

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

PNG Sustainable Development Program Ltd.

v.

Independent State of Papua New Guinea

(ICSID Case No. ARB/13/33)

**THE TRIBUNAL'S DECISION ON THE RESPONDENT'S OBJECTIONS UNDER
RULE 41(5) OF THE ICSID ARBITRATION RULES**

Gary Born, President of the Tribunal
Duncan Kerr, Arbitrator
Michael Pryles, Arbitrator

Secretary of the Tribunal
Monty Taylor

Assistant to the Tribunal
Valeriya Kirsey

Date of dispatch to the Parties: 28 October 2014

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I. INTRODUCTION

1. This Decision sets out the Tribunal's reasons and the Tribunal's decision on the Respondent's "Preliminary Objections Under Rule 41(5) of the ICSID Arbitration Rules" dated 16 July 2014 (the "Application").

II. THE PARTIES

A. 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, and Mr. Matthew Brown of Clifford Chance Pte. Ltd., Mr. Audley Sheppard of Clifford Chance LLP, and Mr. Romesh Weeramantry and Mr. Sam Luttrell of Clifford Chance.

B. 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.

III. THE ARBITRAL PROCEDURE AND APPLICATION

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

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Settlement of Investment Disputes (“ICSID”).

5. On 20 December 2013, the Secretary-General of ICSID (“Secretary-General”) 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 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 constitution of the arbitral tribunal.
7. In due course, the Tribunal was composed of Mr. Gary Born, a national of the United States of 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, 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.
9. On 16 July 2014, the Respondent submitted the Application, together with accompanying factual and legal exhibits.
10. 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.

11. In accordance with the Tribunal's Procedural Order No. 1, on 8 August 2014 the Claimant filed its "Observations on the Respondent's Preliminary Objections under Rule 41(5)" ("Claimant's Observations"), together with accompanying factual exhibits and legal materials.
12. On 12 August 2014, the Claimant requested a one-day extension to file reply observations with respect to its "Request for Provisional Measures" dated 14 July 2014, which were due to be filed that day under the terms of the Tribunal's Procedural Order No. 1. This request was granted by the Tribunal on 12 August 2014, and an equivalent one-day extension was granted to the Respondent to file its "Reply Observations on Rule 41(5) Preliminary Objections" ("Respondent's Reply Observations").
13. In accordance with the granted extension, the Respondent's Reply Observations were filed on 20 August 2014, together with supporting legal exhibits.
14. In accordance with the revised procedural timetable, hearing on the Application took place at Maxwell Chambers in Singapore on 10 October 2014. In addition to the Members of the Tribunal (with Dr. Pryles attending by video-conference), the Secretary of the Tribunal, the Tribunal Assistant (attending by audio-conference) and the court reporter, attending the hearing were:

For the Claimant:

Counsel

Mr. Nish Shetty	Clifford Chance
Mr. Paul Sandosham	Clifford Chance
Mr. Romesh Weeramantry	Clifford Chance
Mr. Sam Luttrell	Clifford Chance
Mr. Mathew Brown	Clifford Chance

Parties

Mr. Andrew Lind	Gadens Lawyers
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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

15. A verbatim transcript of the oral hearing was prepared by professional stenographers. This transcript was issued on 10 October 2014.¹ The audio recording of the hearing was dispatched to the Tribunal and the Parties on 14 October 2014.

IV. FACTUAL BACKGROUND

16. To the extent required by the Tribunal to address the Respondent's Application, and for that limited purpose only, the Tribunal briefly summarises the factual background to the dispute as pleaded in the Claimant's Request for Arbitration. The below summary of the facts does not constitute any finding by the Tribunal on any facts disputed by the Parties, still less any final findings of fact.
17. 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.² OTML's rights to the Ok Tedi mine are set out in Special Mining Lease No. 1 (the "Special

¹ Under Paragraph 24.4 of the Tribunal's Procedural Order No. 1, the parties shall agree on any corrections to the transcripts within 15 days of the later of the dates of the receipt of the sound recordings and the transcripts, and such agreed corrections may be entered by the parties in the transcripts (there is also provision made for disagreement between the parties with respect to transcript corrections). Without prejudice to the completion of this process, given the time constraints in issuing this ruling (pending the outcome of the Application, a hearing on jurisdiction is currently due to take place at the end of November 2014), the Tribunal in this Order will refer to the transcript as issued on 10 October 2014 (*i.e.*, without corrections by the parties). The references to the draft transcript ("DT") will be in the following format: DT.[page].[line].

² Request for Arbitration, Para. 16.

- Mining Lease”). The Special Mining Lease is the primary asset of OTML.³
18. 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.⁴ These facts are summarised below, to the extent relevant for the consideration of the Respondent’s Application.
19. 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.⁵ 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 advance the general welfare of the people of PNG, particularly those of the Western Province where the Ok Tedi mine is located.⁶ In connection with the transfer, a charge was created over the Claimant’s shares in OTML (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”).⁷
20. Following a selective share buyback conducted in January 2011, the Claimant and the Respondent have respectively held 63.4146% and 36.5853% of issued ordinary shares in OTML.⁸

³ Request for Arbitration, Para. 25.

⁴ Request for Arbitration, Paras. 9-15.

⁵ Request for Arbitration, Para. 13.

⁶ Request for Arbitration, Paras. 13-14.

⁷ Request for Arbitration, Para. 14.

⁸ Request for Arbitration, Para. 15.

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21. The Claimant was incorporated in Singapore on 20 October 2001.⁹ 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”).¹⁰ The M&A annex a set of Program Rules (the “Program Rules”) which primarily deal with how earnings are to be applied for the purposes of fund management, transparency and accountability.¹¹
22. According to the Claimant, the Claimant carries significant risk as a shareholder in OTML due to, inter alia, its undertaking to take over BHP’s liabilities in respect of the mining activities (and its broader obligations as a shareholder), and indemnities that the Claimant granted in respect of environmental claims and claims arising out of BHP’s stewardship of OTML.¹²
23. The Claimant asserts that, since its establishment in 2001, it has financed and overseen at least USD 500 million dollars worth of 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”).¹³
24. The Claimant asserts that 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.¹⁴
25. In particular, on 13 September 2013, the Respondent adopted the Mining (Ok Tedi Tenth Supplemental Agreement) Act 2013 (the “Tenth Supplemental Act”), along with the

⁹ Request for Arbitration, Para. 18.

