

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Société Resort Company Invest Abidjan, Stanislas Citerici and Gérard Bot**

**v.**

**Republic of Côte d'Ivoire**

**(ICSID Case No. ARB/16/11)**

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**Decision on the Respondent's Preliminary Objection to Jurisdiction**

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***Members of the Tribunal***

Professor Zachary Douglas QC, President of the Tribunal  
The Honorable L. Yves Fortier QC, Arbitrator  
Professor Kaj Hobér, Arbitrator

***Secretary of the Tribunal***

Ms. Ella Rosenberg

*Date of dispatch to the Parties: 1 August 2017*

## Representation of the Parties

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## **I. INTRODUCTION**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) pursuant to Ordonnance N° 2012-87 of 7 June 2012, *Code des Investissements* (“**2012 Code**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”).
2. The Republic of Côte d’Ivoire has objected to the jurisdiction of this Tribunal on the ground that the Claimants failed to satisfy the requirements of Article 20 of the 2012 Code which, according to the Côte d’Ivoire, requires foreign investors to expressly declare their consent to ICSID arbitration in their request for investment authorization (“*demande d’agrément*”) which the Côte d’Ivoire claims that the Claimants failed to do.<sup>1</sup>

### **A. THE CLAIMANTS**

3. The Claimants in this proceeding are Société Resort Company Investment Abidjan (“**RCI-Abidjan**”), a company incorporated under the laws of the Côte d’Ivoire (held by Mr. Citerici, Mr. Bot, and Société Resort Company Invest Dakar), Mr. Stanislas Citerici, a French national, and Mr. Gérard Bot, a French national (the “**Claimants**” or “**RCI**”).

### **B. THE RESPONDENT**

4. The Respondent is the Republic of Côte d’Ivoire (the “**Respondent**” or “**Côte d’Ivoire**”).

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<sup>1</sup> Respondent’s letter to ICSID dated 5 December 2016. See also the Respondent’s Memorial on Jurisdiction dated 14 February 2017, ¶¶ 1-2.

## II. PROCEDURAL HISTORY

5. On 2 March 2016, ICSID received a request for arbitration from Société Resort Company Invest Abidjan, Stanislas Citerici and Gérard Bot against the Côte d'Ivoire accompanied by factual exhibits 1 through 54 (the "**Request**").
6. On 29 March 2016, the Secretary-General of ICSID registered the Request, as supplemented by the Claimants' letter of 17 March 2016, submitted with factual exhibits 55 through 67, and the Claimants' letter of 25 March 2016.
7. By letter of 16 June 2016, the Claimants informed the Centre that the Parties were attempting to agree on a method of constitution of the Tribunal pursuant to Article 37(2)(a) of the ICSID Convention and decided to postpone the constitution of the Tribunal until 1 September 2016.
8. By letter of 6 September 2016, the Claimants informed the Centre that the Parties had agreed to constitute the Tribunal pursuant to Article 37(2)(b) of the ICSID Convention, composed of three members nominated pursuant to Rule 3 of the ICSID Arbitration Rules (the "**Arbitration Rules**"). The Claimants indicated that they wished to appoint the Honorable L. Yves Fortier QC as arbitrator, and that the Respondent wished to appoint Professor Kaj Hobér as arbitrator.
9. On 12 September 2016, the Centre invited the Respondent to confirm (i) its agreement with the method proposed by the Claimants for the constitution of the Tribunal which, if confirmed, would constitute an agreement on the method of constitution of the Tribunal for the purposes of Article 37(2)(a) of the ICSID Convention; and (ii) to confirm its appointment of Professor Kaj Hobér as arbitrator. The Centre also noted the Parties' disagreement as to the language of the proceedings and the place of arbitration, and informed them that these questions would be discussed at the First Session.
10. By letter of 13 September 2016, the Claimants confirmed their request that the Tribunal in this case be constituted pursuant to the formula provided by Article 37(2)(b) of the

ICSID Convention. The Claimants appointed the Honourable L. Yves Fortier QC, a national of Canada, as arbitrator.

11. On 14 September 2016, the Centre acknowledged receipt of the Claimants' letter of 13 September 2016, and informed the Parties that the Tribunal would be constituted pursuant to Article 37(2)(b) of the ICSID Convention. The Centre noted that the Claimants had nominated the Honourable L. Yves Fortier QC, a national of Canada, as arbitrator and invited the Respondent to confirm its nomination of Professor Kaj Hobér, a national of Sweden, as arbitrator.
12. On 23 September 2016, the Respondent (i) confirmed its agreement that "*the Tribunal in this case be constituted pursuant to a mechanism identical to that provided for in Article 37(2)(b) of the ICSID Convention*"; (ii) confirmed its appointment of Professor Kaj Hobér, a national of Sweden, as arbitrator; and (iii) invited ICSID to "*appoint the third arbitrator who will serve as President of the Tribunal*".
13. By letter of the same date, the Centre informed the Parties that the Honourable L. Yves Fortier QC had accepted his appointment as arbitrator in this case.
14. By email of 26 September 2016, the Claimants requested that the President of the Tribunal be designated by the Chairman of the Administrative Council of ICSID, in accordance with Article 38 of the ICSID Convention and ICSID Arbitration Rule 4.
15. On 7 October 2016, the Centre informed the Parties that Professor Kaj Hobér had accepted his appointment as arbitrator in this case.
16. By letter of 14 October 2016, the Centre invited the Parties to consider a list of seven candidates for the appointment of the President of the Tribunal.
17. By letter of 21 October 2016, the Centre informed the Parties that they had agreed to appoint Professor Zachary Douglas QC, a national of Australia, as the presiding arbitrator in this case.
18. By letter of 27 October 2016, the Secretary-General, in accordance with Article 37(2)(b) of the ICSID Convention and ICSID Arbitration Rule 6(1) 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. Ms. Ella Rosenberg, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

19. By letter of 10 November 2016, further to several exchanges with the Parties, the Tribunal proposed that the First Session be held by videoconference on 16 December 2016.
20. By letter of 21 November 2016, the Centre circulated a draft Procedural Order No. 1 to help the Parties prepare for the First Session and set out the Tribunal's views on certain matters raised in draft Procedural Order No. 1.
21. On 5 December 2016, The Respondent submitted (i) its Preliminary Objections to Jurisdiction; (ii) a request to bifurcate the proceedings; and (iii) its comments on draft PO 1.
22. By letter of 9 December 2016, the Tribunal informed the Parties that the issue of whether the Respondent's Objections would be decided in a preliminary phase of this arbitration and whether the proceedings on the merits should be suspended in accordance with Rule 41(3) of the Arbitration Rules would not be on the agenda for the First Session scheduled to occur on 16 December 2016. The Tribunal further invited Claimants to submit a response to Respondent's request to bifurcate the proceedings by 19 December 2016.
23. By letter of 12 December 2016, the Tribunal informed the Parties that given that there was no agreement on the language to be used by the Tribunal for the First Session, a coin would be flipped to determine whether it would be English (as requested by the Respondent) or French (as requested by the Claimants). The coin flipping would occur on 14 December 2016, via telephone conference, between the Parties and Ms. Ella Rosenberg, Secretary of the Tribunal, who would flip the coin.
24. On 14 December 2016, the coin toss was held to determine the language to be used by the Tribunal during the First Session. It resulted from the coin toss that it would be

French. The Centre transmitted the video and audio recordings of the coin toss to the Parties and the Tribunal on the same day.

25. Also on 14 December 2016, the Tribunal circulated a proposed agenda for the First Session scheduled for 16 December 2016.
26. On 16 December 2016, the Tribunal held a First Session with the Parties by videoconference. The Tribunal members participated from London and used French, the Claimants participated from Paris and also used French, and the Respondent and Ms. Rosenberg participated from Washington D.C. and used English.
27. During the First Session, the Parties confirmed that the Tribunal was properly constituted, that they had no objection to the appointment of any member of the Tribunal and that they agreed on the application of the 2006 version of the ICSID Arbitration Rules. They also agreed that the place of the proceedings would be Washington D.C.
28. On 19 December 2016, the Claimants submitted a response to Respondent's Objections and a request to bifurcate the proceedings.
29. On 21 December 2016, the Tribunal transmitted to the Parties the executed versions of Procedural Order No. 1 in French and English, as well as the procedural timetables.
30. On 26 December 2016, Respondent submitted a Reply to the Claimants' Response of 19 December 2016.
31. Also on 26 December 2016, the Centre informed the Parties that it had received an application from Mr. Oulepo Nemlin Hie for leave to file a non-disputing party submission on behalf of the ex-employees of the "Café de Rome", and invited their comments by 17 January 2017.
32. On 10 January 2017, the Tribunal issued Procedural Order No. 2, whereby it decided that "*the preliminary objection to the Tribunal's jurisdiction raised by the Respondent in its letter of 5 December 2016 shall be determined in a preliminary phase of these*

*proceedings and that the proceedings on the merits shall be suspended pending the Tribunal's determination*".

33. By letters of 17 and 18 January 2017, the Respondent and the Claimants, respectively, objected to Mr. Oulepo's request to intervene in these proceedings as a non-disputing party.
34. By letter of 18 January 2017, the Respondent stated that it intended to file an expert opinion that would address issues of international investment law together with its Memorial on Jurisdiction and that it "*may rely on expertise in the area of Ivorian law.*"
35. On 19 January 2017, the Tribunal took note of the Respondent's intention to file an expert opinion on "*issues of international investment law*". The Tribunal also indicated that while "*it is ultimately for the parties to decide how to present their cases*" it had "*a strong preference for points of international investment law to be made by submission rather than by expert evidence*".
36. By letter of 1 February 2017, the Tribunal informed the Parties that it would reserve its position on Mr. Oulepo's request to intervene as a non-disputing party, as it considered the question to be premature.
37. On 13 February 2017, Mr. Oulepo wrote to the Tribunal to request access to the Parties' comments on his application to intervene in these proceedings as a non-disputing party.
38. On 14 February 2017, the Respondent filed its Memorial on Jurisdiction along with factual exhibits R-1 through R-10, the expert opinion of Professor Sohaily Felix Acka and the witness statement of Mr. Esmel Emmaniel Essis.
39. On the same date, the Claimants filed their Memorial on the Merits along with factual exhibits C-69 through C-99.
40. On 28 February 2017, the Parties informed the Tribunal that they did not consent to Mr. Oulepo's request to access the Parties' comments on his application to intervene in these proceedings as a non-disputing party.

41. By letter of 9 March 2017, the Tribunal informed Mr. Oulepo that his request to access the Parties' comments on his application was denied.
42. On 17 March 2017, the Claimants submitted a Counter-Memorial on Jurisdiction along with factual exhibits C-100 through C-108, and an expert opinion by Professor Emmanuel Gaillard.
43. On 20 March 2017, The Respondent wrote that in submitting Professor Emmanuel Gaillard's expert opinion with their Counter-Memorial on Jurisdiction, the Claimants had failed to follow the instructions conveyed in the Tribunal's letter of 19 January 2017. Subsequently, the Respondent requested leave to submit a draft opinion of Professor Christoph Schreuer into the record.
44. By letter of 21 March 2017, the Claimants objected to the Respondent's request.
45. On 21 March 2017, the Tribunal invited the Parties to confirm, by 23 March 2017, their availability for a pre-hearing organizational meeting, to be held by teleconference. The Tribunal also circulated a draft agenda and invited the Parties to submit a joint proposal confirming their points of agreement, or their respective points of disagreement no later than 27 March 2017. The Tribunal further informed the Parties that it would revert to them in due course concerning the Respondent's request of 20 March 2017 to submit Professor Schreuer's draft Opinion into the record.
46. On 22 March 2017, the Tribunal invited the Respondent to file a signed and dated report by Professor Schreuer by no later than 27 March 2017. The Respondent did so on 24 March 2017.
47. On 29 March 2017, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference. Minutes of the pre-hearing organizational meeting were transmitted to the Parties on 4 April 2017.
48. On 4 April 2017, the Parties submitted their respective skeleton arguments.
49. The Hearing on jurisdiction (the "**Hearing**") took place on 6 and 7 April 2017 at the World Bank offices in Washington, D.C. In attendance at the Hearing were the

Members of the Tribunal, the Secretary of the Tribunal, and the following Party representatives:

*On behalf of Claimants*

Ms. Danyèle Palazo-Gauthier, Cabinet Tour Maubourg

Ms. Marie P. Michon, Cabinet Tour Maubourg

Mr. Francois Tosi, Cabinet Tosi

Mr. Jean-Chrysostome Blessy, Cabinet Blessy

Mr. Alain Fénéon, Cabinet Fénéon

*On behalf of Respondent*

Mr. Lee Caplan, Arent Fox

Mr. Timothy Feighery, Arent Fox

Mr. Gerard Leval, Arent Fox

Ms. Laure Hadas-Lebel, Arent Fox

Mr. Hady Gouda, Arent Fox intern

50. The Hearing was sound recorded and the audio recordings were made available to the Tribunal and the Parties on 19 April 2017, on the Box platform created for this case. Verbatim transcripts of the Hearing were made available to the Tribunal and the Parties in real-time.
51. On 28 April 2017, the Parties submitted their respective submissions on costs, and their comments on the decision issued on 8 March 2017 in the case of *Vladislav Kim and others v. Republic of Uzbekistan* (ICSID Case No. ARB/13/6), as requested by the Tribunal during the Hearing. On the same date, the Parties informed the Tribunal that they had agreed to submit the revised versions of the Hearing's transcripts on 9 May 2017.
52. By letter of 9 May 2017, the Claimants submitted the Parties' revisions to the transcripts. The only disagreement between the Parties regarding the transcripts related

to the translation into French of the terms “state”, “asked”, “spell out”, “set forth formally” and “perfected” which had been translated as “exprimé”.

