

PCA CASE NO. 2016-7

**In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With
The Agreement Between The Government Of The United Kingdom Of Great Britain
And Northern Ireland And The Government Of The Republic Of India
For The Promotion And Protection Of Investments**

-and-

**The Arbitration Rules Of The United Nations Commission On International Trade Law,
1976 (the “UNCITRAL Arbitration Rules”)**

-between-

**CAIRN ENERGY PLC
CAIRN UK HOLDINGS LIMITED**

Claimants

-and-

The Republic of India

Respondent

Procedural Order No. 4

Decision on the Respondent’s Application for Bifurcation

The Arbitral Tribunal
Dr. Laurent Lévy (Presiding Arbitrator)
Mr. Stanimir A. Alexandrov
Mr. J. Christopher Thomas, QC

Registry
Permanent Court of Arbitration

19 April 2017

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I. PROCEDURAL HISTORY

1. On 18 April 2016, the Parties and the Tribunal held the first procedural hearing to discuss, inter alia, the procedural calendar. During that hearing, the Respondent indicated that it intended to wait until the Claimants filed their Statement of Claim before formulating its objections to jurisdiction and admissibility, and proposed that whether those objections should be heard in a preliminary bifurcated phase should be determined thereafter.¹ That said, the Respondent made the following commitments:
 - a. First, “[i]f following the Claimants' memorial being filed, we realize that in fact, on the claim as formulated, there are no objections we wish to take to either jurisdiction or admissibility, we would commit to letting the Tribunal know that straightaway, irrespective of the timeline which would have been otherwise put in place to file the objections.”²
 - b. “Secondly, if when we file the objections to jurisdiction and admissibility, we realize that there would be no good grounds for bifurcation or in fact feel that actually everything is better dealt with in one phase, we would also say that straightaway.”³
2. On 21 April 2016, the Tribunal wrote to the Parties to follow up on various matters discussed during the first procedural hearing. With respect to the question of bifurcation, the Tribunal recorded the agreement reached at the hearing as follows: “If, once the Respondent has received the Claimants’ Statement of Claim, the Respondent wishes to raise objections to jurisdiction and/or admissibility, it may file a request for bifurcation and should do so as soon as reasonably possible, failing which the Respondent will submit its Statement of Defense in full. If the Respondent does request a bifurcation, the Tribunal would then allow the Claimants to comment and will ultimately make a decision.”⁴
3. On 6 June 2016, the Respondent filed an Application for a Stay of the Proceedings (the “Stay Application”).⁵
4. On 28 June 2016, the Claimants filed their Statement of Claim.
5. On 1 July 2016, in the context of the timing for a decision on the Respondent’s Stay Application and for the filing of the Respondent’s Statement of Defence, the Tribunal noted that the Claimants had already filed their Statement of Claim, and reiterated the

¹ Tr. 18.04.2016, 27:3-28-7 (Mr. Moolan).

² Tr. 18.04.2016, 28:8-15 (Mr. Moolan).

³ Tr. 18.04.2016, 28:17-23 (Mr. Moolan).

⁴ Tribunal’s email of 21 April 2016 (AT-7).

⁵ The procedural history relating to the Stay Application is summarized in Procedural Order No. 3.

directions regarding the timing of an application for bifurcation by the Respondent quoted at paragraph 2 above.⁶

6. On 8 July 2016, the Respondent indicated that it would await the Tribunal's decision on its Stay Application before filing any application for bifurcation.⁷ The Claimants objected to this, and requested the Tribunal to "reject the Respondent's proposal to delay notification of any preliminary objections and any bifurcation request until after the Tribunal issues a decision on its stay application, and [...] encourage the Respondent to comply with its commitment made at the organisational hearing to raise those issues straightaway."⁸
7. By letter of 25 July 2016, the Respondent responded that it had only promised to inform the Tribunal and the Claimants "straightaway" if it did not wish to raise objections to jurisdiction and admissibility, or whether bifurcation appeared inappropriate. The Respondent also argued that in view of the formulation of Article 21(3) of the UNCITRAL Rules (1976), it had no obligation to file any jurisdictional objections or file an application for bifurcation prior to the submission of its Statement of Defence. Further, as in the Respondent's view the proceedings should be stayed, it argued that it is "perfectly legitimate" for it to await the Tribunal's decision on its Stay Application before filing its foreshadowed application for bifurcation.⁹
8. By letter of 4 August 2016, the Tribunal determined that the Parties' submissions did not call for a revision of its previous directions on this matter. It therefore reiterated that "if the Respondent wishes to raise objections to jurisdiction and/or admissibility to the Claimants' claim, it may file a request for bifurcation and should do so as soon as reasonably possible, failing which the Respondent shall submit its Statement of Defence in full." The Tribunal added that "when ruling on a request for bifurcation, it will take into consideration whether it was timely made."¹⁰
9. Separately, in its letter of 8 July 2016, the Respondent requested a hearing on its Stay Application. The Claimants objected to this hearing; this objection notwithstanding, they proposed that if the Tribunal decided that a hearing should be held, the Parties should use "any such hearing to address questions of bifurcation, even if India insists on briefing its objections later." The Claimants clarified that "[t]he Respondent would only need to be willing to identify those objections it believes warrant bifurcated treatment." The Claimants added that this "would allow the Tribunal and the Parties to address in a single hearing two threshold procedural questions, the resolution of which will dispose of the stay application and set a path towards resolving the Respondent's jurisdictional objections."¹¹

⁶ Tribunal's letter of 1 July 2016 (AT-20).

⁷ Respondent's email of 8 July 2016 (RCom-27).

⁸ Claimants' letter of 18 July 2016, p. 5 (CCom-35).

⁹ Respondent's letter of 25 July 2016, ¶¶ 4-5 (RCom-32).

¹⁰ Tribunal's letter of 4 August 2016, p. 3 (AT-25).

¹¹ Claimants' letter of 29 July 2016, p. 2 (CCom-36).

10. In its letter of 4 August 2016, the Tribunal granted the Respondent's request for a hearing on its Stay Application. Ultimately, this hearing was scheduled for 7 October 2016.¹²
11. By letter of 8 August 2016, the Respondent rejected the Claimants' proposal that they should identify their preliminary objections prior to the hearing on the Stay Application or include a discussion on bifurcation during that hearing, arguing that either "(i) the Respondent would have filed its Application for Bifurcation before the date of the hearing, in which case, procedural directions can be issued by the Tribunal in writing in the usual way; or (ii) the Respondent would not have filed its Application for Bifurcation before that date, in which case it would not be appropriate for the Tribunal to require the Respondent to identify objections to jurisdiction in advance of its Statement of Defence given the terms of Article 21 of the UNCITRAL Rules[.]"¹³
12. By email of 2 September 2016, the Tribunal included in the agenda for the hearing on the Stay Application the discussion of the procedural calendar, including blocking dates for an evidentiary hearing.¹⁴ The Respondent objected to this and other items listed in the agenda.¹⁵ The Claimants expressed no objection to the Tribunal's agenda for the hearing, but argued that "had the Respondent been more forthcoming about its plans in respect of bifurcation, as it was invited to do, a parallel briefing and combined hearing could have been organised to address both applications" and, as a result, "any request by the Respondent for a separate hearing on bifurcation should receive little sympathy, and in no circumstance should it provide an excuse for the late filing of the Statement of Defence."¹⁶
13. By letter of 28 September 2016, after hearing the Parties, the Tribunal eliminated from the agenda for the hearing a broad discussion of the procedural calendar, but confirmed that the agenda would include a discussion of the dates for an evidentiary hearing, noting that this item could not be delayed any longer. The Tribunal also reiterated its directions of 21 April, 1 July and 4 August 2016.¹⁷
14. On 6 October 2016, on the eve of the hearing scheduled for the Respondent's Stay Application, the Respondent filed its Application for Bifurcation (the "Respondent's Application"). At the same time, the Respondent proposed a briefing schedule for that application consisting of two rounds, and requested a hearing on that application.
15. On 7 October 2016, the Parties and the Tribunal held a hearing to address the Respondent's Stay Application, as well as certain procedural matters, including the determination of dates for the evidentiary hearing.

¹² Tribunal's letter of 4 August 2016, p. 3 (AT-25).

¹³ Respondent's letter of 8 August 2016, ¶ 3 (RCom-36).

¹⁴ Tribunal's email of 2 September 2016 (AT-30).

¹⁵ Respondent's letters of 16 and 26 September 2016 (RCom-38 and RCom-40).

¹⁶ Claimants' letter of 21 September 2016, p. 4 (CCom-44).

¹⁷ Tribunal's letter of 28 September 2016 (AT-34).

16. By letter of 17 October 2016, the Claimants objected to a hearing on the Respondent's Application for Bifurcation, arguing that "the Respondent has been tactically withholding its Bifurcation Application, notwithstanding repeated urgings by the Tribunal and the Claimants", and that "[h]ad the Respondent done so, the issue could have been briefed and decided long ago, or it could have been addressed in a combined hearing on 7 October 2016, as the Claimants proposed."¹⁸
17. In its Letter 1 of 3 November 2016, after considering the circumstances described above and in the exercise of its discretion under Article 15(1) of the UNCITRAL Rules, the Tribunal denied the Respondent's request for a hearing on its Application for Bifurcation.¹⁹ However, it agreed that the application would be briefed in two rounds, with the first round to take place before the filing of the Respondent's Statement of Defence, and the second round to take place thereafter. The Tribunal also invited the Parties to consult and agree on two timetable proposals, one for a bifurcated proceeding, and one for a non-bifurcated proceeding.
18. In a second letter dated 3 November 2016, the Tribunal informed the Parties that before it issued its decision on the Stay Application, it wished to explore avenues of coordination with the *Vedanta* tribunal that would be directed at reducing the risk of inconsistent decisions while allowing both arbitrations to proceed, and invited the Parties to consult with each other and with Vedanta to determine whether other options – short of a full consolidation or a full stay of the proceedings – would be feasible.²⁰ As explained in Procedural Order No. 3, the Parties cooperated with this invitation, but these efforts ultimately failed, and on 17 December 2016 the Respondent renewed its Stay Application. These exchanges were followed by new submissions by the Parties on the Stay Application which continued until March 2017, and a request by the Respondent for a second hearing for this application.²¹
19. On 9 November 2016, the Claimants filed their Response to the Respondent's Application for Bifurcation (the "Claimants' Response").
20. On 4 February 2017, after several requests for extensions, the Respondent filed its full Statement of Defence.
21. On 19 February 2017, the Respondent filed its Reply to the Claimants' Response to its Application for Bifurcation (the "Respondent's Reply").
22. On 6 March 2017, the Claimants filed their Rejoinder on the Respondent's Application for Bifurcation (the "Claimants' Rejoinder").
23. By letter of 27 March 2017, the Tribunal informed the Parties that the Stay Application was denied, that a decision containing the Tribunal's reasoning would

¹⁸ Claimants' letter of 17 October 2016, pp. 1-2 (CCom-49).