¹⁰ Request for Arbitration, Para. 18.

¹¹ Request for Arbitration, Para. 18.

¹² Request for Arbitration, Para. 19.

¹³ Request for Arbitration, Para. 20.

¹⁴ Request for Arbitration, Para. 24.

Mining (Ok Tedi Mine Continuation) (Ninth Supplemental Agreement) (Amendment) Act 2013.¹⁵ According to the Claimant, among other things, the Tenth Supplemental Act purports to cancel the shares held by the Claimant in OTML. 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.*¹⁶

26. According to the Claimant, Subsection 5(1) of the Tenth Supplemental Act purports to empower the Prime Minister of PNG, Mr. Peter O'Neill, to declare whether compensation is payable to any person in respect of the effects of the Tenth Supplemental Act and, if so, the amount of compensation and the terms on which it is payable.¹⁷ The Claimant further states that Section 5(4) provides that nothing in the Tenth Supplemental Act imposes any obligation on the Respondent or any other person to pay compensation in respect of the effects of the Tenth Supplemental Act other than pursuant to an order under Section 5(1).¹⁸

27. 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*

¹⁵ Request for Arbitration, Para. 35.

¹⁶ Request for Arbitration, Para. 36.

¹⁷ Request for Arbitration, Para. 37.

¹⁸ Request for Arbitration, Para. 37.

*no legal effect and shall not create any interest of any nature whatsoever in any share of OTML.*¹⁹

28. 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.*²⁰

29. 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 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.²²

V. SUMMARY OF THE PARTIES' SUBMISSIONS ON THE APPLICATION

A. The Respondent's Application

30. The Respondent raises two objections in the Application regarding the Claimant's Request for Arbitration: first, that the jurisdictional requirements set out in the ICSID Convention are not satisfied, and therefore that this Tribunal has no jurisdiction over the Claimant's claims; and second, that certain of the Claimant's substantive claims are manifestly without legal merit.

¹⁹ Request for Arbitration, Para. 39.

²⁰ Request for Arbitration, Para. 40.

²¹ Request for Arbitration, Para. 54.

²² Request for Arbitration, Para. 55.

1. Jurisdiction

31. In referring to Article 25(1) of the ICSID Convention, the Respondent notes that the jurisdiction of the Centre may only be invoked in relation to a “legal dispute arising directly out of an investment between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”²³ The Respondent claims that it is clear from a review of the Request for Arbitration that the mandatory jurisdictional requirements of Article 25(1) are not satisfied, as there is no “private foreign investment” and there is no consent to arbitration by PNG under the ICSID Convention.²⁴
32. Dealing first with the argument as to “private foreign investment,” the Respondent alleges that the Claimant’s objects and the circumstances surrounding the Claimant’s incorporation compel the conclusion that PNGSDP is not a “foreign investor” and that there is no “private foreign investment.”²⁵
33. The Respondent notes that, in order to determine whether an alleged “investment” falls within the auspices of Article 25(1) of the ICSID Convention, one must look at the object and purpose of the Convention.²⁶ In referring to the *Report of the Executive Directors on the Convention* and other legal materials for guidance on that object and purpose,²⁷ the Respondent contends that the existence of a private foreign investment is required in order to qualify for protection under the ICSID Convention.²⁸ The Respondent submits that no such private foreign investment is present in this case.²⁹

²³ Application, Para. 17.

²⁴ Application, Para. 18.

²⁵ Application, Para. 19.

²⁶ Application, Para. 20.

²⁷ See Application, Paras. 21-22 in this respect.

²⁸ Application, Paras. 21-23.

²⁹ Application, Para. 23.

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34. Citing Clauses 5 and 12 of the M&A, the Respondent submits that the Claimant's members³⁰ have no rights to the income and property of the Claimant, as these are to be applied solely towards the promotion of the objects of the Claimant: namely, to promote sustainable development within, and advance the general welfare of the people of, PNG (and in particular the Western Province thereof).³¹ The Respondent contends that it is undisputed that the assets held by the Claimant, including its shares in OTML, are to be used solely for the benefit of the people of PNG, and are not beneficially owned by the Claimant or its members.³²
35. In light of the above, the Respondent claims that PNGSDP cannot be a "foreign investor" with a "private foreign investment," as the company exists to fulfil the sole public purpose of promoting sustainable development and advancing the general welfare of the PNG people.³³
36. The Respondent also alleges that the Claimant is not a private investor with respect to the OTML shares, as these were simply gifted to the Claimant by BHP for a specified public purpose.³⁴ The Respondent concludes that, as a result, there has been no "private foreign investment" to speak of, since the time BHP exited as a shareholder of OTML in 2001.³⁵
37. The Respondent submits that the present dispute is one between PNG and, in substance and effect, its own nationals, and the ICSID Convention is not intended to apply to such disputes.³⁶ The Respondent concludes that any contention by the Claimant that this dispute concerns a "private foreign investment" is manifestly without legal or factual merit, and as a consequence, the Tribunal should decline to find jurisdiction.³⁷

³⁰ The Respondent notes that the Claimant has no shareholders, but rather only members (Application, Para. 25).

³¹ Application, Para. 25.

³² Application, Para. 27. In this regard, the Respondent refers to the Request for Arbitration, Paras. 13 and 21-23.

³³ Application, Para. 27.

³⁴ Application, Para. 28.

³⁵ Application, Para. 28.

³⁶ Application, Para. 31.

³⁷ Application, Para. 32.

38. As to consent, the Respondent notes that the Claimant in this proceeding relies upon provisions of the Respondent's domestic legislation as constituting the requisite written consent for the purposes of Article 25(1) of the ICSID Convention. Specifically, the Claimant contends that section 39 of PNG's *Investment Promotion Act 1992* ("IPA"), either on its own or when read in conjunction with section 2 of PNG's *Investment Disputes Convention Act 1978* ("IDCA") (as amended by the *Investment Disputes Convention (Amendment) Act 1982*), constitutes a standing offer by PNG to arbitrate investment disputes at ICSID.³⁸ The Respondent submits that this reliance is flawed, and that there is a clear failure to satisfy the Article 25(1) jurisdictional requirements in this case.³⁹

39. Section 39 of the IPA provides as follows:

[The IDCA], 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.

