IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1976

AND

PURSUANT TO THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE REPUBLIC OF MOZAMBIQUE FOR THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENT

Between

PATEL ENGINEERING LIMITED

Claimant

and

THE REPUBLIC OF MOZAMBIQUE

Respondent

CLAIMANT'S RESPONSE TO RESPONDENT'S MOTION TO BIFURCATE

---

4 December 2020

ADDLESHAW GODDARD

TABLE OF CONTENTS

I. INTRODUCTION

1 Pursuant to paragraph 13 and Annex 1 of Procedural Order No. 1 of 14 October 2020, Claimant (also referred to as "**PEL**") hereby files its Response to Respondent's Motion to Bifurcate (the "**Motion**").

2 In summary, Claimant submits that the Motion should be dismissed because procedural efficiency and fairness militate against the bifurcation of Respondent's jurisdictional objections in this case.

3 Respondent's objections as to the existence and legality of the investment would be more efficiently addressed together with the merits of this case. Respondent's objection concerning the existence of an investment requires the Tribunal to review the vast majority of the documentary and witness evidence submitted with the Statement of Claim as part of its merits claim, including expert forensic evidence as to the authenticity of the version of the Memorandum of Interest ("**MOI**") relied upon by PEL. To decide this issue the Tribunal must determine the content of the parties' obligations to one another. This is the factual dispute at the very heart of the arbitration, the determination of which is also clearly relevant to PEL's case on the merits and quantum. In other words, both the objection to jurisdiction and Claimant's merits claims require the Tribunal to determine the content of the parties' obligations to one another by analysis of the same documentary and testimonial evidence. As to Respondent's objection in respect of the legality of the investment, it requires the consideration of expert evidence on Mozambican laws that are also relevant to the merits of PEL's case. Beyond being inextricably entwined with the merits of the dispute, these two objections are also meritless.

4 Respondent's other objections, which all essentially revolve around the fact that there is a parallel ICC arbitration (the "**ICC Arbitration**") (a situation of Respondent's own making), are so frivolous and contrived that time and costs dealing with such objections on a preliminary basis would be wasted. It would also be unfair for Respondent to be permitted to benefit from its own procedural tactics. Simply put, Respondent commenced that parallel arbitration precisely to make the arguments it does in front of this Tribunal. That cannot be rewarded.

5 In the round, fairness also militates against bifurcation. Respondent has requested bifurcation on the basis that it should be spared unnecessary expenses, should its

jurisdictional objections ultimately be successful. However, the costs that PEL will incur as a result of Respondent's decision to commence parallel ICC proceedings and to refuse consolidation of the two arbitrations (even despite this Tribunal's urging), are far in excess of any costs which Respondent would face, should bifurcation be refused, and Respondent nonetheless be successful in challenging the jurisdiction of this Tribunal.

II. RELEVANT BACKGROUND

6 Respondent insists, in the very first paragraph of its Motion, that "[b]*ifurcation of the jurisdictional questions from the merits and damages is the efficient, economical and sensible approach to proceed*".[1] However, Respondent does not discuss the procedural background to its application. With good cause: such background reveals an unflattering image of Respondent irreconcilable with that of a party minded to a "sensible approach" to the efficiency or economy of these proceedings. In truth, Respondent's conduct thus far has already considerably undermined the efficiency and economy of this arbitration.

7 As the Tribunal is aware, Respondent, together with its instrumentality, the Ministry of Transport and Communications ("**MTC**"), commenced the ICC Arbitration, pursuant to Clause 10 of the MOI. This was three months after this arbitration was commenced and almost two years after Respondent had been notified of an investment dispute between the parties under the Treaty,[2] which had led to protracted negotiations between the parties. Before it commenced the ICC Arbitration, Respondent had never once suggested that the parties should resolve their dispute pursuant to the arbitration agreement contained in the MOI.

8 The ICC Arbitration is a tactical manoeuvre aimed at undermining this arbitration. This is not only obvious from the contents of the Request for Arbitration in the ICC Arbitration, which reads as a response to the arguments raised by PEL in this arbitration,[3] but also from the fact that Mozambique and the MTC have no genuine claim in the ICC Arbitration, in which they essentially seek declaratory relief.[4]

---

1 Motion, p. 1.

2 **Exhibit C-49**, Letter dated 25 June 2018 from Addleshaw Goddard to the Prime Minister of Mozambique, the Ministry of Foreign Affairs and Cooperation and the Investment Promotion Centre.

3 **Exhibit C-178**, ICC Request for Arbitration, para 2, which reads "[f]*or its part, PEL contends, inter alia, that on the basis of the six-page MOI...*" Paragraph 3 further provides: "[y]*ears after the 2011 MOI, PEL now contends that Mozambique must pay PEL more than $100 million in alleged and speculative lost profits..."*

4 **Exhibit C-178**, ICC Request for Arbitration, para. 280.12.

9 As the Tribunal will recall from the procedural meeting on 22 July 2020, Claimant nonetheless sought to reach agreement with Mozambique and to consolidate the two sets of proceedings, so as to avoid unnecessary costs and potentially conflicting awards. Claimant made multiple proposals to Mozambique in the course of June[5] and July 2020.[6]

10 After the procedural meeting, PEL even went so far as to propose that the two arbitrations be consolidated under either set of arbitration rules at Mozambique's election with the consolidated arbitration to be seated in virtually any suitable neutral jurisdiction other than Mozambique.[7]

11 To no avail. Respondent refused all of Claimant's reasonable proposals thereby demonstrating its scant concern for procedural efficiency or for the inducement of unnecessary costs which is now the justification for its Motion.

