

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ODED BESSERGLIK

Claimant

and

REPUBLIC OF MOZAMBIQUE

Respondent

ICSID Case No. ARB(AF)/14/2

AWARD

Members of the Tribunal

Mr. Makhdoom Ali Khan, President
The Honourable L. Yves Fortier CC, QC, Arbitrator
Dr. Claus von Wobeser, Arbitrator

Secretary of the Tribunal

Ms. Anna Holloway

Date of dispatch to the Parties: October 28, 2019

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TABLE OF ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	2006 ICSID Arbitration (Additional Facility) Rules
Additional Facility Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes
BIT, or Treaty	Agreement Between the Government of the Republic of South Africa and the Government of the Republic of Mozambique for the Promotion and Reciprocal Protection of Investments, signed on May 6, 1997 (CL-0003 / RL-0077)
C-[#]	Claimant’s Exhibit
Cl. Amended PHB	Claimant’s Amended Post-Hearing Brief submitted on May 6, 2018 and dated June 20, 2018
Cl. Amended SoC	Claimant’s Amended Statement of Costs dated May 25, 2018
Cl. Mem.	Claimant’s Memorial on Jurisdiction and Liability dated January 8, 2016
Cl. PHB	Claimant’s Post-Hearing Brief submitted on April 23, 2018 and dated June 20, 2018
Cl. Reply	Claimant’s Reply on Jurisdiction and Liability dated October 14, 2016
Cl. Response on Motion	Claimant’s Response on Respondent’s Motion to Dismiss dated July 14, 2017
Cl. Rej. on Motion	Claimant’s Rejoinder on Respondent’s Motion to Dismiss dated September 1, 2017
CL-[#]	Claimant’s Legal Authority
CPI	Investment Promotion Centre of the Republic of Mozambique

DIRCO	Department of International Relations and Cooperation of the Republic of South Africa
DIRCO Guide	DIRCO, “Practical Guide and Procedures for the Conclusion of International Agreements” (RL-0084)
DTI	Department of Trade and Industry of the Republic of South Africa
Hearing	Hearing on Respondent’s new jurisdictional objection held on March 15-16, 2018
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Mozambique Investment Law, or MIL	Republic of Mozambique Law No. 3/93 (CL-0004)
Mozambique Diplomatic Note	Diplomatic Note from the Republic of Mozambique to the Republic of South Africa dated November 20, 2017 (R-0017)
New jurisdictional objection	Respondent’s objection of June 20, 2017 that the Mozambique-South Africa BIT never entered into force
Resp. Motion to Dismiss	Respondent’s Motion to Dismiss and, in the Alternative, <i>in Limine</i> dated June 20, 2017
Resp. Reply on Motion	Respondent’s Reply on its Motion to Dismiss dated August 3, 2017
R-[#]	Respondent’s Exhibit
Resp. C-M	Respondent’s Counter-Memorial on Jurisdiction and Liability dated April 22, 2016
Resp. Obj. of Sept. 7	Respondent’s Objections to Certain Evidence submitted by Claimant in connection with its Rejoinder on the Motion to Dismiss dated September 7, 2017
Resp. PHB	Respondent’s Post-Hearing Brief dated April 20, 2018

Resp. Rej.	Respondent's Rejoinder on Jurisdiction and Liability dated January 23, 2017
RL-[#]	Respondent's Legal Authority
South Africa court case	High Court of South Africa (Gauteng Division) Case No. 5420/2018; court case initiated by Claimant to try to compel Ms. Johanna de Wet and Ms. Hanna de Beer to attend the Hearing
South Africa Diplomatic Note	Diplomatic Note from the Republic of South Africa to the Republic of Mozambique dated November 27, 2017 (R-0018)
Tr. Day [#], [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on January 26, 2015

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) under the Additional Facility Rules on the basis of the Agreement Between the Government of the Republic of South Africa and the Government of the Republic of Mozambique for the Promotion and Reciprocal Protection of Investments, signed on May 6, 1997 (the “**BIT**” or “**Treaty**”)¹ and the Republic of Mozambique Law No. 3/93 (the “**Mozambique Investment Law**” or “**MIL**”).²
2. Claimant is Mr. Oded Besserglik (“**Mr. Besserglik**” or “**Claimant**”), a natural person having the nationality of the Republic of South Africa.
3. Respondent is the Republic of Mozambique (“**Mozambique**” or “**Respondent**”).
4. Claimant and Respondent are collectively referred to as the “Parties.” The Parties’ representatives and their addresses are listed above on page (i).
5. This dispute relates to Mr. Besserglik’s interests in contractual arrangements with two Mozambican State-owned entities—Empresa Mozambicana de Pescas EE (“**Emopesca**”) and Sulpesca Lda (“**Sulpesca**”)—for the conduct of a joint fishing venture in Mozambique.

II. PROCEDURAL HISTORY

6. On March 24, 2014, ICSID received in hard copy an Application for Approval of Access to the ICSID Additional Facility dated March 4, 2014 from Mr. Oded Besserglik. The Application was transmitted to the Republic of Mozambique on March 27, 2014. In response to a letter dated April 1, 2014 from ICSID seeking additional information, Claimant further supplemented his Application by email on April 8, 2014, providing

¹ BIT (CL-0003 / RL-0077).

² Mozambique Investment Law (CL-0004).

additional documentation at that time; that supplementation was transmitted to the Republic of Mozambique the same day.

7. Pursuant to Article 4(5) of the ICSID Additional Facility Rules, and in accordance with Article 4(2) of the ICSID Additional Facility Rules, on April 17, 2014, the Secretary-General of ICSID (“**Secretary-General**”) granted approval of access to the Additional Facility in respect of the dispute referred to in the Application, which was submitted on the basis of the Mozambique-South Africa BIT.
8. On June 9, 2014, ICSID received in hard copy a request to institute arbitration proceedings under the Additional Facility Rules dated June 4, 2014 from Mr. Oded Besserglik against the Republic of Mozambique, together with Exhibits A through E (the “**Request**”). The Request, which was transmitted to the Republic of Mozambique the following day, was then supplemented by letters of June 28, 2014 and July 2, 2014, both of which were conveyed to Respondent.
9. Following exchanges between Mr. Besserglik and the ICSID Secretariat, on July 3, 2014, the Acting Secretary-General of ICSID (“**Acting Secretary-General**”) informed the Parties that the Request refers to an additional basis for consent to arbitration, namely the Investment Law, in respect of which access to the ICSID Additional Facility had not previously been approved by ICSID. Therefore, pursuant to Article 4(5) of the Additional Facility Rules of ICSID, and in accordance with Article 4(2) of the Additional Facility Rules, on July 3, 2014 the Acting Secretary-General approved access to the Additional Facility in respect of the dispute referred to in the Request, as supplemented.
10. Further on July 3, 2014, the Acting Secretary-General registered the Request, as supplemented, in accordance with Articles 4 and 5 of the ICSID Arbitration (Additional Facility) Rules (“**Arbitration Rules**”) and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Article 5(c) and Chapter III of the Arbitration Rules.

11. On August 26, 2014, the Minister of Fisheries wrote to the Secretary-General raising several objections to jurisdiction and to the registration of the Request. On August 29, 2019, ICSID informed the Parties that, as set out in the Notice of Registration, the registration of Claimant's Request for Arbitration was without prejudice to the powers and functions of the Tribunal in regard to competence and the merits and that the Tribunal, once constituted, will have the power to consider Respondent's concerns as to competence and the merits.
12. By letter dated October 2, 2014, Claimant requested that the Arbitral Tribunal in this case be constituted pursuant to Article 9(1) of the Arbitration Rules. In accordance with this provision, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the Parties.
13. By letter of October 9, 2014, Claimant appointed the Honourable L. Yves Fortier CC, QC, a Canadian national, as arbitrator. Mr. Fortier subsequently accepted his appointment.
14. As the Tribunal was not constituted within 90 days of the registration of the Request, Claimant requested on November 4, 2014 that the Chairman of the ICSID Administrative Council appoint the two arbitrators remaining to be appointed pursuant to Article 6(4) and Article 10 of the Arbitration Rules. On November 5, 2014 the Minister of Fisheries wrote again to the Secretary-General raising several objections to jurisdiction and the registration of the Request.
15. On November 25, 2014, Respondent appointed Mr. Juan C. Basombrio, a U.S. national, as arbitrator. On December 9, 2014, Respondent replaced Mr. Basombrio as arbitrator pursuant to Article 12 of Arbitration Rules and appointed Dr. Claus von Wobeser, a Mexican national. Dr. von Wobeser subsequently accepted his appointment.
16. In the absence of an agreement between the Parties, on January 23, 2015 the Chairman of the ICSID Administrative Council appointed Mr. Makhdoom Ali Khan, a Pakistani national, as the President of the Tribunal, pursuant to Articles 6(4) and 10 of the Arbitration Rules.

17. On January 26, 2015, the Secretary-General, in accordance with Article 13(1) of the Arbitration Rules, notified the Parties that all three arbitrators had accepted their respective appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr. Monty Taylor, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. Mr. Taylor was later replaced by Ms. Martina Polasek, ICSID Legal Counsel; Ms. Polasek was later replaced by Ms. Celeste Mowatt, ICSID Legal Counsel; Ms. Mowatt was later replaced by Ms. Anna Holloway, ICSID Legal Counsel.
18. Following exchanges between the Parties, the first session was scheduled to take place by teleconference on March 20, 2015, in accordance with Article 21(1) of the Arbitration Rules.
19. However, by letter of March 17, 2015, the Secretary-General moved that the Tribunal stay the proceeding for lack of payment pursuant to ICSID Administrative and Financial Regulation 14(3)(d). By letter of that same date, the Tribunal informed the Parties that the proceeding was stayed pursuant to ICSID Administrative and Financial Regulation 14(3)(d).
20. On September 8, 2015, the proceeding resumed following payment of the requested advance by Claimant.
21. On September 10, 2015, the Parties agreed to extend the 60-day time period for the first session of the Tribunal.
22. In accordance with Article 21(1) of the Arbitration Rules, the Tribunal held a first session with the Secretary of the Tribunal and the Parties on October 30, 2015, by teleconference.
23. Following the first session, on December 15, 2015, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the Arbitration Rules would apply to the present proceeding, that the procedural language would be English, and that the legal seat of the arbitration would be Washington, D.C., United States of America. Procedural Order No. 1 also set out a schedule for the jurisdictional and liability phase of the proceedings (“procedural timetable”).

24. Following exchanges between the Parties, on December 29, 2015, the Tribunal issued Procedural Order No. 2 modifying the procedural timetable.
25. On January 8, 2016, Claimant filed his Memorial on Jurisdiction and Liability (“**Memorial**”), together with a Witness Statement of Mr. Oded Besserglik, a Witness Statement of Mr. Dror Besserglik, Exhibits C-0001 through C-0060 and Legal Authorities CL-0001 through CL-0030.
26. On April 22, 2016, Respondent filed its Counter-Memorial on Jurisdiction and Liability (“**Counter-Memorial**”), together with a Witness Statement of Mr. Silvestre Salomão Silindane, a Witness Statement of Ms. Teresa Filomena Muenda, a Witness Statement of Mr. Hélder Henriques Pateguana, a Witness Statement of Mr. Quintus van der Merwe and Legal Authorities RL-0001 through RL-0067.
27. On May 17, 2016, Claimant submitted a request for the Tribunal to decide on the production of documents, together with Legal Authorities CL-0031 through CL-0033.
28. On May 24, 2016, Respondent filed a response to Claimant’s document production request, together with a Witness Statement of Ms. Teresa Filomena Muenda, Exhibits R-0001 and R-0002 and Legal Authorities RL-0068 through RL-0071.
29. On June 6, 2016, Claimant filed a reply to Respondent’s response of May 24, 2016, together with a Second Witness Statement of Mr. Oded Besserglik, a Second Witness Statement of Mr. Dror Besserglik, a Witness Statement of Mr. Pedro Gomes Macaringue, Exhibits C-0061 through C-0070 and Legal Authorities CL-0034 through CL-0039.
30. Following exchanges between the Parties, on June 16, 2016, the Tribunal issued Procedural Order No. 3 modifying the procedural calendar.
31. On June 28, 2016, the Tribunal issued Procedural Order No. 4 concerning document production.
32. On October 14, 2016, Claimant filed his Reply on Jurisdiction and Liability (“**Reply**”), together with a Third Witness Statement of Mr. Dror Besserglik, a Witness Statement of Mr. Andrew Pike, a Witness Statement of Mr. Frederico Jamisse Mossugueja, a Witness

Statement of Mr. Justino Manuel Muhlana, Exhibits C-0080 through C-0157 and Legal Authorities CL-0034 through CL-0079.³

33. On January 23, 2017, Respondent filed its Rejoinder on Jurisdiction and Liability (“**Rejoinder**”), together with a Second Witness Statement of Mr. Quintus van der Merwe, a Second Witness Statement of Mr. Silvestre Salomão Silindane, a Second Witness Statement of Mr. Hélder Henriques Pateguana, a Second Witness Statement of Ms. Teresa Filomena Muenda, a Response of Ms. Teresa Filomena Muenda to the Witness Statement of Mr. Justino Manuel Muhlana, Exhibits R-0003 and R-0004 and Legal Authority RL-0072.
34. By letter transmitted on January 27, 2017, Respondent submitted an application for a one-month stay of the Hearing on Jurisdiction and Liability then scheduled for March 2017, together with a request for leave to submit a Third Witness Statement of Mr. Quintus van der Merwe and the opportunity to obtain and file testimony of Mr. Antonio Barradas.
35. By letter of that same date, Claimant objected to Respondent’s application for a one-month stay of the hearing and argued that, in any event, the hearing should proceed on jurisdiction. Claimant also sought leave to admit to the record a Second Witness Statement of Mr. Oded Besserglik, which Claimant contended was meant to be submitted with his Reply.
36. Later, on January 27, 2017, the President of the Tribunal held what was intended to be a pre-hearing organizational meeting with the Parties by teleconference. However, in view of their earlier correspondence of that date, the Parties agreed that it was not feasible to consider the organizational items included in the pre-hearing organizational agenda. After providing their respective views in the teleconference, the Parties determined a briefing schedule to address the issues raised in their earlier correspondence of that date.
37. On February 3, 2017, each Party filed a response to the other Party’s correspondence of January 27, 2017, with each Party objecting to the witness testimony that the other sought to admit to the record; in his response, Claimant consented to Respondent’s proposed one-

³ CL-0034 through CL-0039 were duplicates of previously filed legal authorities, filed with the same exhibit numbers.

month stay of the hearing. Claimant also filed with his response a Third Witness Statement of Mr. Oded Besserglik, a Fourth Witness Statement of Mr. Dror Besserglik and a Witness Statement of Mr. Leonid Dudkin, together with Exhibit C-0158 and Legal Authorities CL-0080 through CL-0087.

38. By letter of February 7, 2017, the Tribunal confirmed that, pursuant to the Parties' agreement of February 3, 2017, the Hearing on Jurisdiction and Liability scheduled for March 2017 was vacated. The Tribunal then invited Claimant to confirm whether he maintained his position that jurisdiction should be bifurcated from liability, as per Claimant's letter of January 27, 2017.
39. By letter of February 8, 2017, Respondent informed the Tribunal of its preference for an evidentiary hearing bifurcated on jurisdiction only. By letter of February 9, 2017, Claimant stated his position that jurisdiction and liability should be heard together, in view of Respondent's indication that a hearing on jurisdiction would be evidentiary.
40. On February 10, 2017, in accordance with the briefing schedule agreed to by the Parties during the January 27, 2017 teleconference, each Party filed observations on the other Party's response of February 3, 2017. Each Party reiterated its objection to the other's application to admit additional witness testimony.
41. By letter of February 17, 2017, the Tribunal invited the Parties to consult and indicate whether they were able to reach an agreement concerning the scope and duration of the hearing.
42. Through separate communications dated February 24, 2017, the Parties informed the Tribunal that they were not able to reach an agreement on the scope and duration of the hearing.
43. By letter of March 14, 2017, ICSID informed the Parties of the Tribunal's decision to hold a five-day evidentiary hearing on jurisdiction and liability and asked the Parties to confirm their availability. Also, in this letter, the Parties were informed that the Tribunal would admit to the record Respondent's Third Witness Statement of Quintus van der Merwe and, further to the Parties' respective requests of January 27, 2017, each Party would be given

the opportunity to file additional witness evidence and rebuttal witness evidence. Finally, the Parties were invited to indicate whether they were available for a hearing from May 1 to 5, 2017 (with May 6, 2017 held in reserve).

44. By email of March 17, 2017, Claimant indicated that he was unavailable during the proposed hearing dates in May 2017; therefore, on March 22, 2017, the Tribunal invited the Parties to indicate whether they were available for a hearing from August 7 to 11, 2017. The Parties indicated their availability for these dates by their respective emails of March 23 and 24, 2017.
45. On April 4, 2017, the Tribunal issued Procedural Order No. 5, adopting the procedural calendar regarding the additional witness evidence and confirming that the Hearing on Jurisdiction and Liability would be held on August 7 to 11, 2017 (with Saturday, August 12, 2017 held in reserve).
46. On April 20, 2017, Claimant informed the Secretary of the Tribunal and Respondent that his witness, Mr. Justino Manual Muhlanga, had passed away and asked Respondent to confirm that it had no objection to Claimant securing a replacement witness. By email of that same date, Respondent stated that it had no objection to a replacement witness, provided that he or she did not add to or change Mr. Muhlanga's testimony.
47. Pursuant to Procedural Order No. 5, on May 1, 2017, Claimant filed a document entitled "Claimant's Additional Witness Statements," a Fourth and a Fifth Witness Statement of Mr. Oded Besserglik, a Fifth Witness Statement of Mr. Dror Besserglik, a Witness Statement of Dr. Everard Polakow, a Witness Statement of Mr. Zuko Mack Nonxuba and a Witness Statement of Mr. Helder Amaral Matlaba, together with Exhibits C-0159 through C-0166 and Legal Authorities CL-0088 through CL-0091. On May 2, 2017, Claimant filed an amended Fifth Witness Statement of Mr. Dror Besserglik. No witness statements were filed by Respondent; however, following communications between the Parties, Respondent informed the Tribunal on May 3, 2017 of its view that the documents submitted by the Claimant were beyond the scope of what was allowed by the Tribunal and indicated that Respondent would provide rebuttal witness evidence as permitted under Procedural Order No. 5.

48. By letter of May 15, 2017, ICSID informed the Parties that the Tribunal had proposed the appointment of Ms. Aaminah Qadir as Assistant to the Tribunal and asked that the Parties confirm their agreement. Ms. Qadir's appointment was subsequently confirmed by Respondent's email of May 18, 2017 and Claimant's email of May 19, 2017. On April 11, 2018, ICSID informed the Parties that Ms. Qadir was no longer available to continue as Tribunal Assistant.
49. Pursuant to Procedural Order No. 5, on June 2, 2017, Respondent transmitted its rebuttal witness evidence, comprised of a Third Witness Statement of Mr. Hélder Henriques Pateguana, a Third Witness Statement of Mr. Silvestre Salomão Silindane, a Third Witness Statement of Ms. Teresa Filomena Muenda and a Fourth Witness Statement of Mr. Quintus van der Merwe, together with Exhibits R-0005 and R-0006, a partial translation of Exhibit R-0006 and Legal Authorities RL-0073 through RL-0075. In its cover letter, Respondent requested that the Tribunal strike Claimant's May 1, 2017 Witness Statements of Dr. Everard Polakow, Mr. Zuko Mack Nonxuba and Mr. Dror Besserglik (Fifth Statement) on the grounds that the Tribunal never gave Claimant leave to file these additional witness statements. Respondent also requested that the Tribunal strike Claimant's document entitled "Claimant's Additional Witness Statements." Respondent stated that it did not object to the statement filed by Mr. Helder Amaral Matlaba, as it was filed to substitute the testimony of the deceased Mr. Justino Manual Muhlanga. Finally, Respondent indicated that it had not been able to attain the testimony of Mr. Antonio Barradas (see above paragraph 34).
50. On June 3, 2017, Respondent filed Exhibit R-0007, which Respondent stated had been inadvertently left out of its submission of the previous day.
51. On June 5, 2017, the Tribunal invited Claimant to respond to Respondent's submission of June 2, 2017 by June 12, 2017.
52. By email of June 12, 2017, Claimant stated that he had attached thereto his response to Respondent's submission of June 2, 2017; however, Claimant's email did not contain any attachments or a substantive response to the submissions of Respondent. By email of June 13, 2017, Claimant indicated that he "omitted to attach the documents" to his email

of the previous date and therein submitted a letter in response to Respondent's submission of June 2, 2017, a Sixth Witness Statement of Mr. Oded Besserglik, a Witness Statement of Mr. Rui Marto and a Second Witness Statement of Mr. Zuko Mack Nonxuba.

