

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Standard Chartered Bank (Hong Kong) Limited

v.

United Republic of Tanzania

(ICSID Case No. ARB/15/41)

PROCEDURAL ORDER NO. 3 ON BIFURCATION

Members of the Tribunal

Professor Lawrence Boo, President of the Tribunal
David Unterhalter, Arbitrator SC
Dr. Kamal Hossain, Arbitrator

Secretary of the Tribunal

Aurélia Antonietti

October 11, 2016

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. This case originates from a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated March 18, 1965 (the “ICSID Convention”), arising out of a Implementation Agreement dated June 8, 1995 (“the ‘Implementation Agreement’”) ¹ entered into by Independent Power Tanzania Limited (“IPTL”) and the Government of the United Republic of Tanzania (the “Respondent,” “Tanzania” or the “GoT”).
2. The Implementation Agreement related to a 100 MW electric power plant built by IPTL at Tegeta, Dar es Salaam, Tanzania, pursuant to a Power Purchase Agreement dated May 26, 1995 (the “PPA”) concluded between IPTL and Tanzania Electrical Supply Company Limited (“TANESCO”). The majority of the funds required for the project were raised by means of a loan provided by a consortium of foreign lenders under a Facility Agreement. The loan provided under the Facility Agreement was secured over the project assets by a Security Deed entered on June 28, 1997 (the “Security Deed”) ² by IPTL and Sime Bank Berhad, Singapore Main Office, in its capacity as Security Agent under the Facility Agreement (the “Security Agent”) and by a Share Charge. ³
3. The Claimant in this arbitration is Standard Chartered Bank (Hong Kong) Limited (“SCB (HK)” or the “Claimant”), a corporation registered under the laws of Hong Kong.
4. SCB HK brings the claim as legal assignee of the Implementation Agreement, in which its assignor, IPTL, had consented in writing to settle any disputes between the parties arising out of or in connection with the Implementation Agreement in accordance with the ICSID Rules of Procedure for Arbitration Proceedings. ⁴ Article 21.2 provides as follows:

Any dispute or difference between the Parties arising out of or in connection with this Agreement (each a “Dispute”) shall be settled by arbitration in accordance with the Rules of Procedure for Arbitration Proceedings (the “ICSID Rules”) of the International Center for the Settlement of Investment Disputes (the “Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “Convention”). For purposes of

¹ Exhibit C-008.

² Exhibit C-014, Article 3.2.1. By the Security Deed, IPTL assigned all of its present and future right, title and interest in and to the “Assigned Contracts” to the lenders’ nominated Security Agent as security for the loan.

³ Exhibit C-015, Article 2. By the Share Charge, VIP Engineering & Marketing Limited, a Tanzanian company, and Mechmar Corporation (Malaysia) Berhad, a Malaysian company, who owned 30% and 70%, respectively, of IPTL’s shares, each charged their shares in IPTL in favour of the Security Agent as security for the loan.

⁴ RfA, para. 128; Exhibit C-008, Article 21.2.

consenting to the jurisdiction of the Convention, the Parties agree that the Company is a foreign controlled entity unless the amount of the voting stock in the Company held by Foreign Investors should decrease to less than thirty-five (35) percent of the outstanding voting stock of the Company.

5. According to SCB HK, the United Republic of Tanzania's written consent is reflected in the Implementation Agreement of June 8, 1995.⁵
6. SCB HK claims to have acquired the loan (and related security) from the original lenders in August 2005, thereby becoming the sole lender to IPTL under the Facility Agreement.⁶ SCB HK also contends to be the Security Agent within the meaning of the Facility Agreement, the Security Deed and the other project finance agreements. As such, SCB HK claims to be entitled to exercise all rights and remedies under the Implementation Agreement in its own name and without reference to IPTL, particularly the right to pursue the present arbitration proceeding against Tanzania under Article 21.2 of the Implementation Agreement. According to SCB HK, the Government of Tanzania was given notice of the assignment of the Implementation Agreement on October 3, 1997, and the Government of Tanzania acknowledged it.⁷
7. On September 30, 2015, the Secretary-General of the International Centre for the Settlement of Investment Disputes ("ICSID" or the "Centre") registered a Request for Arbitration filed by the Claimant.
8. A Tribunal composed of Professor Lawrence Boo Geok Seng (President, appointed by the Chairman of the Administrative Council), Sir Stanley Burnton (Arbitrator, appointed by the Claimant), and Mr. Kamal Hossain (Arbitrator, appointed by the Respondent), was constituted on May 19, 2016. Ms. Aurélie Antonietti, Legal Counsel, ICSID, was designated to serve as Secretary of the Tribunal.
9. On June 27, 2016, the Tribunal issued Procedural Order No. 1 before a First session was held, pursuant to the Parties' agreement, as recorded in their letters of June 14 and June 27, 2016.
10. On June 29, 2016, the Respondent filed a proposal for the disqualification of Sir Stanley Burnton. Sir Stanley Burnton resigned on July 7, 2016.