53. By letter of 10 May 2017, the Respondent responded to the Claimants’ letter of 9 May 2017, and requested that the Tribunal let the French translation stand and reject the Claimants’ proposed modifications.

54. On 12 May 2017, the Parties submitted their respective replies on costs.

### **III. THE PARTIES’ REQUESTS FOR RELIEF**

55. In its Memorial on Jurisdiction, the Respondent made the following requests:

*“Respondent respectfully requests that this Tribunal render an award:*

*(a) in favor of the Respondent and against Claimants, dismissing Claimants’ claims in their entirety and with prejudice; and*

*(b) pursuant to paragraph 1 of ICSID Rule 28, ordering that Claimants bear the costs of this arbitration, including Respondent’s costs for legal representation and assistance.”<sup>2</sup>*

56. In their Counter-Memorial on Jurisdiction, the Claimants requested the Tribunal to declare that it had jurisdiction pursuant to Article 20 of the 2012 Code and to order the Respondent to bear the entirety of the costs related to the arbitration including the costs related to legal representation and experts.<sup>3</sup>

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<sup>2</sup> Respondent’s Memorial on Jurisdiction, ¶ 124.

<sup>3</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 227.

#### IV. THE RESPONDENT'S OBJECTION TO JURISDICTION

##### A. THE RESPONDENT'S POSITION

57. The Respondent objects to the jurisdiction of this Tribunal on the ground that the Claimants allegedly failed to meet the consent requirements of Article 20 of the 2012 Code requiring an investor to expressly state its consent to ICSID arbitration in the application for authorization (*demande d'agrément*).<sup>4</sup> According to the Respondent, since the Claimants never properly accepted the Respondent's offer to consent to ICSID arbitration, no agreement to arbitrate between the Parties ever formed and the Claimants' claims should be dismissed in their entirety.<sup>5</sup>
58. The Respondent's objection focuses on the language of the last sentence of Article 20 of the 2012 Code which states:

*Le consentement des parties à la compétence du CIRDI ou du mécanisme supplémentaire, selon le cas, requis par les instruments les régissant est constitué, pour la République de Côte d'Ivoire par le présent article, et exprimé expressément dans la demande d'agrément pour la personne concernée.*<sup>6</sup>

59. The Respondent's position is that by its own clear terms, Article 20 imposes unambiguous conditions on an investor's ability to perfect its consent to ICSID arbitration.<sup>7</sup> According to the Respondent, an investor may only accept the Respondent's offer of consent to ICSID arbitration by expressly indicating so in the *demande d'agrément*. The Respondent's position is that the consent of the investor does not arise impliedly through the submission of the *demande d'agrément*.<sup>8</sup> The Respondent submits that it is undisputed that no express consent to ICSID arbitration was given on the part of the Claimants in their *demandes d'agrément* dated 22 April

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<sup>4</sup> Respondent's Memorial on Jurisdiction, ¶ 1-2.

<sup>5</sup> Respondent's Memorial on Jurisdiction, ¶ 6.

<sup>6</sup> Exhibit C-77: Publication au Journal Officiel en date du 20 septembre 2012 de l'Ordonnance n°2012-487 portant nouveau Code des Investissements du 7 juin 2012.

<sup>7</sup> Respondent's Memorial on Jurisdiction, ¶ 18.

<sup>8</sup> Respondent's Memorial on Jurisdiction, ¶ 5.

2010 and 11 December 2013. Based on its interpretation of Article 20 of the 2012 Code, therefore, the Respondent concludes that the Tribunal lacks jurisdiction.<sup>9</sup>

60. With respect to the standard of interpretation that should be adopted by the Tribunal, the Respondent submits that provisions on consent to ICSID arbitration under a national investment law, such as Article 20, are to be interpreted in accordance with rules of international law relating to unilateral acts, and Ivorian principles on statutory interpretation.<sup>10</sup> In support of its position, the Respondent submitted the expert Report of Professor Félix Acka, who opined that under Ivorian law, in the absence of ambiguity, the interpreter need not look beyond the plain meaning of the text. According to the Respondent, Ivorian law is “*consistent and complementary to the interpretive approaches followed in the international law, and otherwise accepted by both parties.*”<sup>11</sup>
61. The Respondent submits that “[t]he Parties’ basic views on the applicable standard of interpretation are not far apart. Both accept the non-restrictive standard of interpretation adopted in *Tidewater v. Venezuela*. Both have cited in their memorials the same passage of this case which provides that unilateral declarations should be interpreted ‘in good faith ‘as it stands, having regard to the words actually used’; ‘in a natural and reasonable way, having due regard to the intention of the State concerned.’”<sup>12</sup>
62. The Parties’ positions differ with respect to their interpretations of Article 20 of the 2012 Code. For the Respondent, the text is clear and unambiguous.<sup>13</sup> It argues that “*under both international and Ivorian law, the plain meaning of the law to be interpreted is the critical point of departure in the interpretive analysis. The context*

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<sup>9</sup> Exhibit R-1: Claimants’ Application for Authorization (April 22, 2010); Exhibit R-2: Claimants’ Application for Authorization (December 11, 2013). See also Respondent’s Memorial on Jurisdiction, ¶¶ 20-27.

<sup>10</sup> Respondent’s Memorial on Jurisdiction, ¶ 34.

<sup>11</sup> Respondent’s Skeleton Argument, p. 2. See also English Transcripts D1: P19:L8-22.

<sup>12</sup> Respondent’s Skeleton Argument, p. 1. See also English Transcripts D1: P14:L3-P16:L12.

<sup>13</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 55, 123.

*and purpose of the text may be considered, but such examination is less important where the text is clear and unambiguous.”*<sup>14</sup>

63. The Respondent argues that the plain meaning of Article 20 restricts the investor’s means of consenting to ICSID arbitration to the selection of ICSID expressly in its application for authorization.<sup>15</sup> According to the Respondent, the State’s offer of consent to ICSID arbitration is subject to certain formalities for perfecting the investor’s consent to ICSID arbitration.<sup>16</sup> For the Respondent, Article 20 establishes both the manner and the mode by which an investor can express consent to ICSID arbitration.<sup>17</sup> An investor can only accept the Respondent’s offer of consent if the investor’s consent is expressly stated (“*exprimé expressément*”) in the investor’s application for authorization (“*dans la demande d’agrément*”).<sup>18</sup> The Respondent argues that since the plain meaning of the text of Article 20 clearly requires the Claimants to expressly state their consent to ICSID arbitration in their *demande d’agrément*,<sup>19</sup> which they did not do,<sup>20</sup> the Claimants have not complied with Article 20.
64. The Respondent further argues that “*the context provided by the design and structure of the 2012 Code confirms the plain meaning of Article 20.*”<sup>21</sup> In particular, the Respondent submits that the 2012 Code distinguishes between “*avantages*” on the one hand and “*garanties*” on the other. The Respondent submits that “[a]vantages’ are economic incentives, such as reductions in or exonerations from taxes and customs duties, which an investor may benefit from for a limited period of time in order to maximize its profitability as a business venture. ‘Garanties’ are fundamental

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<sup>14</sup> Respondent’s Memorial on Jurisdiction, ¶ 47.

<sup>15</sup> Respondent’s Skeleton Argument, p. 2.

<sup>16</sup> Respondent’s Memorial on Jurisdiction, ¶ 50.

<sup>17</sup> Respondent’s Memorial on Jurisdiction, ¶ 59.

<sup>18</sup> Respondent’s Memorial on Jurisdiction, ¶ 17. See also ¶¶ 51-61.

<sup>19</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 49-64.

<sup>20</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 20-27.

<sup>21</sup> Respondent’s Skeleton Argument, p.3. See also Respondent’s Memorial on Jurisdiction, ¶¶ 65-84.

*investment protections for investors designed to create an open and fair marketplace for foreign direct investment in Côte d’Ivoire.”*<sup>22</sup>

65. According to the Respondent, under the 2012 Code, ICSID arbitration is a “*garantie*” not an “*avantage*”. It points out that recourse to ICSID arbitration falls under Title II of the 2012 Code entitled “*Garanties Accordées Aux Investisseurs*,” not Title IV entitled “*Régimes d’Incitation*”.<sup>23</sup> According to the Respondent, “*the 2012 Code is designed and structured in a way such that when an investor submits an application for authorization to seek to obtain ‘avantages,’ it does not automatically obtain the ‘garantie’ of ICSID arbitration when the investor’s application is approved. Rather, as the context of the Code demonstrates, to be entitled to ICSID arbitration, an investor must take the additional step of expressly stating its consent to ICSID arbitration in its application for authorization.*”<sup>24</sup>
66. The Respondent explains that the 2012 Code has two separate regimes which serve separate purposes: one which regulates the availability of certain economic benefits (“*avantages*”) and the other which regulates consent to ICSID arbitration (a “*garantie*”). If an investor wishes to benefit from the Code’s *avantages*, it must submit its application for authorization to the CEPICI (*Centre de Promotion des Investissements en Côte d’Ivoire*), pursuant to Article 40.<sup>25</sup> If, however, an investor wishes to choose ICSID arbitration, the 2012 Code regulates consent to ICSID arbitration as a *garantie* in Article 20.<sup>26</sup> The Respondent further explains that:

*While the same document (the application for authorization) is used to effectuate each choice, the result of those choices is determined in accordance with entirely different terms and conditions. To obtain ‘avantages’ under Part IV of the Code, an investor must provide detailed information in its application for authorization that demonstrates its corporate bone fides and the nature and scope of its investment. To*

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<sup>22</sup> Respondent’s Memorial on Jurisdiction, ¶ 66.

<sup>23</sup> Respondent’s Memorial on Jurisdiction, ¶ 78.

<sup>24</sup> Respondent’s Memorial on Jurisdiction, ¶ 67.

<sup>25</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 68-76.

<sup>26</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 76-84.

*obtain the 'garantie' of ICSID arbitration under Part II of the Code, the investor simply must expressly state its consent to ICSID arbitration in its application for authorization.*<sup>27</sup>

67. The Respondent concludes that the existence of separate regimes under the 2012 Code confirms the plain meaning of the consent requirements established in Article 20.<sup>28</sup>
68. The Respondent also argues that the purpose and intent behind Article 20 confirms its plain meaning. First, according to the Respondent, in establishing a process by which the investor must inform the Respondent of its consent to ICSID arbitration, Article 20 furthers the Respondent's policy goals of "*ensuring that the parties enjoy a reciprocal right of arbitration; providing both parties clear notice as to when consent to ICSID arbitration is perfected; and allowing Respondent the opportunity to assess and manage its exposure to ICSID.*"<sup>29</sup> The Respondent submits that it also serves the policy goals of "*clarity with respect to the timing and efficacy of the parties' consent to ICSID arbitration*"<sup>30</sup> and allowing the Respondent to manage its litigation risk.<sup>31</sup>
69. The Respondent rejects the Claimants' interpretation of the 2012 Code. According to the Respondent, the Claimants' argument that the filing of the *demande d'agrément* constitutes consent on the part of the Claimants cannot stand because, if adopted, the Claimants' interpretation of Article 20 would (i) render the consent requirements in Article 20 meaningless; and (ii) deprive all investors of their right to choose between domestic courts and international arbitration.<sup>32</sup> The Respondent argues that the Claimants' interpretation of Article 20 would reverse its alleged presumption from one where investors must opt in to ICSID arbitration to one where investors must opt out

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<sup>27</sup> Respondent's Memorial on Jurisdiction, ¶ 82.