53. On June 19, 2017, the Tribunal issued Procedural Order No. 6. In that Order, the Tribunal decided: i) to exclude from the record the document entitled "Claimant's Additional Witness Statements" filed on May 1, 2017; ii) to exclude from the record the First Witness Statement of Mr. Zuko Mack Nonxuba and the Fifth Witness Statement of Mr. Dror Besserglik filed on May 1 and 2, 2017; iii) to admit the testimony of Mr. Helder Amaral Matlaba as a substitute for that of the deceased Mr. Justino Manual Muhlanga; iv) to strike certain paragraphs from the Fourth Witness Statement of Mr. Quintus van der Merwe filed on June 2, 2017; v) to strike certain paragraphs from the Third Witness Statement of Ms. Teresa Filomena Muenda filed on June 2, 2017; and vi) to exclude the three witness statements filed by Claimant on June 13, 2017.
54. On June 20, 2017, less than two months prior to the scheduled Hearing on Jurisdiction and Liability, Respondent filed a Motion to Dismiss and, in the Alternative, *in Limine* ("**Motion to Dismiss**"), together with Exhibits R-0008 through R-0012 and Legal Authorities RL-0076 through RL-0083. In its Motion, Respondent requested the immediate and summary dismissal of all Claimant's claims on the basis of a newly raised objection that the Mozambique-South Africa BIT never entered into force (the "**new jurisdictional objection**"). The Motion also requested that the proceedings be suspended until the Tribunal ruled on Respondent's request.
55. On June 22, 2017, the Tribunal invited Claimant to file a response to Respondent's Motion to Dismiss by June 29, 2017. The Tribunal also confirmed that the pre-hearing organizational meeting previously scheduled to take place on June 30, 2017 by teleconference would proceed as planned.
56. On June 25, 2017, the Secretary of the Tribunal transmitted to the Parties the draft agenda for the pre-hearing organizational meeting; the procedure for addressing Respondent's motion to raise a new jurisdictional objection was included in the agenda. The Parties were invited to identify additional agenda items or to provide any comments on the agenda.

57. By Respondent's email of June 26, 2017 and Claimant's email of June 27, 2017, the Parties agreed on the following: i) to suspend all remaining deadlines, including the August 2017 hearing, in the procedural calendar; ii) a briefing schedule of two rounds of submissions, beginning with Claimant's response to Respondent's new jurisdictional objection; and iii) to reserve the hearing dates for a hearing limited to the new jurisdictional objection, if necessary.
58. By letter of June 27, 2017, ICSID informed the Parties of the Tribunal's preliminary view that all jurisdictional objections should be addressed during the hearing, including the new jurisdictional objection, with issues concerning liability to be heard later. Moreover, the letter indicated that the Tribunal would determine the next steps, including deadlines for further written submissions, after the pre-hearing organizational meeting.
59. In accordance with the procedural calendar set forth in Procedural Order No. 5, on June 30, 2017, the Tribunal held a pre-hearing organizational meeting with the Secretary of the Tribunal and the Parties by teleconference.
60. During the pre-hearing organizational meeting, each Party commented on the procedure to address the new jurisdictional objection and the Parties agreed on a procedural timetable. The Parties further agreed that the August 2017 hearing should be rescheduled, with the rescheduled hearing to be limited in scope to Respondent's new jurisdictional objection. The Parties informed the Tribunal that they would revert at a later date concerning the modalities of the rescheduled hearing.
61. Pursuant to the procedural timetable determined by the Parties at the June 30, 2017 pre-hearing organizational meeting, on July 14, 2017, Claimant filed his Response on the Motion *in Limine* ("**Response on Motion**"), together with a Seventh Witness Statement of Mr. Oded Besserglik, a Second Witness Statement of Mr. Helder Matlaba, a Sixth Witness Statement of Mr. Dror Besserglik, Exhibits C-0167 through C-0172 and Legal Authorities CL-0092 through CL-0095.
62. On July 27, 2017, the Tribunal issued Procedural Order No. 7, memorializing the Parties' agreed procedural timetable regarding the new jurisdictional objection.

63. On August 3, 2017, Respondent filed its Reply on the Motion *in Limine* (“**Reply on Motion**”), together with a Fifth Witness Statement of Mr. Quintus van der Merwe, a Witness Statement of “the Republic of Mozambique” (provided by Mr. Fernando Manhiça), a Declaration of Ms. Teresa Filomena Muenda, Exhibits R-0013 through R-0016 and Legal Authorities RL-0084 through RL-0087.
64. On August 17, 2017, Claimant requested a two-week extension to file his Rejoinder on the Motion *in Limine*; by email of that same date Respondent objected to Claimant’s request. Later on August 17, 2017, the Tribunal granted Claimant’s request for an extension.
65. On September 1, 2017, Claimant filed his Rejoinder on the Motion *in Limine* (“**Rejoinder on Motion**”), together with an Eighth Witness Statement of Mr. Oded Besserglik, a Seventh Witness Statement of Mr. Dror Besserglik; a Third Witness Statement of Mr. Helder Matlaba; a Third Witness Statement of Mr. Zuko Mack Nonxuba; a Second Witness Statement of Mr. Frederico Jamisse Mossugueja, a Second Witness Statement of Mr. Rui Marto, Exhibits C-0173 through C-0192 and Legal Authorities CL-0096 through CL-0113.
66. On September 7, 2017, Respondent filed a document entitled “Objections to Certain Evidence Submitted by Claimant in Connection with its Rejoinder on the Motion in *Limine*” (“**Objections of September 7**”). In its Objections, Respondent requested that the Tribunal strike the entirety of the September 1, 2017 Witness Statement of Mr. Zuko Mack Nonxuba as well as certain passages of the September 1, 2017 Witness Statements of Mr. Oded Besserglik, Mr. Dror Besserglik, Mr. Frederico Jamisse Mossugueja and Mr. Rui Marto, which Respondent alleged to contain hearsay.
67. Following exchanges between the Parties, the Parties agreed that Claimant would provide a response to Respondent’s Objections of September 7 by September 15, 2017; this agreement was subsequently confirmed by the Tribunal.
68. On September 15, 2017, Claimant filed a Response to Respondent’s Objections of September 7 (“**Response to Objections of September 7**”), together with a Ninth Witness Statement of Mr. Oded Besserglik, a Fourth Witness Statement of Mr. Helder Matlaba, a

Fourth Witness Statement of Mr. Zuko Mack Nonxuba, Exhibits C-0193 through C-0197 and Legal Authorities CL-0114 through CL-0119.

69. On September 16, 2017, Respondent filed a Reply in Support of its Objections of September 7, 2017 (“**Reply to Objections of September 7**”), together with Legal Authorities RL-0089 through RL-0091.
70. By Respondent’s letter of September 17, 2017 and Claimant’s letter of September 18, 2017, the Parties informed the Tribunal of their positions regarding the modalities of the rescheduled hearing.
71. By letter of October 2, 2017, the Tribunal informed the Parties that it had considered the Parties’ comments on the nature and scope of a hearing regarding Respondent’s new jurisdictional objection and invited the Parties to submit their views regarding hearing venue and duration and testimony of witnesses and experts by October 6, 2017. The Parties indicated their respective views by letters of October 6, 2017.
72. Also on October 6, 2017, Claimant requested leave from the Tribunal to substitute Exhibits C-0196 and C-0197, on the basis that the versions filed with Claimant’s submission of September 15, 2017 inadvertently contained irrelevant advertising material.
73. By emails of October 27, 2017, the Tribunal communicated six separate messages to the Parties.
74. In its first message of October 27, 2017, the Tribunal informed the Parties that, upon consideration of the Parties’ submissions, the hearing on the new jurisdictional objection would be an in-person, evidentiary hearing held in Washington, D.C., and invited the Parties to determine mutually convenient hearing dates.
75. In its second message of October 27, 2017, the Tribunal granted Claimant’s request of October 6, 2017 to substitute Exhibits C-0196 and C-0197; Claimant subsequently refiled these exhibits on November 2, 2017.
76. In its third message of October 27, 2017, the Tribunal informed the Parties that, in considering the Objections of September 7, the Response to Objections of September 7 and

the Reply to Objections of September 7, it was not inclined to strike any of the witness statements either entirely or in part on grounds of hearsay or otherwise; instead, it would take these matters into account when weighing the evidentiary value of the witness statements in question. Also in this message, the Tribunal granted: i) Respondent leave to respond to the September 1, 2017 Witness Statement of Mr. Zuko Mack Nonxuba; and ii) Claimant leave to respond to Respondent's Reply to Objections of September 7. The Parties were instructed to file these submissions by November 10, 2017.

77. In its fourth message of October 27, 2017, the Tribunal ruled, in response to the Parties' letters of October 6, 2017 regarding testimony of witnesses and experts at the hearing, that: i) Claimant is permitted to call his own witnesses or experts; and ii) Respondent is at liberty to cross-examine these witnesses and experts, if it so desires.
78. In its fifth message of October 27, 2017, the Tribunal affirmed, in response to the Parties' letters of October 6, 2017 regarding testimony of witnesses and experts at the hearing, that Claimant is permitted to cross-examine individuals who have submitted statements in the proceeding on behalf of Respondent.
79. In its sixth message of October 27, 2017, the Tribunal directed, in response to the Parties' letters of October 6, 2017 regarding testimony of witnesses and experts at the hearing, that: i) the Parties should use their best possible efforts to file declarations or witness statements of South African Government officials Ms. Johanna de Wet (relating to Exhibit R-0013) and Ms. Hanna de Beer (relating to Exhibit C-0169) and produce them for cross-examination; and ii) Claimant may file declarations or witness statements of certain other South African Government officials (and that failure to do so would preclude the individuals from being examined at the hearing). The Parties were instructed to file these submissions by November 24, 2017; that deadline was later extended to November 30, 2017.
80. By Respondent's email of October 29, 2017 and Claimant's email of November 1, 2017, the Parties informed the Tribunal that they were available for a hearing on Respondent's new jurisdictional objection on March 15-16, 2018 in Washington, D.C. The Tribunal confirmed the date and venue of the hearing by letter of November 3, 2017.

81. On November 10, 2017, pursuant to the Tribunal's third message of October 27, 2017, Respondent filed a Sixth Witness Statement of Mr. Quintus van der Merwe in response to the September 1, 2017 Witness Statement of Mr. Zuko Mack Nonxuba.
82. On November 10, 2017, pursuant to the Tribunal's third message of October 27, 2017, Claimant stated that he did not intend to file a response to Respondent's Reply to Objections of September 7.
83. On November 24, 2017, pursuant to the Tribunal's sixth message of October 27, 2017, Claimant filed a Witness Statement of Ms. Johanna de Wet, a draft Witness Statement of Ms. Hanna de Beer and a letter from the Director General of South Africa's Department of International Relations and Cooperation ("**DIRCO**") dated November 22, 2017, indicating that Ms. de Beer was on vacation and would confirm the contents of her statement upon her return. Claimant subsequently submitted a finalized Witness Statement of Ms. Hanna de Beer on December 8, 2017.
84. On November 28, 2017, pursuant to the Tribunal's sixth message of October 27, 2017, Respondent filed a Diplomatic Note from the Republic of Mozambique to the Republic of South Africa (the "**Mozambique Diplomatic Note**") and a Diplomatic Note from the Republic of South Africa to the Republic of Mozambique (the "**South Africa Diplomatic Note**") (together, the "**Diplomatic Notes**"), with the request that these documents be added to the record of the proceeding.⁴
85. On November 29, 2017, the Tribunal invited Claimant to provide any comments he may have on Respondent's request to add the Diplomatic Notes to the record by December 1, 2017; this deadline was later extended to December 6, 2017.
86. Later on November 29, 2017, Respondent wrote to the Tribunal: i) to assert that the Diplomatic Notes were "exchanged and have been produced in response to the Tribunal's request [that Respondent obtain a witness statement from the South African Government officials at DIRCO];" and ii) to object to and ask the Tribunal to strike from the record the

⁴ These Diplomatic Notes were subsequently admitted to the record as Exhibits **R-0017** and **R-0018**. *See below* paragraph 91.

Witness Statements of Ms. Johanna de Wet and Ms. Hanna de Beer filed by Claimant on November 24, 2017 (“**Respondent’s Evidentiary Objections**”). The Tribunal subsequently invited Claimant to provide any observations on Respondent’s Evidentiary Objections by December 6, 2017.

87. By letters of December 6, 2017, Claimant filed: i) a request that the Tribunal deny Respondent’s request to introduce the Diplomatic Notes into the record; and ii) observations on Respondent’s Evidentiary Objections.
88. By email of December 6, 2017, Respondent submitted that the Tribunal should rule on the Respondent’s Evidentiary Objections “in connection with the [March 2018] hearing.”
89. By letter of December 7, 2017, Respondent submitted comments on Claimant’s letter of December 6, 2017 regarding the Diplomatic Notes, together with a Second Witness Statement of “the Republic of Mozambique” (provided by Mr. Fernando Manhiça) and Legal Authority RL-0092. Respondent also attached to its letter the Diplomatic Notes, labelled as Exhibits R-0017 and R-0018.
90. By letter of December 8, 2017, Claimant reiterated his request that the Tribunal deny Respondent’s request to introduce the Diplomatic Notes into the record.
91. By letter of December 19, 2017, the Tribunal informed the Parties that: (i) the Diplomatic Notes “may have some relevance to the dispute, and therefore [it] admits them to the record as Exhibits R-0017 and R-0018, pursuant to Section 16.3 of Procedural Order No. 1;” and (ii) the Tribunal was not inclined to strike the Witness Statements of Ms. Johanna de Wet and Ms. Hanna de Beer, as requested by Respondent in its Evidentiary Objections. The Tribunal then invited each Party to confirm whether it wished to cross-examine Ms. de Wet and Ms. de Beer at the March 2018 hearing.
92. By letter of December 22, 2017, Respondent informed the Tribunal that it did not call Ms. Johanna de Wet or Ms. Hanna de Beer for cross-examination but reserved its right to cross-examine these witnesses should Claimant call them.

93. By letter of December 29, 2017, Claimant informed the Tribunal that he intended to produce Ms. Johanna de Wet and/or Ms. Hanna de Beer at the hearing and requested an extension to January 10, 2018 to provide a response to Respondent's letter of December 22, 2017. The extension was subsequently granted by the Tribunal.
94. On January 10, 2018, Claimant requested that that the Tribunal confirm Claimant's understanding that "it is unnecessary for the Claimant to call the witnesses de Wet or de Beer in the absence of any objection [by Respondent] to the statements." Claimant also stated that he had initiated a legal action in South Africa to try to compel Ms. Johanna de Wet and Ms. Hanna de Beer to attend the hearing (the "**South Africa court case**").
95. On January 19, 2018, the Tribunal wrote to the Parties to clarify that, because Respondent had not called Ms. Johanna de Wet or Ms. Hanna de Beer for cross-examination, it was not necessary for Claimant to produce them; should Claimant want to conduct direct examination of these witnesses, he had leave to do so.
96. On January 31, 2018, Respondent requested the Tribunal to order Claimant to confirm by February 9, 2018 whether Ms. Johanna de Wet and/or Ms. Hanna de Beer would be produced at the hearing. Respondent also requested that the Tribunal order Claimant to provide Respondent with copies of all pleadings and papers pertaining to the South Africa court case.
97. On February 3, 2018, Claimant informed the Tribunal that his South Africa court application to compel Ms. Johanna de Wet and Ms. Hanna de Beer to provide direct examination before the Tribunal was adjourned until February 20, 2018 for final argument and judgment.
98. By letter of February 5, 2018, Claimant objected to Respondent's request for documents regarding the South Africa court case. By email of that same date, Respondent reiterated its request that it be provided with documents pertaining to the South Africa court case and expanded its request to encompass correspondence between Claimant and Ms. Johanna de Wet and Ms. Hanna de Beer and the South African Government and any draft witness statements exchanged between them.

99. Later on February 5, 2018, the ICSID Secretariat received a letter from the South African Government, signed by Ms. Johanna de Wet, asking the Tribunal to clarify its prior procedural orders. The Tribunal responded by letter of February 12, 2018, with copy to the Parties.
100. On February 12, 2018, the Tribunal issued Procedural Order No. 8, confirming the logistics of the upcoming March 2018 hearing.
101. Also on February 12, 2018, the Tribunal, in a letter to the Parties, ordered Claimant to produce to Respondent all documents filed with the court in the South Africa court case by February 14, 2018; the Tribunal declined to grant Respondent's amended request of February 5, 2018 concerning correspondence and draft witness statements.
102. On February 14, 2018, Claimant produced to Respondent documents relating to the South Africa court case.
103. Following exchanges between the Parties, on February 15, 2018, the Parties agreed that all material relevant to the South Africa court case be tendered to the Tribunal as part of the record; the Secretary of the Tribunal subsequently transmitted the material to the Tribunal.
104. On February 22, 2018, Claimant informed the Tribunal that he would not be able to produce Ms. Johanna de Wet and Ms. Hanna de Beer at the March 2018 hearing.
105. On February 27, 2018, Respondent filed a request to include an additional nine documents, labelled Exhibits R-0019 through R-0027, into the record.
106. On February 28, 2018, the Tribunal acknowledged Respondent's request of the previous day, noting that six of the nine documents already form part of the record, either as case correspondence (Exhibits R-0019 and R-0020) or by agreement of the Parties (Exhibits R-0021 through R-0024, previously tendered to the Tribunal pursuant to the Parties' agreement of February 15, 2018). The Tribunal therefore invited Respondent to resubmit the documents already in the record with the appropriate reference numbers by March 2, 2018. Moreover, in accordance with Procedural Order No. 1, the Tribunal invited Claimant: (i) to confirm by March 1, 2018 whether he had any objections to the

introduction of Exhibits R-0025 through R-0027; and (ii) to file his observations concerning Exhibits R-0019 through R-0024, together with any responsive documents, by March 6, 2018. The March 1, 2018 deadline was subsequently extended to March 3, 2018. The March 6, 2018 deadline was subsequently extended to March 7, 2018.

107. Later on February 28, 2018, Respondent submitted Exhibits R-0019 through R-0024 into the record.
108. On March 3, 2018, Claimant stated that he did not object the introduction of Exhibits R-0025 through R-0027 into the record. These documents were subsequently added to the record on March 4, 2018.
109. By letter of March 6, 2018, the ICSID Secretariat wrote to the Parties requesting their comments regarding arrangements for the hearing to be made public further to the Parties' agreement as recorded in paragraph 20.7 of Procedural Order No. 1 and paragraph 32 of Procedural Order No. 8. By Respondent's email of March 6, 2018 and Claimant's email of March 9, 2018, the Parties agreed that the hearing would not be open to the public.
110. On March 7, 2018, pursuant to the Tribunal's direction of February 28, 2018, Claimant submitted his observations concerning Exhibits R-0019 through R-0027. Also on March 7, 2018, Claimant produced additional documents relating to the South Africa court case.
111. On March 8, 2017, each Party submitted a Skeleton Brief summarizing its arguments in advance of the hearing ("**Claimant's Skeleton Brief**" and "**Respondent's Skeleton Brief**"). On March 9, 2017, without leave from the Tribunal, Claimant submitted a Skeleton Brief addressing exclusively Article 45 of the Arbitration Rules; later that day, Respondent submitted a Skeleton Brief responding to Claimant's Article 45 Argument. On March 11, 2018, the Tribunal informed the Parties that both March 9, 2018 Skeleton Briefs would be admitted into the record and ordered that no further submissions should be filed by the Parties before the hearing unless invited by the Tribunal.
112. A Hearing on Respondent's New Jurisdictional Objection and Motion to Dismiss was held on March 15 and 16, 2018 in Washington, D.C. (the "**Hearing**"). Together with the

Members of the Tribunal and the Secretary of the Tribunal, the following persons were present at the Hearing:

For Claimant:

Mr. Hugh Patrick Jefferys	Independent Attorney
Mr. Oded Besserglik	Claimant
Mr. Dror Besserglik	Claimant's son
Mr. Rui Marto (via videoconference)	Marco Lafitte & Associates Inc.
Mr. Frederico Lucas Jamisse Mossugueja (via videoconference)	<i>Domingos</i> Newspaper
Mr. Helder Amaral Matlaba (via videoconference)	Independent Attorney
Mr. Michael Zuko Nonxuba	Nonxuba Inc.

