

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Westwater Resources, Inc.**

**v.**

**Republic of Turkey**

**(ICSID Case No. ARB/18/46)**

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**PROCEDURAL ORDER No. 2**

***Members of the Tribunal***

Hon. Ian Binnie, C.C., Q.C., President of the Tribunal

Prof. Brigitte Stern, Arbitrator

Prof. Robert Volterra, Arbitrator

***Secretary of the Tribunal***

Ms. Veronica Lavista

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28 April 2020

**I. Procedural History**

1. On 13 December 2018, ICSID received a request for arbitration of that date from Westwater Resources, Inc. against the Republic of Turkey, along with Exhibits C-1 to C-15 (the “**Request for Arbitration**”).
2. On 21 December 2018, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
3. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the two co-arbitrators.
4. The Tribunal is composed of former Judge Ian Binnie, C.C., Q.C., a national of Canada, President, appointed by agreement of his co-arbitrators; Professor Robert Volterra, a national of Canada, appointed by the Claimant; and Professor Brigitte Stern, a national of France, appointed by the Respondent.
5. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session on 17 July 2019 by telephone conference.
6. On 5 September 2019, the Tribunal held a preliminary procedural consultation with the Parties by telephone conference.
7. Following the first session and the procedural consultation with the Parties, on 9 September 2019, the Tribunal issued Procedural Order No. 1 (“**P.O. No. 1**”) recording the agreement of the Parties on procedural matters. P.O. No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of the proceeding would be Washington D.C., U.S.A. P.O. No. 1 also sets out a procedural calendar included as Annex B to that order.
8. In accordance with P.O. No. 1, on 27 January 2020, the Claimant filed its Memorial on the Merits along with three supporting Witness Statements, two Expert Reports, Exhibits C-0001 to C-0079 and Legal Authorities CL-0001 to CL-0064 (“**Cl. Mem.**”).

9. Following a short extension agreed by the Parties, on 11 March 2020, the Respondent filed a request to address the objections to jurisdiction as a preliminary question, along with Exhibits R-0001 and R-0002 and Legal Authorities RL-0001 to RL-0013 (“**Request for Bifurcation**”, or “**RRFB**”).
10. On 30 March 2020, the Claimant filed a Response to the Request for Bifurcation, along with Exhibits C-0001-TUR, C-0080 and C-0081, and Legal Authorities CL-0065 to CL-0092 (the “**Claimant’s Response**” or “**CRRFB**”), in accordance with Annex B of P.O. No. 1.
11. On 6 April 2020, the Tribunal invited the Parties’ comments on which of the two versions of the United States-Turkey Bilateral Investment Treaty (the “**BIT**” or “**Treaty**”) that were on the record (Exhibits C-1 and C-0001) should be considered authoritative for the purposes of this proceeding.
12. On 16 April 2020, the Parties agreed that the Tribunal should consider Exhibit C-0001 to be the authoritative English language version of the BIT.

## **II. Parties’ Requests**

13. By its Request for Bifurcation dated 11 March 2020 the Respondent Republic of Turkey applied for a separate hearing of two preliminary objections to the jurisdiction of the Tribunal. The Request for Bifurcation is made under Article 41 of the ICSID Convention and Rule 41 of the ICSID Arbitration Rules in accordance with Annex B of Procedural Order No 1 dated 9 September 2019. Specifically, the Respondent contends:
  - (1) that the Claimant failed to demonstrate any “investment in the territory” of Turkey as required by Article 1(1)(c) of the Treaty and “failed to make a contribution to the Republic’s economic development as required by Article 25(1) of the ICSID Convention.” Consequently, it says, the Tribunal lacks jurisdiction *ratione materiae*, and
  - (2) that the Tribunal also lacks jurisdiction because the Claimant failed to negotiate an amicable resolution of this dispute for at least one year from the date on which the dispute arose (“**the Negotiation Period**”) as required by Article VI(3) of the BIT.
14. In its Response dated 30 March 2020 the Claimant opposed bifurcation, contending that bifurcation in this case would not achieve “procedural efficiency” as “neither objection is serious and bifurcation would not materially reduce the scope of issues to be considered by the Tribunal” (CRRFB para 1).