12 Indeed, Respondent has employed the ICC Arbitration to maximise disruption and inefficiency in these proceedings. Despite having exhibited to its Request for Arbitration in the ICC proceedings PEL's Notice of Arbitration ("**Notice**") in this arbitration,[8] as well as many of PEL's exhibits to its Notice, Respondent has refused PEL's proposals to agree even to any transparency between the two arbitrations.[9] Respondent has also objected to the confirmation of Professor Tawil as PEL's arbitrator in the ICC Arbitration, on the very basis of his involvement in this arbitration.

13 In this context, Respondent's stated concern for a "sensible approach" to procedural efficiency and economy as its primary justification for the Motion does not pass muster.

III. RELEVANT LEGAL PRINCIPLES

14 It is common ground that the Tribunal has discretion to bifurcate jurisdictional questions *inter alia*, pursuant to Article 15(1) of the 1976 UNCITRAL Arbitration Rules (the "**UNCITRAL Rules**").[10]

15 This being said, it is now well-established that this discretion must be exercised with care, particularly where bifurcation could increase the time and costs of the overall proceedings.

---

5 **Exhibit C-179**, Letter dated 19 June 2020, from Addleshaw Goddard to Dorsey & Whitney.

6 **Exhibit C-180**, Letter dated 14 July 2020 from Addleshaw Goddard to Dorsey & Whitney; **Exhibit C-181**, Letter dated 21 July 2020 from Addleshaw Goddard to Dorsey & Whitney.

7 **Exhibit C-185**, Email dated 27 July 2020 from Addleshaw Goddard to Dorsey & Whitney LLP.

8 Notice of Arbitration dated 20 March 2020.

9 **Exhibit C-186**, Email dated 20 July 2020 from Addleshaw Goddard to Dorsey & Whitney**; Exhibit C-187**, Exchange of emails dated 3 August 2020 between Addleshaw Goddard and Dorsey & Whitney.

10 Motion, p. 7.

This is reflected in the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, which include the following warning:

> "Where the arbitral tribunal decides to adopt a bifurcated approach to resolving certain issues, the parties' submissions and, where applicable, their disclosure of documents may be organized in separate stages to reflect that staged organization of the arbitral proceedings. Such an approach may have an impact on the adjudicative process, and therefore, the arbitral tribunal may wish to consider carefully whether such a staged process is likely to save time and costs of the overall proceedings or to have the opposite effect."[11]

16 This is further reflected in empirical studies that have been conducted on the issue of bifurcation. Lucy Greenwood, who completed empirical studies in 2011 and 2018 (published in 2019) on the effect of bifurcation in ICSID proceedings, unequivocally concluded that there should be a presumption against bifurcation on efficiency grounds:

> "In 2011, I concluded 'whilst bifurcation should certainly be considered, tribunals should not necessarily order it purely on the assumption that bifurcation might reduce time and costs of the arbitration'. I would now go further than this in light of the additional research on duration of 'unsuccessful' bifurcated proceedings and suggest that the assumption that bifurcation might reduce time and costs of the arbitration is flawed. Far from making this assumption, I would argue that the data suggests there should be a presumption against agreeing to bifurcate proceedings (on efficiency grounds) unless a tribunal can be confident that it is more likely than not that determination of the bifurcated issue (which is usually a jurisdictional objection) will result in termination of the proceeding."[12]

17 The growing recognition of this reality is further reflected in the emergence of what commentators term a recent trend of investment treaty tribunals "*towards joining objections in the merits phase of the proceedings in the interest of efficiency*."[13]

18 In this context, recent awards consistently highlight that the overarching consideration when deciding whether or not to bifurcate proceedings is whether fairness and procedural efficiency will be improved. As the tribunal in *Cairn v India* put it, in its discussion of the UNCITRAL Rules, fairness and procedural efficiency are the determinative when considering a bifurcation application:

> "As the tribunal in *Accession Mezzanine* stated and the Parties have expressly recognized, 'an overarching question [is] whether fairness and procedural efficiency would be preserved or improved.' These considerations – fairness and

---

11 **CLA-179**, 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, para. 70 (emphasis added).

12 **CLA-180**, Lucy Greenwood, "Revisiting Bifurcation and Efficiency in International Arbitration Proceedings", in Journal of International Arbitration, Vol 36, Issue 4, 2019, p. 424. (Emphasis added). *See also* **CLA-181**, A. Raviv, "Achieving a Faster ICSID," Transnational Dispute Management, 2014, 11(1), p. 29: "*the presumption should be against suspending the merits stage of a proceeding. If a respondent seeks preliminary determination of a jurisdictional objection, it should bear the burden of making an initial showing in its submission that its objection has a strong chance of prevailing*."

13 **CLA-182,** J. Billiet, *International Investment Arbitration*, *A Practical Handbook*, (Maklu Publishers 2016), p. 73.

