretation under the State’s domestic law conflict with international law principles, international law principles will ordinarily prevail, although this is an issue that must be resolved on a case-by-case basis, in light of the nature of the conflict. In general, the relevant rules of international law would be *sui generis*, reflecting the character of unilateral acts, but the Vienna Convention’s provisions will often be applicable by analogy.
266. Beyond the general agreement that both international and PNG law are relevant to a certain extent, one of the specific areas of disagreement that emerges from the Parties’ submissions is whether the *effet utile* principle should apply to the interpretation of Section 39 of the IPA. The Claimant argues that *effet utile* should apply as one of the common canons of statutory construction; it was applied in the ICSID arbitration context in *SPP v. Egypt*⁵⁷² and otherwise exists in an equivalent form under Section 190(4) of the PNG Constitution.⁵⁷³ The Respondent argues that *effet utile* should not apply because it “is now

⁵⁷⁰ *Mobil v. Venezuela*, at paras. 95-96, **Exhibit RL-4**.

⁵⁷¹ *SPP v. Egypt*, at para. 59, **Exhibit CA-3**.

⁵⁷² See above at paras. 55(c), 94-95. See also above at paras. 98, 115-116, 152, 176, 216.

⁵⁷³ See above at para. 106.

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no longer taken into account in interpreting state's unilateral declarations, including its domestic legislation," as distinguished from treaties.⁵⁷⁴

267. *Effet utile* has been recognized as one of the principles of treaty interpretation under international law.⁵⁷⁵ However, whether this principle applies to the interpretation of unilateral declarations of the States has been less fully considered, particularly in the context of investment arbitration. In *SPP*, the arbitral tribunal referred to *effet utile* as a principle of statutory interpretation, noting that:

"Under general principles of statutory interpretation, a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text."⁵⁷⁶

By contrast, in *CEMEX v. Venezuela*, the tribunal refused to apply the principle of *effet utile* to unilateral declarations, relying on ICJ judgments in *Anglo-Iranian Oil Co.* and *Fisheries Jurisdiction*.⁵⁷⁷

268. In the Tribunal's view, as explained above, provisions of domestic investment legislation that assertedly contain the State's standing offer to arbitrate must be interpreted taking into account both international law and the law of that State. Regardless of whether it applies to "pure" unilateral declarations made by States under international law, the Tribunal is of

⁵⁷⁴ Objections to Jurisdiction, at para. 37. *See above* at para. 55(c).

⁵⁷⁵ *See, e.g., Fisheries Jurisdiction* (Spain v. Canada), ICJ Reports 1998, p. 455, at para. 52 (The principle of effectiveness "[c]ertainly... has an important role in the law of treaties and in the jurisprudence of this Court."), **Exhibit CA-37, RL-54 and Annex 33 to Dolzer Report; Anglo-Iranian Oil Co.** (United Kingdom v. Iran), ICJ Reports 1952, p. 105 (The Court recognized that the principle of *effet utile* "should in general be applied when interpreting the text of a treaty."), **Exhibit CA-35** (cited in *CEMEX v. Venezuela*, at para. 110, **Exhibit CA-2**); *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, at para. 110 (referring to "the rule *ut magis valeat quam pereat* ('*effet utile*')"), **Exhibit CA-31; CEMEX v. Venezuela**, at para. 107, **Exhibit CA-2**. The Tribunal has found no authority to cause it to doubt the conclusions in these decisions. *See, e.g., Pan American Energy LLC and BP Argentina Exploration Co. v. Argentine Republic*, ICSID Case No. ARB/03/13, and *BP America Production Co. and Others v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, at para. 132 ("Given [the parties' silence], the provision must be considered to carry some legal meaning on account of the rule *ut magis valeat quam pereat* ('*effet utile*')."); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, at para. 95 ("Such an interpretation [of a Treaty provision] runs counter to the general principle of effectiveness ('*effet utile*') and for that reason also ought to be set aside.").

⁵⁷⁶ *SPP v. Egypt*, at para. 94, **Exhibit CA-3**.

⁵⁷⁷ *See CEMEX v. Venezuela*, at paras. 110-112, **Exhibit CA-2**. *See also Mobil v. Venezuela*, at para. 118, **Exhibit RL-4**.

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the view that *effet utile* is one of the common principles of statutory construction that generally apply to the interpretation of such “hybrid” provisions.

269. In the Tribunal’s view, the same considerations that warrant application of *effet utile* to treaties apply fully to “hybrid” instruments like Section 39 of the IPA and Section 2 of the IDCA: States ordinarily intend their legislative acts, particularly in the context of investment legislation, to have meaning and to produce consequences, rather than to be empty or meaningless. *Effet utile* gives effect to that common sense proposition.

B. Interpretation of Section 39 of the IPA and Section 2 of the IDCA

270. As noted above, the Parties disagree as to the meaning of Section 39 of the IPA and Section 2 of the IDCA. The Claimant maintains that:

[I]nterpreted objectively and in good faith, Section 39 of the IPA is, at its most basic level, a deliberate statement by the State that disputes arising out of foreign investment are subject to resolution in accordance with the ICSID Convention⁵⁷⁸

According to the Claimant, the context and purpose of the PNG legislation, as well as subsequent practice of the Respondent, confirm this interpretation.⁵⁷⁹

271. By contrast, the Respondent argues that, “regardless of whether a literal, contextual or purposive interpretation is taken of Section 39 and Section 2, no ‘*consent in writing*’ necessary for ICSID’s jurisdiction over the matter may be construed from either Section 39 or Section 2.”⁵⁸⁰

272. The Tribunal’s mandate therefore requires it to interpret Section 39 of the IPA and Section 2 of the IDCA, in light of the Parties’ submissions, to determine their meaning and legal significance. These provisions of PNG law have not been previously interpreted or applied

⁵⁷⁸ Response on Jurisdiction, at para. 204. *See above* at paras. 108-111.

⁵⁷⁹ *See above* at paras. 112-114.

⁵⁸⁰ Objections to Jurisdiction, at para. 24.

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by any international arbitral tribunal, and the Tribunal's task is therefore one of first impression.

273. Preliminarily, like other investment tribunals faced with an analogous interpretive task, the Tribunal considers that, although the Respondent's interpretation of its own legislation "is unquestionably entitled to considerable weight, it cannot control the Tribunal's decision as to its own competence."⁵⁸¹ It is for the Tribunal itself, applying the principles of construction set out above, independently to construe the relevant provisions of PNG law. The Respondent's interpretation is of relevance, but no more so than that of other parties; the decisive issue is how the text of the legislative provision, in all the circumstances, would be understood by those to whom it is addressed.

274. In fulfilling its interpretive mandate, the Tribunal analyzes the relevant statutory provisions in light of the ordinary meaning of their language, objectively construed, as well as their purpose and relevant context. The Tribunal also considers the legislative history of these provisions and the investment promotion materials as part of the relevant context in which the legislation was adopted and understood.

1. Textual Interpretation

275. The starting point of interpretation of PNG investment legislation is the ordinary or grammatical meaning of the words used in the relevant statutory provisions, objectively construed, as they would be understood by a reasonable investor or other addressee.⁵⁸²

276. The critical provisions on which the Tribunals' decision turns are Section 39 of the IPA and Section 2 of the IDCA. Article 2 of the IDCA provides that "[a] dispute shall not be referred to the Centre unless the dispute is fundamental to the investment itself."⁵⁸³ In turn,

⁵⁸¹ *SPP v. Egypt*, at para. 60, **Exhibit CA-3**. See also *CEMEX v. Venezuela*, at para. 70 ("[A] sovereign State's interpretation of its own unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues. Thus the interpretation given to Article 22 by Venezuelan authorities or by Venezuelan courts cannot control the Tribunal's decision on its competence."), **Exhibit CA-2**; *Mobil v. Venezuela*, at para. 75, **Exhibit RL-4**.

⁵⁸² See, e.g., *SPP v. Egypt*, at para. 74, **Exhibit CA-3**; *CEMEX v. Venezuela*, at para. 90, **Exhibit CA-2**.

⁵⁸³ IDCA (as amended in 1982), at Section 2, p. 2, **Exhibit CL-2**.

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according to Section 39 of the IPA, “[t]he *Investment Disputes Convention Act 1978*, implementing the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, applies, according to its terms, to disputes arising out of foreign investment.”⁵⁸⁴

277. The instrument upon which the Claimant principally relies in arguing that the Respondent has made a standing offer to arbitrate disputes at ICSID is the IPA, and specifically its Section 39. The Claimant’s submissions on this issue have evolved through this arbitral proceeding, from the initial position articulated in the Claimant’s Request for Arbitration – “[e]ither on its own, or when read in conjunction with Section 2 of the IDCA, Section 39 of the IPA constitutes a standing offer by the Respondent to arbitrate investment disputes at ICSID”⁵⁸⁵ – to the position that Section 39 of the IPA constitutes “consent in writing,” which requirement “is satisfied by the word ‘*applies*’.”⁵⁸⁶
278. In reply, and as detailed above, the Respondent submits that literal interpretations of the IPA and the IDCA “leave no doubt that the State has not consented to ICSID arbitration,”⁵⁸⁷ because Section 39 of the IPA merely provides that the IDCA “applies, according to its terms,” and thus refers back to the IDCA, and is therefore subject to the requirement of a separate “consent in writing,”⁵⁸⁸ not independently provided by either Section 2 or Section 39.
279. The Tribunal has carefully considered the Parties’ arguments and submissions, which have been both thorough and of great assistance. The Tribunal records with particular appreciation the value of the oral and written submissions of both Parties’ counsel.

⁵⁸⁴ IPA, at Section 39, **Exhibit CL-1**.

⁵⁸⁵ Request for Arbitration, at para. 67. *See above* at para. 41.

⁵⁸⁶ Rejoinder on Jurisdiction, at para. 34. *See above* at para. 179.

⁵⁸⁷ *See above* at paras. 52-59.

⁵⁸⁸ *See above* at paras. 52-59, 66.

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280. In the Tribunal’s view, the meaning of Section 39 of the IPA turns on the interpretation of the statement that the IDCA “applies, according to its terms.” It is this text, and ultimately only this text, that provides, or fails to provide, the State’s standing offer to arbitrate.
281. The Parties agree that, grammatically, Section 39’s reference to “its terms” means the terms of the IDCA, rather than those of the ICSID Convention.⁵⁸⁹ The IDCA attaches the ICSID Convention, as an annex, and implements the Convention, but IPA Section 39’s reference is, as the Parties agree, to the IDCA, not the Convention. The Parties are in disagreement, however, concerning the meaning of, and relationship between, the words “applies” and “according to its terms,” as used in Section 39.
282. The Claimant argues that the words “applies” and “according to its terms” play two distinct functions: the word “*applies*” has an “*independent* function – it declares the State’s consent,” whereas the words “*according to its terms*” are “cross-referential and fundamentally concerned with ... ensuring that the scope of the State’s consent is limited according to the terms of IDCA Section 2” (*i.e.*, to disputes that are fundamental to investment itself).⁵⁹⁰ According to the Claimant, the word “terms” encompasses “all of the articles of the ICSID Convention,” including Article 25’s requirement of consent in writing, which is then satisfied by the preceding word “applies.”⁵⁹¹ Put simply, the Claimant argues that, by declaring all of the ICSID Convention applicable to investment disputes, Section 39 of the IPA provides the written consent required by Article 25 of the Convention.
283. The Respondent submits that this is an “artificial way of construing” Section 39’s decisive phrase; rather, the expression “applies, according to its terms” “should be construed together ... [and] ‘according to its terms’ governs or limits the application,” which “includes the consent in writing” and “the issue about nationals of contracting states.”⁵⁹² In other

⁵⁸⁹ See above at paras. 53, 66, 109, 111(b), 150(c), 153, 198-200.

⁵⁹⁰ Response on Jurisdiction, at para. 208. See above at para. 109.

⁵⁹¹ Response on Jurisdiction, at para. 209. See above at para. 109.

⁵⁹² DT(Day1).30.12-19. See above at paras. 201-202.

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words, the Respondent argues that the word “terms” encompasses all the requirements of the ICSID Convention, including Article 25’s “consent in writing” requirement, and that this requirement is not satisfied by Section 39 itself.⁵⁹³

284. These arguments are finely balanced and the proper interpretation of Section 39 is by no means free from doubt. Nonetheless, reading the words of the legislation literally, the Tribunal concludes that Section 39 of the IPA simply refers the reader to the IDCA, which “applies, according to its terms.” The terms of Section 39, read literally, do nothing more than declare that the IDCA applies, without adding to the content of the IDCA.
285. As both Parties appear to acknowledge, Section 39 refers to all of the terms of the IDCA. There is no exception in Section 39’s text for any of the “terms” of the IDCA that are made applicable through the operation of Section 39.
286. The Tribunal is unable to discern, in this general reference to the IDCA, anything that would qualify as an independent consent to ICSID jurisdiction by the State. In the Tribunal’s view, Section 39’s natural and ordinary meaning is a declaration that the terms – all the terms – of the IDCA apply to foreign investments. Nothing in Section 39’s text does more than that.
287. There is nothing in Section 39’s general reference to the IDCA that can fairly be read to satisfy the specific requirement for written consent to ICSID jurisdiction under Article 25 of the Convention. There is no specific reference to consent or ICSID jurisdiction in Section 39, or in the IDCA, apart from Section 2 of the IDCA (which, as discussed below, contains no such consent). In particular, there is nothing in Section 39 that indicates that Article 25’s requirement for consent is satisfied, or waived, in future cases. If anything, the general reference of Section 39 reaffirms the continued application of the requirement for consent, “according to its terms,” rather than fulfills or waives it.