15. The Parties agree that procedural efficiency is best assessed using three factors: (1) whether the objections are substantial or frivolous; (2) whether bifurcation would lead to a material reduction in the proceeding at the next stage; and (3) whether bifurcation is impractical in the sense that the issues are intertwined with the substantive phases of the proceeding. The Claimant argues that “procedural efficiency does not operate solely to the benefit of the respondent.” (CRRFB para 5). Care should also be taken to ensure that bifurcation is not being used as a delaying tactic.
16. To the extent that the Respondent suggests that there is some sort of presumption in favour of bifurcation (RRFB, paras 8 and 9), the Tribunal considers the better view to be that each case turns on its own facts and the relevant text of the BIT, in particular the dispute resolution clause. Whether or not “most” applications for bifurcation in unrelated cases have succeeded or failed is irrelevant, except for the persuasive value of the reasoning behind the result.

### **III. Objections to Jurisdiction**

#### **A. Objection No 1 – the Claimant did not make an “investment ... in the territory” within the meaning of the BIT or the ICSID Convention**

##### **a. Parties’ Positions**

17. The Claimant alleges that it acquired shares in the Australian company Anatolia Energy Limited (“**Anatolia**”) in November 2015. Anatolia owned the Turkish company Adur Madencilik Ltd (“**Adur**”) which held the licences at issue to explore and mine uranium in parts of Turkey. The Respondent challenges whether any acquisition in fact occurred (RRFB para 16), points out that the acquisition, if any, took place in Australia and not “in the territory” of Turkey (RRFB para 17), and contends that by November 2015 Adur had already acquired the licences and thus the Claimant was not the source of any fresh investment in Turkey (RRFB para 17).
18. The Claimant responds that its investment is protected by Article I(1)(c) of the BIT which provides that “‘investment’ means every kind of investment in the territory of one Party owned or **controlled**, directly or **indirectly**, by nationals or companies of the other Party” (CRRFB para 17, second emphasis added). The Respondent’s attempt to impose a temporal limitation on when investment occurred, it says, finds no support in the BIT.
19. The Respondent further argues, and the Claimant denies, that in any event the Claimant’s investment, such as it was, failed to satisfy the factors suggested in *Salini v Morocco*, and in particular has made no contribution to Turkey’s economic development (RRFB paras

21-22). The Claimant disputes not only the relevance and applicability of the “so-called” test in *Salini* (CRRFB para 23) but also the factual basis of the objection. The Claimant points to evidence that its investment has, in fact, contributed to Turkey’s economic development (CRRFB para 33).

20. The Respondent contends that disposition of its “investment” objection is not so intertwined with the merits as to create procedural inefficiency but would, if upheld, put an end to the arbitration.

**b. The Tribunal by Unanimity Rejects Bifurcation of the Respondent’s “Investment” Objection**

21. Such objections to jurisdiction *ratione materiae* are standard fare in investor state arbitrations and often, as here, involve disputes about facts that are better developed at the merits stage. For example, the Respondent’s contention that the Claimant must establish that its investment made a positive contribution to the Respondent’s economic development, even if accepted, may well be intertwined with the Respondent’s explanation for the actions that it allegedly took in relation to Adur’s licences and are now the subject of the Claimant’s complaint. The argument denying protection to shareholders in a foreign investor whose shares were acquired after the investment in the Respondent had been made would, if accepted, create great complexity in the case of a large multinational investor in which blocks of shares in the Turkish company are successively acquired and disposed of and ownership of its own shares are constantly changing hands. On the Respondent’s argument, the early investors might be protected but investors who bought blocks of shares after the multinational’s investment would not be protected, thereby creating a checkerboard of rights for holders of the same classes of shares. It would be a challenge for the Respondent to fit this into the public international law concepts of State responsibility in general and the BIT in particular; that could only properly be addressed by the Tribunal if it were in full possession of all the facts and arguments of the Parties. In any event the only issue before the Tribunal now is bifurcation and the “investment” argument is not sufficiently compelling or extricable from the facts to be explored in the substantive phase of the arbitration as to justify the cost and delay of a preliminary jurisdictional procedure.

**B. Objection No 2 – the Claimant did not comply with the “Negotiation Period” required by Article VI(3) of the BIT.**

**a. Parties’ Positions**

22. The second objection raised by the Respondent has to do with the failure of the Claimant to comply with what the Respondent refers to as the “Negotiation Period” of one year called for by Article VI(3) of the BIT. Article VI provides in its entirety as follows, in the English-language version of the BIT:

*ARTICLE VI*

*1. For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.*

*2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations in good faith. If such consultations or negotiations are unsuccessful, the dispute may be settled through the use of non-binding, third party procedures upon which such national or company and the Party mutually agree. If the dispute cannot be resolved through the foregoing procedures, the dispute shall be submitted for settlement in accordance with any previously agreed, applicable dispute settlement procedures.*