> procedural efficiency – are the determining factors that should guide the Tribunal's discretion. As noted above, these were the principles that guided the negotiations for the 1976 Rules."[14]

19 The fact that procedural efficiency ought to be an overarching concern when a tribunal decides the issue of bifurcation is even more *à propos* where the arbitration is seated in The Hague, as is the case here. Article 1036(3) of the Dutch Arbitration Act contains an explicit duty for the tribunal to ensure that there is no unreasonable delay of the proceedings. It provides:

> "The arbitral tribunal shall guard against unreasonable delay of the proceedings and, if necessary, at the request of a party or of its own motion, take measures. The parties shall mutually be obliged to prevent unreasonable delay of the proceedings."[15]

20 As to factors relevant to the Tribunal's exercise of this discretion, it is well-established that each case turns on its own facts.[16] However, the factors identified by the tribunal in *Glamis Gold v United States*, which specifically considered the *travaux* of the UNCITRAL Rules in this respect,[17] are widely accepted as helpful guidance including in very recent awards.[18] These factors are the following:

> "Considerations relevant to this analysis include, *inter alia*, (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 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

---

14 **CLA-183,** *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7, Procedural Order No. 4 – Decision on the Respondent's Application for Bifurcation, 19 April 2017, para. 78 (emphasis added) (hereinafter, "***Cairn Energy v. India* Bifurcation Decision**"). *See also* **CLA-184**, *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezelo v. Republic of Hungary,* ICSID Case No. ARB/12/3, Decision on Respondent's Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013, para. 38. *See also* **CLA-185**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent's Request for Bifurcation, 17 January 2020, para. 25 (hereinafter, "***Gran Colombia v. Colombia* Bifurcation Decision**"). *See also* **CLA-186**, *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3, 24 June 2019, para. 15 (hereinafter, "***Rand Investments v. Serbia* Decision**"). *See also* **CLA-187**, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 15, 12 January 2015, para. 26.

15 **CLA-188**, Text of the Dutch Arbitration Act published by the Netherlands Arbitration Institute, *available at* https://www.nai-nl.org/en/documents/dutch_arbitration_act/.

16 **CLA-183,** *Cairn Energy v. India* Bifurcation Decision, para. 81. *See also* **CLA-185,** *Gran Colombia v. Colombia* Bifurcation Decision, paras. 25-26. *See also* **CLA-186,** *Rand Investments v Serbia* Decision, paras. 15-16. *See also* **CLA-189,** *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, paras. 66 and 90.

17 **CLA-190,** *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, paras. 10-11 (hereinafter, "***Glamis Gold v. USA* Bifurcation Decision**").

18 **CLA-191,** *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 4, 27 February 2020, para. 87. *See also* **CLA-186,** *Rand Investments v. Serbia* Decision, paras. 15-16. *See also* **CLA-192,** *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 2, 21 April 2017, para. 18. *See also* **CLA-193,** *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2 Decision on Bifurcation, 13 August 2020, paras. 42-43. *See also* **CLA-194,** *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Procedural Order No. 3, Decision on Bifurcation, 9 October 2019, para. 36.

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."[19]

21 Tribunals nonetheless regularly emphasise that these factors are not "one-size-fit-all" criteria and that they may refuse to bifurcate jurisdictional objections even if all three factors are met.[20]

22 In contrast, Respondent's presentation of the standard relevant to the determination its Motion appears to suggest that there exists a rigid three-factor test for tribunals to decide the question of bifurcation.[21] This is not supported by its own authorities. The tribunal in *Philip Morris* made it clear that each case turned on its own circumstances.[22]

23 As to the test itself, Respondent relies on the three criteria set out by the tribunal in *Philip Morris,* which, as the tribunal explicitly stated, was adopted in accordance with the parties' suggestions.[23] In any event, the *Philip Morris* criteria broadly overlap with those set out in *Glamis*. The tribunal in *Philip Morris* asked itself the following questions *"(1) Is the objection prima facie serious and substantial? (2) Can the objection be examined without prejudging or entering the merits? (3) Could the objection, if successful, dispose of all or an essential part of the claims raised?*" [24] It also considered whether "*the Respondent's objections involve*[d] *facts that* [were] *inextricably linked to the merits*" [25] as well as overall procedural efficiency. [26]

24 To the extent *Philip Morris* sets out a lower threshold for the determination of whether or not a jurisdictional objection is substantial (i.e. Mozambique contends that this criterion is satisfied where "*a jurisdictional objection is* prima facie *serious and substantial*," or in other words, "*not frivolous or vexatious*)",[27] it is submitted that the standard as formulated in *Glamis* should be preferred (i.e. "*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*").[28] As the tribunal in *Eco Oro v. Colombia*

---

19 **CLA-190,** *Glamis Gold v. USA* Bifurcation Decision, para. 12(c).
20 **CLA-186,** *Rand Investments v. Serbia* Decision, para. 16. **CLA-183,** *Cairn Energy v. India* Bifurcation Decision, para. 77.
21 Motion, pp. 7-8.
22 **RLA-2**, *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No 8 Regarding Bifurcation of the Procedure, 14 April 2014, para. 103 (hereinafter, "***Philip Morris v. Australia* Bifurcation Decision**"): "*The Tribunal has taken note of the Parties' references to decisions of other courts and tribunals regarding bifurcation. While the Tribunal agrees that taking into account such other jurisprudence is indeed helpful and appropriate, and will do so in its considerations, the present procedure must be examined in light of its own specific factual and legal circumstances which differ in various ways from the cases addressed by other courts and tribunals*."
23 **RLA-2**, *Philip Morris v. Australia* Bifurcation Decision, para. 109.
24 **RLA-2**, *Philip Morris v. Australia* Bifurcation Decision, para. 109.
25 **RLA-2**, *Philip Morris v. Australia* Bifurcation Decision, para. 108.
26 **RLA-2**, *Philip Morris v. Australia* Bifurcation Decision, paras. 104-107.
27 Motion, p. 7.
28 **CLA-190**, *Glamis Gold v. USA* Bifurcation Decision, p. 3 (para. 12(c)) (emphasis added).

held, the threshold cannot be lowered to the point where any objection would have to be deemed substantial as long as it is not frivolous; this would effectively make bifurcation a default rule:

> "[F]or an objection to be held to be 'serious and substantial' a higher threshold must be applied than merely requiring that the objection is not frivolous or vexatious".[29]

25 The tribunal in *Mr. Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia* also adopted this approach, where it held:

> "Like the Glencore and Eco Oro tribunals, this Tribunal finds that mere assertions are not sufficient to satisfy the required threshold and that, in order for this factor to weigh in favor of bifurcation, the Respondent's jurisdictional objections must be supported by concrete factual allegations and the Respondent must make a prima facie showing of their potential success on their merits."[30]

IV. PROCEDURAL EFFICIENCY AND FAIRNESS MILITATE AGAINST BIFURCATION

26 In its Motion, Mozambique spends precious little pages dealing with the question of procedural efficiency and does not deal with the fairness of bifurcation at all. It merely asserts, in general terms, that it would be inefficient for "*Mozambique to expend resources in merits discovery, hiring expert, and briefing a dispute in which the Tribunal lacks jurisdiction*" and "*a waste of resources for the Tribunal to analyze the complex and various merits and damages issues without determining first whether there is jurisdiction*."[31]

27 Respondent's first assertion is premised upon the false assumption that the Tribunal lacks jurisdiction, a line of inquiry that is premature and irrelevant at this stage of the proceedings.[32] Its second assertion is unparticularised and could be used in respect of *any* case.

28 Respondent's superficial approach to procedural efficiency and fairness of bifurcation in this arbitration is unsurprising. These considerations militate against bifurcation in this

---

29 **CLA-195**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2, Decision on Bifurcation, 28 June 2018, para. 51.

30 **CLA-196**, *Mr. Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Procedural Order No. 3: Decision on the Respondent's Request for Bifurcation, 5 December 2018, para. 41.

31 Motion, p. 20.

32 *See e.g.* **RLA-3**, *Resolute Forest Products, Inc. v. Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 4, Decision on Bifurcation, 18 November 2016, para. 4.4; **CLA-183**, *Cairn Energy v. India* Bifurcation Decision, para. 82(a).

case. Any proper analysis of these considerations undermines Respondent's case in favour of bifurcation.

29 As Section V below demonstrates, Respondent's first objection involves close and considerable investigation into factual and expert evidence, which overlaps substantially with the merits and quantum of the case. It requires the Tribunal to parse that evidence to determine the scope and extent of PEL's investment, which in turn requires an extensive review of the supporting factual and witness evidence both relating to its negotiations and implementation as well as expert evidence as to the authenticity of the version of the MOI relied upon by Claimant.

30 There is also no doubt that the question of what was (or was not) promised to PEL goes to the merits of PEL's claim that Respondent breached the fair and equitable treatment standard, the obligations it had entered into in respect of PEL's investment, and indirectly expropriated PEL's contractual rights to a concession and to exclusivity in respect of the Project.

31 This question also goes to the quantum, in that whether or not Respondent promised to award Claimant a concession in respect of the Project is central to the issue of damages.

32 Similarly, Respondent's fourth objection, in which Respondent alleges *inter alia* that PEL's investment was made contrary to Mozambique law, requires the Tribunal to review expert evidence on domestic law. As is clear from the expert report PEL has adduced in this respect, such evidence is also relevant to the merits of the case. It is particularly relevant to the question of whether Respondent acted in breach of its duty to act in good faith and acted arbitrarily.

33 As explained in more details below, Respondent's objections about the existence and legality of Claimant's investment are also meritless, which would render their consideration, at this stage, procedurally inefficient.

34 As to Respondent's remaining objections, which essentially revolve around the overlap of the ICC Arbitration with this arbitration, a situation squarely and deliberately of Respondent's own making, they are so meritless that they do not even pass the less onerous test Respondent advocates should apply (i.e. whether they are *prima facie* frivolous). Furthermore, if accepted, Respondent would be rewarded for its procedural manoeuvre, which would be unfair.

35 Accordingly, there would be no gain in procedural efficiency or economy in bifurcating this proceeding, in light of the extent of the evidence that needs to be considered at the jurisdictional stage, the fact that the issues of jurisdiction are intertwined with the merits and quantum of the case, and all objections are meritless.

36 Furthermore, overall fairness militates against bifurcation. As explained at paragraphs 6 to 13 above, in the interest of procedural efficiency, Claimant has made every effort to consolidate this arbitration with the ICC Arbitration. Claimant went so far as to propose that the two arbitrations be consolidated under either set of arbitration rules at Mozambique's election with the consolidated arbitration to be seated in virtually any suitable neutral jurisdiction other than Mozambique.[33] Respondent refused this proposal as well as any proposal that would have promoted procedural efficiency and economy. Instead, Respondent has sought to maximise inefficiencies between the two arbitration, including by refusing transparency between the two sets of proceedings and objecting to the confirmation of Professor Tawil as Claimant's appointee in the ICC Arbitration.

37 It would therefore be unfair to grant Respondent's Motion essentially to spare it unnecessary expenses, should its jurisdictional objections be successful, when Respondent has imposed an unnecessary second arbitration upon Claimant (including the costs attached to it) and has refused all the reasonable proposals aimed at favouring procedural efficiency and economy between the two arbitrations. The costs that Claimant will incur as a result of Respondent's conduct are far in excess of any costs which Respondent would face, should bifurcation be refused, and Respondent nonetheless be successful in challenging the jurisdiction of this Tribunal.

38 It follows that in the circumstances of this case, it would not promote procedural efficiency and economy and it would be unfair for the Tribunal to grant Respondent's Motion.