40. Section 2 of the IDCA provides as follows:

A dispute shall not be referred to [ICSID] unless the dispute is fundamental to the investment itself.

41. By reference to Principle 7 of the UN International Law Commission's 2006 Guiding Principles applicable to Unilateral Declarations of States capable of creating Legal Obligations ("ILC Principle 7"), the Respondent submits that consent to ICSID arbitration in "clear and specific terms" (as required by ILC Principle 7) is conspicuously absent in the two above-excerpted provisions.⁴⁰

42. The Respondent refers to an alleged acknowledgement by the Claimant that neither the

³⁸ Request for Arbitration, Para. 67.

³⁹ Application, Para. 58.

⁴⁰ Application, Para. 40.

IDCA generally, nor section 2 of the IDCA specifically, constitutes consent by PNG *per se*.⁴¹ The Respondent argues that this asserted concession was rightly made,⁴² and raises, in summary, the following arguments as to why section 2 of the IDCA does not constitute written consent for the purposes of Article 25(1) of the ICSID Convention:

- (a) The provision is framed in the negative and only precludes the option of arbitration for a certain class of disputes (namely, those which are not fundamental to the investment itself). It does not otherwise deny or grant an option to arbitrate other categories of disputes under ICSID;⁴³
- (b) Section 2 merely reflects a notification filed by PNG on 14 September 1978 under Article 25(4) of the ICSID Convention to inform ICSID and other Contracting States that PNG wished to exclude certain types of disputes from ICSID's jurisdiction.⁴⁴ Pursuant to Article 25(4) of the ICSID Convention, any such notification shall not constitute the consent required by Article 25(1),⁴⁵ and
- (c) Because the term "disputes" in section 2 is defined in the IDCA by reference to Article 25 of the ICSID Convention,⁴⁶ section 2 is subject to (rather than constitutes) the jurisdictional requirement of written consent set out in Article 25(1) of the ICSID Convention.⁴⁷

43. As section 2 of the IDCA does not provide for written consent (as allegedly conceded by the Claimant), the Respondent submits that it must follow that no consent resides in section 39 of the IPA because that provision simply refers to the IDCA and states that the

⁴¹ Application, Paras. 41 and 48, excerpting the Claimant's letter to the Tribunal Secretary dated 8 November 2013.

⁴² Application, Para. 42.

⁴³ Application, Para. 43.

⁴⁴ Application, Para. 44.

⁴⁵ Application, Para. 45.

⁴⁶ Section 1(1) of the IDCA provides as follows: "'dispute' means any legal dispute arising directly out of an investment as referred to in Article 25 of the [ICSID] Convention."

⁴⁷ Application, Para. 47.

IDCA implementing the ICSID Convention “applies, according to its terms.”⁴⁸

44. The Respondent rejects the Claimant’s argument that section 39 of the IPA must function as a standing offer to ICSID arbitration because otherwise the provision could not be assigned any other useful purpose.⁴⁹ Rather, the Respondent submits that it is commonly accepted that legislative provisions such as section 39 can serve useful purposes, including: (i) recalling and confirming the State’s commitments under the ICSID Convention; or (ii) to clear the way for the State to conclude specific types of dispute resolution agreements without facing internal *ultra vires* issues, and thereby providing encouragement to investors.⁵⁰
45. The Respondent argues that its interpretation of section 39 of the IPA is confirmed by context. In particular, the Respondent refers to two bilateral investment treaties entered into by PNG prior to and around the same time as the 1992 IPA was enacted (respectively, the UK-PNG BIT, signed on 14 May 1981 and entered into force on 22 December 1981, and the PNG-PRC BIT, signed on 12 April 1991 and entered into force on 12 February 1993), which contain clear and unequivocal consent to ICSID arbitration.⁵¹ The Respondent contends that, had the State intended to give unilateral consent to ICSID arbitration in section 39 of the IPA, it could have easily inserted into that Act the clear language of consent adopted in its BITs with other States.⁵² The Respondent posits that it is implausible that a country would consent to ICSID’s jurisdiction through treaties in clear and precise terms but, at the same time, seek to express consent to ICSID arbitration by way of an opaque and generalised reference in its national legislation.⁵³

⁴⁸ Application, Para. 50.

⁴⁹ Application, Para. 51.

⁵⁰ Application, Para. 51, and the authorities cited therein.

⁵¹ Application, Para. 52. The Respondent also refers to a more recent example of a BIT entered into by PNG which also provides unambiguous consent to ICSID arbitration (see Articles 16(4) and 16(5) of the Japan-PNG BIT, signed in April 2011: Application, Para. 53).

⁵² Application, Para. 55.

⁵³ Application, Para. 55.

46. The Respondent also contends that incongruities would arise if the Claimant's interpretation of section 39 were preferred. The Respondent submits that, if the Claimant's interpretation of section 39 were accepted, then the State would effectively have extended an offer to arbitrate under ICSID to ineligible investors under the ICSID Convention: *i.e.* the definition of "foreign investment" and "foreign investor" under the IPA is not limited to investors who are nationals of ICSID Convention Contracting States.⁵⁴ The Respondent submits that the State could not have intended this outcome.⁵⁵
47. The Respondent refers to the Preamble of the ICSID Convention, which provides 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."⁵⁶ As described in the *Report of the Executive Directors on the Convention*, consent is "the cornerstone of the jurisdiction of the Centre," and the Respondent concludes that there is an obvious absence of that consent in the IPA and the IDCA.⁵⁷ As such, the Respondent submits that the Claimant's claims should be dismissed in their entirety with costs.⁵⁸

2. Claims based on alleged MFN clause

48. The Respondent also contends that the Claimant's reliance upon the alleged "most favoured nation" clause in section 37(1) of the IPA is manifestly without legal merit.⁵⁹
49. Section 37(1) of the IPA provides as follows:

The provisions of this section shall apply to a foreign investor except where treatment

⁵⁴ Application, Para. 56.

⁵⁵ Application, Para. 56. The Respondent also notes that the five year limitation period in the Japan-PNG BIT would make no sense if the IPA operated in the manner proposed by the Claimant, as Japanese investors could easily circumvent that limitation period by relying upon the IPA (Application, Para. 56).

⁵⁶ Application, Para. 54.