⁵ RfA, para. 128.

⁶ RfA, para. 20.

⁷ RfA, para. 114.

11. On July 11, 2016, the Claimant appointed Mr. David Unterhalter SC, and the Tribunal was reconstituted.
12. The first session of the Tribunal was scheduled by the Tribunal to be held on August 5, 2016, at 9:30 a.m., at the IDRC in London. A request for the adjournment of the session was presented on August 1, 2016, and had been rejected by the Tribunal on August 3, 2016.
13. On August 4, 2016, Counsel for the Respondent wrote to inform the Tribunal that they had been instructed, by the Attorney General of Tanzania, not to attend the session in his absence.
14. The first session of the Tribunal was held as scheduled on August 5, 2016, at 9:30 a.m., at the IDRC in London.
15. An audio recording of the session was made and deposited in the archives of ICSID. The recording was distributed to the Members of the Tribunal and the Parties. Participating in the session were the Members of the Tribunal, Francisco Abriani, ICSID Legal Counsel, and counsel for the Claimant.
16. Following consultations with respective counsel for the Parties, the Tribunal by letter of August 5, 2016, the Tribunal confirmed that a procedural hearing with the Parties be held in London on Friday September 23, 2016 to discuss bifurcation and to hear the Parties on all items contains in draft Procedural Order No. 2.
17. By letter of August 5, 2016, the Tribunal informed the Parties that they were requested to make the following submissions:
 - On August 15, 2016, the Respondent will submit a Memorandum on Bifurcation setting out the reasons justifying the bifurcation of the proceedings;
 - On September 2, 2016, the Claimant will submit a Response to the Respondent's Memorandum on Bifurcation.
18. It was also decided that a procedural hearing would take place on September 23, 2016, with the following agenda:
 - a. Whether the proceedings should be bifurcated in order to address the Respondent's jurisdictional objections as a preliminary question;
 - b. If the Tribunal so decides to bifurcate these proceedings, whether the Respondent's jurisdictional objections should be made prior to or after the submission of the Memorial on the Merits by the Claimant;

- c. The timelines for all procedural steps leading up to the making of the final award in this arbitration; and
 - d. All items contained in draft Procedural Order No. 2.
19. On August 15, 2016, pursuant to the Arbitral Tribunal's decision incorporated in its letter dated August 5, 2016, and in accordance with Article 41(2) of the ICSID Convention and ICSID Arbitration Rule 41(3), Tanzania submitted an application for the Tribunal to bifurcate the proceedings, so that it may deal with the Respondent's objections to jurisdiction and admissibility as preliminary questions (the "Application for Bifurcation").
20. On September 2, 2016, the Claimant submitted its Response to the Respondent's Application for Bifurcation (the "Response").
21. On September 15, 2016 the Claimant submitted the Award in ICSID Case No. ARB/10/20 (SCB HK v. TANESCO) as an additional exhibit C-76 and stated that it wished to rely on such exhibit at the upcoming hearing on bifurcation.
22. The hearing on bifurcation took place on September 23, 2016 in London at the IDRC. The following persons participated in the hearing:

Members of the Tribunal

Prof. Lawrence Boo, President of the Tribunal
Mr. David Unterhalter SC, Arbitrator
Dr. Kamal Hossain, Arbitrator

ICSID Secretariat:

Mr. Marco Tulio Montañés-Rumayor, Legal Counsel

On behalf of the Claimant:

Mr. Joseph Casson, Standard Chartered Bank (Hong Kong) Limited
Mr. James Denham, Standard Chartered Bank
Mr. Matthew Weiniger QC, Linklaters LLP
Mr. Iain Maxwell, Herbert Smith Freehills LLP
Mr. Dominic Kennelly, Herbert Smith Freehills LLP
Mr. Adam McWilliams, Herbert Smith Freehills LLP
Mr. Divyanshu Agrawal, Herbert Smith Freehills LLP

On behalf of the Respondent:

Mr. Beredy Malegesi, Crax Law Partners
Prof. Bonaventure Rutinwa, R.K. Rweyongeza & Co. Advocates
Mr. David Hesse, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Galileo Pozzoli, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Luciana Ricart, Curtis, Mallet-Prevost, Colt & Mosle LLP

Mr. James Cockburn, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Valerio Salvatori, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Rebecca Johnston, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Dav Holat, IT technician, Curtis, Mallet-Prevost, Colt & Mosle LLP

23. Following the hearing of September 23, 2016, the Tribunal issued on October 3, 2016 Procedural Order No.2 regarding procedural items left to be decided subsequently to Procedural Order No. 1.
24. Having heard the Parties' arguments on the bifurcation application, the Tribunal deliberated and informed the Parties of its decision not to bifurcate. The Tribunal now sets out its brief reasons in this Order.

II. THE POSITIONS OF THE PARTIES

A. The Respondent's Position

25. In its Application for Bifurcation, the Respondent submits that bifurcating the proceedings into a jurisdictional phase and a merits phase would in this instance be appropriate, as well as in accordance with the ICSID Convention.⁸
26. According to the Respondent, the present proceedings are “only the latest of several vexatious, groundless proceedings which Claimant or its affiliated entities have brought against the Government or Tanzania Electrical Supply Company Limited (“Tanesco”), the Tanzanian State-owned electric company, in relation to a power project in Tegeta, Tanzania (the “Facility”), designed, constructed and operated by Independent Power Tanzania Limited (“IPTL”) pursuant to a Power Purchase Agreement dated 26 May 1995 (the “PPA”) between IPTL and Tanesco.”⁹
27. The Respondent states that it intends to raise two preliminary objections which are “threshold issues” that “can and need to be resolved on a preliminary basis before delving into the merits of the case.”¹⁰ Therefore, the Respondent argues, bifurcation is “necessary and proper” and would spare the Parties and the Tribunal “an onerous, unnecessary and costly fact-finding exercise.”¹¹
28. With respect to its first preliminary objection, the Respondent contends that the Claimant cannot bring its claim because Article 15.1 of the Implementation Agreement “prohibits any assignment

⁸ Application for Bifurcation, ¶ 1.

⁹ Application for Bifurcation, ¶ 2.

¹⁰ Application for Bifurcation, ¶ 4.

¹¹ Application for Bifurcation, ¶ 4.

- or transfer by either party without the prior written consent of the other party.”¹² The Respondent further points out that “where an assignment is performed for the purpose of financing the construction and operation of the Facility, Article 15.2 also requires the prior written approval of the Government.”¹³ The Respondent adds that “[t]he obligation to obtain the Government’s prior written consent or approval is clear and unequivocal and constitutes an absolute contractual prohibition on assignment if the condition is not met.” The Respondent contends that no prior written approval “was ever obtained by any party from the Government.”¹⁴
29. The Respondent notes that the Claimant’s Request for Arbitration refers to a notice addressed to the Government of an assignment of IPTL’s rights under the Implementation Agreement to Sime Bank (Singapore) Berhad [Exhibit C-004] but argues that this document (i) postdates the assignment and (ii) is signed for acknowledgement by an unspecified person. In addition, the Respondent indicates that it “is currently evaluating the authenticity of th[e] document.”¹⁵ It concludes that since the Claimant has not provided evidence of the Respondent’s prior written approval of the transfers of rights granted under the Implementation Agreement to the Claimant, it cannot be an assignee of such Agreement.¹⁶
30. As its second ground, the Respondent asserts that the Claimant “lacks standing to bring this arbitration as it does not hold an investment as defined by Article 25(1) of the ICSID Convention.” The Respondent argues that Claimant’s acquisition of “a purported claim to account receivables long after the alleged underlying investment was made” does not constitute an investment for the purposes of the ICSID Convention since the Claimant “did not contribute in any way to the economic development of Tanzania.”¹⁷
31. The Respondent also highlights that “in related proceedings regarding the Facility arguments have been made that the underlying investment is contrary to Tanzanian law and public policy and was not made in good faith, thus failing to qualify for protection under the ICSID Convention.”¹⁸
32. In the course of their oral submissions, the Respondent drew to the Tribunal’s attention the award made in favour of the Claimant in ICSID Case No. ARB/10/20, in which it was found that US\$

¹² Application for Bifurcation, ¶ 6(i); See also Ex. C-8 Implementation Agreement, Article 15.1.

