EXHIBIT B

COUR PERMANENTE D'ARBITRAGE PERMANENT COURT OF ARBITRATION

CERTIFICATION OF COPY OF
INTERIM AWARD DATED 22 DECEMBER 2010

RE: PCA CASE N° 2010-7 – BALKAN ENERGY (GHANA) LIMITED V. THE REPUBLIC OF GHANA

I, Dirk Pulkowski, Senior Legal Counsel of the Permanent Court of Arbitration ("PCA"), which acts as Registry in the above-referenced matter, hereby CERTIFY that the document annexed hereto (Interim Award dated 22 December 2010) is a true and authentic copy of the original document kept in the PCA's archives.

Signed, this 14th day of February 2017, at The Hague, the Netherlands:

Dirk Pulkowski
Senior Legal Counsel
Permanent Court of Arbitration
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE POWER PURCHASE AGREEMENT BETWEEN THE GOVERNMENT OF GHANA, ACTING BY AND THROUGH ITS MINISTER FOR ENERGY, AND BALKAN ENERGY (GHANA) LIMITED ON OSAGYEFO POWER BARGE AND ASSOCIATED FACILITIES, EFFASU PROJECT, DATED JULY 27, 2007

-and-

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RULES OF ARBITRATION OF 1976 ("UNCITRAL RULES")

ADMINISTERED BY THE PERMANENT COURT OF ARBITRATION ("PCA")

PCA CASE NO. 2010-7

-between-

BALKAN ENERGY LIMITED (GHANA)

("Claimant")

-and-

THE REPUBLIC OF GHANA

(the "Respondent," and together with the Claimant, the "Parties")

INTERIM AWARD

By the Tribunal

Professor Francisco Orrego Vicuña (Presiding Arbitrator)
Judge Stephen M. Schwebel
Judge Thomas A. Mensah

Dated 22 December 2010

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TABLE OF ABBREVIATIONS

Balkan US	Balkan Energy LLC, incorporated in the United States and with its principal place of business in Dallas, Texas
Balkan UK	Balkan Energy Limited, incorporated in the United Kingdom
Barge	One hundred and twenty-five megawatt (125MW) dual fired (diesel and gas) Osagyefo Power Barge in Effasu in Ghana's western region
BEC	The Claimant, Balkan Energy Limited (Ghana)
Claimant's Answers	Claimant's Answers to Questions Posed to the Parties by the Arbitral Tribunal, 14 September 2010
Claimant's Reply Submission	Claimant's Reply Submission to Respondent's Brief Regarding Procedural Order No. 1, 4 October 2010
Claimant's Third Submission	Claimant's Answers to Questions Posed to the Parties by the Arbitral Tribunal at the Hearing of 15/10/10, 5 November 2010
DCCP	Dutch Code of Civil Procedure
GADRA	Ghana's Alternative Dispute Resolution Act, 2010 (Act 798)
Ghana	The Respondent, the Republic of Ghana
Ghana High Court	High Court of Justice (Commercial Division), Accra, Ghana
Ghana High Court Order	Order for Interlocutory Injunction, 25 June 2010, High Court of Justice (Commercial Division), Accra, Ghana
Ghana High Court Ruling	Ruling, 6 September 2010, High Court of Justice (Commercial Division), Accra, Ghana
Hearing Transcript	Transcript of the Hearing Held in London, England on 15 October 2010
MOU	Memorandum of Understanding of 16 May 2007, signed between Ghana's Minister of Energy, the Honourable Joseph K. Adda, and Mr. Phillip Elders, Senior Vice President for Balkan US
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
Notice of Arbitration	In the Matter of an Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), Balkan Energy (Ghana) Limited v. The Republic of Ghana, acting as the Government of Ghana and, more in particular, through its Ministry of Energy, Notice of Arbitration, 23 December 2009

Parties	Claimant and Respondent
PCA	Permanent Court of Arbitration (The Hague, Netherlands)
Power Station	Osagyefo Power Barge and associated facilities
PPA	Power Purchase Agreement Between the Government of Ghana, Acting by and through its Minister for Energy and Balkan Energy (Ghana) Limited on Osagyefo Power Barge and Associated Facilities Effasu Project July 2007
Procedural Order No. 1	Procedural Order No. 1 of 2 July 2010 by the Arbitral Tribunal
Procedural Order No. 2	Procedural Order No. 2 of 27 July 2010 by the Arbitral Tribunal
Respondent's Brief	Respondent's Brief Regarding Procedural Order No. 1, 14 September 2010
Respondent's Reply Brief	Respondent's Reply Brief Regarding Procedural Order No. 1, 4 October 2010
Respondent's Third Submission	Respondent's Answers to the Questions Posed by the Tribunal, 5 November 2010
Terms of Appointment	Terms of Appointment, 2 July 2010
Tribunal	Arbitral Tribunal in the present arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law of 1976

I. INTRODUCTION

A. The Parties

1. The Claimant in this matter is Balkan Energy Limited (Ghana) ("BEC" or "Claimant"), a limited liability company incorporated and existing under the laws of Ghana, with its registered office in Accra, Ghana. BEC's sole shareholder is Balkan Energy Limited, a company incorporated in the United Kingdom ("Balkan UK"), which in turn is wholly owned by Balkan Energy LLC, a company incorporated in Texas, United States ("Balkan US"). The Claimant is represented by Mr. Gerard J. Meijer, NautaDutilh N.V., P.O. Box 1110, 3000 BC Rotterdam, and Weena 750, 3014 DA Rotterdam, The Netherlands, and Mr. Kojo Bentsi-Enchill and Mr. Ace Anan Ankomah, Bentsi-Enchill, Letsa & Ankomah, 4 Barnes Close, Education Loop (off Barnes Road), PO Box GP1632, Accra, Ghana.

2. The Respondent is the Republic of Ghana (hereinafter "Respondent" or "Ghana"), represented by The Honourable Mrs. Betty Mould-Iddrisu, Attorney-General and Minister of Justice, Attorney-General's Department, Post Office Box MB 60, Accra, Ghana; Mr. Joseph Tato, Mr. Jonathan D. Siegfried, and Mr. Jeffrey J. Amato, Dewey and LeBoeuf LLP, 1301 Avenue of the Americas, New York, New York 10019-5389 USA; Mr. Fui S. Tsikata and Ms. Marian Ekua Hayfron-Benjamin, Reindorf Chambers, Legal Practitioners, 20 Jones Nelson Road, Adabraka, Accra, Ghana; and Ms. Jacomijn J. van Haersolte-van Hof, HaersolteHof B.V., Tobias Asserlaan 5, 2517 KC The Hague, The Netherlands.

B. Background of the dispute

3. The present dispute concerns a Power Purchase Agreement ("PPA") entered into by the Parties on 27 July 2007, with an effective date of 31 October 2007.[1] Faced with a severe power shortage, in 2007, Ghana entered into negotiations with Balkan US for the refurbishment and commissioning of the one hundred and twenty-five megawatt (125MW) dual fired (diesel and gas) Osagyefo Power Barge ("Barge") and associated facilities ("Power Station") in Effasu in Ghana's western region, which was then unused.[2] Under the PPA, BEC was to commission the

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1 Power Purchase Agreement Between the Government of Ghana, Acting by and through its Minister for Energy and Balkan Energy (Ghana) Limited on Osagyefo Power Barge and Associated Facilities Effasu Project July 2007 ("PPA"), (In the Matter of an Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), Balkan Energy (Ghana) Limited v. The Republic of Ghana, acting as the Government of Ghana and, more in particular, through its Ministry of Energy, Notice of Arbitration, 23 December 2009 ("Notice of Arbitration"), Exhibit C-1).

2 PPA, Preamble; Notice of Arbitration, paras. 24-25; Respondent's Brief Regarding Procedural Order No. 1, 14 September 2010 ("Respondent's Brief"), at 3.

Barge within 90 working days of the effective date of the PPA; convert it into a combined cycle power plant by the addition of certain facilities; upgrade the capacity of the Barge; and invest in infrastructure to enable natural gas to be supplied to the Barge.[3] For its part, Ghana was to ensure that all electricity necessary for the refurbishment and commissioning of the Barge was provided; facilitate the acquisition of government approvals, visas, and equipment; construct and install the transmission line required for connection to the national grid; and take and pay for all electricity thereafter generated by the Power Station.[4]

4. Each Party alleges that the other has failed to perform its obligations under the PPA. For its part, BEC contends that Ghana has failed to provide adequate site electricity;[5] failed to provide a connection to the national grid through a proper transmission line;[6] and failed to comply with its obligation to facilitate the importation of equipment and the acquisition of all necessary permits, approvals, and visas.[7] BEC further contends that, under Article 11.9 of the PPA, it is owed tolling fees since 28 October 2008, the date on which it alleges that the Power Station would have been completed but for Ghana's failure to provide an adequate transmission line and interconnection facilities.[8] The tolling fees are meant not only to cover the cost of electricity but also remunerate BEC for its investments. BEC states that it has since 25 November 2008 sent to Ghana invoices totalling over USD 50,000,000 in respect of tolling fees.[9]

5. For its part, Ghana contends that it has fulfilled its obligations and claims that the Power Station has never been operational because of breaches of the agreement by BEC.[10] By letter dated 28 August 2009, Ghana's Ministry of Energy stated that Ghana had provided BEC with grid connectivity via the transmission line and interconnection facilities, and asserted that the fact that the Power Station was not operational was due to BEC's own inability to complete the facilities.[11] Ghana also claims that the upgrading of certain necessary equipment was not

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3 PPA, Preamble, at 1; PPA, paras. 2.1-2.4; PPA, First Schedule.

4 PPA paras. 2.5-2.10, 3.3.

5 Notice of Arbitration, paras. 45-48.

6 Notice of Arbitration, paras. 49-57.

7 Notice of Arbitration, paras. 58-60.

8 Notice of Arbitration, paras. 61-69.

9 PPA, paras. 65, 79.3; Notice of Arbitration, Exhibits 23 (invoice of 25 November 2008), 24 (twelve monthly invoices, from 25 November 2008).

10 *See, e.g.*, Respondent's Brief, at 4-5.

11 Notice of Arbitration, Exhibit 3.

undertaken by BEC. Moreover, Ghana asserts that recent efforts by it to inspect the Barge and to test whether it is operational "have been repeatedly rebuffed and refused by [BEC]".[12] Relying on statements made by BEC in a lawsuit filed in a United States District Court against a subcontractor on the Barge, Ghana asserts that BEC's claim that the Barge is operational is fraudulent.[13] Ghana also disputes the BEC invoices referred to above.[14]

6. After unsuccessful attempts to resolve their differences, the Parties explored the alternative of dispute resolution through arbitration. By letter dated 28 August 2009, Ghana stated that the dispute regarding the invoices "must be resolved by arbitration before any payments can be made to BEC" by Ghana.[15] By letter dated 1 September 2009, Ghana stated that, in light of the Parties' differences, "we have come to the conclusion that there is a dispute between the parties which cannot be settled through direct discussions . . . ". Ghana therefore "invoke[d] clause 22.2 of the PPA" and "recommend[ed] that the issue be referred to the Permanent Court of Arbitration for resolution".[16]

7. However, this course of action was ultimately not pursued by the Respondent. Rather it was the Claimant that on 23 December 2009 filed a Notice of Arbitration. In the arbitration BEC sought a declaration that Ghana had breached the PPA; an order that Ghana pay tolling fees of not less than USD 50,000,000 as well as damages for breaches of the PPA; and an order that Ghana fulfil its obligations under the PPA within six months from the date of the award.[17]

8. On 25 June 2010, after the appointment of the Arbitral Tribunal and four days before the First Procedural Meeting between the Parties was scheduled to take place on 29 June 2010, Ghana applied for and was granted an interlocutory injunction against the arbitral proceedings by the High Court of Justice (Commercial Division) in Accra, Ghana ("Ghana High Court"). The injunction ("Ghana High Court Order") restrained BEC from, *inter alia*, taking any further steps

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12 Respondent's Brief, at 4-5.

13 Respondent's Brief, at 4-5.

14 Notice of Arbitration, Exhibit 25.

15 Notice of Arbitration, Exhibit 3.

16 Notice of Arbitration, Exhibit 4. Ghana invoked the PPA a third time in two nearly identical facsimile letters, dated 8 and 10 February 2010. Ghana's Attorney General and Minister of Justice referred to BEC's letter of 2 February 2010, and stated that "[i]t is evident that we differ with regard to our respective interpretations of article 11.7 of the Power Purchase Agreement;" and "[t]he government of Ghana has more than complied with the terms of that provision. Thus, "[w]e have no intention of facilitating your client's execution of its expressed determination to draw down on letters of credit when it has not delivered on its commitments and is not entitled to draw down under the terms and conditions of the Power Purchase Agreement". Claimant's Answers to Questions Submitted to the Parties by the Arbitral Tribunal, 14 September 2010 ("Claimant's Answers"), Exhibits C-37, C-38.

17 Notice of Arbitration, para. 79.

in the arbitration proceedings pending final determination of the suit before the Ghana High Court. Ghana alleged, in its suit before the High Court, that the PPA and the arbitration clause, which is part of the PPA, are void for lack of prior Parliamentary approval.[18] On 6 September 2010, the Ghana High Court issued a ruling ("Ghana High Court Ruling") confirming the Order and dismissing the Claimant's application for a stay of proceedings.[19] The facts concerning actions before Ghanaian courts will be examined further below.

9. The issue at present before the Tribunal relates only to its jurisdiction in this case. The Respondent contends that both the PPA and the arbitration clause are void because the PPA did not receive Parliamentary approval as required by the Constitution of Ghana. The Claimant maintains that both questions are properly before this Tribunal. These jurisdictional questions will be examined and decided in this Interim Award.

II. PROCEDURAL HISTORY

10. By Notice of Arbitration dated 23 December 2009, pursuant to Article 22.2 of the PPA and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (the "UNCITRAL Rules"), BEC commenced arbitration against Ghana.[20] In accordance with the UNCITRAL Rules, BEC proposed that the dispute be decided by three arbitrators.[21] BEC noted that the PPA stipulated that the place of arbitration would be The Hague, and that the arbitration would take place under the auspices of the Permanent Court of Arbitration ("PCA"); that the arbitration would be governed by and conducted in accordance with the UNCITRAL Rules; and that the PPA would be governed by and construed in accordance with the laws of the Republic of Ghana. Noting that the PPA did not expressly state the language in which the arbitral proceedings were to be conducted, BEC requested, in accordance with Article 17 of the UNCITRAL Rules, that the language of the arbitration be English, following the language of the PPA and all communications between the Parties.[22]

11. Ghana responded by facsimile dated 7 January 2010. On behalf of Ghana's Minister of Justice and Attorney-General, Mrs. Betty Mould-Iddrisu, Ghana's Solicitor-General, Mrs. Amma A.

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18 Order for Interlocutory Injunction, 25 June 2010, High Court of Justice (Commercial Division) ("Ghana High Court Order") (Claimant's Answers, Exhibit C-27).

19 Ruling, 6 September 2010, High Court of Justice (Commercial Division) ("Ghana High Court Ruling") (Claimant's Answers, Exhibit C-41).

20 Notice of Arbitration, paras. 1, 14; PPA, para. 22.2.

21 Notice of Arbitration, paras. 21-23.

22 Notice of Arbitration, para. 20.

Gaisie, informed BEC that Ghana agreed to the number of arbitrators being three, with each Party nominating one arbitrator, and the two arbitrators together appointing the third. Ghana also agreed that, pursuant to Article 22.2 of the PPA, the arbitration would take place at the Permanent Court of Arbitration in The Hague, and would be governed by and conducted in accordance with the UNCITRAL Rules. Finally, Ghana agreed that the language of the arbitration would be English, and notified BEC that it would be represented in the arbitration by the Minister of Justice, the Honourable Mrs. Betty Mould Iddrisu.[23]

12. On 15 January 2010, the Claimant appointed Judge Stephen M. Schwebel as the first arbitrator.[24] By letter dated 17 February 2010, Ghana stated that it had no record of receiving a Notification of Appointment from BEC; that it would deem BEC's letter of 16 February 2010 to be such Notification; and that it would appoint an arbitrator by 16 March 2010.[25] By letter dated 23 February 2010, BEC agreed that it would not seek any action from the appointing authority until 16 March 2010.[26] On 12 March 2010, the Respondent appointed Judge Thomas A. Mensah as the second arbitrator.[27]

13. On 1 April 2010, the Co-arbitrators notified the Parties that they had chosen Professor Francisco Orrego Vicuña as the President of the Tribunal.[28]

14. By letter dated 28 April 2010, the Tribunal confirmed the Parties' agreement that the First Procedural Meeting would take place on 29 June 2010 in Paris, France.[29]

15. The Tribunal was informed in June 2010 that, on 22 February 2010, BEC had applied to the District Court of Amsterdam for leave to attach certain assets of the Government of Ghana in the Netherlands. On 24 February 2010, the District Court had granted leave to attach assets up to USD 66,330,000, pending the determination of the arbitration. However, no attachments were successfully placed, because the Government of Ghana had no assets in the relevant bank accounts.[30] As will be explained below, the Claimant later gave an undertaking before the

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23 Claimant's Answers, Exhibit C-35.

24 Claimant's Answers, Exhibit C-36.

25 Letter from the Respondent of 17 February 2010, not included as Exhibit to pleadings.

26 Letter from the Claimant of 23 February 2010, not included as Exhibit to pleadings.

27 Claimant's Answers, Exhibit C-39.

28 Terms of Appointment, 2 July 2010 ("Terms of Appointment"), para. 3.3.

29 Letter from the Tribunal of 28 April 2010, not included as Exhibit to pleadings.

30 Claimant's Answers, paras. 208–220; Claimant's Answers, Exhibit C-44.

Ghana High Court that it would seek no further conservatory attachments of the Respondent's assets in any jurisdiction pending the final determination of the arbitration.

16. On 25 June 2010 the Respondent informed the Tribunal that, on that same day, the Ghana High Court had issued an interlocutory injunction restraining BEC from proceeding with the arbitration; taking further steps to attach assets of the Government of Ghana; or instituting or pursuing any other arbitration proceedings or seeking any other relief in any jurisdiction outside Ghana in relation to the dispute.[31] Both Parties submitted their views on the effect of the Ghana High Court Order on the present proceedings. The Tribunal, having considered both Parties' views, decided to postpone the First Procedural Meeting "until both the relevant facts and the Parties' positions have been more fully clarified".[32]

17. On 2 July 2010, the Tribunal adopted the Terms of Appointment, which reflected points of agreement communicated by the Parties in a joint letter of 8 June 2010 and telephone communications of 11 June 2010. The Terms of Appointment confirmed the UNCITRAL Rules as the governing rules and the laws of the Republic of Ghana as the governing law, and designated English as the language of arbitration and The Hague, the Netherlands, as the place of arbitration. The Parties also agreed that, notwithstanding this latter designation, the Tribunal will conduct hearings or meetings in London, England, unless the Tribunal, after having consulted with the Parties, finds it appropriate that a specific hearing or meeting be held in another location. The Parties also agreed that the Tribunal may conduct hearings or meetings by telephone. Finally, the Terms of Appointment recorded the terms of Tribunal remuneration and PCA Registry support.[33]

18. On 2 July 2010, the Tribunal also adopted Procedural Order No. 1, communicating the Tribunal's decision to address questions regarding the validity of the arbitration clause contained in Article 22.2 of the PPA as a preliminary matter. The Tribunal requested the Parties to submit simultaneously, by 2 August 2010, written briefs addressing the following questions: (a) whether the Tribunal is competent to rule on the validity of the PPA and of the arbitration clause contained in Article 22 thereof; (b) whether the PPA is valid; (c) whether the Parties are bound by an agreement to arbitrate in respect of the proceedings initiated by the Claimant in its Notice of Arbitration dated 23 December 2009; and (d) whether the Injunction issued by the Court of Justice (Commercial Division) in Accra on 25 June 2010, or any other court order of a similar nature that may be issued in the future, affects the jurisdiction of the Tribunal. Both

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31 Letter from the Respondent of 25 June 2010, not included as Exhibit to pleadings.