¹⁹ Tribunal's Letter 1 of 3 November 2016, pp. 6-7 (AT-37).

²⁰ Tribunal's Letter 2 of 3 November 2016, pp. 1-2 (AT-36).

²¹ See Procedural Order No. 3, ¶¶ 5-11.

follow shortly, and that the Tribunal would thereafter address the Respondent's Application for Bifurcation.

24. On 31 March 2017, the Tribunal issued Procedural Order No. 3 with its Decision on the Respondent's Stay Application.
25. The present Decision addresses the Respondent's Application for Bifurcation.

II. THE PARTIES' POSITIONS

26. As it is the Respondent who requests a stay of the proceedings, the Tribunal will start with the Respondent's position, and will then address the Claimants'.

A. The Respondent's position

27. The Respondent contends that the present dispute falls outside of the scope of protection of the India-United Kingdom bilateral investment treaty (the "BIT"), and as a result is outside of the scope of the Tribunal's jurisdiction²², or the claim is inadmissible.²³ More specifically, the Respondent raises the following three preliminary objections:²⁴
 - a. First, the Respondent argues that the Claimants' claim is premature, because it concerns a first instance assessment order which is still in the process of being reviewed within the appellate procedure provided for in the Indian Income Tax Act 1961 (the "Income Tax Act" or the "Act") (the "First Preliminary Objection").²⁵ The Tribunal understands the Respondent's position in this regard to be that this renders the claim inadmissible.²⁶
 - b. Second, the Respondent contends that the BIT does not apply to disputes concerning taxation measures (the "Second Preliminary Objection").²⁷ The Tribunal understands that, as a result, the Respondent argues that the Tribunal has no jurisdiction over the Claimants' claim.²⁸
 - c. Third, the Respondent submits that the dispute does not concern the Claimants' "investments", but rather it relates to a taxation measure that has been imposed on the Claimants' "returns", which either (i) do not fall within the scope of the

²² Respondent's Application, ¶ 2.

²³ Respondent's Statement of Defence, Section V.

²⁴ In its Statement of Defence, the Respondent raises a fourth preliminary objection to the Tribunal's jurisdiction, namely that the Claimants have not made an investment in accordance with Indian Law (Respondent's Statement of Defence, Section V.D). However, the Respondent "recognises that this preliminary objection is inappropriate for bifurcation inasmuch as it is intertwined with the merits of the dispute." (Respondent's Statement of Defence, ¶ 245).

²⁵ Respondent's Application, ¶ 5.

²⁶ Respondent's Statement of Defence, ¶ 195.

²⁷ Respondent's Application, ¶ 5.

²⁸ Respondent's Statement of Defence, ¶ 225.

investor-State dispute settlement provisions in Article 9 of the BIT and therefore fall outside of the Tribunal’s jurisdiction, or (ii) are not protected by the substantive protections invoked by the Claimants, which cover “investments” and not “returns” (with the exception of Article 7 of the BIT, which is inapplicable) (the “Third Preliminary Objection”).²⁹ As explained at paragraph 40 below, the Tribunal understands the Respondent’s position is that “the Claimants’ claim is outside the scope of protection of the BIT” (and thus outside of the Tribunal’s jurisdiction, or “alternatively that the bulk of the substantive protections invoked by the Claimants are not available to them”).³⁰

28. The Respondent submits that it would be in the interests of procedural efficiency to bifurcate these proceedings so that these three objections can be heard and determined in a separate preliminary phase.³¹ The Respondent makes two main arguments in this regard: first, that the UNCITRAL Arbitration Rules 1976 (the “UNCITRAL Rules” or the “Rules”) contain a presumption in favor of bifurcation in the event that the Respondent raises any preliminary objections (Section 1); and second, that the objections raised are fit for bifurcation under the criteria determined by other international tribunals (Section 2).

1. The UNCITRAL Rules contain a presumption in favor of bifurcation

29. The Respondent submits that the UNCITRAL Rules 1976 contain a presumption in favor of bifurcation in the event that the Respondent raises any preliminary objections.³² This presumption derives from the text of Article 24(1) of the UNCITRAL Rules, which provides that “[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.”³³ Citing the rules and practice of other international courts and tribunals, the Respondent argues that “[i]t is usual practice in international dispute settlement to separate jurisdictional objections from the merits of the dispute.”³⁴ The Respondent acknowledges however that tribunals retain the discretion to join any preliminary objections to the merits, as confirmed by the tribunal in *Glamis Gold*.³⁵
30. The Respondent emphasizes that Article 23(3) of the 2010 version of the UNCITRAL Rules (the “2010 Rules”) does not include this presumption, as the relevant text states

²⁹ Respondent’s Application, ¶¶ 5, 66.

³⁰ Respondent’s Statement of Defence, ¶ 226.

³¹ Respondent’s Application, ¶ 5.

³² Respondent’s Application, ¶ 7.

³³ Respondent’s Application, ¶¶ 22-23, citing Article 21(4) of the UNCITRAL Rules. *See also* Respondent’s Reply, ¶ 6(a).

³⁴ Respondent’s Application, ¶ 22.

³⁵ Respondent’s Application, ¶ 23, citing *Glamis Gold Ltd v. United States of America* (“*Glamis Gold*”), Procedural Order No 2 of 31 May 2005 (Exh. RLA-33), ¶ 9.

that “[t]he arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits.”³⁶

31. The Respondent denies that Article 21(4) of the UNCITRAL Rules creates a “soft” presumption, as asserted by the Claimants. To the contrary, it submits that “[t]he combination of the direction that ‘in general’ an arbitral tribunal ‘should’ rule on a plea concerning its jurisdiction as a preliminary question is quite the reverse of a ‘soft’ presumption.³⁷ Further, the *Glamis Gold* tribunal’s statement merely reiterates that it is a presumption, but does not seek to diminish the strength of the presumption.³⁸
32. Likewise, the Respondent denies that the presumption is in some way premised on a respondent’s having raised its objections in a timely manner. While the Respondent does not dispute that “the primary motive for the presumption was to ensure efficiency in proceedings”, “it does not follow that the goal of procedural efficiency imposes any obligation as to the timing of preliminary objections.”³⁹ If this had been UNCITRAL’s intention, Article 21(3) would have been worded differently.⁴⁰
33. The Respondent recognizes that the Tribunal encouraged it to raise any objections to jurisdiction and file any request for bifurcation “as soon as reasonably possible”, but argues that the Tribunal was not purporting to impose an exclusionary time limit; rather, it simply noted that when ruling on a request for bifurcation, it would take into account whether it was timely made.⁴¹ The Claimants’ reliance on *Desert Line* is misplaced as that decision was based on the very different wording of Rule 41(1) of the ICSID Arbitration Rules.⁴²
34. In any event, the Respondent denies that “in the unusual and complex circumstances of this case and the *Vedanta* claim” its Application for Bifurcation could have been filed at any time over the past year, as the Claimants assert. According to the Respondent, “[i]t was perfectly reasonable for the Respondent to await the full elaboration of the Claimants’ case in its Statement of Claim” and, “contrary to the Claimants’ assertion, the Application does rely on facts and matters which were developed in the Statement of Claim” (the Respondent notes in this regard that “the Claimants’ arguments on the interpretation of Indian law are developed in much greater detail in the Statement of Claim”).⁴³ The Respondent also notes that it indicated as early as July 2016 that it would await the Tribunal’s decision on its Stay

³⁶ Respondent’s Application, ¶¶ 24-25, citing inter alia Article 23(3) of the 2010 Rules, *Guaracachi America Inc. and Rurelec PLC v Bolivia* (“*Rurelec*”), Procedural Order No 10 of 17 December 2012 (Exh. RLA-36), ¶ 9, and *Philip Morris Asia Ltd v. Australia* (“*Philip Morris*”), Procedural Order No 8 of 14 April 2014 (Exh. RLA-37), ¶ 101.

³⁷ Respondent’s Reply, ¶ 9.

³⁸ *Id.*, citing *Glamis Gold*, Procedural Order No 2 of 31 May 2005 (Exh. RLA-33), ¶ 9.

³⁹ Respondent’s Application, ¶ 10.

⁴⁰ *Id.*

⁴¹ Respondent’s Application, ¶ 11, citing the Tribunal’s letter of 4 August 2016.

⁴² Respondent’s Application, ¶ 11.

⁴³ Respondent’s Application, ¶ 12.

Application before filing an Application for Bifurcation, which was a “perfectly reasonable approach to take” and “one which was consistent with the interests of procedural efficiency”, as at that time it was expected that the Tribunal would issue its decision the Stay Application by the end of August 2016.⁴⁴

35. The Respondent further contends that, contrary to the position taken in *Desert Line*, the Application was not issued on the very last day possible under Article 21(3); “[i]t had been presaged since April 2016 and was ultimately filed on 6 October 2016.”⁴⁵ The Respondent explains that its Application for Bifurcation was made in advance of the 7 October 2016 hearing “precisely in order that it could be taken into account in the discussions of timetabling issues.”⁴⁶ The Respondent emphasizes that “[t]his is not a case in which the Respondent has sought to ambush the Claimants or the Tribunal and/or to derail the timetable”, noting that separate timetables for bifurcated and non-bifurcated proceedings’ were discussed and proposed by the Parties.⁴⁷
36. As a result, the Respondent submits that “in the exercise of its discretion, the Tribunal should start from a presumption in favour of bifurcation, before taking into account other relevant considerations.”⁴⁸

2. The Respondent’s objections are fit for bifurcation under the criteria adopted by international tribunals

37. Citing *Glamis Gold* in particular, the Respondent notes that tribunals constituted under the UNCITRAL and the ICSID Rules have identified the following criteria to determine whether preliminary objections should be heard separately from the merits:
- a. Whether the objection is substantial (in the sense of not being frivolous);
 - b. Whether, if granted, the objection to jurisdiction would result in a material reduction of the proceedings at the next phase; and
 - c. Whether bifurcation is impractical, in the sense that the preliminary issue raised is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost.⁴⁹

⁴⁴ Respondent’s Application, ¶ 12.