⁵⁷ Application, Para. 58.

⁵⁸ Application, Para. 58.

⁵⁹ Application, Para. 66.

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more favourable to the foreign investor is accorded under any bilateral or multilateral agreement to which the State is a party.

50. The Respondent contends that the wording of this provision is clear: a foreign investor will be entitled to the protections under the IPA, unless that investor is entitled to more favourable treatment under any other bilateral or multilateral agreement to which PNG is also party, in which case the more favourable treatment prevails over the rights under the IPA.⁶⁰ In this way, the provision does not function as a typical MFN clause, which entitles a foreign investor to avail itself of more favourable treatment offered by the Respondent to investors of other States.⁶¹
51. In light of the wording of section 37(1), the Respondent submits that the Claimant cannot rely upon the provision to import (for itself) rights which PNG has granted to investors of other States.⁶² Referencing ILC Principle 7, the Respondent notes that an MFN clause has to be clear and unequivocal as to the obligations that are created; by way of example and also by way of contrast with section 37(1), the Respondent refers to two MFN clauses agreed by PNG in its respective treaties with Germany and Australia.⁶³ The Respondent submits that these clauses, unlike section 37(1), make clear that PNG has promised to give investors of the beneficiary state equal treatment as that enjoyed by any other state.⁶⁴
52. The Respondent contends that, as section 37(1) of the IPA is not an MFN clause, the Claimant is not entitled to the various “more favourable” protections which PNG has provided to investors of other States.⁶⁵ Rather, if the IPA applies in this arbitration (which the Respondent denies), the Claimant is only entitled to those protections specifically enumerated in that statute at sections 37(2) to 37(5) thereof. As such, the Respondent submits that any relief sought by the Claimant that is not provided for under

⁶⁰ Application, Paras. 61 and 68.

⁶¹ Application, Para. 61.

⁶² Application, Para. 63.

⁶³ Application, Paras. 63-64.

⁶⁴ Application, Para. 64.

⁶⁵ Application, Para. 67.

sections 37(2) to 37(5) of the IPA is manifestly without legal merit and should be dismissed or struck out.⁶⁶

53. The Respondent requests the following relief from the Tribunal in its Application:⁶⁷

- (a) *Dismiss all of the Claimant's claims in the [Request for Arbitration] on the basis that they are "manifestly without legal merit", as the mandatory jurisdictional requirements in Article 25(1) of the ICSID Convention are not met; and/or*
- (b) *Dismiss or strike out paragraphs 73(ii) to 73(x) of the [Request for Arbitration] and the relevant paragraphs of the [Request for Arbitration] that refer to such reliefs as set out in Annex 1, on the basis that these reliefs are "manifestly without legal merit", as section 37(1) of the [IPA] (even if applicable, which is denied) is not a MFN Clause and the reliefs fall outside section 37(2) to 37(5) of the [IPA];*
- (c) *Order costs in favour of the State; and*
- (d) *Order such other and further relief as may be deemed just and appropriate in the circumstances.*

B. *The Claimant's Observations on the Respondent's Application*

54. The Claimant submits that the Respondent's Application must fail for reasons of form (lack of clarity) and substance (failure to demonstrate that any part of the Claimant's case is "manifestly without legal merit").⁶⁸ The Claimant contends that the Application represents a misuse of the Rule 41(5) procedure.⁶⁹

55. In providing its summary of the relevant standard to be applied under Rule 41(5), the Claimant notes that a successful objection under this Rule must show that the relevant

⁶⁶ Application, Para. 71.

⁶⁷ Application, Para. 72; Respondent's Reply Observations, Para. 38.

⁶⁸ Claimant's Observations, Para. 2.

⁶⁹ Claimant's Observations, Para. 3.

claim is “manifestly without legal merit,” which is a high standard.⁷⁰ The Claimant submits that the phrase “legal merit” dictates that only the law (and not disputed facts) can be considered at this early stage of the proceeding.⁷¹ Further, the Claimant notes that the Rule requires that an objection “shall specify as precisely as possible the basis for the objection,” and submits that objections which are expressed with insufficient precision should fail for lack of clarity.⁷²

56. The Claimant maintains that each of the jurisdictional requirements set out in Article 25(1) of the ICSID Convention is satisfied in this case, and that Article 37(1) of the IPA is an MFN clause. That said, the Claimant preliminarily notes that all it must show in order to defeat the Application is that the Respondent is unable to establish, with relative ease and despatch, that the Claimant’s case on jurisdiction is manifestly without legal merit.⁷³

1. “Private Foreign Investment”

57. First, the Claimant observes that the Respondent’s objection on this question requires a factual enquiry, which is outside the scope of Rule 41(5).⁷⁴ In any event, the Claimant submits that the objection lacks the clarity required under Rule 41(5).⁷⁵

58. The Claimant submits that it is an investor under both the IPA and the ICSID Convention: with respect to the former, it holds the necessary certification under Part IV of the IPA, and with respect to the latter, the Claimant is a Singapore-incorporated

⁷⁰ Claimant’s Observations, Para. 7.

⁷¹ Claimant’s Observations, Para. 8.

⁷² Claimant’s Observations, Para. 9.

⁷³ Claimant’s Observations, Para. 11.

⁷⁴ Claimant’s Observations, Para. 13. The Claimant also notes that the Respondent’s Application only specifically addresses one of the Claimant’s alleged investments, namely the Claimant’s shares in OTML. To the extent that the Respondent argues that the Claimant’s other alleged investments “stem from” those shares, the Claimant contends that this would not be sufficient for the purposes of a Rule 41(5) objection with respect to those investments (Claimant’s Observations, Para. 14).

