INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

GOVERNMENT OF THE PROVINCE OF EAST KALIMANTAN

(CLAIMANT)

v.

PT KALTIM PRIMA COAL
RIO TINTO PLC
BP P.L.C.
PACIFIC RESOURCES INVESTMENTS LIMITED
BP INTERNATIONAL LIMITED
SANGATTA HOLDINGS LIMITED
KALIMANTAN COAL LIMITED

(RESPONDENTS)

(ICSID Case No. ARB/07/3)

AWARD ON JURISDICTION

Members of the Tribunal:

Professor Gabrielle Kaufmann-Kohler, *President*
Mr. Michael Hwang, *Arbitrator*
Professor Albert Jan van den Berg, *Arbitrator*

Secretary of the Tribunal:

Mr. Ucheora Onwuamaegbu

Date of dispatch to the parties: December 28, 2009

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Table of Abbreviations

BP/RT Mem.	BP/Rio Tinto Respondents' Memorial on Jurisdiction dated 31 August 2007
BP/RT PHB	BP/Rio Tinto Respondents' Post-Hearing Brief dated 10 April 2008
BP/RT Reply	BP/Rio Tinto Respondents' Rebuttal Submission dated 20 December 2007
BP/RT Respondents	Rio Tinto plc, BP p.l.c., Pacific Resource Investments Limited and BP International Limited
CCOW	Coal Contract of Work = the KPC Contract
C. CM.	Claimant's Counter-Memorial on Jurisdiction dated 22 November 2007
CJDC	Central Jakarta District Court
Claimant	The Government of the Province of East Kalimantan, or GPEK
C. Reply	Claimant's Submission on Indonesian Law dated 17 January 2008
C. Rejoinder	Claimant's Summary of 10 April 2008
Exh. BP/RT	BP/RT Respondents' Exhibits
Exh. C-	Claimant's Exhibits
Exh. KPC	KPC Respondents' Exhibits
Exh. RA C.	Claimant's Exhibits filed with the Request for arbitration
GPEK	The Government of the Province of East Kalimantan, or the Claimant
GOI	The Government of Indonesia = Government
Government	The Government of Indonesia = GOI
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICSID Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
KPC Contract	Agreement dated 8 April 1982 between PT KPC and Peruskan Negara Tambang Batubura and its successors in title, as amended.
KPC Mem.	KPC Respondents' Objections to Jurisdiction dated 31 August 2007
KPC PHM	KPC Respondents' Post-Hearing Memorial dated 10 April 2008
KPC Reply	KPC Respondents' Rebuttal to Claimant's Counter-Memorial dated 20 December 2007
KPC Respondents	PT Kaltim Prima Coal, Sangatta Holdings Limited and Kalimantan Coal Limited
LA. BP/RT	BP/RT Respondents' Legal Authorities
LA. C.	Claimant's Legal Authorities
LA. KPC	KPC Respondents' Legal Authorities

PKP2B [KPC]	The KPC Contract
PTBA	PT Tambang Batubura Bukit Asam (Persero)
PT KPC	PT Kaltim Prima Coal
RA or Request	Claimant's Request for Arbitration dated 5 April 2006
Tr.	Transcript of the Hearing on Jurisdiction of 27-28 February 2008

I. FACTS RELEVANT TO JURISDICTION

1. This section summarizes the factual background of this arbitration in so far as it is necessary to rule on the Respondents' objections to jurisdiction.

1. PARTIES

1.1 Claimant

2. The Claimant is the Government of the Province of East Kalimantan (the "Claimant" or the "GPEK"). Its address is Jalan Gajah Mada No. 1, Samarinda, East Kalimantan, Indonesia.

3. The Claimant is represented in this arbitration by Mr. P.D.D. Dermawan, DNC Advocates at work, The Landmark Centre, Tower B, Floor 8, Jalan Jenderal Sudirman No. 1, Jakarta 12910, Indonesia.

1.2 Respondents

4. The Respondents are

- **PT Kaltim Prima Coal ("PT KPC")**, a corporation incorporated under the laws of Indonesia, with its offices at Menara Kadin Indonesia, 28th floor, Jalan H.R. Rasuna Said, Block X-5, Kav. 02-03, Jakarta 12940, Indonesia. PT KPC was originally a joint venture company between CRA Limited, an Australian corporation (Conzinc RioTinto of Australia Ltd, now Rio Tinto Limited) and BP p.l.c., a corporation incorporated under the laws of England and Wales, which owned PT KPC with a 50:50 shareholding. The current shareholding structure of PT KPC is disputed by the Parties (see *infra* ¶ 63).

- **Sangatta Holdings Limited ("Sangatta")**, a corporation incorporated under the laws of the Cayman Islands, having its offices at Maples and Calder, George Town, Grand Cayman, Cayman Islands.

  Sangatta was a wholly owned subsidiary of Pacific Resource Investments Limited (a company incorporated under the laws of the Cayman Islands and a subsidiary of Rio Tinto Limited) until 15 July 2003. From that date, Sangatta has been owned by PT Bumi Resources Tbk, a public company traded on the Indonesian stock exchange.

- **Kalimantan Coal Limited**, a corporation incorporated under the laws of the Republic of Mauritius, having its offices at 608, St James Court, St Denis Street, Port Luis, Mauritius. Kalimantan Coal Limited was wholly-owned by BP International Ltd until 15 July 2003, and then by PT Bumi Resources Tbk.

- **Rio Tinto plc**, a corporation incorporated under the laws of England and Wales, having its registered office at 6 St James's Square, London, England SW1Y 4LD.

  Rio Tinto plc, formerly known as the RTZ Corporation p.l.c., was "unified" in 1995 with CRA Limited "*into a single economic entity through a dual listed company structure,*" listed respectively in England and in Australia (BP/RT Mem., ¶ 10).

- **BP p.l.c.**, a corporation incorporated under the laws of England and Wales, having its registered office at 1 St James's Square, London, England SW1Y 4PD.

- **Pacific Resource Investments Limited**, a corporation established under the laws of the Cayman Islands, having its registered office at Maples & Calder, Ugland House, South Church Street, George Town, Grand Cayman, Cayman Islands. It is domiciled at 55 Collins Street, Melbourne 3001, Australia (BP/RT Mem., ¶ 17).

  Pacific Resource Investments Limited is a member of the Rio Tinto group of companies (BP/RT Mem., ¶ 18). More particularly, it is a wholly owned subsidiary of Rio Tinto Limited.

- **BP International Limited**, a company established under the laws of England and Wales, having its registered office at Chertsey Road, Sunbury–on-Thames, Middlesex, England, TW16 7 BP (BP/RT Mem., ¶ 19).

  BPI is a wholly owned subsidiary of BP p.l.c. (BP/RT Mem., ¶ 20).

(collectively the "Respondents").

5. The KPC Respondents (PT Kaltim Prima Coal, Sangatta Holdings Limited, and Kalimantan Coal Limited) are represented by Mr. Michael Lennon, Jr., Ms. Ania Farren, and Ms. Sarah Nelson Smith of the law firm of Baker Botts (UK) LLP, London.

6. The BP/Rio Tinto Respondents (Rio Tinto plc, BP p.l.c., Pacific Resource Investments Limited and BP International Limited) are represented by Mr. Matthew Weiniger, Ms. May Tai, and Ms. Alexandra Long of the law firm of Herbert Smith LLP, London.

7. The Claimant and the Respondents are collectively referred to in this decision as the "Parties."

2. PROJECT AND DISPUTE

2.1 The KPC Contract

8. On 9 March 1982, CRA Limited and BP p.l.c. incorporated PT KPC, under the laws of Indonesia (Exh. KPC 13 Deed of Establishment). They each owned half of the shares.

9. On 8 April 1982, PT KPC entered into an agreement with a state-owned company by the name of Peruskan Negara Tambang Batubura to conduct coal mining operations for a duration of 30 years commencing on 1 January 1992 in Sangatta, East Kalimantan, Regency of East Kutai[1] (the "KPC Contract," Exh. KPC 6 = Exh. BP/RT 5). The KPC Contract was the first coal agreement entered into by the Government of Indonesia (the "GOI," hereinafter also referred to as the "Government") with foreign investors (BP/RT Mem., ¶ 27). It is governed by Indonesian law. BP p.l.c. and CRA Limited (the parent companies of PT KPC at that time) are referred to as the foreign investors in the Preamble of the KPC Contract.

10. On 19 February 1991, with the approval of the GOI, CRA Limited transferred its shareholding in PT KPC to Sangatta.

11. On 16 December 1991, Peruskan Negara Tambang Batubura was liquidated and substituted by another state-owned company, PT Tambang Batubura Bukit Asam (Persero) (PTBA) (Exh. KPC 4, Exh. BP/RT 15-20).

12. This dispute arises in connection with an alleged obligation of PT KPC under Article 26 of the KPC Contract to offer PT KPC's shares for sale. The first paragraph of Art. 26.1 reads as follows:

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[1] Indonesian provinces are subdivided into Regencies. The Claimant states that the Regency of East Kutai came into existence in 2001 (C. CM., ¶ 96).

Participation and Promotion of National Interest

> Subject to the provisions hereunder, Contractor [PT KPC] shall ensure that its shares are offered either for sale or issue to the Government or Indonesian nationals or Indonesian Companies controlled by Indonesians (hereinafter called 'the Indonesian Participant') in each year following the end of fourth full calendar year after commencement of the Operating Period. (Exh. KPC 6 = Exh. BP/RT 5)

13. Accordingly, starting in the fifth year of the operating period, i.e., in 1996, PT KPC was to offer a pre-determined percentage of its shares for sale to Indonesian participants. Any shares not sold as a result of the yearly process were to be included in the following year's offer process until a total of 51% of PT KPC's shares had been sold to Indonesian participants.

14. The parties to the KPC Contract agreed to arbitrate disputes in relation to the Contract as follows:

> 23.1 Except for tax matters, which are subject to the jurisdiction of the Majelis Pertimbangan Pajak (The Consultative Board for Taxes), any dispute between the Parties hereto arising before or after termination concerning anything related to this Agreement and the application thereof, including contentions that a Party is in default in the performance of its obligations, shall, unless settled by mutual agreement, or by mutually satisfactory conciliation, be referred for settlement by arbitration to the International Centre for Settlement of Investment Disputes pursuant to the Convention thereon which entered into force on October 14, 1966. The provisions of Article 23.2.3 hereof shall apply mutatis mutandis to any such arbitration.
>
> 23.2 If the services of the Centre are unavailable to the Parties, then such unsettled dispute shall be referred for settlement to a Board of Arbitration of three members, consisting of two arbitrators and an umpire. Batubara and [PT KPC] shall each appoint one arbitrator and the arbitrators so appointed shall appoint an umpire. If the arbitrators appointed by the Parties shall be unable to agree upon the umpire within thirty (30) days after appointment of the second arbitrator, the umpire shall, upon request of either Party hereto, be designated by the President of the International Court of Justice. If for any reason an arbitrator or umpire shall fail or be unable to act, his successor shall be appointed in the same manner as the arbitrator or umpire whom he succeeds. The umpire shall not be closely connected with, or have been in the public service of, or be a national of Indonesia, Australia or the United Kingdom and he shall be a person of recognised standing in the international jurisprudence.
>
> 23.1.1 If within two (2) months after institution of a Board of Arbitration proceeding hereunder by either Party, the other Party shall fail to appoint an arbitrator by written notice to the instituting Party, such instituting Party shall have the right to apply to the President of the International Court of Justice for the appointment of a sole arbitrator having the same qualifications as those required in the case of an umpire. In such event, the sole arbitrator shall constitute the Board of Arbitration hereunder with respect to such proceeding.

> 23.2.2 Unless the Parties otherwise agree, the place of arbitration shall be Geneva, Switzerland. The Board of Arbitration shall determine its own rules of procedure and the place of arbitration, and, in the case of a Board of Arbitration constituted pursuant to Article 23.2 or 23.2.1, the decision of the Board shall be made by majority vote of the members or by the sole arbitrator as the case may be. The decision of the Board of Arbitration shall be final and binding on the Parties hereto, and the Parties shall comply in good faith with the decision and award of the Board. [...]
>
> 23.3 The provisions of this Article shall continue in force notwithstanding the termination of this Agreement. (Exh. KPC 6 = Exh. BP/RT 5)

15. The KPC Contract was amended on 27 June 1997 (Exh. KPC 5 – Amendment to contract) and all the rights and obligations of PTBA were transferred to the GOI, acting through its Minister of Mines and Energy, now the Minister of Energy and Mineral Resources (hereinafter also referred to as "the Minister").

2.2 Origin of the present dispute

16. As of 1996 through to 2001, PT KPC was to sell its shares in order to comply with Article 26 of the KPC Contract. The divestment process under Article 26 is at the core of the present dispute. For the purposes of its determination on jurisdiction, the Tribunal deems it necessary to state some of the main facts of the dispute. The Tribunal will indicate when these facts are uncontroversial. However, most of the facts alleged by the Parties are contentious. In its analysis of the jurisdictional objections, the Tribunal will make the findings of fact necessary for its determination on jurisdiction on the basis of the extensive evidence submitted by the Parties. By making these findings of fact, the Tribunal does not, in any way, pass any judgment on the merits of the case.

2.2.1 Early divestment process

17. The early divestment process covers the period between 1996, when PT KPC was to make the first offer of shares, and 2001, when Claimant allegedly manifested its interest in benefiting from the divestment. Since the early divestment process is not at issue in the present case, it will thus suffice to describe it summarily. During the first years, the obligation to offer shares was deferred until 1 April 1998. In 1998, PT KPC offered 23% of its shares to three potential Indonesian participants (Exh. BP/RT 41). Negotiations lasted several months and the period for acceptance of the 1998 offer lapsed, unaccepted, on 12 January 1999 (Exh. BP/RT 53).

18. In 1999, PT KPC was required by the KPC Contract to offer 30% of its shares for sale. It made its offer on 19 November 1999 to 11 participants, including the Claimant (Exh. BP/RT 65). The period for acceptance was extended and lapsed on 19 August 2000 without any of the offerees having accepted such offer.

19. In December 2000, PT KPC offered 37% of its shares to the Government. This offer also lapsed unaccepted on 15 March 2001.

2.2.2 2001 divestment process

20. In 2001, after discussions with the Government, PT KPC agreed to offer 51% of its shares subject to an agreement on the price.

21. According to the BP/Rio Tinto Respondents, PT KPC had discretion to decide to whom it would sell its shares, subject to the Government's approval. The Claimant disputes this allegation and argues that the Government had priority rights (C. CM., B ¶ 54-55).

22. The Claimant submits that from as early as 2000 the Minister of Energy and Mineral Resources had promised that the Claimant would benefit from such divestment (see Judgment of the Central Jakarta District Court of 8 March 2006 (Judgment of the CJDC),[2] Exh. C-14, ¶ 24).