⁴⁵ Respondent’s Application, ¶ 13.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Respondent’s Application, ¶ 27.

⁴⁹ Respondent’s Application, ¶¶ 28-30, citing *Glamis Gold*, ¶ 12(c); *Philip Morris*, ¶ 109; *Emmis International Holding BV v. Hungary* (ICSID Case No ARB/12/2) (“*Emmis*”), Decision on Bifurcation of 13 June 2013 (Exh. RLA-38), ¶ 37(2); *Accession Mezzanine Capital LP v. Republic of Hungary* (ICSID Case No ARB/12/13) (“*Accession Mezzanine*”), Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation of 8 August 2013 (Exh. RLA-39), ¶ 38; *Tulip Real Estate and Development Netherlands BV v. Turkey* (ICSID Case No ARB/11/28) (“*Tulip*”), Decision on Bifurcation of 2 November 2012 (Exh. RLA-40), ¶ 30. *See also* Respondent’s Reply, ¶ 6(b).

38. The Respondent submits that the jurisdictional objections it has raised are fit for bifurcation under the criteria identified above. Specifically, it argues that all three objections “(a) are serious and substantial; (b) would, if accepted, either end the case or substantially reduce the scope of the merits phase; and (c) are capable of ready identification and are discrete from the merits.”⁵⁰
39. First, the Respondent submits that all of its preliminary objections are serious and substantial. Specifically:
- a. The First Preliminary Objection (i.e., that the Claimants’ claim is premature because it concerns a first instance assessment order which is still in the process of being reviewed by the appellate procedure provided for in the Income Tax Act) is serious and substantial for the following reasons:
 - i. The Respondent is not suggesting that the Claimants must exhaust local remedies; rather, it submits that “the Claimants must make proper use of the dispute settlement procedures available to it under the Income Tax Act of 1961 before its claim for alleged breach of the BIT can be pursued any further.”⁵¹ More specifically, it argues that “what is required of the Claimants is that they take such reasonable steps to challenge the FAO and Tax Demand through the statutory and constitutional procedures that are available to it.”⁵² According to the Respondent, the chronology of the Claimants’ actions demonstrates the prematurity of these arbitral proceedings, as the Claimants served their Notice of Dispute under the BIT the day following the Draft Assessment Order was served on CUHL, and filed their Notice of Arbitration without awaiting the results of the domestic challenge that CUHL had initiated before the Dispute Resolution Panel.⁵³ Nor have the Claimants pursued their challenge to the tax assessment “diligently”, as they have chosen not to pursue all available appeal mechanisms and have sought to delay the proceedings before the Income Tax Appellate Tribunal (“ITAT”) as much as possible.⁵⁴
 - ii. The Respondent summarizes the basis for its First Preliminary Objection as follows: “(a) [t]here are a number of independent domestic avenues open to CUHL to challenge the Final Assessment Order; (b) CUHL has invoked the first of these mechanisms – albeit that it has then sought to delay that domestic process; (c) [t]he heart of the Claimants’ claim is based on detailed issues of Indian law, which have as yet not been tested

⁵⁰ Respondent’s Application, ¶ 36.

⁵¹ Respondent’s Application, ¶¶ 37, 45. *See also* Respondent’s Reply, ¶ 17.

⁵² Respondent’s Application, ¶ 45. *See also* Respondent’s Reply, ¶ 17.

⁵³ Respondent’s Reply, ¶ 18, citing the First Witness Statement of Mr. Sanjay Puri (“Puri WS1”), ¶¶ 85-89.

⁵⁴ Respondent’s Reply, ¶ 19, citing Puri WS1, ¶ 95. The Respondent also asserts that while CUHL could not have filed a Writ Petition challenging the constitutionality of the 2012 Amendment under Article 19 of the Constitution, it could have brought an equivalent action under Article 14 of the Constitution. Respondent’s Reply, ¶ 21.

by the Indian courts; (d) [i]t is perfectly possible that the domestic mechanisms available to the Claimants will provide complete or partial redress and/or refine the issues of Indian law which are in dispute.”⁵⁵

- iii. Citing *Generation Ukraine*, the Respondent contends that “[t]he Claimants cannot simply treat as irrelevant their statutory rights of appeals and available constitutional review processes, and bring before this Tribunal a decision made by the lowest revenue officer in the assessment chain and purport to treat it as a finally adjudicated demand.”⁵⁶ According to the Respondent, “[t]his is not simply a case where the Claimants have not availed themselves of the domestic avenues”; here, “the Claimants seek to keep a toe in the door of the domestic proceedings, whilst simultaneously rail-roading the Respondent into this arbitration.”⁵⁷
- b. The Second Preliminary Objection (i.e., that the BIT does not apply to disputes that concern taxation measures) is also serious and substantial. Although the Respondent acknowledges that the BIT does not formally exclude taxation measures, it submits that “tax disputes are not capable of being resolved by arbitration under the BIT in light of an implied exception to the scope of application of the BIT, and of the fact that the Respondent and the United Kingdom have in fact specifically agreed that tax disputes should be settled in accordance with the procedure prescribed in the contemporaneous Double Taxation Agreement (‘the DTA’).”⁵⁸ More specifically, the Respondent contends that:
 - i. There is “an implied exception in relation to disputes (such as this one) which involve a challenge to a State’s legislative powers to tax.”⁵⁹ Citing Dutch law and Indian law, the Respondent submits that a dispute concerning the ability of a sovereign state to introduce general legislation in respect of taxation is not arbitrable.⁶⁰
 - ii. The India-UK DTA, which was being negotiated at the same time as the BIT, determines the respective powers of India and the UK to impose taxes on persons who are residents of one or both of those States, and its scope extends to capital gains tax. At Article 27, the DTA provides that disputes between a resident and one or both of the Contracting States are not to be resolved by a third party mechanism such as arbitration, but by mutual agreement between the “competent authorities” of both Contracting

⁵⁵ Respondent’s Reply, ¶ 22.

⁵⁶ Respondent’s Application, ¶ 44, citing *Generation Ukraine v. Ukraine* (ICSID Case No ARB/00/9) (“*Generation Ukraine*”), Award of 16 September 2003 (Exh. RLA-43), ¶ 20.30. The Respondent also relies on *Feldman v. Mexico* (ICSID Case No ARB(AF)/99/1) (“*Feldman*”), Award of 16 December 2002 (Exh. RLA-44), ¶ 114.

⁵⁷ Respondent’s Application, ¶ 20.

⁵⁸ Respondent’s Application, ¶¶ 54-55.

⁵⁹ Respondent’s Reply, ¶ 24.

⁶⁰ Respondent’s Reply, ¶¶ 24-26.

States. According to the Respondent, “it would [...] be surprising if India and the UK had simultaneously intended that disputes arising out of their sovereign powers of taxation were nonetheless to be subject to arbitration under the BIT.”⁶¹

- iii. The Claimants’ contention that the DTA and the limits on arbitrability under domestic law are irrelevant to the status of claims brought under the BIT misses the point: “[t]he issue is whether the Claimants’ claims are properly within the scope of the BIT”.⁶² According to the Respondent, “it cannot be assumed, from the fact that the BIT does not expressly exclude tax matters, that disputes which go to the heart of a State’s sovereign powers to tax fall within the scope of the BIT”; “[o]n the contrary, the [DTA] and the approach of Indian and Dutch law are all consistent with an intention that such public law disputes are outside the scope of the Tribunal’s jurisdiction.”⁶³
- c. The Respondent further contends that the Third Preliminary Objection (i.e., that the dispute does not concern the Claimants’ “investments”, but rather it relates to the Claimants’ “returns”) is serious and substantial. Specifically, the Respondent contends that:⁶⁴
- i. The measure challenged by the Claimants concerns a taxation measure that has been imposed on capital gains made by the Claimants from the 2006 intragroup share transactions. The Claimants’ assertion that the 2006 transactions did not give rise to any capital gain or profit assumes the very point which the Claimants must prove in this arbitration.
 - ii. These capital gains qualify as “returns” and not “investments” under the BIT. Indeed, Articles 1(b) and 1(e) of the BIT clearly distinguish between “investments” and “returns”.
 - iii. The scope of application of the BIT (Article 2) and the substantive provisions contained at Articles 3(2), 3(3), 4(1), 5(1), 6(1) and 9(1) of the BIT apply to investments and not returns, while Articles 4(2) and 7(1) apply only to returns. In particular, the dispute resolution mechanism provided at Article 9 of the BIT only covers disputes relating to the Claimants’ purported investments in India, not their returns. The Claimants do not explain the basis upon which they say their claims relate to investments and not returns.

40. As a result, with respect to its Third Preliminary objection the Respondent contends that:

⁶¹ Respondent’s Reply, ¶ 28.

⁶² Respondent’s Reply, ¶ 29.

⁶³ Respondent’s Reply, ¶ 29.

⁶⁴ Respondent’s Application, ¶¶ 5, 66-83; Respondent’s Reply, ¶¶ 30-31.