⁵⁹³ See above at para. 203.

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288. The Tribunal has no doubt that Section 2 of the IDCA does not provide consent to ICSID jurisdiction. That is the Respondent's position,⁵⁹⁴ and the Claimant accepts this as well⁵⁹⁵ (although its initial position was arguably to the contrary⁵⁹⁶).
289. In the Tribunal's view, the Parties' positions regarding Section 2 are correct: the provision does not grant consent, but instead limits the cases in which future consent may be given. The function, and the only function, of Section 2 of the IDCA is to narrow the category of disputes that may be referred to ICSID to disputes that are "fundamental to the investment itself."
290. Section 2 does not eliminate, and does not affirmatively satisfy, the requirement of "consent in writing" under Article 25 of the ICSID Convention. Instead, this language simply mirrors the Respondent's 1978 Notification, in which it informed ICSID of its "wish[] to exclude certain types of disputes from ICSID's jurisdiction ... [and] will only consider submitting those disputes to the Centre which are fundamental to the investment itself."⁵⁹⁷ Indeed, Section 2 very clearly contemplates that future consent is required for submission to ICSID jurisdiction. Section 2 not only does not provide consent; it makes clear that future consent is required.
291. Likewise, there is nothing else in the IDCA, beyond Section 2, that would constitute consent to ICSID jurisdiction. The Claimant does not point to any other provisions of the IDCA that would have this effect or purpose. In any event, that is the clear import of the IDCA's text: it is Section 2 of the IDCA that is the only part of the statute that is addressed to the issue of ICSID jurisdiction. As already discussed, nothing in that provision provides consent to ICSID jurisdiction; on the contrary, the provision clearly contemplates a requirement that consent be provided in a future investment dispute.

⁵⁹⁴ See above at paras. 57-58, 62, 66, 148, 196-197, 216.

⁵⁹⁵ See above at paras. 179, 225(c).

⁵⁹⁶ As explained above, the Claimant's original position on consent was that "[e]ither on its own, *or when read in conjunction with Section 2 of the IDCA*, Section 39 of the IPA constitutes a standing offer by the Respondent to arbitrate investment disputes at ICSID." Request for Arbitration, at para. 57.

⁵⁹⁷ See above at para. 65.

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292. Thus, Section 39’s reference to the IDCA, including Section 2 of the IDCA, does not incorporate any consent to ICSID jurisdiction from the IDCA. That is because, as the text of Section 2 makes clear, and as the Parties agree, the IDCA does not contain any such consent. Thus, by making the IDCA applicable to investment disputes, Section 39 does not incorporate anything that can be regarded as consent to ICSID jurisdiction. And the act of “apply[ing]” the IDCA to investment disputes does not, if the IDCA contains no consent to ICSID jurisdiction, itself constitute consent to jurisdiction. Put simply, neither Section 2 standing alone, nor Section 39’s incorporation of Section 2, provides consent to ICSID jurisdiction.
293. The Tribunal is unable to conclude that Section 39’s statement that the IDCA “applies” separately constitutes consent to ICSID jurisdiction. The statutory declaration that the IDCA applies, read literally, is only a confirmation that the IDCA is in force and applicable to investment disputes. That declaration adds nothing by way of consent that the IDCA does not already provide (and, as noted above, the IDCA concededly does not provide the requisite consent to the ICSID jurisdiction, and, on the contrary envisages that consent must be given with respect to future disputes).
294. In the Tribunal’s view, this interpretation is confirmed by Section 39’s reference to “according to its terms” (*i.e.*, “according to [the IDCA’s] terms”). That language makes even more clear that Section 39 does not add anything to what was contained in the IDCA, but merely declares the IDCA’s applicability – whatever the IDCA’s terms may be.
295. In this regard, ICSID decisions cited by the Parties do not provide any reason to arrive at a different interpretation of Section 2 or Section 39. As summarized above, the Parties relied on several ICSID awards which interpreted and applied provisions of Egyptian⁵⁹⁸ and

⁵⁹⁸ Article 8 of the Egyptian Investment Law: “Investment Disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of agreements in force between the Arab Republic of Egypt and the investor’s home country, or within the framework of the Convention for the Settlement of International Disputes between the State and nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such law applies.” *SPP v. Egypt*, at para. 71, **Exhibit CA-3**; Response on Jurisdiction, at para. 138.

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Venezuelan⁵⁹⁹ investment law. None of those cases materially alters the Tribunal's interpretive task in this arbitration because they dealt with very different wording in different legislative provisions.

296. Because of the difference in the wording used in the Egypt Investment Law and the Venezuelan Investment Law, on the one hand, and Section 39 of the IPA, on the other hand, the Tribunal considers that extending the solutions reached in *SPP* or any of the Venezuela Cases to the present case would be inappropriate.
297. In particular, unlike Article 8 of the Egypt Investment Law, and as the Respondent pointed out,⁶⁰⁰ Section 39 of the IPA:
- a. does not contain mandatory language “shall be settled;”⁶⁰¹
 - b. does not set forth a “mandatory and hierarchic sequence of dispute settlement procedures”⁶⁰² for resolution of the parties’ dispute, including the right to dispute settlement conferred under a bilateral investment treaty, and culminating with the ICSID Convention;⁶⁰³
 - c. does not contain the language “within the framework of the Convention for Settlement of Investment Disputes between the State and the nationals of other countries to which

⁵⁹⁹ Article 22 of the Venezuelan Investment Law: “Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion or protection of investments, or disputes to which are applicable the provision of the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), shall be submitted to international arbitration according to the terms of the respective treaty or agreement, *if it so provides*, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.” *Mobil v. Venezuela*, at para. 68, **Exhibit RL-4** (emphasis added); Response on Jurisdiction, at para. 152. See also *CEMEX v. Venezuela*, at para. 64, **Exhibit CA-2**.

⁶⁰⁰ See above at paras. 54-55, 66(c).

⁶⁰¹ See *SPP v. Egypt*, at para. 74, **Exhibit CA-3**. See above at paras. 55, 66(c).

⁶⁰² *SPP v. Egypt*, at para. 116, **Exhibit CA-3**.

⁶⁰³ See *SPP v. Egypt*, at paras. 83-88, **Exhibit CA-3**. See above at paras. 55-56.

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Egypt has adhered by virtue of Law No. 90 of 1971, *where it (i.e., the Convention) applies.*⁶⁰⁴

298. With regard to the last of the foregoing points, the Respondent noted at the hearing on jurisdiction that such a reference *to the ICSID Convention* that applies would take the provision one step further towards the finding of consent.⁶⁰⁵ It is common ground, however, that no such language is contained in Section 39 of the IPA.
299. As noted above, Section 39 instead refers to back to *the IDCA – i.e., the Act*, and *not* the ICSID Convention. It is therefore the IDCA, and not the ICSID Convention itself, which “applies, according to its terms.” As already noted above, however, it is the Tribunal’s view (accepted by the Parties), that nothing in the IDCA provides consent to ICSID jurisdiction.⁶⁰⁶
300. The Tribunal therefore need not, and does not, decide whether a different result would be obtained if Section 39 had provided that the ICSID Convention itself, rather than the IDCA, “applies, according to its terms.” In that case, not presented here, the Tribunal would need to decide whether the legislation’s application of the ICSID Convention directly to foreign investments would constitute consent in writing to ICSID jurisdiction. That is not, however, the present case.
301. Section 39 refers to, and recognizes the application of the IDCA, but does not do the same with respect to the ICSID Convention itself. The IDCA implements the ICSID Convention in PNG, including by annexing the Convention, but the IDCA is not the same as the ICSID Convention, as the Claimant acknowledges.⁶⁰⁷ On the contrary, as already discussed, Section 2 of the IDCA fairly clearly provides that future consent – and only future consent in some categories – is necessary. Whatever the effect of direct and specific application of the ICSID Convention itself might be, the Tribunal is satisfied that application of the

⁶⁰⁴ *SPP v. Egypt*, at para. 71, **Exhibit CA-3**. See *above* at paras. 55, 95(d).

⁶⁰⁵ See *above* at paras. 198-200.

⁶⁰⁶ See *above* at paras. 288-292.

⁶⁰⁷ See *above* at para. 225.

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IDCA, including particularly Section 2 of the IDCA, does not constitute advance consent to ICSID jurisdiction.

302. Moreover, as the Claimant pointed out,⁶⁰⁸ unlike Article 22 of the Venezuelan Investment Law, Section 39 of the IPA:

- a. does not refer to an obligation relating to the settlement of disputes (“shall be submitted to international arbitration”);⁶⁰⁹
- b. does not contain “certain conditions” to which the obligation to submit disputes to arbitration is subject, including the conditional language “if it so provides;”⁶¹⁰
- c. does not contain language that renders two interpretations “grammatically possible” – one referring to international arbitration, and the other referring to the obligation to submit disputes to arbitration;⁶¹¹
- d. does not make any reference to the ICSID Convention but only refers to the IDCA.

303. Again, the Tribunal agrees that the different text of the Venezuelan Investment Law makes awards interpreting it of limited relevance here. Suffice it to say, however, that none of the awards provides any reason for the Tribunal to adopt a different reading of Section 39 from that set forth above.

2. Effet Utile

304. As noted above,⁶¹² in the Tribunal’s view, the principle of *effet utile* applies to the interpretation of Section 39 of the IPA in this case.

⁶⁰⁸ See above at para. 97.

⁶⁰⁹ See, e.g., *Mobil v. Venezuela*, at paras. 101-111, **Exhibit RL-4**.

⁶¹⁰ See, e.g., *Mobil v. Venezuela*, at paras. 98 (“The Parties agree that [Article 22 of the Venezuelan Investment Law] creates an obligation to go to arbitration subject to certain conditions and in particular subject to the last condition thus incorporated in Article 22. But they disagree on the interpretation to be given to that condition.”), 101-111, **Exhibit RL-4**.

⁶¹¹ See, e.g., *Mobil v. Venezuela*, at paras. 109-110, **Exhibit RL-4**.

⁶¹² See above at para. 266-269.

Award

305. The Respondent denies that Section 39 of the IPA would be “a provision without content” if the Tribunal were to adopt the Respondent’s textual interpretation.⁶¹³ According to the Respondent, Section 39 – like other analogous investment legislation provisions – “could serve useful purposes, *e.g.*, to recall and confirm the state’s commitments under ICSID or to ‘clear the way for the State to conclude specific types of dispute resolution agreement, without internal issues such as *ultra vires* arising, and as such ... [provide] a degree of certainty for investors’.”⁶¹⁴ The Respondent also argues that, within the wider context of the IPA, Section 39 “does serve a purpose to tell investors that ICSID arbitration may be available;”⁶¹⁵ “there is a purpose in putting everything in one statute, so that parties reading it can be made aware of it.”⁶¹⁶
306. The Claimant submits that “neither of these alleged purposes is convincing – first because there was no need for the provision to do either of these things, and secondly, because there is no evidence that either was what the State intended.”⁶¹⁷ The Claimant argues that the result of the application of *effet utile* in this case is two-fold: (i) “it triggers the actual application of the ICSID Convention to this dispute;” and (ii) it requires the Tribunal “to dismiss the State’s argument that [Section 39] merely serves to affirm the State’s commitment to the ICSID system,” which has already been affirmed twice – when the Respondent ratified the ICSID Convention, and when the Respondent passed the IDCA, “which implemented the Convention locally.”⁶¹⁸ In other words, if Section 39 of the IPA does not provide the Respondent’s consent to arbitrate, it serves no meaningful purpose.
307. The Tribunal agrees with the Respondent that *effet utile* does not authorize the Tribunal to re-write the legislative provisions.⁶¹⁹ As acknowledged by the Claimant, “intent and good faith come first,”⁶²⁰ whereas *effet utile* plays a subsidiary role in determining intent. As

⁶¹³ Reply on Jurisdiction, at para. 38. *See above* at para. 152.

⁶¹⁴ Objections to Jurisdiction, at para. 39. *See above* at paras. 55, 152, 157, 202, 213.

⁶¹⁵ DT(Day1).35.07-11.

⁶¹⁶ DT(Day1).35.15-17.

⁶¹⁷ Rejoinder on Jurisdiction, at para. 43. *See also* Rejoinder on Jurisdiction, at paras. 44-52.

⁶¹⁸ Response on Jurisdiction, at para. 268.

