PCA CASE No. 2016-21

In the matter of an arbitration before a Tribunal constituted in accordance with the United Nations Commission on International Trade Law Rules of Arbitration, as revised in 2010 ("**UNCITRAL Rules**")

between

(1) MR. JOSIAS VAN ZYL (SOUTH AFRICA)
(2) THE JOSIAS VAN ZYL FAMILY TRUST (SOUTH AFRICA)
(3) THE BURMILLA TRUST (SOUTH AFRICA)
(the "**Claimants**")

and

THE KINGDOM OF LESOTHO
(the "**Respondent**", and, together with the Claimants, the "**Parties**")

PROCEDURAL ORDER No. 1:
Suspension, Bifurcation and Procedural Timetable

Arbitral Tribunal
Mr Michael Tselentis QC
Judge Frederik Daniël Jacobus Brand
Mr Peter Leon (Presiding Arbitrator)

Tribunal Secretary
Mr. Ben Winks

Registry
Permanent Court of Arbitration

3 November 2016

15/45399_1

I. BACKGROUND

1. On 12 June 2009, the Claimants and certain related entities (the "**Former Claimants**")[1] instituted an application against the Respondent in the Tribunal of the Southern African Development Community, seated in Windhoek, Namibia (the "**SADC Tribunal**").[2] The Claimants and the Former Claimants sought substantial declaratory and compensatory relief in reparation for the following alleged breaches of the Respondent's international obligations (collectively, the "**Claims**"):[3]

   1.1. uncompensated expropriation of the Claimants' and Former Claimants' diamond mining leases through certain measures taken by the Respondent between 1991 and 1995 ("**Expropriation Claim**");[4] and

   1.2. denial of justice by the Respondent's courts in the disposal of disputes arising from the alleged expropriation between 1996 and 2000 ("**Denial of Justice Claim**").[5]

2. In its Defence, the Respondent, in addition to denying liability on substantive grounds,[6] objected that the Claims were inadmissible owing to the over eight year delay in bringing them before the SADC Tribunal (the "**Prescription Objection**"),[7] and that the Claims, or at least certain aspects of them, fell outside the jurisdiction of the SADC Tribunal, in three respects (collectively, the "**Jurisdictional Objections**"):

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[1] The Former Claimants were six companies incorporated in the Kingdom of Lesotho and jointly owned by the Claimants, which held the mining leases in issue in this matter: Swissbourgh Diamond Mines (Pty) Limited, Matsoku Diamonds (Pty) Limited, Motete Diamonds (Pty) Limited, Orange Diamonds (Pty) Limited, Patiseng Diamonds (Pty) Limited, and Rampai Diamonds (Pty) Limited.

[2] The Respondent is a founding Member State of the Southern African Development Community ("**SADC**"), under a Treaty which was signed on 17 August 1992 and entered into force on 30 September 1993 (the "**SADC Treaty**"). The other Member States of SADC are Angola, Botswana, the Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. The SADC Tribunal was established under Article 16 of the SADC Treaty and governed by the Protocol on the Tribunal, which was signed on 7 August 2000 and entered into force on 14 August 2001 ("**SADC Tribunal Protocol**"). Appended to it are Rules of Procedure for the SADC Tribunal ("**SADC Rules**").

[3] See the Claimants' Application Instituting Proceedings before the SADC Tribunal, 12 June 2009, SADC (T) Case No. 4/2009.

[4] See the Claimants' Application Instituting Proceedings before the SADC Tribunal, 12 June 2009, §1(a) to (d).

[5] Id, §1(g).

[6] See the Respondent's First Answering Affidavit before the SADC Tribunal, 14 October 2009, §B1 to §B9, §C1 to §C27, §D1 to §D4.8.2, §F1 to §F9.10.

[7] See the Respondent's First Answering Affidavit before the SADC Tribunal, 14 October 2009, §3.1 to §3.2; Respondent's Procedural Proposals, 15 September 2016, Annex A, §A.4.

2.1. the Claimants and Former Claimants had not exhausted all remedies available to them under the Respondent's domestic jurisdiction, as required by Article 15(2) of the SADC Tribunal Protocol ("**Non-Exhaustion Objection**");[8]

2.2. the Claims include alleged breaches of the Respondent's international obligations in respect of matters occurring prior to the entry into force of the SADC Treaty on 30 September 1993, which fall outside the temporal scope of the SADC Tribunal's jurisdiction (*ratione temporis*) ("**Temporal Scope Objection**");[9]

2.3. the Claims include alleged breaches of the Respondent's international obligations allegedly arising from sources other than the SADC Treaty, which fall outside the material scope of the SADC Tribunal's jurisdiction (*ratione materiae*) ("**Material Scope Objection**").[10]

3. By August 2010, the Parties had exchanged several sets of extensive affidavits, as well as heads of argument,[11] in the course of the Written Proceedings contemplated in Part V of the SADC Rules,[12] but had not commenced the Oral Proceedings contemplated in Part VI of the SADC Rules.[13] However, through several processes between August 2010 and August 2014, the SADC Member States (including the Respondent) decided to suspend the SADC Tribunal's operations indefinitely and ultimately to restrict its jurisdiction to state-state disputes.[14]

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[8] See the Respondent's First Answering Affidavit before the SADC Tribunal, 14 October 2009, §A1 to §A14; Respondent's Procedural Proposals, 15 September 2016, Annex A, §A.1.

[9] Respondent's Procedural Proposals, 15 September 2016, Annex A, §A.2.

[10] Respondent's Procedural Proposals, 15 September 2016, Annex A, §A.3.

[11] According to the SADC Tribunal Record filed by the Claimants, the following documents were exchanged: Claimants' Application Instituting Proceedings, 12 June 2009; Claimants' Founding Affidavit, 10 June 2010; Respondent's Answering Affidavits, 14 October 2009 and 20 November 2009; Claimants' Replying Affidavits, 26 February 2010 and 12 August 2010; Respondent's Rejoining Affidavit, 12 November 2010; Claimants' Heads of Argument, 15 February 2011; Respondent's Heads of Argument, 15 February 2011.

[12] SADC Rules 32 to 41 provide for the filing of an Application (or Special Agreement) Instituting Proceedings, a Defence, Counter-Claim, Reply and Rejoinder, as well as any other documents required by the Tribunal or agreed upon by the Parties.

[13] SADC Rules 42 to provide for the Tribunal to determine the date and place for a Hearing, to which witnesses are to be called by the Parties and/or summoned by the Tribunal, and at which the Parties' representatives are to present oral argument.