- a. “The Tribunal lacks jurisdiction because the Claimants’ claims do not concern ‘investments’ but are rather brought concerning their ‘returns’, and Article 9 of the BIT only provides that international arbitration is available for disputes in relation to ‘investments’.”
 - b. “In the alternative, if the Tribunal does not accept that the Claimants’ claims are in relation to ‘returns’ rather than in relation to ‘investments’, the Tribunal nonetheless lacks jurisdiction over the Claimants’ claims for breach of Article 7, for their claim under Article 7 only concerns the Claimants’ capital gains.”
 - c. “In the further alternative, even if the Tribunal has jurisdiction under Article 9, Articles 3 and 5 are not available to the Claimants, and Article 7 is inapplicable[.]”⁶⁵
41. Second, the Respondent submits that all of its preliminary objections would, if accepted, either end the case or substantially reduce the scope of the merits phase.
42. Third, the Respondent contends that all of its preliminary objections are capable of ready identification and are discrete from the merits.”⁶⁶ According to the Respondent, to the extent that the objections raise any factual issues, these facts are different from, and not intertwined with, those that relate to the merits of the dispute.⁶⁷
43. The Respondent further submits that, according to commentators and tribunals, “an ‘overarching question’ in deciding whether or not to bifurcate is whether procedural efficiency would be preserved or improved as a result of bifurcation.”⁶⁸ Here, the Respondent contends that it would be in the interests of procedural efficiency to hear and determine these objections in a preliminary bifurcated phase. The Respondent adds that, “[i]f the Tribunal were to conclude that some, but not all, of the objections satisfy the criteria for bifurcation so that there should in any event be a bifurcated phase, it would be procedurally efficient to determine all the objections in that bifurcated phase (and, conversely, procedurally inefficient not to do so).”⁶⁹
44. Finally, the Respondent argues that “as a matter of fairness, the Respondent should not have to participate in a full hearing of the Claimants’ claim before the Tribunal has determined whether its claim is outside the scope of protection of the BIT.”⁷⁰ The Respondent refers in this regard to the first *Caratube* case, in which the tribunal noted

⁶⁵ Respondent’s Application, ¶ 83.

⁶⁶ Respondent’s Application, ¶ 36.

⁶⁷ Respondent’s Application, ¶ 36.

⁶⁸ Respondent’s Application, ¶¶ 31-33, citing David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (OUP, 2nd ed, 2013) (Exh. RLA-41), pp. 457-458; *Emmis*, Decision on Bifurcation of 13 June 2013 (Exh. RLA-38), ¶ 37(2); *Accession Mezzanine*, Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation of 8 August 2013 (Exh. RLA-39), ¶ 38; *Glamis Gold*, Procedural Order No 2 of 31 May 2005 (Exh. RLA-33), ¶ 12(c). *See also* Respondent’s Reply, ¶ 6(c).

⁶⁹ Respondent’s Application, ¶ 36.

⁷⁰ Respondent’s Application, ¶ 34.

that, “[w]ith the wisdom of hindsight, the majority of the costs and expenses of each party and of the dispute, both in duration and expense, would have been avoided had Respondent opted for bifurcation and the preliminary determination of its equivalent of Rule 41(1) objections under the Rules.”⁷¹ In the Respondent’s view, “there is a very real prospect of savings of time, expense and clarity of presentation and analysis if bifurcation is the course adopted now.”⁷²

* * *

45. For the reasons set out above, the Respondent requests the Tribunal to decide that:
- a. “The Respondent’s First, Second and Third Preliminary Objections should be bifurcated and determined in a preliminary phase;
 - b. The Respondent be awarded the costs of its Application for Bifurcation;
 - c. Such other relief as the Tribunal determines to be appropriate.”⁷³
46. Finally, the Respondent notes that the tribunal in the *Vedanta* arbitration has directed that two objections equivalent to the Respondent’s First and Second Preliminary Objections here (namely, that the claim is premature and that tax disputes are not arbitrable) should be bifurcated.⁷⁴

B. The Claimants’ position

47. The Claimants object to the Respondent’s Application for Bifurcation. Their arguments are essentially two-fold. First, they argue that the Respondent’s decision to withhold its Application for Bifurcation in disregard of the Tribunal’s repeated requests warrants its rejection (Section 1 below). Second, the Claimants contend that even if the Respondent’s Application for Bifurcation had been filed at the earliest reasonable time, the Respondent fails to demonstrate that bifurcation at this stage of the proceedings would be efficient (Section 2 below).

1. The Respondent’s decision to withhold its Application for Bifurcation warrants its rejection

48. The Claimants allege that the Respondent deliberately withheld raising its objections to jurisdiction [or admissibility] until October 2016, ignoring four instructions from the Tribunal to raise any such objections “as soon as reasonably possible”.⁷⁵ The Claimants refer specifically to the Tribunal’s communications to the Parties dated 21

⁷¹ *Caratube International Oil Company LLP v Kazakhstan* (ICSID Case No ARB/08/2) (“*Caratube I*”), Award of 5 June 2012 (Exh. RLA-42), ¶ 487.

⁷² Respondent’s Application, ¶ 35.

⁷³ Respondent’s Application, ¶ 85, reiterated at Respondent’s Reply, ¶ 32.

⁷⁴ Respondent’s Reply, ¶ 15. The Respondent clarifies that the Third Preliminary Objection raised in this arbitration does not arise in the *Vedanta* arbitration.

⁷⁵ Claimants’ Response, ¶ 2.

April 2016, 1 July 2016, 4 August 2016 and 28 September 2016.⁷⁶ The Claimants note in particular that, in its letter of 4 August 2016, the Tribunal emphasized that it had wide discretion under Article 15(1) of the UNCITRAL Rules to conduct the proceedings as it considered appropriate, and that, when ruling on a request for bifurcation, it would take into consideration whether it was timely made.⁷⁷ According to the Claimants, the Respondent “wilfully disregarded these explicit directions and warnings.”⁷⁸

49. According to the Claimants, it is obvious that the objections raised by the Respondent “relate purely to issues of treaty interpretation and could have been raised at any time after the Notice of Arbitration was filed on 22 September 2015 – and certainly at any time after the Tribunal first directed the Respondent to raise them in April of this year.”⁷⁹ Contrary to the Respondent’s suggestions, these objections “are all based on the Respondent’s interpretation of the UK-India BIT and do not rely in any respect on information disclosed in the Claimants’ Statement of Claim.”⁸⁰ Indeed, the Claimants note that the Respondent raised the first two objections as early as 11 May 2015 in a letter to the Claimants.⁸¹ The Claimants reject the Respondent’s explanation that it waited to receive the Statement of Claim because the Claimants’ arguments on the interpretation of Indian law were developed in more detail in that submission, arguing that the Respondent’s objections are based on its interpretation of the BIT and have not been shaped in any material way by any discussion of Indian law in the Statement of Claim.⁸²
50. The Claimants also assert that the Respondent insisted that under Article 21(3) of the UNCITRAL Rules it was not required to raise its objections to jurisdiction or file its request for bifurcation until it filed its Statement of Defence, and that “it would be somehow inappropriate to disclose its jurisdictional objections before the Tribunal decided its Stay Application.”⁸³ The Claimants further allege that, when the Respondent finally decided to file its Application for Bifurcation on 6 October 2016, on the eve of the 7 October 2016 hearing, it was “only because it could no longer avoid a discussion of the Procedural Calendar, and wanted to have its objections on the table (together with its request to postpone filing its Statement of Defence) for the purposes of that discussion.”⁸⁴ Thus, the Claimants understand that the Respondent’s position is not that it was unable to raise its objections earlier, but that it was entitled

⁷⁶ See *supra* ¶¶ 2, 5, 8, and 13.

⁷⁷ Respondent’s Application, ¶ 6, citing to the Tribunal’s letter of 4 August 2016.

⁷⁸ Respondent’s Application, ¶ 6.

⁷⁹ Claimants’ Response, ¶ 2.

⁸⁰ Claimants’ Response, ¶¶ 7-8.

⁸¹ Claimant’s Response, ¶ 7, citing Exh. C-64.

⁸² Claimants’ Rejoinder, ¶ 8.

⁸³ Claimants’ Response, ¶ 8, citing the Respondent’s letter to the Tribunal dated 25 July 2016, ¶ 4.

⁸⁴ Claimants’ Response, ¶ 9, citing the Respondent’s letter to the Tribunal dated 6 October 2016, ¶ 1.

to withhold them as long as it wished, provided it raised them no later than the Statement of Defence.⁸⁵

51. According to the Claimants, the Respondent confirmed in its Reply that “the timing of its filing was a tactical decision designed to ensure that the question of its jurisdictional objections was reflected in the procedural calendar”, while offering no justification other than its own decision to await the Tribunal’s decision on its Stay Application.⁸⁶ The Claimants further argue that the Respondent revealed in its Reply that months before it had already raised two equivalent objections in the *Vedanta* arbitration, yet still chose to withhold them in this arbitration.⁸⁷
52. The Claimants accept that the Respondent cannot be compelled to raise its jurisdictional objections prior to the deadline for the filing of its Statement of Defence.⁸⁸ They also agree that Article 21(4) of the UNCITRAL Rules contains a general presumption in favor of preliminary treatment of jurisdictional objections, but submit, citing *Glamis Gold* and the second part of Article 21(4), that the choice not to do so is left to the Tribunal’s discretion.⁸⁹ Finally, the Claimants note that it is common ground between the Parties that Article 15(1) of the UNCITRAL Rules confers to the Tribunal broad discretion in the conduct of the proceedings, including whether or not to bifurcate.⁹⁰ However, the Parties disagree as to how the Tribunal should exercise that discretion.⁹¹
53. In light of the Respondent’s deliberate choice to delay raising its objections, despite the Tribunal’s requests for it to do so, the Claimants submit that the Tribunal should exercise that discretion by denying the Respondent’s Application for Bifurcation. According to the Claimants, “[t]he question of whether to bifurcate arbitral proceedings ultimately turns on considerations of procedural efficiency.”⁹² The Claimants submit that “the soft presumption in favour of preliminary treatment in the 1976 UNCITRAL Rules is premised on a respondent having raised its objections in a timely manner consistent with the efficiency rationale for treating objections in a

⁸⁵ Claimants’ Response, ¶ 10.

⁸⁶ Claimants’ Rejoinder, ¶¶ 6-7.

⁸⁷ Claimants’ Rejoinder, ¶ 5.

⁸⁸ Claimants’ Response, ¶ 11.

⁸⁹ Claimants’ Response, ¶ 11, citing *Glamis Gold*, Procedural Order No. 2 of 31 May 2005 (Exh. RLA-33), ¶ 9.

⁹⁰ Claimants’ Response, ¶ 11.

⁹¹ Claimants’ Response, ¶ 12.