⁶¹⁹ *See* DT(Day1).37.22-24. *See above* at para. 216.

⁶²⁰ Response on Jurisdiction, at para. 263.

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the *CEMEX v. Venezuela* tribunal explained, *effet utile* “does not require that a maximum effect be given to a text;” rather, “[i]t only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible.”⁶²¹

308. That said, the principle of *effet utile* is an important interpretive tool. As noted above, it rests on the natural proposition that meaning should be given to the words of States, rather than the opposite. As other ICSID tribunals pointed out, this principle requires rejecting or disfavoring interpretations of treaties and similar instruments that would render particular provisions or language either meaningless or redundant.⁶²²

309. Nonetheless, there are serious reasons for applying this principle – disfavoring *ex abundanti cautela* interpretations – with circumspection in the context of unilateral declarations.⁶²³ The rationale of this position applies, in part, to national investment legislation which, as discussed above, has a hybrid character.⁶²⁴ In particular, unlike cases involving negotiated, bilateral treaties, a State’s legislation may in some circumstances be merely confirmatory. Critically, however, this remains a question of interpretation, in particular cases, of specific language. The presumption against *ex abundanti cautela*, whatever its precise terms, is merely an aid to what remains the objective construction of specific words in a particular context.

⁶²¹ *CEMEX v. Venezuela*, at para. 114, **Exhibit CA-2**. See Response on Jurisdiction, at para. 264. See above at paras. 115, 269.

⁶²² See, e.g., *CEMEX v. Venezuela*, at para. 114, **Exhibit CA-2**; *ConocoPhillips v. Venezuela*, at para. 261, **Exhibit CA-1**. See also *Pan American Energy LLC and BP Argentina Exploration Co. v. Argentine Republic*, ICSID Case No. ARB/03/13, and *BP America Production Co. and Others v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections dated 27 July 2006, at para. 132 (“Given [the parties’ silence], the provision must be considered to carry some legal meaning on account of the rule *ut magis valeat quam pereat* (‘*effet utile*’).”); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction dated 9 November 2004, at para. 95 (“Such an interpretation [of a Treaty provision] runs counter to the general principle of effectiveness (‘*effet utile*’) and for that reason also ought to be set aside.”); *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Jurisdiction, 17 October 2006, at para. 52 (“[W]henver possible, terms must be interpreted literally and given practical effect, which excludes redundancy.”)

⁶²³ See, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, ICJ Reports 1952, at p. 105, **Exhibit CA-35**; ILC Guiding Principles applicable to Unilateral Declarations of States Capable of Creating Legal Obligations (2006), Article 7, Commentary (3), **Exhibit RL-19**.

⁶²⁴ See above at para. 265.

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310. In the Tribunal’s view, application of *effet utile* does not provide a basis for finding consent to ICSID jurisdiction in Section 39. As explained above, the language of Section 39 of the IPA – even when read in conjunction with Section 2 of the IDCA – is insufficient to establish the Respondent’s “consent in writing” to ICSID jurisdiction. It is therefore not simply a matter of selecting between two plausible interpretations that follow from the grammatical meaning of the provisions. Finding consent in Section 39 requires going beyond, and to some extent against, the words of this provision.
311. The Tribunal sees no basis for doing so. Section 39 of the IPA serves a useful purpose, particularly in the context of a comprehensive national investment statute, even if it does not provide the Respondent’s standing offer to arbitrate at ICSID. As the Respondent pointed out, even on its interpretation, Section 39 serves constructive purposes, including declaring the continued applicability of the IDCA, notwithstanding the later enactment of the IPA; providing all material information regarding investors’ potential rights in one comprehensive statute;⁶²⁵ and clearing “the way for the State to conclude specific types of dispute resolution agreements.”⁶²⁶
312. The Tribunal is not convinced by the Claimant’s argument that the Respondent did not need to reaffirm its commitment to the ICSID Convention in Section 39 because it “has already been affirmed twice.”⁶²⁷ The Tribunal considers that the IPA sought to set forth a relatively detailed and comprehensive legislative regime addressing foreign investments. In that context, recording the continued force and effect of a prior legislative enactment, for the benefit of readers (including investors and courts), serves a useful purpose. The fact that the statute might, perhaps, have been interpreted to reach the same result, even absent Section 39, does not render the provision useless.
313. Section 39’s purpose is to provide a limited form of investment guarantee – *i.e.*, access to ICSID arbitration – which will be available, but only if the requirements of Article 25 of

⁶²⁵ See above at paras. 55, 152, 157, 202, 213.

⁶²⁶ Objections to Jurisdiction, at para. 39.

⁶²⁷ Response on Jurisdiction, at para. 268. See above at para. 116.

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the ICSID Convention are satisfied (*i.e.*, that there is a an investor from another ICSID Contracting State, an investment, a legal dispute, and consent in writing being provided by the parties). Section 39 provides this limited protection, without also providing a further offer to arbitrate then and there.

314. This result is not unusual. It is not uncommon for national legislation (and investment treaties) to set out provisions that are conditional upon completion of certain conditions. This is what Section 39 does: it refers to the conditions in Article 25 of the ICSID Convention, as implemented by the IDCA, and does not do more or less.
315. The Claimant agrees that all of the Article 25 requirements must be satisfied, but contends that the word “applies” “declares the State’s consent.”⁶²⁸ As explained above, the Tribunal sees no reason to differentiate between Article 25’s consent requirement, on the one hand, and the other Article 25 requirements, on the other hand. It is therefore unable to conclude that Section 39’s statement that the IDCA “applies” separately constitutes consent to ICSID arbitration.
316. PNG law principles reinforce the Tribunal’s conclusion. As pointed out by the Claimant, PNG law contains a principle analogous to *effet utile*.⁶²⁹ As a general matter, as set out in Part 2, Schedule 2.2 of the PNG Constitution, PNG law applies the rules and principles of English common law in force as at immediately before PNG’s independence.⁶³⁰ It is a well-established common law principle of statutory interpretation that a court should strive to give effect to every element of a statutory enactment.⁶³¹
317. For the reasons set out above, Section 39 is not meaningless or useless if it is not interpreted as constituting a standing offer to arbitrate; rather, it serves several possible purposes or

⁶²⁸ See above at para. 109.

⁶²⁹ See above at para. 106(b).

⁶³⁰ See First Griffin QC Report, at paras. 16-23; Schedule 2.2 of the Constitution of Papua New Guinea, Annex A3 to First Griffin QC Report; *Wahgi Savings & Loan Society Ltd. v. Bank of South Pacific Ltd.* [1980] PGSC 4 (per Kapi J), at pp. 15-16, Annex B1 to First Griffin QC Report.

⁶³¹ See, *e.g.*, *Hill v. William Hill (Park Lane) Ltd.* [1949] AC 530, at pp. 546-547 (“The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.”), **Exhibit CA-47**.

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functions. Nothing has been advanced by the Parties regarding PNG law that would conflict with the Tribunal's conclusion above, resulting from the application of *effet utile*.

3. Context and Purpose

318. The Tribunal has also carefully considered the Parties' submissions on the context and purpose of Section 39 of the IPA.
319. The Claimant relies on the purpose and context of the IPA, including the place of Section 39 in the chapter entitled "Investment Guarantees," and Sections 37 and 38 of the IPA, as confirming its case on consent.⁶³² The Respondent submits that neither the purpose of the IPA nor Sections 37 and 38 of the IPA indicate that "consent in writing" was provided in Section 39.⁶³³ The Parties also discuss the Respondent's BITs concluded prior to and around the time the IPA was enacted; the Respondent argues that these BITs contain clear language of express consent and show that the Respondent knows how to phrase its "consent in writing" when one is provided.⁶³⁴
320. The Tribunal examines the main elements of the Parties' context and purpose analysis in turn below.
321. **First**, Section 39's location in Part V of the IPA entitled "*Investment Guarantees*" does not in and of itself indicate that Section 39 sets forth an automatic right to neutral, international adjudication. The suggestion that inclusion of Section 39 in a Part of the legislation titled "*Investment Guarantees*" connotes an intention to confer an immediate right to international adjudication has a measure of credibility.
322. On more careful consideration, however, the title of Part V is of minimal assistance. If one assumes that Section 39 contains "guarantees," by virtue of its inclusion in Part V (labelled

⁶³² See above at paras. 112, 226(e).

⁶³³ See above at paras. 60-66, 205-215.

⁶³⁴ See above at paras. 61(c), 84, 88, 95(f), 117(d), 209.

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“Investment Guarantees”), it remains necessary to ascertain the content of those “investment guarantees.”

323. As explained above,⁶³⁵ the wording of Section 39 itself does not allow the Tribunal to conclude that the provision sets forth a right to arbitrate, absent a further “consent in writing” by the Respondent. What Section 39 identifies as “guarantees,” therefore, are the provisions of the IDCA and, as incorporated and implemented by the IDCA, the ICSID Convention. Both the statute and the Convention provide significant legal protections (“guarantees”), which is sufficient to explain the inclusion of Section 39 in a Part titled “Investment Guarantees.” The fact that Section 39 would provide greater legal protection for investors, if interpreted as the Claimant urges, does not alter this conclusion: Part V refers only to “Guarantees,” not the most favorable or protective guarantees that could be afforded.
324. The Tribunal considers that the natural interpretation of Section 39 is that it refers back to the investment protections provided by the IDCA. The inclusion of Section 39 in a Part of the IPA entitled “Investment Guarantees” does not, in the Tribunal’s view, alter the substantive content of Section 39’s terms.
325. More broadly, the Tribunal is doubtful that Part V’s title can provide any substantial assistance in interpreting Section 39. It is noteworthy that Section 37 (like Part V) is entitled “Investment *Guarantees*,” while Section 38 is entitled “The Convention Establishing the Multilateral Investment *Guarantee* Agency.” An entirely plausible explanation for the title to Part V (“Investment Guarantees”) is that it refers to the fact that two of the three provisions in Part V are concerned with guarantees. There is no necessary reason that Section 39 itself must be regarded as concerning guarantees, merely by virtue of its placement in Part V.⁶³⁶ But, even assuming it does, then, as discussed above, that

⁶³⁵ See above at paras. 279-303.

⁶³⁶ Further, neither the Parties nor the Tribunal have any doubt that Sections 37 and 38 of the IPA extend “investment guarantees” to investors. As the Respondent pointed out, those provisions are phrased in mandatory terms (“shall”) and set out specific rights. In contrast, Section 39 contains no such mandatory language, suggesting that it was not in fact intended to give investors the automatic right to international adjudication.

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title provides no real guidance in determining what the content of Section 39's guarantees are.

326. Similarly, Section 39 is entitled "International Centre for Settlement of Investment Disputes." Section 39 is not titled "Enforcement of Investment Guarantees," nor "Guarantee of ICSID Arbitration." The most that can be drawn from the titles to Part V and Section 39 is that the provision contains guarantees of some sort, and that the content of these is set out in the terms of that provision, implementing the ICSID Convention.
327. **Second**, the general purpose of the IPA also does not provide any basis for reaching a different conclusion. It is not disputed that one of the purposes of the IPA was to promote foreign investment; however, as the Respondent pointed out, there were other purposes, on which the parliamentary debate was focused, including the creation of the Investment Promotion Authority. More fundamentally, there are a variety of balances that could be struck in promoting foreign investment, and that general objective does not compel one interpretation or another of Section 39.
328. **Third**, as explained in Section V.B.4 below, the legislative history of the relevant PNG legislation does not assist the Tribunal in reaching a definitive conclusion either.⁶³⁷
329. **Finally**, the reference to the BITs entered into by the Respondent also does not advance the analysis. On this point, the Tribunal agrees with the Claimant that BITs relied upon by the Respondent are irrelevant, to the extent that they are not contemporaneous to the IPA; even where they are contemporaneous, they bear "no evidentiary value"⁶³⁸ of the Respondent's intent behind a separate, unrelated provision of domestic investment law.
330. The Tribunal agrees with the arbitral tribunal's analysis in *CEMEX v. Venezuela* in addressing similar arguments. The *CEMEX* tribunal noted that acceptance of arbitration clauses in BITs by Venezuela "does not imply that Venezuela was ready to accept such an

⁶³⁷ See below at Section V.B.4.

⁶³⁸ See above at para. 117(d).

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obligation vis-à-vis States with which it had no BIT. One cannot draw from Article 1 [*i.e.*, investment promotion purposes of the Venezuelan Investment Law] and from the Law as a whole the conclusion that Article 22 must be interpreted as establishing consent by Venezuela to submit to arbitration all potential disputes falling within the ambit of the ICSID Convention.”⁶³⁹

331. The *CEMEX* tribunal concluded that:

[T]he Tribunal cannot draw from this general evolution the conclusion that Venezuela, when adopting Article 22, intended to give in advance a general consent to ICSID arbitration in the absence of any Treaty. *For a State to commit itself through treaties creating reciprocal obligations is one thing; to commit itself unilaterally without counterpart is another.*⁶⁴⁰

332. In this case, the reference to the various BITs does not advance the discussion on whether Section 39 of the IPA constitutes the Respondent’s “consent in writing,” other than to illustrate the examples of possible language in which the Respondent’s consent may be expressed.⁶⁴¹ The language of the various BITs is irrelevant either for establishing the Respondent’s consent, or, conversely, for disproving its existence in Section 39 of the IPA.