*3. (a) The national or company concerned may choose to consent in writing to the submission of the dispute to the International Centre for Settlement of Investment Disputes ("Centre") for settlement by arbitration, at any time after one year from the date upon which the dispute arose, provided:*

*(i) the dispute has not, for any reason, been submitted by the national or company for resolution in accordance with any applicable dispute settlement procedures previously agreed to by the parties to the dispute; and*

*(ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute.*

*(b) Each Party hereby consents to the submission of an investment dispute to the Centre for settlement by arbitration.*

*(c) Arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States and the “Arbitration Rules” of the Centre.*

*4. Any dispute settlement procedures regarding expropriation and specified in the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the investment agreement, relevant provisions of domestic laws, and applicable international agreements regarding enforcement of arbitral awards.*

*5. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counter-claim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.*

*6. For the purposes of this Article, any company legally constituted under the applicable laws and regulations of either Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party.*

23. There is no doubt that the Claimant commenced this arbitration prior to the expiry of the “Negotiation Period”. The Request for Arbitration was filed on 13 December 2018. Even on the Claimant’s own showing, the investment dispute arose no earlier than 24 January 2018 when, as the Claimant states, “Turkish officials of MIGEM informed Adur that they were revoking its licences and Mr Er clearly expressed Adur’s disagreement with MIGEM’s decision.” (Claimant’s Memorial para 83). For its part, the Respondent contends that the dispute did not arise until June 2018, firstly because the uranium mining licences were not revoked until that month and, secondly, because the Claimant itself wrote to President Erdogan on 28 June 2018 complaining that “[o]n June 20, 2018 we learned from Migem that it was immediately revoking all uranium mining licences that it had granted to Adur.” (RRFB para 31). On this basis, the Respondent says, the Negotiation Period was cut short by the Claimant by a little less than 6 months.
24. The Respondent argues that there could be no “investment dispute” prior to June 2018 when “the Republic took the actions that, according to Westwater, amount to an expropriation ...” (RRFB para 32). The Claimant responds, citing *Achmea v Slovak Republic (II)*, that the dispute crystallized between the Parties when the Government “announced its intention to expropriate the investor’s investment and the investor disputed the legality of the impending expropriation” (CRRFB footnote 72). In short, the Claimant’s

position is that the Negotiation Period is no more than a “procedural rule” (CRRFB para 40) against which the Tribunal may grant relief. On this point, the Respondent cites *Murphy v Ecuador*, which criticized this approach, suggesting that if “non-compliance does not have any consequence whatsoever ... [s]uch a way of interpreting the obligation simply ignores the “**object and the purpose**” of the rule, which is contrary to Article 31(1) of the aforementioned Vienna Convention.” (RRFB para 27, *Murphy* para 147, emphasis added).

25. The Respondent rejects the Claimant’s argument that further negotiations would have been futile (RRFB para 33). The most that can be said, the Respondent argues, is that there was a minimal delay “of two weeks without an answer from the Republic from the last letter Westwater wrote to the Republic on 25 November 2018” (RRFB para 33) and “two weeks is by no means an unreasonable period of time” (RRFB para 33). The Claimant responds that the Parties did negotiate from January to December 2018 but that the Respondent “after June refused to put forward an amount of compensation that it was willing to pay Claimant for the expropriation of Claimant’s investment.” (CRRFB para 55). Thus “in these circumstances it is obvious that it would have been futile for Claimant to wait another six weeks before commencing arbitration of the investment dispute” (CRRFB para 55).
26. The Claimant denies that the text of Article VI(3)(a) makes the “Negotiation Period” mandatory. In the Turkish text of Article VI<sup>1</sup>, the one-year Negotiation Period is introduced prior to the statement of conditions. The Turkish-language text provides (in translation) that:

*(t)he national or company concerned may, at any time after one year from the date upon which the dispute arose, by way of writing, apply to the International Center for the Settlement of Investment Disputes to settle the dispute by an arbitrator, subject to the following conditions:*

*(i) the dispute has not, for any reason, been submitted by the national or company for resolution in accordance with the applicable dispute-settlement procedures previously agreed to by the Parties to the dispute; and*

*(ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies competent jurisdiction of the Party that is a Party to the dispute.*

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<sup>1</sup> An English-language translation of the Turkish-language BIT is found at C-0001-TUR.



Thus, only the “fork in the road” provisions of (i) and (ii) are conditions precedent to the Respondent’s consent (CRRFB para 45).