⁷⁵ Claimant’s Observations, Para. 15.

company (Singapore being a Contracting State to the ICSID Convention) and is therefore a “national of another Contracting State” for the purposes of Article 25(1) of the Convention.⁷⁶

59. As to whether there is a “private foreign investment” for the purposes of the ICSID Convention, the Claimant notes that this is a highly contested issue and should be fully argued, rather than decided in an expedited Rule 41(5) procedure.⁷⁷ The Claimant contends that the State’s argument is a factual one which should not be determined summarily at this stage, because the Respondent’s submissions regarding the transactions which underpin the Claimant’s alleged investments and the origin of the investment capital (to the extent the latter is relevant, which the Claimant denies) will require evidence and a closer analysis than the Rule 41(5) procedure can afford.⁷⁸ In any event, the Claimant maintains that its alleged investments are foreign in character.⁷⁹
60. Beyond the alleged inappropriateness of the enquiry at this stage, the Claimant submits that it has covered investments under the commonly used “two-step test,” namely under both section 3 of the IPA and Article 25 of the ICSID Convention.⁸⁰ The Claimant contends that the only question with respect to jurisdiction *ratione materiae* for the purpose of Rule 41(5) is whether any of the relevant investments are “pure commercial transactions”:⁸¹ the Claimant submits that they clearly are not, and contends that the Respondent has not suggested otherwise.⁸²

⁷⁶ Claimant’s Observations, Para. 17.

⁷⁷ Claimant’s Observations, Para. 18.

⁷⁸ Claimant’s Observations, Para. 22.

⁷⁹ Claimant’s Observations, Para. 22. The Claimant notes that there is no requirement under the ICSID Convention that the investment be private.

⁸⁰ Claimant’s Observations, Paras. 21, 22 and 24.

⁸¹ The Claimant in this respect relies upon *Global Trading Resource Corp v. Ukraine* (ICSID Case No. ARB/09/11), Award, 1 December 2010, which is the only instance to date where a Rule 41(5) objection based upon the meaning of the term “investment” under the ICSID Convention has been successful. There, according to the Claimant, the tribunal found that the short-term poultry sales contracts under consideration were “pure commercial transactions” and, as a result, were outside the scope of the ICSID Convention (Claimant’s Observations, Paras. 21 and 23).

⁸² Claimant’s Observations, Paras. 21 and 23.

2. Consent

61. The Claimant submits that the Respondent's consent objection requires a factual enquiry, which is outside the scope of Rule 41(5).⁸³ The Claimant also contends that the Respondent's objection does not establish that the Claimant's case on consent is manifestly without legal merit.⁸⁴
62. The Claimant addresses the Respondent's objections with respect to both the IDCA and the IPA. As to the IDCA, the Claimant submits that section 2 of that instrument is not the Article 25(4) notification itself, and as such some other purpose must be assigned to the provision.⁸⁵ The Claimant contends that section 2 expresses a general condition or jurisdiction/admissibility requirement applicable to subsequent agreements to arbitrate entered into by the State, and that the permissive wording of the title of the section ("Classes of disputes which may be referred to the jurisdiction of the Centre") is supportive of the Claimant's case on consent.⁸⁶
63. Turning to the IPA, the Claimant argues that ILC Principle 7 should be approached with caution: the ILC Principles offer guidance, rather than a prescriptive reflection of customary international law.⁸⁷ The Claimant submits that the principles are primarily concerned with diplomatic acts performed by States (as opposed to the interpretation of foreign investment laws), and that the Tribunal should rather take guidance from ICSID cases.⁸⁸
64. In considering ICSID cases, the Claimant contends that the tribunal's jurisdictional

⁸³ Claimant's Observations, Para. 26.

⁸⁴ Claimant's Observations, Para. 27. The Claimant submits that this Tribunal, in considering whether the Rule 41(5) test is met, is not prohibited from taking into account the fact of registration of the Request for Arbitration by the Secretary-General of ICSID. In this connection the Claimant notes that the standards are the same ("manifest") in both the registration and Rule 41(5) settings (Claimant's Observations, Para. 29).

⁸⁵ Claimant's Observations, Para. 30.

⁸⁶ Claimant's Observations, Para. 30.

⁸⁷ Claimant's Observations, Para. 31.

⁸⁸ Claimant's Observations, Para. 31.

decision in *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*⁸⁹ (“SPP decision”) has not been challenged, but rather followed, by other ICSID tribunals, and notes the tribunal’s statement in that case that “jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith.”⁹⁰ The Claimant submits that the purpose of section 39 cannot be to recall and confirm the State’s commitments under the ICSID Convention, as this was achieved by the prior enactment of the IDCA.⁹¹

65. To the extent that the Respondent compares the terms of section 39 with the language of other BITs entered into by PNG, the Claimant submits that no firm interpretive conclusion can be drawn from the dates on which PNG entered into other BITs, as some were entered into before the IPA was enacted and others were entered into after.⁹² In any event, the Claimant submits that the language of section 39 is not “opaque or generalised” in comparison with the language used by PNG in its treaties (as contended by the Respondent): the language of section 39 is short, clear and simple, and provides that the IDCA, implementing the ICSID Convention, applies, according to its terms, to foreign investment disputes.⁹³
66. The Claimant also addresses the Respondent’s argument that, under the Claimant’s interpretation of section 39, PNG would effectively have extended an offer to ICSID arbitration even to investors who are not nationals of ICSID Contracting States. The Claimant submits that this argument is devoid of legal merit, as section 39 provides that the ICSID Convention “applies, according to its terms,” which includes the requirement in Article 25(1) that the dispute must be between a Contracting State and a national of another Contracting State.⁹⁴

⁸⁹ (ICSID Case No. ARB/84/3), Decision on Jurisdiction, 14 April 1988.

⁹⁰ Claimant’s Observations, Para. 31 (quoting Para. 63 of the SPP decision).

⁹¹ Claimant’s Observations, Para. 31.

⁹² Claimant’s Observations, Para. 31.

⁹³ Claimant’s Observations, Para. 31.

⁹⁴ Claimant’s Observations, Para. 31.

67. According to the Claimant, the Respondent's reliance upon the Japan-PNG BIT is also misplaced, as an investor covered by the IPA and the Japan-PNG BIT may simply elect which instrument to use to make a claim.⁹⁵
68. The Claimant observes that the key interpretive task for the Tribunal is to determine the meaning and legal effect of the phrase "applies, according to its terms" in section 39.⁹⁶ On this issue, the Claimant notes that statements on the PNG Investment Promotion Authority's website (the agency responsible for administering the IPA and for promoting PNG as a destination for foreign investors) are lacking in any reference to the need for a subsequent arbitration agreement with the State.⁹⁷ In reliance upon the *SPP* decision, the Claimant submits that these statements can be taken into account as evidence of the legislative intent behind the unilateral declaration in section 39.⁹⁸
69. The Claimant also notes that all "Investment Guarantees" in Part V of the IPA (of which section 39 is one) are extended and effective as soon as the investor receives the requisite certificate under Part IV of the same Act.⁹⁹ As the Claimant has such a certificate, the Claimant submits that it is entitled to all the benefits and protections it entails, including recourse to ICSID arbitration, without any further formalities.¹⁰⁰ Further, to the extent that the IPA is ambiguous (which the Claimant denies), the Claimant observes that it should be construed in a manner that aids rather than impedes its effective operation as a declaration of consent to ICSID arbitration.¹⁰¹
70. Finally, the Claimant posits that the principle of *effet utile* can be applied in this case and,

⁹⁵ Claimant's Observations, Para. 31.