<sup>28</sup> Respondent's Memorial on Jurisdiction, ¶ 84.

<sup>29</sup> Respondent's Memorial on Jurisdiction, ¶ 86.

<sup>30</sup> Respondent's Memorial on Jurisdiction, ¶ 91.

<sup>31</sup> Respondent's Memorial on Jurisdiction, ¶ 95.

<sup>32</sup> Respondent's Memorial on Jurisdiction, ¶¶ 108-109.

of ICSID arbitration if they do not want it, which is not how the 2012 Code should be read.<sup>33</sup>

70. The Respondent further rejects the Claimants’ argument that their 2013 *demande d’agrément* constitutes consent to ICSID arbitration since they requested “*tous les avantages qui découlent du régime de l’agrément à l’investissement en vertu de l’ensemble du Code des investissements*”.<sup>34</sup> According to the Respondent, the Claimants’ 2013 *demande d’agrément* cannot be construed as the Claimants’ consent to ICSID arbitration because “*not only did Claimants not request all of the benefits under the 2012 Code, but, as explained, ICSID Arbitration is not an economic benefit under the Code in any event.*”<sup>35</sup> The Respondent further points out that the Claimants’ 2013 *demande d’agrément* did not contain a reference to ICSID arbitration.<sup>36</sup>
71. The Respondent also rejects the Claimants’ argument that the filing of the Request for Arbitration constitutes the Claimants’ consent to ICSID arbitration and that the Claimants have a public interest right to ICSID arbitration, as “*baseless.*”<sup>37</sup> For the Respondent, the Claimants’ arguments in this regard “*completely ignore [...] the clear requirement that their consent to ICSID arbitration must be expressly stated ‘dans la demande d’agrément.’*”<sup>38</sup> It also argues that the Claimants’ arguments disregard the Respondent’s reciprocal rights under Article 20.<sup>39</sup>
72. In addition, the Respondent submits that Article 20 contains a “fork-in-the-road” provision requiring the investor to choose between Ivorian courts or ICSID arbitration.<sup>40</sup> Accordingly, the Respondent argues, the investor must expressly make

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<sup>33</sup> English Transcripts D1: P53:L5-17.

<sup>34</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶¶ 131-132. See English Transcripts D1: P:58L16-P:60: L14.

<sup>35</sup> English Transcripts D1: P:59:L11-P:60:L16.

<sup>36</sup> English Transcripts D1: P:59:L17-P:60:L21.

<sup>37</sup> Respondent’s Memorial on Jurisdiction, ¶ 110.

<sup>38</sup> Respondent’s Memorial on Jurisdiction, ¶ 111. See also ¶¶ 110-117.

<sup>39</sup> Respondent’s Memorial on Jurisdiction, ¶ 112.

<sup>40</sup> English Transcripts D1: P41:L11-20.

that choice; it is not made automatically for the investor when its *demande d'agrément* is approved.<sup>41</sup>

73. Finally, the Respondent rejects the Claimants' argument of *contra proferentem* as irrelevant. According to the Respondent, *contra proferentem* derives solely from domestic contract principles and “[t]here is simply no place for this doctrine in interpreting a unilateral offer of consent to ICSID arbitration in national legislation.”<sup>42</sup>
74. Similarly, the Respondent rejects any relevance of the proportionality-based approach taken by the Tribunal in *Kim et al. v. Republic of Uzbekistan*.<sup>43</sup> According to the Respondent (i) the nature of the norm involved in the current proceeding is fundamentally different from that addressed in *Kim*; (ii) the application in this case of the allegedly clear consent requirements does not produce “harsh consequences” for the investor; (iii) the approach adopted by the *Kim* Tribunal “has no place in the well-established jurisprudence governing consent to investor-State arbitration under unilateral offers in national investment laws”; and (iv) adopting the position in *Kim* would establish a “devastating precedent” since it would impose ICSID arbitration on every investor who filed an application for authorization.<sup>44</sup>

## **B. THE CLAIMANTS' POSITION**

75. The Claimants submit that this Tribunal has jurisdiction to hear its claims since the Claimants and the Respondent consented to ICSID arbitration, in compliance with the terms of Article 25 (1) of the ICSID Convention and Article 20 of the 2012 Code.<sup>45</sup>

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<sup>41</sup> Respondent's Skeleton Argument, p.3. See also English Transcripts D1:P17:L5-L14.

<sup>42</sup> Respondent's Skeleton Argument, p.1.

<sup>43</sup> *Vladislav Kim et al. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 March 2017) (“**Kim**”).

<sup>44</sup> Respondent's Comments on *Kim et al. v. Republic of Uzbekistan* dated 28 April 2017 pp 2-4.

<sup>45</sup> Claimants' Counter-Memorial on Jurisdiction, ¶¶ 3-4.

76. The Parties agree that the last sentence of Article 20 of the 2012 Code constitutes an offer to ICSID arbitration on the part of the Respondent.<sup>46</sup> They disagree, however, on whether the Claimants have consented to ICSID arbitration within the meaning of the last sentence of Article 20 of the 2012 Code<sup>47</sup> which states, in relevant part:

*Le consentement des parties à la compétence du CIRDI ou du mécanisme supplémentaire, selon le cas, requis par les instruments les régissant est constitué, pour la République de Côte d'Ivoire par le présent article, et exprimé expressément dans la demande d'agrément pour la personne concernée.*<sup>48</sup>

77. The Claimants argue that they consented to ICSID arbitration in the following ways:

- i) *Le dépôt de la demande d'agrément à l'investissement vaut consentement à l'arbitrage CIRDI;*
- ii) *Même si le dépôt de la demande d'agrément vaut consentement, les Demandeurs ont en plus, même si non-nécessaire aux termes de l'article 20 du Code, déclaré leur consentement à l'intérieur de leur demande d'agrément du 11 décembre 2013 (Pièce C-68) en indiquant qu'ils consentaient à tous les avantages et obligations qui découlent du Code, incluant nécessairement l'arbitrage CIRDI ; et,*
- iii) *Considérant l'impossibilité, selon la jurisprudence CIRDI, de renoncer de manière implicite au droit à l'arbitrage CIRDI, ce qui serait le cas en l'espèce, qu'il doit être considéré que la Requête d'arbitrage vaut, dans les circonstances, consentement à l'arbitrage CRDI.*<sup>49</sup>

78. The Claimants reject the Respondent's restrictive interpretation of the language of Article 20 of the 2012 Code and its conclusion that since the Claimants did not

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<sup>46</sup> Claimants' Counter-Memorial on Jurisdiction, ¶ 6. Respondent's Memorial on Jurisdiction, ¶ 17.

<sup>47</sup> See Article 20 2012 Code and Claimants' Counter-Memorial on Jurisdiction, ¶¶ 7-8.

<sup>48</sup> Exhibit C-77: Publication au Journal Officiel en date du 20 septembre 2012 de l'Ordonnance n°2012-487 portant nouveau Code des Investissements du 7 juin 2012.

<sup>49</sup> Claimants' Counter-Memorial on Costs, ¶ 31.

expressly state their consent to ICSID arbitration in their *demande d'agrément*, they have not complied with the terms of Article 20 of the 2012 Code.<sup>50</sup>

79. Like the Respondent, the Claimants consider that Article 20 of the 2012 Code is a unilateral declaration.<sup>51</sup> The Claimants further submit that it is a unilateral act that was adopted freely in the framework of a treaty (the ICSID Convention) which recognizes this freedom of action.<sup>52</sup> As such, the Claimants reject the restrictive approach adopted by the Respondent<sup>53</sup> and argue that Article 20 of the 2012 Code should be interpreted according to the principles of interpretation adopted in the case *Tidewater v. Venezuela*,<sup>54</sup> i.e., (i) in good faith and in a reasonable way; (ii) taking into consideration the ordinary and grammatical meaning of the words used (textual analysis); and (iii) in conformity with the intention of the State, which can be deduced from the text and also from the circumstances of its preparation and the purposes intended to be served.<sup>55</sup>
80. Contrary to the interpretation of the Respondent, the Claimants contend that Article 20 of the 2012 Code is ambiguous. According to the Claimants, such ambiguity stems from the placement (*positionnement*) of the last sentence of Article 20 and from its drafting.<sup>56</sup>
81. With respect to the placement of the text in question, the Claimants submit that one cannot ignore the fact that the last four paragraphs of Article 20 are alternative in nature, and that the last paragraph, from which the phrase in question directly follows, relates specifically to situations where “*la personne concernée ne remplit pas les*

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<sup>50</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 20-27.

<sup>51</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 43. Respondent’s Memorial on Jurisdiction, ¶ 37.

<sup>52</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶¶ 43-47.

<sup>53</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶¶ 48-57.

<sup>54</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 68. Exhibit RL-7: *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, February 8, 2013, ¶ 102 point 5.

<sup>55</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 68 and Exhibit RL-7: *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, February 8, 2013, ¶ 102 point 5.

<sup>56</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 5.

*conditions de nationalité stipulée à l'article 25 de la convention*".<sup>57</sup> The Claimants argue that placement of the provision related to consent at this location and not as an entirely separate paragraph creates ambiguity. This is even more curious given that the third bullet of the second paragraph of Article 20<sup>58</sup> relates to the ICSID Convention which it states, "*est applicable*".<sup>59</sup>

82. With respect to the drafting of Article 20, the Claimants submit that the terms "*exprimer*", "*expressément*" and "*dans*" contained in the last sentence of Article 20 of the 2012 Code each have two meanings in French. They dispute the Respondent's systematic reliance on the more restrictive meaning of these terms.<sup>60</sup>
83. According to the Claimants, the verb "*exprimer*" has a meaning which is "*beaucoup plus abstrait que celui de 'déclarer' ('state') utilisé de manière récurrente par la Défenderesse, ou encore, que des verbes comme 'mentionner' ou 'préciser' utilisés dans d'autres lois d'investissement.*"<sup>61</sup>
84. The Claimants argue that the word "*expressément*" should be interpreted in the context of the sentence in which it is contained.<sup>62</sup> They contend that in this context it is used to make clear that filing the *demande d'agrément* constitutes written consent within the meaning of Article 25 of the ICSID Convention.<sup>63</sup>
85. Finally, the Claimants contend that "*dans*" can either mean "*à l'intérieur de*" or be used to indicate the manner in which, or the instrument through which, something is done, depending on the context.<sup>64</sup> According to the Claimants, the Ivorian legislator

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<sup>57</sup> Claimants' Counter-Memorial on Jurisdiction, ¶¶ 81- 90.

<sup>58</sup> It states "*la Convention du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, établie sous l'égide de la Banque Internationale pour la Reconstruction et le Développement et ratifiée par la République de Côte d'Ivoire en vertu du décret n° 65-238 du 26 juin 1965 est applicable.*"

<sup>59</sup> Claimants' Counter-Memorial on Jurisdiction, ¶¶ 81- 90.

<sup>60</sup> Claimants' Skeleton Argument pp. 2-3. See also English Transcripts, D1:P10:L10-P96:L9.

<sup>61</sup> Claimants' Counter-Memorial on Jurisdiction, ¶ 122.

<sup>62</sup> Claimants' Counter-Memorial on Jurisdiction, ¶ 106.

<sup>63</sup> Claimants' Counter-Memorial on Jurisdiction, ¶¶ 106-110.

<sup>64</sup> Claimants' Counter-Memorial on Jurisdiction, ¶¶ 113-114.

used the prepositions “*dans*” and “*par*” interchangeably.<sup>65</sup> Therefore, contrary to the position of the Respondent, the Claimants submit that the investor need not include a written statement of consent to ICSID arbitration within the confines of the *demande d’agrément*.<sup>66</sup>

86. In light of these ambiguities, the Claimants add that the principle of *contra proferentem*, according to which any ambiguity in the drafting of a text should be interpreted against the person who drafted it (the Respondent in the present case), is applicable and would favor their interpretation of Article 20 over that of the Respondent.<sup>67</sup>
87. For the Claimants, the “*sens véritable et raisonnable*” of Article 20 of the 2012 Code is that it does not impose a condition or obligation upon the investor in order to consent to ICSID arbitration other than filing the *demande d’agrément*.<sup>68</sup> They argue that had the Respondent wished to require a specific reference to consent to ICSID arbitration, it would have included it in the model *demande d’agrément*. Failure on the part of the State to do so shows that the State always considered that the *demande d’agrément* itself expresses the consent of the investor to ICSID arbitration.<sup>69</sup>
88. The Claimants reject the Respondent’s argument that “*Article 20 of the 2012 Code exclusively governs the issue of consent to ICSID arbitration independent of and unaffected by any other provisions of the Code or the regulations implementing the Code’s ‘avantages’ scheme.*”<sup>70</sup> For the Claimants, ICSID case law recognizes the relevance of examining all of the dispositions of a law in order to interpret one of its Articles.<sup>71</sup>

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<sup>65</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶¶ 116-121.

<sup>66</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 121.

<sup>67</sup> Claimant’s Skeleton Argument, p. 3.

<sup>68</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶¶ 95-99.

<sup>69</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 104.

<sup>70</sup> Respondent’s Memorial on Jurisdiction, ¶ 80.

<sup>71</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 128.

89. The Claimants also reject the Respondent’s argument that ICSID arbitration is a “*garantie*” not an “*avantage*” since it falls under Title II of the 2012 Code entitled “*Garanties Accordées Aux Investisseurs,*” not Title IV entitled “*Régimes d’Incitation*”.<sup>72</sup>
90. Even though it is their position that the filing of their *demande d’agrément* suffices to establish consent to ICSID arbitration, the Claimants second main argument is that they also consented to ICSID arbitration, in writing, when they indicated, in their *demande d’agrément* dated 11 December 2013, that they wished to benefit from “*tous les avantages qui découlent du régime de l’agrément à l’investissement en vertu de l’ensemble du Code des investissements.*”<sup>73</sup> This includes ICSID arbitration which the Claimants submit, constitutes an “*avantage.*”<sup>74</sup>
91. The Claimants argue that “[e]n adhérant au régime de l’agrément à l’investissement, en déposant une demande d’agrément, les investisseurs ont droit à tous les avantages qui en découlent, incluant le droit à l’arbitrage CIRDI the 2012 Code.” In this respect, Article 40 of the 2012 Code states:
- [t]out investisseur, désirant bénéficier des avantages particuliers prévus par le présent Code, est tenu de déposer un dossier de demande d’agrément auprès de la Commission Technique Interministérielle des Investissements visée à l’article 39.*
92. According to the Claimants, the expression “*avantages particuliers prévus par le présent Code*” means “*tous les avantages qui peuvent découler du régime de l’agrément à l’investissement dans l’ensemble du Code et non pas uniquement aux avantages particuliers prévus ‘dans la présente section’, ‘le présent sous-titre’ ou*

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<sup>72</sup> Respondent’s Memorial on Jurisdiction, ¶ 78.

<sup>73</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶¶ 131-132.

<sup>74</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 135, 151. See also Claimants’ Skeleton Argument p. 4, (“*Article 2, 20 et 40 du NCI : Le droit à l’arbitrage CIRDI est aussi considéré comme un avantage*”).

*‘prévus au chapitre III du présent Sous-titre’. Il est écrit ‘par le présent Code’*”.<sup>75</sup> One such advantage, the Claimants argue, is ICSID arbitration.<sup>76</sup>

93. Therefore, the Claimants conclude :

*en l’espèce, considérant l’ensemble des dispositions du NCI, la déclaration écrite des Demandeurs revient à dire que: ‘nous souhaitons bénéficier de tous les avantages qui découlent du régime de l’agrément à l’investissement en vertu de l’ensemble du Code des investissements et nous nous engageons à respecter toutes les obligations qui en découlent’ comprend nécessairement le consentement des Demandeurs à l’arbitrage CIRDI au même titre que s’il était écrit ‘L’investisseur consent à la compétence du CIRDI.’*<sup>77</sup>

94. The Claimants submit that the intention of the Ivorian legislator supports its position that filing a *demande d’agrément* constitutes consent.<sup>78</sup> According to the Claimants, it is telling that there is no mention of ICSID arbitration in the model investment applications. If the Ivorian legislator wanted to require investors to specifically mention consent to ICSID arbitration in the *demande d’agrément* it would have included it in the model forms.<sup>79</sup>

95. The Claimants also argue that the placement of Article 20 in “TITRE II: GARANTIES ACCORDÉES AUX INVESTISSEURS” of the 2012 Code shows that the Ivorian legislator wanted to treat it as a true “*garantie*.”<sup>80</sup> The Claimants contend that it would not make sense for the State to accord a guarantee and then to impose a condition as detrimental as that which the Respondent suggests, in order to benefit from it. In that case it would no longer be a guarantee.<sup>81</sup>

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<sup>75</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 144.

<sup>76</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 145.

<sup>77</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 161.

<sup>78</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 150.

<sup>79</sup> Claimant’s Skeleton Argument, p. 4.

<sup>80</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 179.

<sup>81</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶¶ 176-182.

96. For the Claimants, the purpose of the 2012 Code is the promotion of investment and reassurance of investors, not, as suggested by the Respondent, a means through which it can assess exposure to ICSID and manage its litigation risk.<sup>82</sup> The Claimants support their position by pointing to “[l]es Travaux parlementaires qui ont conduit à la rédaction de l’article 24 du Code des Investissements de 1995 présentent les seuls objectifs de l’Etat: rassurer les investisseurs et ainsi promouvoir les investissements.”<sup>83</sup> The Claimants point out that these goals were maintained with the 2012 Code when the State also added as goals, (i) “de favoriser et de promouvoir les investissements productifs”; and (ii) “d’encourager la création et le développement des activités orientés vers certains secteurs dont, le développement touristique et d’hôtellerie.”<sup>84</sup> The State also modified the dispute resolution clause adding the right to a fair trial, “[l]’État garantit aux investisseurs, le droit à un procès équitable pour tout litige né dans le cadre de l’application des dispositions du présent Code.”<sup>85</sup>
97. The Claimants’ third main argument is that they accepted the State’s offer to ICSID arbitration by filing their Request for Arbitration on 2 March 2016.<sup>86</sup> According to the Claimants:

*Même s’il était considéré – à tort – que les Demandeurs n’ont pas en l’espèce consenti à la juridiction du CIRDI, il serait inéquitable, dans les circonstances, de considérer qu’ils ont dans les faits renoncé à ce droit. Une renonciation non-éclairée à l’offre d’arbitrage CIRDI contenue à l’article 20 du Code des investissements de 2012 (le « NCI ») ne pourrait pas être qualifiée de valide, et, de ce fait, la requête d’arbitrage CIRDI des Demandeurs doit valoir consentement.*<sup>87</sup>

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<sup>82</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 185.

<sup>83</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 189.

<sup>84</sup> Claimant’s Skeleton Argument, pp. 4-5.

<sup>85</sup> Claimant’s Skeleton Argument, p. 5.

<sup>86</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶ 9. See also English Transcripts, D1:P111:L8-P112:L13.

<sup>87</sup> Claimant’s Skeleton Argument, p. 1.

98. The Claimants argue that the offer of the Respondent was still standing when the Claimants filed their Request for Arbitration.<sup>88</sup> Therefore, their consent to ICSID arbitration was given, at the latest, when the Request was filed.<sup>89</sup>
99. Finally, the Claimants argue that the principle of proportionality, which was discussed in the case *Kim et al. v. Republic of Uzbekistan*,<sup>90</sup> supports their position.<sup>91</sup> According to the Claimants:

*Considérant la combinaison du faible degré d'Importance de l'Obligation/formalité et l'analyse du Comportement de l'Investisseur, en tenant notamment compte du caractère ambigu de l'article 20 du Code et en l'absence de 'compromission' d'intérêt significatif équivalent de la Défenderesse, l'application de la sanction sévère qu'est le déni à l'arbitrage CIRDI serait complètement disproportionnée.*<sup>92</sup>

### C. THE TRIBUNAL'S ANALYSIS

100. The 2012 Code is divided into seven parts:

*TITRE I : DISPOSITIONS GÉNÉRALES*  
*TITRE II : GARANTIES ACCORDÉES AUX INVESTISSEURS*  
*TITRE III : OBLIGATIONS DES INVESTISSEURS*  
*TITRE IV : RÉGIMES D'INCITATION*  
*TITRE V : DISPOSITIONS SPÉCIFIQUES AUX PETITES ET MOYENNES ENTREPRISES*  
*TITRE VI : DISPOSITIONS DIVERSES*  
*TITRE VII : DISPOSITIONS TRANSITOIRES ET FINALES*

101. “Investisseur” is defined as “toute personne physique ou morale, de nationalité ivoirienne ou non, réalisant dans les conditions définies dans le cadre du présent code,

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<sup>88</sup> Claimants' Counter-Memorial on Jurisdiction, ¶ 225.

<sup>89</sup> Claimants' Counter-Memorial on Jurisdiction, ¶ 226.

<sup>90</sup> *Vladislav Kim et al. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 March 2017).

<sup>91</sup> Claimants' Reply Submission on Costs, ¶ 60. See also the Claimants' Comments on *Vladislav Kim et al. v. Republic of Uzbekistan* dated 28 April 2017.

<sup>92</sup> Claimants' Comments on *Vladislav Kim et al. v. Republic of Uzbekistan* dated 28 April 2017, p.4.

*des opérations d'investissement sur le territoire de la Côte d'Ivoire*". Hence the 2012 Code applies to both national and foreign investors unless stipulated otherwise.

102. This is made explicit in Article 2 of the 2012 Code:

*La présente ordonnance portant code des investissements fixe les conditions, avantages et règles générales applicables aux investissements directs, nationaux et étrangers, réalisés en Côte d'Ivoire.*

103. The principal focus of the present inquiry in this preliminary phase on jurisdiction is Article 20 of the 2012 Code, which is reproduced below in its entirety (paragraph numbers have been added to assist with the Tribunal's subsequent analysis):

*L'Etat garantit aux investisseurs le droit à un procès équitable pour tout litige né dans le cadre de l'application des dispositions du présent code. [Paragraph 1]*

*Tout différend ou litige entre les personnes physiques ou morales étrangères et la République de Côte d'Ivoire relatif à l'application du présent code, à défaut d'un règlement amiable, est réglé par les juridictions ivoiriennes ou par un tribunal arbitral. Les compétences du tribunal arbitral sont déterminées dans les conditions ci-après : [Paragraph 2]*

*- des Accords et Traités relatifs à la protection des investissements sont conclus entre la République de Côte d'Ivoire et l'Etat dont la personne physique ou morale étrangère concernée est ressortissante ; [Paragraph 2(a)]*

*- une procédure de conciliation et d'arbitrage dont les parties sont convenues est définie ; [Paragraph 2(b)]*

*- la Convention du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, établie sous l'égide de la Banque Internationale pour la Reconstruction et le Développement et ratifiée par la République de Côte d'Ivoire en vertu du décret n° 65-238 du 26 juin 1965, est applicable ; [Paragraph 2(c)]*

*- la personne concernée ne remplit pas les conditions de nationalité stipulée à l'article 25 de la convention susvisée,*

*conformément aux dispositions des règlements du mécanisme supplémentaire, approuvé par le conseil d'administration du Centre international pour le Règlement des différends relatifs aux investissements, en abrégé CIRDI. Le consentement des parties à la compétence du CIRDI ou du mécanisme supplémentaire, selon le cas, requis par les instruments les régissant est constitué, pour la République de Côte d'Ivoire par le présent article, et exprimé expressément dans la demande d'agrément pour la personne concernée.*

**[Paragraphe 2(d)]**

104. The guarantee of the right to an “equitable procedure” (“*procès équitable*”) in Paragraph 1 is applicable to both national and foreign investors, given that “investor” is defined to cover both. The remaining text of Article 20, however, relates only to foreign individuals or legal entities (“*les personnes physiques ou morales étrangères*”) which will be referred to collectively as “foreign nationals”. The term “investor” (“*investisseur*”) is not retained.
105. Paragraph 2 appears to set out two possible *fora* for the resolution of disputes with foreign nationals: the courts of the Republic of Côte d'Ivoire or an arbitral tribunal. It does not expressly confer a right of election on either party to the dispute in respect of either *forum*. The subparagraphs of Paragraph 2 then purport to regulate the “*compétences*” (plural) of the arbitral tribunal (singular). Once again, however, no right of election is expressly conferred on either party in relation to each possible type of arbitral tribunal defined in subparagraphs (a), (b), (c) and (d) of Paragraph 2. Each subparagraph is instead formulated as a different basis for vesting an arbitral tribunal with jurisdiction or “*compétence*” and each sets out a particular condition for the vesting of that jurisdiction.
106. Paragraph 2(a) refers to bilateral investment treaties. The condition is that the foreign individual or legal entity is a national of a State which has concluded a treaty with the Republic of Côte d'Ivoire.
107. Paragraph 2(b) refers to a procedure of conciliation and arbitration which the Parties have agreed to as “defined” (“*une procédure de conciliation et d'arbitrage dont les parties sont convenues est définie*”). The present tense of the verb “être” (“*est*”) is used

here and thus can mean “is defined”—as a statement of fact, or “shall be defined”—as a modal phrase. The latter use of the verb “*être*” is common in statutory texts but both meanings are formally correct and only the context can reveal the statutory intention.