⁹² Claimants’ Response, ¶ 3. *See also* Claimants’ Rejoinder, ¶ 9, citing *Glamis Gold*, Procedural Order No. 2 of 31 May 2005 (Exh. RLA-33), ¶ 11; *Emmis*, Decision on Bifurcation of 13 June 2013 (Exh. RLA-38), ¶ 37(2); *Accession Mezzanine*, Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation of 8 August 2013 (Exh. RLA-39), ¶ 38; *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID ARB(AF)/12/1) (“*Apotex*”), Procedural Order deciding Bifurcation dated 25 January 2013 (Exh. CLA-98), ¶ 10; *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company* (ICSID Case No. ARB/10/20), Procedural Order No. 5 dated 29 May 2012 (Exh. CLA-99), ¶ 22.

preliminary phase.”⁹³ The Claimants note that the *Glamis Gold* tribunal made clear that Article 21(4) of the UNCITRAL Rules reflects a presumption in favor of efficiency, and emphasize that the Tribunal’s discretion under Article 15(1) of the UNCITRAL Rule and Article 1036 of the Dutch Arbitration Act is guided by the principle of efficiency and the need to avoid unnecessary delay.⁹⁴ The Claimants add that the Respondent is under a duty to cooperate in the efficient conduct of these proceedings, and argue that it is a general principle of arbitral procedure that jurisdictional objections should be raised as early as possible, as recognized by India’s representative to the UNCITRAL Committee.⁹⁵

54. The Claimants contend that “the Respondent’s actions in deliberately withholding its Bifurcation Application – for no other apparent reason than to cause delay – undermines this essential rationale for bifurcation and flouts the Respondent’s duty to cooperate in the efficient conduct of these proceedings.”⁹⁶ Accordingly, the Claimants submit that, in the exercise of its broad discretion under Article 15(1) of the UNCITRAL Rules, “the Tribunal can readily dismiss the Respondent’s Bifurcation Application simply on the basis that it was untimely submitted in disregard of the Tribunal’s explicit directions and multiple warnings.”⁹⁷
55. The Claimants cite in this respect *Desert Line v. Yemen*, which they submit “stands for the proposition that a bifurcation request by a party that has deliberately withheld objections it could have raised earlier cannot be justified in the name of efficiency.”⁹⁸ While the Claimants acknowledge that the relevant Article 41 of the ICSID Arbitration Rules also provides that jurisdictional objections shall be made as early as possible, they argue that any textual distinction with Article 21(4) of the UNCITRAL Rules “is rendered moot in these circumstances by the fact that the Tribunal repeatedly gave the Respondent the same instructions, namely that it should raise its preliminary objections ‘as soon as reasonably possible’”, and is undercut by the Parties’ obligation to cooperate in the efficient organization and conduct of these proceedings.⁹⁹
56. By contrast, the Claimants argue that in *Philip Morris v. Australia* the tribunal agreed to hear Australia’s objections to jurisdiction preliminarily in part because Australia

⁹³ Claimants’ Response, ¶ 12.

⁹⁴ Claimants’ Response, ¶ 12, citing *Glamis Gold*, Procedural Order No. 2 of 31 May 2005 (Exh. RLA-33), ¶ 11, and David Caron and Lee Caplan, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* (Oxford University Press 2013) (Exh. CLA-72), p. 34.

⁹⁵ Claimants’ Response, ¶ 13, citing Article 1036(3) of the Dutch Arbitration Act, Pieter Sanders, “Commentary on UNCITRAL Arbitration Rules” in *YEARBOOK COMMERCIAL ARBITRATION* Vol. 2 (1977), Exhibit CLA-96, p. 196; Summary Record of the 8th Meeting of the Committee of the Whole] (II), UNCITRAL, Ninth Session, UN Doc A/CN.9/9/C.2/SR.8, Exhibit CLA-89, p. 5 & ¶ 30 (1976) (Comment by Mr Dey, India); ICSID Rules of Procedure for Arbitration Proceedings (2006) (the “ICSID Arbitration Rules”) (Exh. CLA-93), Rule 41.

⁹⁶ Claimants’ Response, ¶ 3.

⁹⁷ Claimants’ Response, ¶ 3.

⁹⁸ Claimant’s Response, ¶ 14, citing *Desert Line Projects LLC v. The Republic of Yemen* (ICSID Case No. ARB/05/17) (“*Desert Line*”), Award dated February 2008 (Exh. CLA-86), ¶¶ 60, 89-90, 97.

⁹⁹ Claimants’ Response, ¶ 15, citing the Tribunal’s letter to the Parties dated 4 August 2016.

demonstrated that it had filed its objections at the earliest possible time, as required under the 2010 UNCITRAL Rules.¹⁰⁰ In that case there was no question of the respondent having tactically withheld its objections, as was the case in *Desert Line* and in the present case.

2. The Respondent fails to demonstrate that bifurcation at this stage of the proceedings would be efficient

57. Even if the Respondent had raised its objections at the earliest reasonable time, the Claimants contend that the Respondent fails to demonstrate that bifurcating the arbitration at this stage of the proceedings would yield significant efficiency benefits for the Parties.¹⁰¹
58. First, the Claimants argue that, by the time that the Respondent's Application for Bifurcation is decided in early 2017, both Parties will have submitted their primary memorials on the merits, and the merits issues will have been fully joined. The Claimants submit that "[b]ifurcation is often warranted where a preliminary objection has a likelihood of resulting in the dismissal or significant narrowing of the dispute before the parties have gone through the time and expense of filing detailed merits submissions. Here, however, the Respondent indicated to the Tribunal that its objections would be informed by the Statement of Claim and should therefore follow that filing."¹⁰² According to the Claimants, not only did the Statement of Claim prove irrelevant to the Respondent's jurisdictional objections, but the Respondent's delay in filing its Application for Bifurcation would not yield any cost savings; rather, it would likely increase costs. More specifically, the Claimants note that, to date, both Parties have submitted their main memorials with their arguments on the merits, and all that remains is a document production phase, a narrower set of rebuttal submissions, a dispositive hearing and a final award. By contrast, a bifurcated proceeding would add four additional memorials, an additional round of document production, an additional hearing and a separate reasoned award.¹⁰³
59. Second, the Claimants contend that the timeline proposed by the Respondent to hear its jurisdictional objections in a bifurcated proceeding would add nine months to the procedural calendar, should the Application for Bifurcation be decided in the first quarter of 2017,¹⁰⁴ with the hearing on objections to jurisdiction and admissibility to be heard in January 2018, and the merits to be considered at some unspecified time thereafter.¹⁰⁵ The Claimants argue that "[i]n a dispute of this magnitude, involving a

¹⁰⁰ Claimants' Response, ¶ 26, citing *Philip Morris*, Procedural Order No. 4 Regarding the Procedure until a Decision on Bifurcation, dated 26 October 2016 (Exh. CLA-88), ¶ 24.

¹⁰¹ Claimants' Response, ¶¶ 4, 18.

¹⁰² Claimants' Response, ¶ 19, citing the Claimants' letter to the Tribunal dated 17 October 2016, pp. 3-5.

¹⁰³ Claimants' Rejoinder, ¶ 10.

¹⁰⁴ Claimants' Response, ¶ 20.

¹⁰⁵ Claimants' Rejoinder, ¶ 13.

massive deprivation of assets, there would need to be an overwhelmingly compelling reason to incur such a lengthy delay, which does not remotely exist here.”¹⁰⁶

60. Third, the Claimants argue that the Respondent’s objections are frivolous, and “according them a dedicated preliminary phase would result in a fruitless delay of up year or more in these proceedings, ending in dismissal of the objections.”¹⁰⁷ Citing *Glamis Gold*, the Respondent argues that frivolous objections are unlikely to reduce the costs or time required for the proceedings.¹⁰⁸
61. According to the Claimants, all three of the Respondent’s preliminary objections are “totally lacking in legal merit”, as “each objection improperly asks the Tribunal to fundamentally re-write the terms of the UK-India BIT, as well as, in one case, the terms of the UK-India [DTA].”¹⁰⁹
62. More specifically, the Claimants argue that the First Preliminary Objection lacks legal merit and factual support, for the following reasons:
- a. According to the Claimants, the Respondent seeks to obfuscate the real dispute between the Parties: the present claims arise from a violation of the UK-India BIT, not a violation of Indian law. In light of the dispute settlement provisions contained at Article 9 of the BIT, the proper forum cannot be the Indian courts. The Claimants are arguing that that India’s retrospective imposition of the tax measure violates its treaty rights, and the remedy for that is treaty arbitration.¹¹⁰
 - b. The UK-India BIT does not contain any exhaustion of local remedies requirement. Indeed, one of the core purposes of the dispute settlement mechanism contained in Article 9 of the BIT is to relieve an injured investor from this requirement. The Respondent’s attempt to read a local remedies requirement back into the BIT must be rejected.¹¹¹ The tribunal in *Generation Ukraine*, on which the Respondent relies, recognized that any requirement to pursue local remedies as a pre-condition to bringing a treaty claim must be expressly stated in the treaty.¹¹²

¹⁰⁶ *Id.*

¹⁰⁷ Claimants’ Response, ¶ 4.

¹⁰⁸ Claimants’ Response, ¶ 21, citing *Glamis Gold*, Procedural Order No. 2 of 31 May 2005 (Exh. RLA-33), ¶ 12(c).

¹⁰⁹ Claimants’ Rejoinder, ¶ 14.

¹¹⁰ Claimants’ Rejoinder, ¶ 16.

¹¹¹ Claimants’ Response, ¶ 25, citing *Helnan International Hotels v. Egypt* (ICSID Case No. ARB/05/19) (“*Helnan*”), Decision of the ad hoc Committee of 14 June 2010 (Exh. CLA-87), ¶ 47; the writings of Judge Stephen Schwebel (Exh. CLA-94 and 95), and The Institute of International Law, Arbitration between States, State Enterprises, or State Entities, and Foreign Enterprises, Resolution of the Eighteenth Commission dated 12 September 1989 (Exh. CLA-90). *See also* Claimants’ Rejoinder, ¶ 17.

¹¹² Claimants’ Rejoinder, ¶ 17, citing *Generation Ukraine*, Award of 16 September 2003 (Exh. RLA-43), ¶ 13.5.