23. In a letter of 4 April 2001 (Exh. BP/RT 128 = Exh. C-80), the Minister of Energy and Mineral Resources, Mr. Purnomo Yugsgiantro, referred to a meeting held the previous day and stressed that the Government was not interested in acquiring shares and that PT KPC was to take account of the "aspirations" of the local government and people of East Kalimantan "in the context of the implementation and spirit of regional autonomy:"

> With reference to the outcome of the meeting between the Department of Energy and Mineral Resources and the Directors of PT KPC on 3 April 2001, an agreement has been reached to resolve the PT KPC share divestment issue in the best possible manner based on the spirit of good faith to fulfill [sic] the requirements of Article 26 of the Coal Mining Cooperation Agreement number J2/ Ji-DU/16/82 dated 8 April 1982.
>
> With regard to this, and considering that the government through the Finance Minister's letter number S-380/MK.017/2000 dated 26 July 2000 has stated that there is as yet no need for the government to purchase PT KPC shares, we hope that the Board of Directors of PT KPC will

[2] The Judgment of the CJDC, also produced as Exh. RA. C-2 , Exh. KPC 65 and Exh. BP/RT 316, was made on 8 March 2006. A copy thereof (produced as Exh. RA. C-2 and Exh. C-14), bearing an annotation to the effect that it was "*[m]ade in conformity with its original*" was issued on 27 March 2006 by the Deputy Clerk of the CJDC. For the sake of consistency, the Tribunal will refer to the date of 8 March 2006 in this Award.

> promptly offer and implement the share divestment in the first quarter of 2001 in the amount of 51% (fifty one percent) in accordance with the terms of Article 26 of the Coal Agreement based on the principle of 'business to business' by taking into account the aspirations of the local government of East Kalimantan and the people of East Kalimantan in the context of the implementation and spirit of regional autonomy.

24. PT KPC answered on 9 April 2001. It requested that the Government agree that no Indonesian participant benefited from priority rights (Exh. BP/RT 129).

25. The Director General of Geology and Mineral Resources, Mr. Wimpy S. Tjetjep, replied on behalf of the Minister on 24 April 2001 (Exh. BP/RT 131). He stressed that the definition of government under the KPC Contract included Provinces and Agencies and, accordingly, the need to account for the local aspirations:

> In accordance with Article 26 PKP2B No. J2/Ji.DU/16/82, the Contractor must guarantee that the shares are offered to or issued to the Government of Indonesia or its citizens or corporations owned by or controlled by Indonesians.
>
> The central government thorough [sic] the Minister of Finance pursuant to letter No. S-380/MK/017/2000 dated 26 July 2000 has declared that they are not yet interested in purchasing the PT Kaltim Prima Coal (KPC) shares.
>
> Since the definition of Government as specified in the contract includes the Provincial and Regency Administrations, we draw to the attention of PT KPC, that it should, in offering the shares, take into account the aspirations of the local government and people of East Kalimantan, by adhering to the principle of 'business-to-business.'
>
> Regarding the price of the shares offered, we wish that you remain at the price basis as agreed upon for the 30% share offer, namely US$ 175 million in accordance with the minutes of meeting of 26 October 2000, hence the price for the 51% share offer should be US$ 297 million. As you have been informed, the agreement specified in the Minutes of Meeting constitutes a step in the context of resolving the matter of the percentage of the shares that should be divested by PT Kaltim Prima Coal.

26. PT KPC and the Minister conducted negotiations regarding the price and the divestment process from April 2001 to the beginning of 2002 (see *inter alia* Exhs. BP/RT 137, 141, 142, 144, 147, 148, 149, 151, 152, 153, 156, 157, and 164).

27. Meanwhile, the GPEK initiated criminal proceedings against PT KPC in June 2001 (Exh. BP/RT 138). Subsequently, in July 2001, the GPEK commenced domestic civil proceedings before the District Court of South Jakarta. Among other relief, it sought to attach PT KPC's shares and to prevent PT KPC from selling such shares to third parties (C. CM, ¶ 53, p. 32).

28. On 19 December 2001, the GPEK through its Governor informed the Minister of Energy and Mineral Resources that it intended to buy the shares for a price of USD

453 million and requested that the Minister order PT KPC to immediately sell the shares (Exh. BP/RT 158 = Exh. C-32, with translations that are not identical). The Regent of East Timur appears to have taken the same action on 28 January 2002 (Exh. BP/RT 162). On 6 February 2002, the Governor reiterated its request to the Minister (Exh. C-33).

29. The Secretary General of the Ministry of Energy and Mineral Resources, Mr. Djoko Damorno, wrote to both the GPEK and the Regent of East Timur on 4 February 2002 (Exh. BP/RT 163) as follows:

> As you are aware, with reference to the letter No. 1412/80/MEM.S/2001 dated 4 April 2001, the Minister of Energy and Mineral Resources has requested KPC's Director to immediately offer and implement 51% share divestment on the first quarter of 2001 in accordance with Article 26 of Coal Agreement based on '*business to business*' principle and taking into consideration the aspiration of the Local Government and people of the East Kalimantan in relation with implementation and spirit of regional autonomy.
>
> With regard to the mentioned above, we kindly ask your assistance to comply to those who are interested in buying the KPC's share to submit their official offer, along with the complete data concerning their financial sources, work program and amount of share to be bought.
>
> For your information, PT Batu Bara Borneo Batuah which has had support and recommendation from Bupati Kutai Timur and DPRD Kabupaten Kutai Timur has shown its interest to buy 51% of KPC's share through the letter No. 007/B.4/I/2002 dated 28 January 2002.
>
> Furthermore, with reference to the Agreement with KPC, 31 March 2002 is the final date to determine the price of 2001 share offer. It is expected that the agreed price to be offered should have been reached by 31 March 2002 and immediately offered to the interested parties.

30. The Parties have offered different and partly confusing versions of the facts as of March 2002. For present purposes, it will suffice for the Tribunal to set forth the following factual elements based on its chronological analysis of the exhibits on record.

31. From 4 through 6 March 2002, a meeting took place during which PT KPC agreed that it would offer 51% of its shares to Indonesian participants for USD 419.22 million by no later than 31 March 2002. This agreement was referred to as the 2001 Offer Price Agreement (Exh. C-87 letter of the Secretary General enclosing the minutes of the meeting produced as Exh. C-30 = Exh. BP/RT 167).

32. On 6 March 2002, the House of Representatives of the GPEK published in the Jakarta Post, among other media, an open letter to PT KPC, Rio Tinto and BP. It urged these companies to comply with their legal obligations (Exh. C-81). Following

this open letter, the Claimant asserts that it called a meeting on 7 March 2002 (CM, B, ¶ 65).

33. On 7 March 2002, a meeting did indeed take place between the Minister, Mr. Purnomo Yusgiantro, the Governor of East Kalimantan, the Regent of East Kutai, the Secretary General of the Ministry of Energy and Mineral Resources, Mr. Djoko Darmono, the Director General of Geology and Mineral Resources of the Department of Energy and Mineral Resources, Mr. Wimpy Tjetjep, the President Director of PT KPC, and the President Director of BP Indonesia (Exh. C-86 = Exh. BP/RT 169). It was agreed that the civil and criminal proceedings pending against PT KPC before the District Court of South Jakarta would be withdrawn. It was further agreed that, upon the withdrawal of these proceedings, the PT KPC divestment would be promptly undertaken as agreed during the meeting of 4-6 March 2002.

34. Another meeting took place on 18 March 2002 between the representatives of the Minister of Energy and Mineral Resources (the Secretary General and the Director General) and PT KPC (Exh. C-87= Exh. BP/RT 176, Minutes of the meeting dated 18 March 2002, which reiterated the points agreed upon during the meeting of 4-6 March 2002). The minutes mention that the divestment would be undertaken with due consideration for "the aspirations of the people and the governments of East Kalimantan Province and East Kutai regency towards participation in the divestment process" (Exh. C-87= Exh. BP/RT 176, also under BP/RT 177).

35. Various subsequent meetings were held and correspondence was exchanged. In particular, there were meetings between PT KPC and the Government regarding the divestment process, the main issue being the role of PT KPC in the selection of the buyers.

36. In a limited cabinet meeting chaired by the President of the Republic of Indonesia on 30 July 2002, it was decided that 51% of the shares of PT KPC should be offered to the GOI, out of which 31% would be allocated to the GPEK and the Regency of East Kutai, and the remaining 20% would be kept by the GOI. These decisions were recorded as follows (Exh. BP/RT 208 = Exh. C-7= Exh. KPC 70):

> 1. That 51% of shares of PT KPC be offered to the Government of the Republic of Indonesia on 31 July 2002 at a price of US$ 419,220,000.
> 2. Furthermore the said 51% of PT KPC's shares be allocated to the Provincial Government/Kabupaten Government of Kutim in the amount of 31% and the balance of 20% to the Government of the Republic of Indonesia.

3. Due Diligence will be conducted on all prospective buyers of shares of PT KPC especially with respect to capacity and resources of their funding.

4. The Government will give protection (indemnity) to PT KPC and related parties against any civil claims in Indonesian District Courts in relation to divestment process of PT KPC.

5. Furthermore such protection (indemnity) will be passed on to all purchasers of the divested shares of PT KPC on a joint and several basis.

37. On or around 31 July 2002, the Provincial House of Representatives of the Province of East Kalimantan (Exh. BP/RT 214 = Exh. KPC 72) rejected the Government's decision to keep 20% of PT KPC's divested shares. It stressed that 51% of the shares "must be offered" to the GPEK and the Regency of East Kutai. By Decree of 1 August 2002 (Exh. BP/RT 215), the same body demanded to participate in the purchase of the shares, sought to force the GOI not to take part, to stop all coal shipping activities of PT KPC, and to supervise the management of PT KPC until completion of the divestment process.

38. In spite of these developments, a few days later, on 5 August 2002, PT KPC and the GOI entered into a Framework Agreement (Exh. BP/RT 222 = Exh. KPC 73) whereby PT KPC offered 51% of the shares to the GOI. The Claimant contends that the Government breached its duties by concluding such an agreement which it considers contrary to national interests (C. CM., B ¶ 69).

39. Under the Framework Agreement, 51% of the shares were to be offered to the GOI, the latter being entitled to assign its rights to more than one potential Indonesian Participant. The Framework Agreement listed companies owned by the GPEK and the Regency of East Kutai as potential assignees. More particularly, Article 3.1 provides for the following process to confirm the 2001 Offer and to allocate the shares:

(a) The 2001 Offer was made by KPC to GOI on the Offer Date and will be confirmed by KPC sending a letter in the form of the Offer Terms ('Offer Letter') promptly after the date hereof.

(b) Without limiting the obligations of GOI under this Agreement and within 30 days from the Offer Date, GOI shall be entitled, to assign and transfer its rights to and interest in and in respect of the 2001 Offer arising under the Offer Letter in part only to the entities described below (each, an 'Assignee') in respect of such number of Offer Shares as is described below, subject to the requirements of the Offer Terms:

(i) to GOI or a State-Owned Enterprise involved in mining, in each case as agreed in writing between GOI and KPC - a number of Offer Shares being a Material Shareholding; and

(ii) to the Provincial Government of Kaltim, the Regency Government of Kutim, or companies owned by the Provincial Government of Kaltim or the Regency Government of Kutim respectively – a number of Offer Shares to be determined in each case by GOI but which, in aggregate, shall be a Material Shareholding,

provided always that:

A) the aggregate percentage which GOI assigns and transfers its rights and interest to under this Clause 3.1 (b) shall not exceed the total percentage of the Offer Shares;

B) the assignment and transfer of the rights to and interest in the 2001 Offer by GOI under this Clause 3.1 (b) may be exercised in respect of any Offer Shares once only;

C) the Government's right to assign and transfer the rights to and interest in the 2001 Offer in accordance with this Clause 3.1 is strictly personal to GOI;

D) no single person or entity may give an Acceptance in respect of the whole of the Offer Shares; and

E) the 2001 Offer shall not be capable of acceptance by any person other than an Assignee.

[...] (Exh. BP/RT 222)

40. The Framework Agreement further provides that disputes between the parties to that agreement or any third party beneficiary would be resolved in accordance with the dispute settlement mechanism of the KPC Contract, which provides primarily for ICSID arbitration:

> 14.1 Any dispute under this Agreement between the Parties, or any Party and third party beneficiaries of rights under this Agreement conferred by Clause 2.3 [*recte* 23], arising before or after termination concerning anything related to this Agreement and the application thereof, including contentions that a Party is in default, shall be resolved in accordance with the procedures contained in Article 23 of the Coal Agreement [the KPC Contract] which are hereby adopted mutatis mutandis.
>
> 14.2 In the event of any dispute between the Parties (or any Party and third party beneficiaries of rights under this Agreement conferred by Clause 2.3) being referred for settlement in accordance with the provisions of this Clause 14, the operation of and processes under this Agreement (and, if necessary the Offer Terms) shall be suspended until such time as the dispute has been finally settled by agreement between the Parties (or any Party and third party beneficiaries of rights under this Agreement conferred by Clause 2.3) or resolved in accordance with the terms of this Agreement. (Art. 14, Exh. BP/RT 222)

41. The Framework Agreement was consequently amended on 28 August 2002 to extend the period of assignment and notification to PT KPC from 30 days to 60 days from the offer date (Exh. BP/RT 225 = Exh. KPC 108). Hence, the assignment was to take place by 30 September 2002, with unconditional offers from the assignees due by 31 October 2002 and payment before 31 January 2003. The due diligence

was to be completed by 31 October 2002 (Letter from PT KPC of 29 August 2002, Exh. BP/RT 226, see also the timetable attached to presentation document Exh. BP/RT 228).

42. The minutes of a meeting held on 20 September 2002 mention that the GOI had informed PT KPC of the names of the assignees on the same date (Exh. BP/RT 231, which minutes do not list the attendees).

43. A letter of 24 September 2002 from PT KPC to the Ministry of Energy and Mineral Resources shows that the GOI's shortlisted candidates for the acquisition of the 20% of PT KPC's shares going to the GOI were the two state-owned entities, PT Tambang Batubara Bukit Asam (Persero) and PT Aneka Tambang Tbk, and that PT KPC agreed to provide them access to its data room (Exh. BP/RT 235). PT Tambang Batubara Bukit Asam (Persero) was the final assignee of the shares allocated to the Government and the assignees of the 31% shares which were allocated by the GOI to the Government of the Province of East Kalimantan were Perusda Melati Bhakti Satya and Perusda Pertambangan dan Energi Kutai Timur, as shown by the minutes of a limited coordination meeting held among Ministers on 31 October 2002 (Exh. BP/RT 239).

44. A second amendment to the Framework Agreement was made on 29 September 2002, again extending the time for the assignment of the GOI's right to buy PT KPC's shares, this time until 28 October 2002:

> The first paragraph of Clause 3.1 (b) of the Framework Agreement (as has been amended by the First Amendment) shall be hereby amended to read as follows:
>
> 'Without limiting the obligations of GOI under this Agreement and not later than 1700 Jakarta time on 28 October 2002, GOI shall be entitled, to assign and transfer its rights to and interest in and in respect of the 2001 Offer arising under the Offer Letter in part only to the entities described below (each, an 'Assignee') in respect of such number of Offer Shares as is described below, subject to the requirements of the Offer Terms.' (Exh. BP/RT 236 = Exh. KPC 109)

45. According to the BP/RT Respondents, the Government failed to assign its rights by the agreed date of 28 October 2002 and the offer lapsed by 31 October 2002. PT KPC informed the Government that the offer had expired on 31 October 2002 and that the Perusda Melati Bhakti Satya and Perusda Pertambangan Dan Energy Kutai Timur had not satisfied the due diligence criteria set out in the Framework Agreement, which assignees of the PT KPC shares were required to meet (BP/RT Mem., ¶ 76).