32 Letter from the Tribunal of 26 June 2010, not included as Exhibit to pleadings.

33 Terms of Appointment.

Parties were invited to submit reply briefs to address the arguments of the opposing Party within 20 days from receipt of the briefs referred to above.[34]

19. By letter dated 13 July 2010, the Respondent notified the Tribunal that, pursuant to the Ghana High Court Order, the Respondent considered that the Parties would be unable to make any submissions to the Tribunal regarding Procedural Order No. 1 or Draft Procedural Order No. 2, at least until after the hearing scheduled for 20 July 2010 in Ghana or such time as the Ghana High Court issued a further ruling. The Respondent observed that for either Party to make submissions to the Tribunal would subject the offending Party to contempt.[35]

20. By letter dated 23 July 2010, the Claimant notified the Tribunal that the hearing before the Ghana High Court did not proceed as planned, but had been rescheduled for 27 July 2010. The Claimant requested an extension of the deadline for submission of the written briefs set out in Procedural Order No. 1 until 14 August 2010.[36]

21. On 27 July 2010, the Tribunal amended Section 1 of Procedural Order No. 1 to extend the due date for filing of briefs on the matters set out in that Section until 14 August 2010; notified the Parties that it intended to hold the oral hearing on the same matters on 15 October 2010 in London, England; and requested the Parties to keep the Tribunal informed about relevant developments in connection with any hearings before or decisions adopted by the Ghana High Court.[37]

22. On 27 July 2010, taking into account the Parties' comments, the Tribunal also adopted Procedural Order No. 2, providing additional direction on procedural matters such as quorum and decisions; forms of decisions, notifications and motions; evidence; document production; and records of hearings.[38]

23. On 30 July 2010, the Respondent notified the Tribunal that, as a result of recent filings by both Parties, the Ghana High Court adjourned the hearing of Ghana's motion to stay the arbitration and BEC's motion to compel arbitration to 11 and 12 August 2010.[39] In view of this

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34 Procedural Order No. 1 of 2 July 2010 ("Procedural Order No. 1").

35 Letter from Reindorf Chambers of 13 July 2010 (Claimant's Answers, Exhibit C-43).

36 Letter from the Claimant of 23 July 2010, not included as Exhibit to pleadings.

37 Letter from the Tribunal of 27 July 2010, not included as Exhibit to pleadings.

38 Procedural Order No. 2 of 27 July 2010 ("Procedural Order No. 2").

39 Letter from the Respondent of 30 July 2010, not included as Exhibit to pleadings.

adjournment, on 17 August 2010, the Tribunal extended the due date for the filing of briefs to 14 September 2010, and the due date for reply briefs to 4 October 2010.[40]

24. On 7 September 2010, the Respondent informed the Tribunal that, on the previous day, the Ghana High Court had dismissed BEC's motion to stay the court proceedings in Ghana and to compel arbitration, but had granted Ghana's request to confirm the interlocutory injunction, pending the determination of the court proceedings in Ghana.[41]

25. On 8 September 2010, the Tribunal confirmed the due date of 14 September 2010 for filing of the briefs on the matters set out in Section 1 of Procedural Order No. 1, and the due date for reply briefs of 4 October 2010. The Tribunal also invited the Parties to address in their briefs the implications of the Ghana High Court Ruling of 6 September. Finally, the Tribunal confirmed the date of 15 October 2010 for the oral hearing on the matters set out in Section 1 of Procedural Order No. 1, to be held in London, England.[42]

26. On 14 September 2010, both Parties submitted to the Tribunal briefs on the matters set out in Section 1 of Procedural Order No. 1.

27. On 4 October 2010, both Parties submitted to the Tribunal reply briefs regarding the matters addressed in the briefs of 14 September 2010.

28. The hearing was held on 15 October 2010 in London, England. Counsel for both Parties addressed the Tribunal on their respective views regarding the matters set out in Section 1 of Procedural Order No. 1. The Tribunal also put questions to the Parties at the hearing which were further explained in writing on 21 October 2010. The Parties submitted their respective answers to these questions on 5 November 2010.

29. The Tribunal held deliberations in person and by correspondence following the hearing and has come to the conclusions set forth in this Interim Award on Jurisdiction.

III. STATEMENT OF FACTS

30. The following section sets out what appear to be the undisputed facts regarding the arbitration proceedings and the proceedings in the Ghanaian courts. This statement of facts does not in any way indicate the position of the Tribunal with regard to the merits of the dispute, as has been noted above.

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40 Letter from the Tribunal of 17 August 2010, not included as Exhibit to pleadings.

41 Letter from the Respondent of 7 September 2010, not included as Exhibit to pleadings.

42 Letter from the Tribunal of 8 September 2010, not included as Exhibit to pleadings.

A. Conclusion of the Power Purchase Agreement

31. In 2007, the Republic of Ghana faced a severe power shortage.[43] As a step toward addressing this crisis, the Government of Ghana engaged in negotiations with Balkan US in order to conclude an agreement for Balkan to refurbish and recommission the 125-megawatt Osagyefo Barge in Effasu in the Western Region of Ghana.[44]

32. In furtherance of these negotiations, Balkan US sent an Expression of Interest, dated 10 May 2007, promising a complete technical proposal for the commissioning of the Barge.[45] Ghana's Ministry of Energy responded by inviting Balkan US to see the Barge to assist with the preparation of the proposal.[46] A Memorandum of Understanding ("MOU"), dated 16 May 2007, was signed by Ghana's Minister of Energy, the Honourable Joseph K. Adda, and by Mr. Phillip Elders, Senior Vice President for Balkan US. The MOU called for a Power Purchase Agreement to stipulate the final terms and conditions of the agreement between the two Parties.[47] The PPA was subsequently negotiated by the Parties with the participation of government and corporate officials.[48]

33. Article 12 of the Ghana Energy Commission Act of 1997 (Act 541) requires that, for a company to hold a license for bulk energy supply in Ghana, it must be incorporated in Ghana.[49] To meet this requirement, BEC was, with the agreement of Ghana, registered under the Companies Code, 1963 (Act 179) of Ghana as a locally incorporated company on 16 July 2007. The ownership structure of BEC has been explained in paragraph 1 above.[50]

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43 PPA, Preamble.

44 Notice of Arbitration, paras. 24-26; Respondent's Brief, at 3. The Parties appear to dispute the status and condition of the Barge at the time of their negotiations. The Claimant states, "At the time of the conclusion of the PPA, the Osagyefo Power Barge had already been in Ghana since 2002 without ever having been used. This means the Power Station had never run and was in a state of neglect". Notice of Arbitration, para. 24. By contrast, the Respondent states that the Barge, "over time from non-use, was in need of repair". Respondent's Brief, at 3.

45 Notice of Arbitration, Exhibit 5.

46 Notice of Arbitration, Exhibit 6.

47 Notice of Arbitration, Exhibit 7.

48 Claimant's Answers, Exhibit C-29.

49 Ghana Energy Commission Act of 1997 (Act 541), Art. 12 (Claimant's Answers, Exhibit C-30).

50 Certificate of Incorporation, Balkan Energy (Ghana) Limited (Claimant's Answers, Exhibit C-31).

34. The PPA was signed by representatives of both Parties on 27 July 2007.[51]

35. In Article 29.2 of the PPA, Ghana warranted that:

> [The Government of Ghana] has the full power, authority, and legal right to carry on its business as now conducted. The [Government of Ghana] has taken all actions necessary or reasonably requested by BEC to authorize it to execute, deliver, perform and observe the terms and conditions of this Agreement and the other documents. The [Respondent] has the full legal right, power and authority for and on behalf of the Government of Ghana to pledge the full faith and credit of the Republic of Ghana under the terms of the Agreement.
>
> . . .
>
> The [Government of Ghana] has duly executed and delivered this Agreement on or before the Agreement date . . . . This Agreement has been executed and delivered and constitutes, and will constitute, a direct, general, and unconditional legal obligation of the [Government of Ghana] which is legal, valid, and binding upon the [Government of Ghana] and enforceable against the [Government of Ghana] in accordance with its respective terms, and for which the full faith and credit of the Republic of Ghana is pledged.[52]

36. Additionally, Article 7.2 of the PPA conditioned the effectiveness of the PPA on issuance, within 14 days of its execution, of a letter from the Government of Ghana that all required approvals from the relevant authorities in Ghana had been obtained, as well as a legal opinion of the Attorney-General of Ghana as to the validity, enforceability, and binding effect of the agreement.[53] Specifically, the legal opinion was to address Article 181(5) of the Constitution of Ghana, which requires Parliamentary approval for any "international business or economic transaction to which the Government is a party".[54]

37. On 26 October 2007, the Minister of Justice and Attorney-General of Ghana, the Honourable Joe Ghartey, issued two legal opinions. The first opinion stated:

> After examining the attached documents we are satisfied that . . .
>
> . . . the power producer, Balkan Energy (Ghana) Limited (BEC) is a locally incorporated company and as a result the PPA does not come under the ambit of Article 181(5) of the 1992 Constitution which stipulates that an international business or economic transaction to which the Government is a party should be submitted to Parliament for approval. In the Supreme Court case of Attorney General versus Faroe Atlantic Co. Ltd. (2005-2006) . . . the Supreme Court held that international business or economic transaction means international business or

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51 PPA.

52 PPA, para. 29.2(a), (d).

53 PPA, para. 7.2.

54 Constitution of Ghana, Art. 181(5) (Respondent's Compendium of Authorities, Exhibit 26).

> international economic transaction. This clearly excludes the project hereof which involves a local company in a local transaction with the Government.
>
> In light of the above a Parliamentary approval would not be required for the effectiveness of the Agreement[].[55]

The second legal opinion stated:

> I have examined executed copies of the [PPA and project Site Lease ("Project Agreements")] and such other documents as I have considered necessary or desirable to examine in order that I may give this opinion. . . .
>
> I am of the opinion that:
>
> (i) [The Government of Ghana] has the power to enter into the Project Agreements and to exercise its rights and perform its obligations there under, and execution of the Project Agreements on behalf of [the Government of Ghana] by the person(s) who executed the Project Agreements was duly authorised;
>
> (ii) all acts, conditions and things required by the laws and constitution of the Republic of Ghana to be done, fulfilled and performed in order (a) to enable [the Government of Ghana] lawfully to enter into, exercise its rights under and perform the obligations expressed to be assumed by it in the Project Agreements, (b) to ensure that the obligations expressed to be assumed by it in the Project Agreements are valid and enforceable by appropriate proceedings and (c) to make the Project Agreements admissible in evidence in the Republic of Ghana, have been done, fulfilled and performed in compliance with the laws and constitution of the Republic of Ghana;
>
> (iii) The obligations of [the Government of Ghana] under the Project Agreements are legal and valid obligations binding on [the Government of Ghana] and enforceable in accordance with the terms of the Project Agreements;
>
> (iv) [The Government of Ghana] is not entitled under the terms of the Project Agreements to claim any immunity from suit, execution, attachment or other legal process in the Republic of Ghana and such waiver is legal and binding on [the Government of Ghana] and enforceable in accordance with the terms of the Project Agreements; and
>
> (v) The sanctity of contract is recognised under the laws of Ghana and consequently the validity of the Project Agreements and the binding nature of the obligations of the parties there under are constitutionally safeguarded.[56]

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[55] Operationalising the Osagyefo Barge, Legal Opinion by the Attorney-General, 26 October 2007 (Notice of Arbitration, Exhibit 8).

[56] Legal Opinion, Power Purchase Agreement Between the Government of Ghana and Balkan Energy (Ghana) Limited, 26 October 2007 (Notice of Arbitration, Exhibit 8).

38. On 30 October 2007, the Minister for Energy of Ghana, Mr. Adda, noted in a communication to Mr. Elders that, as per the conditions precedent in Article 7 of the PPA, Ghana had: issued a legal opinion as to the validity, enforceability and binding effect of the PPA; issued to BEC a standby letter of credit, as required by Article 11.7; and provided BEC with construction power at the Effasu site. Mr. Adda also acknowledged that BEC had submitted to Ghana: copies of BEC's Certificate of Incorporation, Certificate to Commence Business, and Regulations of BEC; copies of resolutions adopted by BEC's Board of Directors authorizing the execution, delivery and performance by BEC of the PPA; and copies of a resolution adopted by BEC shareholders authorizing the execution, delivery and performance by BEC of the PPA, certified by the BEC Secretary. In the communication, Mr. Adda declared 31 October 2007 to be the PPA Effective Date.[57]

39. Under the PPA, the Parties agreed that, whereas Ghana had an urgent need for additional electricity generation to meet its power supply deficiencies, BEC, bearing all costs, estimated at USD 40 million, would lease the Power Station from Ghana, and would commission it within 90 working days of the effective date of the PPA; that BEC, bearing all costs, estimated at USD 100 million, would convert the Power Station into a combined cycle power plant by the addition of a heat recovery steam generator with an incremental capacity of approximately 60MW, a steam turbine, and electric generator and associated facilities within nine months of the effective date of the PPA; that BEC, at an estimated cost of USD 250 to 300 million, would privately invest and bring two more combined cycle barge mounted systems, with capacity of approximately 185 megawatts each, to the site within thirty-six months of agreement on a tolling fee for the systems; that BEC would, subject to satisfactory conclusion of supply agreements with other source providers and at an estimated cost of USD 100 million, invest in infrastructure to enable natural gas to be supplied to the Power Station within three years of the effective date of the PPA; and that BEC would provide all fuel to the Project at cost.[58]

40. Under the PPA, the Parties also agreed that Ghana would ensure that all necessary electricity was provided, at BEC's cost, and made available at the site as reasonably required by BEC; that Ghana would promptly facilitate the acquisition of governmental approvals for the duty-free importation and transportation of equipment to the site, for operating permits, licenses and approvals for the project, and for visas and work permits for foreign personnel and for full compliance with all local and other regulations; that Ghana thereby guaranteed that BEC would have the exclusive right to generate electricity from the site subject to meeting the agreed timetable; that Ghana would facilitate the acquisition of all governmental approvals required for

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57 Claimant's Answers, Exhibit C-32.

58 PPA, Preamble; paras 2.1-2.4; First Schedule.

the leasing, equipping and operation of the Power Station, including relevant environmental permits from the Environmental Protection Agency; that Ghana would construct, install and connect the transmission line and relay protection equipment necessary to connect the Power Station to the national grid, except that BEC would be responsible, at its own cost, for provision of adequate transmission cables to the point of interconnection with Ghana's national electricity grid; that Ghana would take and pay for all electricity generated by the Power Station during the term of the Agreement.[59]

41. Under the PPA, the Parties also agreed that they would mutually collaborate with each other in order to achieve the objectives of the Agreement and the performance by each Party of its obligations, and that Ghana would provide full and timely cooperation in connection with BEC's efforts to finance the Power Station on a non-recourse, project finance basis, including, without limitation, responding to all requests for information on and certification of Ghana's authority and the status of the PPA.[60]

42. The PPA further provides that, should BEC be unable to commence testing of the Power Station as a result of Ghana's failure to provide an adequate transmission line and interconnection facilities for the Power Station, Ghana would be obligated to commence paying tolling fees to BEC on the thirtieth day after BEC certified to Ghana that the Power Station was complete or would have been complete except for Ghana's non-performance.[61]

43. Finally, Article 22.2 of the PPA provides, in relevant part:

> If any disputes arise out of or in relation to this Agreement and if such matter cannot be settled through direct discussion of the Parties, the matter shall be referred to binding arbitration at the Permanent Court of Arbitration, Peace Palace, Carnegieplein 2, 2517 KJ in The Hague, The Netherlands. . . . Applications may be made to such court for judicial recognition of the award and/or an enforcement as the case may be. Arbitration shall be governed by and conducted in accordance with UNCITRAL rules.

B. Initiation of proceedings in Ghana

44. As noted above, by Notice of Arbitration dated 23 December 2009, BEC initiated arbitral proceedings against Ghana on the basis of Article 22.2 of the PPA.[62] The Tribunal was duly constituted on 1 April 2010.[63]

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59 PPA, paras. 2.5-2.9, 3.3.

60 PPA, para. 2.10.

61 PPA, para. 11.9.

62 Notice of Arbitration, paras. 14-15.

63 Claimant's Answers, Exhibit C-36, C-39; Terms of Appointment, para. 3.3.

45. On 25 June 2010, upon motion *ex parte* for interlocutory injunction by the Attorney-General of Ghana, the Ghana High Court issued an injunction, restraining BEC from proceeding with arbitration pending the determination of the enforceability, under Article 181(5) of the Constitution of Ghana, of the arbitration clause and the PPA. BEC was additionally restrained from taking further steps in relation to the 26 February 2010 decision of the District Court of Amsterdam attaching the Government of Ghana's assets in the Netherlands pending final determination of the suit before the Ghanaian courts. Finally, BEC was restrained from instituting or pursuing any other arbitration proceedings or seeking any other relief in any jurisdiction outside the jurisdiction of Ghana in respect of the PPA, pending the final determination of the suit before the Ghanaian courts.[64]

46. On 5 July 2010, on further application by the Government of Ghana, the Ghana High Court renewed the order and set 20 July 2010 for argument on the Government's motion.[65]

47. On 14 July 2010, the Claimant filed a motion on notice in the Ghana High Court for an order to stay proceedings and to compel arbitration.[66]

48. On 15 July 2010, BEC gave a specific undertaking before the Ghana High Court that it would not seek any further conservatory attachments of any of Ghana's assets in any country, pending the final determination of the arbitration.[67]

49. On 20 July 2010, the hearing before the Ghana High Court did not proceed as planned, and was rescheduled for 27 July 2010.[68] However, as a result of further filings by both Parties, the Ghana High Court adjourned the hearing on Ghana's motion to stay the arbitration, and BEC's motion to compel arbitration, to 11 and 12 August 2010.[69]

50. On 6 September 2010, the Ghana High Court dismissed BEC's motion to stay the court proceedings in Ghana and to compel arbitration, and it granted Ghana's request for an interlocutory injunction pending the determination of the court proceedings in Ghana. The injunction restrains BEC from proceeding with or taking any further steps whatsoever in the arbitration proceedings instituted by it on 23 December 2009 against Ghana, save to notify the

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64 Ghana High Court Order.

65 Respondent's Brief, Exhibit 8; *see also* Letter from Reindorf Chambers of 13 July 2010.

66 Motion on Notice for Stay of Proceedings, 14 July 2010, High Court of Justice (Commercial Division), not included as Exhibit to pleadings.

67 Claimant's Answers, para. 219.

68 Letter from the Claimant of 23 July 2010, not included as Exhibit to pleadings.

69 Letter from the Respondent of 30 July 2010, not included as Exhibit to pleadings.

Tribunal of this restraint, pending the final determination of the suit in Ghana; restrains BEC from taking any further steps in relation to or in connection with a decision made by the District Court of Amsterdam in the Netherlands on 26 February 2010 attaching assets of Ghana in the Netherlands, pending final determination of the suit in Ghana; and that BEC, its privies and agents are restrained from instituting or pursuing any other arbitration proceedings or seeking any other relief in any jurisdiction outside Ghana in respect of the PPA, pending the final determination of the suit in Ghana.

51. In its Ruling, the Court relied on Ghanaian case law, arguments of the Deputy Attorney-General, and affidavits from officials of the Attorney-General's Office and the Ministry of Energy. The Court first found that Ghana had established that the application was neither frivolous nor vexatious because serious constitutional and legal issues had been raised.[70] These constitutional and legal issues were: whether the PPA and arbitration clause were "international business or economic transaction[s]" and thus void for failure to obtain prior Parliamentary approval, and whether the 2005 decision of the Ghana Supreme Court in *Attorney General v. Faroe Atlantic* had determined the constitutional issue, or whether, instead, the corporate veil should be lifted on BEC.