4. Legislative History of the IPA and the IDCA

333. The Parties exchanged detailed submissions on the legislative history of the IPA and the IDCA, including the 1991 text of the IPA (the “1991 Bill”); Hansards of the 1991 Bill and the 1992 IPA; Hansards of the 1978 IDCA and its 1982 amendment.⁶⁴²

334. The Claimant has attached substantial significance to the legislative history of the IPA and the IDCA. According to the Claimant, the evolution that the relevant legislative provisions of PNG law underwent support its case on consent, because this evolution shows that “there was a progression towards consent over the three pieces of legislation.”⁶⁴³ The Claimant

⁶³⁹ *CEMEX v. Venezuela*, at para. 120, **Exhibit CA-2**.

⁶⁴⁰ *CEMEX v. Venezuela*, at para. 126, **Exhibit CA-2** (emphasis added).

⁶⁴¹ *See SPP v. Egypt*, at para. 111, **Exhibit CA-3**.

⁶⁴² *See above* at paras. 64(b), 154-158, 181-182, 208, 225.

⁶⁴³ *See above* at para. 225.

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further argues that legislative history evidences the Respondent's intention and desire to improve the investment protection climate in PNG and attract foreign investment.⁶⁴⁴

335. The Respondent, in turn, argues that the legislative history supports its position because, *inter alia*, it shows that the Respondent removed from the 1992 IPA the standing offer to arbitrate "non-dollar" disputes that was set out in the 1991 Bill, and that the purpose of enacting the IPA was primarily to create the Investment Promotion Authority.⁶⁴⁵ The Respondent argues that the 1991 Bill is irrelevant because it never entered into force, and was superseded by the 1992 IPA;⁶⁴⁶ the 1991 Bill was imperfect because it was adopted hastily, and was therefore substituted by the 1992 final version currently in force, in an effort to "improve" the previous version.⁶⁴⁷

a) Legislative History of Section 39 of the IPA

336. As explained below, the Tribunal is of the view that, contrary to the Claimant's suggestions, the evolution of the legislation – and in particular the change of language between the 1991 Bill and the 1992 IPA – suggests that the Respondent did not intend to extend a standing offer to arbitration under the ICSID Convention in that legislation. Rather, it would appear that the Respondent intended to withdraw what would have become the imperfect offer to arbitrate "non-dollar" disputes had the 1991 Bill been enacted, and instead adopted a general statement currently in Section 39 of the IPA that refers back to the IDCA that "applies, according to its terms."

337. These inferences are, however, necessarily of uncertain and subsidiary weight. In the Tribunal's view, the fundamental point is that there is nothing in the legislative history that justifies not giving effect to the plain, ordinary reading of Section 39 of the IPA (and Section 2 of the IDCA).

⁶⁴⁴ See above at para. 225(e).

⁶⁴⁵ See above at paras. 154, 156.

⁶⁴⁶ See above at para. 154.

⁶⁴⁷ See above at para. 154.

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338. The legislative history sheds some light on the Respondent's decision-making process in adopting the IPA. As explained below, the language of Section 39 of the IPA significantly changed between the 1991 Bill and the 1992 IPA.

339. The text of the two versions of Section 39 of the IPA is provided below:

1991 Bill, Section 39⁶⁴⁸	1992 IPA, Section 39 (current version)⁶⁴⁹
<p>1) A dispute resulting from interpretation or application of this Act shall be settled by the competent Papua New Guinea jurisdiction in accordance with the laws and regulations of the country.</p> <p>a. however, unless otherwise agreed by the parties concerned, disputes between Papua New Guinea State and foreign nationals relating to the application or interpretation of this code shall be settled definitively in arbitration conducted –</p> <p>i. in accordance with the provisions of the convention of March 18 1965, on the ‘Settlement of Investment Disputes between States and Nationals of other States’ adopted under the aegis of the International Bank for Reconstruction and Development, and ratified by the State; and</p> <p>ii. if the person or business concerned does not meet the nationality requirements stipulated in Article 25 of</p>	<p>The Investment Disputes Convention Act 1978, implementing the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, applies, according to its terms, to disputes arising out of foreign investment.”</p>

⁶⁴⁸ Sections 37 and 39 of the 1991 IPA Act, **Exhibit CL-51**.

⁶⁴⁹ Investment Promotion Act 1992, **Exhibit CL-1**.

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this convention, in accordance with the provisions of the additional mechanism approved on September 27 1978, by the Administrative Council of the International Centre for the Settlement of Investment Disputes (ICSID).

- 2) By agreement between the Government and investors in an enterprise certified under Part IV, any disputes arising out of the activities of that enterprise may be referred to international arbitration under the convention of the International Center for the Settlement of Investment Disputes (ICSID) or to any other international arbitration body to which the State is a beneficiary.”

340. The Tribunal agrees with the Claimant that Section 39(1)(a) of the 1991 Bill contained language that, had the 1991 Bill been enacted, would have constituted the Respondent’s standing offer to arbitrate “non-dollar” disputes in ICSID arbitration (and arguably “dollar” disputes as well).⁶⁵⁰ In the Tribunal’s view, however, the version of Section 39 in the 1991 Bill does not materially assist with construction of Section 39 of the 1992 Act. The two provisions differ so significantly that it is impossible to draw any guidance from the 1991 Bill as to the meaning of the wording in the current text of Section 39. In this regard, the Tribunal agrees with the Respondent that the 1991 Bill “affords [the Tribunal] no guidance in terms of construing the current IPA.”⁶⁵¹

341. The Hansards of the 1991 Bill and the 1992 IPA also do not provide any guidance for establishing the legislators’ intention on the issue of consent. The Hansard of the 1991 Bill indicates that the purposes of that Act included, *inter alia*, “[t]o promote and facilitate

⁶⁵⁰ See above at paras. 112(b), 182, 225(d).

⁶⁵¹ DT(Day1).59.19-20.

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investment in Papua New Guinea for domestic and foreign investors;” and “[t]o establish an Investment Promotion Authority.”⁶⁵² It also indicates that the legislator intended to “encourage both domestic and foreign investors particularly through assistance in setting up joint ventures, to bring together the expertise of both parties.”⁶⁵³ The Hansard of the 1991 Bill does not make any mention of ICSID, let alone any consent granted by the Respondent to arbitrate disputes with foreign investors at ICSID.⁶⁵⁴

342. The Hansard of the 1992 IPA⁶⁵⁵ also does not shed light on the intention behind the text of Section 39 of the IPA. The Claimant maintains that the Hansard of the 1992 Act aimed to “improve” the 1991 Bill, which could mean “an improvement from the point of view of the aims which [the Minister] articulated, which included to promote private sector investment as well as meet conditions set under the World Bank structural adjustment loan.”⁶⁵⁶ According to the Claimant, because the purpose of the 1992 Act was to “improve” the 1991 text,⁶⁵⁷ the current Section 39 shows that the Respondent “made a conscious decision to broaden the scope of IPA Section 39 and make it more attractive to foreign investors by declaring that the IDCA (and with it the ICSID Convention) applies to foreign investment disputes, rather than just disputes about the ‘interpretation or application’ of the IPA.”⁶⁵⁸

343. In contrast, according to the Respondent, this Hansard only indicates that the purpose of the IPA was to streamline procedures through the establishment of the Investment Promotion Authority, and it makes no mention of ICSID or of giving advance consent to ICSID arbitration or of broadening the scope of such consent compared to the previous

⁶⁵² **Exhibit RE-18**, at p. 48.

⁶⁵³ **Exhibit RE-18**, at p. 49.

⁶⁵⁴ *See above* at paras. 64(b), 154(d).

⁶⁵⁵ Second Reading of the Investment Promotion Authority Bill 1991, **Exhibit RE-16**.

⁶⁵⁶ DT(Day1).148.15-18.

⁶⁵⁷ Response on Jurisdiction, at para. 230. *See also* Second Reading of the IPA Bill 1991, at p. 45 (recording the PNG Minister for Trade and Industry’s statements that the 1992 IPA was meant “to incorporate ... improvements” to the 1991 bill and “replace and repeal the previous Act.”), **Exhibit RE-16**.

⁶⁵⁸ Response on Jurisdiction, at para. 230. The Claimant also argues that “the 1991 text shows that the State was intending to make an offer of ICSID arbitration in the IPA – on further consideration, the Government realised the offer it made in the 1991 form of the IPA was not good enough to give foreign investors real comfort, and so it took steps to improve the offer in the 1992 revision of the IPA.” Response on Jurisdiction, at para. 231.

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version of the Act.⁶⁵⁹ The Respondent argues that the intention of the legislature to make “improvements” to the previous version of the Act could be understood from the point of view of the State, rather than from the point of view of foreign investors.⁶⁶⁰

344. The Tribunal disagrees with the Claimant’s interpretation of the significance of the removal of the 1991 Bill’s language (which, as noted above, could have constituted the Respondent’s limited standing offer to arbitrate, had the 1991 Bill been enacted) from Section 39 in the 1992 IPA. The Tribunal is not convinced by the Claimant’s inference, which is merely based on the intention of PNG legislator to “improve” the 1991 text in the 1992 IPA.

345. The relevant passage of the 1992 Hansard reads:

[The 1991 Bill] was prepared under considerable time constraints in the light of this Government’s ambition to promote private sector investment as well as ambitions to meet conditions set under the World Bank structural adjustment loan. This circumstance resulted in an Act which as it turned out later on *could be substantially improved*. I therefore decided not to bring the Act into force. Instead I decided *to incorporate these improvements in this improved Bill which will replace and repeal the previous Act*.⁶⁶¹

346. Among the improvements made in the 1992 IPA, the Hansard cites, in particular: (i) the simplification of the certification procedures for foreign investors; (ii) the fact that “investment guarantees for foreign investors have been strengthened so as to cover all foreign investors, legally operating in the country;” and (iii) “several improvements ... made in order to strengthen the promotional functions of the Investment Promotion Authority.”⁶⁶² However, there is no mention of “consent in writing” to ICSID arbitration or any broadening of the standing offer to arbitrate. As noted by the Claimant, the silence

⁶⁵⁹ See above at paras. 154, 156, 212-213.

⁶⁶⁰ See above at para. 208(b).

⁶⁶¹ Second Reading of the Investment Promotion Authority Bill 1991, **Exhibit RE-16**, at p. 45 (emphasis added).

⁶⁶² Second Reading of the Investment Promotion Authority Bill 1991, **Exhibit RE-16**, at p. 46.

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may well have meant that the Parliament thought that dispute resolution provisions were just a technicality, and therefore did not address the issue.⁶⁶³

347. In any event, the Tribunal does not draw any conclusions, one way or the other, from the silence in the Hansard on the consent to arbitration at ICSID, and agrees with Mr. Webb's suggestion that the Hansard should be "neutral on the question of interpretation." Thus, the 1992 Hansard does not assist with the Tribunal's interpretive task. The general reference to the 1992 IPA's purpose of "promotion of domestic and foreign investment" in the Hansard⁶⁶⁴ does not, in itself, alter the Tribunal's analysis.
348. In the Tribunal's view, absent any clear indication to the contrary in the legislative history, deletion of the standing offer to arbitrate "non-dollar" disputes is not indicative of an intention to extend that offer to all categories of disputes. Likewise, the reference to a desire to "improve" the 1991 Bill in the 1992 IPA does not materially advance the analysis. As the Respondent pointed out, "improvement" is a multi-faceted concept, which could be taken from the perspective of the State or from that of an investor.⁶⁶⁵ It is also a general reference that did not necessarily extend to provisions regarding ICSID jurisdiction.
349. If anything, the legislative history arguably supports the Respondent more than the Claimant. Although Section 39(1)(a) in the 1991 Bill could have constituted a standing offer to refer "no dollars" disputes to ICSID arbitration (had the 1991 Bill been enacted), the Tribunal agrees with the Respondent that the deletion of this language in the 1992 IPA can be understood to suggest that the State "chose to depart from the wording used" in the 1991 Bill in the final version of Section 39 in the 1992 IPA;⁶⁶⁶ that departure would weigh towards the conclusion that the Respondent did not intend to make a standing offer to arbitrate. At a minimum, the replacement of the 1991 language with the current wording

⁶⁶³ See above at para. 225(e).

⁶⁶⁴ Second Reading of the Investment Promotion Authority Bill 1991, **Exhibit RE-16**, at pp. 45-46.

⁶⁶⁵ See above at para. 208(b).

⁶⁶⁶ Reply on Jurisdiction, at para. 54.