For Respondent:

Mr. Juan C. Basombrio	Dorsey & Whitney LLP
Ms. Erica Haggerty	Dorsey & Whitney LLP
Mr. Angelo Vasco Matusse	Deputy Attorney-General, Republic of Mozambique
Mr. Silvestre Salomão Silindane	National Director of Legal Affairs, Republic of Mozambique
Mr. Fernando Manhiça	Director for Legal and Consular Affairs, Ministry of Foreign Affairs and Cooperation, Republic of Mozambique
Mr. Quintus van der Merwe	Shepstone & Wylie Attorneys
Ms. Teresa Filomena Muenda	Independent Attorney

Court Reporter:

Ms. Dawn Larson	B&B Court Reporters
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Interpreters:

Ms. Marisia Laure	Independent Interpreter
Ms. Teresa Figueira	Independent Interpreter

113. During the Hearing, the following persons were examined:

On behalf of Claimant:

Mr. Oded Besserglik	Claimant
Mr. Dror Besserglik	Claimant's son
Mr. Rui Marto (via videoconference)	Marco Lafitte & Associates Inc.
Mr. Frederico Lucas Jamisse Mossugueja (via videoconference)	<i>Domingos</i> Newspaper

Mr. Helder Amaral Matlaba (via videoconference) Independent Attorney
Mr. Michael Zuko Nonxuba Nonxuba Inc.

On behalf of Respondent:

Mr. Fernando Manhiça Director for Legal and Consular Affairs,
Ministry of Foreign Affairs and
Cooperation, Republic of Mozambique
Mr. Quintus van der Merwe Shepstone & Wylie Attorneys
Ms. Teresa Filomena Muenda Independent Attorney

114. On April 20, 2018, Respondent filed its Post-Hearing Brief and Statement of Costs. Claimant filed a Statement of Costs on April 21, 2018 and a Post-Hearing Brief on April 23, 2018 (which was dated on its face June 20, 2018), together with Legal Authorities CL-0121 through C-0123, CL-0127, CL-0128, CL-0130, CL-0132, CL-0133, and CL-0135.⁵
115. Also on April 23, 2018, Respondent filed observations on Claimant’s Statement of Costs, (“**Response to Statement of Costs**”) as well as an application to strike Claimant’s Post-Hearing Brief and the new legal authorities submitted with it.
116. On April 24, 2018, Claimant requested time to respond to Respondent’s application to strike (a request to which Respondent objected later that day). The same day, Claimant submitted a response to Respondent’s Statement of Costs.
117. Also on April 24, 2018, Respondent objected to Claimant’s response on costs, on the basis that Claimant did not reply to Respondent’s Statement of Costs, but instead made further arguments in support of his own Statement of Costs.
118. On April 25, 2018, Claimant made further observations on the Respondent’s application to strike of April 23, 2018; Respondent replied the same day.
119. On April 26, 2018, the Tribunal communicated to the Parties that it was of the view that the Post-Hearing Brief submitted by Claimant was contrary to the directions of the

⁵ While Legal Authorities CL-0124, CL-0126, CL-0129 and CL-0134 were referenced in Claimant’s submission, they were omitted from Claimant’s supporting documentation. Legal Authorities CL-0125 and CL-0131 were neither cited nor submitted by Claimant.

Tribunal. The Tribunal directed Claimant to submit, within 10 days, an amended Post-Hearing Brief conforming to the directions of the Tribunal and which did not contain new arguments or attach or reference new authorities. The Tribunal also noted that Claimant's April 24, 2018 response to Respondent's Statement of Costs was out of order, and gave Claimant leave to, within 10 days, file an amended submission only responding to Respondent's costs submissions. Finally, the Tribunal stated that "[i]f the Claimant wishes to make any new arguments or submit any new authorities for the consideration of the Tribunal it may apply to the Tribunal, within three days of complying with the two directions above, for leave to do so."

120. In accordance with these directions, on May 6, 2018, Claimant submitted an amended Post-Hearing Brief (which was dated on its face June 20, 2018) which also contained an amended cost submission, as well as an amended response to Respondent's Statement of Costs ("**Amended Post-Hearing Brief**").
121. On May 7, 2018, Claimant notified the ICSID Secretariat that his legal counsel (Mr. Patrick Jefferys and Mr. Rui Marto) were no longer acting on his behalf in respect of this case.
122. The following day, on May 8, 2018, Claimant informed the ICSID Secretariat that he had appointed new counsel, Mr. Lee Caplan of Arent Fox LLP.
123. Later on May 8, 2018, Claimant, through his new counsel, filed an Application for Leave to File New Evidence ("**May 8 Application to Admit New Evidence**"). The evidence sought to be submitted was said to comprise "copies of communication[s] that support the Claimant's contention that the Mozambique-South Africa BIT ("Treaty") is in force" and specifically:
 - (i) "[c]opies of emails between the Claimant and a senior official of the South African Government, concerning the Diplomatic Note of Ratification ("NOTE") received from Mozambique by South Africa;
 - (ii) Witness statement of the Claimant explaining the circumstances around this email exchange; and

- (iii) Witness statement of the Claimant's son, who was also present at the meeting referred to in the emails."⁶
124. These materials were said to relate to "previously overlooked email exchanges between Claimant and a senior official of the South African Government who advised that she had received the note from Mozambique and that it had been sent for translation" which were said to have been discovered by the Claimant "[i]n the course of preparing the post hearing briefs."⁷
125. By separate letter of that same day, Claimant also sought an extension of time to properly file a motion for the introduction of legal authorities in accordance with the Tribunal's direction of April 26, 2018 ("**May 8 Application for Extension**"), as well as leave to further amend his Post-Hearing Brief to include an item relating to costs which was inadvertently omitted.
126. Later on May 8, 2018, Respondent indicated by email its intention to file by May 10, 2018 an opposition to Claimant's May 8 Application to Admit New Evidence. Shortly thereafter, also on May 8, 2018, Respondent responded, in two emails, to Claimant's May 8 Application for Extension, as well as Claimant's request to further amend its Post-Hearing Brief.
127. On May 9, 2018, Respondent filed its formal opposition to Claimant's May 8 Applications. Claimant submitted a response, without advance leave, on May 10, 2018. The following day, May 11, 2018, Respondent objected to Claimant's response and moved to strike Claimant's letter on the ground that it was an unauthorized submission (in the same communication, Respondent also submitted additional observations on Claimant's letter, in the event that the Tribunal decided to consider it).
128. The Tribunal wrote to the Parties on May 13, 2018. It indicated that it had taken note of Claimant's most recent letter and Respondent's objections thereto. The Tribunal granted Respondent leave to file any further consolidated response to Claimant's Applications,

⁶ Cl. May 8 Application to Admit New Evidence, para. 4.

⁷ Cl. May 8 Application to Admit New Evidence, para. 9.

should it wish, by May 16, 2018. The Tribunal also directed the Parties to refrain from filing any other application or any new materials, without the prior leave of the Tribunal.

129. In accordance with the Tribunal's directions, on May 15, 2018, Respondent submitted its "Supplemental Opposition" submission.
130. On May 23, 2018, the Tribunal wrote to the Parties regarding Claimant's May 8 Applications. With respect to Claimant's request to further amend its Post-Hearing Brief, the Tribunal granted Claimant's request, pursuant to Article 35 of the ICSID Arbitration Rules. The Tribunal directed Claimant to submit its amended Post-Hearing Brief, with the additional cost line item inserted and corresponding total(s) amended, by May 25, 2018. The Tribunal also granted Respondent leave to make any brief observations pertaining specifically to that additional line item by May 30, 2018 should it wish to do so. In accordance with this direction, Claimant submitted its amended Post-Hearing Brief on May 25, 2018, and Respondent confirmed it had no further observations to make in this regard that same day.
131. With respect to the Claimant's May 8 Application to Admit New Evidence, the Tribunal addressed at length the Parties' arguments and explained that in the circumstances, if the Tribunal were to decide to grant Claimant's Application it would also, pursuant to Administrative and Financial Regulation 14(3)(d) and Article 35 of the Arbitration Rules, authorize the Centre to make a further request for advance payment from Claimant only, in the estimated amount of the Centre's and the Tribunal's costs attributable to the submission of this new evidence. The Tribunal invited Claimant to confirm, by May 25, 2018, whether, in light of the Tribunal's comments, he would maintain his Application and commit to meeting any further request for advance payment that would potentially arise if the new evidence were admitted. The Tribunal stated that it would consider the Application upon receipt of the confirmation requested.
132. With respect to Claimant's May 8 Application for Extension, the Tribunal stated that it would defer its ruling until after Claimant's confirmation requested with respect to the May 8 Application to Admit New Evidence was received.

133. Later on May 23, 2018, Respondent wrote to the Tribunal to object to the possibility of reconvening the hearing if the new evidence were to be admitted, and to note that, even if Claimant was willing to advance funds for the costs of the Tribunal and Centre, this would not address the costs that Respondent would be forced to incur.
134. On May 25, 2018, Claimant wrote to the Tribunal, confirming his “willingness to incur the Tribunal’s and ICSID’s costs” associated with the introduction of new evidence alone, and acknowledging that he was “willing to assume the risk that, depending on the outcome of this phase of the proceedings, [his] current request may be considered in the Tribunal’s formulation of its final cost award.” With this letter, the Claimant filed an amended Post-Hearing Memorial on Costs (“**Amended Statement of Costs**”).
135. Later on May 25, 2018, Respondent wrote to the Tribunal to make observations on Claimant’s earlier letter of that date. It explained the costs that would be attendant upon it if the new evidence were to be admitted and rejected as “unacceptable” Claimant’s suggestion that the Tribunal can simply assess costs at the end of the proceedings. It reiterated its request that the Tribunal deny Claimant’s May 8 Application to Admit New Evidence.
136. The following day, May 26, 2018, the Tribunal invited Claimant to provide any further observations on the points in Respondent’s May 25, 2018 email by May 30, 2018 and directed the Parties to otherwise refrain from any further correspondence on this topic without prior leave of the Tribunal.
137. On May 30, 2018, in accordance with the Tribunal’s directions, Claimant provided his further observations on Respondent’s May 25, 2018 email.
138. On June 8, 2018, the Tribunal wrote to the Parties with respect to Claimant’s May 8 Application to Admit New Evidence. The Tribunal explained that it had taken note of Claimant’s confirmation that it would be willing to advance an additional amount to ICSID to cover arbitration costs that would arise if the Application were granted. It further noted that it was sympathetic to Respondent’s concern that admitting the documents in question, at this stage, would mean that Respondent may have to bear significant costs in order to

consider and respond to the new documents, costs which Respondent would not have been put to if the documents had been introduced in a timely manner. The Tribunal stated that it was of the view that this concern of Respondent could be addressed by Claimant furnishing security for such costs of Respondent that would arise if the Application were granted. The Tribunal therefore invited Claimant to indicate, by June 19, 2018, whether he would be willing to provide to Respondent security for such costs, in the form of payment made into an escrow account or a bank guarantee. It also asked Respondent to first provide, by June 15, 2018, an estimate of what it believed would be its reasonable costs to review the documents admitted, to make any written observations regarding these, and to, should it consider it necessary, produce evidence and undertake further cross-examination of Claimant's witnesses. To facilitate this, the Tribunal suggested that Claimant provide Respondent (but not the Tribunal or the Tribunal Secretary) the emails which he wished to have admitted, by June 12, 2018.

139. The Tribunal's June 8, 2018 letter further explained that the Tribunal's comments and invitations contained within the letter were without prejudice to the Tribunal's final decisions on each of Claimant's open Applications, to any decision on any formal application for security for costs which might be brought by a Party in the future, or to the Tribunal's ultimate decision on the allocation of costs.
140. Later on June 8, 2018, Respondent requested extensions of the deadlines imposed in the Tribunal's letter, such that Respondent would provide its cost estimate by June 22, 2018, and Claimant would indicate its position by June 27, 2018. The Tribunal confirmed the requested extensions on June 10, 2018.
141. Before the aforementioned deadlines came to pass, on June 13, 2018, Claimant wrote to inform the Tribunal that he would not proceed with the process proposed by the Tribunal regarding the May 8 Application to Admit New Evidence and was withdrawing it. By the same letter, Claimant also reiterated his May 8 Application for Extension of the time period to seek leave to introduce new legal authorities.

142. Later on June 13, 2018, Respondent wrote to the Tribunal requesting that Claimant's May 8 Application for Extension be denied, setting forth its position that, if the new legal authorities were to be admitted, security for costs should also be required.
143. On June 29, 2018, the Tribunal wrote to the Parties. The Tribunal informed the Parties that it had taken note of Claimant's confirmation, as set forth in its letter of June 13, 2018, that he had withdrawn his May 8 Application to Admit New Evidence. With respect to Claimant's May 8 Application for Extension, the Tribunal granted Claimant until July 9, 2018 to make a reasoned application for leave to introduce additional legal authorities and gave Respondent until July 16, 2018 to file any observations it may wish to make on that request.
144. On July 2, 2018, the Tribunal agreed to extend the date for Respondent's observations until July 23, 2018.
145. On July 5, Claimant wrote to the Tribunal to inform it that he was also withdrawing the May 8 Application for Extension.
146. On July 10, 2018, the Tribunal wrote to the Parties, confirming that it had taken note of Claimant's letter withdrawing the remaining Application and that it would proceed to consider its decision on Respondent's new jurisdictional objection filed on June 20, 2017.
147. On May 15, 2019, the Tribunal provided the Parties with an update regarding the expected timing of its decision.
148. A further update was provided to the Parties on August 30, 2019.
149. The proceeding was closed on October 28, 2019.

III. FACTUAL BACKGROUND

150. From 1993 to 1995, Claimant, along with another South African investor by the name of Mr. Antonio Barradas ("**Mr. Barradas**"), invested in various fishing operations in Mozambique. In 1995, Claimant learnt that three fishing vessels owned by a South African

company called Natal Ocean Trawling (Pty) Ltd (“**NOT**”) were to be sold by public auction in Durban, South Africa.

151. Since Claimant and Mr. Barradas were already involved in fishing operations, they decided to purchase these vessels. On August 3, 1995, they attended the auction and purchased the three vessels: Ocean Dawn, Ocean Wave and Sistello.⁸
152. At the auction, Claimant and Mr. Barradas met Mr. Ian Cameron (“**Mr. Cameron**”) who had been employed by NOT as a manager. He informed them that NOT “had an existing agreement with Sulpesca and Emopesca” in terms of which under a joint venture they “fished for deep and shallow water prawns off Mozambique.”⁹ According to Claimant, Mr. Cameron suggested that “Claimant and [Mr.] Barradas purchase the shares in NOT and continue with the joint-venture.”¹⁰ The entire shareholding of NOT was indeed purchased by Claimant and Mr. Barradas.¹¹
153. The three vessels were transferred to a company called Spradbrows Boat Yard (Pty) Ltd. (“**Spradbrows**”), which was to carry out the fishing operations. Mr. Cameron was appointed as its manager. Claimant and Mr. Barradas then approached Emopesca and Sulpesca with a proposal to continue the prawn fishing operations.¹²
154. In December 1996, NOT offered to purchase 40% of the shares in Sulpesca, which were owned by Emopesca, for US\$ 400,000. According to Claimant, this offer was orally accepted.¹³ At the time, the Managing Director of Emopesca was Mr. Hélder Pateguana (“**Mr. Pateguana**”). Through a letter dated December 13, 1996, Mr. Pateguana confirmed that the joint venture with NOT would continue subject to certain conditions, including renewal of the project by the Investment Promotion Centre (“**CPI**”) which falls under the

⁸ It is not clear what happened to this third vessel Sistello. It appears from the pleadings that its name was later changed to Nadia (*see* Cl. Mem., para. 5.2) but no claim is made with regard to Sistello/Nadia.

⁹ Cl. Mem., para. 5.3.

¹⁰ Cl. Mem., para. 5.3.

¹¹ The manner in which the purchase was eventually made is described in Cl. Mem., paras. 5.4-6.3.

¹² Cl. Mem., paras. 7-8.

¹³ Cl. Mem., para. 9.1.

Ministry of Planning and Finances of Mozambique.¹⁴ On December 16, 1996, Mr. Pateguana wrote to the Minister of Agriculture and Fisheries stating that Emopesca wanted to continue with the joint venture. On December 19, 1996, the Minister responded that Emopesca should choose the best option available to it.¹⁵

155. According to Claimant, on December 24, 1996, NOT and Spradbrows concluded a partly oral and partly written agreement with Emopesca and Sulpesca. The material terms of this agreement were that:

- (i) The parties would conduct a joint fishing venture off Mozambique for prawns under fishing licenses held by Sulpesca;
- (ii) Emopesca would sell to NOT 40% of the shareholding in Sulpesca;
- (iii) NOT would pay Emopesca US\$ 400,000 for these shares;
- (iv) This consideration would be paid in three installments;
- (v) Spradbrows would provide Sulpesca with four prawn fishing vessels;
- (vi) The agreement would be subject to renewal of the project by CPI; and
- (vii) NOT would have an irrevocable option to purchase a further 20% of Sulpesca's shares for US\$ 200,000.¹⁶

156. According to Claimant, in early January 1997, a further oral agreement was reached between the parties that income derived from the fishing operations would be divided on a monthly basis between Spradbrows and Sulpesca. The former would receive 70% and the latter 30%.¹⁷ The fishing operations would be managed by Spradbrows, which would also bear the expenses incurred for the operations.¹⁸ The remuneration derived from the venture

¹⁴ Cl. Mem., para. 10.

¹⁵ Cl. Mem., paras. 11-12.

¹⁶ Cl. Mem., paras. 13-14.

¹⁷ Cl. Mem., para. 16.1.

¹⁸ Cl. Mem., para. 16.2.

was receivable by Sulpesca which was to distribute the income between the parties in the agreed proportions.¹⁹

157. On January 13, 1997, NOT transferred a sum of US\$ 50,000 to Emopesca “in part payment of the shares, as the first instalment.”²⁰
158. This above-mentioned agreement was reduced to writing and executed by the parties on May 8, 1997 (the “**May 1997 Agreement**”).²¹
159. According to Claimant, on October 21, 1997, NOT exercised its option to purchase a further 20% of the shares in Sulpesca from Emopesca.²²
160. On November 11, 1997, Sulpesca “confirmed it had agreed to purchase the vessel Ocean Wave” from NOT and Spradbrows for Rand 5,000,000 and “the vessel would be transferred to Sulpesca” on December 1, 1997.²³ Spradbrows responded by agreeing to sell the vessel Ocean Wave subject to the consideration being set off against Sulpesca’s share of the income from the fishing operations and the balance consideration due to Emopesca being guaranteed by the vessels Ocean Dawn and Ocean Wave.²⁴
161. On November 12, 1997, NOT paid a further US\$ 100,000 to Emopesca as second part payment for purchase of Sulpesca’s shares.²⁵
162. According to Claimant, on July 7, 1998, he and his son, Mr. Dror Besserglik, “sold their shares in various companies” including NOT and Spradbrows to Mr. Barradas.²⁶ The consideration payable by Mr. Barradas was Rand 2,380,000. Mr. Barradas, however, failed

¹⁹ Cl. Mem., para. 16.3.

²⁰ Cl. Mem., para. 17.

²¹ Cl. Mem., para. 18.

²² Cl. Mem., para. 22.

²³ Cl. Mem., para. 24.

²⁴ Cl. Mem., para. 25.

²⁵ Cl. Mem., para. 28.