52. Furthermore, analyzing the "balance of conveniences," the Court found that Ghana had made a strong case that it would suffer greater harm, as compared to mere delay in the arbitral proceedings, if the application was not granted, including expenses incurred in defending other proceedings while the matter was pending in Ghana.[71] In the Court's view, however, the dispositive issue was not so much which Party would suffer the greater harm, but whether or not the harm caused could be easily repaired. In that regard, it found that, whereas the seizure and disposition of Ghana's assets would not be easily repaired, BEC could be compensated by Ghana where necessary.[72] In determining the balance of convenience, the Court also considered whether the Arbitral Tribunal possesses competence to decide the constitutional question at issue in the Ghanaian proceedings, and whether the Tribunal would be bound by any stay of execution it issued, which is provided for in Ghana's Alternative Dispute Resolution Act, 2010 (Act 798) ("GADRA"). Finally, the Court noted the fact that the UNCITRAL Rules permit the Tribunal to rule on objections at the close of the proceedings.[73]

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70 Ghana High Court Ruling, at 9-11.

71 Ghana High Court Ruling, at 11-12.

72 Ghana High Court Ruling, at 12.

73 Ghana High Court Ruling, at 14.

53. By letter dated 9 September 2010 addressed to the Claimant, Ghana's Attorney-General and Minister of Justice Mrs. Mould-Iddrisu stated Ghana's position that, in view of the decision, "the proper steps to take in relation to the arbitration proceedings is to ask the Tribunal to suspend its proceedings pending the determination of the Ghana High Court action. Should Balkan take any steps with a view to continuing the proceedings, it will be in contempt of court and we will not hesitate to take appropriate and immediate action. To put the matter beyond doubt, we would be happy to take steps jointly with you to advise the Tribunal to suspend any further proceedings including the hearing that it has scheduled for 15th October 2010".[74]

54. At the Tribunal's directions, the hearing took place on 15 October as envisaged, and both Parties were duly in attendance to argue their respective views on the jurisdictional issues raised. The Tribunal notes that, after the hearing, the procedure for referral of the constitutional issue to the Supreme Court was nevertheless set in motion by the Respondent's application to this effect to the Ghana High Court, and notice was served on counsel for BEC on 4 November 2010.[75] The procedure for pre-trial conference was also set in motion on 5 November 2010.[76]

55. On the basis of the Parties' submissions both in writing and orally the Tribunal is now in a position to decide the jurisdictional matter disputed.

IV. RELIEF REQUESTED

56. As noted earlier, the present Interim Award relates exclusively to certain matters that require a preliminary determination on the part of the Tribunal—notably, the question of the Tribunal's jurisdiction in these proceedings. The Interim Award does not address the Parties' substantive claims and defences. Accordingly, the Tribunal will only restate in the following section the Parties' requests for relief to the extent that they pertain to matters covered by the present Interim Award.[77]

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74 Claimant's Answers, Exhibit C-28.

75 Respondent's Answers to the Questions Posed by the Tribunal, 5 November 2010 ("Respondent's Third Submission"), at 4.

76 Respondent's Third Submission, at 4.

77 As indicated in its Notice of Arbitration, the substance of the Claim concerns BEC's purported entitlement to tolling fees "provisionally estimated at an amount of no less than US$ 50 million" as well as a yet-unspecified amount of compensation. The Claimant noted, further, that it intended "to provide full particulars of the amounts claimed by way of payment of Tolling Fees and of damages, as well as a detailed statement of the declarations and orders that it shall seek from the Arbitral Tribunal to that end" and reserved "the right to amend or supplement its claims in its Statement of Claim," Notice of Arbitration, paras. 77 and 80.

57. The Respondent initially requested that the Tribunal "decline to rule on a non-arbitrable matter —namely, whether the Constitution of Ghana, as properly interpreted, renders the arbitration agreement unenforceable—and, in any event, suspend these proceedings pending a final determination by the Ghana court on the constitutional issue before it".[78]

58. The Claimant, in its initial brief, concluded that "this Arbitral Tribunal is the competent and correct decision-maker on the question of its jurisdiction" and that "this Arbitral Tribunal has jurisdiction to proceed with this arbitration". In addition, the Claimant requested that the Arbitral Tribunal "issue both a procedural order on the confidentiality of these proceedings, as well as an anti-suit injunction ordering [the Respondent] to withdraw its requests currently before the Ghanaian High Court of Justice and to refrain from initiating any further court proceedings in Ghana or anywhere else".[79]

59. In its Reply Brief, the Respondent stated that the Tribunal "should decline from ruling on a non-arbitrable matter, or suspend these proceedings pending a decision by the Supreme Court of Ghana on the applicability of Article 181(5) of the Constitution to the PPA and arbitration clause therein". The Respondent also requested that the Tribunal "deny the request for interim relief sought by Balkan".[80]

60. In addition to confirming its position regarding the Tribunal's competence, the Claimant restated in its Reply Submission the request that the Tribunal "issue both a procedural order on the confidentiality of these proceedings, as well as an anti-suit injunction ordering [the Respondent] to withdraw its requests currently before the Ghanaian High Court of Justice and to refrain from initiating any further court proceedings in Ghana or anywhere else".

V. JURISDICTIONAL ISSUES TO BE DECIDED BY THE TRIBUNAL

61. In its Procedural Order No. 1, which was adopted in consideration of the Parties' initial views regarding the implications of the Ghana High Court Order of 25 June 2010, the Tribunal had identified the following points, which it believes to be central to the question of its jurisdiction:

    a. The competency of the Tribunal to rule on the validity of the PPA and the arbitration clause contained in Article 22 thereof;

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78 Respondent's Brief, at 17.

79 Claimant's Answers, paras. 262, 264.

80 Respondent's Reply Brief Regarding Procedural Order No. 1, 4 October 2010 ("Respondent's Reply Brief"), at 32.

b. The validity of the PPA, and whether the Parties are bound by an agreement to arbitrate in respect of the proceedings initiated by the Claimant in its Notice of Arbitration dated 23 December 2009;

c. Whether the Ghana High Court Order of 25 June 2010, or any other court order of a similar nature that may be issued in the future, affects the jurisdiction of the Tribunal, and the implications of the 6 September 2010 Ghana High Court Ruling in relation to Ghana's application for an interlocutory injunction and BEC's motion on notice for a stay of proceedings.

62. The Tribunal will examine the Parties' arguments and come to its findings on each of these points. In so doing the Tribunal wishes to state at the outset that it has the highest respect for the courts of Ghana and its legal system as a whole. It does not regard the issues disputed as entailing a legal competition between its competence as an arbitration tribunal and the jurisdiction of the national courts of Ghana. Rather, it believes that its decision should be taken solely on the basis of the legal rules and principles that ought to apply, in the light of the Parties' commitments, including those specified in Article 22 of the PPA, and of the Tribunal's aim to seek the most reasonable alternative in the pursuit of justice.

63. The Tribunal notes with appreciation that the Ghana High Court Order does not question the competence of this Tribunal, under the UNCITRAL Rules, to give its ruling on objections at the appropriate point of the proceedings, be it the jurisdictional or the merits phase, nor does it purport to subject the Tribunal to the orders (e.g., stay of execution) of the Ghana High Court. In the same spirit of courtesy and respect the Tribunal will not grant the request of the Claimant that the Tribunal issue an anti-suit injunction ordering Ghana to withdraw its domestic suit or to refrain from any further court proceedings in Ghana or elsewhere. As indicated below, the Tribunal will be pleased to take fully into account the views of the courts in Ghana, to the extent that such views become available in the course of its proceedings. For that purpose, the Tribunal will endeavour as much as possible to arrange for an ample procedural calendar so as to take account of this possibility.

A. The competency of the Tribunal to rule on the validity of the PPA and the arbitration clause contained in Article 22 thereof.

The Respondent's arguments

64. The Respondent maintains that determination of the validity of either the PPA or the arbitration clause involves determinations on questions of interpretation of the Ghanaian Constitution, and is, therefore, non-arbitrable. The Respondent further maintains that, even if the Tribunal nonetheless were to find that it is competent to rule on the validity of either or both agreements, the proper and practical course would be for the Tribunal to exercise restraint and to await a

definitive determination of the issues of Ghanaian Constitutional law by the Ghana Supreme Court, which is seized of those issues.

65. In respect of the Tribunal's competence to rule on the validity of the PPA, the Respondent submits that the PPA, by its terms, is expressly governed by Ghanaian law.[81] The Respondent asserts that there is a threshold question of Ghanaian constitutional law as to whether the PPA is valid in the absence of Parliamentary approval. In this regard, the Respondent refers to Article 181(5) of the Ghanaian Constitution, which provides that the Ghanaian Parliament must approve any "international business or economic transaction" to which the Government of Ghana is a party.[82] In the Respondent's view, the Ghana Supreme Court has not yet clearly spoken as to whether Article 181(5) applies to transactions that are between the Government of Ghana and a local entity, but which have international elements. The Respondent refers to the Ghana High Court Ruling, which found that "serious constitutional questions" exist as to whether the PPA is an international business or economic transaction, within the meaning of Article 181(5).[83]

66. The Respondent further submits that Ghanaian law is clear that the Ghana Supreme Court is vested with exclusive jurisdiction to interpret the Ghanaian Constitution, and that questions

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81 Transcript of the Hearing Held in London on 15 October 2010 ("Hearing Transcript"), 6:12-23; 25:16-17; Respondent's Third Submission, at 1 (question 1).

82 Hearing Transcript, 5:5-8:4; 21:10-21; Respondent's Third Submission, at 1 (question 1). Article 121 of the Ghanaian Constitution provides, in full:

> (1) Parliament may, by a resolution supported by the votes of a majority of all the members of Parliament, authorise the Government to enter into an agreement for the granting of a loan out of any public fund or public account.
>
> (2) An agreement entered into under clause (1) of this article shall be laid before Parliament and shall not come into operation unless it is approved by a resolution of Parliament.
>
> (3) No loan shall be raised by the Government on behalf of itself or any other public institution or authority otherwise than by or under the authority of an Act of Parliament.
>
> (4) An act of Parliament enacted in accordance with clause (3) of this article shall provide
>
> (a) that the terms and conditions of a loan shall be laid before Parliament and shall not come into operation unless they have been approved by a resolution of Parliament; and
>
> (b) that any moneys received in respect of that loan shall be paid into the Consolidated Fund and form part of that Fund or into some other public fund of Ghana either existing or created for the purposes of the loan.
>
> (5) This article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan.

83 Hearing Transcript, 5:10-17; 7:11-8:4.

relating to the interpretation of the Constitution of Ghana are non-arbitrable.[84] In these regards, the Respondent refers to Article 130(1)(a) of the Ghanaian Constitution, which vests exclusive original jurisdiction in the Ghana Supreme Court over "all matters relating to the enforcement or interpretation of this Constitution,"[85] and to Article 1 of the GADRA, which, in the Respondent's view, expressly exempts from arbitration issues of "enforcement and interpretation of the Constitution".[86] The Respondent argues that these two provisions, taken together, render non-arbitrable the question whether the PPA is void *ab initio* for failure of Parliamentary approval.[87]

67. The Respondent argues that Ghanaian law governs the arbitration clause and thus also determines issues of objective arbitrability.[88] According to the Respondent, Ghanaian law governs the arbitration clause because the Parties specifically subjected the PPA to the laws of Ghana, and the default position in international arbitration is that a choice of law provision in the main contract also applies to an arbitration clause contained therein. In the Respondent's view, there is at least a strong presumption in favour of extending the application of the law of the main contract to the arbitration clause.[89] The Respondent later clarified that the invalidity of the arbitration clause is not due to the invalidity of the PPA, but is rather a consequence of the fact that the arbitration clause is also subject to the same requirements of Article 181(5) of the Ghanaian Constitution.

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84 Hearing Transcript, 8:5-18; 9:8-10:3.

85 Hearing Transcript, 8:13-18; 9:8-13; 25:17-19. Article 130(1) of the Ghanaian Constitution provides, in full:

> (1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in –
>
> (a) all matters relating to the enforcement or interpretation of this Constitution; and
>
> (b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.

86 Respondent's Brief, at 7-8. Article 1 GADRA provides, in relevant part: "This Act applies to matters other than those that relate to . . . (c) the enforcement and interpretation of the Constitution;".

87 Hearing Transcript, 88:4-19.

88 Respondent's Reply Brief, at 11; Respondent's Third Submission, at 7 (question 6).

89 Respondent's Reply Brief, at 13-16; Hearing Transcript, 27:6-20; Respondent's Third Submission, at 1 (question 1), 6 (question 6).

68. The Respondent contends that the conclusion that Ghanaian law governs the arbitration clause is all the more compelling in this dispute because neither the arbitration agreement nor the PPA itself specified the seat for the arbitration. Rather, the seat of the arbitration (in the Netherlands) and the place of hearing were only agreed to by the Parties' counsel in May 2010, and were not part of the PPA. It is the Respondent's position that at no point during the May 2010 discussions did counsel for either Party suggest or agree that the law of the arbitral seat would replace Ghanaian law with regard to the substantive validity of either the arbitration clause or of the PPA, or that the law of the arbitral seat would apply beyond the procedural laws of the arbitration.[90]

69. In the alternative, the Respondent argues that, even if one accepts that no presumption exists in favour of applying the law governing the main agreement to the arbitration agreement, and the 'closest connection' test is applied instead, all factors in this case point to Ghanaian law. These factors include: Ghanaian law governs the main agreement; the place of performance is Ghana; both Parties to the arbitration agreement are subject to Ghana law; and the object of the agreement relates entirely to Ghana. In the Respondent's view, the only factor suggesting that Dutch law should govern the arbitration clause (and thus govern arbitrability) is the Parties' choice of the Netherlands as the seat of arbitration. However, in view of the strength of the other factors, and because the claims arise under the substantive laws and policies of Ghana, this latter choice is of lesser importance. Moreover, the Respondent suggests that, in view of the reality that any potential challenges to enforcement will arise in Ghana, it makes little sense, at this stage, to apply Dutch rather than Ghanaian law to the questions of arbitrability.[91]

70. The Respondent disputes what it views as the Claimant's argument that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, ("New York Convention") prescribes the application of the *lex fori* to questions of arbitrability, and particularly that the *lex fori* should govern questions of substantive arbitrability in the first place.[92] However, Respondent suggest that, even if the Tribunal decides that it is appropriate to apply Dutch law, Articles 1020 and 1073 of the Dutch Code of Civil Procedure ("DCCP") provide a conflict of laws approach that leads to the application of Ghanaian law, as the law to

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90 Respondent's Third Submission, at 6 n.11 (question 6).

91 Respondent's Reply Brief, at 16-17, 25-27; Hearing Transcript, 27:21-28:2; 94:10-96:19; 98:6-99:10; 102:25-103:8; Respondent's Third Submission, at 6 (question 6).

92 Respondent's Reply Brief, at 25-26; Hearing Transcript, 22:22-24:5. In the Respondent's view, Article V(2) of the New York Convention is addressed to the courts, and applies during the enforcement stage; it does not prescribe the law to be used in the arbitration proceedings.

which the dispute is most closely connected.[93] Moreover, even failing the application of Ghanaian law pursuant to Articles 1020 and 1073 DCCP, the Respondent argues that the Ghanaian Constitution may be considered non-arbitrable under Dutch legal provisions that provide exceptions in respect of matters of public policy and for matters for which exclusive jurisdiction is vested in a specific court.[94]

71. The Respondent takes the position that if Ghanaian law governs arbitrability, the validity of the arbitration clause is non-arbitrable. In the Respondent's view, the Tribunal has jurisdiction to hear the instant dispute only if the arbitration clause is valid and binding.[95] However, serious questions exist as to whether the arbitration agreement itself is an international business or economic transaction, within the meaning of Article 181(5) of the Ghanaian Constitution, and thus invalid for lack of Parliamentary approval. Thus, for the Tribunal to consider the validity of the arbitration agreement with a view to determining its jurisdiction would require it to engage in interpretation of a provision of the Ghanaian constitution, a function which Ghanaian law does not permit an arbitral tribunal to perform. The Respondent refers to the Ghana High Court Ruling to this effect; to Article 130(1) of the Ghanaian Constitution; and to Article 1 of the GADRA.[96] The Respondent further refers to the international law doctrine of "non-arbitrability," which it argues permits States, through their national laws, to exempt matters of fundamental public policy from the purview of arbitration. The Respondent contends that a decision by the Tribunal that it has competence to answer a question relating to the constitutional law of Ghana would directly violate the New York Convention and other conventions.[97] In the Respondent's view, the conclusion that the Tribunal is not competent is particularly appropriate given the fundamentally public nature of the task of constitutional interpretation. Moreover, the Respondent asserts that a pronouncement by this Tribunal that it is competent to decide the dispute between the Parties would have the "untenable" consequence that the review of the Tribunal's interpretation of the Ghanaian Constitution could ultimately fall to foreign courts (for example, in enforcement proceedings outside Ghana).[98]

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93 Hearing Transcript, 24:6-25:5; 96:20-99:17; Respondent's Third Submission, at 6 (question 6). Article 1020(3) DCCP provides: "The arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose".

94 Hearing Transcript, 26:6-15; 99:11-101:18.

95 Respondent's Third Submission, at 1 (question 1).

96 Respondent's Brief, at 6-8; Respondent's Reply Brief, at 11; Respondent's Third Submission, at 1 (question 1).

97 Respondent's Brief, at 6-8; Respondent's Reply Brief at 23.

98 Respondent's Brief, at 9.

72. The Respondent disputes the Claimant's contentions that no "genuine" issue of constitutional interpretation exists with respect to Article 181(5); that the Respondent has raised the jurisdictional objection in the Ghanaian courts merely as a pretext to evade an obligation to arbitrate; and that the constitutional questions are unambiguous and clear. The Respondent refers to its submissions in the proceedings before the Ghana High Court, in which it sought a declaration that the PPA is unenforceable because it does not satisfy the requirements specified by Article 181(5) of the Ghanaian Constitution.[99] The Respondent also refers to the Ghana High Court's conclusion, after extensive briefing and argument, that the application presented serious issues of constitutional interpretation.[100] The Respondent suggests that the arguments now made by the Claimant to this Tribunal are the same that it previously made to, and that were rejected by, the Ghana High Court.[101]

73. The Respondent also disputes the Claimant's contention that any genuine issue of constitutional interpretation that exists is not currently pending before the Ghana Supreme Court. It argues that the Claimant itself created delay in the referral to the Supreme Court by failing to file its defence until 13 October 2010.[102] It disputes the Claimant's estimate for the completion of the Ghanaian proceedings, including the claim that there will be a mandatory 30-day mediation at the outset.[103] A delay of six to nine months has been the Respondent's best estimate as to the resolution of the issue by the Ghana Supreme Court. As has been noted above proceedings for a referral to the Ghana Supreme Court and procedures for a pre-trial conference were in fact set in motion in early November 2010.[104] The Respondent maintains that the question of the constitutionality of the PPA and the arbitration clause could be avoided neither by the Respondent, nor by the Ghanaian courts.[105] It further notes that the Ghana High Court has ordered the Respondent to file an undertaking to fully compensate the Claimant for any

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99 Respondent's Reply Brief, at 5-6.

100 Respondent's Reply Brief, at 6-8, 22-23; Hearing Transcript, 19:1-9; 15-21; 87:9-88:3; Respondent's Third Submission, at 2 n.5 (question 2).

101 Hearing Transcript, 19:21-20:21; 86:22-24; 86:25-87:8.

102 Respondent's Reply Brief, at 6-7; Hearing Transcript, 19:1-20; 85:11-86:1; 93:2-16; Respondent's Third Submission, at 2 n.6 (question 3), Exhibit A, at 8, para. 15.

103 Hearing Transcript, 86:2-11; Respondent's Third Submission, at 3 (question 3).

104 In this regard, the Respondent refers to its own application of 3 November 2010 to the Ghana High Court, pursuant to Article 130(2) of the Ghanaian Constitution, for immediate referral of the constitutional questions to the Supreme Court. Respondent's Third Submission, at 2-3 (question 3), Exhibit A.