⁹⁶ Claimant's Observations, Para. 32.

⁹⁷ Claimant's Observations, Paras. 33-35.

⁹⁸ Claimant's Observations, Para. 33.

⁹⁹ Claimant's Observations, Para. 36.

¹⁰⁰ Claimant's Observations, Para. 36.

¹⁰¹ Claimant's Observations, Para. 37. The Claimant also submits that, as the State drafted the provision in question, doubts over its meaning should be resolved *contra proferentem* against the State and in favour of the Claimant (Claimant's Observations, Para. 39).

in reliance upon this principle (and ICSID authority¹⁰²), submits that the purpose of the IPA (*inter alia*, to “promote and facilitate investment in [PNG] by citizens and foreign investors”) should be applied in favour of the protection of covered investments where there is uncertainty in the IPA’s interpretation.¹⁰³

3. MFN clause

71. The Claimant observes that the Respondent had to effectively re-write section 37(1) of the IPA in order to make its objection with respect to that provision.¹⁰⁴ According to the Claimant, the Respondent’s argument replaces the term “the foreign investor” in section 37(1) with the term “that foreign investor.”¹⁰⁵ The Claimant submits that this distorts the language of the Act, as “the foreign investor” in the context of section 37(1) refers to the foreign investor (as a class) under a more favourable treaty instrument, rather than the foreign investor under the IPA.¹⁰⁶ In this sense, the Claimant contends that the provision provides that the investment guarantees given by the Respondent in the IPA apply to a foreign investor (here, PNGSDP) unless standards of treatment more favourable to the foreign investor are available under any BIT to which the Respondent is a party.¹⁰⁷
72. The Claimant requests that the Tribunal issue a decision under Rule 41(5):
- (a) dismissing the Application in full; and
 - (b) ordering the Respondent to pay the legal costs incurred by the Claimant in relation to the Application.¹⁰⁸

¹⁰² Namely, *SGS Société Générale de Surveillance SA v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision on Jurisdiction, 29 January 2004 (“*SGS v. Philippines*”), Para. 116.

¹⁰³ Claimant’s Observations, Para. 38.

¹⁰⁴ Claimant’s Observations, Para. 42.

¹⁰⁵ Claimant’s Observations, Para. 45.

¹⁰⁶ Claimant’s Observations, Para. 46.

¹⁰⁷ Claimant’s Observations, Para. 48.

¹⁰⁸ Claimant’s Observations, Para. 49.

C. *The Respondent's Reply to the Claimant's Observations*

73. In reply, the Respondent claims that the Claimant, in its written submission, offers no credible answers to the Respondent's various Rule 41(5) objections.¹⁰⁹ The Respondent suggests that the Claimant's Observations both mischaracterise matters and strain legal principles.¹¹⁰
74. The Respondent contests the Claimant's submission that the State's Rule 41(5) objections require a factual enquiry.¹¹¹ The Respondent notes that there are no factual disputes for the purposes of the present application, as the only facts it relies upon are undisputed facts contained in the Claimant's Request for Arbitration.¹¹²

1. Consent

75. The Respondent's argument with respect to written consent can be summarised briefly: as the Claimant has allegedly conceded that no consent resides in section 2 of the IDCA, and as section 39 of the IPA simply refers back to the IDCA, it follows that section 39 of the IPA does not constitute "consent in writing" for the purposes of Article 25(1) of the ICSID Convention.¹¹³
76. The Respondent observes that the Claimant has not sought to retract its asserted concession with respect to the IDCA (namely, that neither the IDCA generally nor

¹⁰⁹ Respondent's Reply Observations, Para. 2.

¹¹⁰ Respondent's Reply Observations, Para. 2. With respect to legal principles, the Respondent disagrees with the Claimant's assertion that the legal standards are the same under both Article 36(3) of the ICSID Convention relating to registration and Rule 41(5) of the ICSID Arbitration Rules. It notes that the Secretary-General's decision to register the Request for Arbitration under Article 36(3) does not in any way bind this Tribunal in its consideration of the Respondent's Rule 41(5) Application (Respondent's Reply Observations, Para. 2, fn 3, and the authorities cited therein).

¹¹¹ Respondent's Reply Observations, Para. 4.

¹¹² Respondent's Reply Observations, Paras. 4 and 5.

¹¹³ Respondent's Reply Observations, Paras. 6 and 12.

section 2 specifically constitutes consent of the State *per se*).¹¹⁴ To the extent that the Claimant has relied upon the “permissive” heading of section 2 of the IDCA, the Respondent notes that PNG statutory interpretation law provides that section headings do not form a part of the relevant statutory provision.¹¹⁵ As such, the Respondent submits that the heading could not override the clear and express wording of the provision itself, which precludes the option of arbitration for a class of disputes (i.e., disputes that are not fundamental to the investment itself) and makes no pronouncement on the availability of arbitration for other classes of disputes.¹¹⁶

77. The Respondent expresses some confusion with respect to the Claimant’s argument regarding the distinction between section 2 of the IDCA and the actual Article 25(4) notification made by the State to ICSID in 1978.¹¹⁷ The Respondent submits that, as the 1978 notification was incapable of constituting the consent required by Article 25(1), *a fortiori* a domestic statute reflecting that notification must be similarly incapable.¹¹⁸
78. The Respondent posits that the Claimant’s arguments are also flawed with respect to section 39 of the IPA.¹¹⁹ It distinguishes the *SPP* decision on the basis that the Egyptian investment law under consideration in that case included mandatory language with respect to the submission of disputes to ICSID (*i.e.* disputes “shall be settled ... within the framework of the [ICSID Convention]”), whereas such language is absent from section 39 of the IPA.¹²⁰
79. The Respondent distinguishes the promotional material referred to in the *SPP* decision from the statements on the IPA website, and notes that those statements cannot fulfil the legal requirement of “consent in writing” under the ICSID Convention: these statements

¹¹⁴ Respondent’s Reply Observations, Para. 7.