[14] *Swissbourgh Diamond Mines (Pty) Limited & Eight Others v The Kingdom of Lesotho*, PCA Case No. 2013-29, Partial Final Award on Jurisdiction and Merits, 18 April 2016 ("**Williams Award**"), §5.56 to §5.62.

4. On 20 June 2012, the Claimants and Former Claimants instituted arbitration proceedings against the Respondent under the SADC Protocol on Finance and Investment,[15] alleging that the Respondent's participation in the closure of the SADC Tribunal, while the Claims were still pending and without providing an alternative forum to determine the Claims, constituted *inter alia* a denial of justice toward the Claimants and Former Claimants.[16] The resulting arbitration was seated in Singapore, governed by the UNCITRAL Rules and administered by the Permanent Court of Arbitration ("**PCA**") under Case No 2013-29.[17] The Tribunal comprised Mr R Doak Bishop, Judge P M Nienaber and Prof David A R Williams, presiding (the "**Williams Tribunal**").

5. On 18 April 2016, the Williams Tribunal (with Mr. Justice Nienaber dissenting) delivered a Partial Final Award on Jurisdiction and Merits (the "**Williams Award**"), declaring and ordering as follows at §11.1 (underlining added):

> *(a) The Tribunal has jurisdiction to hear and determine the claims of the second, third and fourth Claimants. The claims of the first Claimant and the fifth to ninth Claimants are dismissed. The Kingdom of Lesotho's other objections to jurisdiction are dismissed.*
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> *(b) The Kingdom of Lesotho acted in breach of Articles 14 and 15 of the SADC Tribunal Protocol by unilaterally withdrawing its consent to the SADC Tribunal's jurisdiction over the part-heard claims.*
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> *(c) The Kingdom of Lesotho acted in breach of Article 6(1) of Annex 1 to the Investment Protocol by failing to accord fair and equitable treatment to Claimants and their investment.*
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> *(d) The Kingdom of Lesotho acted in breach of Article 27 of Annex 1 to the Investment Protocol by failing to protect Claimants' right to access the SADC Tribunal, being a judicial tribunal or other authority competent under the laws of the Kingdom.*

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[15] This Protocol, which was signed on 18 August 2006 and entered into force on 16 April 2010, provides as follows in Article 28(1) of Annex 1: "*Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.*"

[16] See the Williams Award (note 14 above), §1.2.

[17] Id, §3.1 to §3.9

(e) The Kingdom of Lesotho acted in breach of Articles 4(c) and 6(1) of the SADC Treaty by failing to uphold the rule of law, being one of the principles of the SADC Treaty.

(f) The Parties shall establish a new tribunal to hear and determine the part-heard claims in accordance with the terms set out in paragraph 9.34 of this Award.

(g) The Kingdom of Lesotho shall pay costs to Claimants in an amount to be determined by this Tribunal in a final ruling on costs in accordance with section 10 of this Award.

6. The terms to which the underlined paragraph (f) refers read as follows:[18]

(a) The Parties shall submit the original SADC claims as set out in Claimants' Notice of Application before the SADC Tribunal (CE-108) to a three-person arbitral tribunal to be seated in Mauritius, one of the SADC states, unless the Parties agree on an alternative seat.

(b) The arbitrators must meet the qualifications of the SADC Tribunal, that is, they must be nationals of a SADC Member State "who possess the qualifications required for appointment to the highest judicial offices in their respective States or who are jurists of recognized competence".

(c) The arbitrators must be independent of the Parties and impartial.

(d) The jurisdiction of the new tribunal will be the same as that bestowed on the SADC Tribunal at the time Claimants filed their SADC case in 2009, with that Tribunal to determine its own jurisdiction on that basis.

(e) The arbitration will be subject to the application of the 2010 UNCITRAL Rules, save that, to the extent practicable, the tribunal should take into account the SADC Tribunal Protocol and Rules, including in relation to jurisdiction.

(f) The PCA will administer the arbitration, unless the Parties agree otherwise.

(g) This Tribunal shall remain constituted and will retain jurisdiction until the new tribunal has been established.

(h) The Claimants and Respondent shall simultaneously notify each other of the person whom they appoint within 45 days of this Award. The two Party

[18] Id, §9.34.

appointed arbitrators shall select the presiding arbitrator within 45 days of their appointment.

(i) The PCA shall be the appointing authority in the event that either Party fails to appoint an arbitrator or if the arbitrators cannot agree on a presiding arbitrator within the required timeframe.

(j) The record (including the pleadings) of the part-heard SADC claim and the record in the present arbitration shall become part of the record of the case before the new tribunal.

(k) The Parties shall confirm in writing to this Tribunal within 30 days of the issuance of this Award that they agree to submit, and thereby consent, to arbitration before this new tribunal on the basis set out in this Award.

7. On 29 April 2016, the Claimants confirmed that they "*agree to submit, and … consent, to arbitration before the new tribunal on the basis set out in paragraph 11.1(f) as read with paragraph 9.34 of the [Williams] Award.*"

8. On 13 May 2016, the Respondent requested an interpretation of the Williams Award, in terms of Article 37 of the UNCITRAL Rules, requesting clarification as to whether the obligation to establish a new tribunal referred to the Claims of the Claimants only, and not the Former Claimants.

9. On 17 May 2016, the Respondent instituted an application in the Singapore High Court "*to set aside the [Williams] Award in its entirety on the basis that the [Williams Tribunal] had erred in law in upholding its jurisdiction over the Claimants' claims, and had thereby exceeded its jurisdiction*".[19] That annulment application is opposed by the Claimants,[20] and has yet to be heard.[21]

10. The following day, 18 May 2016, the Respondent confirmed that it agreed to submit and consent to arbitration before the new tribunal to be constituted in accordance with the terms set out in the Williams Award "*under reservation as to the outcome of its application before the courts of Singapore (including, for the avoidance of doubt, any appeal)*".[22]

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[19] Respondent's Request for Suspension, 26 August 2016, §4.2 and Annex 1.

[20] See the Claimants' Response to the Request for Suspension, 31 August 2016, §22.

[21] Id, §21.

[22] See the Tribunal's Terms of Appointment, §2.7.