27. The Claimant points out that the English text uses the word “provided” instead of “subject to the following conditions” but the distinction, it says, is without a difference. Further, the Claimant argues, the Respondent is attempting to interpret the US-Turkey BIT as if it contained language used by the Respondent elsewhere but not here, e.g., the Israel-Turkey BIT, which makes the host state consent to arbitration “subject to” completion of a period of negotiations. On the contrary, Article VI here makes the Negotiation Period part of the “mechanics of filing a claim” and does not condition the consent to arbitration. In addition, the Claimant contends that the one-year negotiating period “concerns the admissibility of a particular claim rather than the jurisdiction of the Tribunal” (CRRFB para 49).
28. The Claimant’s position is that “if the Tribunal ... finds ... that this objection is sufficiently serious to warrant bifurcation ... the more efficient procedure would be for the Tribunal to reach an immediate decision on the issue in order to allow Claimant to commence arbitration anew if it should become necessary to do so.” (CRRFB para 56).
29. The Tribunal notes the Respondent’s reliance, citing *Murphy v Ecuador*, on the “object and purpose” of Article VI in accordance with Article 31(1) of the *Vienna Convention on the Law of Treaties* (“VCLT”) which provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the **terms** of the treaty in their **context** and in the light of its **object and purpose** (emphasis added).
30. This formulation is attributed in part to the “principle of effectiveness” that requires treaties to be interpreted to produce an outcome that advances the aims of the treaty and its particular terms.<sup>2</sup> In this case the Respondent itself has stated that the object and purpose of what it calls the “Negotiation Period” is that it “serve[s] the important goal of providing the parties with a robust opportunity to settle the dispute amicably before they are compelled to endure a lengthy and costly ICSID arbitration.” (RRFB para 27). Such an objective cannot be achieved, the Claimant argues, if negotiations prove to be futile.

**b. The Tribunal by Majority Rejects the Application for Bifurcation on the Second “Negotiation Period” Ground as Well**

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<sup>2</sup> For example, see Richard Gardiner, *Treaty Interpretation* (OUP, 2015) 211 § 5.

31. In the circumstances the Tribunal by majority is of the view that procedural efficiency would not be served by bifurcation of the Respondent's second objection to jurisdiction (failure to respect the Negotiation Period).
32. With respect to the precise wording of Article VI(3)(a), the Respondent's argument is neither "frivolous" nor "substantive" but is more accurately characterized as "arguable". It requires the Tribunal to interpret the text by inserting additional language, *i.e.*, "the national or company ... may choose to consent in writing to the submission of the dispute ... **provided at least one year has elapsed** from the date upon which the dispute arose **provided** (i) the dispute had not [etc. etc.]". To determine whether the text should be read as the Respondent contends the Tribunal, in accordance with Article 31(1) of the VCLT, must turn to the context and the object and purpose.
33. In terms of "context", the contested words in Article VI(3)(a) occur in the broader framework of Article VI, which sets out a complete procedure for the efficient resolution of investment disputes. The Parties seem to agree that "the paramount goal" of the process, including but not limited to bifurcation, is "procedural efficiency" (RRFB para 10) (CRRFB paras 2, 56). This agreement of the Parties confirms the Tribunal in its view that procedural efficiency in the resolution of investment disputes is, indeed, the paramount goal of Article VI and thus the intention of the drafters of the BIT. In relation to this aspect of the Request for Bifurcation, the Tribunal's interpretation of the text is supported by its view of the context as well as the object and purpose with which, as stated, the Parties are in broad agreement (as is further discussed below). And at this point, it is important to recall that a tribunal's decision as to a request for bifurcation is not a decision as to the underlying questions of jurisdiction. The Tribunal must remain alive to those and all issues of jurisdiction throughout the arbitration. A tribunal's decision on a request for bifurcation reflects the tribunal's assessment of the most efficient and appropriate procedures to be followed in deciding any questions of jurisdiction.
34. The Tribunal by majority is further of the view that procedural efficiency would not be achieved by bifurcation leading (according to the Respondent) to rejection of the claim for want of jurisdiction followed (according to the Claimant) by immediate re-issue of the same Request for Arbitration. The only result would be delay and costs thrown away. The context therefore favours interpreting the Negotiation Period text as a procedural rule against which the Tribunal may grant relief in order to achieve the intended effect of the parties to the BIT of procedural efficiency in resolving investment disputes. The Tribunal notes, however, that it would be unlikely to do so if, for example, the Respondent is able to show that the early filing of a Request for Arbitration caused it prejudice.