- c. Contrary to the Respondent’s contention, the decision in *Generation Ukraine* does not stand for the proposition that a claimant must first challenge the offending measure in the courts of the host State; that tribunal merely referred to the principle that the exhaustion of available judicial remedies is necessary to establish a substantive claim for denial of justice.¹¹³
 - d. In any event, the facts on this case are very different to those in *Generation Ukraine*: while in that case the claimant made no “reasonable efforts” to challenge the actions of an inferior government official,¹¹⁴ here the Claimants have “diligently challenged the application and enforcement of India’s tax measure against Cairn before domestic authorities for almost two years, but to no avail.”¹¹⁵
 - e. The Respondent’s suggestion that the Claimants must challenge the 2012 Amendment before the Indian courts is ironic, as the 2012 Amendment was passed to overturn the Supreme Court decision in the *Vodafone* case. In any event, the Claimants assert that such a constitutional challenge is only guaranteed to Indian citizens and is not available to the Claimants under Article 19 of the Constitution.¹¹⁶ As to the Respondent’s argument that a similar remedy would be available under Article 14 of the Constitution, the Claimants “fail to see how an alleged pre-condition to pursue remedies up to the highest court of the land differs in substance from an exhaustion of local remedies requirement”.¹¹⁷
63. With respect to the Second Preliminary objection, the Claimants raise the following arguments:
- a. The Respondent’s argument that matters of taxation are not arbitrable is wrong as a matter of treaty interpretation.¹¹⁸ The BIT does not contain any express exclusion for all tax-related claims; it merely contains “a very precise and limited exclusion in Article 4(3)”, which excludes tax treaties and domestic tax legislation from the scope of national treatment and most-favoured nation (“MFN”) treatment, which is irrelevant here because the Claimants do not invoke these obligations.¹¹⁹ According to the Claimants, “India is well aware of

¹¹³ Claimants’ Rejoinder, ¶ 20, citing *Generation Ukraine*, Award of 16 September 2003 (Exh. RLA-43), ¶ 20.33.

¹¹⁴ Claimants’ Response, ¶ 26, citing *Generation Ukraine*, Award of 16 September 2003 (Exh. RLA-43), ¶ 20.30.

¹¹⁵ Claimants’ Response, ¶ 27, citing several instances in which they have challenged the Income Tax Authority’s assessment (Exh. C-30, C-63, C-66, C-68, C-69, C-70, C-77. *See also* Claimants’ Rejoinder, ¶ 19.

¹¹⁶ Claimants’ Response, ¶ 28, citing Article 19(1)(g) of the Indian Constitution.

¹¹⁷ Claimants’ Rejoinder, ¶ 18.

¹¹⁸ Claimants’ Rejoinder, ¶ 4.

¹¹⁹ Claimants’ Response, ¶¶ 31-32, citing Article 4(3) of the BIT. *See also* Claimants’ Rejoinder, ¶ 23.

how to exclude all tax-related claims from the scope of an investment treaty because it has done so in a handful of its other investment treaties.”¹²⁰

- b. The Respondent’s contention that tax matters are not arbitrable under Indian law “is wholly irrelevant to the status of claims brought under a treaty governed by international law, and is in any event inconsistent with the limited and defined carve-out for tax matters that India agreed to in the UK-India BIT.”¹²¹ The Claimants also submit that this is not an “international commercial arbitration”, but a treaty arbitration.¹²²
- c. The Claimants further deny that the Tribunal’s jurisdiction should be ousted by the UK-India DTA. The Claimants argue that the UK-India BIT and the UK-India DTA “serve different purposes and provide different remedies to achieve them.”¹²³ More specifically, the Claimants submit the subject matter of these treaties is distinct and separate: “The UK-India DTA (like all double taxation agreements) represents a division of tax bases between the two contracting states in relation to incomes that are taxable in both states and stipulates which State has the taxing rights over the relevant income.”¹²⁴ As to remedies, “[t]he Mutual Agreement Procedure contained in the DTA provides for inter-State consultations in the event a person of one Contracting Party may have been taxed in contravention of the DTA” (a remedy that the Claimants do not seek), while “the UK-India BIT allows a private investor like Cairn to bring a direct action against the State for measures – including tax measures – that violate specific protections contained in the BIT.”¹²⁵ Noting that the BIT was concluded one year after the DTA, the Claimants contend that if the Contracting Parties had intended to preclude any claims relating to taxation or tax legislation under the BIT, it would have been easy to clarify that intent in the BIT.¹²⁶ In any event, the Claimants note that capital gains tax is expressly excluded from the scope of the DTA, as a result of which the Respondent itself has declared it to be inapplicable to this dispute.¹²⁷
- d. Finally, the Claimants argue that this objection raises merits issues that are inappropriate for preliminary treatment. The Claimants note in particular that in

¹²⁰ Claimants’ Rejoinder, ¶ 24, citing Agreement between the Government of the Russian Federation and the Government of the Republic of India for the Promotion and Mutual Protection of Investments signed on 23 December 1994 (Exh. CLA-91), Article 2(2), and India’s Model Bilateral Investment Treaty Text, Government of India, Ministry of Finance, Department of Economic Affairs (Investment Division) dated 28 December 2015 (Exh. CLA-92), Annex. *See also* Claimants’ Response, ¶ 33, citing

¹²¹ Claimants’ Response, ¶ 35.

¹²² Claimants’ Rejoinder, ¶ 25.

¹²³ Claimants’ Rejoinder, ¶ 26.

¹²⁴ Claimants’ Rejoinder, ¶ 26.

¹²⁵ Claimants’ Rejoinder, ¶ 26.

¹²⁶ Claimants’ Rejoinder, ¶ 27.

¹²⁷ Claimants’ Rejoinder, ¶ 28, citing the Final Assessment Order (Exh. C-70), p. 99; the India-UK DTA (Exh. RLA-45), Article 14).

its Statement of Defence, the Respondent argues for the first time that, irrespective of the 2012 Amendment, “the 2006 share transfers made in preparation for the initial public offering in India triggered a liability to tax because they were part of an unwholesome tax avoidance scheme.”¹²⁸ According to the Claimants, deciding this argument would require a full hearing on the merits. Likewise, the Respondent’s argument that the Claimants’ claims are inadmissible because they challenge India’s tax “policy”, rather than the application of tax laws, raises merits issues.¹²⁹

64. As to the Third Preliminary Objection, the Claimants argue as follows:

- a. There can be no serious debate that the Claimants have “investments” under the meaning of Article 1 of the BIT, and that the government measures challenged in this arbitration relate to those investments. The Claimants assert that their shareholding in CIL falls within the definition of investment, and that their claim relates in part to the Respondent’s seizure of those shares. The Claimants add that the corporate reorganization of Cairn’s assets in 2006 and initial public offering in January 2009 (the “IPO”) could arguably have resulted in a change in the form of Cairn’s investments, but note that Article 1 expressly includes in its definition of investment “every kind of asset established or acquired, including changes in the form of such investment”.¹³⁰
- b. As to the Respondent’s contention that the challenged measure relates to capital gains which should be qualified as “returns”, the Claimants submit that “[t]his argument confuses its characterisation of the government measures at issue with the investments to which those measures were applied.”¹³¹ The Claimants allege that while the IPO resulted in extraordinary gains that were fully reported and were not taxable under Indian law, the intragroup share transfers between non-Indian companies made in preparation for that IPO that India is retroactively seeking to tax did not give rise to any capital gain or profit whatsoever, because equal economic values were exchanged.¹³² Accordingly, the Claimants argue that “this dispute does not relate to any actual capital gains earned by CUHL, but rather to the abusive application of India’s tax laws – under the rubric of “capital gains tax” – to Cairn’s investments in India, including Cairn’s shareholdings in CIL, which are clearly protected “investments” under Article 1(b) of the Treaty.”¹³³
- c. Further, the Claimants argue that the Respondent has not provided any reasoning for its request that the Claimants’ claim under Article 7 be dismissed, nor has it

¹²⁸ Claimants’ Rejoinder, ¶ 4.

¹²⁹ *Id.*

¹³⁰ Claimants’ Response, ¶¶ 36-37, citing Article 1. *See also* Claimants’ Rejoinder, ¶ 29.

¹³¹ Claimants’ Response, ¶ 38.

¹³² Claimants’ Response, ¶ 38, citing their Statement of Claim, Section II.B. *See also* Claimants’ Rejoinder, ¶30.

¹³³ Claimants’ Response, ¶ 38.

responded to the Claimants' arguments that Article 7 does protect investors by allowing the free transfer or repatriation of both investments and returns.¹³⁴

- d. Finally, the Claimants submit that "even if one were to accept *arguendo* India's characterisation, it would not provide any support whatsoever for a dismissal on jurisdictional grounds": Article 9 of the BIT allows a claimant to bring "any dispute... in relation to an investment", and in the Claimants' submission, "[a] dispute over investment returns clearly constitutes a claim 'in relation to an investment'."¹³⁵
65. As a result, the Claimants contend that "[b]ifurcating the proceedings would do nothing more than substantially postpone the resolution of this dispute with nothing gained, while the amounts at stake climb by hundreds of millions of dollars (including because the tax demands by the Respondent are subject to a very high interest rate prescribed under Indian law), and Cairn continues to be deprived of its assets seized in January 2014."¹³⁶ The Claimants further argue that "the pendency of India's massive tax claim also continues to render substantial reputational damage to Cairn."¹³⁷
66. According to the Claimants, the Respondent's reliance on the bifurcation of two objections in the *Vedanta* arbitration is unpersuasive. The Respondent does not explain what preliminary objections it raised in that arbitration but not here, nor does it provide evidence of the circumstances that could have led to that procedural outcome. The Claimants further stress that there are significant legal and factual differences between the *Cairn* and *Vedanta* arbitrations, including the Respondent's argument raised in its Statement of Defence that the Claimants' allegedly improper tax planning practices made the 2006 corporate reorganization taxable regardless of section 9(1)(i) of the Income Tax Act. In any event, the Claimants argue that, because the hearing on jurisdictional objections in *Vedanta* is scheduled for May 2017, the bifurcation in that case does not cause the same delay that it would here.¹³⁸

* * *

67. For the reasons set out above, the Claimants request the Tribunal to:
- a. "DISMISS the Respondent's Bifurcation Application with prejudice;
 - b. DECIDE that the Respondent's preliminary objections should be considered and determined with the merits in a unitary proceeding; and
 - c. ORDER the Respondent to pay the Claimants' costs associated with the Respondent's Bifurcation Application."¹³⁹

¹³⁴ Claimants' Rejoinder, ¶ 30.