11. On 27 June 2016, the Williams Tribunal delivered an Interpretation of the Partial Final Award on Jurisdiction and Merits, which clarified that it had ordered only the Claimants and the Respondent to establish the new tribunal:

> *8.1. The Tribunal clarifies the meaning of paragraph 11.1(f) of the Award as follows:*
>
> *8.1.1. The Award compels the Respondent and the second, third and fourth Claimants to establish a new tribunal. That tribunal is to hear and determine the original part-heard SADC claims as they were filed before the SADC Tribunal and as set out in the Claimants' Notice of Application before the SADC Tribunal.*
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> *8.1.2. As all nine Claimants filed the Notice of Application before the SADC Tribunal, all nine Claimants may wish to participate in the arbitration before the new tribunal. The new tribunal has the power to determine its own jurisdiction, including in relation to which claimants may be the proper parties to that dispute.*
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> *8.1.3. Should the first and fifth to ninth Claimants wish to join the proceedings before the new tribunal they must seek to do so by making due application to the new tribunal to be so joined.*

12. By 14 July 2016, this Tribunal had been duly constituted, in accordance with the terms of the Williams Award,[23] to decide the Claims pending before the SADC Tribunal before it became inoperable. This arbitration is seated in Mauritius,[24] administered by the PCA,[25] and governed by the UNCITRAL Rules, taking into account, to the extent practicable, the SADC Tribunal Protocol and Rules.[26]

13. On 15 August 2016, the Parties signed this Tribunal's Terms of Appointment, in which, among other things, the Parties undertook within one month to deliver "*their submissions and proposals as to the contents of the First Procedural Order*" ("**Procedural Proposals**").[27]

14. On 26 August 2016, the Respondent delivered a Request for a limited suspension of this Tribunal's proceedings, pending the outcome of its annulment application in Singapore,

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[23] See the Tribunal's Terms of Appointment, 15 August 2016, §4.1 to §4.7.

[24] Id, §6.1.

[25] Id, §8.1.

[26] Id, §5.1

[27] Id, §5.4.2. For ease of reference, the Claimants are referred to in this Order as constituting a single "**Party**".

which it anticipated would be known by March 2017 ("**Request for Suspension**").[28] This Request is opposed by the Claimants, who delivered a Response to it on 31 August 2016. With the leave of the Tribunal, the Respondent delivered a Reply on 2 September 2016. The Request for Suspension is discussed in **Part II** below.

15. On 15 September 2016, the Parties each delivered their Procedural Proposals, revealing little common ground. The Claimants proposed that the entire dispute be determined at a single hearing, to be held over five days between 20 and 31 March 2017, consisting only of oral legal submissions and, if necessary, expert evidence on aspects of Lesotho law.[29] The Respondent, by contrast, reiterated its Request for Suspension,[30] and (alternatively or additionally) requested that its Prescription Objection and Jurisdictional Objections (collectively, the "**Preliminary Objections**")[31] be bifurcated from the merits of the Claim ("**Request for Bifurcation**").[32] The Request for Bifurcation is discussed in **Part III** below. If both Requests were refused, the Respondent proposed that a hearing be held over no more than ten days commencing no earlier than 29 May 2017,[33] preceded by a sequential exchange of "*fresh, concise pleadings*",[34] as well as any witness statements and expert evidence.[35]

16. With the leave of the Tribunal, the Claimants delivered a Response to the Respondent's Procedural Proposals on 21 September 2016, to which the Respondent delivered a Reply on 26 September 2016.

17. In order to assist in resolving several areas of disagreement between the Parties over the proper course of proceedings, the Tribunal considered it appropriate to hold a procedural hearing by teleconference on 13 October 2016 ("**First Procedural Hearing**"), for which the Tribunal circulated an Agenda on 7 October 2016. In the Agenda, the Parties were

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[28] See the Respondent's Request for Suspension, 26 August 2016, §17 to §18; Respondent's Reply in the Request for Suspension, 9 September 2016, §71; Respondent's Proposals for Procedural Timetable, 12 October 2016; Respondent's Notes from the First Procedural Hearing, 17 October 2016, §22(b). The Respondent initially requested the Claimants' consent to such a suspension, in a letter dated 23 August 2016, which the Claimants refused, in letters dated 24 and 25 August 2016.

[29] See the Claimants' Procedural Proposals, 15 September 2016, §9(e) and (f).

[30] Respondent's Procedural Proposals, 15 September 2016, §2(b).

[31] See §2 to §2.3 above.

[32] See the Respondent's Procedural Proposals, 15 September 2016, §3(b) and §28 to §42; Respondent's Reply to the Claimants' Response to its Procedural Proposals, 26 September 2016, §36 to §38.

[33] See the Respondent's Proposed Procedural Timetable, 12 October 2016.

[34] See the Respondent's Procedural Proposals, 15 September 2016, §3(a) and §18 to §27; Respondent's Reply to the Claimants' Response to its Procedural Proposals, 26 September 2016, §25 to §35.

[35] See the Respondent's Procedural Proposals, 15 September 2016, §3(c) and §43 to §52; Respondent's Reply to the Claimants' Response to its Procedural Proposals, 26 September 2016, §39 to §42.

asked, among other things, to address the Tribunal on the Requests for Suspension and Bifurcation,[36] as well as on the appropriate procedural steps to be followed in conducting the arbitration (the "**Procedural Timetable**").[37]

18. On 12 October 2016, the Parties each submitted a Proposed Procedural Timetable, as well as a bundle of documents to which their respective counsel intended to refer during the First Procedural Hearing. As scheduled, the First Procedural Hearing was conducted by teleconference on 13 October 2016. Counsel for the Claimants addressed the Tribunal first, followed by counsel for the Respondent after a short adjournment. In the course of the First Procedural Hearing, counsel for the Claimants expressed an intention to provide the Tribunal with a copy of the written notes informing his address, to which counsel for the respondent promptly objected. The following day, on 14 October 2016, the Tribunal indicated that it would admit the Claimants' Notes, and invited the Respondent to submit its own Notes by 17 October 2016, with the instruction to "*limit itself as far as possible to the arguments it raised during the [First Procedural Hearing]*".[38] The Respondent did so. The Tribunal is grateful to the Parties and their counsel for their detailed representations, which have been carefully considered in the preparation of this Order.

19. It is obviously necessary for this Tribunal to decide first on the Request for Suspension (discussed in **Part II**), and then on the Request for Bifurcation (discussed in **Part III**), before determining the Procedural Timetable (discussed in **Part IV**).

II. REQUEST FOR SUSPENSION

20. It is common cause that the Tribunal has the power to order a limited suspension or 'stay' of its own proceedings, in the exercise of its broad discretion under Article 17(1) of the UNCITRAL Rules,[39] which reads as follows:

> *Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its*

[36] See the Agenda for the First Procedural Hearing, 7 October 2016, §2 and §5.

[37] Id, §5.1 to §5.3 and §6.

[38] See the email from the PCA to the Parties, 14 October 2016.

[39] See the Respondent's Request for Suspension, 26 August 2016, §7; Claimants' Response to the Request for Suspension, 31 August 2016, §15; Claimants' Notes for the First Procedural Hearing, 13 October 2016, §34 to §35; Respondent's Notes from the First Procedural Hearing, 17 October 2016, §19.