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of Section 39 cannot be interpreted as broadening the scope of the consent to arbitrate set forth in Section 39(1)(a).⁶⁶⁷

350. On balance, the legislative history of the IPA appears to show a regression – rather than a progression – in the scope of jurisdictional rights that the Respondent granted to foreign investors. While the 1991 Bill undoubtedly could have contained a standing offer to arbitrate “non-dollar” disputes – albeit of limited use – had the 1991 Bill been enacted, the 1992 IPA does not contain that language at all.

b) Legislative History of Section 2 of the IDCA

351. According to the Claimant, the original 1978 IDCA was an act that implemented the ICSID Convention in a comprehensive way, and which also annexed the Convention itself.⁶⁶⁸ Moreover, the Claimant argues that the 1982 amendment to the IDCA, which removed the requirement to exhaust local remedies,⁶⁶⁹ took the Respondent quite a long way down the line to an agreement to arbitrate,” because “it got rid of a major obstacle to foreign investment, which is the local remedies rule”⁶⁷⁰ The Claimant maintains that “[t]here was nothing that the Papua New Guinea parliament could have done after 1982 that would have made Papua New Guinea more available to ICSID than the expression of a consent to arbitrate. Nothing more was required.”⁶⁷¹

352. The Respondent submits that the Hansard of the 1978 IDCA indicated that consent was not provided in the IDCA itself but rather was required to be provided.⁶⁷² The Respondent further argues that the Hansard of the 1982 amendment to the IDCA similarly shows that “there was no attempt to say [that the Respondent is] providing the consent in writing to ICSID;” rather, the focus of the debate was to eliminate the requirement of exhaustion of

⁶⁶⁷ See above at para. 154.

⁶⁶⁸ See above at para. 225.

⁶⁶⁹ See above at para. 225(b).

⁶⁷⁰ DT(Day1).131.23-132.06. See above at para. 225(b).

⁶⁷¹ DT(Day1).146.12-147.03. See above at para. 225(f).

⁶⁷² See DT(Day2).38.18-39.06. See above at para. 208(d).

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local remedies which was reflected in “the sole change made in 1982” – *i.e.*, removal of the part of the provision “about local and diplomatic remedies.”⁶⁷³

353. The Tribunal considers it useful to provide the text of the original version of Section 2 in the 1978 IDCA and the text of Section 2 resulting from its 1982 amendment:

Original 1978 version of the IDCA, Section 2 ⁶⁷⁴	Section 2 of the IDCA in the Amendment Act (1982) ⁶⁷⁵
CLASSES OF DISPUTES WHICH MAY BE REFERRED TO THE JURISDICTION OF THE CENTRE	REPEAL AND REPLACEMENT OF SECTION 2
“A dispute shall not be referred to the Centre unless –	Section 2 of the Principal Act is repealed and replaced by the following:
(a) all administrative and judicial remedies in Papua New Guinea that are appropriate to the dispute have been exhausted; and	“2. CLASS OF DISPUTES WHICH MAY BE REFERRED TO THE JURISDICTION OF THE CENTRE
(b) the dispute is fundamental to the investment itself.”	No dispute shall be referred to the Centre unless the dispute is fundamental to the investment itself.”

354. In the Tribunal’s view, the original text of Section 2 and its amended version do not evidence the Respondent’s intention to make a standing offer to arbitrate. There is no dispute between the Parties that the 1978 Section 2 of the IDCA did not constitute consent or that the current version of Section 2 does not constitute consent in itself.⁶⁷⁶ Likewise, the legislative history of the IDCA does not assist the Claimant’s case either.

355. The Tribunal agrees with the Respondent that the Hansards of the 1978 IDCA and the 1982 Amendment Act indicate that consent in writing was still required in order to permit access to ICSID jurisdiction. This is particularly clear from the Hansard of the original IDCA.

⁶⁷³ DT(Day2).40.08-17. *See above* at para. 208(d).

⁶⁷⁴ Original 1978 Version of the IDCA, Section 2, **Exhibit CL-53**.

⁶⁷⁵ Act No. 14 of 1982 – Section 2 of the IDCA Amendment Act (1982), **Exhibit CL-3**.

⁶⁷⁶ *See above* at paras. 289-290. *See also above* at paras. 57-58, 62, 66, 148, 179, 196-197, 208(d), 216, 225(b)-(c).

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That Hansard states that the purpose of that bill “is to provide for the Convention on the Settlement of Investment Disputes – ICSID – to have internal effect in Papua New Guinea.”⁶⁷⁷ It further states that:

The centre may only be used for dispute settlement after all Papua New Guinea administrative and judicial remedies have been exhausted, *provided that consent in writing has been given to permit the matter to be brought to the centre.*⁶⁷⁸

Jurisdiction is ceded to the centre only after all Papua New Guinea administrative and judicial remedies have been exhausted, *provided that consent in writing has been given.*⁶⁷⁹

356. It is clear from the above excerpts that in 1978 there were two pre-conditions for bringing a dispute to ICSID arbitration under the IDCA – (i) exhaustion of local remedies; and (ii) consent in writing. This is also confirmed by the following passage from the Hansard:

By giving effect to the terms of the Convention, the flow of private international investment into Papua New Guinea should be stimulated. The limitations which should ensure that Papua New Guinea will not be disadvantaged *in entering any agreement in which ICSID clauses are included.*⁶⁸⁰

357. If the 1978 IDCA provided the Respondent’s consent in writing within the meaning of Article 25 of the Convention, there would have been no need for “any agreement in which ICSID clauses are included” to be entered into.
358. The Tribunal also agrees with the Respondent that the Hansard of the 1982 Amendment Act⁶⁸¹ shows that the revisions made to Section 2 were aimed at streamlining the dispute

⁶⁷⁷ Second Reading of the IDCA Bill 1978, at p. 15/6/2, **Exhibit RE-15**.

⁶⁷⁸ Second Reading of the IDCA Bill 1978, at p. 15/6/1, **Exhibit RE-15** (emphasis added).

⁶⁷⁹ Second Reading of the IDCA Bill 1978, at p. 15/6/2, **Exhibit RE-15** (emphasis added).

⁶⁸⁰ Second Reading of the IDCA Bill 1978, at p. 15/6/2-3, **Exhibit RE-15** (emphasis added).

⁶⁸¹ Hansard extracts in respect of the IDCA Amendment Act 1982, **Exhibit CL-15**.

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resolution process by removing the first, but only the first, of the above two requirements (*i.e.*, the requirement to exhaust local remedies).⁶⁸² The Hansard states that:

The Bill will remove from the Act a provision requiring that all domestic remedies be exhausted before this Bill can be referred to ICSID. We have found that the requirement to exhaust all domestic remedies, that is the attempt to settle disputes through all the courts and tribunals in Papua New Guinea has caused difficulty in negotiating contracts for the development of this country. Foreign investors [sic] prefer to be able to apply straight to ICSID if there is a dispute. Their argument is that the process of going to all the courts and tribunals of Papua New Guinea is costly and time consuming. Also the most satisfactory way of settling these disputes is through arbitration not through the judicial process.

Mr. Speaker, the Government believes that this agreement will be an incentive to foreign investors [sic] and will enable agreement with those investors [sic] to be concluded more speedily.⁶⁸³

359. As the Respondent pointed out, this Hansard demonstrates that the purpose of the 1982 amendment was to remove the requirement for local remedies to be exhausted; nothing was said about removing the second requirement of “consent in writing.”⁶⁸⁴ There is nothing in the Hansard that would indicate the removal of the “consent” requirement. The phrase “prefer to be able to apply straight to ICSID” does not remove that requirement; rather, when read in the context of the paragraph in which it is contained, it clearly refers to the removal of the requirement to exhaust local remedies as a pre-condition for referral of any dispute to ICSID.
360. In its expert opinion submitted at the registration stage, Professor Crawford opined that “IDCA s 2 was inserted in 1982 in substitution for an earlier provision requiring exhaustion of local remedies. Again the amendment might be argued to have had some operative

⁶⁸² See above at paras. 208(d), 352.

⁶⁸³ Hansard extracts in respect of the IDCA Amendment Act 1982, **Exhibit CL-15**, at p. 1.

⁶⁸⁴ See above at para. 208(d).

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effect.”⁶⁸⁵ In the Tribunal’s view, that amendment indeed had an operative effect – namely, that of removing the requirement to exhaust local remedies as the last additional obstacle to ICSID jurisdiction. Once that obstacle had been removed, investors could submit disputes to ICSID arbitration, provided that there was a “consent in writing” from the Respondent.

361. In light of the foregoing analysis and reasons, the Tribunal concludes that the legislative history of the PNG’s investment protection legislation does not change the conclusion that Section 39 of the IPA and Section 2 of the IDCA contain no standing offer to arbitrate under the ICSID Convention.⁶⁸⁶

5. Investment Promotion Materials

362. Finally, the Tribunal turns to the excerpts from the investment promotion materials relied upon by the Claimant. The Claimant argues that, as part of the Respondent’s “subsequent practice,” the Tribunal should take into account the statements on the Investment Promotion Authority’s website, before and after the filing of the Request for Arbitration, and on the PNG Embassy to the Americas website.⁶⁸⁷

363. According to the Claimant, those statements are “relevant” because they are statements “by an official agency authorised to make [them],” acting within the scope of its statutory mandate of the “competent body in respect of investment.”⁶⁸⁸ The Claimant submits that these statements are “damning” for the Respondent because they leave “no doubt in the reader’s mind: if you invest in PNG, and a dispute arises in relation to your investment, your dispute can be adjudicated at ICSID.”⁶⁸⁹

⁶⁸⁵ Prof. James Crawford AC SC, *Expert Opinion on the Screening Power of the ICSID Secretary-General under Article 36(3) of the ICSID Convention in Relation to Papua New Guinea Sustainable Development Program Ltd. v. Papua New Guinea*, 21 November 2013, at para. 15, **Exhibit RE-2**.

⁶⁸⁶ *See above* at paras. 275-303.

⁶⁸⁷ *See above* at paras. 113, 117, 230-233.

⁶⁸⁸ *See above* at para. 233(b).

⁶⁸⁹ Response on Jurisdiction, at para. 245. *See above* at para. 113.

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364. The Respondent argues that these investment promotion materials are not “subsequent practice falling within article 31 of the VCLT;”⁶⁹⁰ instead, they are purely “informative” and “cannot, on their own, confer ‘consent in writing’.”⁶⁹¹ The Respondent submits that, in any event, the excerpts from websites – both old and new – do not assist the Claimant because their language “cannot ... be construed as reflecting the State’s ‘consent’ to ICSID arbitration.”⁶⁹²
365. The Tribunal understands that the text of the website of the Investment Promotion Authority was modified as of 18 November 2013, as submitted by the Respondent.⁶⁹³ The website of the PNG Embassy to the Americas has remained unchanged.⁶⁹⁴
366. Turning to the text of the websites, the Tribunal considers it useful to reproduce the wording used on those websites in the below table.

Original Version of the Website of the Investment Promotion Authority (before 18 November 2013)⁶⁹⁵	Current Version of the Website of the Investment Promotion Authority (since 18 November 2013)⁶⁹⁶	Website of the PNG Embassy to the Americas
“Investment disputes can be settled through diplomatic channels or through the use of local remedies before having such matters adjudicated at the International Centre for the Settlement of Investment Disputes or through another appropriate tribunal of which Papua New Guinea [sic] is a member.”	“International Centre for Settlement of Investment Disputes. Section 39 of the [IPA] seeks to encourage greater flows of international investment by providing facilities for the conciliation and arbitration of disputes between government and foreign investors.”	“The issue of repudiating or cancelling contracts must be settled through diplomatic channels or through the use of other local remedies, before having such matters adjudicated at the International Centre for the Settlement of Investment Disputes or through another appropriate tribunal of which Papua New Guinea is a member.”

⁶⁹⁰ DT(Day2).5.15-17. *See above* at para. 210.

⁶⁹¹ *See above* at para. 210.

⁶⁹² Reply on Jurisdiction, at paras. 81, 83-84.

⁶⁹³ *See above* at para. 158(d).

⁶⁹⁴ *See above* at paras. 113, 158(f).

⁶⁹⁵ Screenshot of Investment Promotion Authority Website (October 2013), **Exhibit CE-17**.

⁶⁹⁶ Screenshot of Investment Promotion Authority Website (June 2014), **Exhibit CE-18**.

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367. The Tribunal agrees with the *SPP* tribunal that the investment promotion materials are, by their nature, usually informative and are not usually intended to have independent legal or normative significance. In this regard, the Tribunal agrees with the *SPP* tribunal that:

In determining the effect to be accorded [to] ... statements made in promotion investment literature ..., the Tribunal must take account of the fact that such statements by their nature are intended to be informative rather than normative. Investment promotion literature does not create rights; it informs potential investors of the rights they will enjoy by virtue of existing law if an investment is made.⁶⁹⁷

368. Applying the above principle, the *SPP* tribunal looked at the investment promotion literature – not to alter the terms of the statute – but to “confirm the conclusion already reached by the Tribunal on the basis of the text of Law No. 43 and the legislative intent thereof to the effect that Article 8 does not require a further *ad hoc* expression of consent to establish the jurisdiction of the Centre.”⁶⁹⁸

369. However, as noted above, the ICSID Convention does not set forth any limitations as to the form in which a State’s consent to arbitrate may be expressed.⁶⁹⁹ The Tribunal therefore sees no reason why, as a matter of principle, a State’s consent to arbitrate cannot be given in a statement on a website, or in another form of investment promotion literature. Notwithstanding, for the reasons detailed below, however, the Tribunal concludes that the pre-November 2013 version of the IPA website could not reasonably have been understood by an investor to have been of that nature.