105 Hearing Transcript, 14:2-18; 30:6-12.

damages caused by the delay in the proceedings before the Tribunal, should the Claimant prevail in the proceedings in Ghana.[106]

74. With regard to the doctrines of competence-competence and separability, the Respondent maintains that although Article 21(1) of the UNCITRAL Rules, Article 1052 of the DCCP, and the GADRA each provide that the Tribunal may rule on objections to its jurisdiction, none instructs that the Tribunal must do so. The Respondent further asserts that these doctrines are not absolute where the existence or validity of an agreement to arbitrate is questioned.[107] In the Respondent's view, the instant case presents a unique scenario in which both the validity of the main agreement and the validity of the arbitration agreement are disputed.[108]

75. Specifically, the Respondent asserts that, although the separability principle provides that an arbitration clause is not invalid simply *because* the underlying contract is invalid, the law that renders the underlying contract invalid may also render the arbitration clause invalid. The Respondent stresses that the separability presumption does not necessarily mean that different bodies of law govern the arbitration clause and the underlying contract. In the Respondent's view, in the present case, both the PPA and the arbitration clause are subject to Ghanaian law, and are thus subject to the same challenge for failure to comply with Article 181(5) of the Ghanaian Constitution.[109]

76. Moreover, the Respondent challenges the Claimant's view that the Tribunal's jurisdiction to consider and to resolve issues concerning its own jurisdiction derives from the arbitration law that governs the arbitration agreement. In the Respondent's view, and as it has stated above, Ghanaian law is explicit that it is exclusively for the Ghana Supreme Court to determine whether the arbitration clause is invalid, because, in this case, this determination involves a matter of constitutional interpretation.[110]

77. The Respondent further argues that, even apart from the Ghana Supreme Court's exclusive jurisdiction, as a matter of efficiency, fairness, and institutional competence, the challenge to the validity of the arbitration agreement in this case should be decided, in the first instance, by the Ghana Supreme Court. It recognizes that the approach adopted by legal systems differ on

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106 Hearing Transcript, 15:22-16:9; 93:17-21.

107 Respondent's Reply Brief, at 12-13; Hearing Transcript, 26:16-27:5; Respondent's Third Submission, at 6 (question 6).

108 Hearing Transcript, 103:9-104:13.

109 Respondent's Third Submission, at 5-6 (question 6).

110 Respondent's Third Submission, at 6-7 (question 6).

the issue of allocation of competence over jurisdictional objections, and is even prepared to accept that the "better approach" may well be that questions regarding the *scope* of the arbitration agreement should be decided in the first instance by the Arbitral Tribunal. However, it argued that, where there is a credible dispute as to the *existence*, *validity*, or *legality* of an arbitration agreement, the issues should be decided by the national courts, following full consideration.[111] The Respondent asserts, moreover, that the Ghanaian courts were first seized of the jurisdictional question arising from Article 181(5) of the Constitution, even though the Notice of Arbitration was introduced earlier, and it argues that the Ghanaian courts should be accorded priority to resolve that question.[112] The Respondent acknowledges, however, that the order of seizure is only a "supplementary consideration".[113]

78. The Respondent emphasizes that, even if the Tribunal decides that it may rule on the validity of the arbitration clause, and further decides that the arbitration clause is valid, the Tribunal is still faced with the question whether the PPA is valid under the Ghanaian Constitution.[114] The Respondent therefore suggests that the wise and proper course for the Tribunal to follow, as a matter of international comity, *lis pendens arbitralis*, practicality, and enforceability, would be to exercise its discretion to await a definitive interpretation of the Ghanaian Constitution by the Ghana Supreme Court, as the body with greater expertise and the body that is already seized of the issue.[115] In this regard, the Respondent adds that the question whether the Tribunal or the Ghanaian courts were seized first is not determinative under the applicable substantive law (although the Tribunal is of course free to consider that question in deciding how to exercise its discretion).[116] The Tribunal should accordingly suspend its proceedings pending such interpretation.[117]

79. As to enforceability, the Respondent asserts that, although the New York Convention may permit conflicting decisions on enforcement in different jurisdictions, it is nonetheless a fundamental principle of international arbitration that a tribunal should attempt to render an

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111 Respondent's Third Submission, at 1-2 (question 2), 7-8 (question 6).

112 Respondent's Third Submission, at 1 (question 2).

113 Hearing Transcript, 91:14-92:22; Respondent's Third Submission, at 2 n.3 (question 2).

114 Respondent's Reply Brief, at 13; Hearing Transcript, 5:19-8:4; 18:3-11; 21:10-22:8; 26:7-12; 31:23-32:9.

115 Hearing Transcript, 10:4-15:21; 20:15-21; 22:9-14; 25:16-26:5; 30:13-25; 32:9-24; 92:18-93:1, 104:14-19.

116 Hearing Transcript, 91:14-92:22.

117 Respondent's Reply Brief, at 27.

enforceable award.[118] The Respondent suggests that any issue regarding the enforcement of a potential award would arise in Ghana. It further contends that because, under the New York Convention, the Ghanaian courts will look to their own laws to determine whether the interpretation of the Constitution was arbitrable, the Tribunal should, at this time, give deference to the Ghanaian courts regarding arbitrability, and should allow the Ghana Supreme Court an opportunity to rule on the applicability of Article 181(5) to the arbitration clause.[119]

80. As regards questions of estoppel, the Respondent argues that the Attorney-General's statement to the Claimant, on 1 September 2009, that she was recommending that the issues then in dispute be referred to arbitration, does not in any way affect the arbitrability of the present dispute. The Respondent suggests that the Attorney-General's statement was precipitated by the Claimant's threats to unilaterally draw down on a letter of credit. The Respondent asserts that, upon further review of the constitutional issues involved, both the Attorney-General and the Solicitor General concluded that the PPA and the arbitration clause are unenforceable under Article 181(5) of the Constitution, and notes that the Respondent therefore did not proceed to file for arbitration. The Respondent acknowledges that, under certain circumstances, a party may waive a jurisdictional argument by commencing and prosecuting an arbitration, or by participating without raising a jurisdictional defence, but the Respondent asserts that such circumstances are not present here.[120]

81. The Respondent submits that the Tribunal should reject the Claimant's request for the issue of an anti-suit injunction, first, because the proper forum for adjudication of the constitutional issue is the Ghana Supreme Court, and, second, because it is doubtful that an arbitral tribunal has competence to restrain the Ghana Supreme Court from interpreting the Constitution of Ghana.[121] The Respondent also disputes the necessity for a confidentiality order, and argues that it is appropriate for both the Tribunal and the Ghanaian courts to have full knowledge of the positions taken by the Parties in each of the proceedings, and that no extraordinary circumstance meriting a confidentiality order exists.[122]

82. Finally, the Respondent states that it appears from the Notice of Arbitration that all of the Claimant's claims are premised on the existence of a valid and enforceable PPA which the

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118 Hearing Transcript, 13:1-14:1; 14:19-15:14; *see also* Hearing Transcript, 88:20-89:18.

119 Respondent's Reply Brief, at 26-27.

120 Respondent's Third Submission, at 8 (question 7).

121 Respondent's Reply Brief, at 31; Hearing Transcript, 30:13-25.

122 Respondent's Reply Brief, at 31-32; Hearing Transcript, 31:1-22.

Respondent is alleged to have breached. Therefore, the Respondent suggests that it cannot conceive of issues in dispute between the Parties that are unconnected to the constitutional questions and thus subject to arbitration.[123]

The Claimant's arguments

83. The Claimant, by contrast, maintains that the Tribunal is the competent and correct decision-maker as to its own jurisdiction, as well as to the validity of the PPA and the validity of the arbitration clause.[124]

84. The Claimant invokes the principle of competence-competence, which it argues is a universally accepted principle of international commercial arbitration and a general principle of international law, and which includes the right of the arbitral tribunal to decide on objections raised to the validity of an arbitration agreement.[125] According to the Claimant, arbitral tribunals virtually always find that they have power to consider and to decide the extent of their own jurisdiction.[126]

85. The Claimant submits that the arbitration rules in all major jurisdictions, as well as those applicable in this dispute, recognize the competence-competence principle. In this regard, the Claimant refers to Article 1052(1) of the DCCP[127] and to Article 21(1) of the UNCITRAL Rules.[128] In addition, the Claimant argues that the New York Convention, to which the Republic of Ghana and The Netherlands are signatories, effectively prescribes the recognition of competence-competence in international arbitrations.[129] It is the Claimant's position that the Tribunal was first seized of all issues in dispute between the Parties, and that, under the doctrine of competence-competence and under the New York Convention regime, the Tribunal, having been seized first, thus has full authority to make findings in relation to the subsidiary issue—the

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123 Respondent's Third Submission, at 8-9 (question 8).

124 Claimant's Answers, para. 42; Claimant's Answers to Questions Submitted to the Parties by the Arbitral Tribunal at the Hearing of 15/10/10, 5 November 2010 ("Claimant's Third Submission"), at 5 (question 6).

125 Claimant's Answers, paras. 44, 50; Claimant's Third Submission, at 5 (question 6).

126 Claimant's Answers, para. 40.

127 Article 1052(1) of the DCCP provides: "The arbitral tribunal shall have the power to decide on its own jurisdiction".

128 Claimant's Third Submission, at 5 (question 6). Article 21(1) UNCITRAL Rules provides: "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement".

129 Claimant's Answers, para. 51.

applicability of Article 181(5)—that is before the Ghanaian courts.[130] The Claimant argues that it would not be appropriate for the Tribunal to brush aside the concept of competence-competence in order to allow the Ghanaian courts to first decide on Article 181(5).[131]

86. In the Claimant's view, the Respondent's argument that the validity of the arbitration agreement is objectively non-arbitrable erroneously shifts the arbitrability inquiry away from the merits of the dispute to the validity of the arbitration clause and to the question of the Tribunal's competence. The Claimant argues that, in this way, the Respondent denies the principle of competence-competence, under which arbitration tribunals, once arbitration proceedings have been initiated, always have jurisdiction to determine the validity of the arbitration agreement in the first instance. The argument would also render ineffective any arbitration agreement to which the Respondent is a party.[132] The Claimant disputes the Respondent's contention that competence-competence applies with lesser force where the validity of the arbitration agreement is questioned.[133]

87. The Claimant submits that, through the arbitration clause, the Parties did in fact agree that the applicability of Article 181(5) of Ghana's Constitution would be determined by an arbitral tribunal, and suggests that, in view of the Respondent's identity as a sovereign state, the Tribunal is the more appropriate forum to make such a determination in this dispute.[134] The Claimant argues that the Respondent's earlier reliance on the PPA and invocations of the arbitration clause, before the Claimant filed its Notice of Arbitration, are patently inconsistent with the Respondent's current positions that the PPA and the arbitration clause are invalid and that the dispute is non-arbitrable. The Claimant asserts that it indeed filed the Notice of Arbitration in reaction to the Respondent's earlier position.[135]

88. The Claimant further maintains that Dutch, rather than Ghanaian, law applies to questions of objective arbitrability. In this respect, the Claimant refers to Article 1073 of the DCCP, which provides that the Netherlands Arbitration Act (Articles 1020 to 1073 of the DCCP) applies to domestic and international arbitrations in the Netherlands, and to Article 1020 of the DCCP,

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130 Claimant's Third Submission, at 3 (question 2).

131 Claimant's Third Submission, at 5 (question 6).

132 Claimant's Reply Submission to Respondent's Brief Regarding Procedural Order No. 1, 4 October 2010 ("Claimant's Reply Submission"), para. 13-18; Hearing Transcript, 49:17-50:11; 51:19-52:11; 52:3-53:10; 62:10-22.

133 Hearing Transcript, 53:11-54:15.

134 Claimant's Third Submission, at 3 (question 2).

135 Claimant's Third Submission, at 6 (question 7).

which the Claimant argues provides substantive rules of objective arbitrability.[136] Moreover, the Claimant argues that the conflict of laws rules (private international law), including the cumulative approach employed by the Respondent, should not be used to determine the law applicable to arbitrability, but, rather, only to determine the substantive contract law applicable to the arbitration agreement.[137] In the Claimant's view, even if the formal validity of the arbitration clause is governed by Ghanaian substantive contract law, Ghanaian law does not govern issues of arbitrability. This is because, in addition to the clear language of Article 1073 of the DCCP, Tribunals usually determine the arbitrability of a dispute on the basis of the law of the place of arbitration, except in exceptional cases involving matters of public policy.[138] The Claimant argues that that this approach accords with the New York Convention.[139]

89. In contrast to the Respondent, the Claimant argues that Article 1020(3) of the DCCP contains a substantive rule of objective arbitrability, by providing that matters of Dutch public policy may not be decided by arbitration.[140] The Claimant maintains that, under this provision, there is no reason to find that the interpretation of the Ghanaian Constitution is non-arbitrable.[141] First, in the Claimant's view, the public policy exceptions to arbitrability under Dutch law are exceedingly narrow.[142] Second, the Claimant argues that, under Dutch law, the vesting of exclusive jurisdiction in a specific court, such as Article 130 of the Ghanaian Constitution appears to do, does not necessarily exclude arbitration.[143] Finally, the Claimant submits that

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136 Claimant's Answers, paras. 39, 70; Claimant's Reply Submission, para. 21; Hearing Transcript, 45:13-20; 46:23-47:2.

137 Hearing Transcript, 120:3-13.

138 Claimant's Reply Submission, para. 22-23, Hearing Transcript, 121:13-122:21; Claimant's Third Submission, at 2 (question 1).

139 Claimant's Reply Submission, paras. 23-24, 27; Hearing Transcript, 48:18-49:16; 50:12-18. The Claimant asserts that, under the Convention, a State court outside the seat of arbitration may deny recognition and enforcement of an arbitral award if the subject matter of the dispute is not capable of settlement by arbitration under its laws. However, this decision has no extraterritorial effect, particularly in the country where the award was validly made. Thus, although enforcement of any award may be challenged in Ghana, the Claimant asserts that the Arbitral Tribunal may decide the claim before it, and that State courts worldwide may recognize and enforce any award issued. Claimant's Reply Submission, para. 34. Moreover, under the New York Convention and the UNCITRAL Rules, a State court may also refuse to refer a dispute to arbitration; however, this decision in no way binds the arbitrators. Hearing Transcript, 50:19-51:9.

140 Claimant's Answers, para. 70; Claimant's Reply Submission, paras. 21, 31; Hearing Transcript, 45:21-46:17.

141 Claimant's Reply Submission, paras. 30-32.

142 Hearing Transcript, 45:21-46:17; 55:16-56:16; 124:1-23.

143 Hearing Transcript, 56:23-57:7; 122:22-123:16.

arbitral tribunals frequently apply constitutional provisions, and frequently decide claims that involve making decisions on issues of public policy. In this regard, the Claimant suggests that, among other constitutional rights and obligations, arbitral tribunals regularly apply Article 17 of the Dutch Constitution and Article 6 of the European Convention on Human Rights, which provide that parties may waive their fundamental right of access to the courts by agreement, when ruling on objections to their own jurisdiction.[144]

90. The Claimant contends that, if the Respondent's approach were adopted and constitutional questions were deemed non-arbitrable across the board, governments could effectively block all arbitral proceedings against them by alleging that interpretation of a constitutional question is required. In this regard, the Claimant contends that the Respondent's current argument is a mere scheme to bring the Parties' dispute under the control of Ghanaian State courts.[145]

91. Even assuming, for the sake of argument, that Ghanaian law governs objective arbitrability, the Claimant offers two arguments as to why the present dispute is arbitrable, under Ghanaian law. First, the Claimant asserts that Article 130 of the Ghanaian Constitution does not necessarily render the interpretation of the Ghanaian Constitution non-arbitrable. This is because, in the Claimant's view, the vesting of exclusive jurisdiction in a specific court does not normally imply that arbitration is excluded. Rather, a court's exclusive jurisdiction is intended to exclude the jurisdiction of other courts, and not that of arbitral tribunals.[146]

92. Second, assuming that Ghanaian law were to govern objective arbitrability, the Claimant submits that the Tribunal may nonetheless decide whether the arbitration clause is an international business or economic transaction because this determination does not require "interpretation and enforcement" of the Ghanaian Constitution.[147] In the Claimant's view, Ghanaian case law makes clear that a genuine matter of constitutional interpretation that would trigger the Supreme Court's exclusive original jurisdiction arises only where a question of constitutional law is ambiguous or unclear. A mere allegation that there is an issue of constitutional interpretation is insufficient.[148] The Claimant refers to, *inter alia*, the Ghana Supreme Court's decision in *Agyekum v. Boadi*, which, in its view, held that where a question has been determined by the Supreme Court, reference from another court or tribunal for

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144 Hearing Transcript, 57:15-58:19; 124:1-125:24; Claimant's Third Submission, at 2 (question 1).

145 Claimant's Reply Submission, para. 33.

146 Hearing Transcript, 56:23-57:7; 122:22-123:16.

147 Claimant's Answers, paras. 144, 154.

148 Claimant's Answers, para. 162-166; Hearing Transcript, 71:6-72:16; 74:21-75:21; 76:1-12.

interpretation is not appropriate.[149] The Claimant argues that, in this case, the Ghana Supreme Court has already ruled on the dispositive issue, in its decision in *Faroe Atlantic Co. Limited v. Attorney General*. In the Claimant's view, *Faroe Atlantic* defined an international business or economic transaction as one between the Government of Ghana and a foreign company, and held that the nationality of the company is determined by its place of incorporation.[150] The Claimant argues that the Tribunal can easily apply this decision to the present case, and that—in view of the undisputed fact that the Claimant is incorporated under the law of Ghana—any future challenge to enforcement in Ghana would not succeed.[151]

93. As an additional matter, the Claimant raises allegations that the proceedings in Ghana have not been instituted and prosecuted in good faith, but rather in an attempt to frustrate the arbitral proceedings. According to the Claimant, a genuine interpretation or enforcement action must be commenced in the Supreme Court, and cannot be commenced in the High Court.[152] The only other route to the Supreme Court is provided in Article 130(2), via referral by a court seized of proceedings in which an issue of interpretation or enforcement arises.[153] However, a Party may not cause delay in arbitral proceedings by filing an interpretation or enforcement action in the High Court in the expectation of a reference to the Supreme Court.[154] The Claimant asserts that if the proceeding initiated by the Respondent were to be considered an interpretation or enforcement action, the High Court would have been without jurisdiction to issue an injunction against the Claimant.[155]

94. It was the Claimant's contention at the 15 October 2010 hearing that no interpretation or enforcement action relating to the PPA or to the arbitration agreement was then pending before the Ghana Supreme Court.[156] It was also argued then that, before reference may even be made to the Ghana Supreme Court, the pleadings must close; the Parties must go through a 30-day mandatory mediation in the Commercial Court; the Commercial Court must set down the issues

149 Hearing Transcript, 76:19-77:6.

150 Claimant's Answers, paras. 163-168; Hearing Transcript, 67:3-17; 69:2-15; 76:13-18; 77:8-16; 80:6-21, 116:15-118:15.

151 Hearing Transcript, 126:24-127:17.

152 Hearing Transcript, 75:22-24; 72:23-73:7; 77:17-23.

153 Hearing Transcript, 77:24-78:4; 78:5-12.

154 Hearing Transcript, 78:13-79:5; Claimant's Third Submission, at 3 (question 2).

155 Hearing Transcript, 73:21-74:14.

156 Hearing Transcript, 66:11-23; 73:8-20; 74:17-20; 80:22-81:4; 109:2-110:8.

for trial to determine whether a reference needs to be made; and the latter decision may be appealed.[157] The Claimant disputed the Respondent's contention that arbitration would commence if the Ghana Supreme Court found that Article 181(5) did not apply to the agreements. The Claimant asserted that the Respondent would instead attempt to avoid arbitration by reviving its claim for relief for fraudulent misrepresentation that it argued before the Ghana High Court as an alternative basis for relief, should it not prevail in the Ghana Supreme Court.[158]

95. As noted above, both referral and pre-trial conference procedures were started subsequent to the Tribunal's hearing on 15 October 2010, following the Respondent's application of 3 November 2010 to the Ghana High Court for reference to the Ghana Supreme Court. In particular, the Claimant now asserts that it was served, on 5 November 2010, with a notice that the mandatory 30-day mediation has been fixed to begin on 22 November 2010. The Claimant maintains that it does not expect a decision from the Ghana Supreme Court until the 2011-2012 legal year. This is because, even if the reference action is successful, it will follow an elaborate statutory process, involving a transfer of the entire record to the Supreme Court and further filings and oral testimony by the Parties. The Claimant contends, further, that the Supreme Court's decision will not end the matter. Rather, the High Court must then resume its hearing in order to dispose of the case according to the Supreme Court's decision. The Claimant states that it does not anticipate the High Court proceedings will conclude within one year after the Supreme Court's decision. The time-frame could be further extended by several years should either or both Parties pursue appeals.[159]

96. With regard to the question raised by the Tribunal at the 15 October 2010 hearing, i.e., whether the Parties can conceive of issues in dispute between them that are not related to the questions regarding the applicability of the Ghanaian Constitution, the Claimant respectfully invited the Arbitral Tribunal to consider, first, whether the Respondent has become unjustly enriched, or has gained unjust benefits, at the Claimant's expense. In this regard, the Claimant asserts that the Respondent, through its Attorney-General, represented to the Claimant that all acts and conditions required to make the PPA valid, legal, binding, and enforceable had been done. The Claimant further asserts that this representation induced the Claimant to enter into the PPA and

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157 Hearing Transcript, 81:5-17; 111:6-113:15.