> *discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.*

21. The Parties also agreed that in interpreting this power,[40] the Tribunal should consider the reasoning applied by the NAFTA Tribunals in *Myers v Canada*[41] and *Bilcon v Canada*.[42] In each case, Canada had sought a stay of the arbitral proceedings on quantum, pending the outcome of an application in the Federal Court of Canada for the setting aside of the partial award on jurisdiction and liability.[43] Both cases were conducted under the 1976 UNCITRAL Rules, Article 15(1) of which was the forerunner of the current Article 17(1) of the UNCITRAL Rules, which this Tribunal is required to apply.[44] The *Myers* Tribunal[45] adopted the following approach (subsequently endorsed by the *Bilcon* Tribunal[46]):

> *The Tribunal's point of departure is the presumption that a party to an arbitration (whether claimant or respondent) is entitled to have the arbitration proceedings continued at a normal pace. Accordingly, for CANADA to succeed [in seeking a stay] it must demonstrate to the Tribunal that the arbitration should be suspended pending the proceedings in the Federal Court.*[47]

22. The Tribunal in *Myers* elsewhere emphasised that "*it is the duty of this Tribunal to* both *of the Disputing Parties to determine the disputes between them as expeditiously and efficiently as possible*".[48] It concluded as follows:

> *An arbitral tribunal has no permanent, independent or institutional life of its own. There are strong policy reasons for not placing the performance of its functions "on*

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[40] See the Respondent's Request for Suspension, 26 August 2016, §8 to §9; Claimants' Response to the Request for Suspension, 31 August 2016, §16; Claimants' Notes for the First Procedural Hearing, 13 October 2016, §38.

[41] *S. D. Myers Inc. v Government of Canada*, Procedural Order No. 18, 26 February 2001 ("***Myers***").

[42] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v Government of Canada*, Procedural Order No. 19, 10 August 2015 ("***Bilcon***").

[43] *Myers* (note 41 above), §1; *Bilcon* (note 42 above), §4.

[44] Article 15(1) of the 1976 UNCITRAL Rules read as follows: "*Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*"

[45] Comprising Prof Bryan Schwartz, Mr Edward C Chiasson QC and Prof J Martin Hunter, Presiding Arbitrator.

[46] Comprising Prof Donald McRae, Prof Bryan Schwartz and Judge Bruno Simma, Presiding Arbitrator.

[47] *Myers* (note 41 above), §8.

[48] Id, §11 (original emphasis).

> *hold" (unless of course the parties so agree); and no compelling reasons that it should do so have been provided to the Tribunal in this instance.*

23. By virtue of the Williams Award,[49] as well as its Terms of Appointment,[50] this Tribunal is also bound, "*to the extent practicable*", to "*take into account the SADC Tribunal Protocol and Rules*". SADC Rule 60(1) affords the Tribunal a broad discretion to order a stay:

> *At any stage of the proceedings, the Tribunal may at its own instance or on the application of a party to the proceedings … may order that the proceedings be stayed where:*
>
> *(a) a national court is already [seized] of the matter and the same relief is sought;*
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> *(b) a party fails to give security for costs ordered by the Tribunal;*
>
> *(c) a party to the proceedings, dies or becomes mentally incompetent or insolvent;*
>
> *(d) the respondent relies on a counter claim or set off which extinguishes wholly the applicant's claim;*
>
> *(e) an agreement between the parties provides for submission of the subject matter of the action to arbitration and the other party pleads the question of going to arbitration first and applies for a stay of proceedings pending arbitration; and*
>
> *(f) the Tribunal finds it appropriate.*

24. Particularly in light of paragraph (f), it appears that SADC Rule 60(1) does not direct this Tribunal one way or the other in the exercise of its discretion to order a stay. Accordingly, the appropriate framework remains Article 17(1) of the UNCITRAL Rules.

25. While it does not depart significantly from Article 15(1) of the 1976 UNCITRAL Rules,[51] Article 17(1) of the current UNCITRAL Rules benefits from a second sentence, requiring that the Tribunal, "*in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute*". This Tribunal considers that the approach adopted in *Myers* is wholly consistent with this amplification or qualification in the current UNCITRAL Rules.

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[49] Williams Award (note 14 above), §9.34(e).

[50] Terms of Appointment, §5.1.

[51] See note 44 above.

26. Accordingly, this Tribunal adopts the approach that the Request for Suspension may be granted only if the Respondent discharges its burden to displace the presumption *against* suspending proceedings, by demonstrating that the suspension sought would better serve the imperatives of *efficiency* and *fairness*.

27. The Respondent's Request for Suspension is premised on "*a clear and significant risk that if Lesotho is successful in its challenge to the [Williams Award] before the Singapore courts, … the effort and expenditure involved in progressing the [present] arbitration in the interim may prove to be wasted*".[52] The Claimants did not dispute this premise in their Response to the Request for Suspension,[53] but did so (some three weeks later) in their Response to the Respondent's Procedural Proposals.[54] There, the Claimants disputed that annulment of the Williams Award in Singapore would deprive this Tribunal of jurisdiction, arguing that the Respondent had expressed its irrevocable consent to the current arbitration *prior* to depositing its conditional consent in terms of the Williams Award.[55] On the face of it, this issue is fundamentally significant, and it thus became the first item on the Tribunal's Agenda for the First Procedural Hearing.[56] It has been debated intensely by the Parties,[57] as well as carefully considered by the Tribunal.

28. At this stage, however, it is unnecessary and undesirable for this Tribunal to make a definitive pronouncement on its jurisdiction.[58] The Tribunal considers it appropriate, as well as sufficient, for present purposes, to assume that there is indeed a "*risk*" (as the Respondent put it)[59] that effort and expense in advancing this arbitration may eventually prove to have been wasted, if the Williams Award is ultimately annulled in Singapore. In every request for a stay of arbitral proceedings, pending a challenge to an antecedent

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[52] See the Respondent's Reply to the Claimants' Response to the Request for Suspension, 2 September 2016, §38.

[53] On the contrary, the Claimants characterised this arbitration as an exercise in the "*execution*" of the Williams Award, in support of an argument that, per section 10 of Singapore's International Arbitration Act, 2002, the Respondent's annulment application "*shall not operate as a stay*" of such "*execution*" (see Claimants' Response to the Request for Suspension, 31 August 2016, §6 to §8).

[54] See the Claimants' Response to the Respondent's Procedural Proposals, 21 September 2016, §9.

[55] Id, §9 to §12.

[56] Agenda for the First Procedural Hearing, 7 October 2016, §1.