46. On 18 November 2002, the GPEK and the East Kutai Regency Government wrote to the President of Indonesia challenging the Framework Agreement and alleging that it was unlawful and void by operation of law (Exh. BP/RT 250). Ten days later, the GPEK filed an action to nullify the Framework Agreement before the Samarinda District Court.

47. On 4 December 2002, the Saraminda District Court issued a "determination" by which it nullified the Framework Agreement, among other reasons because it "*has a purpose which is against the law*" since "*article 3.1 (b) contains limitations on the government's authorities both central or regional, in performing their functions to control land and water and natural sources*" (Exh. BP/RT 252). It also held that the agreement was against good morality and public order. By letter of 14 December 2002, the Department of Energy and Mineral Resources requested the Saraminda District Court to reconsider such decision (Exh. BP/RT 253). By letter dated 17 December 2002, PT KPC, in turn, objected to the cancellation of the Framework Agreement (Exh. BP/RT 254).

48. On 20 January 2003, PT KPC wrote to the Minister to explain that its offer under the Framework Agreement had lapsed on 31 October 2002. It offered to proceed under the provisions of Clause 3.1.(g), i.e., to offer shares as part of the 2001 process (despite the expiry of such process) before steps were to be taken by PT KPC and the GOI with respect to any 2002 offer. It also stated that, in addition to PTBA, "*[o]ther potential offerees, including representatives of the people and Governments of Kaltim/Kutai, could also be considered subject to appropriate due diligence being successfully carried out*." (Exh. BP/RT 256).

49. On 5 March 2003, PT KPC followed up by sending to the Ministry a "Draft Agreement on Confirmation, Amendment and Restatement of the Framework Agreement for the Implementation of KPC Shares Offer" (Exh. BP/RT 268). The draft provided for a completion date on 15 May 2003 and a divestment of 20% to the GOI's nominee, PT Tambang Batubara Bukit Asam (Persero) and of 31% to Perusda Melati Bhakti Satya and Perusda Pertambangan Dan Energy Kutai Timur.

50. At a meeting held on 10 March 2003 between the "*East Kutai Regency Government*," the "*East Kutai Regional Peoples Representative Peoples Assembly*," the "*Alliance of the East Kalimantan People for Justice and Prosperity*," the "*East Kutai Youth Figures*" and PT KPC, the following decisions were taken with respect to the due diligence process to be carried out in view of the divestment:

1. The divestment due diligence process will be undertaken by both parties (purchaser and seller) in accordance with the Coal Agreement [the KPC Agreement] and applicable regulations and will be undertaken as soon as possible and will be facilitated by the Government and PT. KPC.
2. If the time up to 31 March 2003 is not enough, it is suggested that the due diligence process be extended for 3 months from 31 March 2003.
3. For implementation of the above matters, it is suggested that the related parties (Governor, Head of the Kalimantan Province Regional Peoples Representative Assembly, the Bupati, the Head of the East Kutai Regional Peoples Representative Assembly and the East Kalimantan Peoples Alliance for Justice and Welfare, the shareholder of PT. KPC namely BP and Rio Tinto, the Minister for Mining, the Minister for State Owned Enterprises, the Minister of Home Affairs) have a meeting in Jakarta as soon as possible, to be facilitated by the Coordinating Minister for Economic Affairs. (Exh. BP/RT 271)

51. This meeting was followed by another one held on 3 April 2003 between representatives of the GOI and PT KPC. During that meeting, the Minister handed out a memorandum entitled "Points of discussion on negotiation," stating that the Ministry had come to an agreement with the GPEK pursuant to which the latter would withdraw its legal actions (Exh. BP/RT 273).

52. On 25 April 2003, Sangatta Holdings Limited, acting for the Rio Tinto group, sent a notice of suspension of the Framework Agreement to the Minister, PT KPC and BP International Limited (Exh. BP/RT 279). Following such notice, starting in June 2003, the parties entered into discussions about the termination of the Framework Agreement (Exh. BP/RT 289). In that context, on 10 October 2003, PT KPC wrote to the Minister to request the termination of the Framework Agreement (Exh. KPC 24, also in Exh. KPC 58). During that same month, according to PT KPC, the Government and PT KPC agreed to terminate the Framework Agreement. According to PT KPC, they preferred doing so "rather than to seek to formally overturn the District Court ruling" (KPC Mem., ¶ 53).

2.2.3 Sale of the shares of PT KPC to Bumi and others

a) Sale to Bumi

53. Meanwhile PT Bumi Resources Tbk ("Bumi"), an Indonesian company, had expressed an interest in acquiring a 100% interest in PT KPC (Exh. BP/RT 280 and 84). Bumi had already expressed an interest in February 2002 and featured amongst the potential Indonesian Participants (Exh. BP/RT 165). Thus, between April and June 2003, BP and Rio Tinto commenced negotiations with Bumi for the sale of their entire interest in PT KPC (BP Mem., ¶ 81; Exh. BP/RT 288).

54. According to a notice sent by Rio Tinto to PT KPC on 6 August 2003, Bumi purchased all the shares of Sangatta Holdings Limited and Kalimantan Coal Limited for USD 500 million on 16 July 2003 (Exh. KPC 22). It thus became the owner of the two holding companies that owned the shares of PT KPC and thus the sole (indirect) shareholder of PT KPC.

55. BP and Rio Tinto contend that their involvement in the management and operations of PT KPC ceased on 10 October 2003 (BP Mem., ¶ 84).

b) Sale to the East Kutai Regency

56. On 13 October 2003, the District Government of Kutai Timur (i.e. the East Kutai Regency Government, C. CM., ¶ 35, p. 21) bought 18.6% of PT KPC's shares from Sangatta Holdings Limited and Kalimantan Coal Limited (now owned by Bumi) (Exh. KPC 23). The share purchase was approved by the House of People's Representatives of Kutai Timur in a resolution of 30 October 2003 (Exh. KPC 25), by the shareholders of PT KPC on 12 January 2004 (Exh. KPC 27), and by the Government on 12 March 2004 (Exh. KPC 29).

57. On 10 June 2004, the Regency of East Kutai transferred the right to purchase the shares so acquired to PT Kutai Timur Energi (Exh. KPC 32). Such transfer was challenged by the Claimant before the State Administrative Court of Samarinda in November 2004. The GPEK also brought the matter before the State Administrative Court of Jakarta to challenge the legality of the Government's approval of such transfer. These proceedings were dismissed for lack of jurisdiction.

58. On 21 February 2005, PT Kutai Timur Energi agreed to transfer 13.6% of the shareholding in PT KPC to Bumi because it was unable to pay for the shares. A share purchase agreement was entered into on 25 August 2005.[3] It appears from Bumi's information to its shareholders of May 2006 (Exh. C-110) that such transfer was approved by Bumi and by the Government in October 2005.

c) Sale to PT Sitrade Nusaglobus

59. On 10 March 2005, Sangatta Holdings Limited and Kalimantan Coal Limited sold a further 32.4% of PT KPC's shares to PT Sitrade Nusaglobus, an Indonesian Participant. The sale was approved by the Government on 24 June 2005 (Exh. KPC 43) and by the Investment Coordinating Board of the GOI on 15 August 2005 (Exh.

[3] According to the notes to Bumi's Consolidated Financial Statements for the year 2005 (point 4 quoted by the Claimant in C. CM., A ¶ 48, p. 27).

KPC 44). It was further approved by Bumi. The shares so acquired by PT Sitrade Nusaglobus were transferred to PT Sitrade Coal on 26 August 2005.

60. By letter dated 11 October 2005, the Minister of Energy and Mineral Resources approved the share divestment and summarized the then shareholdings in PT KPC (Exh. KPC 124). In a listing established by the Investment Coordinating Board on 17 October 2005 (Exh. KPC 125), PT Sitrade Coal does appear (with a USD 9,720,000.00 placement in equity), together with PT Kutai Timur Energi (USD 1,500,000 placement in equity), PT Sitrade Nusaglobus (USD 0 placement in equity), PT Bumi Resources Tbk (USD 4,080,000.00 placement in equity), Sangatta (USD 7,350,000 placement in equity) and Kalimantan Coal Limited (USD 7,350,000 placement in equity).

61. The Claimant challenges the validity and regularity of this transaction. It contends that there is neither evidence of payment, nor an approval by the general meeting of shareholders of Bumi (C. CM, A ¶ 42, ¶ 48, p. 28). It also stresses that 90% of PT Sitrade Coal is held by Bumi (C. CM, A ¶ 48, p. 29).

d) Sale to Tata Power

62. On 30 March 2007, Tata Power (Mauritius) Limited purchased a further 30% of PT KPC's shares from Sangatta Holdings Limited and Kalimantan Coal Limited. The Claimant considers this transaction irrelevant to the case (C. CM., A ¶ 46).

63. The Claimant views the current shareholding structure of PT KPC as follows (C. CM., ¶ 44): Kalimantan Coal Ltd and Sangatta each holding 50% of the shares of PT KPC (each of them being 100% owned by PT Bumi Resources Tbk). The PT KPC Respondents view it as follows (KPC Mem., ¶ 48): Kalimantan Coal Ltd and Sangatta each holding 9.5% of the shares of PT KPC (each of them being 100% owned by PT Bumi Resources Tbk), PT Sitrade Coal, PT Kutai Timur Energi, PT Bumi Resources Tbk, and Tata Power (Mauritius) Limited respectively holding 32.4%, 5%, 13.6% and 30% of the shares of PT KPC.

2.2.4 Proceedings before the Jakarta Courts

64. On 27 July 2005, the Claimant and its wholly owned subsidiary Perusahaan Daerah (Perusda) Melati Bhakti Satya initiated civil proceedings before the Central Jakarta District Court ("CJDC") against 14 defendants, including all of the Respondents in this arbitration, as well as the Minister of Energy and Mineral Resources, the Director General of Geology and Mineral Resources, and other government officials

of Indonesia (the Secretary General of the Department of Energy and Mineral Resources; the former Coordinating Minister for Economy; and the then Coordinating Minister for Economy). It requested payment of USD 774 million as a result of PT KPC's failure to sell to it or its subsidiaries 51% of its shares. The claim was brought on the ground of unlawful action (tort) pursuant to Article 1365 of the Indonesian Civil Code (C. CM., A ¶ 7).

65. Some of the defendants, including PT KPC, Sangatta, and Kalimantan Coal Limited, argued that the District Court lacked jurisdiction because Article 23 of the KPC Contract provided that any dispute between the Government and PT KPC was to be submitted to ICSID Arbitration (Judgment of the CJDC, Exh. C-14, p. 35). The rest of the defendants, including Rio Tinto, BP p.l.c., Pacific Resources Investments Limited and BP International Limited, relied on Article 23 of the KPC Contract as well as Clause 14 of the Framework Agreement, that also refers to "*arbitration/ICSID*" to support their objection of lack of jurisdiction. They argued that the "*Plaintiffs are part of the united Government of the Republic of Indonesia and is subordinate of the Central Government,*" which is bound by the KPC Contract (Judgment of the CJDC, Exh. C-14, p. 40). They also argued that the plaintiffs lacked the right, capacity, or authority to file a claim in relation to the KPC Contract or Framework Agreement, the party to the KPC Contract being the Government and its representative the Minister, not the GPEK. The Minister, the Director General and the other officials also relied on Article 23 of the KPC Contract referring to "*arbitration/ICSID*" for the settlement of disputes related to the KPC Contract to argue that the CJDC did not have jurisdiction to examine and adjudicate the claims submitted to it. They further argued that the administrative courts were not competent since they were acting as state officials in the divestment process.

66. On 8 March 2006, the CDJC dismissed the case for lack of jurisdiction on the basis of Article 23 of the KPC Contract (Exh. C-14). It noted that PT KPC and the Government had agreed that any dispute relating to the KPC Contract be submitted to ICSID arbitration. It further observed that Article 1.8 of the KPC Contract included "Provincial or District Authorities" as part of the definition of "Government," and that such expression included in turn the GPEK (Judgment of the CJDC, Exh. C-14, p. 54).

67. The Claimant brought an appeal to the Supreme Court of Indonesia on 19 July 2006 (Exh. KPC 66 = Exh. BP/RT 317). In its petition, it quoted the letters exchanged with ICSID in the course of the registration process and argued that the Respondents were challenging ICSID jurisdiction before the Centre. It also requested the

attachment of the shares of Sangatta, Kalimantan Coal Limited, and of the assets of Minister Yusgiantoro.

68. On 13 December 2007, the Supreme Court of Indonesia dismissed the appeal for lack of jurisdiction, finding, *inter alia*, (i) that the rights of PT Tambang Batubara Bukit Asam (Persero) were transferred on 7 October 1997 to the Government of the Republic of Indonesia; (ii) that such Government subsequently became party to the KPC Contract; and (iii) that on the basis of Article 23(1), any dispute arising from such Contract shall be settled "*through arbitration/ICSID.*"

II. PROCEDURAL HISTORY

1. INITIAL PHASE

69. On 5 April 2006, the Claimant filed a Request for Arbitration (hereinafter also referred to as the "Request" or "RA") with the International Centre for the Settlement of Investment Disputes ("ICSID" or the "Centre"), accompanied by 4 exhibits (Exh. RA. C-1 to C-4). In the Request, the Claimant invoked the provisions of the KPC Contract and sought the following relief:

> As result of Respondents' default in the performance of its (their) obligations under KPC CONTRACT and also violation of Law on Foreign Investment and Decisions of the Government of the Republic of Indonesia, Claimant has to incur damages *inter alia* in the form of loss of revenue/income from dividend which has been or will be distributed by PT KALTIM PRIMA COAL, which should have been received by Claimant, if Respondents perform or complete the performance of PT KALTIM PRIMA COAL's and RIO TINTO's and BP's (being "Foreign Investors" under KPC CONTRACT) obligation to divest 51% shares in PT KALTIM PRIMA COAL and to comply with the provisions of Article 26 of KPC CONTRACT in conjunction with the above mentioned Decisions of the Government of the Republic of Indonesia, as follow:
>
> (1) on the basis of data from Directorate of Coal, Directorate General of Geology and Mineral Resources, tabulated below [...]
>
> [Total of USD 144.18 million].
>
> (2) on the basis of projection of PT KALTIM PRIMA COAL's profit after tax for year 2001 until year 2010, which was prepared by Salomon Smith Barney, appraiser of PT KALTIM PRJMA COAL at the time it submitted the price of PT KALTIM PRIMA COAL shares to the Government of the Republic of Indonesia, as tabulated below [...]
>
> [Total USD 627.95 million]
>
> If Respondents perform or complete the performance of PT KALTIM PRIMA COAL's and RIO TINTO's and BP's (being "Foreign Investors" under KPC CONTRACT) obligation to divest

> 51% shares in PT KALTIM PRIMA COAL and to comply with the provisions of Article 26 of KPC CONTRACT in accordance with the above mentioned Decisions of the Government of the Republic of Indonesia, on which basis 31% shares in PT KALTIM PRIMA COAL has been allocated to Claimant, therefore the damages of Claimant shall at minimum be (US$ 144,180,000 + US$ 627,950,000) X 31/51 = US$ 469,333,921.56 (four hundred sixty nine million three hundred thirty three thousand nine hundred twenty one United States Dollars and fifty six cents). Claimant seek full compensation for such damages:
>
> - in the amount of US$ 469,333,921.56 (four hundred sixty nine million three hundred thirty three thousand nine hundred twenty one United States Dollars and fifty six cents);
> - interest on such sums from May 2003 (taking into account 3-month period for due diligence and acceptance as of the Decision of the Government of the Republic of Indonesia dated 31 October 2002 [the Minutes of Limited Coordination Meeting between Ministers [or Limited Inter-Ministers Coordination Meeting] dated 31 October 2002 mentioned above], and another 3-month period for completion as of the acceptance, both as regulated in Article 26 of KPC CONTRACT) until the date of payment; and
> - costs of attorneys, consultants, the arbitration panel, and such other losses and expenses as are legally allowable, together with such further and additional relief as the Arbitration Tribunal may deem appropriate. (RA, ¶ 17)

70. On 10 April 2006, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "ICSID Institution Rules"), acknowledged receipt of the Request and on 28 April 2006 it transmitted copies thereof to the Respondents.