V. RESPONDENT'S OBJECTIONS INVOLVE SUBSTANTIAL ENQUIRIES INTO FACTUAL AND EXPERT EVIDENCE, ARE INTERTWINED WITH THE MERITS AND QUANTUM, AND ARE MERITLESS

39 This Section explains that Respondent's objections involve substantial enquiries into factual documentary and expert evidence, are intertwined with the merits and quantum, are meritless, and thus should not be bifurcated.

---

[33] **Exhibit C-185**, Email dated 27 July 2020 from Addleshaw Goddard to Dorsey & Whitney LLP.

A. Mozambique's First Objection Relating to the Existence of an Investment

40 Respondent has divided its first objection into five sub-objections, which are addressed in turn below.

41 First, Respondent contends that it has a substantial jurisdictional objection on the basis that the MOI is merely an expression of interest, and a mere right of first refusal or option are not investments under international law, specifically in light of *PSEG Global v. Turkey*.[34] Respondent contends that "*the MOI on its face does not obligate Patel or for that matter the MTC to enter into a concession*."[35]

42 In its Statement of Claim, PEL argues that it invested in an economic transaction aimed at developing a rail corridor and port in Mozambique, which was valued at USD 3.115 billion (the "**Project**"). Its investment included: (i) the direct award of a concession to implement the Project as well as all the rights under the MOI associated with the Project such as Claimant's exclusive right to develop the Project and its right of first refusal for the implementation of the Project; (ii) the considerable value of the information and data transferred to Respondent; (iii) the Preliminary Study PEL conducted in 2011; and (iv) the detailed Prefeasibility Study Claimant carried out during the course of 2011 and 2012 (the "**PFS**").[36]

43 To determine Respondent's objection, the Tribunal must therefore answer the questions of what comprised PEL's investment, including what was agreed under the MOI, i.e. whether PEL's investment comprised a "*mere right of preference*" or an "*expression of interest*" as Respondent contends, or whether it comprised the bundle of rights and obligations presented by PEL, including the direct award of a concession and all of the activities associated with the several years PEL spent developing the Project.

44 This is a question at the very heart of this arbitration. Contrary to the impression Respondent seeks to create, this is not a question that can be resolved "*on the face of MOI*". Even on the sole basis of the evidence adduced by Claimant with the Statement of Claim, it is already clear that what the parties agreed to in the MOI is a fundamental question which demands not only that the Tribunal review the MOI itself but also substantial factual and expert evidence:

---

34 Motion, p. 9.
35 Motion, p. 10.
36 Statement of Claim, para. 257.

(a) The Tribunal will need to review the history of the MOI, covered in over 50 paragraphs of factual background in the Statement of Claim, which itself is contained *inter alia* in the documents pre-dating its entry into force relating to the Project, the early relationship between PEL, the MTC and the Government's state authority, Mozambique Ports and Railways, the negotiations of the MOI as well as the witness evidence of Messrs Kishan Daga and Ashish Patel.

(b) The Tribunal will also need to review the facts relating to the implementation of the MOI, covered in over 100 paragraphs of the factual background in the Statement of Claim, which is itself contained *inter alia* in the documents relating to the Project such as for instance the PFS itself and all the work associated to it, the correspondence between the parties regarding the issuance of the concession agreement as well the witness evidence of Messrs Kishan Daga and Ashish Patel in this respect.

(c) The Tribunal will need to determine whether the English version of the MOI relied upon by Claimant is authentic. Respondent has made allegations as to the authenticity of the version relied upon by Claimant, which has a direct impact as to the rights and obligations of the parties under the MOI (particularly regarding the right to a concession in respect of the Project). Such determination will require that the Tribunal hear the expert evidence of Mr Gerald Laporte on the authenticity of the MOI, as well as expert evidence on Mozambican law in relation to the binding nature of the rights and obligations contained in the MOI.

45 Furthermore, the question of what was agreed under the MOI is intertwined with the merits of the case. The Tribunal must determine what was (or was not) promised to PEL to decide its claims that: (i) Respondent breached the FET standard under the Treaty including by reneging on the specific assurances contained in the MOI,[37] by failing to act consistently and transparently,[38] and by breaching its obligation to act in good faith;[39] (ii) Respondent breached the obligations it had entered into in respect of PEL's investment, contrary to Article 3(4) of the Mozambique-Netherlands BIT;[40] and (iii) Respondent

[37] Statement of Claim, paras. 317-345.
[38] Statement of Claim, paras. 346-365.
[39] Statement of Claim, paras. 374-379.
[40] Statement of Claim, paras. 398-407.

indirectly expropriated PEL's contractual rights to a concession and to exclusivity in respect of the Project.[41]

46 The question of what was agreed under the MOI is also intertwined with the quantum of the case. Whether or not Respondent promised to award PEL a concession in respect of the Project is central to the issue of damages.[42]

47 What is more, Respondent's objection is meritless as a matter of law. Respondent has not even been able to find a single decision in support of its argument. It relies on *PSEG v. Turkey* to argue that the "*PSEG Global Tribunal agreed with the Republic of Turkey and concluded that the memorandum of understanding was not an investment*".[43] This is not what the tribunal decided in *PSEG*. The tribunal found that the concession agreement between PSEG and the Turkish government was a valid concession agreement, which constituted an investment, even if such contract omitted essential terms and conditions.[44] The passages of *PSEG* relied upon by Respondent concerned the standing of an investor other than *PSEG*, the North American Coal Corporation ("**NACC**"), to bring a treaty claim on the basis of a Memorandum of Understanding between itself and PSEG conferring NACC the option to acquire ownership interest in PSEG's wholly owned special purpose company in Turkey.[45] Other than the fact that the relevant paragraphs use the expression "Memorandum of Understanding" the circumstances of the case have nothing to do with the case at hand.