[57] See the Claimants' Response to the Respondent's Procedural Proposals, 21 September 2016, §9 to §12; Respondent's Reply to the Claimants' Response to its Procedural Proposals, 26 September 2016, §9 to §24; Claimants' Notes for the First Procedural Hearing, 13 October 2017, §1 to §31; Respondent's Notes from the First Procedural Hearing, 17 October 2017, §8 to §17.

[58] That pronouncement need not be made *unless*, and cannot be made *until* a final (that is, un-appealed or un-appealable) decision to set aside the Williams Award is made by a competent court in Singapore.

[59] See the Respondent's Reply to the Claimants' Response to the Request for Suspension, 2 September 2016, §38.

award on jurisdiction, the "*risk*" of wasted effort and expense is raised,[60] but it remains inherently hypothetical.[61] Irrespective of the complexity or cogency of the hypothesis, the question for the Tribunal presented with such a request is whether, *regardless of the inherent risk of wasted effort and expense*, the overarching imperatives of efficiency and fairness would be served better by granting or by refusing the suspension sought.

29. Proceeding from the premise discussed above, the Respondent advanced the following grounds in support of its Request for Suspension:[62]

> *a. the substantial prejudice which Lesotho risks suffering if the Tribunal were to refuse its request; and*
>
> *b. the failure of the Claimants in their Response to put forward, still less to establish, that they would suffer any prejudice as a result of the Tribunal suspending the proceedings pending the judgment of the Singapore High Court.*

30. In the view of this Tribunal, the Respondent's ground (b) is inapposite. As reasoned in *Myers* (on which the Respondent itself relied), there is a presumption *against* suspension of proceedings.[63] There is no burden on the Claimants to satisfy the Tribunal that the arbitration should proceed at a normal pace, whereas there is a burden on the Respondent to satisfy the Tribunal that this would be inefficient or unfair.[64] It is instructive that the *Myers* Tribunal addressed an argument akin to this Respondent's ground (b), as follows:

> *At the hearing, CANADA asserted that MYERS would not suffer prejudice if a suspension were to be granted. Standing alone, a lack of prejudice to MYERS does not assist CANADA; and Counsel for CANADA conceded that there is minimal if any, prospect of prejudice to CANADA in the sense of "legal prejudice", which relates to procedural unfairness (for example, where the live testimony of witnesses may be lost).*[65]

31. This Tribunal respectfully concurs with the position adopted in *Myers*, that the question is not whether the party *opposing* a stay will *not* suffer any prejudice if the proceedings *are* stayed, but rather whether, if they are *not* stayed, the party *seeking* it will consequently

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[60] See, for example, *Myers* (note 41 above), §10; *Bilcon* (note 42 above), §20.

[61] The Parties and the Tribunal cannot achieve any certainty on the outcome of the annulment proceedings until a final (un-appealed or un-appealable) decision has been made by a competent court in Singapore.

[62] Respondent's Reply to the Request for Suspension, 2 September 2016, §3.

[63] See *Myers* (note 41 above), §8.

[64] Id, §15.

[65] Id, §9.

suffer "*'legal prejudice', which relates to procedural unfairness*".[66] The inherent risk of wasted effort and expense cannot, on its own, constitute such prejudice.

32. In the Respondent's ground (a),[67] it contends that it would suffer "*substantial prejudice*" if the Request for Suspension is not granted. The Respondent amplified this submission as follows:[68]

> *In the absence of suspension, Lesotho would suffer prejudice both as a result of having to fight two sets of proceedings simultaneously, and as a result of the risk that, in the event that the [Williams Award] were set aside, the costs it would have to expend in progressing the present arbitration would be irrecoverable.*
>
> *The latter risk of prejudice results principally from the fact that there is good reason to believe that the Claimants would be unwilling to comply with any order for costs which might be made against them in these proceedings. Notably, the Claimants have not offered any undertaking that they would comply with any order as to costs.*

33. It does not appear that that these factors can have any material bearing on the *procedural fairness* or *efficiency* of this arbitration proceeding at a normal pace. The Respondent has not alleged that these factors will prohibit or inhibit it from preparing and presenting its case fully and fairly in accordance with an appropriate Procedural Timetable commenced immediately.[69] The Respondent's allegations as to its own lack of means, and that of the Claimants, are disputed and appear to be somewhat speculative,[70] but, more significantly, even if they are substantiated, they do not implicate the procedural fairness or efficiency of commencing *this* arbitration *immediately* under an appropriate Procedural Timetable. The mere existence of concurrent annulment proceedings cannot, on its own, give rise to *procedural prejudice*, as the Parties are equally afflicted by both the burden of having to fight on two fronts, and the risk that their efforts and expenses on one of those fronts might ultimately prove to have been wasted.

34. While the inherent risk of wasted effort and expense is unexceptional and, on its own, is insufficient to justify suspension of these proceedings (just as it was insufficient to justify

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[66] Id.

[67] See §11 above.

[68] Respondent's Notes from the First Procedural Hearing, 17 October 2016, §23 and §24.

[69] Indeed, before the First Procedural Hearing, the Respondent helpfully provided the Tribunal with a detailed Proposed Procedural Timetable, in which the Respondent indicated what steps and intervals would be required to allow the Parties to present their cases fully and fairly.

[70] See the Claimants' Response to the Request for Suspension, 31 August 2016, §9 to §9.4; Claimants' Notes for the First Procedural Hearing, 13 October 2016, §51 to §57.

suspending the proceedings in *Myers* and *Bilcon*),[71] one additional, exceptional risk arises in this case. The singular circumstances that led to this Tribunal being constituted have left open the possibility, in principle, that, if the Williams Award is ultimately annulled in Singapore, and this Tribunal consequently orders the Claimants to contribute to the wasted costs duly incurred by the Respondent in this arbitration, the Claimants could conceivably resist the recognition and enforcement of such a costs order on the grounds that this Tribunal lacks jurisdiction to make any order at all. While the Claimants have not expressly reserved their right take such a position (which, indeed, would be a direct contradiction of their argument, resisting the Request for Suspension, that this Tribunal's jurisdiction would survive annulment of the Williams Award),[72] there remains a residual theoretical risk that they might do so at some stage. While initially speculative, this risk crystallised when the Respondent challenged the Claimants to furnish it with a written undertaking to the contrary,[73] and the Claimants failed to do so.[74]

35. In order to assess this risk, and how to mitigate it, this Tribunal (without making any definitive findings as to its jurisdiction)[75] considers it necessary to make some provisional observations about the Claimants' challenge to the Respondent's premise that annulment of the Williams Award would deprive this Tribunal of jurisdiction to make any order at all (including as to wasted costs). In short, the Tribunal is presently not persuaded that this arbitration came about from any source other than the letters of consent provided by the Parties pursuant to the Williams Award. The Respondent's consent, provided on 17 May 2016, was expressly conditional on the outcome of the annulment application in Singapore.[76] The Claimants' own consent to this arbitration, provided on 29 April 2016, was made expressly "*on the basis set out in paragraph 11.1(f) as read with paragraph 9.34 of the [Williams] Award*". It appears that, in doing so, the Claimants did not accept, nor purport to accept, the Respondent's offer of 6 October 2015 which they had robustly rejected at the time, and which was expressed in somewhat different terms to paragraph 9.34 of the Williams Award. Accordingly, this Tribunal is provisionally of the view that

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[71] See *Myers* (note 41 above), §10; *Bilcon* (note 42 above), §20.