370. Unlike in the *SPP* case, the statements on websites relied upon by the Claimant in this case make no reference to a “right to arbitration.”⁷⁰⁰ In the Tribunal’s view, these statements do not eliminate the requirement of “consent,” and do not themselves evidence or “confirm” such consent by the Respondent in either the IPA or the IDCA.

⁶⁹⁷ *SPP v. Egypt*, at para. 112, **Exhibit CA-3**.

⁶⁹⁸ *SPP v. Egypt*, at para. 115, **Exhibit CA-3**.

⁶⁹⁹ See above at paras. 244-245.

⁷⁰⁰ See *SPP v. Egypt*, at para. 114, **Exhibit CA-3**.

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371. The language of the statements cited by the Claimant is broad and of a general nature; they are also rife with inaccuracies.⁷⁰¹ For example, the pre-November 2013 IPA website refers to the requirement to exhaust local remedies “before” bringing a dispute to ICSID arbitration. The website was apparently based on the 1978 IDCA, and not the 1982 version (now in force): the requirement to exhaust local remedies was removed in the subsequent version of Section 2 of the IDCA.⁷⁰²
372. In the Tribunal’s view, the statements on the pre-November 2013 IPA website are not only outdated and inaccurate, but they are also equivocal and do not provide unambiguous interpretations of Section 39 or Section 2. The excerpt from the website reads as follows: “[i]nvestment disputes *can* be settled through diplomatic channels *or* through the use of local remedies *before having such matters adjudicated* at the International Centre for the Settlement of Investment Disputes *or* through another appropriate tribunal of which Papua New Guinea [sic] is a member.”
373. Even if the website text is understood as a statement that investment disputes “*can* be settled ... at [ICSID],”⁷⁰³ that statement does not clearly indicate that the Respondent’s consent has already been provided to ICSID arbitration. A variety of other interpretations of this statement are possible, including that the requirements of the ICSID Convention, including those set forth in Article 25 of the Convention, remain to be satisfied. If the website intended to express a right, different language would have been used – *e.g.*, “investment disputes shall be brought” to ICSID arbitration or “shall be settled through ICSID arbitration.”
374. Moreover, the website refers to ICSID “or ... another appropriate tribunal of which Papua New Guinea *is a member*.” Thus, the website indicates that PNG is “a member” of ICSID – or more accurately, a Contracting State to the ICSID Convention – and that other *fora*

⁷⁰¹ See above at para. 210.

⁷⁰² See above at paras. 358-359.

⁷⁰³ The text is in fact more equivocal. It states that “investment disputes can be settled” through diplomatic channels or local remedies, and then only implies that such disputes thereafter also “can be settled” through ICSID or other means. The text is ambiguous as to the status of ICSID or other international adjudication.

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may be available to investors (“*another appropriate tribunal* of which Papua New Guinea is a member”). The Claimant does not contend – nor could it – that this sentence means that PNG has extended its consent to arbitrate in other *fora*.

375. Thus, the website excerpt does nothing more than: (a) (mistakenly) say that local remedies must precede bringing the dispute to ICSID; (b) indicate that PNG is a member of ICSID; and (c) suggest (at best) that the dispute “can” be brought to ICSID. It does not say that investors have unconditional access to ICSID, or even that they can directly bring the dispute to ICSID. It does not say, as the Claimant argues, that “if you invest in PNG, and a dispute arises in relation to your investment, your dispute *can be adjudicated at ICSID*.”⁷⁰⁴
376. The Claimant also has not alleged, and there appears to be no evidence, that it relied upon the statements on these websites in making its investment in PNG. Absent evidence of such reliance, the Tribunal concludes that the language on the websites do not provide consent in circumstances where no such consent has been found in the relevant legislative provisions of the PNG investment law.
377. The Tribunal does not draw any adverse inference from the modification of the text of the website of the Investment Promotion Authority in this case, because there is no evidence of any bad faith or other inappropriate behavior on the Respondent’s part, beyond a mere circumstantial temporal proximity between the changes made to the Investment Promotion Authority’s website and the filing of the Request for Arbitration. As the original version of the IPA website shows, the relevant web-page contained a number of inaccuracies and required an update (for example, it still referred to the requirement to exhaust local remedies before bringing the dispute to ICSID, which, as explained below, was removed

⁷⁰⁴ See above at para. 113.

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by the 1982 Amendment Act to the IDCA⁷⁰⁵). The Tribunal considers that the Respondent's explanation for the amendment of the website is a plausible one.

378. In any event, what is relevant in this regard is what the IPA and the IDCA provide. The Tribunal has already indicated its views on these matters. The character of the Respondent's after-the-fact changes to the Investment Promotion Authority's website is therefore of very limited relevance.

* * *

379. For the foregoing reasons, the Claimant's claims fail for lack of "consent in writing" by the Respondent to the jurisdiction of the Centre and thus of this Tribunal. Because the Tribunal has arrived at this conclusion on the basis of the Respondent's first objection, the Tribunal considers that it is not necessary to decide on other objections raised by the Respondent, including that the Claimant does not qualify as an investor that has made the requisite investment in the PNG. Similarly, the Tribunal considers that it is not necessary to rule on the issue of whether Section 37(1) of the IPA constitutes an MFN clause.

VI. COSTS

A. *The Parties' Submissions on Costs*

1. The Respondent's Submission on Costs

380. In its Submission on Costs, the Respondent argues that the Tribunal has "full discretion under Article 61(2) of the ICSID Convention to make costs orders as it deems appropriate."⁷⁰⁶ According to the Respondent, "there is no universal 'starting point' / presumptive standard for the allocation of costs ... for ICSID proceedings."⁷⁰⁷ The

⁷⁰⁵ See *above* at paras. 358-359; DT(Day2).12.13-14.18 (Mr. Yeo: "If the tribunal notes, it's still talking about diplomatic channels or local remedies before the matter can go to ICSID. ... The reference to 'diplomatic channels' or 'use of local remedies' is actually a reference back to the original IDCA before the 1982 amendment. In terms of reflecting the position post-1982, it's simply wrong.").

⁷⁰⁶ Respondent's Submission on Costs, dated 5 March 2015, at para. 4.

⁷⁰⁷ Respondent's Submission on Costs, dated 5 March 2015, at para. 5. According to the Respondent, ICSID tribunals "commonly require parties to bear their own expenses and share arbitration costs equally in circumstances that either (a) do not justify a departure from the American rule, where that is used as a starting point; or (b) justify an equitable

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Respondent submits that “regardless of the ‘starting point’ for the analysis, the appropriate end point would be for parties to bear their own expenses and share the arbitration costs equally, and there are no countervailing factors (*e.g.*, procedural misconduct) warranting a different approach.”⁷⁰⁸

381. The Respondent argues that the Tribunal should decide that the costs “lie where they fall”⁷⁰⁹ and make no order as to costs in this arbitration, for the following reasons.

a. Costs associated with the Respondent’s Objections to Jurisdiction: the Respondent states that:

i. it “is prepared not to ask that the Claimant bears the costs of the Rule 41(1) Application, it being undisputed that the Claimant’s assets are assets held solely for the benefit of the people of Papua New Guinea;”⁷¹⁰

ii. “costs shifting would not be a meaningful exercise where the assets of *both* the Claimant and the State are to be used solely for the benefit of the People;”⁷¹¹ and

iii. there are “unusual” facts and “novel issues of law” in this case that “also favour the making of no costs order,” and this would be consistent with the approach of other ICSID tribunals in cases “where the matter concerns novel and complex questions in relation to which jurisprudence remains undeveloped.”⁷¹²

b. Costs associated with the Claimant’s Request for Provisional Measures and the Respondent’s 41(5) Application: the Respondent submits that:

allocation of costs, where the American rule is not used / not expressly used as a starting point.” Respondent’s Submission on Costs, dated 5 March 2015, at para. 5.

⁷⁰⁸ Respondent’s Submission on Costs, dated 5 March 2015, at para. 6.

⁷⁰⁹ Respondent’s Submission on Costs, dated 5 March 2015, at para. 14.

⁷¹⁰ Respondent’s Submission on Costs, dated 5 March 2015, at para. 2.

⁷¹¹ Respondent’s Submission on Costs, dated 5 March 2015, at para. 7.

⁷¹² Respondent’s Submission on Costs, dated 5 March 2015, at para. 8.

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- i. “there should be no order as to costs (*i.e.*, each party should bear its own expenses (‘party expenses’) and half of the costs payable under Articles 59 and 60 of the ICSID Convention (‘arbitration costs’)), given *inter alia* the relative newness of the Rule 41(5) procedure, the expediting effect the Rule 41(5) Application had on the Rule 41(1) proceedings, and the mixed result of the Claimant’s [Request for Provisional Measures];”⁷¹³
- ii. the Tribunal should not order costs against the Respondent in connection with Rule 41(5) Application because of “the relative newness of the Rule 41(5) procedure;”⁷¹⁴ because the Tribunal has not found the Respondent’s Rule 41(5) Application “to be an abuse of the Rule 41(5) procedure” as the Claimant argued;⁷¹⁵ and because costs and expenses “had not ... been wasted” given that the Rule 41(5) Application “resulted in less time being required for briefing and hearing” the Respondent’s Objections to Jurisdiction under Rule 41(1);⁷¹⁶
- iii. the Tribunal should not order costs in connection with the Claimant’s Request for Provisional Measures, because “no clearly prevailing party emerged” in respect of that application;⁷¹⁷ rather, the Tribunal “allowed only certain of the Claimant’s provisional measures requests and rejected the others.”⁷¹⁸

382. Accordingly, the Respondent requests that the Tribunal declare that:

- a. “each party shall bear its own expenses incurred in respect of the Rule 39, 41(1) and 41(5) Applications and in preparing its Submissions on Costs and Costs Statement;”⁷¹⁹
and

⁷¹³ Respondent’s Submission on Costs, dated 5 March 2015, at para. 3.

⁷¹⁴ Respondent’s Submission on Costs, dated 5 March 2015, at para. 9.

⁷¹⁵ Respondent’s Submission on Costs, dated 5 March 2015, at para. 10.

⁷¹⁶ Respondent’s Submission on Costs, dated 5 March 2015, at para. 11.

⁷¹⁷ Respondent’s Submission on Costs, dated 5 March 2015, at para. 12.

⁷¹⁸ Respondent’s Submission on Costs, dated 5 March 2015, at para. 13.

⁷¹⁹ Respondent’s Submission on Costs, dated 5 March 2015, at para. 14.

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b. “each party shall bear half of the arbitration costs in respect of the Rule 39, 41(1) and 41(5) Applications.”⁷²⁰

383. The Respondent’s costs statement is for the total amount of: (a) USD 350,000.00 (for the advance payments on account of the arbitration costs); and (b) SGD 837,626.25 + EUR 28,000.00 + AUS 36,000.00 (for the Respondent’s legal costs and expenses).⁷²¹

2. The Claimant’s Submission on Costs

384. In its Submission on Costs, the Claimant maintains that the Tribunal “has the authority and discretion to make awards of costs pursuant to Article 61(2) of the ICSID Convention.”⁷²² While the Claimant notes that Article 61(2) “gives the Tribunal broad discretion to award costs as it sees fit,”⁷²³ the Claimant invites the Tribunal to apply the costs follow the event principle,⁷²⁴ rather than the costs lie where they fall approach, which, according to the Claimant, “is becoming more of an exception rather than a rule.”⁷²⁵

385. In connection with each of the three applications considered by the Tribunal in this arbitration, the Claimant makes the following submissions.

a. ***Costs associated with the Claimant’s Request for Provisional Measures:*** the Claimant argues that it “should be awarded the costs incurred in the provisional measures phase (even if the State’s objection to jurisdiction pursuant to Rule 41(1) succeeds),”⁷²⁶ because the Respondent “intentionally and unapologetically took steps which posed a direct threat to the integrity of the arbitral proceedings,”⁷²⁷ according to

⁷²⁰ Respondent’s Submission on Costs, dated 5 March 2015, at para. 14.

⁷²¹ See Respondent’s Costs Statement, dated 5 March 2015, at Sections 1-6.

⁷²² Claimant’s Submission on Costs, dated 5 March 2015, at para. 3.

⁷²³ Claimant’s Submission on Costs, dated 5 March 2015, at para. 3.

⁷²⁴ The Claimant argues that, in applying this principle, ICSID tribunals “have taken into account, inter alia, ... (a) the reasonableness with which the parties pursued their claims and defences; and (b) the record as it reflects the parties’ general cooperativeness in achieving cost-effective results.” Claimant’s Submission on Costs, dated 5 March 2015, at para. 5.