¹³ Application for Bifurcation, ¶ 6(i); See also Ex. C-8 Implementation Agreement, Article 15.2.

¹⁴ Application for Bifurcation, ¶ 6(i).

¹⁵ Application for Bifurcation, fn 12.

¹⁶ Application for Bifurcation, ¶ 6(i).

¹⁷ Application for Bifurcation ¶ 6(ii).

¹⁸ Application for Bifurcation, ¶ 7.

148.4 million was due from TANESCO arising out of the PPA. In its view, the Claimant would be seeking double compensation in these proceedings.

33. In light of these objections, which the Respondent argues are “of a serious nature”¹⁹ and “obviously substantial,”²⁰ the Respondent submits that bifurcation is appropriate because if such objections were upheld, all of the Claimant’s claims would be dismissed²¹ and that the dismissal of the Claimant’s claims would “lead to a material reduction in the proceedings” since the parties would no longer need to submit multiple rounds of submissions and witness statements.²² Finally, the Respondent points out that its preliminary objections are not “intertwined with the merits” since “their resolution requires nothing more than an examination of the relevant provisions of the Implementation Agreement, of the events surrounding its various alleged transfers and of the notion of investment under the ICSID Convention.”²³ The Respondent thus submits that bifurcation is appropriate in the present case.²⁴

B. The Claimant’s Position

34. In its Response, the Claimant asks the Tribunal to deny the Respondent’s request to bifurcate the proceedings and to join any jurisdictional and admissibility objections to the merits. The Claimant argues that the Respondent’s preliminary objections “are not substantial” and do not form a basis for the Tribunal to bifurcate the proceedings.²⁵ The Claimant argues that the Respondent’s preliminary objections and request for bifurcation “are an unmeritorious attempt to delay these proceedings and to defer bearing the ultimate responsibility for the project that the GoT agreed to assume under the Implementation Agreement.”²⁶
35. As a preliminary point, the Claimant takes issue with the Respondent’s allegation that “[t]his is only the latest of several vexatious, groundless proceedings which Claimant or its affiliated entities have brought against [the Respondent].”²⁷ In response, the Claimant sets forth its understanding of the events and related proceedings leading to the present dispute.²⁸

¹⁹ Application for Bifurcation, ¶ 8

²⁰ Application for Bifurcation, ¶ 12.

²¹ Application for Bifurcation, ¶ 8.

²² Application for Bifurcation, ¶ 13.

²³ Application for Bifurcation, ¶ 14.

²⁴ Application for Bifurcation, ¶ 15.

²⁵ Response, ¶ 3.

²⁶ Response, ¶ 34.

²⁷ Response, ¶¶ 4-6.

²⁸ Response, ¶¶ 4-34.