35. The Tribunal then turns to the third branch of Article 31(1) of the VCLT, namely to draw assistance in the interpretation of Article VI from the “object and purpose” of the Treaty itself as it bears on the interpretation of Article VI. As noted above, the Respondent itself has identified the “object and purpose” of the Negotiation Period provision as serving “the important goal of providing the parties with a robust opportunity to settle the dispute amicably before they are compelled to endure a lengthy and costly ICSID arbitration.” (RRFB para 27). It follows that, if the Parties have exhausted any meaningful negotiations without result, then the purpose of the “robust opportunity” has been served and its potential usefulness ended. The Claimant has alleged, and the Respondent has not at this point disputed, that after June 2018 the Respondent “refused to put forward an amount of compensation that is was willing to pay ...” (CRRFB para 55). The evidence may turn out to be otherwise but on the present state of the record it would appear that providing for a further period of negotiation would be, and would have been, futile.
36. With respect to the concern of the partially-dissenting arbitrator about “due process”, the view of the majority of the Tribunal is that it can always of course be argued that more submissions on a request for bifurcation or even substantive pleadings and a hearing would ultimately establish that the underlying objections are valid and thus that bifurcation was merited. Equally such proceeding and a hearing may demonstrate that the objections are ill-founded and, consequently, that bifurcation did nothing more than cause wasted effort, expense and unjustified delay. A tribunal must as best it can evaluate a procedural application such as a request for bifurcation in terms of procedural efficiency, due process and other considerations. The Tribunal in the present case received the submissions of both Parties that they considered supported their position on whether or not the objections raised should be dealt with as preliminary matters. Both positions were carefully considered. Due process has been respected and it is worthy of note that the Tribunal unanimously felt able to decide the question of bifurcation in relation to the Respondent's first objection (the “investment issue”) without more.
37. In short, the Tribunal by majority concludes that the object and purpose of the Treaty, which sheds light on the proper interpretation of Article VI, is better advanced by a procedural rule (breach of which would not be fatal to jurisdiction) which permitted relief against non-compliance in certain circumstances such as a demonstration that further negotiations would have been futile.
38. A countervailing factor, equally relevant to the Tribunal’s consideration of the character of the Negotiation Period, would be evidence that the Respondent had suffered prejudice or detriment by reason of the premature filing of the Request for Arbitration. This might be shown, for example, by evidence that the Claimant was using the Request for Arbitration

in the middle of productive negotiations as a bargaining tactic. Despite having had the opportunity to do so, the Respondent provided no such evidence. Its attempt to elevate a procedural rule into a foundation stone of sovereign consent under public international law is thus inconsistent with the BIT and rings hollow, when considered in the context of Article VI.

39. In this respect, the Tribunal notes again that much more than one year has passed since a dispute has indisputably arisen under Article VI and the Respondent has not established that it has somehow been prevented by the commencement of this proceeding from otherwise resolving the dispute through negotiation. Furthermore, there is nothing in the text of the BIT that prevents the Parties from settling the dispute by negotiation, even after the commencement of arbitration. It is notorious that this happens frequently in investment treaty disputes. It is important to recall, in this respect, the public international law principle that parties to a dispute must seek to resolve it in good faith and so, unless there were language to the contrary in the BIT, which there is not, that obligation has continued in force as between the Parties to the dispute even after this arbitration was commenced. And yet, they still have not settled their dispute. It would take some showing indeed to establish that the commencement of this arbitration somehow actually prevented the Parties from resolving it through negotiation. The Tribunal by majority therefore concludes that bifurcating this jurisdictional issue would not be consistent with what the Parties agreed is the paramount goal of Article VI: procedural efficiency.
40. The Tribunal by majority is further of the view that the evidentiary basis for the Respondent's objection is intertwined with factual issues that can more effectively be explored in the substantive hearing. For example, the Tribunal would expect to hear evidence of the history of the dealings between the Parties to the alleged breach of the BIT and thereafter to the filing of the Request for Arbitration on 13 December 2018. This would include the contested period between January 2018 and June 2018 when the Claimant claims, and the Respondent denies, the existence of an "investment dispute", and the period when the Respondent claims, and the Claimant denies, that there were meaningful negotiations. The Tribunal would also expect to hear evidence of any prejudice suffered by reason of the early initiation of the arbitration. For example, if the negotiation period was cut short by 6 weeks it may be easier for the Claimant to show that the Respondent suffered no detriment or prejudice than if the negotiation period was cut short by 6 months.
41. As to when the "investment dispute" commenced, Article VI(1) provides that "for purposes of **this** Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement ... (b) the interpretation or application of any investment authorization ... **or** (c) an alleged **breach** of any right conferred or created by