¹¹⁵ Respondent’s Reply Observations, Para. 10, referring to section 26(3) of the PNG *Interpretation Act* (Cap 2, 1975).

¹¹⁶ Respondent’s Reply Observations, Para. 10.

¹¹⁷ Respondent’s Reply Observations, Para. 11.

¹¹⁸ Respondent’s Reply Observations, Para. 11.

¹¹⁹ Respondent’s Reply Observations, Para. 13.

¹²⁰ Respondent’s Reply Observations, Para. 14.

cannot create rights, and cannot alter the terms of the IPA.¹²¹ Further, in oral submissions at the hearing in Singapore on 10 October 2014 the Respondent contended that the *SPP* decision is not reconcilable with the line of ICSID cases which have considered Venezuela's investment law, and as such the *SPP* decision is "simply wrong."¹²²

80. The Respondent submits that the principle of *effet utile* and the *contra proferentem* rule do not apply in this case: the former does not apply to unilateral declarations made by States,¹²³ and the latter is a principle relating to the interpretation of contracts, not of national legislation.¹²⁴ The Respondent also contends that, notwithstanding the Claimant's argument otherwise, the generally accepted view is that the ILC Principles (including ILC Principle 7) are applicable to domestic legislation.¹²⁵
81. Finally, the Respondent criticises the Claimant's interpretation of section 39 in the context of the IPA.¹²⁶ The Respondent submits that the conferment of benefits flowing from the grant of a certificate under Part IV of the IPA cannot *ipso facto* give rise to the requisite "consent in writing" where none in fact exists in section 39 of the same Act.¹²⁷

2. "Private Foreign Investment"

82. The Respondent observes that, given the objects of the Claimant (namely, to promote sustainable development within PNG and to advance the general welfare of the PNG people) and the fact that it is obliged to use its assets solely for those objects, it is not the

¹²¹ Respondent's Reply Observations, Paras. 16-17. The Respondent also notes that the tribunal in the *SPP* decision only relied upon promotional literature to the extent that it "merely confirm[ed]" the conclusion already reached by the tribunal. The Respondent submits that the IPA website statements do no such 'confirming' in this case, as no consent can be located in either the IDCA or the IPA (Respondent's Reply Observations, Para. 19).

¹²² DT.64-67.

¹²³ Respondent's Reply Observations, Para. 21, citing authority in support at fn 25. The Respondent contends that the Claimant's reliance upon *SGS v. Philippines* in this respect is irrelevant (see Claimant's Observations, Para. 38) because that case concerned a bilateral investment treaty, not a State's unilateral declaration (Respondent's Reply Observations, Para. 21).

¹²⁴ Respondent's Reply Observations, Paras. 22-24.

¹²⁵ Respondent's Reply Observations, Para. 26.

¹²⁶ Respondent's Reply Observations, Paras. 27-28.

¹²⁷ Respondent's Reply Observations, Para. 28.

archetypal “private investor” contemplated under the ICSID Convention.¹²⁸ To the extent that the Claimant alleges that there is no requirement that an investment be “private,” and that the expression “private foreign investment” is not used in the ICSID Convention, the Respondent notes that the Preamble to the Convention refers to “private international investment.”¹²⁹

83. The Respondent reiterates its position that, as the Claimant was gifted the OTML shares, there has been no “private foreign investor” to speak of since BHP’s exit in 2001 (the Respondent’s argument is that the Claimant has no standing under the ICSID Convention because it has not contributed to a flow of capital into the economy of PNG).¹³⁰ The Respondent also notes that none of the contracts executed in connection with the transfer of shares from BHP to the Claimant included ICSID dispute resolution clauses.¹³¹

3. MFN clause

84. The Respondent observes that it does violence to the plain wording of section 37(1) of the IPA to contend (as the Claimant does) that the reference to “the foreign investor” in that provision refers to someone other than “a foreign investor” referred to in the preceding line of the same section; in this respect, the Respondent submits that the reference to “the foreign investor” could not refer to comparators from a third State.¹³²

VI. THE TRIBUNAL’S REASONS

85. The Tribunal first addresses the scope of the provision in Rule 41(5) and the relevant standard to be applied, before considering the Respondent’s objections.

¹²⁸ Respondent’s Reply Observations, Para. 31.

¹²⁹ Respondent’s Reply Observations, Para. 32.

¹³⁰ Respondent’s Reply Observations, Para. 33.

¹³¹ Respondent’s Reply Observations, Para. 36.

¹³² Respondent’s Reply Observations, Para. 37.

A. **Rule 41(5): Scope and Standard**

86. Rule 41(5) of the ICSID Arbitration Rules provides as follows:

Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

87. Previous ICSID tribunals have considered Rule 41(5)'s expedited procedure and commented upon the standard to be applied under the provision, namely, "manifestly without legal merit." Like the Parties in this arbitration, the Tribunal regards these interpretations by prior ICSID tribunals as highly relevant and material to its consideration of the Application.¹³³

88. Several ICSID tribunals have found that "manifest," as used in Rule 41(5), is equivalent to "obvious" or "clearly revealed to the eye, mind or judgment."¹³⁴ Under Rule 41(5), the respondent must establish its objection "clearly and obviously, with relative ease and despatch."¹³⁵ The Rule is intended to capture cases which are clearly and unequivocally unmeritorious,¹³⁶ and as such, the standard that a respondent must meet under Rule 41(5)

¹³³ Both the Claimant and the Respondent have relied upon previous decisions of ICSID tribunals, including *Trans-Global Petroleum Inc. v. The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/07/25), The Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, **Exhibit RL-7** ("Trans-Global"); *Global Trading Resource Corp. v. Ukraine* (ICSID Case No. ARB/09/11), Award, 1 December 2010, **Exhibit CA-7** ("Global Trading"); *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3), Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009, **Exhibit RL-2** ("Brandes Investment"). The Tribunal refers to these decisions where relevant below.