²⁶ Cl. Mem., para. 29.

to meet his payment obligations under this agreement and fled South Africa. The share sale agreement was therefore cancelled on October 1, 1999.²⁷

163. Claimant states that on or about June 17, 1999, he came to know that Mr. Cameron (who was still employed as the manager of fishing operations at Spradbrows), either alone or in collaboration with Mr. Barradas, “hijacked the prawn fishing vessels.”²⁸ At the same time, Mr. Pateguana provided Claimant with a letter from Mr. Cameron stating that he was the authorized representative of a South African company called Noremac Marine CC which was willing to charter its vessels Ocean Dawn, Ocean Wave and Sistello (renamed “Nadia”) to Sulpesca.²⁹
164. Thereafter, NOT, Spradbrows, Emopesca, Sulpesca and Claimant initiated a number of actions in South Africa and Mozambique to recover the vessels. These actions included the following.
- (i) *South Africa Case No. 99/15167*: Filed by Claimant and his son against Mr. Barradas seeking damages for breach of their agreement dated June 7, 1999. The action did not proceed because of problems encountered with service of court documents.³⁰
 - (ii) *Mozambique Case No. 46/1999*: Filed by Emopesca and Sulpesca against NOT and Spradbrows seeking arrest of the vessels. On July 14, 1999, judgment was delivered in favor of Emopesca and Sulpesca and the vessels were arrested.³¹
 - (iii) *Mozambique Case No. 51/1999*: Filed by Mr. Cameron to intervene in the arrest of the vessels on the grounds that he had acquired them at an auction. On November 29, 1999, a judgment was delivered in favor of Mr. Cameron and the arrest of the vessels was set aside. Emopesca and Sulpesca appealed and on

²⁷ Cl. Mem., para. 30.

²⁸ Cl. Mem., para. 32.

²⁹ Cl. Mem., para. 33.1.

³⁰ Cl. Mem., para. 34.

³¹ Cl. Mem., paras. 36-37; *Emopesca E.E. and Sulpesca v. Spradbrows Boat Yard (PTY) Limited and Natal Ocean Trawling (PTY) Limited*, Mozambique Case No. 46/1999, Ruling (excerpts), July 14, 1999 (C-0020).

March 19, 2004, the Supreme Court handed down judgment in favor of Emopesca and Sulpesca.³²

- (iv) *Mozambique Case No. 79/1999*: Filed by Claimant for return of the vessels Ocean Dawn and Ocean Wave. Warrants of arrest for the vessels were issued on December 20, 1999.³³
- (v) *Mozambique Case No. 82/1999*: Filed by Mr. Cameron to intervene in Case No. 79/1999 and have the warrants of arrest vacated. On April 10, 2000, the warrants of arrest were set aside.³⁴
- (vi) *Mozambique Case No. 93/1999*: Filed by Emopesca and Sulpesca against NOT and Spradbrows for recovery of amounts due from both and for seizure of the vessels Ocean Dawn and Ocean Wave. Judgment was granted in favor of Emopesca and Sulpesca in 2001.³⁵
- (vii) *South Africa Case Nos. A246/1999 and A18/2000*: Filed by Claimant for issuance of warrants of arrest for three vessels, Ocean Dawn, Ocean Wave and Sistello.³⁶
- (viii) On January 31, 2000, Claimant filed a complaint with the South African Police seeking prosecution of Mr. Cameron.³⁷

³² Cl. Mem., paras. 38-39; *Ian Cameron v. Emopesca E.E. and Sulpesca*, Mozambique Case No. 51/1999, Ruling (excerpts), November 29, 1999 (C-0022).

³³ Cl. Mem., para. 40; *Oded Besserglik v. Ocean Dawn and Ocean Wave*, Mozambique Case No. 79/1999, Ruling, December 20, 1999 (C-0024).

³⁴ Cl. Mem., para. 41; *Ian Cameron v. Oded Besserglik*, Mozambique Case No. 82/1999, Ruling (excerpts), April 10, 2000 (C-0025).

³⁵ Cl. Mem., paras. 43-45; Petition of Emopesca E.E. and Sulpesca against Spradbrows Boat Yard (PTY) Limited and Natal Ocean Trawling (PTY) Limited to the Judicial Court of the City of Maputo dated July 30, 1999 (C-0026).

³⁶ Cl. Mem., paras. 46-50; High Court of South Africa, Case No. A246/1999, "Warrant of Arrest, Admiralty Action *in rem*" dated October 21, 1999 (C-0027); High Court of South Africa, Case No. A18/2000, "Warrant of Arrest, Admiralty Action *in rem* and *in personam*" dated January 19, 2000 (C-0030).

³⁷ Cl. Mem., para. 49; Statement of Oded Besserglik given to South African Police Department dated January 31, 2000 (CL-0034).

- (ix) *Mozambique Case No. 5/2002*: Filed by Emopesca and Sulpesca appealing the judgment dated November 29, 1999 in favor of Mr. Cameron. On March 19, 2004, the Supreme Court handed down judgement in favor of Emopesca and Sulpesca.³⁸
- (x) *Mozambique Case No. 43/2002*: Filed by Mr. Cameron for lifting the warrants of arrest granted to Emopesca and Sulpesca for Ocean Dawn and Ocean Wave. The application was dismissed on March 15, 2004.³⁹

165. During this time, on February 21, 2000, Claimant, Emopesca and Sulpesca reached an agreement (the “**February 2000 Agreement**”) that:

- (i) Claimant, Emopesca and Sulpesca are creditors of Mr. Barradas, who is the owner of Spradbrows and NOT and the fishing vessels Ocean Dawn and Ocean Wave;
- (ii) Both Messrs. Barradas and Cameron have disappeared in order to defeat the claims of the creditors;
- (iii) Only through concerted legal action can the creditors recover their dues;
- (iv) The three parties would share the legal costs of the actions in South Africa and Mozambique equally;
- (v) The outstanding balance of US\$ 227,000 payable by NOT to Emopesca will be paid by Claimant;
- (vi) In case of a favorable decision in court, the vessel Ocean Wave shall become the property of Sulpesca, though Claimant will manage the fishing operations and receive 20% of the income earned from this vessel; and
- (vii) In case of a favorable decision in court, the vessel Ocean Dawn will become the property of Claimant but will be used in Sulpesca’s fishing operations for a period

³⁸ Cl. Mem., paras. 38.2 and 53; *Emopesca E.E. and Sulpesca v. Ian Cameron*, Mozambique Case No. 5/2002, Ruling, March 19, 2004 (C-0036).

³⁹ Cl. Mem., para. 52; *Ian Cameron v. Emopesca E.E. and Sulpesca*, Mozambique Case No. 43/2002, Ruling, March 15, 2004 (C-0035).

of five years, and Sulpesca will receive 30% of the income earned from this vessel.⁴⁰

166. On August 27, 2004, Claimant wrote to Mr. Pateguana, who was still the Managing Director of Emopesca, requesting implementation of the February 2000 Agreement.⁴¹ In late October 2004, Mr. Pateguana informed Claimant that he had been instructed to transfer, and had in fact transferred, shares in Sulpesca to a Mozambican company: ROC Lda (“**ROC**”).⁴² Sulpesca confirmed this in early November 2004 and Claimant lodged a complaint with Emopesca at that time.⁴³
167. On March 29, 2005, Claimant wrote to the President of Mozambique seeking his intervention in the matter.⁴⁴ He sent a similar letter to the President on May 25, 2005.⁴⁵
168. On January 12, 2006, the Ministry of Fisheries of Mozambique wrote to Claimant confirming that Emopesca had transferred its shareholding in Sulpesca to ROC,⁴⁶ which now held almost all the shares in Sulpesca. Further, Emopesca had entered into liquidation and therefore, Claimant should take up any claims he had against it with the liquidator.⁴⁷
169. Further correspondence was exchanged between Claimant and the Ministry of Fisheries. Eventually a meeting was held on October 23, 2007, which was then adjourned to November 14, 2007. This meeting was rescheduled to November 15, 2007 but never took place.⁴⁸

⁴⁰ Cl. Mem., para. 35; Agreement between Emopesca and Sulpesca and Mr. Oded Besserglik dated February 21, 2000 (C-0019).

⁴¹ Cl. Mem., para. 54.1; Letter from Mr. Oded Besserglik to Emopesca (undated) (C-0037).

⁴² Cl. Mem., paras. 55.1-55.3.

⁴³ Cl. Mem., paras. 55.4-55.6; Letter from Mr. Oded Besserglik to Emopesca dated November 3, 2004 (C-0038).

⁴⁴ Cl. Mem., para. 57.1; Letter from Mr. Oded Besserglik to H. E. President Armando Emilio Guebuza dated March 29, 2005 (C-0039).

⁴⁵ Cl. Mem., para. 57.2

⁴⁶ During late October 2004, Mr. Pateguana had informed Claimant that Emopesca had transferred 40% of its shares in Sulpesca to a Mozambican company, ROC: Cl. Mem., para. 55.1.

⁴⁷ Cl. Mem., para. 58.1; Letter from Ministry of Fisheries to Mr. Oded Besserglik dated 12 January 2006 (C-0040).

⁴⁸ Cl. Mem., paras. 58.7-60.1.

170. The two vessels, Ocean Dawn and Ocean Wave were, under new names, put up for sale through a public auction in March 2008. According to the Claimants “[o]n Tuesday, the 1st of April 2008, Claimant came across a notice, dated 31 March 2008, published in a newspaper and entitled ‘*Noticias*’. The notice advertised the sale of Ocean Wave and Ocean Dawn, by way of public auction. The vessel[s]’ names had been changed. The names had been changed to Emopesca 1 and Emopesca 2.”⁴⁹
171. On January 7, 2008, Claimant was given a letter written by Mr. Pateguana and addressed to the Ministry of Fisheries, which the Ministry had instructed be handed over to Claimant.⁵⁰ Mr. Pateguana had written to the Minister of Fisheries stating that: (i) the February 2000 Agreement had been signed on the assumption that Claimant was also a creditor of Mr. Barradas; (ii) only Emopesca proceeded with the legal actions; (iii) Claimant had been unable to prove that he was a creditor of Mr. Barradas; (iv) there was no relationship between Emopesca and Claimant besides this agreement; and (v) since Claimant had not been able to provide evidence that he had any claim against Mr. Barradas, and the Ministry of Fisheries had not approved the agreement, it was void. Claimant responded to this letter on January 21, 2008.⁵¹
172. On January 22, 2008, the President of Mozambique wrote to Claimant (in response to Claimant’s letter of December 18, 2007) stating that it would be improper for him to intervene in a dispute between Claimant and Emopesca; Claimant should address his complaint to the Minister of Fisheries to whom the complaint was being forwarded.⁵² On May 15, 2008, Claimant received a second letter from the President (in response to Claimant’s letter of May 4, 2008) stating he could not intervene in judicial proceedings.⁵³
173. According to Claimant, shortly after June 12, 2008, he received an internal legal opinion delivered by Mr. Silvestre Silindane (“**Mr. Silindane**”), National Director of Legal Affairs

⁴⁹ Cl. Mem., para. 61.1; Notice, Ministry of Fisheries, April 1, 2008 (C-0050).

⁵⁰ Cl. Mem., para. 60.2; Letter from Mr. Hélder Pateguana to Ministry of Fisheries dated January 7, 2008 (C-0047).

⁵¹ Cl. Mem., para. 60; Letter from Mr. Oded Besserglik to Ministry of Fisheries dated January 21, 2008 (C-0048).

⁵² Cl. Mem., para. 60.3; Letter from the Office of the President of the Republic of Mozambique to Mr. Oded Besserglik dated January 22, 2008 (C-0049).

⁵³ Cl. Mem., para. 61.4; Letter from the Office of the President of the Republic of Mozambique to Mr. Oded Besserglik dated May 15, 2008 (C-0052).

at the Ministry of Fisheries to the Vice Minister of Fisheries. The legal opinion reviewed this matter in detail and advised reaching a settlement with Claimant.⁵⁴

174. On August 20, 2008, Claimant instituted an action in the Administrative Court of Mozambique (Case No. 161/2008).⁵⁵
175. On September 1, 2008, Claimant (through his counsel) received a letter from the Ministry of Fisheries informing him of a meeting to take place on September 2, 2008. Claimant was out of the country and requested an alternative date. He got no response.⁵⁶ On October 27, 2008, the Ministry of Fisheries wrote to Claimant (through his counsel) informing him that negotiations could only continue if Claimant withdrew his case before the Administrative Court.⁵⁷
176. On April 9, 2009, Mozambique Case No. 161/2008 was dismissed on the grounds that the court lacked jurisdiction over the dispute.⁵⁸
177. Claimant and his son tried to take the issue to the press but had to discontinue after they were threatened and their lawyers declined to pursue their cases. After receiving threats to his life, Claimant's son left Mozambique.⁵⁹
178. In the circumstances, according to Claimant, there "has been no effective determination of the Claimant's submissions or claims. For this reason, the Claimant has opted to seek recourse by way of international arbitration."⁶⁰

⁵⁴ Cl. Mem., para. 62.1; Ministry of Fisheries, Advisory Committee, Report No. 02/AMP-SSS/2008 dated June 12, 2008 (C-0053).

⁵⁵ Cl. Mem., paras. 63, 66; *Oded Besserglik v. Republic of Mozambique*, Mozambique Administrative Court Case No. 161/2008, Judgment, July 9, 2009 (C-0060).

⁵⁶ Cl. Mem., para. 64.1; Ministry of Fisheries, Cabinet of the Minister, Note No. 1893/651/GM-MP/08 dated September 1, 2008 (C-0055).

⁵⁷ Cl. Mem., para. 64.2; Ministry of Fisheries, Cabinet of the Minister, Note No. 2218/802/GM-MP/08 dated October 27, 2008 (C-0056).

⁵⁸ Cl. Mem., para. 66; *Oded Besserglik v. Republic of Mozambique*, Mozambique Administrative Court Case No. 161/2008, Judgment, April 9, 2009 (C-0060).

⁵⁹ Cl. Mem., paras. 65.1-65.8

⁶⁰ Cl. Mem., para. 66.3.

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

179. Claimant seeks from Respondent compensation arising from:

- (i) The “unlawful and fraudulent appropriation” by Respondent of shares owned by NOT in Sulpesca of which the Claimant was the sole beneficial owner;
- (ii) Failure to deliver the shares to Claimant in terms of the agreements reached between Claimant and Respondent’s companies Emopesca and Sulpesca; and
- (iii) The “unlawful and fraudulent appropriation” of two fishing vessels, namely Ocean Dawn and Ocean Wave, of which Claimant was owner.⁶¹

180. Claimant, therefore, seeks an Award in the following terms:

- (i) A declaration that Respondent violated the terms of May 1997 and February 2000 Agreements;
- (ii) A declaration that Respondent’s actions and omissions and those of its public servants including the President of Mozambique, the Ministers of Fisheries, the Ministers of Planning and Finance, as also Emopesca, ROC, Sulpesca, Mr. Pateguana, and Mr. Silindane and its “instrumentalities for which it is internationally responsible,” (a) unlawfully expropriated Claimant’s shares in Sulpesca, in the vessels Ocean Wave and Ocean Dawn; (b) unlawfully appropriated Claimant’s profits due to him under and in terms of the May 1997 and February 2000 Agreements without “prompt, adequate and effective compensation”; and (c) through its “unreasonable and discriminatory measures” failed to treat Claimant fairly and equitably and afford him the full protection and security which the investments warranted;
- (iii) An award for payment of the sum of US\$ 91,649,177.04 together with such additional sums as may be found to be owing as at the date of the award, together

⁶¹ Cl. Mem., paras. 106.1-106.4.

with interest at the rate of 15.5% per annum from the date of the Award to date of payment; and

- (iv) An award for all costs of the proceedings, including the costs expended by Claimant over the years extending from July 1999 to February 2014 when arbitration proceedings were instituted, at a contingency percentage fee to be determined, or, if the Tribunal were to dismiss the Claimant's claims for lack of jurisdiction, the Claimant's legal costs of the arbitration quantified at US\$ 2,262,630.04.⁶²

181. Respondent denies Claimant's claims on both jurisdictional grounds and on the merits. It, therefore, requests an Award in the following terms:

- (i) Declaring that ICSID lacks jurisdiction and the Tribunal lacks competence in these arbitration proceedings;
- (ii) Alternatively, finding that Claimant is not entitled to any relief on merits and dismissing these proceedings and denying all claims asserted by Claimant herein with prejudice and on the merits in favor of Respondent;
- (iii) Awarding Respondent its actual attorneys' fees and costs incurred herein against Claimant (quantified as US \$1,910,442.19) and ordering the Claimant to bear its own fees and costs; and

⁶² Cl. Mem., para. 106. Cl. Amended Statement of Costs, sec. 6 reads:

[T]he Claimant requests the Tribunal to:

6.1 dismiss the Respondent's motion to dismiss and its motion of objection to "hearsay evidence";

6.2 order the Respondent pay the Claimant's costs incurred [in responding to the Motion to Dismiss] [...] in a total sum of US\$ 636,935.72;

Alternatively, and in the event the Tribunal should elect to dismiss the Claimant's claims for reason of absence of jurisdiction:

6.3 order the Respondent to pay the Claimant's full costs of suit in the sum of US\$ 2,262,630.04 [...]; and

6.4 order the Respondent to pay its own costs of suit.

See also Cl. Response on Motion, para. 15.3 ("the Motion [...] should be dismissed with costs"); Cl. Rej. on Motion, para. 15.3 (same).

- (iv) Providing such other or further relief in favor of Respondent as the Tribunal deems to be just and proper.⁶³

V. RESPONDENT'S JURISDICTIONAL OBJECTION (MOTION TO DISMISS)

182. Respondent has raised, at a late stage in these proceedings, a fundamental objection to the jurisdiction of both ICSID (under the ICSID Additional Facility) and the Tribunal in this matter—that the Mozambique-South Africa BIT has not entered into force. Respondent makes four independent arguments in support of this objection. Claimant disputes these arguments on the merits and argues that Respondent is estopped from raising this objection. The Parties' respective positions in this regard are addressed below in **Section V.A.**
183. In addition, Claimant has also raised a procedural objection to the timing of Respondent's jurisdictional objection—he argues that Respondent's jurisdictional objection cannot be entertained at this stage of the proceedings. According to Claimant, Respondent's jurisdictional objection should have been made at the outset and Respondent, having failed

⁶³ Resp. C-M, para. 315; Resp. Rej., para. 424; Resp. PHB, para. 125. *See also* Resp. Motion to Dismiss, sec. IV:

Respondent moves:

- (1) to immediately dismiss *in limine* all of Claimant's claims asserted under the [Mozambique-South Africa] BIT or, in the alternative, for an immediate order *in limine* that the [Mozambique-South Africa] BIT, and all claims thereunder, are inadmissible in these proceedings, including at the hearing scheduled for August, 2017;
- (2) to immediately dismiss *in limine* all of Claimant's claims asserted under the MIL or, in the alternative, for an immediate order *in limine* that the MIL, and all claims thereunder, are inadmissible in these proceedings, including at the hearing scheduled for August, 2017;
- (3) because no other grounds are asserted by Claimant for jurisdiction, for a final award in favor of Respondent and against the Claimant in these proceedings; [a]nd
- (4) suspending these proceedings until there is a ruling on this motion *in limine*.

Resp. Reply on Motion, para. 112 reads:

...[T]he Respondent requests that (1) this Tribunal dismiss with prejudice all claims asserted by the Claimant pursuant to the [Mozambique-South Africa] BIT and MIL, on the basis that the [Mozambique-South Africa] BIT has not entered into force, and therefore the Tribunal lacks jurisdiction, and there is also no substantive basis to hold the Respondent liable on the merits, (2) render a final award in favor of the Respondent in these proceedings, and (3) hold that the Respondent is entitled to reimbursement of its fees and costs incurred herein from the Claimant.

to do so, should be deemed to have waived it. The Parties' respective arguments on this matter are set out below in **Section V.B.**

A. THE PARTIES' POSITIONS ON THE MOZAMBIQUE-SOUTH AFRICA BIT

(1) Respondent's Position

184. Respondent argues that these proceedings should be dismissed for lack of jurisdiction because (a) the Mozambique-South Africa BIT has not entered into force and therefore, this Tribunal lacks jurisdiction over claims asserted under it; and (b) since Claimant's basis for consent under the Investment Law is the BIT itself, the Tribunal also lacks jurisdiction over claims under this law. Moreover, Respondent maintains that (c) Claimant's estoppel argument also fails.

a. The BIT has Not Entered into Force

185. Respondent sets out four independent reasons in support of its position that the BIT never entered into force.

(i) South Africa and Mozambique have confirmed that the BIT is not in force

186. Respondent relies on (i) the Diplomatic Note transmitted by Mozambique to South Africa on November 20, 2017 stating that "[i]t is the official position of the Republic of Mozambique that the [Mozambique-South Africa] BIT has not gone onto [*sic*] force. [...] [T]he Republic of Mozambique understands that the Republic of South Africa [...] has not provided the required notification under Article 12(1) to Republic of Mozambique;"⁶⁴ and (ii) the Diplomatic Note transmitted by South Africa to Mozambique on November 27, 2017 confirming that the BIT has not entered into force.⁶⁵ Based on these Diplomatic Notes, Respondent argues that once the States themselves have confirmed that the BIT has not entered into force, this ends the matter.