36. In response to the Respondent's first preliminary objection regarding the validity of the assignment of the Implementation Agreement, the Claimant argues that even though there was no prior written approval to the assignment "there were extensive communications between the lenders, IPTL, representatives of the GoT (including the Prime Minister, Minister of Finance, Minister of Energy and Minerals and Attorney-General), Tanesco and the Malaysian Government"²⁹ which illustrate that the lenders operated under the understanding that the Respondent accepted that the Implementation Agreement had been validly assigned. In this regard, the Claimant relies *inter alia*, on (i) a Notice of Assignment dated October 3, 1997³⁰; (ii) a letter from the Minister of Finance to IPTL dated October 13, 1997³¹ (iii) a diplomatic note from the Ministry of Foreign Affairs of the Respondent to the Ministry of Foreign Affairs of Malaysia dated October 28, 1997³²; (iv) memoranda and other internal documentation of the lenders from October-November 1997³³; and (v) correspondence between IPTL and TANESCO regarding the PPA assignment³⁴.³⁵
37. The Claimant also argues that "on its proper construction Article 15.2 of the Implementation Agreement does not invalidate an assignment made without the GoT's prior consent."³⁶ The Claimant's reading of Article 15.2(a) of the Implementation Agreement is that it "has no application to the subsequent transfers to successor Security Agents upon their appointment to that role."³⁷ This reading, according to the Claimant follows from the text and the commercial purpose of Article 15.2(a).³⁸
38. The Claimant's alternative argument, in the event that the Tribunal concludes that Article 15.2(a) does invalidate the assignment of the Implementation Agreement made without prior written consent, is that (i) the Respondent is "estopped from denying the validity of the assignment to the original Security Agent, Sime Bank Berhad" and (ii) "[t]he succession of RHB Bank Berhad and then SBC HK to the role of Security Agent did not require the GoT's further approval."³⁹
39. With respect to the Claimant's estoppel argument, it argues that "for nearly twenty years [the lenders] operated on the basis that the GoT accepts that the Implementation Agreement was validly

²⁹ Response, ¶ 37.

³⁰ Exhibit C-044.

³¹ Exhibit C-047.

³² Exhibit C-048.

³³ Exhibit C-070.

³⁴ Exhibit C-075.

³⁵ Response, ¶¶ 37-44.

³⁶ Response, ¶¶ 46-50

³⁷ Response, ¶ 59.

³⁸ Response, ¶¶ 60-62.

³⁹ Response, ¶ 51.

- assigned to the Security Agent. Among other matters, the lenders have permitted IPTL to make drawdowns on the loan on the faith of the GoT's assurances ..."⁴⁰ The Claimant thus concludes that the Respondent "is estopped from denying that clause 3.2.1 of the Security Deed was a valid assignment of the Implementation Agreement which is binding on the GoT."⁴¹
40. The Claimant's second alternative argument regarding the changes of the security agent is that "[u]nder the Facility Agreement, the participation of the lending banks is freely transferable, as is usual in syndicated lending arrangements. Similarly, under the Facility Agreement, the majority banks are entitled to remove the Security Agent and appoint a successor at any time."⁴² The Claimant points out that the Security Deed was concluded between IPTL on the one hand and "Sime Bank Berhad, Singapore Main Office, in its capacity as Security Agent under the Facility Agreement (the 'Security Agent') which expression includes any successor appointed as Security Agent."⁴³ The Claimant therefore concludes that there was a possibility that the lending banks and their Security Agent, would change and that the Respondent must have been aware of that possibility. The Claimant also argues, in this regard that the Respondent "knew from the Notice of Assignment and the October 1997 correspondence that the Implementation Agreement had been assigned to a Security Agent who would hold the security on behalf of the underlying syndicate of lenders."⁴⁴
41. Alternatively, the Claimant submits that if the Tribunal decides that the appointment of successor Security Agents did require the Respondent's prior signature under Article 15.2(a) and/or 15(1) then, the Claimant submits that the Respondent's letter of October 13, 1997⁴⁵ and its acknowledgement of the Notice of Assignment⁴⁶ amount to such consent.⁴⁷
42. In response to the Respondent's second preliminary objection, that the Claimant failed to prove the existence of an investment for the purposes of Article 25 of the ICSID Convention, the Claimant argues that the Respondent's objection does not respond to the Claimant's case on investment.⁴⁸
43. The Claimant explains that it "relies primarily on the Facility (the power plant itself) and IPTL's investment in it as the 'investment' in relation to which its claim is brought." It adds that it also

⁴⁰ Response, ¶ 52.

⁴¹ Response, ¶ 52.

⁴² Response, ¶ 54 (footnotes omitted).

⁴³ Response, ¶ 54 quoting Exhibit C-014 Security Deed, June 28, 1997, p.1.

⁴⁴ Response, ¶¶ 55-56.

⁴⁵ Exhibit C-047.

⁴⁶ Exhibit C-044.

⁴⁷ Response, ¶ 63.

⁴⁸ Response, ¶ 69.