71. On 18 January 2007, the Secretary-General of the Centre registered the Request for Arbitration, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"). On the same date, in accordance with ICSID Institution Rule 7, the Secretary-General notified the Parties of the registration of the Request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

72. The Parties agreed pursuant to Article 37(2)(a) of the ICSID Convention that the Tribunal would be constituted of three arbitrators, with each party appointing an arbitrator, and the two party-appointed arbitrators subsequently designating the president. On 30 January 2007, the Claimant appointed Mr. Michael Hwang, a national of Singapore. On 17 February 2007, the Respondents appointed Prof. Albert Jan van den Berg, a national of The Netherlands. The two party-appointed arbitrators agreed to appoint Prof. Gabrielle Kaufmann-Kohler, a national of Switzerland, as the President of the Tribunal.

73. On 12 April 2007, the Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointment and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. The Parties were informed by the same letter that Mrs. Claudia Frutos-Peterson, ICSID Counsel, would serve as Secretary to the Tribunal. Subsequently, Mrs. Claudia Frutos-Peterson was replaced by Mr. Ucheora Onwuamaegbu, ICSID Senior Counsel, as the Secretary to the Tribunal.

74. On 26 April 2007, the BP/Rio Tinto Respondents raised jurisdictional objections and made an application pursuant to ICSID Arbitration Rule 41(5) to the effect that the Arbitral Tribunal determine that the Request was manifestly without legal merit.

75. On 13 June 2007, the Tribunal held its first session in London (hereinafter referred to as the "First Session"). At the outset of the session, the Parties expressed their agreement that the Tribunal had been duly constituted (ICSID Arbitration Rule 6) and stated that they had no objections in this respect. The Parties agreed that, pursuant to Article 44 of the ICSID Convention, the proceedings would be conducted in accordance with the ICSID Arbitration Rules in force since 10 April 2006. It was also decided that the language of the proceedings would be English and that the place of arbitration would be Washington, D.C. The BP/Rio Tinto Respondents withdrew their application under ICSID Arbitration Rule 41(5) at the hearing. Accordingly, a timetable was agreed upon to deal with the objections to jurisdiction. An audio recording of the session was later distributed to the Parties. Minutes were drafted and signed by the President and the Secretary of the Tribunal, and sent to the Parties on 13 July 2007.

2. WRITTEN PHASE ON JURISDICTION

76. In accordance with the timetable agreed during the First Session, on 31 August 2007 the KPC Respondents submitted their Objections to Jurisdiction (KPC Mem.), accompanied by 112 exhibits (Exh. KPC 1 to Exh. KPC 112) and legal authorities (LA. KPC A to LA. KPC V).

77. On the same date, the BP/Rio Tinto Respondents submitted their Memorial on Jurisdiction (BP Mem.), accompanied by 319 exhibits (Exh. BP/RT 1 to Exh. BP/RT 319) and legal authorities (LA. BP/RT 320 to LA. BP/RT 326). A witness statement by Mr. Stephen Creese, General Counsel of Rio Tinto Limited, was attached to the Memorial.

78. The Claimant submitted its Counter-Memorial on Jurisdiction on 22 November 2007 accompanied by 98 exhibits (Exh. C-1 to C-98). No witness statements or expert opinion were appended to it.

79. The KPC Respondents filed their Rebuttal to Claimant's Counter-Memorial ("KPC Reply") and the BP/Rio Tinto Respondents their Rebuttal Submissions ("BP/RT Reply") on 20 December 2007.

80. The Claimant filed a submission on Indonesian law ("C. Reply") on 17 January 2008 with Exhibits C-99 to C-116.

3. HEARING ON JURISDICTION

81. On 27 and 28 February 2008, the Arbitral Tribunal held a hearing on jurisdiction in Singapore. With the agreement of all involved, this location was chosen for reasons of convenience and cost reduction. In addition to the Members of the Tribunal and the Secretary, the following persons attended the hearing:

(i) **On behalf of the Claimant:**

Mr. P.D.D. Dermawan, DNC Advocates at work

Mrs. Kirana Diah Sastrawijaya, DNC Advocates at work, assistant

Ms. Khairunusa Dhyani, DNC Advocates at work, secretary

(ii) **Claimant's observers**

Mr. Laden Mering, Chief of Daya Tribes

Mr. Abraham Ingan, Chief of Indigenous Youth of Kalimantan

Prof. Sarosa Hamung Pranoto, former Rector of Mulawarman University

Mr. Muhamad Amir, former Chairperson of Indonesian Youth National Committee, East Kalimantan chapter

Mr. Hamdani Bachtam, Secretary of Indigenous Youth of Kalimantan

Mr. Isran Noor, Deputy and acting Regent of East Kutai

Mr. Budi Surjono, staff of Deputy Regent of East Kutai

Mrs. Eka Komariah Kuncoro, Senator of East Kalimantan

Mr. Ridwan Suedi, Regent of Pasir

Mr. Thariq Mahmud, member of the public

Mr. Adrianto Supoyo, member of the public

Mr. Alvin Arifin, member of the public

Mr. Muhammad Rustam, representative from the non-indigenous group of people of East Kutai

Mr. Mohammad Jono, representative from the non-indigenous group of people of East Kutai

Mr. Ardiansah Sulaiman, Deputy Speaker of the Regional House of People's Representatives of East Kutai

Mr. Marden Assa, member of the Regional House of People's Representatives of East Kutai and representative from Daya people of East Kutai

Mr. Yuwanto Soemadji, Head of Division of Mining of the Regency of Berau

Mr. Ismail Thomas, Regent of West Kutai

Mr. Aji Pangeran Poeger, Prince of the Sultanate of Kutai

Mr. Arifin Praboe, Crown Prince of the Sultanate of Kutai

Mr. Nur Andriyani, Senator of East Kalimantan

Mrs. Marwah Batubara, Senator of DKI Jakarta

Mrs. Rina Laden

Ms. Marthine Pauline Berendine, National University of Singapore

(iii) **On behalf of the KPC Respondents:**

Mr. Michael P. Lennon, Jr., Baker Botts (UK) LLP

Ms. Ania Farren, Baker Botts (UK) LLP

Mrs. Jane Dowling, Baker Botts (UK) LLP

Mr. Carlo Verona, Baker Botts (UK) LLP

Ms. Ibu Yanti Sinaga, PT Bumi Resources Tbk

Mr. Muhammad Sulthon, PT Bumi Resources Tbk

Ms. Yossintana Caroline, PT Bumi Resources Tbk

Mr. Aji Wijaya, Sunarto Yudo & Co

Mr. Eresendi Winaharta, Sunarto Yudo & Co

(iv) **On behalf of the BP/Rio Tinto Respondents:**

Mr. Matthew Weiniger, Herbert Smith LLP

Ms. May Tai, Herbert Smith LLP

Mr. Iain Maxwell, Herbert Smith LLP

Mr. Gary Hodgson, BP p.l.c.

Mr. Stewart Jones, BP p.l.c.

Mr. Trudy Steedman, Rio Tinto

Mr. David Dawborn, Hiswara Bunjamin & Tandjung

Mr. Mulya Lubis, Lubis Santosa & Maulana

Mr. Alexander Lay, Lubis Santosa & Maulana

Mr. Mike Jolley, Rio Tinto

Mr. Pradakso Hadiwidjojo, BP Indonesia

(v) **Other observers**

Mr. Ruston Situmorang, Ministry of Energy and Natural Resources of the Government of the Republic of Indonesia

82. The jurisdictional hearing was tape-recorded, a *verbatim* transcript was made and delivered to the Parties (Tr.).

4. POST-HEARING PERIOD

83. On 10 April 2008 the Parties submitted their Post Hearing Briefs, followed by their statements of costs on 24 April 2008.

84. In a letter of 24 June 2008 to ICSID, Drs Yurnalis Ngayoh wrote that "in [his] capacity acting as the Governor of, and therefore on behalf of the Government of the Province of East Kalimantan as the Claimant hereby revoke the ICSID Case No. ARB/07/03, as submitted by our legal counsel, P.D.D. Dermawan of DNC Advocates at Work […]." He further requested that the "subject case [be] deleted from the registration book and files of International Centre for Settlement of Investment Disputes ('ICSID')" (the "Revocation Letter"). Attached to this letter was a second letter entitled "Cancellation of Power of Attorney" in which the "Government of the Province of East Kalimantan ('East Kalimantan Government') hereby cancels and declares null and void all parts of the power of attorney from East Kalimantan Government to PDD Dermawan, SH, lLM, Ibrahim Senen, SH, lLM, and M. Arie Armand, SH, LL.M (jointly referred to as 'Former Attorney-in-Fact') dated 8 March 2006 in relation to the case ARB/07//03 registered at the International Centre for Settlement of Investment Disputes (ICSID)" (the "Cancellation Letter").

85. On 16 July 2008, ICSID requested the Claimant to confirm that the Revocation Letter was a request pursuant to ICSID Arbitration Rule 44, i.e., a request for the discontinuance of the arbitration.

86. In a letter dated 17 July 2008 to ICSID, Mr. Dermawan contended that the letters sent by Drs Yurnalis Ngayoh were invalid and had no legal effect. Attached to Mr. Dermawan's letter was the latter's original Power of Attorney, a letter sent by Drs Yurnalis Ngayoh to the House of People Representatives East Kalimantan Province, as well as two newspaper articles regarding the expiration of the term of Drs Yurnalis Ngayoh as Governor of East Kalimantan on 25 June 2008. Mr. Dermawan then followed up on this letter on 25 July 2008 mainly disputing the official nature of the Revocation Letter and submitting selected provisions of the *Regulation of the Minister of Domestic Affairs Number 2 Year 2005 Regarding Guidelines for Order of Official Documents within the Provincial Governments* (the "Minister Regulation 2/2005").

87. In the meantime, on 18 July 2008, the Arbitral Tribunal invited Drs Yurnalis Ngayoh to comment on Mr. Dermawan's letter of 17 July 2008. In his reply of 31 July 2008,

Drs Yurnalis Ngayoh presented his observations and admitted that he no longer held the position of Governor of East Kalimantan.

88. On 4 August 2008, the Arbitral Tribunal invited the Respondents to present their comments. Ten days later, the KPC Respondents accepted "the Government of the Province of East Kalimantan's request for discontinuance of this arbitration proceeding contained in Claimant's 24 June 2008 letter of Drs Yurnalis Ngayoh, Governor of the Province."

89. The BP/Rio Tinto Respondents reacted on the same day and stated that they did "not feel that it [was] appropriate for them to comment on the letter" as "[t]he issues raised are internal issues of Indonesian law and domestic politics for those who govern East Kalimantan."

90. On 15 August 2008, Mr. Dermawan commented on the Respondents' letters, objecting to the arguments raised and the opinion submitted by the KPC Respondents. Furthermore, Mr. Dermawan drew attention to the fact the Government of the Province of East Kalimantan had not confirmed the Revocation Letter as requested in the Tribunal's letter of 16 July 2008.

91. On 28 August 2008, the Tribunal issued Procedural Order No. 3 noting the KPC Respondents' acceptance of the discontinuance pursuant to ICSID Arbitration Rule 44. The Tribunal invited the BP/Rio Tinto Respondents to state whether they opposed the discontinuance of the arbitration.

92. On 3 September 2008, the BP/Rio Tinto Respondents confirmed that they did not object to the discontinuance of the proceedings pursuant to ICSID Arbitration Rule 44.

93. On 5 September 2008, the Tribunal received another letter from Mr. Dermawan with eight attachments requesting the cancellation of Procedural Order No. 3, the issuance of a decision on jurisdiction, and the joinder of the Regency of East Kutai as a party to the arbitration. Among the attachments, the Tribunal received two copies of a letter from the Regency of East Kutai to ICSID, both copies dated 29 August 2008. In their letter, the Vice Regent of East Kutai, Ir. H. Isran Noor, M. Si, "confirmed that the result of the Meeting between Acting Governor of East Kalimantan, Ir. Tarmizi A. Karim, MSc; Legal Counsel of the Government of East Kalimantan and Legal Counsel of the Government of the Regency of East Kutai, P.D.D. Dermawan and Acting Regent of East Kutai" was that

(i) the letter sent by Drs Yurnalis Ngayoh on 24 June 2008 regarding the revocation of this arbitration could not be confirmed as it did not conform to the applicable regulations;

(ii) "the Government of the Province of East Kalimantan still continues and is applicant party, together with the Government of the Regency of East Kutai, in ICSID arbitration case No. ARB/07/03, until there is definitive decision from the elected Governor of East Kalimantan;"

(iii) all administrative matters "relating to the joint claim interests in the said ICSID arbitration case" would be handled through the Government of the Regency of East Kutai.

94. As a consequence, the Tribunal requested the Acting Governor of the Province of East Kalimantan to confirm by 26 September 2008 whether the Claimant wished to continue or discontinue the arbitration proceedings.

95. Following a reminder from the Tribunal, Mr. Dermawan informed the Tribunal on 10 October 2008 of various political developments, including the fact that a second round of elections for Governor of the Province of East Kalimantan was to take place in late October 2008. Pending such elections, the Tribunal decided to stay the proceedings until 15 November 2008, when the Parties were requested to report on the status.

96. On 18 November 2008, the Tribunal received an email dated 16 November 2008 from Mr. Dermawan with a status report, including 12 newspaper articles. The email stated that a new Governor for the Province of East Kalimantan, Mr. Awang Farouk Ishak, had been announced on 7 November 2008, and that his inauguration would possibly take place in December 2008. The newspaper articles attached to the email from Mr. Dermawan referred to the effects of the current market crisis on the share prices of PT Bumi Resources Tbk. In the email, Mr. Dermawan also alleged that "Bumi's debacle reveals (for the first time, in public news) who [Bakrie[4] really is] and what kind of things [Bakrie can do with {in particular, the current} government/administration], the 'who and what' we fight against, and the 'who and what' BP and Rio Tinto know about and that is their main reason to 'sell' 100% of PT KPC at USD 500 million to Bumi."

[4] Mr. Bakrie is the controlling shareholder of Bumi.

97. In a letter dated 21 November 2008, the Claimant's attorneys advised that they "hereby declare [their] renunciation of the mandates granted to [them] under those Powers of Attorney [from the GPEK]."