48 Finally, even if *arguendo* Respondent is correct that PEL only had a "mere right of preference" or "expression of interest", which in turn did not constitute an investment, this would not be dispositive of the question of whether or not Claimant has made an investment. Claimant also relies on the valuable information and data transferred to Respondent, the Preliminary Study Claimant conducted in 2011, as well as the PFS, as investments, under the Treaty; but for that valuable information, the Project, which had been deemed by Mozambique and its CFM to be unfeasible, never would have gotten off the ground.

---

41 Statement of Claim, paras. 419-423.

42 *See e.g.* Statement of Claim, paras. 443-444.

43 Motion, pp. 9-10.

44 **RLA-5,** *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, paras. 79-102 (hereinafter, "***PSEG Global v. Turkey* Jurisdiction Decision**").

45 **RLA-5,** *PSEG Global v. Turkey* Jurisdiction Decision, paras. 175 and 182-194.

49 Secondly, Respondent argues that it has a substantial jurisdiction objection on the basis that expenditure made by Claimant in connection with the MOI does not constitute an investment, placing particular reliance upon the decision of the tribunal in *Mihaly v. Sri Lanka*.[46]

50 This objection is meritless. It is founded on a misunderstanding of PEL's case which does not rely on expenditure in relation to the MOI as its investment (as to which see paragraph 42 above). This "misunderstanding" appears to be aimed at drawing a parallel between *Mihaly* and the present case, which is in fact readily distinguishable from *Mihaly*. In *Mihaly*, contrary to the case at hand, no contractual relationships were ever entered into.[47] This seems to be recognised by Respondent, which comments that "*Patel may have a contract claim under local law that Mozambique and the MTC would oppose.*"[48] It is difficult to understand, as Respondent suggests, how PEL simultaneously can have no contractual relationship with Respondent as the claimant in *Mihaly,* but yet have a contract claim under local law.

51 This also makes it clear that the determination of what was agreed between the parties under the MOI is key to the determination of whether Claimant has made a qualifying investment. This, in turn, as explained above, requires the Tribunal to consider substantial factual and expert evidence and is a question which is inextricably intertwined with the merits and the quantum of the case.

52 Thirdly, Respondent contends that it has a substantial objection on the basis that Claimant's investment does not meet the *Salini* factors for there to be an investment.[49] This is *inter alia* based on Respondent's factual allegations that the MOI was "*by its very nature an option*", no profit arises from the MOI itself since no concession was ever negotiated with PEL, and the MOI did not contribute to Mozambique's development.[50] Respondent then seeks to create the impression that this question can be decided on the face of the "*mere six-page"* MOI. [51]

53 However, as explained above, the determination of what comprised PEL's investment and what was agreed between the parties under the MOI requires the Tribunal to consider

---

46 Motion, pp. 10-11.
47 **RLA-6**, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, para. 51.
48 Motion, p. 11.
49 Motion, pp. 11-12.
50 Motion, pp. 11-12.
51 Motion, p. 12.

substantial factual and expert evidence and is a question which is intertwined with the merits and the quantum of the case.

54 Furthermore, Respondent's objection is meritless. As explained in the Statement of Claim, there is considerable debate as to whether the so-called *Salini* criteria are compulsory requirements or mere indicators of the possible existence of an investment, and their relevance outside of the ICSID context is controversial.[52] In any event, there is no doubt that such criteria are met in the present case. [53]

55 Fourthly, Respondent argues that it has a substantial jurisdictional objection in respect of whether the MOI is an investment under the Treaty. It contends that it is not an investment, in that the MOI was "*exploratory and conditional, and not a 'right' to money nor has a financial value*" and that no concession was conferred by Mozambique to PEL by law or under contract. [54]

56 PEL disputes Mozambique's characterisation of PEL's investment (which ignores the fact that investments must be viewed holistically over the course of their duration, and not as discrete components or parts), and the MOI. As explained above, determining what comprises PEL's investment and what was agreed between the parties under the MOI, requires this Tribunal to consider substantial factual and expert evidence and is a question which is intertwined with the merits and the quantum of the case.

57 In any event, this objection is meritless. As Claimant has demonstrated in its Statement of Claim, Claimant's investment clearly falls within the scope of the definition of "investment" under the Treaty.[55]

58 Even if *arguendo* Respondent is correct that the MOI did not constitute an investment under the Treaty, this would not be dispositive of the question of whether or not PEL made a qualifying investment. PEL's investment is much broader than the pigeonhole within which Respondent attempts to place it. For example, PEL relies on, *inter alia*, the valuable information and data transferred to Respondent, the Preliminary Study PEL conducted in 2011, the PFS submitted in 2012, and the value Mozambique derived from PEL's transfer

---

52 Statement of Claim, para. 275.
53 Statement of Claim, para. 276.
54 Motion, p. 12.
55 Statement of Claim, paras. 254-260.

of knowledge and know-how, without which Mozambique's largest infrastructure project to date would have been a non-starter.