108. Paragraph 2(c) refers to the ICSID Convention by its full title and also references the Republic of Côte d’Ivoire’s ratification instrument for the ICSID Convention. Following those references, there is a comma followed by the words “is applicable” or “shall be applicable” (“*est applicable*”) depending, once again, on which meaning of the verb “*être*” is to be preferred.
109. The first sentence of Paragraph 2(d) provides that where the person in question does not satisfy the nationality requirements in Article 25 of the ICSID Convention, then the ICSID Additional Facility Rules apply. This sentence implicitly supplies the condition for Paragraph 2(c): the foreign national must satisfy the nationality requirements of Article 25 of the ICSID Convention for the ICSID Convention to be applicable.
110. Once again, the structure of the first sentence of Paragraph 2(d) is perhaps unusual: the first clause is in the form of a statement “the person concerned does not satisfy the nationality requirements” (“*la personne concernée ne remplit pas les conditions de nationalité*”). It is clear that the use of the present tense in this clause must be as a statement rather than as an obligation as the latter would not make sense. The second clause of the first sentence of paragraph 2(d) is another statement—referring to the application of the ICSID Additional Facility Rules (“*la personne concernée ne remplit pas les conditions de nationalité stipulée à l’article 25 de la convention susvisée, conformément aux dispositions des règlements du mécanisme supplémentaire, approuvé par le conseil d’administration du Centre international pour le Règlement des différends relatifs aux investissements, en abrégé CIRDI.*”)
111. The final sentence of Paragraph 2(d), to which the Parties in these proceedings have devoted most attention, clearly applies both to arbitration under the ICSID Convention as well as under the ICSID Additional Facility Rules. It provides that the consent of the Parties “*requis par les instruments les régissant est constitué, pour la République*

*de Côte d'Ivoire par le présent article, et exprimé expressément dans la demande d'agrément pour la personne concernée.”*

112. The Parties' differing interpretations of this final sentence of Paragraph 2(d) of Article 20 can be stated succinctly: the Claimants maintain that a foreign national's filing of a "*demande d'agrément*" is sufficient to manifest its consent to ICSID arbitration; whereas the Respondent argues that the foreign national must expressly record its consent to ICSID arbitration in the "*demande d'agrément*" itself. It is common ground that no express mention of ICSID arbitration is to be found in the actual "*demande d'agrément*" filed by the Claimants and that there is no express reference to the possibility of ICSID arbitration in the model "*demande d'agrément*" published by the responsible national authority of the Respondent.
  
113. Before the Tribunal embarks on its analysis of the critical final sentence of Article 20, it is important to expose the internal contradictions in the text of Article 20 as a whole. These contradictions are best illustrated by an example. Whichever interpretation of the manner in which consent on the part of the foreign national to ICSID arbitration is to be manifested, both interpretations offered by the Parties require consent to be perfected at the time that the "*demande d'agrément*" is filed. Assuming that the foreign national has manifested its consent to ICSID arbitration either by filing that document (the Claimant's interpretation) or by including an express reference to ICSID arbitration in that document (the Respondent's interpretation), a question then arises as to the impact of that binding ICSID arbitration clause and the possibility that the foreign national may wish to resort to international arbitration under an applicable bilateral investment treaty (Paragraph 2(a) of Article 20). That bilateral investment treaty may provide for ICSID arbitration or arbitration under the UNCITRAL Arbitration Rules, for example. If the foreign national institutes arbitration proceedings under the bilateral investment treaty, could the Republic of Côte d'Ivoire contest the jurisdiction of that tribunal on the basis that the foreign national has already consented to ICSID arbitration?

114. The Parties were confronted with this problem concerning the internal consistency of Article 20 at the hearing. The Respondent's counsel's answer was that Article 26 of the ICSID Convention would prevent the foreign national from resorting to international arbitration under a bilateral investment treaty if consent to ICSID arbitration had already been given under Paragraph 2(c) of Article 20 of the 2012 Code.<sup>93</sup> The Respondent's counsel was fortified in this response by virtue of the fact that, according to the Respondent's research, all the States that are parties to bilateral investment treaties with the Republic of Côte d'Ivoire are also parties to the ICSID Convention.<sup>94</sup>
115. The Respondent's attempt to make sense of Article 20 in this way is problematic for the following reasons.
116. First, Paragraph 2 of Article 20 defines the *ratione materiae* of disputes that can be submitted to an arbitral tribunal as those "*relative à l'application du présent code*". If the Respondent were correct, then by consenting to ICSID arbitration in the "*demande d'agrément*," the foreign national would be simultaneously waiving any right to bring an investment treaty arbitration in respect of a future dispute unrelated to the application of the 2012 Code. The Respondent confronted this difficulty by submitting that the protections afforded in Title II of the 2012 Code are "*broader than a BIT*"<sup>95</sup>. Whether or not this argument holds water on the basis of a textual comparison of the protections in Title II versus those offered in the BITs ratified by the Côte d'Ivoire, it is plain that protections in an investment treaty cannot be unilaterally withdrawn by the State as their legislative counterparts could be and are thus different in juridical nature for that reason alone. The Respondent's conclusion that a foreign national forsakes reliance on an applicable BIT by consenting to ICSID arbitration in the "*demande d'agrément*" is thus rather drastic: it would be a surprising result in the absence of any express wording in Article 20 that would put a foreign national on

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<sup>93</sup> English Transcripts D2:P146-150 (Caplan/Douglas).

<sup>94</sup> English Transcripts D2:P152 (Caplan/Douglas).

<sup>95</sup> English Transcripts D2:P155 (Caplan).

notice of these consequences of consent to ICSID arbitration in the “*demande d’agrément*”.

117. The Respondent’s conclusion is also inconsistent with the terms of the bilateral investment treaties ratified by the Côte d’Ivoire. The most recent such treaty, with Canada, was signed on 30 November 2014 and hence after the 2012 Code was promulgated.<sup>96</sup> The Canada/Côte d’Ivoire BIT confers *ratione materiae* jurisdiction only in relation to claims for a breach of an investment protection obligation in the BIT itself.<sup>97</sup> A tribunal constituted on the basis of the Canada/Côte d’Ivoire BIT would not, therefore, have jurisdiction over the application of the 2012 Code.
118. Second, it is by no means clear that Article 26 of the ICSID Convention extends to remedies conferred by other international instruments. Would a foreign national be precluded by Article 26 from bringing a claim under a regional human rights treaty, for example?
119. Third, Article 20 of the 2012 Code was obviously drafted to cater to a situation where the ICSID Convention (and thus Article 26) would not be applicable: this explains the reference to the ICSID Additional Facility Rules. In that scenario, a conflict between consent to arbitration under the ICSID Additional Facility Rules (ultimately subject to a national law at the seat of the arbitration) and consent to arbitration under a BIT could not be resolved by reference to Article 26 of the ICSID Convention (which would not be applicable) and it would be impermissible for a provision of domestic legislation to have the effect of abrogating or modifying rights granted under an international investment treaty.
120. The unfortunate truth is that Article 20 lacks coherency. Without determining how an election is to be made among different types of arbitration and by whom, Paragraph 2 of Article 20 is formulated as if a single tribunal might be vested with jurisdiction on

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<sup>96</sup> At the hearing, counsel for the Respondent confirmed that in addition to offering ICSID arbitration, that BIT also offered arbitration under the UNCITRAL Arbitration Rules: English Transcripts D2:P158:L1-3 (Caplan).

<sup>97</sup> See Article 20 of the Canada/ Côte d’Ivoire BIT. This BIT was referred to at the Hearing see English Transcripts D2: P 157 L3-P158 L3.

the basis of each type of arbitral consent, which would actually be consistent with the *chapeau* of Paragraph 2—“*Les compétences du tribunal arbitral sont déterminées dans les conditions ci-après.*”—with its use of the plural for “*compétences*” and the singular for “*tribunal arbitral*”. In other words, Paragraph 2 is drafted as if a single tribunal could be vested with as many “*compétences*” as the circumstances permit: one “*compétence*” under a bilateral investment treaty (where applicable) and another under the ICSID Convention (where applicable). But “*compétences*” cannot, of course, be aggregated in this way: if the foreign national selects UNCITRAL arbitration under the BIT and at an earlier point in time consents to ICSID arbitration by filing a “*demande d’agrément*” then the result is not an aggregation of “*compétences*” in a single tribunal but the creation of several tribunals with overlapping “*compétences*.”

121. The Tribunal is thus faced with a text that it cannot make sense of as a whole by resorting to the usual canons of interpretation. It is important to record this impediment at the outset because it would be highly artificial, in the Tribunal’s estimation, to proceed to the interpretation of the critical final sentence of Article 20 as if the anterior text were flawless in conveying the true and coherent intention of its drafters.
122. As was previously stated, the *ratione materiae* scope of arbitral jurisdiction contemplated by Paragraph 2 of Article 20 is “[t]out différend ou litige entre les personnes physiques ou morales étrangères et la République de Côte d’Ivoire relatif à l’application du présent code.” The inclusion of the reference to bilateral investment treaties under this *chapeau* in Paragraph 2(a) makes little sense because at least some of those treaties ratified by the Republic of Côte d’Ivoire (including at least one treaty ratified after the Code was promulgated) do not contemplate that an arbitral tribunal could have jurisdiction over disputes concerning the application of the 2012 Code. The same can be said for the reference to an agreement to a procedure for conciliation and arbitration in Paragraph 2(b). Whether or not such a procedure would extend to disputes relating to the 2012 Code would depend of course on what the foreign national and the Republic of Côte d’Ivoire negotiated in their specific agreement. It cannot be taken for granted that any such agreement would include the scope of disputes contemplated by the *chapeau* provision in Paragraph 2. (Another surprising aspect of

Paragraph 2(b) is that only an agreement to both conciliate and arbitrate is permissible as a potential forum for disputes relating to the 2012 Code.)

123. The Tribunal thus considers that the different arbitral mechanisms set out in Paragraph 2 are not listed as alternative *fora* to resolve the same type of disputes; viz. “*tout différend ou litige entre les personnes physiques ou morales étrangères et la République de Côte D’Ivoire relative à l’application du présent code.*” An arbitral tribunal established pursuant to at least some of the bilateral investments treaties ratified by the Côte d’Ivoire cannot have jurisdiction over such disputes and it is by no means certain that an arbitral tribunal established pursuant to a contractual agreement between a foreign national and the Republic of Côte d’Ivoire would have such jurisdiction either. Moreover, as has already been stated, there is no text in Article 20 that would serve to vest a choice among the different arbitral mechanisms in Paragraph 2 in either the foreign national or the Republic of Côte d’Ivoire.
124. The references to ICSID arbitration in Paragraph 2(c) and (d) are different. Unlike the preceding references to arbitral mechanisms in Paragraphs 2(a) and 2(b), the references to ICSID arbitration in Paragraphs 2(c) and (d) appear to be specifically tailored to the disputes specified by the *chapeau* provision in Paragraph 2 (i.e., “[t]out différend ou litige entre les personnes physiques ou morales étrangères et la République de Côte d’Ivoire relatif à l’application du présent code.”) This is because the consent of the Republic of Côte d’Ivoire to ICSID arbitration (either under the ICSID Convention or the ICSID Additional Facility Rules) is actually fixed by Article 20 of the 2012 Code itself. It follows that such an ICSID tribunal will undoubtedly have jurisdiction over a dispute “*relative à l’application du présent code.*”
125. It thus appears that ICSID arbitration has a privileged place in Paragraph 2 as the only arbitral forum that is certain to have jurisdiction over a dispute “*relative à l’application du présent code*”. Indeed, it is possible to infer that ICSID arbitration would be the primary, perhaps even exclusive, forum for the resolution of disputes between foreign nationals and the Republic of Côte d’Ivoire relating to the 2012 Code for the following reasons.