187. According to Respondent, this exchange of diplomatic notes was confirmed by Mr. Fernando Manhiça, Director of Legal and Consular Affairs at the Mozambique

⁶⁴ Mozambique Diplomatic Note (R-0017).

⁶⁵ South Africa Diplomatic Note (R-0018).

Ministry of Foreign Affairs and Cooperation (“**Mr. Manhiça**”).⁶⁶ Further, Mr. Manhiça in his witness testimony stated that the official position of Mozambique was that “this [BIT] did not come into effect considering that the [parties] did not comply with the stipulated requirements by the Article 12(1) that requires notifications. In other words, Mozambique never notified the South African Republic and, as well, the South African Republic never notified Mozambique of the ratification of the [BIT].”⁶⁷

188. Respondent submits that it is the uncontested and unequivocal position of both States that the BIT has not entered into force, and that this is confirmed by the following.

- (i) On June 12, 2017, by Mr. Jerry Mathye, Deputy Director of Southern Africa Trade and Investment of the Department of Trade and Industry of South Africa (“**DTI**”), through an email to an attorney at the law firm of Respondent’s South African law expert, Mr. Quintus van der Merwe (“**Mr. van der Merwe**”).⁶⁸
- (ii) On June 20, 2017, by Mr. Steven Mathate, DTI Deputy Director Legal for International Trade and Investment of South Africa, through a formal letter to Mr. van der Merwe’s law firm.⁶⁹
- (iii) On July 26, 2017, by Ms. Johanna Gertuida Susanna de Wet (“**Ms. de Wet**”), Chief Law Advisor (International Law) of the Department of Industrial Relations and Cooperation in South Africa (“**DIRCO**”), through a letter to Mr. van der Merwe.⁷⁰

189. At the Hearing, Mr. van der Merwe confirmed that his firm had made enquiries with DIT and DIRCO and were told that the BIT was not in force.⁷¹ Most recently, Respondent notes,

⁶⁶ Tr. Day 1, 159:9-13.

⁶⁷ Tr. Day 1, 169:18–170:8.

⁶⁸ Resp. Motion to Dismiss, p. 3; Email from Mr. Jerry Mathye to Ms. Sharmila Naidoo dated June 12, 2017 (**R-0009**).

⁶⁹ Resp. Motion to Dismiss, p. 3; Letter from Mr. Steven Mathate to Ms. Sharmila Naidoo dated June 20, 2017 (**R-0008**).

⁷⁰ Resp. Reply on Motion, para. 52; Letter from Ms. de Wet to Shepstone & Wylie Attorneys dated July 26, 2017 (**R-0013**).

⁷¹ Tr. Day 1, 89:8–90:2.

the Republic of South Africa wrote directly to the Tribunal on February 5, 2018, stating that the BIT is not in force and that this has been communicated to Mozambique.⁷²

190. Respondent also places reliance on the records filed by South Africa in the South Africa court case initiated by Claimant to compel Ms. de Wet and Ms. Hanna de Beer (“**Ms. de Beer**”) to attend the Hearing.⁷³ In their affidavits filed in those proceedings, Ms. de Wet and Ms. de Beer, on behalf of DIRCO, both confirmed on oath that the BIT is not in force. Ms. De Wet filed an affidavit in which she confirmed the position of South Africa is that the BIT is not in force and that no notification sent by South Africa to Respondent was ever found.⁷⁴ On behalf of DTI, Mr. Rob Davies, the Minister of Trade and Industry filed an affidavit asserting that:

- (i) Claimant misunderstands the law and the basic framework of the South African treaty-making regime;
- (ii) Claimant incorrectly assumes that the BIT falls under Section 231(3) of the Constitution of South Africa (as opposed to Section 231(2));
- (iii) Claimant was consistently advised, at least since 2011, that the BIT was not in force; and
- (iv) There is no evidence that South Africa’s constitutional requirements for enforcing a treaty were complied with.⁷⁵

191. Respondent argues that the Minister’s affidavit comprehensively refutes Claimant’s allegations. The fact that the Minister himself has deposed an affidavit shows the seriousness with which DTI and the South African Government view this matter.⁷⁶

⁷² Letter from Ms. de Wet to Ms. Anna Holloway dated February 5, 2018 (**R-0019**).

⁷³ High Court of South Africa (Gauteng Division), Case No. 5420/2018 (*see above* paragraph 94).

⁷⁴ High Court of South Africa (Gauteng Division), Case No. 5420/2018, Answering Affidavit of Ms. de Wet dated February 13, 2018, paras. 7.11-7.15 (**R-0023**).

⁷⁵ High Court of South Africa (Gauteng Division), Case No. 5420/2018, Answering Affidavit of Mr. Rob Davies dated February 19, 2018 (**R-0025**), paras. 28 *et seq.*

⁷⁶ Tr. Day 1, 94:13-17.

192. Mr. Muhammad Mustaqeem de Gama (“**Mr. de Gama**”), who between 2008 and 2015 served as Director, Legal International Trade and Investment Directorate of the International Trade and Investment Division (“**ITED**”) of DTI, also filed a confirmatory affidavit in the South Africa court case stating that:
- (i) He never advised Claimant that the BIT was in force;
 - (ii) He advised Claimant that he was unable to conclusively establish whether the Treaty was in force and the Claimant should contact DIRCO;
 - (iii) He provided Claimant with a draft document,⁷⁷ which Claimant asserts to be a notification by South Africa under Article 12(1) of the BIT; and
 - (iv) This draft document was not signed and there was no evidence it had ever been sent to Mozambique.⁷⁸
193. Respondent also places great emphasis on a 2011 email which was part of Ms. de Wet’s affidavit in the South Africa court case.⁷⁹ This email, dated December 1, 2011, was sent directly by Ms. Rika van der Walt of DIRCO, Treaty Section, Office of the Chief State Law Advisor to Claimant’s counsel (Mr. Patrick Jefferys) notifying him, three years prior to the initiation of this arbitration, that the BIT was not in force. Respondent contends that Claimant, however, concealed this email when registering his claim with ICSID.⁸⁰
194. According to Respondent, Claimant has admitted that only the Office of the Chief State Law Advisor can legally opine on whether the BIT is in force.⁸¹ Yet, Claimant ignored this 2011 email. For Respondent, Claimant’s attempts to explain the failure to disclose this email on the grounds that his counsel did not recollect whether or not he had received the

⁷⁷ Facsimile from South African High Commission to South African Department of Foreign Affairs dated February 4, 1998, attaching “a copy of a note sent to the Mozambican Ministry of Foreign Affairs and Cooperation regarding the [BIT]” (**C-0169**).

⁷⁸ High Court of South Africa (Gauteng Division), Case No. 5420/2018, Confirming Affidavit of Mr. de Gama dated February 19, 2018 (**R-0026**), paras. 5 *et seq.*

⁷⁹ Email from Ms. Rika van der Walt to Mr. Patrick Jefferys dated December 1, 2011 (**R-0021**).

⁸⁰ Tr. Day 1, 24:21–25:13; Resp. PHB, para. 7.

⁸¹ Tr. Day 1, 17:3-9.

email lack credibility. Claimant himself stated that his counsel told him he could not recall whether he received the email.⁸² His counsel, Mr. Patrick Jefferys, on the other hand, stated (in oral arguments and written pleadings) that he did not receive this email. In Respondent's view, there is a clear contradiction between Claimant's and his counsel's stances.⁸³

195. Respondent submits that Claimant admitted at the Hearing that on the face of it, this email indicated that it was sent to the same email address that continues to be in use by Mr. Jefferys.⁸⁴ Respondent states that the Government of South Africa did not "simply dream[] up" an email address and send an email to it.⁸⁵ Further, Claimant and his son both admitted that Mr. Jefferys has been their advocate since 2008.⁸⁶ It is, therefore, clear to Respondent that Claimant was aware of this email and deliberately concealed it from this Tribunal.

196. According to Respondent, the foregoing evidence establishes that both South Africa and Mozambique have unequivocally and repeatedly confirmed that the BIT is not in force. The position of the contracting States that the BIT is not (and never was) in force is conclusive for this Tribunal.

(ii) Notification required under Article 12(1) of the BIT (that the parties have complied with their respective constitutional requirements) was neither sent nor received by either country

197. In accordance with Article 24(1) of the Vienna Convention, a treaty only enters into force in such manner and on such date as it may provide or the parties agree.⁸⁷ Respondent argues that, even absent the authoritative Diplomatic Notes, the remainder of the record establishes that the BIT has not entered into force because neither South Africa nor Mozambique notified the other as required under Article 12(1) of the BIT. This Article provides:

⁸² Resp. PHB, para. 32, citing Tr. Day 2, 495:6-9.

⁸³ Resp. PHB, para. 32.

⁸⁴ Resp. PHB, para. 33, citing Tr. Day 2, 492:17-19.

⁸⁵ Resp. PHB, para. 33.

⁸⁶ Resp. PHB, para. 33, citing Tr. Day 2, 297:4-13.

⁸⁷ Vienna Convention on the Law of Treaties ("Vienna Convention") (RL-0082), Art. 24(1).

The Contracting Parties shall notify each other promptly when their respective constitutional requirements for entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the day following the day of receipt of the last notification.⁸⁸

198. This language is mandatory and requires delivery of the notifications. Respondent highlights that this was admitted by Claimant’s own Mozambican law expert, Mr. Helder Matlaba (“**Mr. Matlaba**”)⁸⁹ and South African law expert, Mr. Michael Zuko Nonxuba (“**Mr. Nonxuba**”).⁹⁰ Claimant has failed to produce any document to establish that such notifications were sent or received. Claimant’s two legal experts confirmed at the Hearing that they had not seen any such documents.⁹¹
199. According to Respondent, the only documents Claimant produced in support of its contention that a notification was provided by South Africa to Mozambique was a fax and attached draft notification.⁹² In Respondent’s view, the record establishes that the draft notification was an internal South African document, which was neither signed nor sent to Mozambique. As stated by Respondent’s South African law expert, Mr. van der Merwe, government documents are usually signed and stamped; in fact, the very person who prepared this draft confirmed to Claimant’s counsel that this was an internal document.⁹³ Claimant’s counsel, Mr. Rui Marto (“**Mr. Marto**”), during his cross-examination could not point to any other notification.⁹⁴ Claimant in its Response on Motion also admitted that both DTI and DIRCO unequivocally stated that no notification was given by South Africa to Mozambique.⁹⁵

⁸⁸ BIT (CL-0003 / RL-0077), Art. 12(1).

⁸⁹ Tr. Day 2, 345:5-14; 347:9-348:10.

⁹⁰ Tr. Day 2, 403:11-404:5.

⁹¹ Tr. Day 2, 348:20-349:3; 415:5-10.

⁹² See Facsimile from South African High Commission to South African Department of Foreign Affairs dated February 4, 1998, attaching “a copy of a note sent to the Mozambican Ministry of Foreign Affairs and Cooperation regarding the [BIT]” (C-0169).

⁹³ Email from Ms. de Beer to Mr. Marto dated July 11, 2017 (C-0172).

⁹⁴ Tr. Day 2, 374:20-376:13.

⁹⁵ Resp. PHB, para. 50, citing Cl. Response on Motion, para. 4.4.

200. Mozambique, through the Witness Statements of Mr. Manhiça, has also confirmed that no notification was sent by South Africa or vice versa.⁹⁶
201. Respondent maintains that the evidence is, therefore, clear and establishes that the notification requirements of Article 12(1) of the BIT were not satisfied by either Government.

(iii) The BIT was never ratified by South Africa as required under Section 231(2) of the South African Constitution

202. In addition, Respondent's position is that the BIT did not enter into force for a further reason, namely because it was never ratified by South Africa as required under Section 231(2) of the South African Constitution.
203. Section 231(2) of the Constitution of South Africa reads as follows:

An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).⁹⁷

204. This section requires that an international agreement be approved by both the National Assembly and the National Council of Provinces of South Africa. According to Respondent, the BIT falls squarely within the purview of Section 231(2) of the South African Constitution. As no such resolutions have been passed by either the National Assembly or the National Council of Provinces, the BIT, the Respondent contends, therefore has not entered into force.⁹⁸
205. Respondent submits that Claimant's argument that the BIT actually falls within Section 231(3) (and therefore is not subject to the requirement of receiving approval by resolution) is incorrect. Section 231(3) reads as follows:

⁹⁶ Resp. PHB, para. 51, citing Manhiça First Witness Statement, para. 10; Manhiça Second Witness Statement, para. 5; Mozambique Diplomatic Note (**R-0017**).

⁹⁷ Constitution of the Republic of South Africa (1996) ("**SA Constitution**") (Cl. Demonstrative Exhibit dated March 16, 2018), Sec. 231(2).

⁹⁸ Resp. PHB, para. 55.

An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.⁹⁹

206. Respondent argues that the DIRCO Guide¹⁰⁰ controls the analysis of which sub-paragraph of Section 231 is applicable and compels the conclusion that the BIT is governed by Section 231(2) for the following reasons:

- (i) The BIT does not itself provide that it enters into force on signature. The “Entry into Force” section of the DIRCO Guide provides that where an agreement falls within the purview of Section 231(2), the agreement usually states:

The Parties shall notify each other in writing when their respective constitutional requirements for entry into force of this Agreement have been fulfilled. This Agreement shall enter into force on the date of the last written notification.

This language is virtually identical to the language of Article 12(1) of the BIT.¹⁰¹ In contrast, where an agreement falls under Section 231(3), the DIRCO Guide provides that the agreement usually states:

This Agreement shall enter into force on the date of signature thereof by the Parties.

The BIT contains no such language. The absence of such language, the Respondent says, shows that the BIT is governed by Section 231(2) of the Constitution, and further confirms that the contracting States did not intend for the BIT to enter into force on execution.¹⁰²

⁹⁹ SA Constitution (Cl. Demonstrative Exhibit dated March 16, 2018), Sec. 231(3).

¹⁰⁰ DIRCO, “Practical Guide and Procedures for the Conclusion of International Agreements” (“**DIRCO Guide**”) (**RL-0084**).

¹⁰¹ Resp. PHB, para. 57, citing DIRCO Guide (**RL-0084**), p. 24.

¹⁰² Resp. PHB, paras. 56, 58-59, citing DIRCO Guide (**RL-0084**), p. 24.

(ii) The DIRCO Guide states that international agreements which fall under Section 231(2) are those that (1) require ratification; (2) have financial implications that require an additional budgetary allocation from Parliament; or (3) have legislative or domestic implications. Indeed:

(a) The BIT has extra-budgetary financial implications. Article 4 of the BIT requires South Africa to pay compensation for losses. Article 5 requires South Africa to pay compensation for expropriations which shall, at least, be equal to the market value of the investment expropriated plus interest. Article 7 requires South Africa to participate in ICSID and other international arbitrations and, therefore, incur fees and costs.¹⁰³

(b) Similarly, the BIT also has legislative implications. Article 2, the Respondent asserts, requires South Africa to promote foreign investment.¹⁰⁴ Article 3 requires South Africa to afford protections and provide full security to investments.¹⁰⁵

207. This, Respondent argues, further establishes that BIT is governed by Section 231(2) of the Constitution. Respondent submits that Claimant's arguments that the BIT fell under Section 231(3) and hence did not require ratification are incorrect because of the following:

(i) The Presidential Minute No. 97 of 1997 (referred to by Claimant in support of Claimant's argument that the BIT is of an "executive nature" within Article 231(3) of the Constitution) is only an approval to sign an international agreement.¹⁰⁶ It specifically states that the President approves that the BIT may be "entered into." According to the DIRCO Guide, a Presidential Minute has to be obtained regardless

¹⁰³ Resp. PHB, para. 61, citing DIRCO Guide (RL-0084), p. 11.

¹⁰⁴ The Tribunal notes that it is Article 3, not Article 2, that references protection of investments.

¹⁰⁵ Resp. PHB, para. 62.

¹⁰⁶ Resp. PHB, para. 64, citing Cl. Response on Motion, para. 4.2; Republic of South Africa, Office of the President, President's Minute No. 97 dated May 5, 1997 (C-0171).

of whether the agreements falls within Section 231(2) or (3).¹⁰⁷ This was also confirmed by Claimant's witnesses Messrs. Marto¹⁰⁸ and Nonxuba.¹⁰⁹

- (ii) The Witness Statements of Ms. de Wet and Ms. de Beer, employees of DIRCO, must be rejected for a number of reasons. They both admit a lack of recollection. Ms. de Wet admits that she had no personal knowledge of the circumstances surrounding Exhibit C-0169 (the 1998 fax and attached draft notification),¹¹⁰ while Ms. de Beer does not recall whether this document was delivered to Mozambique. Most importantly, neither of these two witnesses actually states that the BIT entered into force.¹¹¹

Ms. de Wet's statement that Section 231(3) applies to the BIT was clearly obtained under duress. Ms. de Wet changed her position after Claimant brought judicial proceedings against her in South Africa and Claimant's counsel, Mr. Marto, sent her a threatening email. Her statement must, therefore, be disregarded.¹¹²

- (iii) Claimant's reliance on a number of other South African BITs to conclude that this BIT falls under Section 213(3) is incorrect. Those other BITs and the record of what South Africa may have done with them are not before this Tribunal. This Tribunal has also not heard from the other contracting States who are party to those BITs. The Tribunal should, therefore, only focus on this BIT. In any case, an analysis of all these BITs would not change the result. For instance, the last BIT South Africa concluded was with Zimbabwe—its entry into force clause (Article 12(1)) is almost identical to Article 12(1) of the BIT. Mr. de Gama testified, in his affidavit in the

¹⁰⁷ Resp. PHB, para. 64.

¹⁰⁸ Resp. PHB, para. 65, citing Tr. Day 2, 361:20–362:1.

¹⁰⁹ Resp. PHB, para. 66, citing Tr. Day 2, 410:17-22.

¹¹⁰ See above paragraphs 192(iii) and 199.

¹¹¹ Resp. PHB, para. 67.

¹¹² Resp. PHB, paras. 69-71, citing email from Mr. Marto to Ms. de Wet dated November 13, 2017 (**R-0022**).

South Africa court case, that the South Africa-Zimbabwe BIT was concluded under Section 231(2).¹¹³

208. Respondent, therefore, submits that the record clearly establishes that the BIT required ratification pursuant to Section 231(2) of the Constitution, and it was not ratified by South Africa.

(iv) The Chief Treaty Section of the Office of Legal Affairs of the United Nations has also confirmed that there are no records that the BIT was ever submitted for registration

209. The DIRCO Guide, Respondent maintains, explains that Article 102 of the Charter of the United Nations (“**UN Charter**”) requires every member state to register its agreements with the Secretariat of the United Nations (“**UN**”) after they come into force. In South Africa, registering agreements is the responsibility of the Treaty Section. There is no evidence that this was ever done. The UN Treaty Section has confirmed as much to the Government of South Africa. The UN Conference of Trade and Development (“**UNCTAD**”) website also confirms that the BIT is not in force.¹¹⁴

210. According to Respondent, Claimant’s reliance on the Treaty Handbook prepared by the Treaty Section of the Office of Legal Affairs of the United Nations¹¹⁵ (which states that exchanges of diplomatic notes must be submitted by a party seeking registration of a BIT with the UN) to argue that since the BIT was listed on the UNCTAD website it must be in force, is flawed. Respondent believes that Claimant is treating the UNCTAD website and the UN Treaty Series interchangeably when they are not. The Treaty Handbook only applies to the UN Treaty Series and not to the UNCTAD website. The former is a valid and reliable source which the UN recognizes when determining whether a treaty is in force. The latter itself contains a disclaimer that “[w]hile every effort is made to ensure the

¹¹³ Resp. PHB, paras. 72-73, citing High Court of South Africa (Gauteng Division), Case No. 5420/2018, Confirming Affidavit of Mr. de Gama dated February 19, 2018 (**R-0026**), para. 10.