¹³⁴ *Trans-Global*, Para. 83; *Global Trading*, Para. 35.

¹³⁵ *Trans-Global*, Para. 88; *Brandes Investment*, Para. 63; *Global Trading*, Para. 35.

¹³⁶ *Brandes Investment*, Para. 62.

is very demanding and rigorous.¹³⁷ In the opinion of the Tribunal, a case is not clearly and unequivocally unmeritorious if the Claimant has a tenable arguable case.

89. Rule 41(5) is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts.
90. In considering the scope of a Rule 41(5) objection (*i.e.*, the scope of the phrase “without legal merit”), ICSID tribunals have found that objections should be based on legal impediments to claims, rather than factual ones.¹³⁸ Given the preliminary nature of the proceeding, a tribunal considering a Rule 41(5) application may not be in a position to decide upon disputed facts.¹³⁹
91. Further, as the Respondent’s Rule 41(5) objections concern both matters of jurisdiction and merits, the Tribunal notes that it agrees with the decisions of other tribunals to the effect that Rule 41(5) allows for objections related both to jurisdiction and the merits of the case.¹⁴⁰ Nonetheless, the very demanding standard of proof outlined above applies no less to jurisdictional than other matters.

B. The Respondent’s Objections

92. Having considered the Parties’ written and oral submissions on the Application, the Tribunal concludes that the Respondent has not satisfied the applicable standard of proof in respect of its three objections under Rule 41(5) – *i.e.* that of “*manifest*” lack of legal merit. As such, the Tribunal determines that the Respondent’s Application should be dismissed.
93. As outlined above, the Respondent’s objections concern, *inter alia*, the interpretation of

¹³⁷ *Trans-Global*, Para. 88; *Brandes Investment*, Para. 63; *Global Trading*, Para. 35.

¹³⁸ *Trans-Global*, Para. 97.

¹³⁹ *Trans-Global*, Para. 97.

¹⁴⁰ *Brandes Investment*, Para. 55; *Global Trading*, Para. 30. This is not disputed by the Claimant in this case.

both PNG's domestic legislation and the ICSID Convention. Again as outlined above, the Respondent's objections also call for a factual analysis of the character of the Claimant itself and the circumstances behind its economic activity in PNG. In the Tribunal's view, none of these matters is appropriate for resolution under Rule 41(5).

94. The Tribunal considers that the factual circumstances of this case are relatively unusual, and that the Respondent's objections raise novel issues of law. Consistent with this, at the hearing conducted on 10 October 2014, the Respondent referred to the "unique" nature of both this case and the Claimant itself.¹⁴¹ In the Tribunal's view, it would in principle be inappropriate to consider and resolve novel issues of law in a summary fashion, which would inevitably limit the Parties' opportunity to be heard and the Tribunal's opportunity to reflect. That is particularly true where those issues are disputed and potentially complex.
95. The Tribunal notes that the interpretation of the IPA and IDCA is central to the Respondent's objections with respect to written consent and the alleged MFN clause in the IPA. The Tribunal considers that these interpretations cannot be satisfactorily made in the context of a Rule 41(5) application, which necessarily involves an expedited and summary procedure. The Tribunal notes that there are disputed questions regarding which system (or systems) of law should apply to the interpretation of the IPA and IDCA (in particular, international or domestic rules of interpretation),¹⁴² and in addition, which specific interpretive principles should apply (*e.g.*, the *effet utile* principle and the rule of *contra proferentem*). Further, the Tribunal notes that the IPA and the IDCA have not yet been the subject of interpretation by an ICSID tribunal, and it will therefore be required to decide issues of first impression. Doing so in a summary Rule 41(5) procedure would be inappropriate.

¹⁴¹ DT.45.2-5, DT.64.6-7, DT.130.5-9, and DT.135-136.

¹⁴² DT.52-53; DT.103-106. In the event that domestic PNG laws may apply to the interpretation of the relevant provisions of the IPA and IDCA, the Tribunal notes that (at this stage) it would be undertaking an interpretive process in a summary fashion without the benefit of secondary legislative materials, such as second reading speeches or explanatory memoranda (see DT.16-17). Such materials may shed light upon the intended purpose of the sections in issue.

96. The Tribunal also notes that, in the context of interpreting section 39 of the IPA, the Respondent has submitted that the *SPP* decision was wrongly decided.¹⁴³ Insofar as the *SPP* decision is relevant to the interpretive task of the Tribunal in this arbitration (and the Tribunal has not formed any view on this point), this is an issue that must be addressed by the Parties, and considered by the Tribunal, outside of a summary procedure.
97. Finally, the Respondent's objection with respect to "private foreign investment" cannot be satisfactorily dealt with at this stage of the proceeding. The Respondent's objection does not appear to be based upon an explicit jurisdictional criterion set out in either the ICSID Convention or the relevant PNG legislation. Rather, the Respondent's objection appears to be based on the Respondent's interpretation of the ICSID Convention's jurisdictional requirements in light of materials extraneous to the terms of Article 25(1) (in particular, the Convention Preamble and the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States) and a distinction drawn by the Respondent between the Claimant and what the Respondent refers to as "typical foreign investors" considered in other ICSID Convention cases.¹⁴⁴
98. As such, the Respondent's objection is unsuited for a Rule 41(5) Application. It does not involve application of undisputed or indisputable legal rules, but rather involves novel issues of interpretation and analysis. The Tribunal does not consider it appropriate to undertake such analysis in the context of a Rule 41(5) procedure.
99. In sum, the Tribunal considers that all of the arguments raised by the Respondent's objections involve disputed, and often complex, legal and factual issues which cannot properly be resolved within the expedited Rule 41(5) procedure. The Respondent's Application must therefore be dismissed.

¹⁴³ DT.64-67.

¹⁴⁴ In respect of distinguishing the Claimant from "typical foreign investors", see DT.43-44.

VII. THE TRIBUNAL'S DECISION

100. For the above reasons, the Tribunal decides as follows:

1. The Respondent's Application of 16 July 2014 is rejected;
2. All questions as to the costs of the Respondent's Application are reserved;
3. The further procedure for this arbitration will be according to the Tribunal's Procedural Order No. 1 and the Tribunal's letter of 11 September 2014.

On behalf of the Tribunal,

[Signed]

Gary Born
President of the Tribunal

Date: 28 October 2014