⁷²⁵ Claimant’s Submission on Costs, dated 5 March 2015, at para. 4.

⁷²⁶ Claimant’s Submission on Costs, dated 5 March 2015, at para. 10. See also Claimant’s Submission on Costs, dated 5 March 2015, at para. 7.

⁷²⁷ Claimant’s Submission on Costs, dated 5 March 2015, at para. 10.

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- the Claimant, “this conduct is independent of the wider result in the arbitration and is sufficient to warrant a costs order against the State.”⁷²⁸
- b. **Costs associated with the Respondent’s 41(5) Application:** the Claimant submits that, because the Tribunal “dismissed the State’s 41(5) application *in toto*,”⁷²⁹ the Claimant is “entitled to an order that the State pay the costs that the Claimant reasonably incurred in the Rule 41(5) phase.”⁷³⁰ The Claimant argues that the Respondent’s conduct “amplif[ied] its costs exposure,”⁷³¹ including due to: (i) the fact that the Rule 41(5) Application “was dismissed comprehensively,”⁷³² and (ii) the Respondent “unnecessarily declined to accept the Claimant’s proposal that the Rule 41(5) objection be dealt with on the papers,” and the Respondent’s conduct in this regard was “unhelpful and unnecessarily escalated costs.”⁷³³
- c. **Costs associated with the Respondent’s Objections to Jurisdiction:** the Claimant argues that, if it prevails on jurisdiction, the Respondent “should be ordered to pay its reasonable costs incurred in this phase of the arbitration,” including the costs of engaging Professor James Crawford as external counsel.⁷³⁴ In the Claimant’s submission, the Tribunal “should adjust any cost order to reflect the fact that the State was not entirely helpful in producing the language of the relevant legislation.”⁷³⁵
386. The Claimant’s costs statement is for the total amount of: (a) USD 350,000.00 (for the advance payments on account of the arbitration costs); and (b) USD 1,611,645.98 (for the Claimant’s legal costs and expenses).⁷³⁶

⁷²⁸ Claimant’s Submission on Costs, dated 5 March 2015, at para. 10.

⁷²⁹ Claimant’s Submission on Costs, dated 5 March 2015, at para. 14.

⁷³⁰ Claimant’s Submission on Costs, dated 5 March 2015, at para. 15.

⁷³¹ Claimant’s Submission on Costs, dated 5 March 2015, at para. 16.

⁷³² Claimant’s Submission on Costs, dated 5 March 2015, at para. 16(a).

⁷³³ Claimant’s Submission on Costs, dated 5 March 2015, at para. 16(b).

⁷³⁴ Claimant’s Submission on Costs, dated 5 March 2015, at para. 20.

⁷³⁵ Claimant’s Submission on Costs, dated 5 March 2015, at para. 21.

⁷³⁶ See Claimant’s Schedule of Costs, dated 5 March 2015 (Annex A to the Claimant’s Submission on Costs).

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3. The Respondent's Reply Submission on Costs

387. In its Reply Submission on Costs, the Respondent reiterates that “*regardless* of whether the Tribunal chooses to adopt the American rule or the principle that costs shall follow the event as the ‘*starting point*’ for its costs analysis, the appropriate end point in view of the circumstances of this case would be for parties to bear their own expenses and share the arbitration costs ..., notwithstanding that the State would have been *wrongfully* forced to go through these proceedings ..., if the arbitration is eventually terminated for want of jurisdiction under Rule 41(1).”⁷³⁷ The Respondent argues that the Claimant has not established “any ground justifying a deviation from the above approach.”⁷³⁸
388. Should the Tribunal choose to apply a costs-shifting approach, however, the Respondent submits that “the costs presented by the Claimant ... – which were in excess of USD 1.6 million (*i.e.*, almost 2.5 times of the State’s total expenses) and which far exceeded the State’s corresponding expenses at every phase of the proceedings ... have not been shown to be reasonable, and should in any case be scaled down accordingly.”⁷³⁹ According to the Respondent, the Claimant has not challenged the factors that the Respondent cited in support of its position that “costs of the Applications should lie where they fall, *viz.* the relative newness of the Rule 41(5) procedure, the expediting effect the Rule 41(5) Application had on the Rule 41(1) proceedings, the mixed result of the Claimant’s Rule 39 Application, and more importantly, the fact that the assets of *both* the Claimant and the State are held for the benefit of the People.”⁷⁴⁰
389. The Respondent objects to certain allegations made in the Claimant’s Submission on Costs, which the Respondent considers as being “untrue and unwarranted,”⁷⁴¹ as follows.
- a. In response to the Claimant’s allegation that the Respondent “deliberately chose not to disclose” the 1991 IPA, the Respondent notes that, as explained in its submissions, it

⁷³⁷ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 1.

⁷³⁸ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 2.

⁷³⁹ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 3.

⁷⁴⁰ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 4.

⁷⁴¹ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 5.

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- did not produce the 1991 Bill because it “*never came into force* and was *irrelevant* to the interpretation of section 39” of the IPA.⁷⁴²
- b. In response to the Claimant’s assertion that the Respondent unnecessarily amplified the costs of Rule 41(5) phase by refusing that this application be dealt with on the papers, the Respondent notes that this assertion is “surprising” given that the parties “were at the outset *agreed* that the Rule 41(5) Application should in principle be disposed of after an oral hearing.”⁷⁴³ In any event, although Rule 41(5) Application did not succeed, the Tribunal “did not find that the State had acted unreasonably or had misused the Rule 41(5) procedure.”⁷⁴⁴
- c. In response to the Claimant’s assertion that its provisional measures application “should be deemed an ‘*independent costs event*’ as the State had purportedly infringed its ‘*self-standing*’ right to the *status quo*,” the Respondent argues that this argument is “a non-starter” because the Claimant “cannot rely on a non-existent ‘*right*’ to justify costs-shifting in disregard of the mixed outcome of Rule 39 Application.”⁷⁴⁵ Rather, according to the Respondent, the Claimant “had itself escalated costs of the Rule 39 Application by engaging in lengthy post-briefing correspondence in which it constantly shifted the basis for its provisional measures requests,” which is “a further reason *against* shifting costs of the Rule 39 Application in favour of the Claimant.”⁷⁴⁶
390. Moreover, the Respondent argues that the Claimant’s costs are in any case unreasonable,⁷⁴⁷ because: (a) the Claimant’s costs “far exceeded the State’s corresponding expenses at every phase of the proceedings;”⁷⁴⁸ and (b) the Claimant “has provided *no* detail (beyond

⁷⁴² Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 6.

⁷⁴³ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 7.

⁷⁴⁴ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 8.

⁷⁴⁵ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 9. The Respondent submits that: (a) “there is no ‘*self-standing right*’ to protection of *status quo* in general as rights to be preserved by provisional measures are circumscribed by the requesting party’s claims for reliefs;” and (b) the Tribunal “did not grant the Claimant’s request for a general order for the preservation of the *status quo* and had also noted that such a request would ‘*ordinarily fail*’.” Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 9.

⁷⁴⁶ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 10.

⁷⁴⁷ Respondent’s Reply Submission on Costs, dated 13 March 2015, at paras. 11-13.

⁷⁴⁸ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 11.

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the total costs incurred for each Application) on how its substantial costs came to be incurred,” making it “impossible to meaningfully assess the reasonableness of the Claimant’s costs.”⁷⁴⁹

391. The Respondent reiterates its requests for relief relating to costs, set out in paragraph 14 of its Submission on Costs.⁷⁵⁰

4. The Claimant’s Reply Submission on Costs

392. In its Reply Submission on Costs, the Claimant argues that the Tribunal “retains the discretion to make orders as to costs at any stage of the arbitration that it deems appropriate,” including to decide now on the costs relating to the various phases of proceedings to date.⁷⁵¹

393. The Claimant submits that the Respondent’s “submission on the state of the law is both inaccurate and internally inconsistent,” in particular because the Respondent concedes that “there is no universal ‘starting point’ with respect to the allocation of costs” but contradicts itself “by suggesting that there somehow needs to be a *justification* to depart from the principle that each party bears its own costs.”⁷⁵² According to the Claimant, “[t]his is not the law;” rather, “the ‘starting point’ is that costs follow the event and there is widespread support amongst international investment tribunals for the idea that the costs award should reflect success.”⁷⁵³ The Claimant argues that “the burden lies with the State to justify a departure from the principle that costs shall follow the event.”⁷⁵⁴

⁷⁴⁹ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 12.

⁷⁵⁰ Respondent’s Reply Submission on Costs, dated 13 March 2015, at para. 14.

⁷⁵¹ Claimant’s Reply Submission on Costs, dated 13 March 2015, at paras. 3-5.

⁷⁵² Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 6.

⁷⁵³ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 7.

⁷⁵⁴ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 8. The Claimant argues that, in its submissions in this arbitration, the Respondent “advocated the same approach that the Claimant asks the Tribunal to take now;” the Respondent “had previously championed the ‘costs follow the event’ approach,” and the Claimant “invites the Tribunal to draw its own inferences from this radical shift in the State’s position.” Claimant’s Reply Submission on Costs, dated 13 March 2015, at paras. 9-10.

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394. According to the Claimant, “conduct is an important factor that tribunals have regard to in determining a just and equitable cost order;” the factors that were considered by tribunals as tipping the scales in favour of adopting the costs follow the event approach included, *e.g.*, “misconduct, fraudulent activity or abuse of process by the losing party,” and “circumstances where parties have been uncooperative or engaged in behaviour that resulted in wastage of resources, time and costs.”⁷⁵⁵
395. In connection with each of the three applications considered by the Tribunal in this arbitration, the Claimant argues that:
- a. ***Costs associated with the Claimant’s Request for Provisional Measures:*** the Claimant submits that it “is entitled to the costs necessitated and/or occasioned by [the provisional measures] application.”⁷⁵⁶ The Claimant argues that the relevant factors to be taken into account include (a) “the Claimant’s critical success in restraining the State from disturbing the *status quo*, insofar as it relates to transferring (or issuing) OTML shares to third parties;” and (b) “the State’s manifest lack of respect for the integrity of these proceedings, which necessitated the [provisional measures] application in the first place.”⁷⁵⁷ On the latter point, the Claimant asserts that the Respondent displayed its lack of respect for the integrity of these proceedings by: (i) “declaring its intent to transfer OTML shares ... to third parties pending the determination of this dispute;” (ii) “acting in a manner that had a serious, adverse impact on the profitability of OTML;” and (iii) “undermining the quality of OTML’s management.”⁷⁵⁸
 - b. ***Costs associated with the Respondent’s 41(5) Application:*** the Claimant disagrees with the Respondent’s arguments on the “relative newness of the Rule 41(5) procedure,”⁷⁵⁹ and states that “it should have been obvious to the State that the procedure was wholly unsuited for cases involving ‘difficult questions of fact and law’”

⁷⁵⁵ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 11.

⁷⁵⁶ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 15.

⁷⁵⁷ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 12.

⁷⁵⁸ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 13.

⁷⁵⁹ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 16.

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at issue in this case.⁷⁶⁰ According to the Claimant, “the relative novelty of the procedure cannot be used by the State to mask the fact that its reliance on the Rule 41(5) mechanism was entirely misconceived.”⁷⁶¹

- c. ***Costs associated with the Respondent’s Objections to Jurisdiction:*** the Claimant argues that the Respondent “has consistently taken the approach that costs should follow the event” in its applications in this arbitration, and “[i]t is only now that the State sought to manufacture various bases to depart from its original position.”⁷⁶² According to the Claimant, the Respondent’s arguments on costs “are mere afterthoughts.”⁷⁶³ The Claimant submits that, “[i]f the Tribunal accepts that the favoured approach is that costs should follow the event, this approach should be consistently applied for all phases of the arbitration to date.”⁷⁶⁴

396. Accordingly, the Claimant seeks an order that it be awarded its costs in the arbitration,⁷⁶⁵ in the total amount of: (a) USD 350,000.00 (for the ICSID and Tribunal fees); and (b) USD 1,655,972.54 (for the Claimant’s legal costs and expenses, including those associated with the submissions and reply submissions on costs).⁷⁶⁶

B. The Tribunal’s Decision on Costs

397. As required by Rule 47(1)(j) of the ICSID Arbitration Rules, the Tribunal sets out its decision on the allocation of costs of this arbitration proceeding below. The Tribunal’s decision is the result of the careful consideration of the Parties’ Submissions on Costs and authorities relied upon by the Parties, and takes into account the Parties’ conduct during this arbitration.

⁷⁶⁰ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 18.

⁷⁶¹ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 20.

⁷⁶² Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 23.

⁷⁶³ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 23.

⁷⁶⁴ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 23.

⁷⁶⁵ Claimant’s Reply Submission on Costs, dated 13 March 2015, at para. 24.

⁷⁶⁶ See Claimant’s Schedule of Costs, dated 13 March 2015 (Annex A to the Claimant’s Reply Submission on Costs).