126. First, in contradistinction with the arbitral mechanisms in Paragraphs 2(a) and (b), the ICSID Convention is stated in Paragraph 2(c) to be “*applicable*”. The use of the present tense of the verb “*être*” (“*est applicable*”) is consistent with the modal expression “shall be applicable” or with an expression of a statement to mean simply “is applicable”. In either case the same inference should be made: unlike the arbitral mechanisms in Paragraphs 2(a) and (b), ICSID arbitration either “is” or “shall be” (“*est*”) applicable.
127. Second, the reference to the ICSID Additional Facility Rules in Paragraph 2(d) conveys the intention that ICSID arbitration (whether under the ICSID Convention or not) should be available in all circumstances for disputes arising out of the 2012 Code; *i.e.* both when the foreign national is a national of a Contracting State to the ICSID Convention and otherwise. The Republic of Côte d’Ivoire’s consent to ICSID arbitration in Paragraph 2(d) is, therefore, provided in relation to both possibilities. As an arbitration under the ICSID Additional Facility Rules has no special status vis-à-vis any other form of contractual arbitration that is already covered in any case by Paragraph 2(b), the intention appears to be to create a comprehensive regime for the arbitration of disputes under the 2012 Code in Paragraphs 2(c) and (d).
128. The Tribunal turns to the final critical sentence of Article 20 of the Code, which is reproduced again for convenience:

*Le consentement des parties à la compétence du CIRDI ou du mécanisme supplémentaire, selon le cas, requis par les instruments les régissant est constitué, pour la République de Côte d’Ivoire par le présent article, et exprimé expressément dans la demande d’agrément pour la personne concernée.*

129. It was common ground between the Parties that the Côte d’Ivoire, by virtue of this final sentence of Article 20 of the 2012 Code, has perfected its consent to ICSID arbitration. The preliminary issue under consideration is, therefore, whether the Claimants have perfected their consent to ICSID arbitration.
130. The Tribunal records at the outset that the final sentence of Article 20, consistent with the remaining text of the Article, is fraught with ambiguities.

131. The consent to ICSID arbitration, by the “*personne concernée*”, is stated to be manifested in some way by the “*demande d’agrément*”. Both Parties have assumed, based on their different interpretations of the requirement in the final sentence of Article 20, that the mere filing of the “*demande d’agrément*” (with or without an express election of ICSID arbitration) would be sufficient to constitute a binding arbitration agreement. But that cannot be right because the national organ of the Republic of Côte d’Ivoire designated in Article 39 of the 2012 Code ultimately has the discretion not to accept the “*demande d’agrément*”.
132. Indeed, the foreign national only becomes an “*investisseur*” under the 2012 Code, and entitled to rely on the guarantees in Part II of the 2012 Code, in the event that approval is given to the “*demande d’agrément*”. Consistent with this interpretation is the fact that the foreign national is not referred to as an “*investisseur*” in Paragraph 2(d) but as a “*personne concernée*”: the “*personne concernée*” only becomes an “*investisseur*” under the 2012 Code if the national organ—here the “*Centre de Promotion des Investissements de Côte d’Ivoire*”—approves the “*demande d’agrément*”.
133. Part IV Section II of the 2012 Code, entitled “*Régime d’agrément à l’investissement*”, is not the only regime for making an investment under the 2012 Code. Part IV Section I of the 2012 Code contains a separate “*Régime de déclaration*”, which, as the title suggests, does not envisage an approval process by the national organ but rather the mere acknowledgement of receipt of the declaration. ICSID arbitration in Paragraph 2(d) does not appear to be contemplated for investments made under this regime because the last sentence refers exclusively to a “*demande d’agrément*” and not to a “*déclaration*”.
134. To conclude this point, ICSID arbitration only applies to investments made under the regime set out in Part IV Section II of the 2012 Code and an ICSID arbitration agreement (whether in respect of arbitration under the ICSID Convention or under the ICSID Additional Facility Rules) will only come into force if the designated national organ of the Republic of Côte d’Ivoire approves the “*demande d’agrément*”. This conclusion militates in favour of interpreting the use of the present tense of the verb

“être” in Paragraph 2(c) to mean “*is applicable*” rather than “*shall be applicable*”. There can be no categorical obligation to resort to ICSID imposed by Article 20 because it will ultimately depend upon whether the foreign national’s “*demande d’agrément*” is accepted by the designated national organ of the Republic of Côte d’Ivoire under Article 39 of the 2012 Code. If the use of the present tense is to be interpreted consistently throughout, it follows that the present tense of the verb “être” in the final sentence of Article 20 is to convey a statement rather than an obligation.

135. When the final sentence of Article 20 is interpreted against this background, it is clear that its object and purpose is to set out the manner in which the requirements for consent to ICSID arbitration are to be ascertained consistently with the applicable ICSID Convention or Additional Facility Rules. The final sentence does not impose obligations on either party to take certain steps to conclude an ICSID arbitration agreement. That is consistent with the fact that ultimately the designated national organ of the Republic of Côte d’Ivoire has the power to accept or reject the foreign national’s “*demande d’agrément*” and thus determine whether a binding ICSID arbitration agreement will actually come into effect.
136. This conclusion also disposes of one of the Respondent’s arguments for its interpretation of the final sentence of Article 20 as imposing an obligation upon the foreign national to include an express stipulation in favour of ICSID arbitration in the “*demande d’agrément*”. The Respondent reasoned that this is necessary to allow the Côte d’Ivoire “*the opportunity to assess its exposure to ICSID claims*”.<sup>98</sup> But, as we have seen, the Republic of Côte d’Ivoire has that opportunity at the time its designated national organ is considering whether or not to approve the “*demande d’agrément*” pursuant to Article 39 of the Code. If, consistent with the Claimants’ submissions, the final sentence of Article 20 simply records the fact that the foreign national’s consent to ICSID arbitration is deemed to have been given by the filing of a “*demande d’agrément*”, then the Republic of Côte d’Ivoire would be on notice that if it approves the “*demande d’agrément*” then it will be “*exposed to ICSID claims*” in the future.

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<sup>98</sup> Respondent’s Memorial on Jurisdiction, ¶ 95.

137. The majority of the Tribunal is thus persuaded, subject to the remaining linguistic points to be considered below, that the legislator intended by the final sentence of Article 20 to set out the manner in which an arbitration agreement may be constituted to satisfy the requirements of the ICSID Convention or the ICSID Additional Facility Rules. The Republic of Côte d'Ivoire's consent is constituted by Article 20 itself, whereas the foreign national's consent is constituted by the "*demande d'agrément*" to be filed in accordance with the regime set out in Part IV Section II of the 2012 Code. The final sentence of Article 20 thus stipulates that the substantive requirement of consent to arbitration is satisfied for ICSID arbitration (each Party is deemed to have expressed its consent to arbitration) as well as the formal requirement (that such consent to have been expressed in writing). If the national organ of the Republic of Côte d'Ivoire then approves the "*demande d'agrément*", there will be a perfected ICSID arbitration agreement.
138. But this finding does not finally resolve the issue of contention: are the formal requirements for consent by the foreign national satisfied by the act of filing the "*demande d'agrément*" (as the Claimants maintain) or is it incumbent upon the foreign national, in addition, to insert specific language into the "*demande d'agrément*" to the effect that it consents to ICSID arbitration (as the Respondent maintains)?
139. The majority of the Tribunal considers that, in this context, it is highly material that the Respondent's model "*demande d'agrément*" makes no reference to ICSID arbitration or Article 20 of the 2012 Code. Moreover, the provision of the 2012 Code that regulates the contents of the *dossier* to be submitted with the "*demande d'agrément*" makes no mention of ICSID arbitration or Article 20 either. Article 40 of the 2012 Code provides:

*Tout investisseur désirant bénéficier des avantages particuliers, prévus par le présent code, est tenu de déposer un dossier de demande d'agrément auprès de l'organisme national chargé de la promotion des Investissements visé à l'article 39.*

*Le dossier visé à l'alinéa précédent comporte, outre la demande, des renseignements précis sur les investisseurs, des*

*informations sur le programme, notamment sa nature, son montant ainsi que toute information nécessaire à la délivrance de l'agrément et à son suivi.*

140. These omissions strongly support the thesis that the act of filing the “*demande d'agrément*” is the manifestation of consent to ICSID arbitration on the part of the foreign national. On this view, there would be no reason for the model “*demande d'agrément*” or the provision regulating the contents of the “*dossier*” accompanying the “*demande*” to refer to ICSID arbitration because the national organ would be on notice that if it approves the “*demande d'agrément*” then there will be an ICSID arbitration agreement.
141. There is, however, one matter that the Respondent maintains points in the other direction. If the filing of the “*demande d'agrément*” were to be sufficient to manifest the foreign national’s consent to ICSID arbitration, it would follow that the foreign national would be deprived of a choice of the local courts in the Republic of the Côte d’Ivoire, which appears to be contemplated in Paragraph 2 of Article 20. This is an important counterargument but one that the majority of the Tribunal ultimately rejects for the following reasons, which have already been alluded to in the preceding discussion.
142. First, there is no express language in Article 20 that would serve to vest a choice in the foreign national (or indeed to vest a choice in the Republic of Côte d’Ivoire). In the absence of such language the majority of the Tribunal cannot infer that Article 20 is a “fork-in-the-road” provision requiring an election between different *fora* for the resolution of disputes.
143. Second, the ICSID Convention is expressly stated to be “applicable” unless the foreign national’s State is not a Contracting State to the ICSID Convention in which case the ICSID Additional Facility Rules are to apply. There appears to be a clear intention to create a comprehensive arbitral regime for disputes relating to the Code in Paragraphs 2(c) and (d).

144. Third, the *ratione personae* scope of Paragraph 2 is different to Paragraphs 2(c) and (d). Paragraph 2 refers to foreign nationals generally whereas Paragraphs 2(c) and (d) refer to a subset of foreign nationals who are submitting a “*demande d’agrément*”, which can only mean a reference to the investment regime in Part IV Section II of the 2012 Code. It is thus plausible that the statutory intention was to carve out disputes with foreign nationals investing under Part IV Section II of the 2012 Code from the general *chapeau* provision in Paragraph 2 of Article 20 and refer that subset of disputes to ICSID arbitration pursuant to Paragraphs 2(c) and (d) in all cases.
145. Fourth, it would be artificial in the circumstances to interpret the foreign national’s silence in the “*demande d’agrément*” as an election of the local courts as the forum for the resolution of any disputes relating to the 2012 Code given that there is no reference to dispute resolution in the model “*demande d’agrément*” or the provisions of the 2012 Code regulating the application process and there is no express language in Article 20 conferring a right of election upon the foreign national in the first place. There is, in other words, no reason to treat the local courts as the default forum for dispute resolution given the structure of Article 20. To the contrary, the ICSID Convention is stated to be “*applicable*” in Paragraph 2(c) of Article 20.
146. For these reasons, the Respondent’s point concerning the access to the local courts has not dislodged the majority of the Tribunal from its interpretation of the final sentence of Article 20.
147. There are, finally, certain linguistic ambiguities in the final phrase of the final sentence of Article 20 that must be confronted.
148. The first relates to the word “*dans*”, which the Claimants have submitted, in French can mean either “*à l’intérieur de*” or “*marque la manière*” depending on the context.<sup>99</sup> This is indeed confirmed by the extracts from leading French dictionaries that the

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<sup>99</sup> Claimants’ Counter-Memorial on Jurisdiction, ¶¶ 111-114.

Parties' have relied upon.<sup>100</sup> The Respondent prefers the former meaning, which it says is consistent with the use of the word “*par*” in the previous phrase. In the Respondent’s view, if the legislator had intended “*dans*” to mean the same as the proposition “*par*” in the previous phrase, then it would have been straightforward to use “*par*” in the final phrase. According to the Respondent, the use of “*dans*” with its preferred meaning is more consistent with a requirement that the foreign national’s consent be recorded by specific text in the “*demande d’agrément*” itself. The Tribunal accepts that the use of the word “*par*” would have made the Claimants’ interpretation of the final phrase of Article 20 stronger. But the majority of the Tribunal cannot accept that the use of the word “*dans*” in and of itself, and in an article that is fraught with both textual and substantive ambiguities and inconsistencies, favours the Respondent’s interpretation.

149. The second linguistic point relates to the word “*expressément*”. The Respondent must be right that the inclusion of this word is consistent with a requirement that the foreign national inserts specific language into the “*demande d’agrément*”. But there is an alternative explanation, which is that the legislator is trying to make it abundantly clear that the formal writing requirement in Article 25 of the ICSID Convention is satisfied by the filing of a written document—the “*demande d’agrément*”. Like the word “*dans*”, there are alternative dictionary meanings of “*expressément*”, each of which is capable of introducing a nuance in support of either Party’s interpretation.<sup>101</sup> Once again, the majority of the Tribunal cannot accept that the inclusion of this word can be dispositive in favour of the Respondent’s interpretation against the other factors that point towards the correctness of the Claimants’ approach.

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<sup>100</sup> Exhibit R-7, Le Petit Robert de la Langue Française (2017): “*dans*” is defined as either “1. Marque le lieu” or “2. Marque la manière.” Exhibit R-8, Le Dictionnaire de l’Académie Française (2017) defines “*dans*” as “I. Marque un rapport de lieu [...] A. Indique le rapport d’une personne ou d’une chose à ce qui la contient. À l’intérieur de [...]” and also as “B. Par ext. S’applique à des termes qui désignent une situation, un état, une disposition, etc. [...]”.