98. In a letter of the same date, the KPC Respondents requested the Tribunal to discontinue the arbitration, as the "last communication […] received from an authorised representative of the Provincial Government of East Kalimantan" was from Drs Yurnalis Ngayoh on 24 June 2008. In addition, neither Claimant nor Mr. Dermawan "submitted any document to suggest that the Provincial Government did not knowingly and willingly request discontinuance." The KPC Respondents requested discontinuance, "notwithstanding the Tribunal specifically requesting such a communication from Drs Ngayoh's successor addressing the point."

99. On 10 December 2008, the Tribunal was informed of exchanges of email correspondence between ICSID and Mr. Dermawan, concerning (i) an email received from Mr. Dermawan on 24 November 2008 entitled "amicus curiae"; and (ii) a letter received from the newly elected Governor of the Province of East Kalimantan dated 14 November 2008. In this letter, the Governor of the Province of East Kalimantan confirmed that "1) The government of the Province of East Kalimantan continues and is the requester, together with the government of the District of East Kutai in the case of the International Centre for Settlement of Investment Disputes Arbitrary [*sic*] Case, number ARB/07/03; 2) Mr. P.D.D. Dermawan who has been officially appointed to represent the Provincial Government of East Kalimantan in the court of law, is still representing the Provincial Government of East Kalimantan in the case of the International Centre for Settlement of Investment Disputes Arbitrary Case, number ARB/07/03."

100. As a result, the Tribunal invited the Claimant to submit a confirmation that it did not wish to discontinue the case once the newly elected Governor had taken office.

101. In a letter dated 9 January 2009, the Claimant confirmed that "the East Kalimantan provincial government will continue to proceed with and act as petitioner jointly with the government of East Kutai regency in ICSID Arbitration Case No. ARB/07/03" and that "Mr. P.D.D. Dermawan and associates, whom [*sic*] were named the legal counsel of the East Kalimantan provincial government are to remain the legal counsel of the East Kalimantan provincial government in ICSID arbitration case No. ARB/07/03."

102. On 23 January 2009, the BP/Rio Tinto Respondents indicated that they were "not in a position to challenge Mr. Dermawan's position as legal representative for Claimant in this arbitration" and that "all the previous jurisdictional and other objections of the BP and Rio Tinto Respondents remain."

103. On the same day, the KPC Respondents wrote that they did not "wish to burden these proceedings at this time with further submissions, evidence or hearings on issues concerning discontinuance pursuant to ICSID Arbitration Rules 43 and 44." They added that "in the interests of simplicity, expediency and finality, KPC Respondents request that the Tribunal lift the stay and promptly proceed to issue a decision on jurisdiction."

104. Accordingly, the Arbitral Tribunal decided to lift the stay of the proceedings. By letter dated 27 January 2009, ICSID notified the Parties that in conformity with the positions they had expressed in the recent correspondence, the Tribunal would proceed to rule on its jurisdiction.

105. On 25 and 27 February 2009, whilst working on its determination on jurisdiction, the Tribunal wrote to the Parties with reference to the Decision handed down by the Supreme Court of Indonesia on 13 December 2007, inviting them to submit any comments they may have on the said decision.

106. The KPC Respondents and the BT/Rio Tinto Respondents filed their respective comments simultaneously by letters dated 20 March 2009. The Claimant filed no further submission on the contents of the decision.

107. On 4 December 2009, ICSID wrote to the Parties that the proceedings were closed as of such date.

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108. The Tribunal has deliberated and considered the Parties' pre-hearing submissions, their oral arguments delivered in the course of the jurisdictional hearing, and their post-hearing memorials and later submissions and correspondence. In the following sections, it will first summarize the Parties' positions, then analyse such positions, and finally set forth its conclusion on jurisdiction.

III. POSITIONS OF THE PARTIES

1. RESPONDENTS' POSITIONS

1.1 KPC Respondents

109. In their written and oral submissions, the KPC Respondents have put forward two main contentions:

(i) The Claimant is not a Contracting State or a designated subdivision of a Contracting State;

(ii) The dispute is not a legal dispute, the Claimant not even being a party to the KPC Contract.

110. First, according to the KPC Respondents, the Claimant is not a Contracting State. It is not a designated subdivision of a Contracting State either. A province can be considered as a subdivision of a State, but it must be designated as such (KPC Mem., ¶¶ 65-73, relying on *Cable TV v. St Kitts and Nevis (ICSID Case No. ARB/95/2)*).

111. Further, the KPC Respondents contend that this is an objective jurisdictional requirement that cannot be bypassed (KPC Mem., ¶ 79). There is no principle allowing a tribunal to interpret Article 25 of the ICSID Convention broadly, liberally or in *favorem jurisdictionis* (KPC Reply, ¶ 10). Compliance with Article 25 is a question of international law. Matters of consent must be resolved by applying international law, not private law (KPC Mem., ¶ 90, relying on *CSOB v. Slovak Republic (ICSID Case No. ARB/97/4)* and *Banro American Resources v. Democratic Republic of the Congo (ICSID Case No. ARB/98/7)*). Consent must be explicit (KPC Reply, ¶ 13).

112. The KPC Respondents submit that the Republic of Indonesia has not approved the submission of GPEK's claims to ICSID. On the contrary, according to the KPC Respondents, the Republic of Indonesia has disapproved the submission to ICSID (Exh. KPC 9). No approval was obtained from the "Regional House of Peoples Representative for the East Kalimantan Province," which refused to fund the arbitration (Exh. KPC 1) (KPC Mem., ¶ 77; KPC Reply, ¶ 57).

113. In addition, the KPC Respondents contend that the GPEK cannot step into the shoes of the Government. The Government's authority has never been delegated to GPEK (KPC Reply, ¶ 15). The GPEK is not generally authorised to act on behalf of the Government. The Province's authority derives from Law No. 32 of 2004 (LA.

KPC L) and it is subordinate and accountable to the Government (KPC Mem., ¶ 84). Indonesia has not authorised the GPEK to act on its behalf (Exh. KPC 69).

114. Furthermore, the KPC Respondents submit that the GPEK cannot designate itself to the Centre by submitting a claim to ICSID (KPC Reply, ¶ 55). It is not allowed to represent the Government in matters of KPC's share divestment, even as an offeree of the 2001 Offer (KPC Reply, ¶ 21). None of the documents invoked by the Claimant support its position that it can put itself in the shoes of the Government with regard to divestment or dispute resolution. According to the KPC Respondents, if the GPEK had the shares, it would have become a shareholder, and nothing more (KPC Reply, ¶ 33). The Ministry of Energy and Mineral Resources has twice confirmed in writing that the "GPEK has no authority to bring these specific proceedings on behalf of the GOI" (KPC Reply, ¶ 35, Exh. KPC 10 and 69).

115. Second, the KPC Respondents contend that the dispute is a political one for which no consent was given: "*The crux of* GPEK*'s claims is that the GOI somehow undertook to assign a portion of KPC shares to it, but then failed to carry out such assignment*" (KPC Mem., ¶ 95). In addition, there is no consent in writing since the GPEK is not a party to the KPC contract.

116. The KPC Respondents submit that the GPEK is not a third party beneficiary to the KPC Contract. Under Indonesian law, a third party cannot acquire rights under a contract to which it is not a party (Article 1340 Civil Code), except when the contract specifically benefits a third party who declares an intent to exercise the right before it is revoked (Article 1317 Civil Code) (KPC Mem., ¶ 104-105; KPC Reply, ¶ 36-40). The GPEK was not expressly designated as a third party beneficiary (KPC Mem., ¶ 106-109); it had no priority right (KPC Reply, ¶ 43); no assignment was ever made (KPC Reply, ¶ 46); there was no more than a provisional allocation of shares (KPC Reply, ¶ 46). The due diligence and the assignment process under the Framework Agreement were never completed to the satisfaction of the Government or KPC (KPC Reply, ¶ 46).

117. The KPC Respondents contend that, in any event, the GPEK never actually accepted the offer of the shares (Exh. KPC 10; KPC Reply, ¶ 46). On 31 July 2002, the "Provincial House of Representatives of East Kalimantan Province" objected to the provisional allocation of the shares decided by the Government (Exh. KPC 72). The GPEK sought to nullify the Framework Agreement that set out the agreed divestment process. The GPEK's refusal is also mentioned in a letter of the

Coordinating Minister for Economic Affairs of 31 December 2003 (KPC Mem., ¶ 111; Exh. KPC 74).

118. According to the KPC Respondents, the GPEK is not a third party under the Framework Agreement either (KPC Reply, ¶48-51); nor is it under the 2001 Offer (*ibidem*, ¶ 52). Moreover, its alleged status as a third party beneficiary cannot in any event establish jurisdiction (KPC Mem., ¶ 89; KPC Reply, ¶ 47).

119. Further, the KPC Respondents contend that the decision of the CJDC of 8 March 2006 is neither inconsistent with a finding that the ICSID tribunal has no jurisdiction, nor does it assist the GPEK in fulfilling the requirements of Article 25 of the ICSID Convention (KPC Mem., ¶ 115). Rather, the dismissal of the GPEK's claim by the Supreme Court of Indonesia supports the argument that there is no basis for jurisdiction by estoppel in the ICSID proceedings (letter of 20 March 2009).

120. On the basis of these arguments, the KPC Respondents request the following relief:

> KPC Respondents respectfully reiterate their request that the Arbitral Tribunal enter a decision:
>
> (i) That all of the GPEK's claims in these proceedings are outside the jurisdiction of ICSID and of this Tribunal;
>
> (ii) Ordering the GPEK to pay all of KPC Respondent's costs associated with these proceedings, including the arbitrators' fees and administrative costs fixed by ICSID, and the legal costs (including attorneys' fees) incurred by KPC Respondents, in an amount to be quantified; and
>
> (iii) Ordering any other relief that the Tribunal sees fit.
>
> (KPC PHM, ¶ 89)

1.2 BP/Rio Tinto Respondents

121. In their written and oral submissions, the BP/Rio Tinto Respondents have put forward five main contentions:

(i) The Claimant is not a Contracting State or a designated subdivision of a Contracting State;

(ii) The Claimant is not a party to any ICSID consent agreement;

(iii) The Republic of Indonesia has never given its approval for the Claimant to consent to ICSID arbitration;

(iv) The BP/Rio Tinto Respondents have not consented in writing to submit the dispute with the Claimant to ICSID arbitration; and

(v) The Claimant lacks standing to bring the present proceedings.

122. First, the BP/Rio Tinto Respondents submit that the jurisdiction of the Centre extends to a constituent subdivision or agency of a Contracting State provided that the latter has been designated to the Centre by the State (BP/RT Mem., ¶ 103). This requirement of Article 25 of the ICSID Convention is further mentioned in ICSID Institution Rule 2(1)(b). The GPEK is not a Contracting State. Indonesia is a unitary State in which regional governments remain subordinate and accountable to the central government (BP/RT Mem., ¶ 107-108). Designation must be made in writing and the GPEK was not designated to the Centre by the State. Indonesia has confirmed that the GPEK was never authorized to file an arbitration (Exh. BP/RT 298). Relying on *Cable TV v. St Kitts and Nevis* and *Amco v. Indonesia (ICSID Case No. ARB/81/1)* (designation of PT Wisma), the BP/Rio Tinto Respondents submit that the designation requirement is mandatory (BP/RT Mem., ¶ 129).

123. Second, the BP/Rio Tinto Respondents contend that the Claimant is not a party to any ICSID consent agreement, be it the KPC Contract or the Framework Agreement. Only the Government is party to the KPC Contract by the effect of the assignments that took place in 1991 and 1997. The definition of government contained in Article 1.1 of the KPC Contract has no bearing on who is a proper party to the Contract since this question is determined conclusively by the 1997 amendment (BP/RT Mem., ¶ 137). In 1997, the KPC Contract was formally assigned to Indonesia, represented by the Minister of Energy and Mineral Resources.

124. Further, the BP/Rio Tinto Respondents submit that the Claimant is not an assignee of shares in PT KPC. The conditions for an assignment were not met (BP/RT Reply, ¶ 46). The Government did not assign its shares on time to the Claimant (BP/RT Reply, ¶ 87).

125. Additionally, the BP/Rio Tinto Respondents contend that the Claimant is not a third party beneficiary of the ICSID consent agreement either. Under Article 1137 of the Indonesian Civil Code, for a third party beneficiary right to arise, a promise made must be in the interest of the third party and the latter must have declared its intention to make use of such right, which the Claimant never did. On the contrary, it sought to annul the Framework Agreement (BP/RT Reply, ¶ 86). In any event, Article 23 of the KPC Contract does not confer the right to arbitrate disputes to any

third parties (BP/RT Mem., ¶ 140). Even if the Claimant had become a shareholder, it would not have become a party to the KPC Contract. Even if it were a third party, it would have only benefited from a right to purchase the shares, not from the entire contract (BP/RT Reply, ¶ 83). Indeed, "*Indonesian law does not automatically make a third party beneficiary a party to the contract generally*" (idem).

126. According to the BP/Rio Tinto Respondents, the Claimant cannot rely on the Framework Agreement. This agreement does not confer any benefit on the Claimant (BP/RT Mem., ¶ 147). The only third party beneficiaries under Clause 14.1 of the Framework Agreement are the BP and Rio Tinto groups and parties related to them (BP/RT Mem., ¶ 151). Given that the Claimant sought to annul the Framework Agreement, it is estopped from or has waived any right to rely on it (BP/RT Mem., ¶ 153).

127. In addition, the BP/Rio Tinto Respondents submit that the judgment of the CJDC does not assist the Claimant either. The Court lacked jurisdiction not just because of the arbitration clause, but also because the Claimant lacked standing to represent the Government in relation to the KPC Contract (BP/RT Mem., ¶ 156). The Supreme Court of Indonesia confirmed the judgment of the CJDC and the submissions of the BP/Rio Tinto Respondents by finding that the CJDC did not have jurisdiction over the claim and that the Claimant did not have standing to benefit from the arbitration agreement in the KPC Contract (BP/Rio Tinto's letter of 20 March 2009).

128. Third, according to the BP/Rio Tinto Respondents, Article 25(3) of the ICSID Convention states that consent by a subdivision or agency requires the approval of the State unless the State otherwise notifies the Centre. This is an additional requirement (BP/RT Mem., ¶ 160). Indonesia never agreed to the Claimant's consenting to ICSID arbitration. Indonesia has confirmed this fact in a letter (Exh. BP/RT 298).

129. Fourth, the BP/Rio Tinto Respondents submit that they have never consented in writing to submit any dispute with the Claimant to ICSID. They have consented to ICSID arbitration in the Framework Agreement, which does not extend to third parties. Consent to ICSID arbitration is not to be interpreted *in favorem jurisdictionis* (BP/RT Mem., ¶ 175-176). The BP/Rio Tinto Respondents have held a consistent position since their demurrer in the 2005 Jakarta litigation. The 15 July 2002 press release on which the Claimant relies does not establish the consent of the BP/Rio Tinto Respondents. The 2001 Offer was subject to the requirements of the Framework Agreement (BP/RT Reply, ¶ 62).

130. Fifth and last, the BP/Rio Tinto Respondents dispute the Claimant's standing in this arbitration. They contend that the Claimant has no standing to bring the ICSID proceedings, not being a third party beneficiary. They further argue that Governor Suwarna and the Claimant's counsel have no authority to represent the Claimant. They submit that Governor Suwarna has been suspended from his duties and convicted on corruption charges. According to the BP/Rio Tinto Respondents, he is likely to be dismissed as governor (BP/RT Reply, ¶ 99). They thus question the authority of Governor Suwarna to represent the Claimant and to empower Claimant's counsel to continue the proceedings. They also question the funding of the arbitration, which was not authorized by the Regional House of Representatives of East Kalimantan (BP/RT Reply, ¶ 111).