¹³⁵ Claimants' Rejoinder, ¶ 31.

¹³⁶ Claimants' Rejoinder, ¶ 10.

¹³⁷ *Id.*

¹³⁸ Claimants' Rejoinder, ¶¶ 11-13.

¹³⁹ Claimants' Response, ¶ 41, reiterated in their Rejoinder, ¶ 34.

III. ANALYSIS

68. The Tribunal will structure its analysis as follows. First, it will address whether the UNCITRAL Rules create a presumption in favor of bifurcation, and if yes, what is the Tribunal's discretion in this regard (Section A). It will then address what are the criteria to be considered when exercising that discretion (Section B). Finally, it will consider whether bifurcation is warranted in the present case (Section C).

A. Do the UNCITRAL Rules create a presumption in favor of bifurcation?

69. Article 21(4) of the UNCITRAL Rules provides:

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

70. Both Parties agree that this provision creates a presumption in favor of bifurcation; however, the Claimants call this a “soft” presumption and emphasize that the decision whether to bifurcate or not rests within the Tribunal's discretion. The Respondent objects to the presumption's characterization as “soft”, but agrees that the Tribunal retains the discretion to join any preliminary objections to the merits. Both Parties also agree that Article 15(1) of the UNCITRAL Rules confers upon the Tribunal broad discretion over the conduct of the proceedings.¹⁴⁰ Both Parties cite *Glamis Gold* in this respect, specifically the tribunal's comment that:

“Article 21(4) establishes a presumption in favor of the tribunal preliminarily considering objections to jurisdiction. Simultaneously, however, Article 21(4) does not require that pleas as to jurisdiction must be ruled on as preliminary questions. The choice not to do so is left to the tribunal's discretion.”¹⁴¹

71. There is therefore no dispute that the 1976 UNCITRAL Rules establish a presumption in favor of bifurcation. Likewise, there is no dispute that, in the exercise of its discretion, the Tribunal may decide not to bifurcate. Where the Parties disagree is how the Tribunal should exercise this discretion in the present case.

72. The Respondent nonetheless suggests that, given the textual differences between the 1976 UNCITRAL Rules and the 2010 UNCITRAL Rules, tribunals should in principle rule in favor of bifurcation. The Tribunal observes in this respect that, in the second edition of their treatise, Caron and Caplan note that the current version of this provision (Article 23(3) of the 2010 Rules) “replaces the express encouragement in original Article 21(4) that the arbitral tribunal ‘should’ rule on a plea that it lacks jurisdiction as a ‘preliminary matter’ with a more neutral rule: the arbitral tribunal may

¹⁴⁰ Article 15(1) of the UNCITRAL Rules provides: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

¹⁴¹ *Glamis Gold*, Procedural Order No 2 of 31 May 2005 (Exh. RLA-33), ¶ 9.

rule on such a plea ‘as a preliminary question or in an award on the merits.’”¹⁴² However, the authors submit that “the same policy of ensuring a fair and efficient arbitration that underpins both the 1976 and 2010 UNCITRAL Rules would minimize any textual differences in practice.”¹⁴³

73. Indeed, the authors had already noted in the first edition of their treatise that the discussion during the negotiations of the 1976 Rules “points to efficiency as the prime factor in determining whether a tribunal should rule on pleas concerning jurisdiction as a preliminary matter.”¹⁴⁴ As the Respondent has also rightly pointed out, “any decision, therefore, must consider the substantiality of the objection, the cost in time and money to the parties of such a preliminary ruling (e.g. whether such a ruling would entail written filings or an oral hearing), and the practicality of bifurcating the proceedings to address jurisdiction preliminarily, especially where jurisdictional issues are intertwined with the merits.”¹⁴⁵
74. The tribunal in *Glamis Gold* made a similar observation, noting that “[i]n examining the drafting history of Article 21(4) of the UNCITRAL Rules, the Tribunal finds that the primary motive for the creation of a presumption in favor of the preliminary consideration of a jurisdictional objection was to ensure efficiency in the proceedings. Importantly, the Tribunal reads the presumption in favor of preliminarily considering an objection to jurisdiction as an instruction to the Tribunal and clearly not as an absolute right of the requesting party.”¹⁴⁶
75. The Tribunal concludes that, under the 1976 Rules which apply to this case, it is required to give serious consideration to a request that an objection to its jurisdiction should be heard as a preliminary question. However, it retains full discretion to determine whether, in the circumstances of the case, that objection should be heard preliminarily or be joined to the merits.

B. What criteria should the Tribunal consider when exercising its discretion?

76. The Respondent submits that the factors to be considered are those identified in *Glamis Gold*, and adopted by the tribunals in *Philip Morris* and *Emmis*, namely:
- a. Whether the objection is substantial (in the sense of not being frivolous);
 - b. Whether, if granted, the objection to jurisdiction would result in a material reduction of the proceedings at the next phase; and

¹⁴² David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2010), p. 459.

¹⁴³ *Id.*

¹⁴⁴ David Caron, Lee Caplan and Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (2006), pp. 450-451. *See also supra* ¶ 30 and *infra* ¶ 76.

¹⁴⁵ *Id.*

¹⁴⁶ *Glamis Gold*, Procedural Order No 2 of 31 May 2005 (Exh. RLA-33), ¶ 11.

- c. Whether bifurcation is impractical, in the sense that the preliminary issue raised is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost.¹⁴⁷
77. The Tribunal agrees that these factors should be taken into consideration when determining whether jurisdictional objections should be bifurcated. However, it does not consider that these factors constitute a stand-alone test. In particular, it does not agree that, if factors (a) and (b) are answered in the affirmative and factor (c) in the negative, a tribunal should necessarily bifurcate a jurisdictional objection.
78. As the tribunal in *Accession Mezzanine* stated and the Parties have expressly recognized, “an overarching question [is] whether fairness and procedural efficiency would be preserved or improved.”¹⁴⁸ These considerations – fairness and procedural efficiency – are the determining factors that should guide the Tribunal’s discretion. As noted above, these were the principles that guided the negotiations for the 1976 Rules. It is also worth noting that the *Glamis Gold* tribunal only enumerated the factors listed in paragraph 76 above as non-exhaustive elements to be considered in the quest for procedural efficiency. That tribunal stated:
- “[I]f an objection is raised to the jurisdiction of the tribunal and a request is made by either party that the objection be considered as a preliminary matter, the tribunal should do so. The tribunal may decline to do so when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, inter alia, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost[.]”¹⁴⁹
79. Other tribunals have also emphasized the need to achieve procedural fairness and efficiency in light of the circumstances of the particular case. For instance, the tribunal in *Apotex* stated as follows:

“The Tribunal must take in this case a difficult but not a complicated decision, weighing for both sides the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice. There is no bright dividing-line as to where that decision now lies, rightly or wrongly.

¹⁴⁷ Respondent’s Application, ¶¶ 28-30, citing *Glamis Gold*, Procedural Order No 2 of 31 May 2005 (Exh. RLA-33), ¶ 12(c); *Philip Morris*, Procedural Order No 8 of 14 April 2014 (Exh. RLA-37), ¶ 109; *Emmis*, Decision on Bifurcation of 13 June 2013 (Exh. RLA-38), ¶ 37(2), among others.

¹⁴⁸ *Accession Mezzanine*, Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation of 8 August 2013 (Exh. RLA-39), ¶ 38.

¹⁴⁹ *Glamis Gold*, Procedural Order No 2 of 31 May 2005 (Exh. RLA-33), ¶ 12(c).

Moreover, the Tribunal must decide the Respondent's application in the particular circumstances of this case. It serves no purpose for this Tribunal to follow blindly what other tribunals have or have not done in other circumstances, particularly with hindsight."¹⁵⁰

80. This quest for procedural efficiency is consistent with the mandate contained in Article 1036(3) of the Dutch Arbitration Act, which provides:

“The arbitral tribunal shall ensure that there will be no unreasonable delay of the proceedings and, if necessary, take measures at the request of a party or on its own initiative. The parties have an obligation towards each other to prevent unreasonable delay of the proceedings.”

81. The Tribunal thus concludes that the question it must ask itself when considering whether to hear a jurisdictional objection as a preliminary question or to join it to the merits is the following: in the circumstances of the particular case, would bifurcation promote fairness and procedural efficiency? In answering that question, the Tribunal may consider the factors identified by the *Glamis Gold* tribunal, among others.

C. Is bifurcation warranted in the present case?

82. The Tribunal has carefully considered the Respondent's arguments in favor of bifurcation. It agrees with the Respondent that, *prima facie*, the objections it has raised meet some of the criteria cited at paragraph 76 above. In particular:

- a. It is not the Tribunal's task at this stage to judge whether the Respondent's objections are justified in substance. However, for purposes of this decision, the Tribunal is satisfied that the Respondent has put forward serious arguments in support of its Application on Bifurcation, as have the Claimants. The Tribunal thus cannot exclude that the Respondent's objections might be successful and does not consider at this juncture that they are frivolous.¹⁵¹
- b. The Claimants do not deny that any of these objections, if upheld, might either put an end to the dispute or significantly reduce its scope. The Tribunal notes however that a bifurcated phase would not dispose of all preliminary considerations: as noted above, in its Statement of Defence the Respondent has raised a fourth preliminary objection, namely that the Claimants have not made an investment in accordance with Indian Law.¹⁵² The Respondent “recognises that this preliminary objection is inappropriate for bifurcation inasmuch as it is intertwined with the merits of the dispute,”¹⁵³ and thus does not request bifurcation in this regard. In addition, as discussed in paragraph 87.b below, the Tribunal is not persuaded that if the Third Preliminary Objection was decided in favor of the Respondent it would put an end to the dispute. As a result, the

¹⁵⁰ *Apotex*, Procedural Order deciding Bifurcation dated 25 January 2013 (Exh. CLA-98), ¶ 10.

¹⁵¹ *See, e.g., Philip Morris*, Procedural Order No. 4 Regarding the Procedure until a Decision on Bifurcation, dated 26 October 2016 (Exh. CLA-88), ¶ 125.

¹⁵² Respondent's Statement of Defence, Section V.D.