¹¹⁴ Resp. PHB, paras. 75, 81; *see also* UNCTAD Website Printout dated June 8, 2017 (**R-0010**); Email from Ms. Márcia Tavarez, UNCTAD Economic Affairs Officer, to Respondent’s counsel dated June 8, 2017 (**R-0011**). Respondent rejects as irrelevant an older UNCTAD Website Printout (undated) (**C-0191**) indicating that the UNCTAD website previously listed the BIT as in force: Resp. PHB, para. 81.

¹¹⁵ UN, Treaty Section of the Office of Legal Affairs, “Treaty Handbook” (**CL-0101**).

accuracy and completeness of the databases, UNCTAD assumes no responsibility for eventual errors or omissions.”¹¹⁶

211. Respondent points out that Ms. de Wet, in her affidavit filed in the South Africa court case, confirmed that the BIT was not registered with the UN. In fact, she submitted a letter from the UN Treaty Section confirming that there are no records in the Treaty Section that this BIT was ever submitted for registration.¹¹⁷ Therefore, Respondent considers it clear that the UN Treaty Section, which is a reliable source for determining whether a Treaty is in force or not, has no record of this BIT ever being registered or in force.¹¹⁸

b. Claimant’s Claims Under the Investment Law Must Also be Dismissed

212. Respondent contends that the only basis for consent to arbitration under the Investment Law that has been asserted by Claimant is the BIT itself. The BIT cannot constitute consent to arbitrate by Mozambique because such consent was conditioned on the fulfillment of the requirements set out in Article 12(1) of the BIT. These were never fulfilled and therefore, the BIT never entered into force. Since the BIT has not entered into force, there is no consent by Mozambique under the Investment Law. Claimant’s claim under the Investment Law, therefore, also fails.¹¹⁹

c. Claimant’s Estoppel Argument Fails

213. Finally, Respondent argues that Claimant’s estoppel argument should not be entertained and has no merit.
214. According to Respondent, Claimant’s estoppel argument is that Respondent allegedly misled investors as to the enforceability of the BIT and it should, therefore, be estopped from denying that the BIT is in force. Respondent submits that this argument fails for the following reasons:

¹¹⁶ Resp. PHB, paras. 76-77.

¹¹⁷ Resp. PHB, para. 80, citing High Court of South Africa (Gauteng Division), Case No. 5420/2018, Answering Affidavit of Ms. de Wet dated February 13, 2018 (**R-0023**), Annex G.

¹¹⁸ Resp. PHB, para. 82.

¹¹⁹ Resp. PHB, paras. 83-88; Resp. Opening Statement, slide 44.

- (i) It should not be entertained because it has not been properly presented. Claimant has simply made conclusory statements without citing any applicable law.¹²⁰ Article 1 of the Arbitration Rules requires that the parties to a dispute agree that it shall be referred to arbitration under these Rules. The doctrine of estoppel is not a substitute for an agreement. If the Tribunal finds that the BIT is not in force, that brings the proceedings to an end.¹²¹
- (ii) Article 24(1) of the Vienna Convention on the Law of Treaties provides “[a] treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.”¹²² The Vienna Convention does not authorize the creation of a treaty by estoppel or recognize the notion of consent by estoppel. The BIT cannot come into force by estoppel.¹²³
- (iii) In any event, estoppel requires reasonable reliance by the party claiming estoppel. There is no evidence to support Claimant’s allegation that Mozambique’s alleged misrepresentation over a period of nineteen years induced it to invest in the country. Claimant has only cited a CPI presentation¹²⁴ and a CPI PowerPoint.¹²⁵ The presentation is dated December 2016 while the PowerPoint is dated June 2014. These were, therefore, prepared years after Claimant’s alleged investment and in fact even after Claimant had registered its case with ICSID. Claimant could not, therefore, have relied on these while making its investment; Claimant himself admitted as much during his cross-examination.¹²⁶

In any case, the presentation does not indicate that the BIT is in force, or for that matter, any of the other treaties listed therein are in force. For instance, the

¹²⁰ Resp. PHB, para. 90.

¹²¹ Resp. PHB, para. 90.

¹²² Vienna Convention (**RL-0082**), Art. 24(1).

¹²³ Resp. PHB, para. 91.

¹²⁴ CPI Presentation, “Laws and Regulations Related to Foreign Direct Investment in Mozambique” (December 2016) (**C-0177**).

¹²⁵ CPI PowerPoint, “Unlocking Investment Opportunities in Mozambique: Japan-American Business Forum” (June 21, 2014) (**C-0192**).

¹²⁶ Resp. PHB, paras. 92-94; Tr. Day 2, 486:10–487:12.

presentation lists the Zimbabwe-Mozambique BIT and the Spain-Mozambique BIT. It is undisputed that neither of those BITs is in force.¹²⁷

Further, CPI presentations always include disclaimers indicating that their content does not constitute legal advice and CPI will not be responsible for any financial loss resulting from an investment made on the basis of the presentation. Even Claimant's Mozambican law expert, Mr. Matlaba, agreed that the CPI documents are not conclusive.¹²⁸

- (iv) Any representation made on the UNCTAD or ICSID websites are not misrepresentations made by Respondent nor are these websites authoritative.¹²⁹
- (v) The publication in the Mozambique Official Gazette of Resolution No. 48 of 1998 does not constitute any misrepresentation that the Treaty entered into force. Notification by both contracting States is yet to be sent. Claimant himself admitted that his lawyer in Mozambique checked the Official Gazette and delivered it to him but that he did not tell Claimant that publication was sufficient for the Treaty to enter into force. Claimant drew this conclusion himself, without any advice from counsel. He also admitted to not being informed about CPI disclaimers or the disclaimers on the UNCTAD website. The estoppel argument should, therefore, also be rejected for lack of reasonable reliance by Claimant.¹³⁰

Any reliance on representations made by Mr. de Gama cannot bind Respondent since Mr. de Gama was an employee of DTI which is a department of the Government of South Africa and not of Respondent. Claimant has failed to point to any official of *Respondent* who misled him or told him that the BIT was in force. Claimant's son admitted as much during his cross-examination.¹³¹

¹²⁷ Resp. PHB, para. 96.

¹²⁸ Resp. PHB, paras. 97-98; Tr. Day 2, 338:5-10.

¹²⁹ Resp. PHB, para. 101.

¹³⁰ Resp. PHB, paras. 101-103; Tr. Day 2, 487:13:19.

¹³¹ Resp. PHB, paras. 104-106; Tr. Day 2, 306:9-17.

- (vi) A party seeking estoppel must have acted reasonably. Claimant failed to reasonably investigate the status of the BIT.¹³²

215. For Respondent, the evidence shows that Claimant was repeatedly informed that the BIT had not entered into force, yet he refused to withdraw these proceedings. Claimant's estoppel argument should, therefore, be rejected by the Tribunal.¹³³

(2) Claimant's Position

216. The Tribunal notes at the very outset that Claimants' pleadings were often not easy to follow, and very often failed to cite to documents referenced or alluded to. The Tribunal has done its best, however, to faithfully summarize Claimant's position below.

a. The BIT was Ratified

217. According to Claimant, Respondent's argument that the BIT was never ratified relies on nine documents:¹³⁴

- (i) The Mozambique Diplomatic Note dated November 20, 2017;¹³⁵
- (ii) The South Africa Diplomatic Note dated November 27, 2017;¹³⁶
- (iii) The email from DTI dated June 12, 2017;¹³⁷
- (iv) The letter from DTI dated June 20, 2017;¹³⁸
- (v) The letter from Ms. de Wet dated July 26, 2017;¹³⁹
- (vi) The letter from Ms. de Wet dated February 5, 2018;¹⁴⁰

¹³² Resp. PHB, paras. 107 *et seq.*

¹³³ Resp. PHB, para. 112.

¹³⁴ Cl. PHB, para. 20.

¹³⁵ Mozambique Diplomatic Note (**R-0017**).

¹³⁶ South Africa Diplomatic Note (**R-0018**).

¹³⁷ Email from Mr. Jerry Mathye to Ms. Sharmila Naidoo dated June 12, 2017 (**R-0009**).

¹³⁸ Letter from Mr. Steven Mathate to Ms. Sharmila Naidoo dated June 20, 2017 (**R-0008**).

¹³⁹ Letter from Ms. de Wet to Shepstone & Wylie Attorneys dated July 26, 2017 (**R-0013**).

¹⁴⁰ Letter from Ms. de Wet to Ms. Anna Holloway dated February 5, 2018 (**R-0019**).

- (vii) The two Witness Statements of Mr. Manhiça;
- (viii) The updated UNCTAD website;¹⁴¹ and
- (ix) The updated ICSID website.¹⁴²

218. Claimant submits that the documents at (iii) to (vi) above are hearsay evidence which should be struck from the record.¹⁴³ The persons who drafted and sent these documents did not appear before this Tribunal and Claimant did not have the opportunity to test their evidence. Claimant also points out that Respondent did not make any attempt to produce the relevant DTI or DIRCO personnel to give evidence.¹⁴⁴
219. Claimant argues that Respondent's entire objection to jurisdiction is premised on the assumption that the BIT did not enter into force because it did not comply with Section 231(2) of the Constitution of South Africa; however, no motion lies before this Tribunal for dismissal of Claimant's claim for lack of jurisdiction based on Section 231(2) of the Constitution. Claimant submits that this BIT falls under Section 231(3) of the Constitution. This is sufficient, in Claimant's view, to dispose of Respondent's objection.¹⁴⁵

b. Notification under Article 12(1) of the BIT

220. According to Claimant, Respondent failed to suggest at the appropriate time that the BIT had not entered into force because either contracting State had failed to deliver a notification under Article 12(1) of the BIT. Claimant's position is that the evidence establishes that Mozambique did notify South Africa; Claimant lists the following facts as relevant in determining whether Mozambique in fact notified South Africa under Article 12(1):¹⁴⁶

¹⁴¹ UNCTAD Website Printout dated June 8, 2017 (**R-0010**).

¹⁴² ICSID Website Printout dated August 1, 2017 (**R-0016**).

¹⁴³ Cl. PHB, para. 20. The Claimant's submission as to hearsay in this regard is addressed below at paras. 377-379.

¹⁴⁴ Cl. PHB, para. 28.2.

¹⁴⁵ Cl. PHB, para. 22.

¹⁴⁶ Cl. PHB, paras. 25-27, 29.5.

- (i) CPI, which is a Mozambique Government institution that provides information to investors and the public, published a document titled “Laws and Regulations Related to Foreign Direct Investment in Mozambique.” Claimant argues that this document confirms that the BIT is in force and expressly states that only three BITs concluded by Mozambique (the Mozambique-South Africa BIT not being one of them) are not in force. Claimant’s evidence that CPI has been advertising, for the past nineteen years, that the BIT is in force has not been denied.¹⁴⁷
- (ii) The Official Gazette of the Mozambique Government confirmed the status of the BIT.¹⁴⁸
- (iii) Mozambique did not raise any objection on the ground that it had failed to notify South Africa that it had met its constitutional requirements until South Africa raised this issue.¹⁴⁹
- (iv) Mr. Manhiça’s evidence that the notification could not be “located” supports Claimant’s assertion that such a notification exists. The failure to locate the document does not justify the inference that it does not exist.¹⁵⁰
- (v) The UNCTAD and ICSID websites would not simply record that the BIT was in force without confirmation from some government or government source. Neither South Africa nor Mozambique have explained why both websites recorded the BIT as being in force.¹⁵¹
- (vi) South Africa has no documents in its possession to support the conclusion that the BIT never entered into force. In accordance with the DIRCO Guide, some eighteen to twenty-six documents need to come into existence before the President of South

¹⁴⁷ Cl. PHB, para. 25.1, citing CPI Presentation, “Laws and Regulations Related to Foreign Direct Investment in Mozambique” (December 2016) (C-0177).

¹⁴⁸ Cl. PHB, para. 25.2; Tr. Day 1, 253:5-6 (“Mozambique signed and published [the BIT] in the [O]fficial Gazette. All that is true.”); Official Gazette of the Republic of Mozambique, Resolution No. 48/98 dated July 28, 1998 (unofficial English Translation) (CL-0092), with a copy of the original publication of the resolution in the Official Gazette in Portuguese.

¹⁴⁹ Cl. PHB, para. 25.3.

¹⁵⁰ Cl. PHB, para. 25.4.

¹⁵¹ Cl. PHB, para. 25.5.

Africa signs a Presidential Minute. These documents *should* have been in DIRCO's records but are missing. The South African Government did not take any steps to investigate how the entire record was lost. The South African Government could easily have made inquiries to UNCTAD or ICSID to resolve this issue but failed to do so.¹⁵²

c. Respondent's Witnesses

221. Claimant addresses the testimony of each of the Respondent's witnesses in detail.

(i) Mr. Quintus van der Merwe

222. Claimant submits that Mr. van der Merwe's evidence is unacceptable and that he is a contradictory and biased witness. According to Claimant, Respondent's argument has finally been laid to rest not only through Ms. de Wet's statement (that the BIT falls under Section 231(3) of the Constitution of South Africa), but also DIRCO's concession at the South Africa court case hearing in February 2018.¹⁵³

223. His statement that Ms. de Beer informed him that the notification was only a draft was clearly rejected by her. According to him, Ms. de Beer had no recollection of this notification being sent. These two statements are "mutually destructive" and show that Mr. van der Merwe gave false testimony.¹⁵⁴

224. While Mr. van der Merwe criticized the fact that the notification was not signed or stamped, he failed to take into account that it was a copy contained on a computer. It is also clear that he did not conduct any research on the issue but simply made inquiries to DTI and DIRCO and then adopted their views as his own.¹⁵⁵

225. Similarly, he did not take into account the fact that DIRCO only had two documents in its possession relating to the BIT. When asked how, on the basis of only two documents,

¹⁵² Cl. PHB, paras. 26-27.

¹⁵³ Cl. PHB, paras. 31.1-31.2.

¹⁵⁴ Cl. PHB, paras. 31.3-31.4.

¹⁵⁵ Cl. PHB, paras. 31.6-31.7

DIRCO could possibly reach the conclusion that that BIT was not in force, he evaded the question and simply said that was what he had been told.¹⁵⁶

226. His suggestion that Article 12(1) of the BIT was similar to the language used in other Article 231(2) treaties ignores the DIRCO Guide which explicitly states that similar clauses may well be inserted in Article 231(3) treaties. He also failed to consider twenty-six treaties that were concluded under Article 231(3), as he was not asked to look at these treaties by Respondent.¹⁵⁷

(ii) Mr. Fernando Manhiça

227. According to Claimant, Mr. Manhiça's evidence was evasive. When asked why, at no stage prior to his statement of August 20, 2017, did he suggest that Respondent had failed to comply with its obligations regarding notification of ratification under the BIT, he stated that he did not see the relevance of Mozambique having been first or second in providing the notification under Article 12(1). He, therefore, regarded Mozambique's alleged failure to notify South Africa as irrelevant. When asked why Mozambique had not raised the issue of its own failure to send a notification under Article 12(1) of the Treaty at the time Claimant initiated the arbitration proceedings, he did not provide any answer and stated that he did not understand the question.¹⁵⁸

228. Likewise, when asked whether it was fair for CPI to advise an investor that the BIT was in force, he stated that the Parties were not here to argue whether it is fair or not. Further, he stated that the CPI documents could simply be ignored and were not binding on the international legal plane.¹⁵⁹

(iii) Ms. Teresa Filomena Muenda

229. Claimant submits that Ms. Teresa Filomena Muenda ("**Ms. Muenda**") prevaricated and evaded questions relating to what her brief was, what instructions she had received, what research she had carried out, whether she had looked into the history behind the conclusion

¹⁵⁶ Cl. PHB, para. 31.8.

¹⁵⁷ Cl. PHB, paras. 31.9-31.12.

¹⁵⁸ Cl. PHB, paras. 33.3-33.5.

¹⁵⁹ Cl. PHB, paras. 33.10-33.12.

that the BIT was not in force, and why she failed to ask the Minister of Foreign Affairs to make his file available to her.¹⁶⁰

230. When asked why she had not simply pointed out to her client that the BIT was not in force because Mozambique had not delivered its notification, no response was forthcoming. When asked to point to any paragraph in her Witness Statements where she had stated that Mozambique had not provided its notification, she declined to answer and evaded the issue.¹⁶¹
231. When asked about CPI's representations, she stated that CPI's representations could not change the requirements of Article 12. When asked whether, assuming there was a misrepresentation, the State would be liable for damages, she again declined to answer the question. In the Claimant's view, it is highly unlikely that the witness was ignorant of the fact that under Articles 58 and 108 of the Constitution of Mozambique the State is liable.¹⁶²

d. Claimant's Witnesses

232. Claimant also emphasizes some of the key points from the testimony of his witnesses.

(i) Mr. Michael Zuko Nonxuba

233. Mr. Nonxuba confirmed that there is evidence showing that the Treaty was listed on the UNCTAD website as being in force for 18 years.¹⁶³

(ii) Mr. Dror Besserglik

234. Claimant states that his son, Mr. Dror Besserglik, confirmed his statement "*in toto*" and was a thorough, accurate and honest witness.¹⁶⁴

¹⁶⁰ Cl. PHB, paras. 34.3-34.4.

¹⁶¹ Cl. PHB, paras. 34.1-34.2.

¹⁶² Cl. PHB, paras. 34.11-34.13, 35.

¹⁶³ Cl. PHB, para. 37.2.

¹⁶⁴ Cl. PHB, para. 38.

(iii) Mr. Frederico Lucas Jamisse Mossugueja

235. Mr. Frederico Lucas Jamisse Mossugueja (“**Mr. Mossugueja**”) confirmed that he personally went to the Ministry of Foreign Affairs in Mozambique to inspect the file on the BIT but was not allowed to do so because it was allegedly a classified document.¹⁶⁵

(iv) Mr. Helder Amaral Matlaba

236. Mr. Matlaba confirmed that he provided the CPI website details to Claimant’s attorneys in 2015. He clearly stated that in his opinion, CPI is promoting and disseminating information about a number of BITs which Mozambique has signed and ratified. According to him, the CPI Presentation¹⁶⁶ states that all of these BITs are in force except for the ones with the United Arab Emirates, Zimbabwe and Spain. He further clarified that in his opinion, the BIT had been ratified and published as if it were in force.¹⁶⁷

(v) Mr. Rui Marto

237. Mr. Marto was clear that Respondent “could not have it both ways.” It could not, on the one hand, rely on the DIRCO Guide and argue that it must be followed and, on the other hand, argue that there are no missing documents when none of the documents required pursuant to the DIRCO Guide are available. Further, Mr. Marto was never asked by Respondent if Ms. de Wet had signed her Witness Statement under duress.¹⁶⁸

(vi) Mr. Oded Besserglik

238. Claimant views his own testimony as clear and confirming a number of points, including the following:¹⁶⁹

- (i) Neither DTI nor DIRCO had a copy of Ms. de Beer’s letter and the notification until that document was provided to them by Claimant.

¹⁶⁵ Cl. PHB, para. 39.

¹⁶⁶ CPI PowerPoint, “Unlocking Investment Opportunities in Mozambique: Japan-American Business Forum” (June 21, 2014) (C-0192).

¹⁶⁷ Cl. PHB, para. 40.

¹⁶⁸ Cl. PHB, para. 41.

¹⁶⁹ Cl. PHB, para. 42.