131. On the basis of these arguments, the BP/Rio Tinto Respondents request that the Tribunal:

> (1) declare that it has no jurisdiction over the Claimant's claims filed by its Request for Arbitration dated 5 April 2006;
>
> (2) order that the Claimant shall pay the BP/Rio Tinto Respondents' legal and other costs of these proceedings; and
>
> (3) order any other remedy the Tribunal deems appropriate.
>
> (BP/RT PHB, ¶ 108)

2. CLAIMANT'S POSITION

132. First, relying on *Amco v. Indonesia*, the Claimant submits that the interpretation of an agreement which refers to ICSID arbitration must not be too formalistic. It further argues that the principle *in favorem jurisdictionis* applies to arbitration under the ICSID Convention (C. CM., A[5] ¶ 56). An arbitration agreement should be construed in good faith and "*by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged*" (quoting *CSOB v. Slovak Republic*) (C. CM., A ¶ 90).

133. According to the Claimant, whether the parties have expressed their common intent within the meaning of the ICSID Convention is not governed by international law (C. CM., A ¶ 59).

134. Second, in order to bring this dispute under the jurisdiction of the ICSID Tribunal, the Claimant argues that it only needs to be either the representative or a "designate" of

[5] The Claimant has divided its Counter-Memorial into section A: answers to KPC Respondents and section B: answers to BP/Rio Tinto Respondents.

Indonesia (C. CM, A ¶ 66). It steps in the shoes of the Government by representing the Republic of Indonesia as a Contracting State (C. CM., A ¶ 62; C. Reply, ¶ 25). Alternatively or cumulatively, as a constituent subdivision or agency of the Republic of Indonesia designated to ICSID, it acts as a "designate" of the Republic of Indonesia.

135. The Claimant also invokes the right of substitution allegedly provided in Article 2 of Indonesian Law No. 5 of 1968 (C. CM., ¶ 63 ; C. Reply, ¶ 26), which reads as follows:

> The Government has the authority to give consent that a dispute regarding investment between the Republic of Indonesia and Nationals of other States is settled in accordance with the [ ] Convention and to represent the Republic of Indonesia in such dispute with right of substitution. (Exh. C-64)

136. Further, the Claimant contends that the GOI and the Claimant are third party beneficiaries under the KPC Contract, since both are identified as parts of the "Government" under Article 1.8 of the Contract (C. CM., A ¶ 67). The benefits of the Contract passed to the Claimant with all their inherent characteristics and attributes (C. CM., A ¶ 67).

137. Also, the Claimant submits that no legal provision was adduced by the Respondents to establish that a province is subordinate and accountable to the GOI, the President, and relevant Ministers (C. CM., A ¶ 84; B ¶ 21). None of the provisions of Law No 32/2004 suggests such interpretation (C. CM., ¶ 84; C. Reply, ¶¶ 44-45). On the contrary, Article 42(1)(f) and (g) of Law No. 32/2004 authorizes the GPEK to enter into international obligations. In addition, the Claimant is authorized to represent the GOI in connection with the 2001 Offer, as it "does not bring this legal claim on behalf of GOI as Authority or as Counterparty" (C. CM., A ¶ 85).

138. Third, the Claimant contends that, as an alternative or an additional element, the Claimant is a constituent subdivision or agency designated to the Centre (C. CM., A ¶ 62). The Republic of Indonesia designated the GPEK as evidenced by the 30 July 2002 Minutes of Limited Cabinet Meeting, the 31 October 2002 Minutes of Limited Coordination Meeting between Ministers, and the Framework Agreement (C. CM., A ¶ 67; C. Reply, ¶ 23).

139. According to the Claimant, designation need not be made in any particular form (C. CM., A ¶ 70); it only needs to be communicated to the Centre in writing (C. CM., A ¶ 70). The designation was communicated in writing to the Centre when the Request for Arbitration was submitted to the Centre (C. CM., A ¶ 73). The Claimant argues

that, as the GOI's assignee, it has the capacity to act as representative of the GOI, and hence to make such a communication to the Centre. The Claimant cannot expect any cooperation or assistance from the GOI or the Minister "due to their collusion with the Respondents" (C. CM., A ¶ 70). It further explains that "[*f*]*or the sake of reasonableness and equity, and due to peculiarity (extreme circumstances, due to collusion and corruption) of this case, Claimant begs for exemption to strict application of such requirement*" (C. CM., A ¶ 73).

140. Fourth, the Claimant submits that it is party to the KPC Contract in its capacity as third party in accordance with Articles 1340 and 1317 of the Indonesian Civil Code[6] (C. CM., A ¶ 104-105) with limited rights (i.e., only in respect of its benefits in Article 26 of the KPC Contract, and without the right to termination, C. Reply, ¶ 27). By becoming a party to the KPC Contract, the GPEK became a party to the "ICSID consent agreement" (C. CM., B ¶ 5; see also diagrams C. Reply, ¶¶ 11 and 17).

141. The Claimant contends that it "*has been designated as offeree*" and accepted the offer. It has thus "*become a party to KPC Contract entitled to enforce the rights thereunder and under the 2001 Offer in accordance with the provisions therein. Therefore, Claimant is party to the ICSID consent agreement contained therein*" (C. Reply, ¶ 30). In the same vein, the Claimant submits that contrary to what the Respondents assert, Clause 2.3 of the Framework Agreement is not a stipulation for the benefit of third parties (C. Reply, ¶ 67).

142. Fifth, the Claimant submits that "*by approving the 2001 Offer containing ICSID arbitration agreement and then by passing on the 2001 Offer to Claimant, GOI has given its approval for Claimant to consent to (such agreement for) ICSID arbitration*" (C. Reply, ¶ 31).

143. According to the Claimant, the GOI has not only designated the Claimant, it also approved the submission of the Claimant's case to ICSID as evidenced in Attachment A to the Framework Agreement which contains the ICSID clause (C. CM., A ¶ 74).

144. In addition, the Government officials in the proceedings before the CJDC argued that the Claimants' claims belonged to ICSID Arbitration (C. CM., A ¶ 74). The Government has thereby approved the Claimant's course of action.

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[6] Extracts of the Indonesian Civil Code appear under LA. KPC BB.

145. The Claimant also asserts that the BP/Rio Tinto Respondents consented to the arbitration: PT KPC is only "*a conduit of BP/Rio Tinto Respondents, through which BP/Rio Tinto Respondents made their investment*," any written consent given by PT KPC "*is deemed to be given by BP/Rio Tinto*" (C. CM., B ¶ 5).

146. In addition, the Claimant contends that, in making the 2001 Offer and in agreeing to any arbitration agreement in respect of the 2001 Offer, "*KPC is agent for – and thus acting for and on behalf of BP/Rio Tinto Respondents*" (C. Reply, ¶ 32).

147. Sixth, the Claimant puts forward that a legal dispute exists over the non-performance of the KPC Contract (C. CM., A ¶ 91), specifically about the enforcement and implementation of the following (C. CM., A ¶ 2) :

- Article 26 of the KPC Contract;
- The agreement on Shares Offering between PT KPC and the GOI as announced in PT KPC's press release of 15 July 2002 (Exh. C-6);
- The decision of the GOI recorded in the Minutes of Limited Cabinet Meeting of 30 July 2002 (Exh. C-7) to allocate 31% of KPC's shares to *inter alia* the GPEK;
- The offer for sale of 51% PT KPC's shares made on 31 July 2002;
- The decision of the GOI as evidenced in the Minutes of Limited Coordination Meeting of 31 October 2002 (Exh. C-9) to allocate 31% of the shares to the two local companies, i.e., the Perusdas referred to in paragraph 43.

148. The Claimant also submits that there is a "real political" disagreement with the GOI leading to court proceedings against certain officials (C. CM., A ¶ 97).

149. Finally, the Claimant contends that it has standing and that the Governor of the Province has authority to represent the Province and to appoint an attorney for its representation (Article 25 of Law No. 32 of 2004 (LA. KPC L)). Consequently, according to the Claimant, there is no requirement to obtain the approval of the Regional House of Peoples Representatives (C. CM., A ¶ 77; C. Reply, ¶ 50).

150. The Claimant also contends that the letter signed by Mr. Herlan Agussalim on behalf of the Regional House of People's Representatives of the Province of East Kalimantan and stating the latter's refusal to fund the ICSID proceedings (Exh. KPC 1) was in reality a personal letter from Mr. Agussalim to counsel for the KPC Respondents (Baker Botts) that, as such, does not bind the GPEK (C. CM., A ¶ 77).

The Claimant also questions the motivation of Mr. Agussalim, said to be influenced in favour of Bumi (C. CM., A ¶ 88). Furthermore, the origin of the funding of the proceedings is irrelevant (C. CM., A ¶ 78).

151. In reliance on these arguments, the Claimant requests that the Tribunal uphold its jurisdiction over all its claims.

IV. ANALYSIS

1. INTRODUCTORY MATTERS

152. Before turning to the issues to be resolved, the Tribunal wishes to address certain preliminary matters, namely the joinder of the Regency of East Kutai to the proceedings (1.1), the relevance of previous decisions and awards (1.2), certain uncontroversial matters (1.3), and the law applicable to jurisdiction (1.4).

1.1 Joinder of the Regency of East Kutai to the proceedings

153. In its Counter-Memorial on Jurisdiction, the Claimant stated that "*the Government of the Regency of East Kutai wishes to join and participate in this* [*sic*] *proceedings together with Claimant*". It attached a "*Power of Attorney granted by the Government of the Regency of East Kutai to counsel for Claimant for said purposes*" (C-CM., p. 85). On 5 September 2008, it formally requested the Arbitral Tribunal to issue a "*decision on the requests of the Government of the Regency of East Kutai to join and participate in this arbitration proceeding under ICSID Arbitration Case No. ARB/07/03*." Moreover, in his letter of 9 January 2009, the Governor of East Kalimantan stated that "[t]*he East Kalimantan provincial government will continue to proceed with and act as petitioner jointly with the government of East Kutai regency in ICSID Arbitration Case No. ARB/07/03.*" The Claimant does not give any reasons or point to any legal basis in support of its request for a joinder.

154. In a letter of 23 January 2009, the KPC Respondents submitted that "*the Regency of East Kutai is not now and had never been a party to these proceedings*."

155. The present proceedings were initiated by the GPEK. The Regency of East Kutai is not named as a party in the Request for Arbitration. It does not appear in the Minutes of the First Session and has not participated as a party in these proceedings to this date.

156. Unlike other arbitration regimes,[7] the ICSID Convention and Arbitration Rules contain no provision on joinder of third parties to the proceedings. The question is thus whether the Tribunal is empowered to order a joinder within its general procedural powers pursuant to Article 44 of the ICSID Convention.

157. The Tribunal can dispense with deciding here whether such power exists against the will of certain of the existing parties to the proceedings. Even if it were to exist, it would not be justified to exercise it under the present circumstances. Indeed, the Tribunal considers that there are insufficient grounds to accept the joinder.

158. The GPEK does not substantiate its request for the joinder of the Regency of East Kutai. Hence, it is difficult for the Tribunal to discern the legal basis on which such a joinder might be admissible. In particular, there is no indication that the Regency complies with the jurisdictional conditions imposed by Article 25 of the ICSID Convention with respect to the expression and approval of consent, the qualification as a State subdivision or agency or its designation to the Center by the Contracting State. There is no indication either on the impact which the joinder would have on the other Parties to these proceedings. In addition, neither the Claimant nor the Regency have put forward any claim to which the Regency would be entitled and which may affect the outcome of this case.

159. In light of these reasons, the Tribunal decides not to accept the joinder of the Regency of East Kutai to the present proceedings.

1.2 The relevance of previous decisions or awards

160. In support of their positions, the Parties have relied on previous decisions or awards. The Tribunal considers that it is not bound by previous decisions.[8] At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to duly consider and possibly adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate

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7 E.g. Art. 22.1.h of the Rules of the London Court of International Arbitration and Art. 4 of the Swiss Rules on International Arbitration.

8 *See e.g.*, *AES Corporation v. Argentine Republic* (ICSID Case No. ARB/02/17), Decision on Jurisdiction of 26 April 2005 ¶¶ 30-32, *available at* http://ita.law.uvic.ca/documents/AES-Argentina-Jurisdiction_001.pdf.

expectations of the community of States and investors towards certainty of the rule of law.[9]

1.3 Uncontroversial matters

161. There is no dispute between the Parties as to the jurisdiction of this Tribunal to decide the jurisdictional challenges brought by the Respondents pursuant to Article 41 of the ICSID Convention.

162. It is also undisputed that four conditions must be met for the Tribunal to uphold its jurisdiction under Article 25 of the ICSID Convention, namely (i) the dispute must be between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State; (ii) the parties must have consented in writing to submit their dispute to ICSID arbitration; (iii) the dispute must be a legal one; and (iv) the dispute shall arise directly out of an investment. It is further common ground that any further conditions set out in any other instrument which is the basis of the Tribunal's jurisdiction, in particular the KPC Contract, must also be fulfilled.

1.4 Law applicable to jurisdiction

163. While the Parties agree that jurisdiction is subject to the four conditions of Article 25 of the ICSID Convention, they diverge on the law governing the Tribunal's jurisdiction. This is in particular so because their alleged consent is not based on a treaty but on an arbitration agreement which is part of a contract governed by national law, and more specifically by an alleged third party beneficiary right to such arbitration agreement.

164. The Claimant argues that "[t]*he question whether the parties'* [*sic*] *have adequately expressed their common will or intent, including their consent, to arbitration within the meaning of the Convention is a question that is not governed by international law*" (C. CM., ¶ 59). On their side, the KPC Respondents reply that the "*GPEK has provided no authority for its contention that Article 25 is not to be construed in accordance with international law. Its argument to that effect is without merit and shall be disregarded*. […] *This point is of particular importance regarding the requirement of consent in writing*" (KPC Reply, ¶¶ 11 and 13). The BP/Rio Tinto Respondents further contend that "[a]*s the Convention is an international treaty which determines the international law rights and obligations between Contracting*

[9] On the precedential value of ICSID decisions, *see* Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity or Excuse? Freshfields lecture 2006, Arbitration International 2007, pp. 368 *et seq*.

States, the question of whether the requirements for jurisdiction of the Centre have been fulfilled is also a question of international law" (BP/RT Mem., ¶ 104).

165. ICSID tribunals usually hold that international law governs the determination of their jurisdiction.[10] The rationale underlying such position is that the requirements for ICSID jurisdiction are contained in Article 25 of the ICSID Convention, and that international law, in particular the Vienna Convention on the Law of Treaties (VCLT), governs the assessment and interpretation of such treaty requirements. Therefore, the Arbitral Tribunal agrees with the Respondents that international law applies to the determination of the Arbitral Tribunal's jurisdiction.

166. The fact that international law sets the requirements for ICSID jurisdiction does not mean that other laws, specifically national laws, may never be considered when reviewing whether the requirements set by international law are met. A review of ICSID cases shows that tribunals do refer to national law, for instance to determine whether the requirements of nationality[11] or of the existence of an investment are fulfilled.[12] In other words, depending on the circumstances, certain jurisdictional requirements under Article 25 of the ICSID Convention may sometimes have to be assessed taking into account national law. This may especially be true of the requirement of consent when the agreement to arbitrate is contained in a contract governed by national law.