[72] See the Claimants' Response to the Respondent's Procedural Proposals, 21 September 2016, §9 to §12; and the Claimants' Notes for the First Procedural Hearing, 13 October 2016, §1 to §31.

[73] See the Respondent's Reply in the Request for Suspension, 2 September 2016, §61; Respondent's Notes from the First Procedural Hearing, 17 October 2016, §24.

[74] See the Claimants' Notes for the First Procedural Hearing, 13 October 2016, §58: "*[I]t is neither necessary (nor appropriate) for this Tribunal to take into account the Respondent's purported concerns as to the costs orders that this Tribunal might make against the Claimants if the [Williams] Award is eventually set aside by the Singapore courts in OS 492. Such concerns are premised on the merits of the jurisdictional objections raised by the Respondent in OS 492, which this Tribunal does not have to pre-judge at this juncture.*"

[75] See §28 above.

[76] See §6 above.

annulment of the Williams Award would deprive this Tribunal of any jurisdiction at all, even to make an award as to wasted costs in that event.

36. The Tribunal takes the view that this risk could potentially place the Respondent at a procedural disadvantage, and thus procedural fairness demands that it is mitigated, in such a manner that does not compromise procedural efficiency. In the circumstances, the Tribunal is not satisfied that this risk justifies ordering the suspension sought by the Respondent, nor ordering the Claimants to furnish the Respondent with security for costs (which, in any event, the Respondent has decidedly not sought).[77] The Tribunal finds that this risk would be sufficiently mitigated by the Claimants providing the Respondent with an unequivocal undertaking, in writing, within two weeks of this Order, in terms to be approved by this Tribunal, that they will satisfy any order this Tribunal may make in respect of wasted costs consequent upon the annulment of the Williams Award.

37. Accordingly, the Respondent's Request for Suspension is refused, on condition that such an undertaking by the Claimants is furnished in a timely manner. For the avoidance of doubt, any failure to do so will require this Tribunal to revisit the Request for Suspension and to make an appropriate order, which may include an order directing the Claimants to provide security for the Respondent's costs.

III. REQUEST FOR BIFURCATION

38. In its Procedural Proposals, the Respondent requested that its Jurisdictional Objections be bifurcated from the merits of the Claims.[78] The Respondent grounded this Request in Article 23(3) of the UNCITRAL Rules, which reads as follows:

> *The arbitral tribunal may rule on a plea [that the arbitral tribunal does not have jurisdiction] either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.*

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[77] See Respondent's Notes from the First Procedural Hearing, 17 October 2016, §26(b). It is worth noting that ordering a party to furnish security for costs is an exceptional remedy which is seldom granted; see for example *South American Silver Limited v The Plurinational State of Bolivia***,** PCA Case No 2013-15, Procedural Order No 10, 11 January 2016, §59: "*Investment arbitration tribunals considering requests for security for costs have emphasized that they may only exercise this power where there are extreme and exceptional circumstances that provide a high real economic risk for the respondent and/or that there is bad faith on the party from whom the security for costs is requested.*"

[78] Respondent's Procedural Proposals, 15 September 2016, §3(b) and §28 to §42.

39. The Respondent submitted that it would be appropriate for this Tribunal to rule on its "*serious and substantial*" Jurisdictional Objections, as a preliminary question, particularly taking into account SADC Rule 67,[79] which reads as follows:

> *1. A party to the proceedings may apply to the Tribunal on a preliminary objection or preliminary plea not going to the substance of the case. Such application shall be made by a separate document.*
>
> *2. The application shall set out the facts and law on which the objection is based, the form of order sought by the applicant and be accompanied by any supporting documents.*
>
> *3. As soon as the application has been filed, the President shall prescribe the period within which the opposite party may file a written statement of its observations and submissions and any documents in support.*
>
> *4. Unless otherwise decided by the Tribunal, further proceedings shall be oral.*
>
> *5. (a) The Tribunal shall decide on the application.*
>
> *(b) If the application is refused the President shall prescribe new time limits for further steps in the proceedings.*

40. The Claimants opposed the Request for Bifurcation, arguing that it had "*no reasonable basis*" and was made "*merely for purposes of engineering yet a further unnecessary delay*".[80]

41. The Respondent referred this Tribunal to the following factors identified by the NAFTA Tribunal[81] in *Glamis Gold v United States*,[82] to determine whether bifurcation would be appropriate:

> *(1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding;*
>
> *(2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even*

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[79] Id, §36 to §37.

[80] Claimants' Response to Respondent's Procedural Proposals, 21 September 2016, §18.7.

[81] Comprising Mr Michael K Young (President), Prof David D Caron and Mr Donald L Morgan.

[82] *Glamis Gold Ltd v The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005 ("***Glamis Gold***"), §12(c).

if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and

(3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost.

42. It is necessary to note, however, that the Tribunal in *Glamis Gold* was interpreting Article 21(4) of the 1976 UNCITRAL Rules,[83] which created a clear presumption in favour of bifurcation.[84] It read as follows:

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

43. Article 23(3) of the current UNCITRAL Rules, which this Tribunal must apply, does not appear to contemplate any presumption, leaving the Tribunal with an even discretion to decide whether to bifurcate proceedings or not.

44. The Respondent urged that the criteria articulated in *Glamis Gold* continued to be applicable "*despite the differences in formulation*" between the Article 23(3) of the current UNCITRAL Rules and Article 21(4) of the 1976 UNCITRAL Rules.[85] This Tribunal takes the view, however, that the shift away from a clear presumption in favour of bifurcation is more than a mere difference in formulation. Its effect is substantive and it requires this Tribunal to approach the Request for Bifurcation from a different point of departure than the Tribunal did in *Glamis Gold*, which it explained as follows:[86]

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

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[83] Id, §1.

[84] Id, §9.