this Treaty...” (emphasis added). Only one of the three branches of the definition requires the existence of an alleged breach. There will have to be evidence of whether in the developing disagreement between January and June 2018 either of the first two definitions applied and if so when. On the Claimant’s version of events the Respondent was made aware of the Claimant’s objection to the proposed action against the licences in January 2018, and this exchange satisfied the definition of “investment dispute” in Article VI(1)(a) and (b). No formal notice of the existence of an investment dispute was required under Article VI.

42. The Tribunal by majority is also of the view that the Respondent’s reliance on *Murphy v Ecuador* is misplaced. In that case, the arbitration clause<sup>3</sup> stated in Article VI(2) that “the

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<sup>3</sup> **Article VI**

**1.** For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

**2.** In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

- (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
- (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
- (c) in accordance with the terms of paragraph 3.

**3. (a)** Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

- (i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (“ICSID convention”), provided that the Party is a party to such Convention; or
- (ii) to the Additional Facility of the Centre, if the Centre is not available; or
- (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
- (iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

**4.** Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

national or company concerned may choose to submit the dispute, under **one** of the following alternatives for resolution ... (c) in accordance with the terms of paragraph 3.” Paragraph 3(a) then stated that “**Provided that** the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b) **and that 6 months have elapsed from the date on which the dispute arose** the national or company concerned may chose to consent [etc.]”. (emphasis added). It is significant that reference to the six month negotiation period follows the word **provided**, which puts the negotiation period on the same footing as the other conditions for consent, unlike in the present case where the negotiation period is referenced before and not after the word “provided”, as discussed above.

43. The Respondent cites *Murphy v Ecuador* for the proposition that characterizing the negotiation period as procedural rather than jurisdictional meant it could be “breached without having any consequence whatsoever” (RRFB para 27, *Murphy* para 141). On the contrary, in the view of this Tribunal by majority, commencement of the arbitration before the expiry of the Negotiation Period may well result in termination of the arbitration if this were to result in prejudice or unfairness to the Respondent. However, in the view of this Tribunal by majority, the conclusion that commencement of the arbitration before the expiry of the Negotiation Period having regard to the particular text in Article VI of this BIT would *ipso facto* result in termination would be repugnant to the very notion of procedural efficiency.

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(a) written consent of the parties to the dispute for Purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(b) an “agreement in writing” for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (“New York Convention”).

5. Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

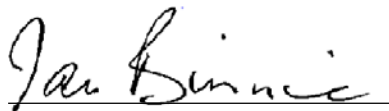
8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25 (2) (b) of the ICSID Convention.

44. The Tribunal by majority therefore concludes that the second jurisdictional objection, as well, has not met the agreed test for bifurcation referenced above in paragraph 15. At the very least, it would require the submission of evidence and argumentation that appear to be significantly intertwined with the merits. It thus might be that evidence and further argument developed during the substantive phase of the arbitration will change that provisional view, but as matters presently stand the requirements for bifurcation – as agreed by both Parties – have not been met.

**c. Dissenting Reasons of Professor Stern**

45. Arbitrator Stern considers that the objection, according to which the Claimant has not respected the period of “one year from the date upon which the dispute has arisen”, before presenting a Request for Arbitration, is an inherent part of the State’s consent to arbitration, whether or not it is introduced by the word “provided”.
46. She considers that it is a serious objection, that it is not intertwined with the merits and that, if accepted, it would put an end to the case.
47. As the majority has entered into the merits of the bifurcation, without having heard the Parties – which in her view, raises *due process* issues – and has seemingly decided that the one-year condition is a procedural condition that can be disregarded by the Tribunal and is not a jurisdictional condition inherent in the State’s consent, that *Murphy v Ecuador* is different, and finally that it is not likely that the jurisdictional objection will succeed, Arbitrator Stern wants to state her strong disagreement with all the aspects of this approach.
48. She considers that the second jurisdictional objection is a textbook case of a situation in which the bifurcation should have been granted. She considers that it is not in the interest of both Parties to have this Damocles sword hanging above the present proceeding and even possibly beyond.

For and on behalf of the Tribunal,



Hon. Ian Binnie, C.C., Q.C.  
President of the Tribunal  
Date: 28 April 2020