<sup>101</sup> Exhibit R-7, Le Petit Robert de la Langue Française (2017): “*expressément*” is defined as “1. En termes exprès, formels. Explicitement, nettement, précisément [...]” and also as “2. Avec une intention, une volonté spéciale bien déterminée. Exprès, spécialement [...]”. Exhibit R-8, Le Dictionnaire de l’Académie Française (2017) defines *expressément* as “1. En termes exprès [...]” and also as “2. Tout exprès ; dans une intention particulière bien déterminée. [...]”.

150. There is no doubt that the final sentence of Article 20 could have been drafted less ambiguously to convey the meaning advocated by the Claimants. An example of a more precise formulation can be found in the investment law of the Democratic Republic of Congo:

*Le consentement des parties à la compétence du CIRDI ou du Mécanisme Supplémentaire, selon le cas, requis par les instruments les régissant, est constitué en ce qui concerne la République Démocratique du Congo par le présent article et en ce qui concerne l'investisseur par sa demande d'admission au régime de la présente loi ou ultérieurement par acte séparé.<sup>102</sup>*

151. In the majority of the Tribunal's view, the linguistic differences between this text and the final sentence of Article 20 of the 2012 Code cannot be interpreted as manifesting a different statutory intention against the background of the Article as a whole.

152. The other side of the coin is that there are also very clear examples of statutory texts that would be consistent with the meaning ascribed by the Respondent to the final sentence of Article 20. The investment law of Cameroon, for example, provides:

*ARTICLE 45*

[...]

*(3) Le choix d'une des procédures ci-dessus doit être expressément mentionné, soit dans la demande d'agrément de l'entreprise concernée. Dans ce dernier cas, la procédure d'arbitrage ou de conciliation est indiquée dans l'acte d'agrément.<sup>103</sup>*

153. The express conferral of a choice (“*choix*”) together with the use of the modal expression “*doit être*” and the final sentence prescribing how the choice is to be manifested in “*l'acte d'agrément*” make it plain that “*l'entreprise concernée*” would have to record its choice in “*l'acte d'agrément*” expressly to consent to ICSID

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<sup>102</sup> Expert Report of Professor Emmanuel Gaillard, ¶ 33 (quoting Article 38 of Law No. 4 dated 21 February 2002 of the Democratic Republic of Congo).

<sup>103</sup> Exhibit C-102 : Ordonnance n°90/007 du 8 novembre 1990 portant code des investissements du Cameroun.

arbitration. On balance, the majority of the Tribunal considers that the linguistic differences between this text and the final sentence of Article 20 are significant and do evidence a different statutory intention.

154. The majority of the Tribunal, on the basis of a thorough and detailed analysis of the 2012 Code and Article 20 in particular, concludes that a valid and binding arbitration agreement for the purpose of Article 25 of the ICSID Convention came into force when the “*Centre de Promotion des Investissements de Côte d’Ivoire*” approved the “*demande d’agrément*” filed by the Claimants. Article 20 of the Code records the Respondent’s prospective consent to ICSID arbitration but a valid and binding ICSID arbitration agreement comes into force only if two conditions are satisfied: first, the putative investor must file a “*demande d’agrément*” and, second, that “*demande d’agrément*” must be approved by the *Centre de Promotion des Investissements*.
155. Two further considerations support the fairness of this conclusion for the majority of the Tribunal.
156. First, if the *Centre de Promotion des Investissements de Côte d’Ivoire* shared the Respondent’s interpretation of Article 20 of the Code in these arbitration proceedings, then it would follow that the Claimants’ “*demande d’agrément*” was defective in the sense that it did not express a choice between local court procedures or ICSID arbitration. (There is nothing to suggest in the text of Article 20 that local court procedures would apply in default of a choice; to the contrary, Paragraph 2(c) of Article 20 states that the ICSID Convention “*est applicable*”.) The Respondent’s national authority had an opportunity to correct what would have been a defect in accordance with this interpretation by requesting the Claimants to make an explicit choice or otherwise raising the issue with the Claimants but they did not do so. To the contrary, they approved the Claimants’ “*demande d’agrément*.” The fact that there is no mention of dispute resolution procedures in the Respondent’s model “*demande d’agrément*” or in the provision of the 2012 Code regulating its contents suggests to the majority of the Tribunal that the conduct of the Respondent’s national authority in approving the Claimants’ “*demande d’agrément*” was not an error.

157. Second, as both Parties have emphasized in their pleadings and submissions, the 2012 Code is a unilateral act on the part of the Côte d'Ivoire. It is not an international treaty between two or more States in which textual ambiguities can sometimes be attributed to a failure to reach a consensus on all issues (hence the epigram that a treaty is a disagreement reduced into writing). The Côte d'Ivoire has complete control over its own text and complete freedom to amend its text as and when it sees fit. It cannot be reasonably claimed that the final sentence of Article 20 is a model of clarity and indeed the Tribunal has identified several other serious difficulties with the remaining parts of Article 20 that are liable to generate unnecessary controversies in the future. As this is reported to be the first ICSID arbitration arising on the basis of the 2012 Code, it may be that the Côte d'Ivoire has not yet had the occasion to revisit the text of Article 20 since its promulgation. If the Côte d'Ivoire, upon receipt of the Tribunal's decision, maintains its disagreement with the majority of the Tribunal's analysis, then its remedy can be swift and straightforward: it can introduce amendments to Article 20 of the 2012 Code and to its model "*demande d'agrément*" with the effect that prospective investors will be in no doubt as to manner in which they are to convey their consent to ICSID arbitration. This will not, of course, shut out the Claimants from pursuing their claims against the Respondent in the present proceedings. But that, in the estimation of the majority of the Tribunal, is a small price to pay when compared with the injustice of informing the Claimants at this point in time that, despite the Respondent's approval of their "*demande d'agrément*" in accordance with the provisions of the 2012 Code and despite their filing of a Request for ICSID Arbitration, they cannot be deemed to have consented to ICSID arbitration after all. And all the while the Respondent's consent to ICSID arbitration is not contested.

## V. COSTS

### A. THE RESPONDENT'S POSITION

158. The Respondent submits that under Article 61(2) of the ICSID Convention the Tribunal has broad discretion to apportion costs. It identifies two relevant factors, (i) the extent to which a party has prevailed on its claims or defenses in and proceeding; and (ii) the extent to which a party's conduct in the proceeding has unnecessarily added to the other's expense.<sup>104</sup> The Respondent further stated that “[t]he types of conduct resulting in apportionment of costs against a party include: (1) filing baseless claims; (2) deficient argumentation; and (c) procedural misconduct.”<sup>105</sup>

159. The Respondent submits that in the event that it prevails on its jurisdictional objection, the Tribunal should consider the following circumstances in rendering its decision on costs:

- The Claimants presented a series of allegedly unfounded legal theories, devised *ex post facto*, in order to avoid the consequences of their own failure to expressly state their consent to ICSID arbitration in any of their applications for authorization;
- The Claimants' legal theories are “*inconsistent, convoluted and legally incoherent*”;
- The Claimants' argument that its Request for arbitration constituted its consent was based on ICSID awards that in the Respondent's opinion have no relation to the Claimants' asserted legal theory;
- Claimants mischaracterized key evidence on which their case relied;
- The Claimants mischaracterized the standard in *PNG v. Papua New Guinea* at the Hearing on Jurisdiction. The Claimants quoted only one sentence from the

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<sup>104</sup> Respondent's Submission on Costs dated 28 April 2017, ¶¶ 1-7.

<sup>105</sup> Respondent's Submission on Costs dated 28 April 2017, ¶ 9.

decision in that case: “*States should be presumed to desire the effective and just resolution of international investment disputes, in a manner that enhances the prospects for foreign investment and confidence in the rule of law.*” Based on that sentence, the Claimants concluded: “*cette présomption est un peu l’équivalent du principe contra proferentem*” ;

- With respect to venue and language, the Respondent was exercising its rights under the ICSID Convention and the ICSID Arbitration Rules. The Respondent argues, however, that the Claimants ignored the Tribunal’s strong preference for points of international investment law to be made by submission rather than by legal experts in filing an expert opinion by Mr. Emmanuel Gaillard; and
- The Claimants repeatedly and baselessly accused the Respondent of acting in bad faith.<sup>106</sup>

160. In Response to the Claimants’ Submission on Costs, the Respondent argues that the Tribunal should reject the Claimants’ submission that the Respondent’s conduct with respect to (i) the First Session; (ii) the place of the proceedings; and (iii) the language of the proceedings, created costs that were “*inutiles et supplémentaires.*”<sup>107</sup> According to the Respondent, holding the First Session via video conference actually resulted in lower costs than if there had been an in-person first session in London. In addition, it argues, the Respondent should not be penalized for exercising its procedural right to have Washington D.C. be the place of the proceedings and to have English be one of the official languages of the proceedings.<sup>108</sup>

161. The Respondent also claims that:

*Claimants’ Submission on Costs seeks reimbursement of many cost items that do not relate to the jurisdictional phase of the proceedings. These include Claimants’ ICSID registration fee*

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<sup>106</sup> Respondent’s Submission on Costs dated 28 April 2017, ¶ 21.

<sup>107</sup> Respondent’s Reply Submission on Costs dated 12 May 2017, pp. 1-3.

<sup>108</sup> Respondent’s Reply Submission on Costs dated 12 May 2017, pp. 2-3.

*in the amount of \$25,000. These also include 130,172.00 € in costs relating to:*

*Ensemble de la procédure, notamment analyse de dossier, Requête d'arbitrage, constitution du Tribunal, suivi de la procédure, échanges de courriers relatifs à la première session, première session, excluant la rédaction du Mémoire sur le fond du 14 février 2017.*<sup>109</sup>

162. The Respondent submits that in the event the Tribunal decides that it has jurisdiction, it should either defer its decision on these costs until the end of the proceedings or, at most, make an award as to costs incurred exclusively relating to the jurisdictional phase of the case.<sup>110</sup>
163. Finally, the Respondent submits that the Claimants failed to demonstrate that they were actually billed by the Claimants' counsel for the total amount that was claimed in their Submission on Costs.<sup>111</sup>
164. In light of the above, the Respondent rejects the Claimants' Submission on Costs and requests the Tribunal to:

*(a) order [...] Claimants to pay all of the costs of the ICSID proceedings, including the Tribunal's fees and expenses and all administrative costs; and*

*(b) order [...] Claimants to bear Respondent's legal costs and expenses in the amount of \$747,529.*<sup>112</sup>

## **B. THE CLAIMANTS' POSITION**

165. The Claimants agree with the Respondent that the Tribunal has the discretion to allocate costs under Article 61(2) of the ICSID Convention.<sup>113</sup>

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<sup>109</sup> Respondent's Reply Submission on Costs dated 12 May 2017, pp. 4.

<sup>110</sup> Respondent's Reply Submission on Costs dated 12 May 2017, pp. 4.

<sup>111</sup> Respondent's Reply Submission on Costs dated 12 May 2017, pp. 4-5.

<sup>112</sup> Respondent's Submission on Costs dated 28 April 2017, ¶ 25.

<sup>113</sup> Claimants' Reply on Costs dated 12 May 2017, ¶ 2.

166. The Claimants do not dispute the Respondent's submission that in allocating costs the Tribunal should consider the following factors, (i) the extent to which a party has prevailed on its claims or defenses in and proceeding; and (ii) the extent to which a party's conduct in the proceeding has unnecessarily added to the other's expense.<sup>114</sup>
167. The Claimants, however, submit that the cases relied on by the Respondent to argue that the Claimants should be ordered to pay the Respondent's costs are irrelevant because they relate to decisions made at the merits phase.<sup>115</sup> They argue that given the ambiguity of Article 20, even if the Tribunal were to decide that it did not have jurisdiction, it would be unjust and inequitable to order the Claimants to pay the Respondent's costs. If, however the Claimants are successful, they argue that it would be just and equitable to order the Respondent to pay their costs because the law in question was drafted by the Respondent.<sup>116</sup>
168. The Claimants further take issue with the Respondent's Submission on Costs for the following reasons.
169. First, they argue that the Respondent wrongly used its Cost Submission as a post-hearing brief, which the Parties and the Tribunal had agreed would not be filed.<sup>117</sup>
170. Second, the Claimants dismiss the Respondent's claim that the Claimants' arguments were unfounded, inconsistent, convoluted and legally incoherent. According to the Claimants:

*L'argumentation juridique des Demandeurs est fondée, consistante, claire et cohérente. Ce que la Défenderesse soulève, c'est seulement son prétendu désaccord avec les arguments des Demandeurs: ce qui ne peut absolument pas être un facteur pertinent concernant la répartition des frais.*

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<sup>114</sup> Claimants' Reply on Costs dated 12 May 2017, ¶ 3. Respondent's Submission on Costs dated 28 April 2017, ¶¶ 1-7.