¹⁵³ Respondent's Statement of Defence, ¶ 245.

Tribunal finds that this consideration would be satisfied only for the First and Second Preliminary Objections.

83. That being said, after carefully considering the circumstances of this case, the Tribunal is not persuaded that a bifurcation would promote fairness or procedural efficiency. The Tribunal has considered in particular the following factors:
- a. A year has passed since the first procedural hearing took place in April 2016. At that time, the Respondent insisted that it wished to await the Claimants' Statement of Claim to file its objections to jurisdiction and file its request for bifurcation. The Tribunal does not raise any objection to that position; however, as recorded by the Tribunal in its email of 21 April 2016 (which the Respondent did not object to), it committed to filing that request "as soon as reasonably possible", failing which it agreed that it would submit its Statement of Defence in full.¹⁵⁴
 - b. The Claimants filed their Statement of Claim in June 2016. On three occasions, the Tribunal reiterated its invitation that the Respondent should file its request for bifurcation as soon as reasonably possible, failing which it would have to submit its Statement of Defence in full, but the application was not forthcoming.¹⁵⁵ The Tribunal also explicitly stated that when ruling on a request for bifurcation, it would take into consideration whether it was timely made.¹⁵⁶
 - c. The Claimants suggested that the Respondent could identify its objections and brief them later, so that the hearing scheduled for 7 October could be used to discuss both the Stay and Bifurcation Applications.¹⁵⁷ The Respondent rejected the Claimants' proposal.¹⁵⁸ Ultimately, it filed its Application for Bifurcation on the eve of that very hearing, and has acknowledged that this was done so that this Application could be considered in the discussion of the procedural calendar during that hearing.¹⁵⁹
 - d. The Respondent has rightly noted that under Article 21(3) of the UNCITRAL Rules, it had the right to withhold the filing of its objections to jurisdiction (and its Application for Bifurcation) until the filing of its Statement of Defence. The Tribunal also recognizes that it was for the Respondent to make whatever strategic decisions it chose in terms of the timing of its Application for Bifurcation. The Tribunal offers no judgment in this respect, but the Respondent's decisions have had an impact on the procedural calendar and on the efficiency of this arbitration: deciding on bifurcation before any significant procedural steps have been undertaken is not the same as deciding on it later on

¹⁵⁴ See paragraph 2 above.

¹⁵⁵ See paragraphs 5, 8 and 13 above.

¹⁵⁶ See paragraph 8 above.

¹⁵⁷ See paragraph 9 above.

¹⁵⁸ See paragraph 11 above.

¹⁵⁹ See paragraphs 14 and 35 above.

in a proceeding and the circumstances are different as will now be considered more in depth. First, precisely, the first round of (full) written submissions are now in the record and this has certainly resulted in significant costs that are already expended.

- e. Likewise, and second, it cannot be ignored that the Tribunal has now decided on the Respondent's Stay Application and that this application and its disposal caused significant delay to the determination of any Application for Bifurcation. As above, the Tribunal offers no judgment in this respect; to the contrary, given the serious nature of the matters raised in the Respondent's Stay Application, in particular the risk of conflicting decisions in the *Cairn* and *Vedanta* arbitrations, the Tribunal considers that the delay caused by that application was justified. That said, as a matter of fact, the Stay Application delayed the consideration of any Application for Bifurcation by several months, in particular because (i) the Respondent requested a hearing on its Stay Application, which the Tribunal granted over the Claimants' objection, and that hearing did not take place until 7 October 2016; (ii) in order to reduce the risk of conflicting decisions, the Tribunal invited the Parties to consult with Vedanta to see if enhanced forms of cooperation between the two arbitrations were feasible; and (iii) after these consultations failed, the Parties made further submissions on the Stay Application. As a result, the Tribunal ruled on the Stay Application in March 2017, and can only now address the Respondent's Application for Bifurcation.¹⁶⁰
- f. It is true that the Parties have already consulted and agreed on a procedural timetable for bifurcated and non-bifurcated proceedings. However, due to the inability to find hearing dates earlier, the hearing for either scenario has been set for January 2018, which effectively means that the briefing and oral submissions for the Respondent's preliminary objections alone would take the same amount of time as if these objections were joined to the merits (approximately one year). Indeed, as noted above, both Parties have already submitted their full memorials in chief, addressing issues of jurisdiction, admissibility and the merits.
- g. The Tribunal is aware that the Respondent has objected to having been required to file its Statement of Defence in full before its Stay Application and Application for Bifurcation were decided. The Tribunal has taken note of this objection, but observes that the Respondent itself agreed to this course of action if it did not file its Application for Bifurcation as soon as reasonably possible after receiving the Claimants' Statement of Claim. Given the procedural history that predates this Application and is cited in Section I above, the Tribunal cannot but conclude that the Respondent did not file this Application as soon as it would have been possible. In the circumstances, the Tribunal ordered the Respondent to submit its full Statement of Defence in an attempt to exercise its discretion under Article 15(1) reasonably and with a view to preserving fairness between the Parties. The Tribunal further notes that it granted the Respondent several extensions to file its Statement of Defence: although the pleading was

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See Procedural Order No. 3.

originally due on 11 November 2016, the Respondent ultimately filed it on 4 February 2017.

- h. The Tribunal is likewise not persuaded that, because the *Vedanta* tribunal has decided to bifurcate two identical objections to the Respondent's two first preliminary objections, the Tribunal should do so here as well. Although the Tribunal does not have the details of the factual and procedural circumstances surrounding that arbitration, it understands that the Respondent filed its request for bifurcation some time before it did so in this arbitration, and that the hearing for that application is scheduled for May 2017. It also understands that the Respondent did not file a stay application in the *Vedanta* arbitration. The procedural circumstances (and the procedural timetables) are thus very different. In any case, as recalled above, each Tribunal has to decide on the merits of bifurcation on the basis of the circumstances of the case before it and not solely in reliance on a precedent, however similar the circumstances of that other case might appear to be.
84. In sum, regardless of the reasons that led to the present situation, the fact of the matter is that the consideration of the Respondent's Application for Bifurcation has been delayed significantly, the Parties have already submitted their main memorials and evidence, considerable time has already elapsed since the commencement of this arbitration and the procedural timetables agreed by the Parties mean that it would take the same time to brief and hear the Respondent's preliminary objections as it would to brief and hear the entire case. The Tribunal thus concludes that bifurcating these proceedings would not increase procedural efficiency and would not result in very significant savings even if a bifurcated case would result in a dismissal, which in any event would not occur significantly earlier than the release of Award on the full case; to the contrary, it might significantly increase time and costs.
85. The Tribunal has also taken into consideration that, given the nature of this dispute, the passage of time could aggravate the dispute and increase the amounts claimed as damages. Indeed, the Respondent has seized and continues to hold the Claimants' shares in Cairn India Limited, and is now threatening to sell them. In addition, significant interest and penalties might accrue to the amounts assessed by India, thus potentially increasing the amount in dispute. In the Tribunal's view, this is yet another consideration that warrants a resolution of this dispute as swiftly as reasonably possible.¹⁶¹
86. That said, the Tribunal acknowledges that, if the Respondent is successful in any of its preliminary objections, it will have incurred costs in addressing the merits that it could have saved in a bifurcated proceeding. The Tribunal might well consider among other factors the outcome of the Respondent's objections to jurisdiction and admissibility when determining the costs of this proceeding. Considering that any prejudice to the Respondent caused by non-bifurcated proceedings can be compensated by an award of costs, the Tribunal believes, like the *Apotex* tribunal did in the case before it, that "in

¹⁶¹ While it is certainly possible that the Respondent could be successful in its preliminary objections, it is also possible that these objections might be rejected, so that bifurcation would postpone the resolution of this dispute.

the circumstances of this case, [...] the balance of procedural fairness bears less heavily on the Respondent without bifurcation than on the Claimants with bifurcation.”¹⁶²

87. Finally, although it considers its reasoning in terms of procedural fairness and economy sufficient, the Tribunal notes that, with respect to the Second and Third Preliminary Objections, it is not satisfied that they can easily and entirely be addressed separately from the merits of the dispute:
- a. With respect to the Second Preliminary Objection, the Claimants have pointed out that in its Statement of Defence the Respondent argues that the 2006 share transfers triggered the Claimants’ tax liability irrespective of the 2012 Amendment because they were part of an “unwholesome tax avoidance scheme”, an argument that according to the Claimants is intertwined with the merits.¹⁶³ The Claimants also argue that the Respondent’s argument that the Claimants’ claims are inadmissible because they challenge India’s tax policy rather than the application of its tax laws may also raise merits issues.¹⁶⁴
 - b. As to the Third Preliminary Objection, the Tribunal is not persuaded that it raises only issues of treaty interpretation. In particular, even if the Respondent’s interpretation of the BIT is correct, the Tribunal might still need to determine whether the Claimants made “investments” in the meaning of the BIT (which the Respondent recognizes is an issue intertwined with the merits), or whether they made the capital gains that the Respondent refers to as “returns” and that do not qualify as “investments”. The Claimants deny that they made any profit from the 2006 transactions, but the Respondent rightly observes that this assumes “the very point” which the Claimants must prove in this arbitration. In the Tribunal’s view, this point would also be intimately linked with the merits.
88. For the reasons set out above and without a need to go into further reasons, the Tribunal denies the Respondent’s Application for Bifurcation.
89. As a result, it confirms that the Procedural Calendar for Non-Bifurcated Proceedings attached to the Tribunal’s letter AT- 42 of 20 January 2017 (and reattached as Annex A hereto) will apply to the remainder of this arbitration.

¹⁶² *Apotex*, Procedural Order deciding Bifurcation dated 25 January 2013 (Exh. CLA-98), ¶ 13.

¹⁶³ *See* paragraph 63.d above.

¹⁶⁴ *Id.*

IV. DECISION

90. For the reasons set out above, the Tribunal:

- a. DENIES the Respondent's Application for Bifurcation;
- b. ORDERS that the Procedural Calendar for Non-Bifurcated Proceedings attached as Annex A shall apply to the remainder of these proceedings; and
- c. DEFERS its decision on costs to a later stage.

Seat of arbitration: The Hague, Netherlands

Date: 19 April 2017

For the Arbitral Tribunal:



Dr. Laurent Lévy
Presiding Arbitrator