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10 See *Československa obchodní banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision on Objections to Jurisdiction of 24 May 1999, ¶ 35; *Azurix Corp. v. Republic of Argentina* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of 8 December 2003 ¶ 50; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction of 2 August 2004, ¶ 38; *Sempra Energy International v. Republic of Argentina* (ICSID Case No. ARB/02/16), Decision on Objections to Jurisdiction of 11 May 2005, ¶ 26; *Noble Energy Inc. and MachalaPower Céa. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, Decision on Jurisdiction of 5 March 2008, ¶ 57.

11 *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Award of 7 July 2004, ¶ 55. While Article 1(3) of the BIT specified that the nationality of a natural person should be determined in accordance with the law of the Contracting State in question (thus rendering such law applicable), the Arbitral Tribunal held that this Article was a reflection of the rule according to which "*nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality*" (thus alluding to the direct applicability of national law for matters related to nationality).

12 *Inceysa Vallisoletana, S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award of 2 August 2006, ¶¶ 131, 155, 156, 157. While Article II of the BIT specified that investments were to be made in accordance with the law of the host State (thus rendering the law of El Salvador applicable to the determination of the Tribunal's jurisdiction), the Arbitral Tribunal also applied *directly* the law of El Salvador (without reasoning in terms of *renvoi* of the BIT), see for instance ¶ 262: "*In accordance with the Constitution and the Foreigners Law, no person who violated systematically the legal principles and foundations that made its investment possible may claim the protection of that law. For a foreigner or foreign company to benefit or be protected by Salvadoran legislation, it must comply with the condition of respecting and obeying the laws whose protection it seeks. The foregoing principle is expressed in the Investment Law itself, which imposes on investors the obligation to comply with the laws of the Salvadoran State* […]."

167. As mentioned, the Claimant argues that the GPEK is a third party beneficiary of the arbitration agreement contained in KPC Contract. The KPC Contract is governed by Indonesian law. Under the principle of autonomy, the arbitration agreement contained in a contract is not necessarily governed by the same law as the contract itself. In this case, however, both Parties have pleaded the issue of third party beneficiary rights under Indonesian law. This is particularly noteworthy with respect to the Respondents, who had previously argued that international law applied to the Tribunal's jurisdiction (BP/RT Mem., ¶¶ 139 et seq.; KCP Reply, ¶¶ 36 et seq.).

168. In sum, the Arbitral Tribunal concludes that international law applies to the determination of its jurisdiction over this dispute and that, in assessing the requirement of consent set by international law, it will take Indonesian law into account because of the specifics of the consent involved here.

169. In this context, the Arbitral Tribunal also wishes to stress that, although it is not bound by the judicial decisions of the Indonesian courts, it will give appropriate consideration to their determinations and defer to their conclusions regarding Indonesian law in appropriate circumstances. This said, it agrees with the Respondents (BP/RT Mem., ¶ 155; KPC Mem., ¶ 114) that decisions of national courts have no *res judicata* effect on international arbitral tribunals.

170. Furthermore, in connection with the standard for interpretation of the jurisdictional requirements under the ICSID Convention, the Claimant argues that "*the purpose of the Convention is to apply the principle in favorem jurisdictionis, meaning that the parties' original intent to submit the dispute to ICSID arbitration shall be respected*" (C. CM., ¶ 56). The KPC Respondents reply that no doctrine of "*in favorem jurisdictionis*" exists and that its application could lead to ignoring the jurisdictional requirements of Article 25 (KPC Reply, ¶ 10).

171. In line with *AMCO Indonesia* and others, the Arbitral Tribunal considers that jurisdictional requirements shall be interpreted neither restrictively nor expansively, but simply in a manner that is consistent with the common intent of the Parties.[13]

172. Finally, the Tribunal stresses that, while it will obviously consider the Parties' interpretation of the jurisdictional requirements set out in Article 25 of the ICSID Convention, it is empowered to review on its own initiative whether a particular

[13] *Amco Indonesia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction of 25 September 1983, 1 ICSID *Reports* 389 (1993), p. 394; for other decisions, see e.g. *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award of 18 August 2008, ¶¶ 129 et seq.

jurisdictional requirement is met, as acknowledged by the KPC Respondents (KPC PHM, ¶ 72).

2. JURISDICTIONAL REQUIREMENTS

173. This investment arbitration is unusual in the sense that the Respondent is not a State but consists of several private parties. Conversely, the Claimant is not a private party but a public entity which claims to have "stepped into the shoes of the State" or to be considered a designated subdivision of that State. The Tribunal has struggled with the question whether the Claimant could indeed bring a claim before ICSID and, if so, how to examine the jurisdictional requirements.

174. Given that the main basis for jurisdiction is an arbitration clause contained in a contract, the Tribunal finds that nothing in the ICSID Convention prevents a State or its subdivisions or agencies from appearing as claimant in an arbitration based on a contract. The question might receive a different response if the basis for jurisdiction were an investment treaty which, in principle, reserves the right to bring an arbitration to investors and does not grant substantive protections to States.

175. However, after long deliberations, a thorough assessment of all the arguments put forward in this complex case, and a careful assessment of the evidence, the Tribunal cannot but conclude that the Claimant's case fails *ab initio* for the simple reason that the Claimant has no right to bring this arbitration. The ICSID Convention subjects jurisdiction to specific conditions which ICSID tribunals are not empowered to ignore. The Claimant does not meet one of these specific conditions and this turns out to be fatal to its case.

176. The fundamental question that the Tribunal is called to answer and will address now is whether the Claimant can be considered a Contracting State because it represents the Republic of Indonesia in this arbitration (2.1), or whether it is a constituent subdivision or agency of a Contracting State designated to the Centre by that State (2.2.) as required by Article 25 of the ICSID Convention. In addition, the Tribunal will address the general estoppel argument which the Parties have raised in the course of the proceedings (3).

2.1 Does the Claimant represent the Republic of Indonesia in this arbitration?

177. The KPC Respondents contend that the GPEK is not a Contracting State (KPC Mem., ¶ 63). More specifically, they assert that the GOI has delegated no authority to the GPEK, and that the latter does not "*step into the former's shoes*" on any other

basis. With reference to the "*right of substitution*" under Law No. 5 of 1968, the KPC Respondents understand such right as being solely permissive and not prescriptive (KPC PHM, ¶ 18).

178. The BP/Rio Tinto Respondents submit that the GPEK is not a Contracting State, but merely a "*regional government with some autonomous power from the GOI*" (BP/RT Mem., ¶ 106). They argue that there is no legal doctrine or precedent where a third party is entitled to "*step into the shoes*" of a Contracting State. They also interpret Article 2 of Law No. 5 of 1968 as entitling the GOI, i.e., the executive power, to represent and give its consent on behalf of the Republic of Indonesia, i.e., the State.

179. In reply, the Claimant asserts that it is "*stepping into the shoes of GOI in representing the Republic of Indonesia*" (C. CM., ¶ 62). It relies on Article 2 of Law No. 5 of 1968, according to which the Republic of Indonesia may be represented by an entity acting in its stead in ICSID proceedings, Indonesia being a Contracting State to the ICSID Convention since 28 October 1968.

180. The Claimant primarily relies on Article 2 of Indonesian Law No. 5 of 1968 to show its entitlement to "*step into the shoes of GOI in representing the Republic of Indonesia*." This Article provides that "*[t]he Government has the authority to give consent that a dispute regarding investment between the Republic of Indonesia and Nationals of other States is settled in accordance with the said Convention and to represent the Republic of Indonesia in such dispute with right of substitution*." (Exh. Cl. CM 64). Article 2 of the "Elucidation on Law No. 5 of 1968" clarifies the scope of this provision by noting that "[*a*]*ccording to Article 25 paragraph (1) and Article 36 paragraph (2) of the Convention all disputes must first have the consent of the parties in dispute before being brought before the Arbitral Tribunal. This article determines that the Government shall have the authority to render such consent in addition to representing the Republic of Indonesia in such dispute with the right of substitution if necessary*" (Exh. BP/RT 327).

181. Moreover, the preamble to the "Elucidation on Law No. 5 of 1968" explains that "[*a*]*lthough the Convention has become applicable to a country, however, it is not necessarily an obligation for a country to resolve disputes in accordance with the Convention. Since the absolute requirement for disputes to be resolved based on the Convention shall be the consent of the parties in dispute*." (Exh. BP/RT 327)

182. In the Tribunal's view, Article 2 of Law No. 5 of 1968 does not create any entitlement to "*step into the shoes of GOI in representing the Republic of Indonesia*." This

article deals with two different issues. The first issue is consent. Acknowledging the importance of consent by the State for agreeing to ICSID arbitration, Article 2 reserves the power to give such consent to the GOI. Consequently, only the GOI can validly consent to ICSID arbitration on behalf of the Republic of Indonesia.

183. The second issue is representation. Article 2 also grants the GOI the power to represent the Republic of Indonesia before ICSID tribunals in cases of investment disputes with a national of another Contracting State. In this event, the GOI has the "right of substitution" which must be understood as the right to nominate or designate a third party to assume such representation. This is not the case here. As will be analyzed later, the GOI expressly indicated that it had never authorized such representation in the present case (see ¶ 199 below).

184. The Claimant also relies on other documents, i.e., the KPC press release dated 15 July 2002, the minutes of the 30 July 2002 meeting, the 2001 Offer, the Framework Agreement, and the minutes of the 31 October 2002 meeting (see ¶¶ 194 and 195 below). The Tribunal cannot see how these documents support the Claimant's position.

185. Therefore, the Claimant cannot be held to have a right to represent the Republic of Indonesia before an ICSID Tribunal.

2.2 Is the Claimant a designated constituent subdivision of the Republic of Indonesia?

186. The BP/Rio Tinto Respondents argue that "[a]*s a subdivision or agency, the Claimant must be designated by a Contracting State to ICSID before it can have standing to appear before ICSID*" (BP/RT Mem., ¶ 110). They contend that the Republic of Indonesia has made no designation, which is confirmed by the public list of constituent subdivisions or agencies which have been designated to ICSID by the Contracting States and by the Republic of Indonesia itself (Exh. BP/RT 298). They stress that the Request for Arbitration contains no statement to the effect that the GPEK has been designated when Rule 2(1)(b) of the ICSID Institution Rules so requires. They add that the GPEK was at best an assignee of shares in PT KPC (which they deny) and that an assignment does not amount to a designation, because a designation must be notified to ICSID by the State. They equally submit that the Judgment of the CJDC (or "*any judgment of the Indonesian courts on its own*," BP/RT PHB, ¶ 46) does not amount to a designation, because it was not notified to ICSID by the Government. Rather, there is evidence to the contrary from the latter (Exh. BP/RT 298; Exh. KPC 10; Exh. BP/RT 313, p.49, ¶ 11, CB2, p. 49;

Exh. BP/RT 318, Section I, ¶¶ 10-11). Further, the BP/Rio Tinto Respondents contend that the State's consent is required twice, that is for designation *and* for approval, as shown by the *travaux préparatoires* to the ICSID Convention (Exh. BP/RT 325, p. 335, ¶¶ 609-610).

187. The KPC Respondents similarly argue that "[j]*urisdiction in respect of a constituent subdivision, such as the GPEK, is* '*only available from ICSID*' *if the entity has been specifically designated as a constituent subdivision by the GOI*" (KPC Mem., ¶ 67). They contend that the GOI has not designated the GPEK as a constituent subdivision for the purposes of Article 25. They further submit that the Judgment of the CJDC does not amount to a designation because the designation must be made by the Contracting State to ICSID with a clear intent to this effect.

188. In contrast, the Claimant argues that designation of a constituent subdivision to the Centre need not be made in any particular form (except in writing) and that "*a State may designate a constituent subdivision at any time, provided such designation exists on the day a request for arbitration is made to the Centre* [...]" (C. CM., ¶ 70). It contends that the requirement of Article 25(1) is fulfilled as the GPEK "*steps into the shoes"* of the GOI with respect to the 2001 Offer and the GOI designates the Claimant "*to receive the benefits of, and to deal with all aspects of, that 2001 Offer*" (C. CM., ¶ 89). It further argues that "[d]*esignation of Claimant as offeree (of the 2001 Offer) by GOI also constitutes designation of Claimant by GOI to ICSID being the arbitration forum that the parties have consented to in writing to adjudicate any disputes and any exercise of any available remedial right under KPC Contract*" (C. Reply, ¶ 27). It finally submits that "*GOI's designation of Claimant and Government of East Kutai as parties to benefit from such Offer and ICSID Arbitration Clause was first announced by KPC on 15 July 2002, and then officially decided by GOI on 30 July 2002*" (C. Rejoinder, p.13).

189. As a basis for designation, the Claimant refers to the decision of the GOI to designate the Claimant as one of the assignees in respect of the 2001 Offer as evidenced by the minutes of the limited cabinet meeting of 30 July 2002 and the minutes of the limited coordination meeting between Ministers of 31 October 2002 (arguing that this amounts to designation by legislation, C. CM., A ¶ 70) as well as to the Framework Agreement (arguing that this amounts to designation by an investment agreement, C. CM, A. ¶¶ 67, 70).

190. Pursuant to Article 25(1) of the ICSID Convention, the jurisdiction of the Centre covers disputes "*between a Contracting State (or any constituent subdivision* [...] *of*

a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

191. The history of the Convention shows that the term "constituent subdivisions" covers a fair range of subdivisions including municipalities, local government bodies in unitary states, semi-autonomous dependencies, provinces or federated States in non-unitary States and the local government bodies in such subdivisions.[14] In this case, it is not disputed that East Kalimantan is a province of the Republic of Indonesia. Consequently, the Tribunal finds no obstacle to declare that East Kalimantan qualifies as a subdivision of a Contracting State. The question is whether it is a "designated" subdivision as required by Article 25 of the Convention.

192. Before examining the existence of a designation, it is necessary to specify what form the designation must take. ICSID's public list of designations made by Contracting States, specifically the footnote appearing at the end, show that designations can be made *ad hoc* and need not appear on the list ("[a]*d hoc designations and notifications made by Contracting States pursuant to Articles 25(1) and 25(3) are excluded from this listing*.") In fact, commentators generally consider that designations are not subject to any formal requirement as long as they are made to the Centre. Christoph Schreuer stresses that "[i]*t has been argued that where there is a clear intention to designate, it does not matter how and through whom the communication reaches the Centre.*"[15] In other words, the form and channel of communication do not matter, provided that the intention to designate is clearly established.

193. The designation requirement in Article 25(1) must be read in conjunction with ICSID Institution Rule 2(1)(b), which provides that "[t]*he request* [for arbitration] *shall state if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention*." Consequently, the designation requirement may in particular be deemed fulfilled when a document that emanates from the State is filed with the request for arbitration and shows the State's intent to name a specific entity as a constituent subdivision or agency for the purposes of Article 25(1).

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[14] Amerasinghe, *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, the British Year Book of International Law, 1974-1975, Oxford, 1977, pp. 227-267.

[15] Christoph H. Schreuer et al., *The ICSID Convention: A Commentary* (2nd ed. 2009), p. 156, ¶ 252.