- (ii) Claimant first contacted Mr. de Gama in 2013. Mr. de Gama offered to assist Claimant as DTI wanted to help South African investors reclaim their losses.
- (iii) Mr. de Gama told Claimant that the BIT was in force and provided him with a letter from Ms. de Beer and the notification from South Africa to Mozambique under Article 12(1) of the BIT. Mr. de Gama further confirmed that South Africa had received a similar notification from Mozambique and undertook to find it.
- (iv) After Respondent raised the present jurisdictional objections, Claimant spoke to Mr. de Gama who confirmed that he would assist Claimant and once again affirmed that the BIT was in force. When a draft affidavit was sent to Mr. de Gama, however, he never responded.
- (v) Claimant received a report given by Mr. Luke Peterson stating that Mr. Peterson had been informed by the South African Department of Foreign Affairs that the BIT was in force.¹⁷⁰
- (vi) Claimant then checked the UNCTAD and ICSID websites.
- (vii) A presentation was given by CPI at a Japan-Africa Business Forum in Tokyo on June 21, 2014, where it confirmed that the BIT was in force. The presentation contained no disclaimer.
- (viii) At no stage did Mr. de Gama inform Claimant that he had not been able to conclusively establish whether the BIT was in force.
- (ix) Mr. de Gama's affidavit in the South Africa court case is incorrect.

239. According to Claimant, the issue of whether South Africa and Mozambique notified one another and the BIT entered into force between the two countries has to be determined on the balance of probabilities.¹⁷¹

¹⁷⁰ L. Peterson, Dialogue on Globalization, Occasional Papers No. 26, "South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights" (November 2006) (C-0182).

¹⁷¹ Cl. PHB, para. 43.4.

240. In light of the evidence submitted before the Tribunal, Claimant submits that South Africa has no record of the notification or any relevant documentation relating to BIT, while Respondent is dishonest in alleging that it failed to notify South Africa.¹⁷²

e. Relevance of Lack of Registration in UN Treaty Series

241. Finally, Claimant argues that he is not barred from availing ICSID's jurisdiction under the ICSID Additional Facility simply because the BIT is not registered under the UN Treaty Series. Article 102 of the Charter of the UN only bars the *parties* to the treaty from invoking it if the treaty has not been registered in accordance with the provisions of paragraph 1 of Article 102. Claimant is a third party and may still invoke the BIT against Mozambique.¹⁷³

f. Estoppel

242. According to Claimant, the doctrine of estoppel derives from the general principle of good faith and is well established in international law. The doctrine of estoppel is, therefore, applicable unless there is good reason to exclude it. An international tribunal will not only have jurisdiction to hear a case against a State which has explicitly consented to its jurisdiction but also against a State which has implicitly consented to its jurisdiction through words, conduct or silence.¹⁷⁴

243. Claimant argues that in this case, if the Tribunal were to find that the BIT did not enter into force, then Respondent should be estopped from "relying on its fraudulent misrepresentations", which were made over a period of nineteen years and which induced Claimant to invest in Mozambique. Had Claimant been aware of the fact that he would receive no protection under this BIT, he asserts, he would not have invested in Mozambique. As a consequence, he has suffered substantial damages.¹⁷⁵

¹⁷² Cl. PHB, para. 43.5.

¹⁷³ Cl. PHB, paras. 43.1-43.3.

¹⁷⁴ Cl. PHB, paras. 13-17.

¹⁷⁵ Cl. PHB, para. 18.

B. THE PARTIES' POSITIONS ON THE FAILURE OF RESPONDENT TO RAISE ITS JURISDICTIONAL OBJECTION AT THE OUTSET

(1) Claimant's Position

244. Claimant submits that Article 45 of the Arbitration Rules prescribes that:

- (i) A jurisdictional objection must be made as early as possible;
- (ii) At the latest, the objection must meet the deadline for the counter-memorial; and
- (iii) If the facts forming the basis of the objection were unknown at the time, the objection may be made later.¹⁷⁶

245. Claimant argues that, as far as Respondent is concerned, the obligation to raise the objection regarding the BIT arose as soon as it received Claimant's Request, i.e., prior to the constitution of the Tribunal. In fact, Claimant's attorney informed Respondent, on June 23, 2010,¹⁷⁷ August 22, 2011,¹⁷⁸ and June 26, 2013,¹⁷⁹ that Claimant intended to institute an action against it before ICSID pursuant to the BIT. Respondent, however, failed to raise this jurisdictional objection even when it filed its Counter-Memorial on April 22, 2016. It was only on June 20, 2017 that Respondent raised this jurisdictional objection—almost six years after it was informed of this arbitration.¹⁸⁰

246. Claimant contends that, during this entire time, Respondent had knowledge or at least constructive knowledge as to whether South Africa or Mozambique had submitted their respective notifications. Respondent, therefore, failed to raise this objection “as soon as possible” as required by Article 45.¹⁸¹

¹⁷⁶ Cl. PHB, paras. 2-3.

¹⁷⁷ Letter from Mr. Nicholas Kaufman to H.E. Mr. Victor Manuel Borges, Minister of Fisheries dated June 23, 2010 (C-0150).

¹⁷⁸ Letter from Mr. Nicholas Kaufman to H.E. Mr. Victor Manuel Borges, Minister of Fisheries dated August 22, 2011 (C-0152).

¹⁷⁹ Letter from Mr. Nicholas Kaufman to Gabinete Jurídico da Presidência da República dated June 26, 2013 (C-0153).

¹⁸⁰ Cl. PHB, paras. 4-6.

¹⁸¹ Cl. PHB, para. 7.

247. While Article 45(2) does create an exception for newly discovered facts, Claimant maintains that the failure to inform the Tribunal that the BIT was not in force hardly constitutes a new fact: Mozambique was bound to have knowledge of this.¹⁸²
248. Claimant submits that while Article 45(3) gives the Tribunal discretion to consider the issue of jurisdiction at any stage of the proceedings, this discretion should not be exercised in favor of Respondent because:¹⁸³
- (i) There has been a “conspiracy of silence” by South Africa whose officials have refused to openly explain their reasoning for stating why the BIT is not in force;
 - (ii) The DIRCO Guide provides for twenty-six documents to come into existence before the President will sign the Presidential Minute for a Section 231(2) or (3) treaty. All these documents have gone missing from the files of DTI and DIRCO (yet the Presidential Minute was in fact signed);¹⁸⁴
 - (iii) The conduct of Respondent has been deplorable. Claimant points in this regard to:
 - (a) a statement by the Director General of Legal Affairs of Mozambique that the continued advertising by CPI should be ignored despite the potential harm caused to investors;
 - (b) Respondent’s attempt to, in Claimant’s view, “besmirch” the reputation of Claimant’s counsel and its South African law expert, Mr. Nonxuba;
 - (c) Claimant’s view that each of Respondent’s witnesses has shown bias, evasion and untruth;
 - (d) that Respondent has managed to unnecessarily delay this arbitration; and
 - (iv) Finally, with respect to the evidence, Claimant argues that the fact that neither South Africa nor Mozambique were able or willing to produce their respective notifications “does not mean that the [notifications] were not exchanged.” In Claimant’s view, the evidence indicates, on the balance of probabilities, that South

¹⁸² Cl. PHB, para. 9.

¹⁸³ Cl. PHB, para. 10.

¹⁸⁴ Cl. PHB, paras. 27, 29.5; Republic of South Africa, Office of the President, President’s Minute No. 97 dated May 5, 1997 (C-0171).

Africa's notification was indeed delivered to Mozambique; that conclusion is buttressed by Mozambique's advertising that the Treaty was in force.

249. Claimant also argues that Article 33 of the Arbitration Rules prescribes that any step taken after the expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the parties an opportunity of a hearing, decides otherwise. Claimant states that Respondent has failed to make out any case of special circumstances. Further, Article 34 provides a clear sanction for parties that miss deadlines for procedural steps or to raise necessary objections, namely that they waive the right to object.¹⁸⁵

(2) Respondent's Position

250. Respondent argues that Article 45(2) of the Arbitration Rules has been satisfied. According to Respondent, the relevant facts on which its jurisdictional objections are based only became known to it after late 2016. These facts include:

- (i) The indication on the ICSID website that the BIT is in force was contradicted in late 2016 by ICSID's publication of a treaties compilation indicating that the BIT was not in force;
- (ii) Claimant was informed as early as 2011, through an email to his counsel, that the BIT was not in force;
- (iii) Claimant never disclosed this email to ICSID or the Tribunal;
- (iv) The notification which Claimant had submitted to ICSID as evidence of an actual notification from South Africa to Mozambique was in fact a draft that had never been shared by South Africa;
- (v) South Africa did not indicate its clear and unequivocal position that the BIT was not in force until 2017 and 2018 through various emails, letters, affidavits and

¹⁸⁵ Cl. PHB, paras. 11-12.

pleadings that were submitted in these proceedings and the South Africa court case;
and

(vi) South Africa did not confirm its official position to Mozambique until the exchange of Diplomatic Notes in November 2017.¹⁸⁶

251. Respondent maintains that it has, therefore, demonstrated special circumstances for invoking Article 45(2).

252. In any case, Respondent asserts that the Tribunal has an independent and continuing obligation to consider its own jurisdiction and competence as set out in Article 45(3) of the Arbitration Rules. Since the BIT has not entered into force, this Tribunal and ICSID cannot create jurisdiction by an arbitration rule relating to the timing of filings in the proceedings.¹⁸⁷

C. THE TRIBUNAL'S ANALYSIS

253. The Tribunal has carefully considered all the pleadings, submissions, evidence and authorities on the record. It has, however, not found it necessary to mention or cite all of these in this Award. The Tribunal has discussed only those found most relevant to the conclusions it has reached. Any omission to mention any specific materials before it does not mean that such materials have not been considered by the Tribunal.

254. In the Sections that follow, the Tribunal considers Claimant's preliminary procedural objections to Respondent's fundamental objection to jurisdiction of both ICSID and the Tribunal in this matter (**Section V.CI.A(1)**) and thereafter the merits of Respondent's fundamental objection (**Section V.C(2)**).

(1) Claimant's Preliminary Procedural Objections

255. The Tribunal is of the view that if either of Claimant's preliminary procedural objections to Respondent's new objection to jurisdiction (Motion to Dismiss), based on Article 45(2)

¹⁸⁶ Resp. PHB, para. 115.

¹⁸⁷ Resp. PHB, paras. 116-117.

of the Arbitration Rules and on waiver stemming from Articles 33 and 34 of the Arbitration Rules, succeed *and* the Tribunal also declines to exercise its authority under Article 45(3) of the Arbitration Rules, then Respondent's Motion to Dismiss would fail. In the two Subsections that follow, therefore, the Tribunal will first consider the two preliminary procedural objections of Claimant:

- (i) Whether under Article 45(2) of the Arbitration Rules, Respondent is barred from raising objections to jurisdiction, as a motion *in limine*, at this stage of the proceeding (**Subsection (aV.C.a)**); and
- (ii) Whether on a reading of Articles 33 and 34 of the Arbitration Rules, Respondent has waived its right to raise a jurisdictional objection to the claim at this stage of the proceeding (**Subsection (b)**).

256. Thereafter, the Tribunal addresses the related issue for determination:

- (i) Whether, even if under the Arbitration Rules, it is too late for Respondent to affirmatively raise a new preliminary objection to jurisdiction, the Tribunal is nevertheless duty bound, under Article 45(3) of the Arbitration Rules, to consider, of its own volition, its own jurisdiction (and in doing so inevitably to consider the fundamental objections to the Tribunal's jurisdiction raised by the Respondent) (**Subsection (c)**).

a. Time for Filing Preliminary Objections

257. On July 3, 2014, the Acting Secretary-General registered the Request. On June 20, 2017, Respondent filed its Motion to Dismiss, its principal ground being that the BIT had not entered into force.

258. Many developments occurred between July 3, 2014 and June 20, 2017, including: the Minister of Fisheries wrote two letters to the Secretary-General of ICSID raising several objections to jurisdiction (not included in these was the fundamental objection to jurisdiction, now raised in the Motion to Dismiss), the Parties appointed their arbitrators and ICSID appointed the President of the Tribunal.

259. On January 26, 2015, the Secretary-General informed the Parties that, all three arbitrators having accepted their appointments, the Tribunal was deemed constituted. Article 45(6) of the Arbitration Rules allowed Respondent, “no later than 30 days after the constitution of the Tribunal, and in any event before the first session” to file objections, if it considered the claim to be “manifestly without legal merit.” Here was an opportunity, provided by the Arbitration Rules, to raise the objections being raised now. It was not availed of.
260. Following its first session, on December 15, 2015, the Tribunal issued Procedural Order No. 1 bifurcating issues of jurisdiction and liability from the issue of damages. On January 8, 2016, Claimant filed his Memorial. On April 22, 2016, Respondent filed its Counter-Memorial supported by witness statements, exhibits and authorities.
261. Filed almost 21 months after the registration of the Request, this Counter-Memorial, totaling 160 pages, raised multiple objections to jurisdiction (in 90 paragraphs spread over 46 pages). Nowhere in these did Respondent even hint that the BIT had not entered into force.
262. Nine months later, on January 23, 2017, Respondent filed a Rejoinder, totaling 230 pages. In 81 paragraphs, over 46 pages, it raised several objections to jurisdiction without mentioning that the BIT was not in force.
263. Article 45(2) of the Arbitration Rules states:
- Any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General as soon as possible after the constitution of the Tribunal and in any event no later than the expiration of the time limit fixed for the filing of the counter-memorial or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.
264. The language of this Article is similar to Rule 41(1) of the ICSID Rules of Procedure for Arbitration Proceedings (applicable to arbitration proceedings under the ICSID Convention). It reads:

Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

265. A reading of Article 45(2) suggests that the time for filing of objections commences immediately after a tribunal is constituted. The use of the words “as soon as possible” make it clear that the objection must be filed without any delay and insofar as possible immediately after the constitution of the tribunal. This Article permits such objections to be raised until the expiry of the time limit for the filing of the counter-memorial. The latter, however, is the outer limit. The primary obligation is to file the objection as soon as possible. Only when this obligation cannot be so discharged may a party seeking to file the objections have further time. As observed by the *Pac Rim v. El Salvador*¹⁸⁸ tribunal, with regard to Rule 41(2) of the ICSID Rules of Procedure for Arbitration Proceedings:

The imposition of this time limit is an additional condition, not an alternative requirement. In other words, the indicated deadline does not negate the primary obligation to raise jurisdictional objections as early as possible. The exception to the time limit for objections based on facts that were unknown at that time further confirms that the governing condition remains that they should be raised “as early as possible.”¹⁸⁹

¹⁸⁸ The Tribunal has, where it considered it useful to do so, referenced relevant case law even if not expressly relied on by one or other of the Parties. That case law, however, is referenced merely to establish that the Tribunal’s analysis, made on first principles, is not inconsistent with approaches taken by other Tribunals. The Tribunal, therefore, did not consider that it would have been aided, in this regard, by soliciting additional submissions from the parties.

¹⁸⁹ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, October 14, 2016 (“*Pac Rim v. El Salvador*”) (available at: https://www.italaw.com/sites/default/files/case-documents/italaw7640_0.pdf), para. 5.42. See also para. 5.43 referring to: *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008 (“*Desert Line v. Yemen*”) (available at: https://www.italaw.com/sites/default/files/case-documents/ita0248_0.pdf), para. 97; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, December 19, 2012 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1324.pdf>), para. 257.

266. The further time for filing the objections, as per Article 45(2), is also not open-ended. The objections must be filed “in any event no later than the expiration of the time limit fixed for the filing of the counter-memorial.” The language is unequivocal. The objections cannot be filed after the counter-memorial has been filed or the time for filing it has expired. The use of the words “in any event” means that the objections must be filed, before this date, regardless of what happens. These words admit of no exception save for the one specifically admitted by the Article itself.
267. That exception, as per the Article, is to be made where “the facts on which the objection is based are unknown to the party at that time.” The burden, therefore, was on Respondent to prove that, immediately after the Tribunal was constituted and until June 20, 2017 when the Motion to Dismiss was filed, it was not aware of the fact that the BIT was not in force. That burden has not been discharged.
268. Indeed, it was not an easy burden to discharge. The Tribunal finds it difficult to conceive of circumstances where a respondent State which, after signing and ratifying a treaty, has not issued a notification to give effect to it, yet can claim that this fact “was unknown” to it. It is even more difficult to accept that such a fact continued to remain so unknown in spite of: (i) the filing, against the State, of a significant financial claim, based on that very treaty; and (ii) the preparation and filing of a counter-memorial raising several jurisdictional objections. The latter, at the very least, would have required an examination by Respondent of its records. Such an examination would have made it evident that the treaty was not in force as the necessary notification had not been issued. If circumstances prevented the Respondent from knowing this fact, from an examination of its own records, it was for Respondent to specifically plead and prove these. This has not been done.
269. In the Tribunal’s view, knowledge of the facts for the purpose of Article 45(2) means facts which were known to Respondent or ought reasonably to have been so known.¹⁹⁰ The

¹⁹⁰ This conclusion is consistent with that reached by other tribunals. *See Desert Line v. Yemen*, para. 97: “The fact that objections shall be filed with ICSID ‘no later’ than the deadline for the Counter-Memorial does not mean that the Respondent was not bound to raise them before that date, if such objections were **or ought to have been already manifest**, in view of the ‘as early as possible’ requirement in the first sentence of Article 41” (emphasis added). *See also Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on the Respondent’s Request of 4 April, April 30, 2018 (“*Gavrilović v. Croatia*”) (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9871.pdf>); para. 41: “these facts **should have been**

Tribunal recognizes that constructive knowledge is not an express requirement of the language of the Article. In the interpretation of time limit clauses, however, where a limitation runs from the date of knowledge of a party, it is reasonable to take the view that actual knowledge need not be proved by the other party. In many such cases, insistence on actual knowledge would give an unfair advantage to the party who alone could have had knowledge of all the facts, by insisting that, until such time actual knowledge is proved, time would not begin to run against it. A reasonable construction of the language that the “facts on which the objection is based are unknown to the party at that time” would, therefore, include facts in the constructive knowledge of the party at that time. If a jurisdictional fact is known or reasonably ought to have been known by a party, then that party is required to act promptly. Dilatory conduct would have the consequence of making time run against a party from the date of not only such actual but also constructive knowledge.

270. The Article sets the “filing of the counter-memorial” as the outer time limit for raising the objection because it is reasonable to expect that one of the first things a State, faced with a treaty-based claim by an investor, would do is to examine its records, consider its defense and raise objections, if any, to the competence of the Tribunal.
271. The Tribunal is justified in drawing the inference that, on a reasonable examination made within a reasonable time, Respondent would have known or indeed ought to have known the fact that the notifications necessary to bring the treaty in force had, in its view, not been issued either by Respondent or by South Africa. In this case in particular, proof that Respondent actually knew such a fact is unnecessary as it is inconceivable that Respondent, on a reasonable examination of its records, could possibly have remained unaware of such a fundamental objection to the competence of the tribunal.
272. A party who was aware or could have, by an examination of its records, made itself aware of the fact that the BIT was not in force, is not protected by the exception. A different

known to the Respondent” (emphasis added); *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009 (“*Siag v. Egypt*”) (**CL-0123**), para. 293: “The pertinent question in the Tribunal’s view is whether Egypt knew **or should have known** of the bases of its objection [...]” (emphasis added).

interpretation would mean that a respondent could raise a fundamental objection to the jurisdiction of a tribunal, at any stage of the proceedings, no matter how late without any fear of consequences. It can wait until a claimant has expended considerable time, effort and money and then put a spanner in the works by claiming that it was ignorant of facts which it ought to have been aware of had it made a reasonable effort or examined its own records. That would not be a correct interpretation of Article 45(2).

273. Thus, Respondent could succeed in claiming the benefit of the exception only if it could prove that it was not only unaware that the BIT was not in force but also that it could not have reasonably been so aware.

274. Respondent has given several reasons to support its submission that its case is covered by the exception to Article 45(2). These are examined below.

(i) ICSID website showed BIT to be in force

275. ICSID receives information about BITs and displays that information on its website in what is described as a “Database of Bilateral Investment Treaties.” This website sets forth information for BITs, including signature date and date of entry into force, and informs users that the data therein is “based on information provided by governments or found on governmental websites” and that ICSID “cannot warrant its accuracy.” The website, thus, indicates to users merely that, on the basis of information received by ICSID, the treaties mentioned there may be in force. It is not an official publication of BITs in force. It creates no rights and gives rise to no obligations on the part of any of the State parties to the BITs.

276. A State, in particular, cannot claim that it was misled by inaccurate information on a publicly accessible and non-official website with respect to a BIT which it itself had negotiated, signed and ratified. Any information on such a website is at best a secondary source. The primary source are the records of the State parties to the BIT. They ought to know if the information displayed on the website is inaccurate. If a website displays incorrect information, it is for them to point out any inaccuracies in the website information and ask for it to be corrected. Having failed to do so they cannot rely on such secondary information, whose accuracy is not guaranteed, to claim that they were misled by it.