<sup>115</sup> Claimants' Reply on Costs dated 12 May 2017, ¶¶ 6 and 10.

<sup>116</sup> Claimants' Reply on Costs dated 12 May 2017, ¶¶ 6-7.

<sup>117</sup> Claimants' Reply on Costs dated 12 May 2017, ¶ 24 and ¶¶ 24-27.

*La Défenderesse ne soulève d'ailleurs aucun argument auquel les Demandeurs n'auraient pas répondu.*<sup>118</sup>

171. Third, with respect to the alleged mischaracterization of the standard in *PNG*, the Claimants submit that in their view, “*surtout dans le contexte où on analyse le consentement de l’investisseur et non celui de l’État*” the statement “*States should be presumed to desire the effective and just resolution of international investment disputes in a manner that enhances the prospects for foreign investments and confidence in the rule of law*” constitutes an objective approach not “*une approche extensive au bénéfice de l’investisseur.*”<sup>119</sup> The Claimants argue:

*En effet, dans le contexte où à l’article 20 du Code, l’État consent à l’arbitrage CIRDI et crée, par sa propre rédaction une ambiguïté quant à la manière pour l’investisseur d’exprimer son consentement, il demeure tout à fait objectif de dire que cette loi, en application des trois principes susmentionnés ou même si on n’applique pas ces principes, doit être interprétée ‘en faveur’ de l’investisseur.*<sup>120</sup>

172. Fourth, the Claimants dismiss the Respondent’s allegation that they mischaracterized evidence in order to attempt to fill in the gaps of their arguments.<sup>121</sup>

173. Fifth, the Claimants maintain their argument that the Tribunal should take into consideration the inappropriate behavior of the Respondent. The Claimants argue that the Respondent’s insistence that the hearing take place in Washington D.C. and that English be one of the official languages of the proceedings resulted in additional expenses, in particular with respect to interpretation, court reporting and translation of documents.<sup>122</sup> The Claimants thus request that in the event that the Tribunal dismisses jurisdiction, the Respondent provide “*plus de détails concernant ses frais et*

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<sup>118</sup> Claimants’ Reply on Costs dated 12 May 2017, ¶¶ 33-34.

<sup>119</sup> Claimants’ Reply on Costs dated 12 May 2017, ¶ 61.

<sup>120</sup> Claimants’ Reply on Costs dated 12 May 2017, ¶ 62.

<sup>121</sup> Claimants’ Reply on Costs dated 12 May 2017, ¶¶ 42-62.

<sup>122</sup> Claimants’ Submission on Costs dated 28 April 2017, ¶¶ 6-12.

*honoraires, et notamment, mais non-exclusivement, d'indiquer la portion qui porte sur la traduction française de tous documents, courriers, pièces, mémoires, etc.”*<sup>123</sup>

174. Sixth, with respect to the behavior of the Parties, the Claimants maintain that the Respondent's behavior was in bad faith.<sup>124</sup>

175. Finally, the Claimants submit that “[l]es honoraires des Conseils de la Défenderesse de 708.993,00 USD sont exorbitants et déraisonnables.”<sup>125</sup>

176. For its part, and as set out in the Claimants' Submission on Costs, the Claimants request the Tribunal to:

- *Condamne la Défenderesse à verser 225.000,00 USD aux Demandeurs, correspondant à la part les Demandeurs de la provision pour honoraires et frais des membres du Tribunal arbitral et frais administratifs du CIRDI;*
- *Condamne la Défenderesse à verser 357.437,00 Euros hors taxe aux Demandeurs, correspondant à ses honoraires et frais de Conseil ;*
- *Condamne la Défenderesse à verser 30.000,00 Euros hors taxe aux Demandeurs, correspondant aux honoraires et frais de son expert juridique ; et*<sup>126</sup>
- *Ordonner le paiement d'intérêts simples aux Demandeurs par la Défenderesse sur les sommes à être versées à titre de remboursement des frais et honoraires et ce, à compter de la date de la décision ordonnant le paiement desdits frais et honoraires jusqu'au jour de leur paiement au taux d'intérêt LIBOR + 2.*<sup>127</sup>

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<sup>123</sup> Claimants' Reply on Costs dated 12 May 2017, ¶ 73.

<sup>124</sup> Claimants' Reply on Costs dated 12 May 2017, ¶ 67.

<sup>125</sup> Claimants' Reply on Costs dated 12 May 2017, ¶ 72.

<sup>126</sup> Claimants' Submission on Costs dated 28 April 2017, ¶ 17.

<sup>127</sup> Claimants' Reply on Costs dated 12 May 2017, ¶ 75.

**C. THE TRIBUNAL'S DECISION**

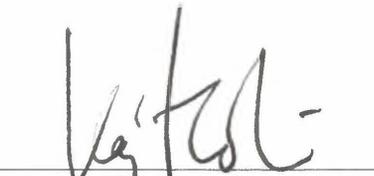
177. The Tribunal has resolved to reserve the issue of costs in respect of this jurisdictional phase of the proceedings until such time as it renders a final award.

**VI. DECISION**

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

- a) By a majority of its Members, dismisses the Respondent's preliminary objection to jurisdiction on the basis of Article 20 of the 2012 Code;
- b) Reserves the issue of costs in respect of this jurisdictional phase of the proceedings until such time as it renders a final award.

  
The Honorable L. Yves Fortier QC  
Arbitrator

  
Professor Kaj Hobér  
Arbitrator  
(Disputing)

  
Professor Zachary Douglas QC  
President of the Tribunal

DISSENTING OPINION OF PROF. KAJ HOBÉR

1. For the reasons set out below, I am unable to agree with my esteemed co-arbitrators on the question of the jurisdiction of the Arbitral Tribunal. My analysis and interpretation of the relevant statutory provisions lead me to the conclusion that the Arbitral Tribunal does not have jurisdiction to try the claims put forward by the Claimants.
2. The disagreement between the Parties centers on the interpretation, understanding and effect of Article 20 of the Code. The critical part of this provision is its final sentence which reads:

*“Le consentement des parties à la compétence du CIRDI ou du mécanisme supplémentaire, selon le cas, requis par les instruments les régissant, est constitué pour la République de Côte d’Ivoire par le présent article, et est exprimé expressément dans la demande d’agrément pour la personne concernée.”*
3. It is common ground between the Parties that the quoted language means that the Respondent, the Republic of Côte d’Ivoire, has consented to ICSID arbitration. The question now before the Arbitral Tribunal is whether the Claimants have consented to ICSID arbitration.
4. Whilst Article 20 – including its final sentence – is not a wonder of clarity, it is in my view clear that the quoted text also requires an investor to consent to ICSID arbitration at some point, in connection with the application for approval of the investment in question (*“demande d’agrément”*). It follows from this, that it is not sufficient for purposes of Article 20 of the Code to submit a request for ICSID arbitration once a dispute has arisen. Such a request does not constitute consent to ICSID arbitration under Article 20 of the Code.
5. The jurisdictional requirements to be analyzed by the Arbitral Tribunal are set forth in Ivorian municipal legislation, i.e. the Code, and must therefore be interpreted based on Ivorian principles of statutory interpretation. At the same time, since we are dealing with a jurisdictional issue under an international treaty – the ICSID Convention – rules and principles of interpretation under international law must be applied, to wit, rules and principles relating to the interpretation of unilateral acts of States. This is so because the Respondent’s consent to ICSID arbitration in Article 20 of the Code constitutes a unilateral act, a unilateral declaration by the Republic of Côte d’Ivoire. The combination of these two approaches to interpretation results in my view in the following four key interpretative elements: good faith; the plain (ordinary) meaning of the words used; the context in which the words are used; and the intention of the State in issuing the unilateral declaration.
6. Let me start with the context in which the words used in the last sentence of Article 20 of the Code are found.
7. Article 20 of the Code as a whole deals with various forms of dispute settlement mechanisms. The second paragraph of the provision states that disputes between individuals, or legal entities, and the Republic of Côte d’Ivoire concerning the application of the Code are to be resolved by Ivorian courts, or by an Arbitral Tribunal (*“est réglé par les juridictions ivoiriennes ou par un Tribunal Arbitral”*). It then goes on to describe how the jurisdiction of arbitral tribunals is to be determined.

It is thus in the context of making a choice of a dispute settlement mechanism that we find the last sentence of Article 20 of the Code. An investor has the choice between, on the one hand, Ivorian courts, and on the other hand different forms of arbitration, including an arbitration mechanism specifically agreed between the parties in question.

8. As far as the choice of ICSID arbitration is concerned, it is regulated by the last sentence of Article 20. The unilateral consent thereto by the Republic of Côte d'Ivoire is provided by the provision itself. The consent of the other party "*est exprimé expressément dans la demande d'agrément...*".
9. In my view the plain and ordinary meaning of the quoted words is that such consent is to be expressly stated in the application for approval of the investment ("*demande d'agrément*") by the investor. I hasten to add that in my view this is also the natural meaning of the words in question resulting from a good faith interpretation of them.
10. I am reinforced in my view when I analyze the plain and ordinary meaning of the three critical elements of the text viz., 1. "*est exprimé*"; 2. "*expressément*"; and 3. "*dans la.*" I will address each of them.

1. *Est exprimé:*

In the context in which these two words appear, their plain and ordinary meaning is: "*to be expressed*". In other words, even though the present tense is used ("*est*"), the words indicate the imperative, i.e. something that is to be done. "*Exprimé*" is of course derived from the verb "*exprimer*" the dictionary meaning of which is "*faire connaître par la langue*". In other words, make something known using language, as opposed to other means of communication. The two words thus mean that something is to be expressed by using language.

2. *Expressément:*

The plain and ordinary meaning of the adverb "*expressément*" is: "*en termes exprès, formels*", or in English: "*expressly*", "*in an express manner*", or "*explicitly*". To put it differently: whatever is to be done "*expressément*" must be done in such a way so as to leave no doubt with respect to the act, choice or declaration in question. In my view, the requirement for an express choice is particularly important in the context of Article 20 of the Code, dealing, as it does, with the choice of a dispute settlement mechanism.

3. *Dans la:*

The words "*exprimé expressément*" are followed by the words "*dans la demande d'agrément*". The word "*dans*" serves as the preposition in the sentence leading on to, and indicating where the consent ("*le consentement*") is to be found, i.e. in the "*demande d'agrément*". Whilst it could perhaps be argued – as Claimants have done – that "*dans*" and "*par*", from a grammatical point of view could have similar functions, they do not normally have the same meaning. The natural – and in my view the only reasonable – meaning of "*dans*" in Article 20 of the Code is "*in*", i.e. indicating that the consent must be set forth in – dans la – "*demande d'agrément*"

11. This analysis leads me to conclude that the plain and ordinary meaning of the words used in the last sentence of Article 20 of the Code is that in order to properly to consent to ICSID arbitration, the investor, ie., the Claimants, must expressly select ICSID arbitration in the “*demande d’agrément*”. It is undisputed that the Claimants have not done so.
12. The Claimants have argued that the submission itself of the “*demande d’agrément*” satisfies the requirements of Article 20 of the Code. I do not agree with that argument. First, it is not reconcilable with the interpretation of Article 20 of the Code that I have explained above. Second, accepting the Claimants’ argument would mean that every investor who submits a “*demande d’agrément*” – and which is eventually accepted by the relevant Ivorian authorities – would be deemed to have consented to ICSID arbitration. That cannot be right. In my view this is not a reasonable – nor the natural – interpretation of Article 20 of the Code.
13. Having thus taken into account three of the four interpretive elements mentioned above – good faith; the plain and ordinary meaning of the words used; and the context – it is strictly speaking not necessary to dwell on the fourth element – the intention of the State issuing the unilateral declaration. In its briefs and at the hearing, the Respondent explained the purpose and intention behind Article 20 of the Code. I do not intend to – nor do I need to – review the policy goals which prompted the regulation in Article 20 of the Code. Suffice it to say that I find no reason to doubt them, nor do I find them unreasonable. The intentions as explained by the Respondent seem to be reflected in Article 20 of the Code, including the last sentence of it, particularly in light of the context in which the last sentence appears.
14. Based on the foregoing, I am of the view that the Arbitral Tribunal lacks jurisdiction to try the claims put forward by the Claimants.

  
Signature

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Prof. Kaj Hobér  
Arbitrator