158 Hearing Transcript, 110:9-111:5.

159 Claimant's Third Submission, at 3 (question 2).

to expend considerable sums on the Barge, which remains in the Respondent's legal ownership.[160]

97. Second, the Claimant invites the Tribunal to consider whether the Respondent, by raising the constitutional defence and by seeking to withdraw from the effects of the opinions and letters written by the prior Attorney-General and by the Minister for Energy, had independently committed the torts of negligent advice and of deceit. In regard to the tort of negligent advice, the Claimant argues that, by rendering the legal opinion addressed to the Claimant, Ghana's Attorney-General assumed, on behalf of the Respondent, a fiduciary duty toward the Claimant. The Claimant argues that, if the advice given by the Attorney-General was false, then since in this situation only the Respondent could have obtained the needed Parliamentary approval, it can establish the special relationship and reasonable reliance required to make out a claim for negligent advice. Further, with regard to the tort of deceit, the Claimant argues that, if the Attorney-General's opinion was false, the Claimant can establish the deliberate false representation, inducement, and detrimental reliance required to make out such a claim. In the Claimant's view, these tort claims are within the Tribunal's jurisdiction, and are unconnected to the questions regarding the applicability of the Ghanaian Constitution.[161]

The Tribunal's findings

98. The Tribunal must note first that, while the Parties agree that the PPA is governed by Ghanaian law, they disagree as to which law governs the arbitration agreement. Dutch law is favoured by the Claimant, while the Respondent maintains that Ghanaian law is the proper law. This issue has arisen in numerous international arbitrations and procedures conducted before national courts. The Tribunal will first set out its views as to the legal framework that governs this arbitration, which will also be determinative of its own jurisdiction or lack thereof.

99. Two bedrock principles of international arbitration bear on the issues before the Tribunal, namely, the principle of competence-competence, and the principle of separability of the arbitration clause from the contract of which it is part. As the Respondent has rightly pointed out, the first principle concerns the power of the arbitral tribunal to decide jurisdictional issues when the arbitration clause is challenged, while the second concerns the substantive validity of the arbitration clause.[162]

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160 Claimant's Third Submission, at 6 (question 8).

161 Claimant's Third Submission, at 7 (question 8).

162 Respondent's Third Submission, at 5-6 (question 6).

100. It is universally agreed that under the principle of competence-competence an international arbitral tribunal is entitled to determine its own jurisdiction. This principle was first developed as a rule of public international law governing arbitration between States. That rule is rooted in State practice going back to the 18th Century. In the *Award in the Case of The Betsey* it was declared that: "the doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd; . . . they must necessarily decide upon cases being within or without their competency".[163]

101. That the same rule applies to international arbitration has also been well established under the authority of the International Court of Justice. In the *Nottebohm Case* it was thus held that "Paragraph 6 of Article 36 [of the Statute of the Court] merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognized, following earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. This principle was expressly recognized in . . . the Hague Conventions . . . . The Rapporteur of the Convention of 1899 had emphasized the necessity of this principle, presented by him as being 'of the very essence of the arbitral function and one of the inherent requirements for the exercise of this function'. This principle has been frequently applied and at times expressly stated".[164]

102. The Tribunal recalls that the Hague Conventions referred to by the International Court of Justice are the international treaties that established the Permanent Court of Arbitration, the institution which administers the instant case. As it has been noted, Article 22.2 of the PPA stipulates that "[i]f any dispute arises out of or in relation to this Agreement and if such dispute cannot be settled through direct discussions of the Parties, the matter shall be referred to binding arbitration at the Permanent Court of Arbitration . . . The Hague, The Netherlands . . . . Applications may be made to such court for judicial recognition of the award and/or an order of enforcement as the case may be. Arbitration shall be governed by and conducted in accordance with UNCITRAL rules".

103. The Parties have much relied in their pleadings on Born's writings on international commercial arbitration. Born notes that "[t]he competence-competence doctrine is almost universally accepted in international arbitration conventions, national legislation, judicial decisions,

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163 Lord Chancellor Loughborough, 13 April 1797, *reported in* J. B. Moore, History and Digest of the International Arbitrations to which the United States Has Been a Party (1898), p. 327.

164 *Nottebohm Case (Preliminary Objection)*, Judgment of 18 November 1953, I.C.J. Reports 1953, pp. 111, 119.

institutional rules and international arbitral awards. Authority in each of these sources recognizes with relative unanimity some version of a competence-competence doctrine. As a consequence, the basic proposition that an international arbitral tribunal presumptively possesses jurisdiction to consider and decide upon its own jurisdiction can be considered a universally recognized principle of international arbitration law. That is confirmed by the almost complete absence of any authority denying the competence-competence of arbitral tribunals to consider and decide jurisdictional challenges, subject to subsequent judicial review".[165]

104. The Parties' explicit choice in Article 22.2 of the PPA—that arbitration would be governed by the UNCITRAL Rules—also leads this Tribunal to examine the applicable provisions of the UNCITRAL Rules. Article 21 provides: "1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause . . . . 2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of Article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause".

105. Furthermore, Article 22.2 of the PPA establishes a connection with the Netherlands and thus with Dutch law. Article 1052(1) of the DCCP has been brought to the attention of the Tribunal insofar as it reflects the competence-competence principle in unequivocal terms: "The arbitral tribunal shall have the power to decide on its own jurisdiction". The same principle is reflected in Ghanaian legislation as contained in the GADRA.[166]

106. The second basic principle which sets the legal framework for this Tribunal's decision on the issue of jurisdiction is the principle of separability—or severability or autonomy—of the arbitration clause of a contract from the contract of which that clause forms part. This principle is encapsulated in the last two sentences of the foregoing paragraph 2 of Article 21 of the UNCITRAL Rules.

107. How and to what extent separability is recognized in international arbitration and practice is again well explained by Born: "a recurrent and virtually universal theme in national arbitration legislation, judicial decisions and arbitral awards, across common law, civil law and other legal

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165 Gary B. Born, International Commercial Arbitration (2009), Vol. I, pp. 855-856.

166 In this regard, the Respondent observes in its Reply Brief, at 12, that the GADRA provides "as a general rule, that the Tribunal has the power to rule on objections to its jurisdiction, including any objections with respect to the existence or validity of the arbitration clause".

systems, has been that arbitration agreements may be—and presumptively are intended by their parties to be—separable from the underlying contracts with which they are associated . . . . The breadth and consistency of the acknowledgements of the separability presumption demonstrate the presumptions's universal and enduring character".[167]

108. The Tribunal will return to this principle in connection with the validity of the arbitration agreement to be discussed below. At this point, however, it should be noted that even where Ghanaian law applies to the PPA, this is not necessarily so in respect of the PPA's arbitration clause as the Respondent maintains. In fact, as noted above, the Respondent believes that Ghanaian law should be applied to the arbitration clause because the Parties specifically subjected the PPA to the laws of Ghana, and the default position in international arbitration is that a choice of law provision in the main contract also applies to its arbitration clause. However, in the light of the provisions of numerous arbitration rules and the consistent practice in support of the principle of separability, Born's conclusion is that the opposite seems to be the correct presumption.

109. The Tribunal also observes that the Respondent accepts that a challenge to the existence, validity or legality of the underlying contract will not necessarily affect the validity of the arbitration agreement under the doctrine of separability, and that consequently the arbitration clause need not be invalid simply "because" of the invalidity of the underlying contract. But while it appears that the Respondent recognizes the principle of separability to this extent, the Respondent nevertheless asserts that the same law that applies to the validity of the underlying contract may also apply to the arbitration agreement and may independently render the arbitration agreement invalid.[168]

110. Although this argument is no doubt ingenious it does not appear to take account of the fact, as will be discussed in greater detail in the next section, that the law applicable to the underlying contract could be different from the law applicable to the arbitration agreement and that, where this is the case, the validity of the arbitration clause will need to be decided by reference to a set of rules that may be wholly different from those to be applied to the underlying contract. In addition, the argument leads to the conclusion that, while the Respondent appears to be accepting the principle of separability in theory, in practice it is claiming that the arbitration agreement should still follow the fate of the underlying contract.

111. Instead, by virtue of the principle of separability, even if the Respondent's contentions that the PPA is void *ab initio* were sustainable, and if they were to be sustained, whether by the Ghana

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167 Gary B. Born, International Commercial Arbitration (2009), Vol. I, p. 348; *see also generally* pp. 311-407.

168 Respondent's Third Submission, at 5-6 (question 6).

Supreme Court or by another Ghanaian judicial body or by this Tribunal, the arbitral clause of the PPA could remain valid and in force. Thus, the jurisdiction of this Tribunal to take decisions, for example, regarding the consequences arising from invalidity of the PPA or on other matters unconnected to the objections to the validity of that contract would not be affected by any such hypothetical determination.

112. The issues of the substantive validity of the PPA under the Constitution of Ghana and its consequences for the rights and obligations of the Parties pursuant to their contractual undertakings are, in essence, questions pertaining to the merits of the dispute, and they do not affect the validity or otherwise of the arbitration agreement. The Claimant has rightly argued in this connection that the principle of objective arbitrability, as invoked by the Respondent, would shift the focus of the issues to be decided by the Tribunal from the merits of the dispute to the arbitration agreement itself and this would in effect deny the application of the principle of competence-competence. As indicated above, the Tribunal is not deciding any question pertaining to the merits at this stage. It will, however, examine below the question of objective arbitrability discussed by the Parties.

113. The Parties have also discussed the meaning of the New York Convention in the context of the issue of competence-competence. The Tribunal agrees with the Respondent's contention that the application of the New York Convention may eventually lead to conflicting decisions on enforcement in different jurisdictions; but the Tribunal also notes that it is a fundamental principle of international arbitration that a tribunal should attempt to render an enforceable award. In any case, it is one thing to assert that when an issue of the enforcement of an award arises in Ghana, the Ghanaian courts will apply their own law based on which court has the authority to interpret the Constitution, but it is quite another matter to conclude from this that the Tribunal should, therefore, abstain from exercising its own jurisdiction. That national courts in the country of the seat of the arbitration, or in States in which enforcement of the arbitral award is sought, may exercise appropriate judicial review is unquestioned, but that does not detract from this Tribunal's duties and powers to pass upon its own jurisdiction.

114. The New York Convention does not expressly treat competence-competence (or separability). Nothing in the Convention expressly requires (or debars) application of those established doctrines. But, as Born points out, Articles II(3) and V(1) of the Convention recognize that both arbitral tribunals and courts may consider and decide disputes about the arbitrators' jurisdiction. Articles V(1)(a) and V(1)(c) of the Convention contemplate that an arbitral tribunal may have made an award notwithstanding jurisdictional objections and will have addressed issues of the validity of the arbitration agreement. The fact that such determinations are subject to judicial review, as at the stage of enforcement, has as its premise that arbitral tribunals are entitled to

pass upon their jurisdiction without prior judicial determination.[169] The Tribunal will consider other pertinent aspects of the meaning of the New York Convention further below.

115. The principles of competence-competence and separability, as embodied in Dutch and Ghanaian legislation, in Article 21 of the governing UNICTRAL Rules and in international arbitral conventions and international arbitral jurisprudence, practice and the opinion of qualified commentators, provide the legal authority for this Tribunal to decide on its own jurisdiction. Above all, this Tribunal is not free to leave aside the UNCITRAL Rules, which the Parties have freely selected to govern the conduct of the arbitration. The Respondent does not appear to deny this conclusion but only to suggest that, as a matter of practical convenience, deference should be accorded to Ghanaian courts for the resolution of the threshold constitutional issue identified. This is a separate matter that the Tribunal will discuss below.

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169 Gary B. Born, International Commercial Arbitration (2009), Vol. I, pp. 857-858. Article II(3) of the New York Convention provides: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

Article V(1) provides in full:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it containes decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that the part of the award which contains decisions on matter submitted to arbitration may be recognized and enforced; or
   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
   (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authoritarbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
   (f) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

B. The issue of the validity of the PPA and the Parties' obligations under the Agreement to Arbitrate in respect of the current proceedings.

The Respondent's arguments

116. As noted above, the Respondent contends that the conclusion of both the PPA and the arbitration clause contained therein raises "serious questions" as to their validity under the Ghanaian Constitution. Specifically, the Respondent disputes the Claimant's contention that Parliamentary approval was not required for the agreements because they were concluded with a local Ghanaian entity. In the Respondent's view, whether an agreement is an "international business or economic transaction" is not determined solely by the contracting party's state of incorporation, but also by reference to the substance of the transaction.[170] Indeed, the contracting party's state of incorporation is only one of many factors that are relevant to the question whether a transaction is international in nature. The Respondent asserts that this latter statement is particularly true where, as here, the Claimant appears to have been incorporated just days before the conclusion of the PPA; the Respondent, in fact, suggests that local incorporation may have been undertaken in an attempt to circumvent Article 181(5).[171] The Respondent further refers to commentary on the Article's legislative history, which observes that approval is required for transactions with a "foreign company, firm or transnational corporation," a description which it asserts fits the Claimant.[172] The Respondent suggests that the interconnected web of affiliated companies known as the Balkan Group is controlled and operated from the United States, and that the Balkan entities are treated as mere departments or agents of one another. In this regard, the Respondent refers to several examples, including the execution by Balkan US, rather than by the Claimant, of a subcontract for refurbishing work to be done on the Barge, as well as the threat by Balkan UK to institute a BIT arbitration against the Respondent arising out of the same acts and injuries alleged in the instant dispute. For all of these reasons, the Respondent maintains that the Claimant is not an independent company, but is instead part of a larger multinational corporation, on which the Claimant relies for the finances and management of its operations, and to which it defers to enter into contracts on its behalf.[173]

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170 Respondent's Reply Brief, at 8-9.

171 Respondent's Third Submission, at 3 (question 4).

172 Respondent's Reply Brief, at 8-9.

173 Respondent's Third Submission, at 3 (question 4). The Respondent also suggests that the Balkan Group "appears to disguise its operations through the use of fictitious entities". In this regard, the Respondent refers to the Memorandum of Understanding entered into between Balkan US and the Government of Ghana, as well as to the Claimant's recent filings in the Ghana High Court, in both of which Balkan US is represented as a "private corporation duly organized and existing under the law of the Netherlands". The

117. The Respondent maintains that both the PPA and the arbitration clause are "international business or economic transaction[s]," and are therefore void and unenforceable for lack of prior Parliamentary approval. In this regard, the Respondent contends that business transactions often involve several elements of either a local or international character "which cannot be meaningfully separated for purposes of parliamentary scrutiny".[174] To support its contention regarding the "international character" of the PPA, the Respondent refers to foreign ownership, management, and control of the Claimant; the signing of a subcontract between Balkan US and a subcontractor for work to be done on the Barge; and several "international" provisions in the PPA.[175]

118. As for the arbitration clause, the Respondent argues that "there is no serious question" that it is "substantively international in nature".[176] The Respondent notes that the agreement provides for international arbitration before an international tribunal, using international rules of arbitration adopted by the U.N. General Assembly in the context of international commercial relations. The Respondent further refers to the foreign and commercial nature of any award that would be rendered, whether under the New York Convention or the GADRA, and asserts that, in essence, the agreement subjects the Respondent to foreign liability before a foreign tribunal.[177] The Respondent further asserts that the clause is properly defined as a "transaction" between the Parties because it concerns or affects their material resources or welfare, and because international arbitration is generally recognized to involve and to represent significant commercial business interests.[178] The Respondent objects to the Claimant's characterization of the arbitration clause as solely a "procedural" clause, and argues that, in any event, this position undermines the Claimant's argument that international public policy should be applied to "correct" the application of Ghanaian law to the clause.[179]

119. The Respondent suggests that the context and intent of Article 181(5) further underscore its applicability to the arbitration clause. In this regard, the Respondent asserts that other provisions

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Respondent suggests that a search of the Dutch Trade Register reveals that no such company exists. Respondent's Third Submission, at 3 (question 4). Irrespectively of this discussion, the corporate structure of BEC has been set out at paragraph 1 of this Interim Award.

174 Respondent's Reply Brief, at 9.

175 Respondent's Reply Brief, at 9 n.7, 24 n.17.

176 Respondent's Third Submission, at 3 (question 4).

177 Respondent's Reply Brief, at 23-24; Respondent's Third Submission, at 3 (question 4).

178 Respondent's Third Submission, at 3 (question 4).

179 Respondent's Reply Brief, at 25.

in Article 181 require Parliamentary approval of all loans made by the Government of Ghana, in order to check Executive authority to enter into agreements directly affecting public finances. In the Respondent's view, Article 181(5) extends this restraint to all international business and economic transactions, in order both to protect against foreign exploitation and to ensure that Ghana is not subjected to foreign liabilities without careful Parliamentary review. The Respondent argues that the Claimant's position that Ghanaian law does not apply to the arbitration clause, and that the Ghanaian Executive agreed to waive Ghanaian law, precisely highlights the public policy objective in Article 181(5).[180]

120. The Respondent disputes that it is estopped from asserting that the PPA is void *ab initio*. The Respondent refers to the Ghana Supreme Court's decisions in *Faroe Atlantic* and in other cases for the proposition that principles of estoppel do not apply to, and cannot render enforceable, a contract that is unconstitutional.[181] It suggests that the Claimant was not justified in relying on the opinion of the prior Attorney-General, both because these precedents were well-established in Ghana, and because the law of England and of the United States, which are home, respectively, to the Claimant's sole shareholder and to the Claimant's ultimate parent company, are in accord. In the Respondent's view, the laws of all three legal systems hold that a legal opinion of a government official cannot give rise to an estoppel defence or to a claim of reasonable reliance, and that a party that relies on such opinion assumes the risk that it was made in error. Thus, the Respondent denies that the Claimant is entitled to claim that the opinions of the previous Attorney-General can have the effect of excluding the PPA and the arbitration clause from legal review.[182] It maintains that, in any event, the purpose of Article 181(5) is to serve as a check on the Ghanaian Executive; and that while, the previous Attorney-General may have expressed his views, the issue remains for the Ghana Supreme Court to decide finally.[183] The Respondent further suggests that the Claimant may have used fraudulent representations to induce it to enter the PPA.[184] The Respondent asserts that the delay in raising its constitutional objection resulted from its good-faith attempts to resolve the dispute through negotiation with the Claimant.[185]

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180 Respondent's Third Submission, at 3 (question 4).