- relies on its “rights under the Share Charge, which it has enforced in proceedings in Malaysia and in the BVI.”⁴⁹ The Claimant’s reliance on the loan to IPTL is accordingly “secondary” to the other investments. In light of the above, the Claimant concludes that “[t]here is therefore no utility in bifurcating the proceedings so that [the Respondent] can challenge whether one of these elements [...] qualifies as an investment.”⁵⁰ It points out that even if the Tribunal concludes that loan to IPTL was not an investment for the purposes of the ICSID Convention (which is denied by the Claimant) such a decision would not dispose of the Claimant’s claim.⁵¹
44. The Claimant also argues that this arbitration is clearly a legal dispute concerning (i) the Facility and (ii) IPTL’s shares, both of which qualify as an investment⁵² a point that the Respondent has not challenged in its Application for Bifurcation.⁵³
45. With respect to its loan to IPTL, the Claimant argues that it would also qualify as an investment for the purposes of the ICSID Convention. The Claimant states that there is “an established line of ICSID cases that provide that the transfer of loan or debt instruments does not undermine their status for the purposes of the ICSID Convention.”⁵⁴ According to the Claimant, the loan to IPTL would therefore qualify as an investment because, even though the identity of the creditor changed, the loan itself remained constant and Tanzania benefitted from the loan “in the form of the additional generating capacity of the Facility.”⁵⁵
46. Finally, with respect to “[t]he requirement that an investment must contribute to the development of the host state to qualify as an investment for the purposes of the ICSID Convention” the Claimant argues that this requirement “is not found in the ICSID Convention itself. It has been developed in investment jurisprudence and is a controversial one not followed by all tribunals, and SCB HK reserves the right to argue in due course that the requirement does not apply.”⁵⁶
47. The Claimant, however also argues that even if it does apply, the requirement is satisfied because, the Facility, which was funded by the loan now held by the Claimant and by Mechmar (whose

⁴⁹ Response, ¶ 70.

⁵⁰ Response, ¶ 70.

⁵¹ Response, ¶¶ 3(3); 70.

⁵² Response, ¶¶ 71-75.

⁵³ Response, ¶¶ 73, 75.

⁵⁴ Response, ¶¶ 77. See also Exh., CLA-004 *Fedax v. The Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction.

⁵⁵ Response, ¶ 78.

⁵⁶ Response, ¶ 79.

shares are now also held by Claimant), contributed to the development of Tanzania even after the Claimant became the lender.⁵⁷

48. The Claimant also points out and encourages this Tribunal to take into consideration the fact that (although it is not binding on this Tribunal), the PPA tribunal, when considering the same investment, concluded that the Claimant's loan to IPTL qualified as an investment.⁵⁸

49. With respect to bifurcation, the Claimant argues that the Tribunal should assess whether bifurcation would serve the interests of procedural efficiency and whether it would be fair under the circumstances.⁵⁹

50. With respect to procedural efficiency the Claimant argues that bifurcation would not be procedurally efficient for the following reasons:

- First, since the Respondent's preliminary objections are "wholly without merit" bifurcation would serve no useful purpose and would unnecessarily prolong and increase the costs of the arbitration.⁶⁰
- Second, with respect to the Respondent's second preliminary objection related to the notion of investment, bifurcation would be "fruitless" since the Claimant's investment goes beyond the loan to IPTL.⁶¹
- Third, the preliminary objections "are or may be closely related to the merits."⁶² Fourth, the potential efficiencies of bifurcation are "overstated" by the Respondent.⁶³
- Finally, the Claimant contends that bifurcation would unfairly prolong proceedings and delay any award in the Claimant's favour since Respondent's bifurcation application is "an unmeritorious attempt to delay these proceedings."⁶⁴

51. In its oral submission, the Claimant explained that the award of US\$ 148.4 million in ICSID Case No. ARB/10/20 was for due from TANESCO arising out of the PPA up to November 2015. It

⁵⁷ Response, ¶¶ 79-82.

⁵⁸ Response, ¶¶ 83-84.

⁵⁹ Response, ¶¶ 88-89.

⁶⁰ Response, ¶ 92.

⁶¹ Response, ¶ 93.

⁶² Response, ¶¶ 94-96.

⁶³ Response, ¶¶ 97-98.

⁶⁴ Response, ¶ 101

concedes that there could well be an overlap or double counting but that is something the Claimant would in due course take into account at the quantum stage of the merits proceedings.