[85] Respondent's Procedural Proposals, 15 September 2016, §39: "*These criteria continue to be applied with respect to the 2010 Rules, which although differently formulated compared to the 1976 UNCITRAL Arbitration Rules, are to similar effect: see e.g. D Caron and LM Lee, The UNCITRAL Arbitration Rules: A Commentary(OUP, 2012) at p. 459, who note that, despite the differences in formulation, 'the policy of ensuring a fair and efficient arbitration that underpins both the 1976 and 2010 UNCITRAL Rules would minimize any textual differences in practice'.*"

[86] *Glamis Gold* (note 82 above), §9 and §11.

> *In examining the drafting history of Article 21(4) of the UNICTRAL Rules, the Tribunal finds that the primary motive for the creation of a presumption in favour of the preliminary consideration of a jurisdictional objection was to ensure efficiency in the proceedings. Importantly, the Tribunal reads the presumption in favor of preliminarily considering an objection to jurisdiction as an instruction to the Tribunal and clearly not as an absolute right of the requesting party.*

45. It is further helpful to recall the comments immediately preceding, and contextualising, that Tribunal's articulation of the threefold factors invoked by the Respondent:[87]

> *[I]f an objection is raised to the jurisdiction of the tribunal and a request is made by either party that the objection be considered as a preliminary matter, the tribunal should do so. The tribunal may decline to do so when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, inter alia… [the three factors quoted above]*

46. This context is important in understanding why these factors were articulated in *Glamis Gold* in somewhat exceptional terms, i.e. that bifurcation should be refused where it is "*very unlikely that there will be any savings in time or cost*" (underlining added).[88] In the circumstances, this Tribunal takes the view that its discretion should be guided evenly by the overarching procedural imperatives of efficiency and fairness. The criteria set out in *Glamis Gold*, perhaps less stringently stated, are helpful in identifying the factors that may bear on efficiency and fairness.

47. Applying these considerations to the Respondent's Request for Bifurcation, this Tribunal makes the following observations. While the Respondent's Non-Exhaustion Objection is substantial and would be dispositive of the Claims, it is so closely intertwined with the Claimants' Denial of Justice Claim (factually as well as legally) that it cannot conveniently or coherently be determined separately from it. On any interpretation, it appears that the Non-Exhaustion Objection is "*so intertwined with the merits that it is very unlikely that there will be any savings in time or cost*" (per *Glamis Gold*). For this reason, it appears that SADC Rule 67 also cannot count in favour of bifurcation of the Non-Exhaustion Objection, as it applies only to "*a preliminary objection or preliminary plea not going to the substance of the case*" (underlining added).

48. The Respondent's Prescription Objection would also be dispositive of the Claims, but it too appears to be bound up, factually and legally, with the very issues in dispute in the Denial of Justice Claim. The Tribunal will thus need to consider how the history of this

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[87] Id, §12(c).

[88] Id.

matter (on which the Parties have conflicting versions) may have impacted on the alleged delay in approaching the SADC Tribunal.[89]

49. The Respondent's Temporal and Material Scope Objections, conversely, are not as closely intertwined with the merits, but they would neither dispose of nor materially reduce the disputed issues on the merits. Moreover, it does not appear that these Objections can be dealt with as crisp issues of law, without the benefit of factual evidence, or at least an assessment of the factual background to this matter, on which the Parties have differing views.

50. It is not apparent to the Tribunal that the bifurcation of any of the Preliminary Objections would make these proceedings more efficient or fair. On the contrary, it seems that each of them would be best addressed against the background of all of the relevant evidence in this case. Moreover, in light of the lengthy and expensive litigation which has characterised the history of this matter, further piecemeal adjudication of the issues would create the possibility of further delays, which ought to be avoided.

51. For these reasons, the Tribunal concludes that the interests of procedural efficiency and fairness are not best served by bifurcating the Preliminary Objections from the merits of the Claims. The Respondent's Request for Bifurcation is accordingly refused. Accordingly, all of the issues in dispute between the Parties (i.e. both jurisdiction and merits, including quantum) are to be addressed at a single substantive hearing, through the cross-examination of witnesses and experts, as well as the presentation of oral legal argument (the "**Hearing**").

IV. PROCEDURAL TIMETABLE

52. The Tribunal has carefully considered the Parties proposals on an appropriate Procedural Timetable, in the event that the Requests for Suspension and Bifurcation were refused, as they are. It is not necessary to rehearse those proposals in this Order, although the Tribunal has adopted elements of each Party's proposals, and compromises between the two, in an effort to ensure that the proceedings are efficient and fair.

53. The Tribunal takes the view that this arbitration must proceed from the stage the Claims had reached when the SADC Tribunal became inoperable. The pleadings have closed: in

[89] See the Claimants' Heads of Argument before the SADC Tribunal, §146.

other words, the Written Proceedings (Part V of the SADC Rules) have been completed,[90] and only the Oral Proceedings (Part V of the SADC Rules) remain.[91]

54. This does not, however, preclude either of the Parties from calling additional witnesses or adducing additional evidence in support of the points they have already addressed in the pleadings.[92] Moreover, either Party may seek the consent of the other, or the leave of the Tribunal on good cause, to amend its pleadings to introduce new points.[93]

55. The Claimants have indicated that the Former Claimants intend to apply for joinder as co-claimants in this arbitration.[94] Any such application ("**Joinder Application**") should be instituted and decided upon without delay. The Claimants proposed that the Joinder Application be instituted within two weeks from the date of this Order, the Respondent to deliver its Response within one week thereafter, and the Former Claimants to deliver any Reply within one week after that.[95] The Tribunal considers it more appropriate to allow two weeks each for the Response and the Reply.

56. Notwithstanding that the pleadings have closed, the Tribunal deems it appropriate, in interests of efficiency, that the Parties should distil the contents of their various Affidavits into concise Statements of Case, in the form of UNCITRAL pleadings but in substance strictly faithful to the existing pleadings. In the interests of fairness, these should be exchanged simultaneously rather than sequentially.

57. Accordingly, the Claimants (and Former Claimants, in the event that they are joined) should deliver a Statement of Claim summarising, in pleading form, the main propositions of fact and law contained in the Affidavits adduced by them before the SADC Tribunal. The Statement of Claim must not exceed forty pages, must cross-refer to the appropriate paragraphs in the Affidavits, and must not contain any new points (i.e. points not already pleaded in the Affidavits).

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[90] See note 11 above: before the SADC Tribunal became inoperable, the Parties had already exchanged extensive Affidavits in Foundation, Answer, Reply and Rejoinder, followed by Heads of Argument.

[91] See SADC Rules 41(1) and 42(1).