181 Respondent's Reply Brief, at 10; Hearing Transcript, 90:12-24; Respondent's Third Submission, at 9 (question 9).

182 Respondent's Third Submission, at 9-10 (question 9).

183 Hearing Transcript, 89:21-90:11.

184 Respondent's Brief, at 3-5; Respondent's Reply Brief, at 2, 16; Hearing Transcript, 90:6-8.

185 Hearing Transcript, 90:25-91:13.

121. The Respondent disputes the Claimant's characterization of the constitutionality of the arbitration agreement as being a matter of subjective arbitrability or of capacity. In the Respondent's view, it may clearly enter an arbitration agreement, provided that it does so in compliance with the Constitution. The threshold issues are rather, first, the substantive validity of the arbitration agreement under Ghanaian law, in other words whether an agreement ever came into existence or whether the PPA is void *ab initio* because it did not receive the required Parliamentary approval, and second, whether, as a matter of objective arbitrability, only the Ghana Supreme Court may interpret Article 181(5) of the Ghanaian Constitution and its applicability to the agreement.[186] The Respondent maintains, further, that even if the Claimant's characterization of the constitutional issue is accepted, capacity is determined by the law of the place of incorporation—which is Ghana.[187]

122. The Respondent disputes the Claimant's suggestion that Ghanaian law that would invalidate the agreements may be set aside through "the application of a direct rule of arbitration law, public policy or international law, or by means of correction of the applicable national law of Ghana".[188] In this respect, the Respondent disputes that there is a rule of substantive international law, as alleged by the Claimant, that a State may not invoke its own law to deny capacity. Rather, the Respondent asserts that there are many commonly accepted restrictions on a State's power to enter into an arbitration agreement.[189] The Respondent further distinguishes the present dispute from those referred to by the authorities cited by the Claimant, in that these authorities refer to narrow national legislation strictly limiting Executive authority to enter into arbitration agreements specifically, which served as specific defences to arbitration clauses. By contrast, the Respondent contends that broad-based laws targeting all types of contracts and which are borne out of legitimate policy concerns, such as Article 181(5), are permitted under the New York Convention and will not be set aside.[190]

123. Finally, the Respondent disputes the Claimant's reliance on the Dutch Supreme Court case of *Defence Industries Organisation of the Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran (DIO) v. International Military Services Limited (IMS)* for the proposition that Ghanaian law may be set aside. The Respondent asserts that *DIO v. IMS* merely

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186 Respondent's Reply Brief, at 17-18; Hearing Transcript, 28:3-14.

187 Respondent's Reply Brief, at 18-19; Hearing Transcript, 28:15-18.

188 Respondent's Reply Brief, at 19.

189 Respondent's Reply Brief, at 19; Hearing Transcript, 28:18-21; 29:20-24.

190 Respondent's Reply Brief, at 20; Hearing Transcript, 28:22-29:13; 101:19-102:24.

prevents a State from relying on its own laws to invalidate an arbitration agreement with a foreign entity where the place of performance is outside that State. In the Respondent's view, the rule does not apply where, as here, the place of incorporation and the place of the agreement are within the State, nor does the Court's decision provide authority for the broad proposition that public international law should trump Ghanaian law.[191] For similar reasons, the Respondent further asserts that the Claimant may not avail itself of a good faith defence grounded in *DIO*. In the Respondent's view, unlike the foreign entity in *DIO* that had no reason to know that the State in which it was situated and with which it was contracting had a law prohibiting it from entering into an arbitration agreement, in this dispute, the Claimant is incorporated in Ghana and was aware of Article 181(5). Moreover, the Respondent suggests that the opinion of the Attorney-General of Ghana, on which the Claimant purports to have relied, was procured by the Claimant's own fraudulent representations and, in any event, cannot constitute a waiver of a constitutional mandate.[192]

124. Finally with regard to the setting aside of Ghanaian law in favour of international legal principles, the Respondent contends that, if the Tribunal were to follow this approach, it would be required to take into account the international public policy interests of developing nations, such as Ghana, whose governments must often undertake commercial transactions due to the paucity of viable private entities. In the Respondent's view, Ghana's interest in maintaining the integrity of its Constitution and of its laws should therefore be treated as paramount.[193]

The Claimant's arguments

125. The Claimant maintains that the PPA is valid under Ghanaian law, applicable as provided for in paragraph 23 of the PPA, because it is an agreement in writing that has been duly signed by both Parties and that has been in full legal operation for more than three years.[194] In the Claimant's view, the PPA required no Parliamentary or other approval, as expressed in the opinions by the Attorney-General, and no intervening change in the law has rendered it invalid.[195] The Claimant maintains that the PPA is not an international business or economic transaction within the meaning of Article 181(5), but rather is a valid contract between the

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191 Respondent's Reply Brief, at 20-21; Hearing Transcript, 29:15-19.

192 Respondent's Reply Brief, at 21.

193 Respondent's Reply Brief, at 22.

194 Claimant's Answers, para. 188-189; Claimant's Third Submission, at 2 (question 1).

195 Claimant's Answers, para. 191.

Respondent and itself.[196] The Claimant contends that it is a corporate citizen of Ghana, operating as a business in its place of incorporation and abiding by Ghanaian law.[197]

126. In any event, the Claimant contends, the Respondent is now estopped from relying on Article 181(5) to contest the validity of the PPA.[198] The Claimant maintains that it was and is entitled to rely on the Respondent's representations that the PPA, and in consequence the arbitration clause, were valid, binding, and constitutional. It asserts that these representations were made to it in at least three ways: first, by the Respondent's provision to the Claimant of the written legal opinion of the Attorney-General of Ghana, which made the clear and unequivocal finding that Article 181(5) did not apply to the PPA, and that the Respondent had the full power to enter into the PPA; second, by the Respondent's position, altered only recently, that the PPA was a valid and binding agreement to which it willingly and conscientiously entered; and, third, by the Respondent's own earlier invocations of the arbitration agreement.[199] The Claimant asserts that neither a change in personnel nor a change in government for the Respondent affects the applicability of the estoppel or good faith doctrines; rather, the acts of previous public servants remain attributable to the Respondent.[200] The Claimant suggests that, until recently, the Respondent consistently invoked provisions of the PPA when advantageous to itself.[201]

127. The Claimant further relies on established international law principles of good faith, prohibition of inconsistent behavior, and prohibition of going against one's own previous conduct. In these regards, the Claimant refers to the UNIDROIT Principles of International Commercial Contracts of 2004, as well as to *Lex Mercatoria* principles, rules, and standards. It argues that, in particular, the prohibition of inconsistent behavior is regularly applied by arbitral tribunals as a general principle of international law, and it refers to several arbitral awards in which tribunals ruled against State actions that were, in its view, analogous to the Respondent's actions here.[202] Applying the concept to the present circumstances, the Claimant contends that the Respondent cannot now, more than three years after signing the PPA, assert that the validity of the PPA and the arbitration clause are affected by Article 181(5). It maintains that any

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196 Claimant's Answers, para. 193.

197 Claimant's Answers, para. 195.

198 Claimant's Reply Submission, paras. 35, 38.

199 Claimant's Third Submission, at 7-8 (question 9).

200 Claimant's Third Submission, at 8 (question 9).

201 Claimant's Answers, para. 196.

202 Claimant's Third Submission, at 9-10 (question 9).

reasonable party in the Claimant's circumstances would have understood the Respondent's representations to indicate that the agreements had been validly concluded and that they continued in force; that it sought and received all reasonable and necessary assurances that the PPA was valid; that no change justifies the Respondent's change of position; and that the Claimant reasonably relied on the Respondent's representations in entering into and continuing performance under the PPA.[203]

128. The Claimant further maintains that, under the principle of separability, even if the PPA is not valid, the Arbitral Tribunal may consider the arbitration clause as a separate agreement.[204] In this respect, the Claimant refers to Article 1053 of the DCCP and to Article 21(2) of the UNCITRAL Rules.[205] The Claimant argues that the separability principle is so widely recognized that it has become one of the general principles of arbitration.[206]

129. The Claimant maintains that the question of the validity of the arbitration agreement is distinct from the objective arbitrability of the subject matters in dispute, discussed above. In the Claimant's view, the validity of the arbitration agreement is determined by Dutch law, including Dutch procedural law related to arbitration and Dutch substantive contract law.[207] The Claimant submits that Articles 1020 and 1021 of the DCCP set out the formal requirements for the validity of arbitration agreements.[208] In the Claimant's view, Article 22.2 of the PPA fulfils the requirements under Dutch law for formal validity of the arbitration clause, because the Parties agreed in writing to submit all disputes arising out of or in relation to the PPA to binding

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203 Claimant's Third Submission, at 9-10 (question 9).

204 Claimant's Answers, para. 55-56; *see also* Hearing Transcript, 59:2-60:22.

205 Claimant's Answers, paras. 57-60; Claimant's Third Submission, at 5 (question 6). Article 1053 of the DCCP provides: "An arbitration agreement shall be considered and decided upon as a separate agreement. The arbitral tribunal shall have the power to decide on the validity of the contract of which the arbitration agreement forms part or to which the arbitration agreement is related". Article 21(2) of the UNCITRAL Arbitration Rules 1976 provides: "The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms part. For the purpose of Article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause".

206 Claimant's Answers, para. 61.

207 Claimant's Answers, paras. 69-75; Hearing Transcript, 49:17-50:11.

208 Claimant's Answers, para. 71.

arbitration.[209] The Claimant submits that Article 22.2 of the PPA also meets the requirements of formal validity set out in Article II(2) of the New York Convention.[210]

130. As for the substantive contract law applicable to the arbitration agreement, the Claimant notes that the Parties have not expressly agreed on the governing law. In such situations, the Claimant suggests, it is common for arbitral tribunals to refuse to apply the general choice-of-law clause in the main contract to the arbitration agreement, especially where the Parties' chosen law would invalidate the arbitration clause.[211] In this respect, the Claimant urges that the Tribunal may refuse to apply the choice-of-law clause to the arbitration clause because Ghanaian law discriminates between national and international transactions to which Ghana is a party and thwarts the Parties' true intentions to arbitrate.[212]

131. However, should the Tribunal wish to proceed instead by applying conflict of laws rules, the Claimant asserts that the conflict of law rules of the seat of arbitration should be applied in determining the substantive law applicable to an arbitration agreement.[213] Under Dutch conflict of law rules, the Claimant asserts that the substantive contract law governing the arbitration agreement is either the law chosen by the Parties, or the law most closely connected to the arbitration agreement.[214] In the Claimant's view, following the "validation principle," the Parties may be said to have impliedly chosen the law that will validate the arbitration agreement.[215] In addition, with respect to the law most closely connected to the arbitration, the Claimant argues that the general position under Dutch law is that the law of the seat of arbitration is the law most closely connected to the arbitration agreement. Moreover, the Claimant asserts that "the parties' explicit choice for The Netherlands as the seat . . . is a deliberate selection of a neutral forum in order to disassociate the dispute resolution process from the host state's laws and courts".[216] Thus, under the Claimant's view, both tests—Party choice and closest connection—favour the application of Dutch contract law to the PPA's

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209 Claimant's Answers, paras. 73-75, 77.

210 Claimant's Answers, paras. 72, 76-77.

211 Claimant's Answers, paras. 78-81; Hearing Transcript, 47:8-21; 118:18-119:8.

212 Claimant's Answers, para. 82.

213 Claimant's Answers, paras. 83-84.

214 Claimant's Answers, para. 85.

215 Claimant's Answers, paras. 86-89; Claimant's Third Submission, at 2 (question 1).

216 Claimant's Answers, paras. 90-92; Hearing Transcript, 47:22-48:8; 118:18-119:14; 119:18-21; 119:23-120:2; Third Submission, at 2 (question 1).

arbitration clause.[217] The Claimant argues that, under the New York Convention, the analysis is similar and the outcome identical.[218]

132. Applying Dutch substantive contract law to Article 22.2 of the PPA, the Claimant argues that the Respondent has raised no contractual defences to its validity, and that the signatures at the bottom of the PPA are proof of the Parties' agreement to enter into the PPA and into the arbitration agreement.[219] Should the Tribunal apply Ghanaian law instead, the Claimant maintains that the same conclusion is reached. However, if Ghanaian law invalidates the arbitration agreement, the Claimant refers again to the validation principle to suggest that Dutch contract law should be applied instead.[220]

133. It is the Claimant's position that the Respondent's "constitutional defence" is most accurately characterized not as a contractual defence, but rather as a matter of subjective arbitrability. That is, the Claimant views the Respondent as asserting that it is prohibited from entering into certain agreements as a matter of public policy.[221] According to the Claimant, subjective arbitrability is subject to international public policy, as well as to the application of a substantive rule of international law, and is out of reach of national law.[222] The Claimant asserts that the Respondent is attempting to rely on its own domestic laws to invalidate an arbitration agreement to which it previously acceded. In this regard, the Claimant refers to the Respondent's previous actions of representing, in negotiations, that Article 181(5) did not apply to the PPA; providing a legal opinion from its Attorney-General to the same effect, clearly stating that, under *Faroe Atlantic*, the project between the Government of Ghana and a locally-incorporated company did not come within the ambit of Article 181(5); and invoking the arbitration clause in correspondence with the Claimant.[223] The Claimant maintains that Dutch law and international law and international public policy do not permit the Respondent to rely on its own domestic laws to escape the application of an otherwise valid arbitration agreement. In this regard, the Claimant refers to "consistent" case law and doctrine,[224] and adds that arbitral

217 Claimant's Answers, paras. 98; Hearing Transcript, 48:9-13.

218 Claimant's Answers, paras. 93-97.

219 Claimant's Answers, paras. 99-101.

220 Claimant's Answers, para. 102.

221 Claimant's Answers, paras. 112, 114-116, 183.

222 Claimant's Answers, paras. 118, 120, 184.

223 Hearing Transcript, 36:24-38:22.

224 Claimant's Answers, para. 108.

awards have also been "remarkably consistent" on this issue.[225] The Claimant also refers to the Dutch Supreme Court case of *DIO v. IMS*, which, in its view, held that Dutch private international law does not allow States to rely on limitations of capacity or authority of which the other contracting party was not and could not reasonably have been expected to be aware.[226] The Claimant disputes the Respondent's argument that *DIO* requires, for its application, that the contracting party be incorporated outside the offending State. Instead, the case requires only that the contracting party had no reason to be familiar with the offending State's lack of authority, perhaps because the State entity gave no indication about any limitations, and that the transaction was international in fact.[227]

134. Indeed, in the Claimant's view, conduct such as the Respondent's in the present arbitration is a phenomenon of contemporary concern to arbitration practitioners. The Claimant asserts that anti-arbitration injunctions are rarely meritorious; constitute a threat to the good practice of arbitration; and are at odds with the system of the New York Convention.[228] In the Claimant's view, therefore, to the extent that Article 181(5) of the Ghanaian Constitution applies and limits the effectiveness of the arbitration clause, the Tribunal may override it by applying the rules of international law and international public policy discussed.[229]

135. The Claimant further contends that, had the Respondent harboured genuine concern regarding the constitutionality of the agreements and the efficiency of the resolution of the dispute between the Parties, it should have first raised its jurisdictional objections before the Tribunal, rather than seeking to block proceedings via recourse to its own judicial system.[230] It further disputes the Respondent's claim that the proceedings in Ghana may be concluded within six to eight months.[231] In addition, the Claimant contests the Respondent's invocation of international comity, and notes that the Respondent sought the injunction six months after service of the Notice of Arbitration.[232]

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225 Claimant's Answers, paras. 122-124; 132-136; 185-186; Claimant's Third Submission, at 10 (question 9).

226 Claimant's Answers, paras. 125-129.

227 Hearing Transcript, 64:62:23-65:5; 125:25-126:18.

228 Hearing Transcript, 41:21-42:15; 42:23-43:5.

229 Hearing Transcript, 61:19-62:15.

230 Hearing Transcript, 39:6-23; 40:16-24.

231 Hearing Transcript, 40:24-41:3.

232 Hearing Transcript, 41:4-9.

136. The Claimant maintains that, regardless of whether the Respondent's constitutional argument is characterized as a matter of lack of capacity or objective arbitrability, following the validation principle, Dutch law should be applied.[233] However, in the view of the Claimant, even if Ghanaian law were to apply, the arbitration clause is not an international business or economic transaction within the meaning of Article 181(5) of the Ghanaian Constitution. Specifically, the Claimant refers to the Ghanaian Companies Code, 1963 (Act 169), which, in its view, provides that a company's nationality is determined on the basis of its State of incorporation.[234] The Claimant refers also to the decision of the Ghana Supreme Court in *Faroe Atlantic* to support the proposition that an international business or economic transaction is one between the Government of Ghana and a company incorporated outside of Ghana.[235] In the Claimant's view, under Ghanaian law, BEC retains its Ghanaian nationality, despite sole ownership by a foreign corporation, Balkan UK. In this regard, the Claimant asserts that the Balkan Group of companies follows a structure seen commonly around the world, in which legally distinct entities form part of a common cluster, but operate in different countries with their own distinct tasks, privileges, and liabilities. The Claimant asserts, in particular, that BEC does not share any common directors with Balkan UK; that one of its own directors is a Ghanaian citizen; and that it is, in all practical aspects, a stand-alone company. The Claimant reiterates that it is incorporated in Ghana, undertakes its business activities in Ghana, has entered contracts for local Ghanaian services and supplies, has employed hundreds of Ghanaian staff over the last three years, pays taxes in Ghana, and complies with Ghanaian law.[236] However, should the Tribunal instead find that Article 181(5) of the Ghana Constitution applies because the arbitration clause is an international agreement, the Claimant argues that application of that Article should be restrained in the present case by the rules of international public policy described above,[237] as well as by the principles of good faith and estoppel.[238]

137. Finally, the Claimant disputes that the arbitration clause is an economic or business transaction at all. In the Claimant's view, under Dutch law, an arbitration agreement is a mixed obligatory

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233 Claimant's Answers, paras. 140, 142.

234 Claimant's Answers, para. 146-147; Hearing Transcript, 67:18-68:14.

235 Claimant's Answers, para. 152-153; Hearing Transcript, 67:9-17; 68:15-69:1; 69:8-15.

236 Hearing Transcript, 113:23-115:5; Claimant's Third Submission, at 4-5 (question 5).

237 Claimant's Answers, paras. 139, 143, 172-178, 180, 184-187.

238 Claimant's Answers, para. 179, 187; Hearing Transcript, 115:12-116:14.

and procedural agreement, not an economic or business transaction.[239] The Claimant notes also that neither the GADRA nor the Ghanaian Arbitration Act, 1961 (Act 38) characterizes an arbitration agreement as a business or economic transaction, and that there is no specific requirement under the Ghanaian Constitution for Parliamentary approval of arbitration agreements.[240] The Claimant further argues that, even if the arbitration agreement has international components, there is no commercial, business, or economic content to it. The Claimant suggests that, if commercial content were not a condition for an agreement to come within the scope of Article 181(5) of the Ghanaian Constitution, any dispute resolution clause involving international arbitral tribunals to which the Government of Ghana is a party would require Parliamentary approval.[241]

The Tribunal's findings

138. The Tribunal is mindful of the Respondent's argument to the effect that, even if the Tribunal finds that it has jurisdiction on the basis of the competence-competence principle, it will still have to contend at some point with the threshold constitutional issue that has been raised about the validity of the PPA with reference to Article 181(5) of the Ghanaian Constitution and the requirement for prior Parliamentary approval of the PPA. The Tribunal must emphasize in this respect that the question of the substantive validity of the PPA is one to be decided on the merits. Insofar as jurisdiction is concerned, the only pertinent question that the Tribunal must decide at this stage is the validity or otherwise of the arbitration agreement.

139. Two issues are intertwined in the assessment of the validity of the arbitration agreement. The first is whether it is permissible for a provision of the Ghanaian Constitution to be interpreted by an entity other than the Ghana Supreme Court, such as this Tribunal. The issue is not, as the Respondent has rightly pointed out, one of subjective arbitrability or capacity to enter into an arbitration agreement as the Claimant appears to characterize the constitutional question raised. The Tribunal considers that the Respondent has this capacity and that it has exercised it beyond doubt. The second issue concerns whether any other legal provision or norm under the applicable law invalidates the arbitration agreement, and the law that should apply in determining that issue. The Tribunal will next examine these issues.