III. ANALYSIS

52. The Tribunal is not requested at this stage to determine whether the Claimant's claims fall within its jurisdiction; rather the Tribunal must decide whether the Respondent's objections to jurisdiction should be heard and decided as preliminary questions or determined with the merits. In this respect, the relevant legal framework to rule on the Application for Bifurcation is composed of (i) the ICSID Convention and of (ii) the 2006 version of the ICSID Arbitration Rules.

53. Article 41(2) of the ICSID Convention states that:

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.

54. Article 41(4) of the ICSID Arbitration Rules provides in relevant part that:

The Tribunal [...] may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

55. Article 41(2) of the ICSID Convention and Article 41(4) of the ICSID Arbitration Rules do not establish a presumption either in favor of or against bifurcation.

56. Investor-state tribunals have identified several factors that are relevant in deciding whether to bifurcate arbitration proceedings, these include:

- whether “the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding”;
- whether the jurisdictional objection would, if granted, result in a final decision or a material reduction of the proceedings at the next phase; and

- whether bifurcation is impractical because jurisdiction is “so intertwined with the merits that it is very unlikely that there will be any savings in time or cost”.⁶⁵

57. The Tribunal agrees with this analysis, which will thus guide it in the exercise of its discretion as to whether to grant the Respondent’s Application for Bifurcation.
58. The Parties have, through their counsel, at the oral hearing, both accepted these underlying principles. The Parties have however applied these principles to this case, with differing conclusions.
59. The Tribunal accepts that the Respondent’s first issue relating to the prohibition against assignment in Art. 15.1 of the Implementation Agreement may well be a discrete issue that could be decided as a preliminary issue. This would however still require the consideration of whether the Claimant’s argument that the Respondent is, by acknowledging the notice of assignment in October 1997, estopped from denying its approval. The Parties were unable to assure us that the consideration of the estoppel issue would not require oral evidence. The spectre of a hearing that is not confined to a crisp question of law on common cause facts renders bifurcation less advantageous,
60. The Tribunal also however apprehends that this issue is one which goes to the merits of the case. The validity of the assignment goes to the standing of the Claimant, and as such operates as a substantive defence on the merits, and not as an issue of jurisdiction going to the Tribunal’s competence within the ambit of Article 41(2) of the ICSID Convention or Article 41 of the ICSID Rules.
61. As regards the Respondent’s second preliminary objection which relates to whether the Claimant is holding an “investment” as defined by Article 25(1) of the ICSID Convention, counsel for both Parties, when asked by at the hearing the Tribunal if they could give an assurance that they would rely and argue the issue based only on written documents and legal arguments without need for witnesses and oral evidence, were reticent and unable to give the assurance sought. While the Respondent says that it was prepared to do so, it acknowledged that the Claimant may raise matters requiring the leading of evidence and the resolution of factual disputes. The Claimant also pointed out that the issue as to whether the Claimant holds an investment is likely to become intertwined with factual enquiries relevant to the merits.

⁶⁵ See *Glamis Gold, Ltd. v. United States*, UNCITRAL, Procedural Order No. 1 (Revised), May 31, 2005, para. 12(c).

62. There is a further issue of importance in the weighing of the Tribunal's discretion. The Claimant submits that its holding of an investment is not based solely on its position as a lender but also as a shareholder. The Claimant complains that its rights as a shareholder have been expropriated. This claim requires adjudication on the merits. The preliminary objections raised by the Respondent would not dispose of this issue. Where a preliminary objection would not be dispositive of the Claimant's case, there is less to be said for bifurcation.
63. Taking into consideration the possible arguments that could be raised and the probability of evidence being adduced in support of these arguments that may become intertwined with the merits, the Tribunal is satisfied that the bifurcation of the proceedings to determine the preliminary issues risks protracted proceedings. There is, in the Tribunal's assessment, a real risk that there could be repetitive oral evidence, with more costs and time lost in the result. There is also no real possibility that the early determination of these issues would be finally dispositive of the matters in dispute in these proceedings.

IV. ORDER

64. For the foregoing reasons, the Tribunal in exercise of its discretion, decided not to order bifurcation and proceeded to finalize the procedural steps in these proceedings with the Parties. These are set out in Procedural Order No. 2.

On behalf of the Tribunal

[Signed]

Lawrence Boo
President of the Tribunal

Date: October 11, 2016