59 Fifthly, Respondent argues that it has a substantial jurisdictional objection, in that Claimant never registered as a foreign investor and has accordingly not made its investment "*in accordance with the national laws of the Contracting Party in whose territory the investment is made*". [56]

60 This objection is meritless. It conflates the concepts of "investor" and "investment", which is dispositive. In any event, it is well-established that failure to register an investment even if such registration is required by law is not sufficient for a finding that an investment has not been invested in accordance with the law.[57]

B. Respondent's Second Objection Concerning the ICC Tribunal's Purported Jurisdiction over PEL's Investment Claim

61 Respondent argues that it has a substantial objection based on the fact that the parties contractually agreed to ICC arbitration. It contends that the ICC Rules are appropriate to hear an investment treaty dispute and that the MOI requires PEL to bring its BIT claim in an ICC arbitration in Mozambique. It concludes that this Tribunal must respect and give effect to the parties' agreement. [58]

62 This objection is meritless. Claimant, of course, agrees that the ICC Rules may be appropriate to govern a BIT dispute – in fact, it has offered that the two arbitrations be consolidated under the ICC Rules. However, Respondent conflates the issue of the arbitration rules with that of jurisdiction, making the wild suggestion that the contractually appointed ICC tribunal has jurisdiction to hear this claim.

63 This is incorrect. Clause 10 of the MOI only covers claims arising out of the MOI, not disputes arising out of violations of the Treaty, which contains a separate dispute resolution agreement in its Article 9. The law applicable to the MOI is Mozambique law not international law. Further, while investment treaty tribunals have routinely held that they had jurisdiction to hear claims arising out of breach of contractual obligations where a breach of an umbrella clause was invoked,[59] the reverse is not true. Tribunals appointed

---

56 Motion, p. 12.

57 *See e.g.* **CLA-87**, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia,* UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, para. 146.

58 Motion, p. 13.

59 *See e.g.* **CLA-79**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, paras. 46-62.

on the basis of an arbitration agreement contained in a contract have no basis to uphold their jurisdiction under a separate arbitration agreement contained in an investment treaty. Accordingly, the only tribunal that has jurisdiction to hear both arguments under the MOI and under the Treaty is this Tribunal.

C. Mozambique's Third Objection Relating to a Purported Election under the Treaty to Proceed before the ICC

64 Respondent argues that it has a substantial objection based on the fact that the ICC clause in the MOI is a contractual election under Article 9(2)(a) of the Treaty which PEL has violated by commencing this Arbitration. [60]

65 This objection is meritless on its face. The parties' agreement to submit disputes arising out of the MOI to ICC arbitration is not an agreement for the purposes of Article 9(2)(a) of the Treaty, which provides:

> "Any such dispute [i.e. a dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement] which has not been amicably settled within a period of six months may, if both Parties agree, be submitted: (a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial, arbitral or administrative bodies…"

66 Article 9(2)(a) thus clearly refers to a dispute under the Treaty, and not a contractual dispute. In the present case, Claimant's claim is for breach of the Treaty, not of the MOI. In contrast, Clause 10 of the MOI only covers disputes "arising out of this Memorandum."

67 Furthermore, Respondent's argument fails as a matter of timing. Article 9(2)(a) contemplates that a party's agreement as to dispute resolution is subsequent to their failure to settle the dispute amicably. This is not the sequence of events in the present case where the Cooling Off Letter, which notified Respondent of an investment dispute under the Treaty and triggered the negotiation period, was issued seven years *after* the MOI was entered into. The parties to the MOI cannot therefore have contemplated or agreed that their investment dispute, which would arise seven years later would be covered by Clause 10 of the MOI.

68 Finally, Mozambique's argument is belied by the fact that the parties were aware of the Treaty (which entered into force in 2009) at the time they executed the MOI in May 2011.

---

[60] Motion, p. 14.

Yet, the parties did not exclude a resort to the Treaty in Clause 10 of the MOI. If that had been their intention, as Respondent asserts, the parties would have stated that all disputes, including investment disputes, should be resolved pursuant to Clause 10 of the MOI, to the exclusion of Article 9 of the Treaty. The parties' failure to do so demonstrates beyond cavil that, as is plainly stated, Clause 10 of the MOI only covers disputes "arising out of this Memorandum," and was never intended to cover investment disputes.

D. Respondent's Fourth Objection Concerning Alleged Interference with the ICC Arbitration

69 Respondent's fourth objection is puzzling. It consists of three distinct arguments.

70 First, Respondent appears to suggest that this arbitration should be stayed, suspended, or dismissed in favour of the ICC Arbitration.[61] These suggestions, in turn, appear to be based on the allegation that the issues before the ICC tribunal are broader and more detailed than those before this Tribunal. This is, in turn, supported by the relief Respondent has sought in the ICC Arbitration and the fact that Claimant is participating in the ICC Arbitration requesting an award that Mozambique and the MTC have violated their obligations under the MOI. [62] Respondent also relies on a statement about the risk of conflicting or inconsistent decisions in overlapping arbitrations by the tribunal in *Fraport*. [63]

71 It is difficult to see how this is a proper jurisdictional objection. Respondent effectively states that it would *prefer* for the ICC tribunal to resolve this dispute. As a matter of fact, this is founded on the relief it claims in the ICC Arbitration. As explained above, the ICC Arbitration was commenced by Respondent *after* Claimant commenced this arbitration, the contents of the Request for Arbitration in the ICC Arbitration read as a response to the arguments raised by PEL in this arbitration,[64] and Mozambique and the MTC have essentially sought declaratory relief in the ICC Arbitration,[65] including relief aimed at depriving this Tribunal of jurisdiction over Claimant's claims.[66] In the ICC Arbitration,

---

61 Motion, pp. 14, 18.
62 Motion, pp. 15-17.
63 Motion, pp. 14-15.
64 **Exhibit C-178**, ICC Request for Arbitration, para 2, which reads "[f]*or its part, PEL contends, inter alia, that on the basis of the six-page MOI...*" Paragraph 3 further provides: "[y]*ears after the 2011 MOI, PEL now contends that Mozambique must pay PEL more than $100 million in alleged and speculative lost profits..."*
65 **Exhibit C-178**, ICC Request for Arbitration, para. 280.12.
66 **Exhibit C-178**, ICC Request for Arbitration, para 280.8.