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239 Claimant's Answers, para. 156.

240 Claimant's Answers, paras. 158-159; Hearing Transcript, 69:16-70:19. Claimant contrasts the Ghanaian Constitution's silence on arbitration agreements with its specific requirement of Parliamentary ratification of agreements related to natural resources; exercises of the power to vary or waive taxes; loan agreements; and international treaties. Claimant's Answers, para. 159.

241 Claimant's Answers, para. 160; Hearing Transcript, 70:20-71:5.

140. The Tribunal addresses, first, whether the question of the validity of the arbitration agreement—and, thus, of the Tribunal's competence—is objectively arbitrable. According to the Respondent, doubts in this respect arise in view of the provision of Article 130 of the Constitution of Ghana, pursuant to which the Supreme Court has exclusive original jurisdiction "in all matters relating to the enforcement or interpretation of this Constitution," and in view of Article 1 of the GADRA, which it claims exempts from arbitration issues of "enforcement and interpretation of the [Ghanaian] Constitution."

141. The Tribunal commences its enquiry with Article 1020 of the DCCP (*see* Article 1073 of the DCCP). Article 1020(3), cited by both Parties, provides that an arbitration agreement in proceedings subject to the Dutch arbitration law "shall not serve to determine legal consequences of which the parties cannot freely dispose". An immediate next question is, of course, which legal order is decisive for the judgment as to whether the parties can freely dispose of certain matters in arbitration. While the Respondent has suggested that Article 1020(3) requires the interpreter to look to the legal order with the closest connection to the dispute—an exercise that, in the Respondent's view, leads to the application of Ghanaian law—the Claimant maintains that the *lex loci arbitri* should be decisive in all but exceptional circumstances.

142. In the present case, the Tribunal considers that there are strong arguments to be made in favour of defining the scope of arbitrable matters in accordance with the *lex loci arbitri*. As explained in further detail below, the Parties' agreement to dispute settlement before the PCA is an indicator that the Parties intended to remove questions relating to dispute resolution—as opposed to the substantive performance of the contract—from the place of either Party, to a neutral forum. However, the Tribunal need not reach any definitive conclusion in this respect, as the Tribunal sees no reason, under Dutch or Ghanaian law, that constitutional provisions should be inherently non-arbitrable.

143. Arbitration tribunals are not infrequently confronted with the need to interpret and apply constitutional provisions relevant to the resolution of disputes submitted to them, just as they are normally required to interpret and apply treaties that are relevant to the disputes. There is nothing abnormal in exercising a judicial function necessary for the proper administration of justice. Hence the Tribunal does not consider that, in asserting its competence to determine its jurisdiction in this case, it is disregarding or in any way contradicting the force of Article 130 of the Constitution of Ghana. In the view of the Tribunal, the purpose of that provision, like similar clauses in numerous other constitutions, is to establish the judicial supremacy of the Supreme Court in the organization and allocation of powers in the domestic context of Ghana. When there is a case that transcends national borders because of an arbitration agreement or some other legal commitment, such a provision becomes qualified and not necessarily

predominant. Otherwise, as the Claimant has rightly noted, any dispute involving some element of constitutional interpretation, or any dispute in which an objection is raised that there is such an element, which is not difficult to do, would automatically be excluded from international arbitration, in spite of the existence of a clear commitment by the Parties to subject the dispute to arbitration.

144. The Tribunal notes in this connection that, under Article 1020(3) of the DCCP, the arbitration agreement "shall not serve to determine legal consequences of which the parties cannot freely dispose". There is here an explicit recognition that some matters may not be arbitrable by reason of public policy considerations. Yet, as argued by the Claimant, a question of constitutional interpretation—such as that raised by the Respondent—does not necessarily fall within the public policy restriction in The Netherlands, because, if it did, any arbitration agreement or contract which encounters an argument of constitutional nature in a foreign country would be excluded from the jurisdiction of an arbitration tribunal to decide upon.

145. The same conclusion can be reached by reference to the provisions of the New York Convention. Under Article II(3) of the Convention, the court of a Contracting State seized of an action arising from an arbitration agreement shall, at the request of a party, refer the matter to arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed". However, this power to assess the agreement is available only to the court that has been seized of the case, and not to any other court. This is also the case if the body seized of the case is an arbitral tribunal. This is without prejudice to the right of a court in Ghana to apply its own law when it is seized of an award at the stage of enforcement, including the right to apply any relevant requirements of public policy, as provided for under Article V(2)(a) of the Convention. However, this is not an impediment to an arbitral tribunal to decide on its own competence or to make an award on a dispute submitted to it; nor does it affect the powers of other courts that may be called upon to consider enforcement of, or a challenge to, the award in a different country. Otherwise, the principle of competence-competence would be meaningless and without effect.

146. The Parties are in dispute as to the law that should apply to the second issue noted, that is, whether any other legal norm invalidates the arbitration agreement. Based on its argument of Constitutional supremacy as noted above, the Respondent considers that only Ghanaian law, and particularly the relevant provisions of the Ghanaian Constitution, should govern the validity of the arbitration agreement. For its part the Claimant argues that the applicable law should be the Dutch procedural law on arbitration as well as Dutch substantive contract law. In the view of the Claimant, the arbitration agreement is valid under both sets of rules—a conclusion which it maintains would not be different even if Ghanaian law were applied.

147. The Tribunal has no doubt about the fact that, from a purely procedural point of view, the arbitration clause is valid both under the Netherlands Arbitration Act according to the DCCP, just as it is valid under GADRA and the New York Convention. In fact, all of the requirements for the formal validity of the arbitration clause are unquestionably met. The only problem arises from the constitutional question raised under Ghanaian law, but, in the view of the Tribunal, this is not connected to the formal validity of the clause as it concerns the question of objective arbitrability, i.e., whether the subject matter of the dispute is capable of being decided by arbitration.

148. As to which law is applicable to the arbitration clause itself, the Parties, not surprisingly, also have different views. According to the Respondent, it follows from the fact that the PPA is governed by the law of Ghana, a matter which is not disputed by the Claimant, that this law should also apply to the arbitration agreement contained in the PPA. To the contrary, the Claimant contends that, since the PPA did not make an express choice of law in respect of the arbitration agreement, the arbitration agreement is governed by the law of the seat of arbitration, in this case Dutch law.

149. The Tribunal notes that the solutions reached by arbitral tribunals, and the views of writers on this issue, differ, with some favouring the view that the arbitration agreement should follow the choice of law applicable to the contract while some others favour the position that, in the absence of express agreement, the applicable law should be that of the seat of arbitration. However, the Tribunal is persuaded that, in deciding this issue, it should favour the approach that is more conducive to making the arbitration agreement effective rather than an approach that would render the agreement ineffective. The Parties agreed to an arbitration clause providing for the resolution of disputes arising under the PPA by arbitration and it is this choice that should prevail and not an interpretation the result of which would be the exact opposite. A contract cannot be deemed to contain a clause which is self-defeating of its objectives. The validation principle invoked by the Claimant lends support to the conclusion that it makes more sense to consider that the Parties opted for an approach that would validate rather than render invalid the arbitration agreement.

150. The solution to this issue is also not clear-cut by reference to conflict of law rules. The basic tenet underlying the doctrine of *lis pendens*, however, points in the direction of finding in favour of the law that is most closely connected to the arbitration agreement. In this case it is the law of the Netherlands that appears to have the closest connection with the arbitration agreement under the PPA. This is borne out by the fact that The Netherlands was chosen as the seat of the arbitration and by the explicit decision to operate under the UNCITRAL Rules, which, among other consequences, determines the courts which will be competent to consider any challenge to the award rendered. More important still is the argument invoked by the

Claimant to the effect that the choice of the seat of the arbitration in a neutral country indicates a clear understanding that the Parties wish to detach the arbitration agreement from the domestic law or the courts of either Party. The situation is, of course, different with respect to the law applicable to the PPA, since the PPA contains a choice of law provision that expressly subjects the contract to Ghanaian law.

151. The Tribunal must emphasize that the New York Convention also supports the conclusion that, in the absence of a choice of law provision in the arbitration agreement, the law of the seat of arbitration should be the applicable law for determining the validity of the arbitration agreement. Indeed, Article V(1)(a) of the Convention provides that an award may not be recognized if the arbitration agreement was not valid under "the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

152. In the light of the above considerations, the Tribunal concludes that the law applicable to the arbitration agreement in the PPA is the law of The Netherlands. In so deciding, the Tribunal wishes to state that this entails no disrespect for the laws of Ghana or of other developing countries. The Tribunal is sensitive to the importance of according due respect to the laws of every sovereign State; and it emphasizes that its decision in the present case is entirely unrelated to any views or judgments regarding the merits of the respective legal systems. Rather, its decision is based solely on its appreciation of which solution appears to be more appropriate for the effective discharge of the dispute resolution functions which have been entrusted to it by the agreement of the Parties themselves.

153. Having reached the conclusion that its jurisdiction is supported by both the competence-competence and the separability principles and that Dutch law properly applies to the validity of the arbitration agreement, the Tribunal will now examine what Dutch law has to say in this regard. As noted above, the Parties seem to agree, and the Tribunal concurs, that the arbitration agreement meets the basic requirements of contract law and the DCCP. The only open question is whether, *under Dutch law*, the constitutional provisions of a foreign State—in this case, Article 181(5) of the Constitution of Ghana—can constitute grounds for invalidating an otherwise valid arbitration agreement.

154. As the Claimant has noted,[242] the Respondent has not advanced any particular arguments to demonstrate that Article 181(5) of the Constitution of Ghana is relevant to the validity of the arbitration agreement, if it is agreed that Dutch law is the governing law of the arbitration

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242 Claimant's Answers, paras. 99-101.

agreement.[243] Instead, the Respondent has argued that Ghanaian law and not Dutch law should apply in the first place and, for that reason, the Constitution of Ghana is directly pertinent.[244] As indicated above, the Tribunal's conclusion is that the proper law governing the validity of the arbitration agreement is Dutch law. Accordingly, taking account of the Parties' submissions and upon a careful review of the relevant Dutch law, the Tribunal does not consider that Article 181(5) of the Constitution of Ghana in any way affects the validity of the arbitration agreement.

155. The Claimant has argued in this respect that there is no such constitutional issue in view of the fact that it was the Respondent who represented that Article 181(5) of the Constitution does not apply to the PPA and provided the legal opinions of the Attorney-General to the effect that a contract with a locally-incorporated company, such as BEC, is not affected by the requirement of Parliamentary approval under that Article because the PPA is not an international business or economic transaction. The Tribunal does not find this argument persuasive; and it finds that there is indeed a constitutional issue here. In the view of the Tribunal, the very fact that the Attorney-General had to issue an opinion on the subject indicates that there were questions in this respect of which the Claimant was or should have been well aware at the time of negotiation and conclusion of the PPA.

156. The Parties have also argued about the meaning of the 2005 decision of the Ghana Supreme Court in *Attorney General v. Faroe Atlantic*, and particularly whether the judgment sufficiently disposes of the constitutional issue raised. In view of the considerations set out above, the Tribunal believes that this issue relates to the merits of the dispute. It is at that stage that the Tribunal will wish the Parties to argue about whether it is only the place of incorporation that should govern the resolution of the constitutional question discussed in *Attorney General v. Faroe Atlantic* or whether consideration should also be given to the nature of the activities undertaken under the contract. Such argument is particularly necessary because it is often the case that international business transactions are carried out through a locally incorporated company that acts as an intermediary. It is indeed the case here that BEC is the vehicle through which the business of an international company was undertaken in Ghana. This is a question that can only be answered in the light of the facts of the present case.

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243 The Tribunal has taken due note of the Respondent's detailed argumentation regarding the question of *objective arbitrability*, including arguments made under the assumption that Dutch law determines which matters are capable of settlement through arbitration. The arguments on this point, however, must be distinguished from the present question of the *validity* of the arbitration agreement, i.e., the question whether there is a legally binding agreement to arbitrate in the first place.

244 As the Tribunal has noted, the Respondent has also argued that, as a matter of practicality, even should the Tribunal find that the arbitration agreement is valid, jurisdiction should be refused, in order not confront the question of the validity of the PPA, which the Parties agree is governed by Ghanaian law.

157. In this context it will also be appropriate for the Parties to discuss the legal and constitutional effects of the requirement of local incorporation under the law of Ghana for the supply of bulk energy in that country. As explained above, Article 12 of the Ghana Energy Commission Act of 1997 (Act 541) requires that, for a company to hold a license for bulk energy supply in Ghana, it must be incorporated in Ghana. Because of this requirement BEC was registered under the Companies Code, 1963 (Act 179) of Ghana as a locally incorporated company.

158. Equally important will be the arguments concerning the legal opinions issued by the Attorney-General, which appeared to state the Government's understanding about the legal requirements to be observed for the award of the licence and the execution of the PPA. Whether such opinions are the legal expression of a commitment that cannot later be denied, as the Claimant maintains, or simply represent the erroneous opinion of a public official, as the Respondent believes, it is a question to be examined on the merits in connection with the validity of the PPA under both Ghanaian and international law as applicable to this arbitration.

159. While such considerations may be appropriate in respect of the validity of the PPA, the Tribunal does not consider that they are pertinent to the issue of the validity of the arbitration agreement. The Tribunal's conclusion is that the validity of the arbitration agreement is not affected by Article 181(5) of the Constitution. Under both Dutch law and Ghanaian legislation an arbitration agreement cannot be considered to be an international business or economic transaction. As argued by the Claimant, if the arbitration agreement is considered invalid, that would mean that any international arbitration agreement to which the Government of Ghana is a party would need to be submitted to Parliamentary approval. Separability acquires a particular significance in this context.

160. The Claimant maintains that the Respondent is attempting to rely on its own domestic law to invalidate an arbitration agreement to which it previously acceded and implemented, an approach that Dutch law and international law and international public policy do not permit. The Tribunal, while accepting the force of this contention, does not accept the Claimant's further contention that the Respondent has acted in bad faith.

161. The Parties have also discussed in this context the Dutch Appeals Court case of *DIO v. IMS*, but have assigned to it interpretations that are of limited usefulness to the Tribunal in this case. According to the Claimant, the decision of the Dutch Appeals Court supports the view that no reliance should be placed on limitations on the authority of officials or agencies of which the other contracting party was not aware, and could not reasonably have been expected to be aware. However, the Tribunal must point out that, as has been noted above, in the present case the Claimant was either aware or should have been aware of the possible legal difficulty arising from Article 181(5) of the Constitution. For its part the Respondent maintains that, while the

decision in *DIO v. IMS* declares that a State is not entitled to rely on its own laws to invalidate an arbitration agreement with a foreign entity, this applies only if the place of performance is outside that State, but not if performance is to be within that State. It is not apparent to the Tribunal that this is a correct interpretation of the decision. In the view of the Tribunal, the decision implies that reliance on internal law should not be permissible to invalidate an arbitration agreement whether the place of performance is within or outside of the State. This is the meaning of the general statement of the Appeals Court that: "The principle that a state or organisation belonging to a state—such as DIO—would not be entiled to argue that an agreement it enters into providing for international arbitration is invalid under its own internal laws, is by now a broadly supported international principle".[245] This conclusion is solidly based on contemporary international precedent, as, for example, in the case of *Benteler v. Belgium*.[246]

162. The Tribunal will now consider the issue of estoppel raised by the Claimant in answer to the Respondent's assertion that the PPA is void *ab initio* and this same consideration applies to the arbitration agreement. There is no doubt that, in the instant case, there have been official representations by the Government of Ghana on which the Claimant has relied. The Respondent has suggested that the Claimant may have used fraudulent representations to induce it to enter the PPA and this would render any consideration of estoppel unwarranted. Here, too, the Tribunal considers that the assertion entails a presumption of bad faith on the part of the Claimant. The Tribunal is unable to endorse such a presumption in the absence of convincing evidence to support it.

163. While there may be valid reasons for the Ghanaian Constitution to impose restrictions on the State's powers to enter into certain kinds of international transactions, there are circumstances where such a restriction cannot derogate from the effectiveness of the arbitration agreement to which the Parties are committed and which has been held out as valid by the competent Ghanaian officials. That is very much the case here. The very fact that the Respondent proposed the alternative of arbitration to settle the dispute indicates that the arbitration agreement was considered by it to be valid and in force, even if the Respondent ultimately decided not to pursue this line of action.[247] Indeed, the Claimant has characterized the attitude of the Respondent in this regard as evidence of inconsistent State behaviour.

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245 *Defence Industries Organisation of the Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v. International Military Services Limited*, Judgment, Supreme Court of the Netherlands, 28 January 2005, NJ 2006/469, para. 3.3 (quoting Appeals Court judgment, para. 4.2) (unofficial translation, Claimant's Reply Submission, Annex 1).

246 *See Benteler v. Belgium*, Award, 18 November 1983, *reported in Journal des Tribunaux* (Brussels, 1984), pp. 230-32, *reproduced in English translation in* 1 *Journal of International Arbitration* (1984), p. 184.

247 Claimant's Third Submission, at 6 (question 7); Notice of Arbitration, Exhibits 3 and 4.

164. In any event, the Tribunal notes in this respect that, under the applicable principles of international law, the decisions of government officials with apparent authority are attributable to the State. The International Law Commission's Articles on State Responsibility have clearly stated this principle in Article 7, with the added commentary that "[t]he State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form".[248]

165. Moreover, the approval of business transactions by government officials not objected to as to their legality under local law, and relied upon for a number of years, have been held to amount to estoppel by various arbitral tribunals.[249] Whether the situation in the instant case is held to constitute estoppel or some other form of inconsistent behavior, the Tribunal's jurisdiction under the arbitration agreement will not be affected.

166. Even if it were ultimately to be held on the merits that the PPA is invalid—as to which this Tribunal now makes no holding—the arbitration clause will still serve an important purpose because it would enable the Tribunal to take decisions on the consequences of such invalidity for the obligations of the parties to the contract, including consequential questions relating to damages and compensation. The Claimant also suggests that there are other questions, not related to the constitutional issues raised, that would still have to be decided, such as unjust enrichment, tort for negligent advice and liability for false representation.[250]

167. In the light of these considerations, the Tribunal concludes that the arbitration agreement embodied in Article 22.2 of the PPA is both valid and enforceable independently from the issue of the validity of the PPA, and that the Parties are bound by this commitment to international arbitration.

C. The question of the Ghana High Court Order and the Ghana High Court Ruling and their effect on the Tribunal's jurisdiction.

The Respondent's arguments

168. The Respondent maintains that the Ghana High Court Order of 25 June 2010 was validly issued after due notice and hearing and that it is binding on the Parties, who are properly subject to the

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248 International Law Commission, *Report of the Work of its Fifty-third Session, Official Records of the General Assembly,* Fifty-Sixth Session, Supplement No. 10 (A/56/10), at 45.

249 Claimant's Third Submission, at 9 (question 9); *Ioannis Kardassopoulos v. Georgia,* ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 194; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 479.