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398. As a preliminary matter, the Tribunal considers it useful to define the categories of costs allocated in this award. The Tribunal's award deals with two categories of costs:
- a. The "Costs of the Arbitration" shall include the Tribunal's fees and expenses, and the ICSID administrative charges and fees.
 - b. The "Legal Costs" shall include the legal fees and expenses, and any other party costs, incurred by either Party in the course of and in connection with this arbitration proceeding.

399. According to Article 61(2) of the ICSID Convention:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.⁷⁶⁷

400. As one leading commentator noted, this provision indicates that, if there is no agreement between the parties on the allocation of costs, "the tribunal is given discretion to make a decision on the issue."⁷⁶⁸

⁷⁶⁷ ICSID Convention, at Article 61(2). Similarly, Rule 28 of the ICSID Arbitration Rules gives discretion to the Tribunal in allocating costs:

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

⁷⁶⁸ C. Schreuer, *The ICSID Convention: A Commentary*, 2nd ed., CUP (2009), at p. 1224, para. 3, **Exhibit RL-87**.

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401. In the Tribunal's view, Article 61(2) of the Convention leaves the door open to the Tribunal to exercise its discretion,⁷⁶⁹ in light of all the circumstances of each case,⁷⁷⁰ to allocate costs among the parties in the manner that it considers fair and appropriate.⁷⁷¹
402. Article 61(2) does not set forth any presumption concerning allocation of costs among the parties. The practice of ICSID tribunals on apportioning costs is "neither clear nor uniform."⁷⁷² As the *LG&E v. Argentina* tribunal noted, "there is no uniform practice in treaty arbitration with regard to this matter."⁷⁷³
403. Different ICSID tribunals followed the "costs lie where they fall" principle,⁷⁷⁴ or "the costs follow the event" (or "loser pays") principle,⁷⁷⁵ or the principle that costs should be allocated "as a sanction against what they saw as dilatory or otherwise improper conduct in the proceedings."⁷⁷⁶ For example, one ICSID tribunal stated that "the recent practice of other arbitral tribunals in investment treaty arbitrations (including ICSID) [was] to take as their starting-point the general principle that the successful party should have its reasonable

⁷⁶⁹ See, e.g., *Burimi SRL & Eagle Games S.H.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013, at para. 162 (referring to the tribunal's "broad powers to rule on the costs incurred by the Parties and ICSID in connection with this proceeding"), Annex 17 to the Claimant's Reply Submission on Costs, 13 March 2015.

⁷⁷⁰ See, e.g., *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, at para. 235, **Exhibit RL-82**.

⁷⁷¹ Certain tribunals have used the terms "fair and reasonable." See, e.g., *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, at para. 236, **Exhibit RL-82**. Others stated that Article 61(2) allows an ICSID tribunal to allocate costs "as it deems appropriate." *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, at para. 150, Annex 1 to the Claimant's Submission on Costs, 5 March 2015; *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, at para. 316, Annex 5 to the Claimant's Submission on Costs dated 5 March 2015.

⁷⁷² C. Schreuer, *The ICSID Convention: A Commentary*, 2nd ed., CUP (2009), at p. 1229, para. 19, **Exhibit RL-87**.

⁷⁷³ *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, at para. 112, **Exhibit RL-80**. See also, e.g., *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, at para. 328, **Exhibit RL-85**. For an award applying the "costs lie where they fall" as a matter of principle or "normal practice" in ICSID arbitrations, see, e.g., *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, at para. 125, **Exhibit RL-79**.

⁷⁷⁴ C. Schreuer, *The ICSID Convention: A Commentary*, 2nd ed., CUP (2009), at pp. 1232-1235, paras. 33-40, **Exhibit RL-87**.

⁷⁷⁵ C. Schreuer, *The ICSID Convention: A Commentary*, 2nd ed., CUP (2009), at pp. 1229-1230, paras. 19-21, **Exhibit RL-87**.

⁷⁷⁶ C. Schreuer, *The ICSID Convention: A Commentary*, 2nd ed., CUP (2009), at pp. 1230-1231, para. 22, **Exhibit RL-87**.

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costs paid by the unsuccessful party, in accordance with the general position in other forms of transnational commercial arbitration.”⁷⁷⁷

404. Another ICSID tribunal decided that “the traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the public international rule which does not apply the principle that the loser pays the costs of the arbitration and the costs of the prevailing party. Rather, the practice has been to split the costs evenly, whether the claimant or the respondent prevails.”⁷⁷⁸ That tribunal added that its “preferred approach to costs is that of international commercial arbitration and its growing application to investment arbitration” – *i.e.*, “there should be an allocation of costs that reflects in some measure the principle that the losing party pays, but not necessarily all of the costs of the arbitration or of the prevailing party.”⁷⁷⁹
405. In many cases, ICSID tribunals’ decisions on costs allocation were guided, *inter alia*, by the parties’ procedural conduct and specific circumstances of each case. For example, in *Phoenix Action v. Czech Republic*, the tribunal applied the “costs follow the event” principle because the Claimant’s claims failed for lack of jurisdiction, but more importantly because the tribunal held that “the initiation and pursuit of this arbitration is an abuse of the international investment protection regime under the BIT and, consequently, of the ICSID Convention.”⁷⁸⁰
406. The Tribunal considers that its decision on costs allocation should generally be guided by:

⁷⁷⁷ *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, Part XVII, at para. 17-22, Annex 11 to the Claimant’s Reply Submission on Costs dated 13 March 2015. *See also, e.g., Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, at para. 24.1 (referring to “the general rule that an unsuccessful litigant in international arbitration should bear the reasonable costs of its opponent”), Annex 15 to the Claimant’s Reply Submission on Costs, dated 13 March 2015.

⁷⁷⁸ *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, at para. 322, **Exhibit RL-90**.

⁷⁷⁹ *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, at para. 327, **Exhibit RL-90**.

⁷⁸⁰ *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, at para. 151, Annex 1 to the Claimant’s Submission on Costs, 5 March 2015.

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- a. the parties' respective requests for relief concerning the allocation of costs;
 - b. the outcome of the parties' respective claims and defenses and applications (*i.e.*, their relative – partial or complete – success or failure);⁷⁸¹
 - c. the complexity or novelty of issues raised in the arbitration proceeding;⁷⁸²
 - d. the existence of special reasons or circumstances, such as, for example, “procedural misconduct, the existence of a frivolous claim, or an abuse of the [investment arbitration] process or of the international investment protection regime;”⁷⁸³ and
 - e. the reasonableness of the parties' legal costs, including any material disproportion that may exist between the parties' respective costs.⁷⁸⁴
407. **First**, in this case, the Respondent has not requested that the Tribunal allocate costs in its favor. Rather, the Respondent asked that the Tribunal apply the “costs lie where they fall” principle by ordering that each Party bear its own Legal Costs and half of the Costs of the Arbitration. In the circumstances, the Tribunal considers that it would generally be

⁷⁸¹ See, e.g., *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, at para. 112, **Exhibit RL-80**; *Gemplus S.A., SLP S.A and Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, Part XVII, at para. 17-20, Annex 11 to the Claimant's Reply Submission on Costs, 13 March 2015.

⁷⁸² See, e.g., *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, at para. 240 and Orders (“[T]he Tribunal is of the view that the dispute raised difficult and novel questions of far-reaching importance for each party, and the Tribunal therefore makes no award of costs ... [E]ach party shall bear its own costs, and shall bear equally the expenses of the Tribunal and the Secretariat.”), **Exhibit RL-81**; *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2001, at para. 228 (“[T]he Tribunal finds it appropriate that each Party bear one half of the ICSID costs and bear its own legal and other costs. Such approach seems fair and reasonable considering [inter alia] that while the Respondent prevailed on jurisdiction, the issues involved were complex and the Claimant's case was certainly not brought lightly.”), **Exhibit CA-19**; *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, at para. 126, **Exhibit RL-84**.

⁷⁸³ *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, at para. 63, **Exhibit RL-78**. See also *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, at para. 126, **Exhibit RL-84**.

⁷⁸⁴ See, e.g., *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, at para. 321 (stating that “the material disproportion between Claimant's and Respondent's arbitration costs” is “a circumstance that shall be duly considered when deciding the allocation of such costs”), **Exhibit RL-90**.

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inappropriate to go beyond the relief requested by the prevailing Party – the Respondent – and order costs in a different manner.

408. **Second**, the Tribunal has not found any evidence of “special circumstances” or procedural misbehavior by either Party that would influence the Tribunal’s decision on the allocation of costs. Neither Party has behaved in a procedurally improper manner in this proceeding. On the contrary, from the moment of the constitution of the Tribunal, both Parties contributed to the efficiency of this proceeding. Both Parties’ behaviour was exemplary in complying with the deadlines set by the Tribunal (with minor exceptions) and with the Tribunal’s directions in this proceeding. And, as noted above, both Parties’ counsel have been of particular assistance to the Tribunal.
409. **Third**, both Parties have submitted reasonable applications and carefully articulated the grounds for those applications. Neither Party’s claims, arguments nor applications were manifestly unfounded, frivolous or otherwise improper.
410. The fact that the Tribunal rejected Rule 41(5) Application should not be misinterpreted as recognition by the Tribunal of impropriety of the Respondent’s application. Rather, as explained in the Tribunal’s Decision on the Respondent’s Rule 41(5) Application, the Tribunal dismissed that application because there were complex issues of fact and law to be addressed, and the Rule 41(5) process would not have allowed appropriately to address these complex and novel issues. This decision is not to be understood as criticizing the Respondent’s submission as improper in any way. The Tribunal also agrees with the Respondent that its Rule 41(5) Application has significantly expedited and focused the discussion on the issues of jurisdiction.
411. Similarly, the Tribunal granted the Claimant’s Request for Provisional Measures in part where the Claimant had established sufficient urgency and serious harm that would result for the Claimant if those provisional measures were not granted. In contrast, the Tribunal rejected those limbs of the Claimant’s Request for Provisional Measures that were overly broad and/or not supported by a sufficient showing of urgency and/or serious harm to the

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Claimant. Thus, the Tribunal's decision on the Claimant's Request for Provisional Measures, too, should not be interpreted as criticizing the Claimant or the Respondent in any way. The Tribunal considers that it would be inappropriate, therefore, to allocate the costs associated with the Claimant's Request for Provisional Measures in favor of the Claimant, as the Claimant requests.⁷⁸⁵

412. **Fourth**, the Claimant's claims – including its arguments on jurisdiction – were not frivolous or manifestly unfounded. As explained above, interpretation of Section 39 of the IPA and Section 2 of the IDCA was a complex undertaking, and the Claimant advanced serious and reasonable arguments in support of jurisdiction in this case. As noted above, these provisions have not been interpreted by any arbitral tribunal, and the task of the Tribunal – and the Parties – in this case was that of first impression. It was a difficult task due to the peculiar language of the relevant provisions and the novelty of the interpretive challenges that these provisions created for the Tribunal and the Parties.
413. This case is therefore far from the *Saba Fakes v. Turkey* scenario, where the tribunal found that “[a] party pursuing a claim which is clearly outside the scope of the Centre’s jurisdiction should not be encouraged, and should bear the risk of paying the full costs of such frivolous proceedings.”⁷⁸⁶ The Claimant's position in this arbitration was far from frivolous or speculative: the Claimant brought its claims in good faith and advanced an attractive, serious case on jurisdiction.
414. Absent special circumstances or procedural impropriety, and taking into account the Parties' respective submissions and requests for costs orders (in particular, the Respondent request that the Tribunal order no costs), the Tribunal decides to apply the “costs lie where they fall” principle in allocating costs.

⁷⁸⁵ See above at para. 385(a).

⁷⁸⁶ *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, at para. 154, Annex 2 to the Claimant's Submission on Costs, dated 5 March 2015.

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415. For the foregoing reasons, the Tribunal orders that the Costs of the Arbitration and the Parties' Legal Costs in this proceeding shall be allocated as follows:
- a. each Party shall bear its own Legal Costs incurred in this arbitration; and
 - b. each Party shall bear 50% of the Costs of the Arbitration.
416. Because the Tribunal decided to apply the "costs lie where they fall" principle in this case, there is no need to assess the reasonableness of, or otherwise "scale[] back," the Claimant's Legal Costs, as the Respondent requests.⁷⁸⁷

VII. AWARD

417. For the above reasons, the Tribunal hereby unanimously decides that:
- a. The Tribunal does not have jurisdiction over the claims brought by the Claimant in this arbitration.
 - b. All provisional measures ordered by the Tribunal will cease to have effect as of the Award's date of dispatch.
 - c. Each Party shall bear its own legal costs and expenses.
 - d. Each Party shall bear 50% of the Costs of the Arbitration.
 - e. All other requests for relief are dismissed.
418. This Award concludes this arbitration proceeding.

⁷⁸⁷ See above at para. 388.

[Signed]

Gary Born
President

Date: April 28, 2015

[Signed]

Michael Pryles
Arbitrator

Date: April 24, 2015

[Signed]

Duncan Kerr
Arbitrator

Date: April 17, 2015