Claimant merely seeks a declaration that Mozambique and the MTC have violated their obligations under the MOI. It does not seek any damages.[67]

72 As to Respondent's stated concern for conflicting decisions, it rings more than a little hollow in light of its conduct in these proceedings.

73 Secondly, Respondent also suggests that bifurcation would be appropriate in that it would allow time for the ICC tribunal to reach a decision.[68] Plainly, the purpose of bifurcation is not to have another tribunal decide the issues before this Tribunal.

74 Thirdly, Respondent contends, relying on *Fraport*, that there is an argument that if the MOI violated Mozambican law, Claimant has not made an investment. [69]

75 Respondent should logically have made this argument together with its objection relating to the existence of the investment. It did not do so. This is because it would then have been forced to acknowledge that an argument regarding the legality of the MOI is an argument which will require this Tribunal to examine substantial expert evidence on Mozambique law, including the expert opinion of Professor Rui Medeiros, which analyses the legal status of the MOI under Mozambican law, the binding nature of the parties' respective commitments in the MOI, and the compatibility of PEL's right to a direct award of a concession for the Project with the laws governing PPP in Mozambique. Respondent would have also been forced to acknowledge that the question of the legality of the MOI is intertwined with the merits of the case, including Claimant's claim that Respondent breached the FET standard by failing to act in good faith and by acting arbitrarily.

76 In other words, had Respondent set out this objection where it belongs, it would have been obvious that it is not suited to bifurcation. Respondent's artificial attempt to link the issue of legality of the MOI to its argument about the ICC Arbitration by arguing that it should be determined by the ICC tribunal cannot save the day. Plainly, no reason is given as to why the ICC tribunal is better positioned than this Tribunal to decide this matter.

77 In any event, Respondent's purported objection based on *Fraport* is meritless. *Fraport*, where the investor had knowingly and intentionally circumvented the relevant law by

---

67 **Exhibit C-192**, PEL's Answer dated 19 August 2020 to the ICC Request for Arbitration submitted by Mozambique and the MTC on May 2020.

68 Motion, p. 18.

69 Motion, p. 18.

means of secret shareholders agreements,[70] is readily distinguishable from the case at hand where no such allegations are made.

E. Respondent's Fifth Objection Concerning an Alleged Failure to Exhaust Local Remedies in Mozambique

78 Respondent's last objection is hard to follow. Respondent first sets out a circular argument whereby the MOI requires compliance with Mozambique law and Mozambique law requires that disputes be resolved in accordance with the parties' contract.[71] Respondent concludes that the UNCITRAL arbitration must be dismissed or suspended because the contract dispute has not been resolved by the ICC Tribunal.

79 This does not appear to be a proper jurisdictional objection. To the extent Mozambique is in fact suggesting that the arbitration clause in the MOI somehow precludes PEL from commencing a treaty claim, the objection is meritless. This argument is contrary to the well-established principle of investment treaty law that that an exclusive jurisdiction clause in a contract does not prevent an investor from commencing a treaty claim, as the causes of action are different. This was established by the *Ad Hoc* Committee in *Vivendi*[72] and has been widely followed and adopted since that time.[73]

80 Respondent then insists that Claimant should not be permitted to turn a procurement dispute into an investment treaty claim, because it did not use the bid protest procedure.[74] Respondent relies on various policy concerns stating that allowing such claim would be "open hunting season" on public financing.[75] Yet, the Treaty does not contain any requirement that an investor exhaust local remedies to bring a claim under the Treaty. Accordingly, this objection too is a non-starter.

---

70 **RLA-9**, *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 401.

71 Motion, p. 18.

72 **CLA-102**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 86-116.

73 **CLA-103**, *SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic*, SCC Case No. V2016/32, Final Award, 25 March 2020, para. 573; **CLA-104**, *Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, para. 163; **CLA-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 479-482; **CLA-106**, *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, paras. 141-142.

74 Motion, p. 19.

75 Motion, p. 18.

VI. PRAYER FOR RELIEF

81 For the reasons set out above, PEL respectfully requests that this Tribunal:

(a) DISMISS Respondent's Motion and proceed in accordance with Scenario B (No Bifurcation), as set out in the Procedural Order No. 1 and Annex I thereto; and

(b) ORDER Respondent to pay all costs incurred by PEL in connection with this Motion, including the costs of the arbitrators and of the Permanent Court of Arbitration in dealing with this Motion, as well as legal costs and other expenses incurred by PEL (including, inter alia, the fees of PEL's legal counsel, consultants, and fees associated with third party funding) associated with the Motion, including interest.

Respectfully submitted on 4 December 2020 by

Counsel for the Respondent

Addleshaw Goddard LLP

Sarah Vasani, Partner, Head of Investor State Dispute Resolution
Nathalie Allen, Legal Director
Canelle Goldstein, Managing Associate
Natasha Chahal, Associate
Sumayya Dhanji, Paralegal

Emilie Gonin, Barrister
Doughty Street Chambers

Miranda & Associados
Sofia Martins, Partner
Renato Guerra de Almeida, Managing Associate
Ricardo Saraiva, Senior Associate

Pimenta & Associados
António Veloso, Partner