250 Claimant's Third Submission, at 6-7.

Court's jurisdiction. Therefore, the Respondent submits that, although the Tribunal itself is not subject to the injunction, the Tribunal must "accord[] respect" to the injunction.[251]

169. The Respondent argues, further, that the Tribunal should accord respect to the Ghanaian injunction because it rests on sound legal grounds. It contends that forcing the Respondent to participate in a matter not properly subject to arbitration constitutes *per se* irreparable harm. The Respondent asserts that the Ghana High Court correctly assessed that the balance of harm falls on the Respondent's side. The Respondent also contends that, rather than a "patently improper or parochial court order by a rogue court," the Ghana High Court Ruling was based on full briefing and argumentation, was well-reasoned, and applied standards consistent with principles used in common law nations and in rules of international arbitration.[252]

170. The Respondent argues that, therefore, the Tribunal should suspend proceedings, and should defer to the injunction and to the Ghana Supreme Court's forthcoming decision on the arbitrability of the dispute.[253] The Respondent contends that decisions of arbitral tribunals and decisions of national courts favour deference to a foreign court which is properly seized of the question of arbitrability. In this respect, the Respondent refers to *The MOX Plant Case*, in which the arbitral tribunal suspended its proceedings, in view of the prospect that the European Court of Justice would be seized with a view to determining whether the relevant provisions of the convention at issue were within the European Community's exclusive competence. The Respondent argues that *MOX Plant* is directly in point and provides a sound basis for the Tribunal to abstain from further proceedings at this stage. The Respondent notes that the Ghana High Court has issued an interlocutory injunction specifically restraining the Claimant from continuing with the proceedings before the Tribunal pending the determination of the Ghana proceedings.[254]

171. The Respondent contends that, in light of the international law doctrines of *lis pendens* and international comity, an arbitral tribunal has two options when confronting the challenge that a matter before it is non-arbitrable: it may decide that it does not have competence to decide on any of the matters submitted, or it may decide to retain jurisdiction on the matters that it finds to be arbitrable but to suspend the proceedings on the other matters until the question of the arbitrability of the matters challenged has been decided by the competent court.[255] The

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251 Respondent's Brief, at 10-12.

252 Respondent's Brief, at 12-13.

253 Respondent's Brief, at 13.

254 Respondent's Brief, at 13-15; Hearing Transcript, 91:14-93:4.

255 Respondent's Reply Brief, at 28.

Respondent argues that determinative factors weigh in favour of suspension of the proceedings: the first is that the question of constitutional interpretation raised before the Ghanaian courts is a *bona fide* issue, and not just a pretext to frustrate arbitration, as alleged by the Claimant; and the second is that the Ghana Supreme Court is the most appropriate forum for determination of the constitutional issues, because that court has exclusive jurisdiction over constitutional questions, and because the dispute raises fundamental questions with broad public policy implications.[256]

172. The Respondent asserts further that if the Tribunal continues the proceedings, it risks subjecting the Parties to conflicting decisions or to inconsistent judgments. It refers to provisions in the New York Convention that permit non-enforcement of awards that are based on invalid arbitration agreements, or that decide matters beyond the scope of the submission to arbitration. Additionally, the Respondent submits that an arbitral award that violates a foreign court's order is itself contrary to public policy, for which enforcement may be refused.[257] The Respondent further argues that an order from the Tribunal directing the Parties to proceed would place the Parties in the difficult position of having to choose between violating the Ghana High Court's injunction, or participating in the arbitral proceedings under protest.[258]

173. The Respondent maintains that deference to the Ghanaian courts should not result in major delay, and that the timing of the referral to the Ghana Supreme Court depended on the Claimant submitting its Statement of Defence. The Respondent argues that it has every reason to have the constitutional issue resolved promptly, as its interests are served neither by having the Barge in continued disrepair, nor by uncertainty as to the proper interpretation of Article 181(5).[259]

174. Finally, the Respondent asserts that the Claimant's insistence that the Tribunal should determine the validity and enforceability of the PPA and of the arbitration clause, or to otherwise urge the Tribunal to proceed with the arbitration, could constitute contempt of the Ghana High Court Order. The Respondent contends that the intent and spirit of the injunction require that the Respondent also refrain from arguing the merits of the constitutional issue before this Tribunal, other than to urge the Tribunal to defer further proceedings pending the outcome in the Ghana litigation.[260]

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256 Respondent's Reply Brief, at 28-29.

257 Respondent's Brief at 15-16.

258 Respondent's Brief, at 16.

259 Respondent's Reply Brief, at 30.

260 Respondent's Brief, at 16-17.

The Claimant's arguments

175. In the Claimant's view, the proceedings in Ghana do not affect the jurisdiction of this Tribunal. The Claimant notes that the Notice of Arbitration was submitted on 23 December 2009, while the request for an injunction was only made on 25 June 2010, that is, six months later. It also points out that the Respondent reacted positively to the notice and responded by nominating an arbitrator. According to the Claimant, the Tribunal was first seized of the dispute and it is, therefore, the appropriate body to resolve it.[261] The Claimant contends that the Respondent's application for the injunction was not made in good faith,[262] and that the grounds relied on for the injunction are without merit.

176. The Claimant also disputes that the Respondent will suffer any harm as a result of the continuation of the arbitration. In particular, it points out that the Claimant did not in fact obtain an ex parte attachment of all of the Respondent's bank accounts and property in the Netherlands in February 2010. Rather, the Claimant states that it was merely granted leave to place attachments—and on the Respondent's bank accounts only—and that it was, in any event, unable to make a successful attachment because none of the relevant accounts contained funds. The Claimant also contests the Respondent's claim that it was not apprised of this attachment until June 2010. Instead, the Claimant maintains that, consistently with Dutch law, the Respondent was notified of the leave for attachments on 5 March 2010.[263] Finally, the Claimant asserts that, on 15 July 2010, it made a specific undertaking to the Ghana High Court that it would not seek any further conservatory attachments of any of Ghana's assets in any jurisdiction pending the final determination of the arbitration.[264]

177. In addition to disputing the grounds on which the Respondent obtained the injunction against the Claimant, the Claimant also maintains that the Ghana High Court Ruling of 6 September 2010 was legally incorrect. In the Claimant's view, the Respondent cannot succeed on the merits in the Ghanaian litigation, because, as discussed, the dispositive constitutional issue—the definition of an "international business or economic transaction"—has already been decided by the Ghana Supreme Court in *Faroe Atlantic*.[265] The Claimant argues that the Ghana High Court also erred in considering, as a basis of its decision, whether the Tribunal can rule on the

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261 Claimant's Third Submission, at 3-4.

262 Claimant's Answers, para. 198-200, 202-205.

263 Claimant's Answers, para. 208-212, 216, 219, 221, 223-224; Hearing Transcript, 43:6-44:22.

264 Claimant's Answers, paras. 219-220, 227.

265 Claimant's Answers, para. 225-226.

Constitution of Ghana, and whether the Tribunal will be bound by the orders of the Ghanaian courts.[266]

178. The Claimant maintains that the injunction of the Ghana High Court contravenes fundamental principles of international law and undermines the system of international arbitration. In this respect, it refers to the doctrines of competence-competence, party autonomy, and judicial abstention until an award is rendered, as well as provisions of the New York Convention that it interprets as prohibiting domestic courts from blocking arbitration.[267] The Claimant notes that, by its terms, the Ghana High Court Order is addressed to the Claimant and not to the Tribunal. In the Claimant's view, the Tribunal has not only the right but also an obligation, to proceed to consider its own jurisdiction, and the Ghanaian courts are under an obligation to stay the domestic court proceedings until the Tribunal has done so.[268] Finally, the Claimant highlights the practical consequences for the system of arbitral dispute resolution if tribunals allow anti-arbitration injunctions to interfere with proceedings.[269]

179. The Claimant disputes that *The MOX Plant Case* is analogous to the present dispute. The Claimant distinguishes that case on the basis that, in *MOX Plant*, a strong possibility existed that an exclusive competence over the dispute had been transferred to the European Community under the European Community Treaty. In view of the initiation of proceedings at the European Court of Justice, which would bind the parties and could preclude the jurisdiction of the MOX Plant arbitral tribunal, the arbitral tribunal suspended its proceedings.[270] By contrast, in the present dispute, the Claimant contends that the Respondent has subjected itself to the New York Convention, which leaves questions of arbitrability to be decided, first, by the arbitral tribunal.[271] Moreover, in the Claimant's view, in contrast to the petitioner in *MOX Plant*, the Respondent has not sought recourse in the proper forum, but instead has petitioned its own judiciary in order to circumvent the correct processes and to obtain an almost certain favourable decision.[272]

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266 Claimant's Answers, para. 230.

267 Claimant's Answers, para. 231-232, 234-236, 241-243; Claimant's Reply Submission, para. 52.

268 Claimant's Answers, paras. 237-238.

269 Claimant's Answers, para. 242.

270 Claimant's Reply Submission, paras. 40-50, 126:19-23.

271 Claimant's Reply Submission, paras. 50-51.

272 Claimant's Reply Submission, para. 53.

180. The Claimant notes that the specter of conflicting decisions was only created as a result of the Respondent's initiation of proceedings in Ghana, despite the arbitration agreement and despite the fact that this Tribunal had been duly appointed.[273] The Claimant maintains that the Respondent should have argued its position before the Tribunal and, in case of an unfavourable decision, it could have then applied to the Dutch courts to set aside the arbitration proceedings. In the current situation, the Claimant finds that the only correct solution is for the Respondent to withdraw the Ghanaian court proceedings, rather than risk conflicting decisions.[274] In any event, the Claimant contends that the decisions of the Tribunal and of the Ghanaian courts will not in fact conflict, because they will be grounded in different sets of law.[275]

181. The Claimant suggests that the anti-arbitration injunction has restricted its ability to proceed in the ordinary course with this arbitration, including inhibiting its ability to correspond fully and freely with the Tribunal.[276] The Claimant fears that it will be prosecuted for contempt of court or will otherwise incur sanctions in Ghana, where its operations continue, as a result of making submissions in these arbitral proceedings.[277] It notes that it has already defended in good faith against the claims made by the Respondent in the proceedings in Ghana, but to no avail.[278] Further, the Claimant draws the Tribunal's attention to the fact that the Respondent has released excerpts from at least one piece of correspondence to the Tribunal from the present confidential arbitral proceedings relating to the instant dispute, in a seeming attempt to prejudice the Ghana High Court against the Claimant.[279]

182. The Claimant submits that the Tribunal also has the power to issue an anti-suit injunction and to order the Respondent to withdraw its requests currently before the Ghana High Court and to refrain from initiating any further court proceedings in Ghana or elsewhere.[280] It argues that a

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273 Claimant's Reply Submission, para. 58.

274 Claimant's Reply Submission, para. 59; Hearing Transcript, 41:10-16.

275 Claimant's Reply Submission, para. 60.

276 Claimant's Answers, para. 244; Hearing Transcript, 79:15-17.

277 Claimant's Answers, paras. 244-245.

278 Claimant's Answers, para. 246.

279 Claimant's Answers, paras. 248-249; *see also* Hearing Transcript, 65:7-14.

280 Claimant's Answers, paras. 250-254, 256-258.

strong signal from the Tribunal that the anti-arbitration injunction is inappropriate will benefit the proceedings.[281]

The Tribunal's findings

183. The Tribunal has stated above that it accords the greatest respect to the decisions of the Ghanaian courts and to the legal system of Ghana as a whole. As also indicated above, the Tribunal has declined to issue an anti-suit injunction against the Respondent, as requested by the Claimant.

184. However, the submission of the Respondent that the Tribunal should defer to the courts of Ghana is a different proposition. In the discussions above regarding the validity of the arbitration agreement and the obligation of the Parties to abide by it, the Tribunal has clearly set out its understanding as to the law applicable to these questions, including the meaning of the relevant Dutch and Ghanaian law and the proper purport of the New York Convention. It is in the light of this understanding that the Tribunal has reached the conclusion that it has jurisdiction to decide the dispute submitted to it by the Parties.

185. The Respondent has relied heavily on *The MOX Plant Case* to support its request for postponement of the proceedings pending determination of the suits before the courts in Ghana, while the Claimant has argued against such postponement on the grounds that the *MOX Plant* case should be distinguished from the present dispute. The Tribunal believes that the situation and the legal context in the *MOX Plant Case* are different from those in the present case. In the *MOX Plant Case*, the major issue in question was the significance of Article 282 of the United Nations Convention on the Law of the Sea in resolving the difference between the parties regarding the competing jurisdictions of the Annex VII arbitral tribunal and the European Court of Justice over the issues in dispute. Article 282 of the United Nations Convention on the Law of the Sea excludes the jurisdiction of the Annex VII Arbitral Tribunal "if the parties in the dispute have agreed . . . that such dispute shall be submitted to another procedure that entails a binding decision".

186. Both of the parties in the *MOX Plant* arbitration, Ireland and the United Kingdom, are parties to the European Community Treaty, Article 292 of which gives exclusive jurisdiction to the European Court of Justice in disputes between Member States concerning the application or interpretation of Community law. Further, in the context of the European Community, now the European Union, the United Nations Convention on the Law of the Sea is a "mixed agreement," because the European Community is a party to the Convention in its own right and in respect of matters for which responsibility has been transferred to the Community, including matters

[281] Hearing Transcript, 65:15-66:2.

concerning the protection of the marine environment, maritime safety, and fisheries. It was claimed by the European Commission that a significant part of the dispute between Ireland and the United Kingdom relates to provisions of the United Nations Convention on the Law of the Sea that were part of Community law and, accordingly, that the application or interpretation of those provisions fell within the "jurisdictional monopoly" of the European Court of Justice. The Annex VII arbitral tribunal agreed that, to the extent that this is so, its jurisdiction would be precluded by virtue of Article 282 of the Convention, and the dispute settlement procedures under the European Community Treaty would prevail in its place. In the circumstances, the arbitral tribunal considered it appropriate to adjourn its proceedings to allow for the jurisdictional issues to be definitely resolved. The arbitral tribunal believed that, without this, substantial doubts would remain as to whether its jurisdiction could "be firmly established in respect of all or any of the claims in the dispute".[282]

187. In the present case, the Tribunal does not have any doubts as to its jurisdiction under the arbitration agreement concluded between the Claimant and the Respondent. This will be so irrespective of the decision that may be reached in the Ghanaian courts regarding the validity or enforceability of the PPA. As explained above, the issue of the validity or enforceability of the PPA relates to the merits of the dispute and has no influence on the validity of the arbitration agreement between the Parties or on the competence of the Tribunal to exercise the functions entrusted to it under the agreement.

188. The Tribunal must also consider in this context the Respondent's argument to the effect that participation in a matter which it regards as not properly subject to arbitration constitutes *per se* irreparable harm. Arbitral jurisprudence and the opinions of writers on the subject indicate that the question of what constitutes irreparable harm is a difficult one.[283] This is even more so when the argument concerns an intangible interest such as the right not to be subjected to inappropriate arbitration. However, it appears to have been well established that harm will only be irreparable when compensation cannot be made available as a remedy.[284] In the instant case it is not easy to foresee how damage could ensue from the exercise by the Tribunal of its legal function under the arbitration agreement. And to the extent that some damage might ensue, it

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282 *The MOX Plant Case (Ireland v. the United Kingdom)*, Procedural Order No. 3, 24 June 2003, para. 25, *reported in* Permanent Court of Arbitration Award Series: The MOX Plant Case (Ireland-United Kingdom) Record of Proceedings 2001-2008 (2010), p. 54.

283 David D. Caron, Lee M. Caplan and Matti Pellonpää, The UNCITRAL Arbitration Rules: A Commentary (2006), p. 537.

284 *See Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, para. 92; *Aegean Sea Continental Shelf Case*, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976, pp. 3, 12.

must be asked why any such damage should not be capable of being compensated by the exercise of the powers that a tribunal always has, including the power to award costs. The suggestion of the Respondent that the Tribunal might undertake a "balance of harm" between the Parties does not appear appropriate in this context, in the light of the commitment of both Parties to resolve any dispute under the PPA by arbitration.

189. With respect to the risk of conflicting decisions or inconsistent judgments that has been raised by the Parties, the Tribunal's view is that an award will always be potentially subject to a challenge either before the courts of the seat of arbitration or at the enforcement stage before the courts of the place of enforcement, including in this case the courts of Ghana. That is the appropriate moment for applying any controls based on issues of public policy, to the extent permissible under the UNCITRAL Rules and the New York Convention.

190. The request by the Respondent for a postponement of the proceedings puts this Tribunal in the invidious position of having to decide between, on the one hand, upholding the validity of the principles of competence-competence and separability and, on the other hand, accepting the consequences arising from an injunction against proceedings in an arbitration which the Parties have previously accepted in a formal and written arbitration agreement. The Tribunal is not only convinced that it has acted correctly in finding in favour of its jurisdiction in the arbitration but it also believes, as the Claimant has argued, that it has an obligation to give effect to the commitment of the Parties to arbitration.

191. The Tribunal wishes to stress that it is incumbent upon the courts of Ghana, as organs of a State Party to the New York Convention, to pay full regard to the international obligations that the Republic of Ghana has undertaken by becoming a Party to the Convention. This is particularly so under the various provisions of the New York Convention that have been examined above, all of which point in the direction of the obligation to give effect to the arbitration agreement and ultimately to the recognition of the award made. It is beyond controversy that a party to a treaty, such as the New York Convention, is bound to perform it in good faith. As the Vienna Convention on the Law of Treaties prescribes, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The object and purpose of the New York Convention is to ensure that agreements to arbitrate and the resultant awards are recognized and enforced. It is difficult to reconcile the New York Convention with the issuance of an anti-arbitration injunction that purports to block pursuance of an international arbitral remedy to which the State concerned is committed.

192. In the light of these considerations the Tribunal does not consider that its jurisdiction is affected by the Ghana High Court Order and Ruling. Accordingly, it does not consider that postponement of proceedings is warranted in the circumstances of this case. However, as has

been noted above, the Tribunal is willing to consider and take fully into account the views of the Ghanaian courts on the issues raised with regard to the applicability of Article 181(5) of the Ghanaian Constitution, to the extent that such views become available in the course of the proceedings of the Tribunal. For this purpose the Tribunal is willing to approve of an ample procedural calendar. As has been noted, the Respondent is confident that the decisions of the Ghanaian courts will not take more than nine months. To the extent that new or additional considerations relevant to the Tribunal's jurisdiction become available, the Parties are permitted and encouraged to put such considerations before the Tribunal at any time before the proceedings on the merits are closed. This is, of course, without prejudice to any other arguments that the Parties may wish to submit concerning the merits of the dispute.

193. In this spirit of mutual respect, even in the face of divergent views, the Tribunal would like to address three other issues. The first concerns the Respondent's arguments to the effect that the Claimant may be held in contempt of court if it proceeds with the arbitration, contrary to the injunction issued by the Ghana High Court. The Tribunal will consider any such steps as highly disruptive of the right to arbitration as embodied in the PPA and the arbitration agreement and provided for in the legislation of the Republic of Ghana. The Tribunal, therefore, urges the Respondent not to pursue this line of action.

194. The second question concerns the conservatory attachments for which the Claimant has obtained leave from the Dutch courts but that could not be implemented. The Tribunal notes the Claimant's undertakings to the Ghana High Court of 15 July 2010 to the effect that it will not seek any further conservatory attachments of any of Ghana's assets in any jurisdiction pending the final determination of the arbitration. As this undertaking has been also argued in this arbitration, the Tribunal holds that the Claimant is under an obligation not to pursue any such current or further attachments of Ghanaian assets in any jurisdiction pending the final determination of this arbitration.

195. Lastly the Tribunal must react to the Claimant's request for a confidentiality order to the Parties to keep confidential all awards and orders in this arbitration, as well as other materials and documents related thereto, unless agreed in writing to the contrary, save when disclosure is ordered in certain domestic court proceedings. The Tribunal does not consider that there is justification for such an order at this stage. However, it is willing to reconsider the matter if in the course of these proceedings new considerations are brought to its attention, and the issue is duly argued by the Parties.

VI. DISPOSITIF

For the foregoing reasons, the Tribunal, having deliberated, unanimously decides:

1. That it is competent to decide on the validity of the arbitration agreement concluded by the Parties.

2. That the Parties are obliged to arbitrate, by virtue of Article 22.2 of the PPA, in respect of the proceedings initiated by the Claimant in its Notice of Arbitration dated 23 December 2009.

3. That, accordingly, it has jurisdiction over the Parties' dispute.

4. That the Claimant's request for an anti-suit injunction against the Respondent is rejected.

5. That the Claimant's request for a confidentiality order is rejected.

This Interim Award is made pursuant to Article 1049 of the *Netherlands Arbitration Act 1986*, at the place of arbitration, The Hague, the Netherlands, this 22nd day of December 2010:

Judge Stephen M. Schwebel
Arbitrator

Judge Thomas A. Mensah
Arbitrator

Professor Francisco Orrego Vicuña
President