[92] See Article 27 of the UNCITRAL Rules; SADC Rules 45(4) and 48. It is thus unnecessary to resolve the Parties' protracted disagreement as to whether the record before the SADC Tribunal included the entire transcript of the trial in the Respondent's domestic courts concerning the mining lease held by Rampai Diamonds (Pty) Ltd ("**the Rampai trial transcript**"). Of course, it will be proper for each Party to identify in advance which parts of that transcript, if any, they intend to refer to and/or rely on at the Hearing.

[93] See Article 22 of the UNCITRAL Rules; SADC Rules 38(3) and 41(2).

[94] Claimants' Proposed Procedural Timetable, 12 October 2016, §10.

[95] Id.

58. Similarly, the Respondent should deliver a simultaneous Statement of Defence (including its objections to jurisdiction and admissibility) summarising, in pleading form, the main propositions of fact and law contained in the Affidavits adduced by it before the SADC Tribunal. The Statement of Defence must not exceed forty pages, must cross-refer to the appropriate paragraphs in the Affidavits, and must not contain any new points.

59. Before the exchange of these Statements, the Parties should decide whether they intend to apply for the bifurcation of quantum (or for the appointment of an expert to determine quantum), and should bring such an application within a reasonable time. If any such application is made, directions will be given at that stage for the service of a Response and Reply. In the absence of any such application, quantum should be addressed in the Statements of Case, as well as at the Hearing, as part of the merits.

60. The Tribunal considers that the Parties should require no more than four weeks from the date of this Order to deliver their Statements of Case. Within three weeks thereafter, the Parties may each apply to amend their respective Statements of Case, to introduce any new points or modify the points already made ("**Amendment Application**"). Any Amendment Application must take the form of: (a) a copy of the Statement of Claim or Statement of Defence, as the case may be, with the proposed amendments highlighted; and (b) an explanatory memorandum containing the reasons why the amendment should be allowed. In each case, the other Party should be afforded four weeks (making allowance for the festive season) to deliver its Response to the Amendment Application, and any Reply should be delivered one week thereafter.

61. An orderly exchange of witness statements and expert reports shall follow, and the Parties shall each identify which witnesses, if any, they wish to cross-examine. The Affidavits already exchanged between the Parties before the SADC Tribunal[96] shall accordingly stand as witness statements before this Tribunal in respect of the relevant deponents, but may be supplemented by further witness statements in respect of those deponents and/or other witnesses. In advance of the Hearing, the Parties should indicate which witnesses, if any, they intend to cross-examine at the Hearing, as well as which parts of the Rampai trial transcript they intend to refer to and/or rely on at the Hearing.

62. In light of the procedural steps and intervals outlined above, the Tribunal concludes that the Hearing should be held between 22 May and 9 June 2017 (subject to reduction, particularly if quantum is to be bifurcated or referred to an expert). The Procedural Timetable set out in this Order is aimed at ensuring that each Party will have a full and fair opportunity to prepare and present its case.

[96] See note 11 above.

V. ORDER

63. For the reasons set out above, the Tribunal hereby orders as follows:

63.1. The Respondent's Request for Suspension is refused, on condition that, within two weeks of this Order, the Claimants furnish the Respondent with an unequivocal written undertaking, in terms to be approved by the Tribunal, that they will satisfy any order this Tribunal may make in respect of wasted costs consequent upon the annulment of the Williams Award.

63.2. The Respondent's Request for Bifurcation is refused.

63.3. All questions of costs are reserved.

63.4. Assuming the Claimants' compliance with §63.1 of this Order, the Procedural Timetable, subject to any subsequent revision by the Tribunal, shall be as follows:

63.4.1. by 18 November 2016, the Claimants shall deliver the written undertaking referred to in §63.1 above;

63.4.2. by 18 November 2016, the Former Claimants shall deliver their Joinder Application;

63.4.3. by 2 December 2016, the Respondent shall deliver its Response, if any, to the Joinder Application;

63.4.4. by 2 December 2016, the Claimants shall deliver their Statement of Claim and the Respondent shall deliver its Statement of Defence;

63.4.5. by 9 December 2016, either or both Parties shall deliver any application for the bifurcation of quantum from the remaining merits of the Claim (or for the appointment of an expert to determine quantum);

63.4.6. by 16 December 2016, the Former Claimants shall deliver their Reply, if any, in the Joinder Application;

63.4.7. by 16 December 2016, the Parties shall deliver their respective proposals as to the appropriate place for the Hearing;

63.4.8. by 16 December 2016, each Party shall deliver any Amendment Application;

63.4.9. by 13 January 2017, each Party shall deliver its Response, if any, to the other Party's Amendment Application;

63.4.10. by 20 January 2017, each Party shall deliver its Reply, if any, in its own Amendment Application;

63.4.11. by 3 February 2017, the Tribunal shall deliver its order(s) in the Amendment Application(s);

63.4.12. by 24 February 2017, each Party shall deliver any further witness statements;

63.4.13. by 17 March 2017, each Party shall deliver any Expert Report(s) in respect of the issues on which expert evidence is appropriate (including quantum, if it is not to be bifurcated from the remaining issues or referred to an expert appointed by the Tribunal);

63.4.14. by 31 March 2017, the Parties shall deliver an agreed List of Issues for the Hearing;

63.4.15. by 31 March 2017, the Parties' Experts in each discipline, having met to discuss their Reports, shall produce a Joint Statement indicating the matters of which they do or do not agree, and the reasons for any disagreement;

63.4.16. by 7 April 2017, each Party shall deliver any Replying Expert Report(s) in respect of those matters on which the experts do not agree;

63.4.17. by 7 April 2017, the Parties shall deliver a list of those parts of the Rampai trial transcript, if any, they intend to rely on and/or refer to at the Hearing;

63.4.18. by 14 April 2017, the Parties shall deliver a list of the witnesses, if any, they intend to cross-examine at the Hearing;

63.4.19. by 14 April 2017, the Claimants shall deliver the Hearing Bundle, which must include a section containing all the contemporaneous documents relating to this matter, arranged in a strict chronological sequence, as well as indexed and paginated, irrespective of whether such documents are also included in the records before the SADC Tribunal and/or the Williams Tribunal;

63.4.20. by 21 April 2017, the Tribunal and the Parties shall conduct a Pre-hearing Review by telephone or video-conference for the purpose of organising the Hearing;

63.4.21. by 1 May 2017, each Party shall deliver its Written Opening Submissions (for which a page limit shall be prescribed by the Tribunal at a later stage), Bundle of Authorities and proposed Hearing Timetable;

63.4.22. from 22 May to 9 June 2017 (subject to reduction), the Hearing shall be held.

For the Tribunal:

Peter Leon
Presiding Arbitrator