194. The minutes relied upon by the Claimant do not create a sufficient basis for designation, as they do not show the State's intent to designate. The minutes dated 30 July 2002 (Exh. BP/RT 239) merely mention the allocation of PT KPC shares without referring to the designation of the GPEK by the Republic of Indonesia. Similarly, the minutes of 31 October 2002 (Exh. BP/RT 239) refer to discussions related to the divestment of shares, without manifesting an intent of the Republic of Indonesia to designate the GPEK.

195. The wording of the Framework Agreement, upon which the GPEK also relies, comes somewhat closer to meeting the designation requirement, although it is still insufficient. Clause 14.1 of that agreement only concerns disputes "*under this Agreement between the Parties, or any Party and third party beneficiaries of rights under this Agreement conferred by Clause 2.3*" (*i.e.*, "Indemnified Parties" as defined in Clause 1.1, which do not include the GPEK). As to Clause 13 of Attachment A to the Framework Agreement (which appears to be the model offer letter referred to in Clause 3.1(a) of the Framework Agreement), its legal status is unclear.

196. In its Request for Arbitration, the Claimant quotes an extract of the judgment of the CJDC dated 8 March 2006, a full version of which is annexed to the Request. It quotes in particular the following passage of the judgment:

> PLAINTIFFS [the GPEK and the Provincial Company Melati Bhakti Satya] are part of the united Government of the Republic of Indonesia and is [sic] the subordinate of the Central Government.[16]

197. At the close of the hearing, the Tribunal invited the Parties to address in their post-hearing brief whether this judgment might be interpreted as an implied designation.[17]

198. The Claimant has not advanced any convincing argument advocating that the language quoted above constitutes a designation conveyed to the Centre with the Request for Arbitration. To reach this conclusion, the judgment would have to manifest an intent to designate the GPEK as a constituent subdivision for purposes of Article 25. The Tribunal is unable to construe this excerpt as showing such an intent to designate the GPEK on the part of the Republic of Indonesia. It thus agrees with the observation of the KPC Respondents that "[t]*he judgment contains no clear statement of designation*" (KPC PHM, ¶ 79).

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16 RA p. 4.

17 The Tribunal had expressly drawn the parties' attention to this possibility at the close of the hearing: "Assume that an argument were to be made that the judgment that is issued by an organ of the State of the Republic of Indonesia could constitute some kind of an implied or not implied designation of a constituent agency, because of the conclusion that the judgment reaches, and/or an approval of the consent to ICSID of the constituent body. Here again, what would your position be on this assumption?" (Tr., p.142, l.6-14)

199. In addition, the letters of 10 August 2006 (Exh. BP/RT 298) and 21 August 2007 (Exh. KPC 10) contradict the thesis of a designation of the GPEK as a constituent subdivision. The letter of 10 August 2006 states that "[t]*he Government of Indonesia* [...] *has never issued any order or authorization in any form whatsoever to the East Kalimantan Provincial Administration in connection with the PKP2B of PT KPC including to file a petition based on the PKP2B to the International Centre for Settlement of Investment Disputes*" and that "*the East Kalimantan Provincial Administration has no authority whatsoever with respect to the PT. KPC Divestment based on the PKP2B.*" The letter of 21 August 2007 confirms these facts by stating that "[t]*he Provincial Government of East Kalimantan shall therefore have no capacity/qualification/authority and legal standing whatsoever to file any claim in relation to PKP2B PT KPC before the International Centre for Settlement of Investment Disputes (ICSID) and elsewhere.*"

200. In conclusion, the Tribunal considers that the State of Indonesia has not validly designated the GPEK as a constituent subdivision to the Centre. On the contrary, it has clearly denied the GPEK's authority to act as a party in this ICSID arbitration.

201. The Tribunal considers that the lack of a valid designation is a bar to its jurisdiction under the ICSID Convention. While holding so, the Tribunal is mindful of Aaron Broches' view that "[f]*ailure of a formal designation should* […] *not by itself defeat jurisdiction if the entity concerned is proved or conceded to be a constituent subdivision or agency of a Contracting State*" *(*BP/RT Reply, ¶ 34). With Christoph Schreuer, the Tribunal considers, however, that Broches' view "*goes too far"* and that designation cannot be dispensed with altogether.[18] Accepting jurisdiction in the absence of designation by the State would not be in line with the ICSID Convention, which expressly constrained the possibility for constituent subdivisions to submit to ICSID arbitration within specified limits.

202. The Tribunal finds further support in *Cable Television v. St. Kitts and Nevis*, which held that designation is a condition to jurisdiction, whether a constituent subdivision is in the position of a claimant or that of a respondent (Exh. BP/RT 323, ¶ 2.28):

> *[I]t is evident from Article 25 (1) that ICSID has no jurisdiction in matters brought by or against an entity other than a contracting state unless the entity has been designated to ICSID by the contracting state as a constituent subdivision or agency of the contracting state*.

[18] Schreuer, *A Commentary (2d)*, p.156, ¶ 252.

3. ESTOPPEL

203. Both sides raise estoppel defenses. On the one hand, the BP/Rio Tinto Respondents argue that the GPEK is estopped from asserting any right under the Framework Agreement as it sought to annul the Agreement. On the other hand, the Claimant submits that the Respondents are estopped from raising lack of jurisdiction because of the position they took in the proceedings before the Indonesian courts. The Tribunal will deal with this latter defence first. Indeed, the Respondents' defense only becomes relevant if the Claimant's estoppel argument were to succeed.

204. The BP/Rio Tinto Respondents submit that they are not estopped from raising lack of jurisdiction in the present proceedings. First, they assert that their argument before the CJDC was that (i) the GPEK lacked standing and capacity to act independently of the GOI when seeking to enforce obligations under the KPC Contract, and that (ii) the CJDC lacked jurisdiction over the dispute because the parties to the KPC Contract had agreed that disputes should be resolved through arbitration. Second, they contend that their declarations before the CJDC did not fulfil the basic conditions of estoppel, namely that (i) these declarations were not clear and unambiguous, (ii) they were not voluntary and unconditional, and (iii) there had been no detrimental reliance by the Claimant on any such declaration. The BP/RT Respondents submit that *SGS v. Pakistan* illustrates the caution of ICSID tribunals in applying the concept of estoppel to limit the "*strict legal rights of the parties*" (BP/RT PHB, ¶ 28). Third, they argue that if the general estoppel argument were to be recognized, it should also prevent the Claimant from bringing the current ICSID proceedings, since the latter had previously taken the view that it was not bound by the arbitration agreement contained in the KPC Contract or the Framework Agreement (Exh. BP/RT 315).

205. The BP/Rio Tinto Respondents also contend that, if it were admitted, the estoppel argument would not satisfy the consent requirement and/or the requirements of Article 25 of the ICSID Convention. More specifically, estoppel cannot supply consent to arbitration, as was illustrated by the decision of the Commercial Court (England and Wales) in the case of *The Republic of Kazakhstan v. Istil Group* (Exh. BP/RT 340). Further, estoppel does not supply any of the other requirements set out in Article 25 of the ICSID Convention.

206. In their letter of 20 March 2009, the BP/Rio Tinto Respondents argue that the judgment of the Supreme Court of Indonesia of 13 December 2007 is entirely

consistent with their oral and written submissions, as well as with the findings of the CJDC, both courts having confirmed that all contractual disputes must be settled by arbitration, to the exclusion of any other forum including the Indonesian courts.

207. The KPC Respondents rely on the decisions of an ICSID tribunal in *Pan American Energy v. Argentine Republic (ICSID Case No. ARB/03/13)* (LA. KPC DD) and of the ICJ in *Temple of Preah Vihear (Cambodia v. Thailand)* (LA. KPC EE) to submit that estoppel is subject to the following requirements: a clear statement of fact by one party (which is voluntary, unconditional and authorized) and reliance in good faith by another party on such statement to that party's detriment or to the advantage of the first party. They argue that these requirements are not met in the present case. First, they have taken no inconsistent positions as they have argued before the CJDC and the Supreme Court of Indonesia that the GOI was the correct party to bring a claim to ICSID, and the GPEK was an integral part of the latter without standing of its own. They maintain that the subject matter of this arbitration falls within the scope of Article 23 of the KPC Contract, but that the GPEK is not the right party to bring a claim pursuant to that arbitration agreement. The CJDC's judgment is said to be consistent with this position, as it found that "*any dispute arising out of the CCOW must be submitted to ICSID and that GPEK is bound by the arbitration clause in the CCOW 'as part of the United Government'*" (KPC PHM, ¶ 65). With respect to the second requirement of estoppel, the KPC Respondents submit that the GPEK has suffered no detriment by relying on their statements, especially since it would have further recourse to the CJDC and the administrative courts, in the event that the Arbitral Tribunal denied its jurisdiction.

208. The KPC Respondents further contend that estoppel cannot supply jurisdiction as Article 25 of the ICSID Convention imposes objective requirements, as was held in the ICSID case *Siag v. Egypt* (LA. KPC N).

209. In their letter of 20 March 2009, the KPC Respondents add that the decision of the Supreme Court of Indonesia validates their position that there is no estoppel in the present case. In particular, they submit that their arguments before the CJDC and the Supreme Court of Indonesia are consistent with the objections to jurisdiction made in the present proceedings.

210. The Claimant argues that the Respondents invoked Article 23 of the KPC Contract to challenge the CJDC's jurisdiction. It submits that no issue of third-party stipulation arose in the CJDC proceedings and that, consequently, the Claimant is not estopped from invoking such stipulation in the present proceedings. The

Claimant further argues that the Respondents' challenge of the CJDC's jurisdiction on the basis of the ICSID arbitration clause prevents them from now challenging ICSID jurisdiction.

211. The Arbitral Tribunal notes that the BP/Rio Tinto and KPC Respondents both refer to the writings of Derek Bowett on the notion of estoppel before international tribunals[19] (Exh. BP/RT 335 = LA. KPC KK). Bowett circumscribes estoppel as follows: "[t]*he rule of estoppel operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit*." He then articulates the following test: (i) the statement of fact must be clear and unambiguous; (ii) the statement of fact must be made voluntarily, unconditionally, and must be authorized; (iii) there must be reliance in good faith upon the statement, either to the detriment of the party relying on the statement or to the advantage of the party making the statement.

212. The Arbitral Tribunal understands such test as reflecting the current state of international law. It refers, in particular, to Ian Brownlie's seminal treatise (LA. KPC MM)[20] and to *Pope & Talbot Inc. v. Government of Canada (NAFTA/UNCITRAL)* (LA. KPC JJ).[21]

213. The burden of showing that the test is met lies upon the Claimant. In the Tribunal's view, the Claimant has not met this burden. While the Respondents' statements before the municipal courts appear to have been made voluntarily, they are not entirely clear and unambiguous.

214. Some of the Respondents' statements before the Indonesian courts could indeed be read as an affirmation of ICSID's jurisdiction over this dispute (in particular Exh. BP/RT 316, p. 129, p. 145 and pp. 147-148). Others, however, mean that, while ICSID arbitration is provided for in the KPC Contract, the Claimant is not entitled to resort to it, e.g. "[...] *in the event that Plaintiffs have legal capacity to file the claim, in fact, they do not have one, the claim must be filed through Arbitration pursuant to*

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19 The reference is the following: Derek W. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence", (1957) 33 *British Year Book of International Law* 176.

20 Ian Brownlie, *Principles of Public International Law*, 7th ed., Oxford University Press, 2008, pp. 643-644.

21 *Pope & Talbot Inc. v. Government of Canada* (NAFTA/UNCITRAL), Interim Award of 26 June 2000, ¶ 111: "In international law, it has been stated that the essentials of estoppel are (1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorized; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement."

Article 23.1 of PKP2B [...]" (Exh. BP/RT 316, p.125). In other words, while the first condition of the test is met, the second one is not.

215. Turning to the third requirement, the Tribunal notes that the Claimant has given no indication on the damage caused by its reliance on the Respondents' alleged conduct (or the advantage incurred for the Respondents by such conduct). Under these circumstances, it is difficult to admit that the Claimant has met its burden of proof with respect to the third requirement for estoppel. This is especially so as the KPC Contract contains an alternative dispute resolution mechanism for the event that this Tribunal has no jurisdiction.[22]

216. Finally, the Tribunal adds that even if its conclusion on estoppel had been different, a valid estoppel defense would not have done away with the requirement of designation of a subdivision under Article 25 of the ICSID Convention. Indeed, such requirement is an objective one that is not subject to the parties' disposition and cannot be waived.[23]

217. In view of the conclusion just reached which confirms the outcome of the analysis of the jurisdictional requirements and leads to a finding of lack of jurisdiction, the Tribunal will dispense with reviewing the Respondents' defense of estoppel.

4. CONCLUSION

218. On the basis of the foregoing reasons, the Tribunal comes to the conclusion that the requirements for jurisdiction set by Article 25 of the ICSID Convention are not met and that it lacks jurisdiction over the present dispute.

219. This said, the Tribunal is mindful that this legal outcome will disappoint the expectations which the Claimant had placed in ICSID. It is aware that the Province and its people, present through numerous representatives at the hearing, have sought means of addressing their dispute for a number of years now without success. The arguments and submissions of the Respondents in the local courts, even if they did not meet the stringent test of estoppel, may have led the Claimant to set its hopes on ICSID, only to discover that ICSID in effect lacked jurisdiction. The Tribunal has no hesitation in stating that this is indeed an unfortunate situation. At

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[22] Article 23.2 KPC Contract: "[i]f the services of the Centre are unavailable to the Parties, then such unsettled dispute shall be referred for settlement to a Board of Arbitration of three members [...]" [Exh. KPC 6].

[23] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001), Article 41. pp. 535-536, ¶ 44, and David A. R. Williams, Jurisdiction *and Admissibility*, in Muchlinski, Ortino, Schreuer (eds.) The Oxford Handbook of International Investment Law, pp. 871-872.

the same time, it must add that the ICSID Convention subjects jurisdiction to specific conditions which ICSID tribunals are not empowered to ignore in view of any possible arguments as to the equities of the case. Finally, it notes that, if the Claimant still intends to pursue its claims, the KPC Contract provides for an alternative dispute settlement mechanism.

5. COSTS

220. In view of the considerations set forth in paragraph 219 above, and in the exercise of its discretion in matters of costs, the Tribunal deems it just and reasonable that the ICSID costs be shared equally between the Parties, it being specified that the costs have been kept unusually low by the Tribunal to account for the special circumstances of this case.

221. For the same reasons, the Tribunal further determines that each Party bear its own legal fees and other costs. This latter determination appears particularly justified considering that the Claimant's counsel by its own account acted entirely *pro bono*.

V. DECISION

On the basis of the reasons set forth above, the Tribunal issues the following decision:

1. The request to join the Regency of East Kutai to these proceedings is denied;

2. The Tribunal lacks jurisdiction over the present dispute;

3. The costs, fees and expenses of the Tribunal and the Centre shall be borne equally by the Claimant, on the one hand, and the Respondents, on the other hand;

4. Each Party shall bear its own legal fees and other costs incurred by it in connection with this arbitration.

[*signed*]

Professor Albert Jan van den Berg

Date: 14 Dec 2009

[*signed*]

Mr. Michael Hwang

Date: 16/12/2009

[*signed*]

Professor Gabrielle Kaufmann-Kohler

Date: 11/12/09