277. Indeed, this seems to be a point on which Respondent is clear. Counsel for the Respondent, when cross-examining Claimant, put it to him that “the ICSID website has a disclosure that the information on it may or may not be accurate, that it’s not authoritative [...]”¹⁹¹
278. Similarly, Respondent, in contesting Claimant’s position on another issue, submits, “[t]he ICSID and UNCTAD websites also are not authoritative. The ICSID website states that the database is ‘not conclusive.’”¹⁹²
279. Respondent, having itself taken the position that the ICSID website was not an authentic source of information cannot, when it suits it, submit that it was misled by the website and was entitled to claim that its case was within the exception to Article 45(2).
280. An investor making a claim or a State defending it must carry out their own due diligence to confirm whether the foundational document on which the claim is based, i.e., the BIT, is in force. For a State, the first place to look for such confirmation is its own records. It may next seek confirmation from the other State party to the BIT. Respondent had plenty of time, from the registration of the Request on July 3, 2014 and thereafter again from the constitution of the Tribunal on January 26, 2015 until the filing of its Counter-Memorial on April 22, 2016, to examine its own records and make necessary inquiries of South Africa. Having failed to do either, it cannot claim that the delay in filing the objection was caused by some inaccurate information on the ICSID website.
281. Respondent submits that the information on the ICSID website was “contradicted in late 2016 by ICSID’s publication of a treaties compilation indicating instead that the [...] BIT ha[d] not entered into force”.¹⁹³ This compilation is on the record.¹⁹⁴ It was issued in December 2016. As observed earlier, Respondent did not need any one else to tell it that the BIT it had signed and ratified had not come into force. This information was available in the primary records which were in its custody. Respondent, therefore, knew or ought to have known that the BIT was not in force. Any information made available in any

¹⁹¹ Tr. Day 2, 489:7-10.

¹⁹² Resp. PHB, para. 101.

¹⁹³ Resp. PHB, para. 115.

¹⁹⁴ ICSID, *Investment Promotion and Protection Treaties: Chronological Index* (December 2016) (R-0012).

publication was at best secondary. Further, there is no explanation on the record why Respondent waited six months after this publication to file its Motion to Dismiss.

282. The Tribunal, therefore, rejects Respondent’s submission that the “indication on the ICSID website”¹⁹⁵ that the BIT was not in force was a cause for or can excuse the delayed filing of Respondent’s Motion to Dismiss.

(ii) Mr. Jefferys knew that the BIT was not in force

283. Respondent also relies on the actions of Claimant (through his counsel) in support of its argument that it should be able to avail itself of the Article 45(2) exception. In particular, Respondent submits that Ms. Rika van der Walt of the South African Treaty Section in DIRCO’s Office of the Chief State Law Adviser wrote an email to Mr. Jefferys on December 1, 2011 stating that the BIT was signed on May 6, 1997 but was not in force.¹⁹⁶ Ms. van der Walt stated that the Department of Trade and Industry is the “line function department of investment agreements” and is directly responsible for their implementation; she also stated that she had “contacted them as well and our political desk to verify that the record that we have is indeed correct.”¹⁹⁷

284. According to Respondent, Claimant did not disclose this 2011 email to ICSID, the Tribunal or the Respondent (ultimately it was disclosed in February 2018, when the Tribunal ordered the Claimant to disclose materials from the South African Court case¹⁹⁸).

285. As for the alleged South African notification to Mozambique submitted by Claimant, Respondent maintains that this was an internal Government draft which was never communicated to Mozambique. It further argues that South Africa had also “repeatedly informed the Claimant that the [...] BIT had not entered into force”.¹⁹⁹

¹⁹⁵ Resp. PHB, para. 115.

¹⁹⁶ Email from Ms. Rika van der Walt to Mr. Patrick Jefferys dated December 1, 2011 (**R-0021**).

¹⁹⁷ Email from Ms. Rika van der Walt to Mr. Patrick Jefferys dated December 1, 2011 (**R-0021**).

¹⁹⁸ See above paragraph 103.

¹⁹⁹ Resp. PHB, para. 115, citing Facsimile from South African High Commission to South African Department of Foreign Affairs dated February 4, 1998, attaching “a copy of a note sent to the Mozambican Ministry of Foreign Affairs and Cooperation regarding the [BIT]” (**C-0169**).

286. The Tribunal has taken note of the alleged conduct of Claimant in this regard. It is, however, of the view that such alleged conduct, in the facts of this case, could not have possibly misled or delayed Respondent in filing the objections within time. Respondent was one of the two custodians of the record relating to the BIT being in force. A glance at its own records was sufficient to convey to Respondent all the information it needed to submit that the BIT was not in force and the Tribunal had no jurisdiction.
287. Claimant could also not have prevented Respondent from making the necessary inquiries with South Africa. The allegations of Respondent—that Claimant made inquiries about the BIT in 2011, and later with officials of South Africa, and was told that the BIT was not in force—only goes to show that this information was readily available with South Africa. All that Respondent had to do was to approach the concerned officials of South Africa; had it done so, it would have known that the BIT was not in force.
288. The Tribunal would like to recall that even this was unnecessary. An examination of its records would have revealed to Respondent that the two notifications, i.e., by South Africa and by the Respondent itself, had neither been issued by nor served upon either State party to the BIT.
289. The Tribunal is, therefore, of the view that even if Mr. Jefferys, counsel for Claimant, was aware that the BIT was not in force and failed to so inform ICSID, the Tribunal and Respondent, that would not condone Respondent filing its objection almost two and a half years after the constitution of the Tribunal and more than a year after it submitted its Counter-Memorial. This is particularly so for the reason that the contents of the 2011 email which are relied upon by the Respondent establish that the information about the BIT not being in force was easily available from South Africa since 2011. There is nothing on the record to suggest that had Respondent sent an email to South Africa it would not have received the same response that was allegedly sent to Mr. Jefferys. Likewise, a simple inquiry would have revealed that Exhibit C-0169 was a draft document. It appears that all Respondent had to do was to write an email to the relevant South African officials and the information would have been made available to it. After all that is exactly what Mr. Jefferys allegedly did.

290. The Tribunal is, therefore, of the view that Mr. Jefferys' alleged failure to disclose the information he had received from the South African authorities about the BIT not being in force or alleged misuse of a draft notification as final cannot bring the case of Respondent within the exception to Article 45(2) of the Arbitration Rules.

(iii) South Africa did not confirm its position till November 2017

291. Respondent submits that the position of South Africa with regard to the BIT was not clear until the exchange of correspondence in 2017 and 2018 and the South Africa court case. It further submits that the official position of South Africa was not confirmed until the exchange of Diplomatic Notes in November 2017. According to Respondent, these circumstances demonstrated that the requirements of Article 45(2) of the Arbitration Rules were satisfied.²⁰⁰

292. The Tribunal may take the last submission, in this regard, first. Respondent filed the Motion to Dismiss on June 20, 2017. Five months later, in November 2017, the Diplomatic Notes between Mozambique and South Africa were exchanged.²⁰¹ It is, thus, obvious that the Motion to Dismiss was not based on such Diplomatic Notes. If Respondent could file the Motion five months before these Notes were exchanged, surely it could have filed it earlier as well.

293. It is Respondent's case that as far back as 2011, South Africa had informed Mr. Jefferys that the BIT was "not in force."²⁰² If that is correct, then all that Respondent had to do was to make an inquiry, similar to that made by Mr. Jefferys, and it would have been informed accordingly by South Africa. The Tribunal recalls here that for the BIT to enter into force, both South Africa and Respondent were required to notify one another that their internal constitutional processes were complete. It is, thus, obvious that all that Respondent had to do was to examine its own archives to discover that South Africa had not sent, and it had not received, the required notification.

²⁰⁰ Resp. PHB, para. 115.

²⁰¹ Mozambique Diplomatic Note (**R-0017**); South Africa Diplomatic Note (**R-0018**).

²⁰² Email from Ms. Rika van der Walt to Mr. Patrick Jefferys dated December 1, 2011 (**R-0021**).

294. Respondent’s witness, Mr. Manhiça, stated that he reviewed the records of the Ministry of Foreign Affairs and Cooperation of Mozambique. He stated that he could not locate the notification by South Africa, which was required under Article 12(1) of the BIT.²⁰³ That led him to conclude that “because the Republic of South Africa has not complied yet with the requirements of Article 12(1) [of the BIT],” the BIT has “not entered into force.”²⁰⁴ He also stated that the BIT had not entered into force, “because the notifications, required by Article 12(1) [...], were not provided by the Republic of South Africa and the Republic of Mozambique.”²⁰⁵
295. It is apparent from Mr. Manhiça’s Witness Statements that he discovered that South Africa had not sent the notification on a review of the records of Respondent. For this he required no fresh information or assistance from South Africa. There is no explanation why Mr. Manhiça or other officials of Respondent did not or could not review these records as soon as possible after the claim was filed or before the filing of the Counter-Memorial.
296. The Tribunal is not persuaded that the facts necessary to raise the new jurisdictional objection were either unknown to Respondent or that Respondent could not have known these by a review of its records. Any action by or assistance from South Africa was unnecessary. The acts or omissions of South Africa, therefore, could not have prevented Respondent from filing the objections to jurisdiction when it filed its Counter-Memorial.
297. The Tribunal is, therefore, not persuaded that Respondent has met its obligations to object to the competence of the Tribunal “as soon as possible after the constitution of the Tribunal and in any event no later than the expiration of the time limit fixed for the filing of the counter-memorial.”

b. Waiver of Objection to the Claim

298. Claimant also submits that under Article 33 of the Arbitration Rules any step taken by a party after the expiration of an applicable time limit has to be disregarded unless the

²⁰³ Manhiça First Witness Statement, para. 10.

²⁰⁴ Manhiça First Witness Statement, para. 11.

²⁰⁵ Manhiça Second Witness Statement, para. 5.

Tribunal in special circumstances decides otherwise. Claimant maintains that Respondent has failed to make out a case of special circumstances. Respondent pleads the same circumstances as referred to in its Article 45(2) submissions to maintain that these were “special.”

299. Article 33 of the Arbitration Rules, which is similar to ICSID Arbitration Rule 26 (applicable to arbitration proceedings under the ICSID Convention), provides that time limits shall be fixed by the tribunal by assigning dates for the completion of the various steps in the proceedings.
300. It is arguable that the authority of a tribunal under Article 33 may be general in nature as compared to that under Article 45(2) which is special. This is for several reasons: (i) under Article 33(1) time limits, where required, are for the completion of the various steps in the proceedings; under Article 45(2) the time limit is for raising an objection to the competence of the tribunal; (ii) under Article 33(2) the time limits are fixed by the tribunal; under Article 45(2) the tribunal has no such authority as the time limits are fixed by the Article itself; and (iii) under Article 33(2) the tribunal may extend any time limit that it has fixed and under Article 33(3) even when the time limit has expired, the tribunal may, in “special circumstances,” extend it; under Article 45(2) the time limit runs out with the filing of the counter-memorial and the tribunal has no authority to extend it except when the facts on which the objection is based were not known to the party at that time.
301. “Special circumstances” not being defined, the authority of the tribunal to condone delay arguably appears to be broader under Article 33 than under Article 45(2) which allows such condonation only in one specific situation.
302. This Tribunal, however, has considered the defense of Respondent under Article 33(3) and is of the view that even if its authority under Article 33(3) is extended and applied to a matter covered by Article 45(2), that would not *ipso facto* result in the extension of the time limit. The objections raised by Respondent would merit consideration only in “special circumstances.” The circumstances, as pleaded by Respondent, include the information available on the ICSID and UNCTAD websites, the alleged withholding of certain information by Claimant through its counsel, Mr. Jefferys, and information being received

late from South Africa.²⁰⁶ For reasons stated under **Subsection V.C(1)(a)** above, the Tribunal is not satisfied that any of these facts can be regarded as “special circumstances” enabling the Tribunal to exercise its discretion, if any, under Article 33(3), in favor of Respondent.

303. In view of the above, the Tribunal concludes that Article 33 may have no application to the time limits fixed by Article 45(2) but even if it does, “special circumstances”, which may persuade the Tribunal to exercise its discretion in favor of Respondent and condone the delay, have not been established.
304. Article 34 deals with a situation which is altogether different. It applies where one party knows that the other has violated a provision of the Arbitration Rules, or of any other rules, or an agreement applicable to the proceedings or an order of the tribunal. The party who is aware of such a violation must promptly object to it. When it fails to do so it “shall be deemed to have waived the right to object.”
305. Under Article 34, a violation by Respondent would be deemed waived by Claimant if it does not promptly object to such violation. The failure to promptly object by Claimant would cure the violation of a rule or agreement or order by Respondent. That is not the case here. In this case, the Article 45(2) time limit for filing objections to jurisdiction has not been observed by Respondent. Claimant does not want that violation to be cured. He has vociferously objected to it. He wants Respondent to be penalized for the violation and for Respondent’s objection to the competence of the Tribunal to be deemed to have been waived. However, Claimant’s submission that the Tribunal should apply Article 34 to declare that Respondent’s objections to the competence of the Tribunal has been waived cannot be accepted. Article 34 simply has no application here.
306. Claimant’s procedural objection, under Article 34, to Respondent’s new objection to jurisdiction set forth in its Motion to Dismiss is, therefore, rejected. Nevertheless, that objection was an alternative to Claimant’s objection under Articles 33 and 45(2) which, as

²⁰⁶ See above paragraph 250.

noted above, the Tribunal has accepted. The Tribunal must, therefore, proceed to consider whether it should exercise its authority under Article 45(3).

c. The Tribunal's Authority under Article 45(3)

307. The Tribunal's ruling that Respondent was in violation of Article 45(2) of the Arbitration Rules would ordinarily have the consequence of the objection filed by Respondent, with such extra-ordinary delay, being dismissed. Respondent has, however, asserted that the Tribunal has an independent and continuing obligation, under Article 45(3) of the Arbitration Rules to "on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within its competence."²⁰⁷

308. Article 45(3) is similar to Rule 41(2) of the ICSID Rules of Procedure for Arbitration Proceedings (applicable to arbitration proceedings under the ICSID Convention). It reads:

The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute [...] is within its competence.

309. Both Article 45(3) and Rule 41(2) are based on Article 41(1) of the ICSID Convention, which provides:

The Tribunal shall be the judge of its own competence.

310. Article 41(1) of the ICSID Convention, Rule 41(2) of the ICSID Rules of Procedure for Arbitration Proceedings and Article 45(3) of the Arbitration Rules are more detailed articulations of the *Kompetenz-Kompetenz* principle.²⁰⁸ Every tribunal has a duty to write valid and enforceable awards. It follows that it must proceed only with such matters as are within its competence.

311. The Tribunal notes that the reaction of tribunals to jurisdictional objections filed with delay is not uniform.²⁰⁹ In some cases, tribunals have refused to take into consideration or

²⁰⁷ Resp. PHB, para. 116.

²⁰⁸ See *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO)*, ICSID Case No. ARB/10/20, Decision on Annulment, August 22, 2018 ("*SCB v. TANESCO*") (available at: https://www.italaw.com/sites/default/files/case-documents/italaw9910_0.pdf), paras. 158 and 321.

²⁰⁹ C. Schreuer, *The ICSID Convention: A Commentary*, Cambridge (2nd ed., 2009), p. 527, para. 40; *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision

dismissed belated jurisdictional objections.²¹⁰ In other cases, tribunals pointed out the delay but proceeded to deal with the objections and disposed of them on the merits.²¹¹ In yet another line of cases, tribunals have referred to Article 41 of the Convention and Article 45(3) of the Arbitration Rules or Rule 41(2) of the ICSID Rules of Procedure for Arbitration Proceedings to conclude that the timeline specified in Article 45(2) “cannot and does not negate the mandate of Article 41 of the Convention” which “requires a Tribunal to determine every objection to jurisdiction.”²¹²

312. In *Zhinvali v. Georgia*, the tribunal found the delay to be “extreme”²¹³ as the objection to jurisdiction was raised after the filing of the counter-memorial.²¹⁴ Yet, it concluded:

The Tribunal notes that Article 41 uses the verb “shall” whereas Rule 41(2) uses the verb “may.” Under the particular facts of this case, the Tribunal believes that it must act “on its own initiative” in spite of the **Respondent’s egregious delay**. The only counter-argument would be that, because of Rule 41(1) and Rule 27, the Respondent’s belated objection is legally deemed to constitute no objection at all. But even under that rationale, Article 41 remains, as does the discretion granted the Tribunal by Rule 41(2). In sum, the Tribunal concludes that any “waiver” by the Respondent of its rights

on Expedited Objections, December 13, 2017 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9453.pdf>), para. 117: “Article 41 and Rule 41 grant to the Tribunal a number of options as to how to proceed. There is considerable jurisprudence, some of it conflicting, as to the correct approach to the exercise of these options.”

²¹⁰ See, e.g., *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, September 23, 2003 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw6354.pdf>), para. 90; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003 (**RL-0025**), para. 16.1. That tribunal, however, pointed out that the objection was “hypertechnical and unmeritorious”; *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, April 15, 2016 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7230.pdf>), paras. 149-150. That tribunal, however, noted that “if the objection were admissible, it would not succeed on the merits”; *Siag v. Egypt (CL-0123)*, para. 288. That tribunal, however pointed out in para. 289 that the issue of Mr. Siag’s nationality was “a matter of personal, not subject-matter, jurisdiction”; *Gavrilović v. Croatia*, para. 47. That tribunal declined to exercise its discretion under Rule 41(2) of the ICSID Arbitration Rules where the objection was filed with delay under Rule 41(1).

²¹¹ *Desert Line v. Yemen*, paras. 97 *et seq.*

²¹² *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, October 7, 2003 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw3077.pdf>), para. 9.2

²¹³ *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, January 24, 2003 (“*Zhinvali v. Georgia*”) (available in 10 ICSID Reports (2007), p. 3), para. 285.

²¹⁴ *Zhinvali v. Georgia*, para. 316.

would not, and could not, foreclose this institutional prerogative of the Tribunal.²¹⁵

313. The *Pac Rim v. El Salvador* tribunal described the exercise of this authority not as merely discretionary but as a “duty, right and competence to satisfy itself that all jurisdictional requirements are fulfilled, regardless of the particular stage of the arbitration.”²¹⁶
314. Claimant is of the view that the Tribunal should not exercise its discretion to consider the issue of jurisdiction under Article 45(3) of the Arbitration Rules in favor of Respondent. Claimant submitted that the conduct of Respondent, the “conspiracy of silence” by South Africa and the balance of probabilities disentitle Respondent from such favorable consideration.²¹⁷
315. The Tribunal would have been inclined to rule the objection out of consideration had the matter been one where Respondent by its delay had secured a procedural advantage or raised a defense of a non-fundamental nature. The objection in this case, however, is that the BIT is not in force. If that be the case, then Respondent cannot be said to have given its consent to ICSID arbitration. Without consent there can be no ICSID arbitration. The objection, therefore, goes to the very root of the jurisdiction of this Tribunal.
316. The Tribunal agrees with Professor Schreuer that, “not all of the Convention’s jurisdictional requirements are subject to the parties’ disposition. The Convention also

²¹⁵ *Zhinvali v. Georgia*, para. 324 (emphasis added). See also *SCB v. TANESCO*, para. 155; *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, August 31, 2018 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9916.pdf>), para. 105: “In general, the provision is the repository of an ICSID tribunal’s broad power to consider any issues relating to its jurisdiction on an *ex officio* basis, and at any stage of the proceedings”; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, October 22, 2018 (“*Cortec v. Kenya*”) (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10051.pdf>), para. 233; *Marfin Investment Group Holdings S.A., Alexander Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, July 26, 2018 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10149.pdf>), para. 578.

²¹⁶ *Pac Rim v. El Salvador*, para. 5.34; see also para. 5.50: “At the same time, the Tribunal is also aware of its mandate under Article 41(1) of the ICSID Convention and of its power under ICSID Arbitration Rule 41(2) to consider, ‘at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.’ With this in mind, the Tribunal has the power to examine, upon its own initiative at any time, any jurisdictional question it considers pertinent, even if it entails a matter that was raised belatedly by a party or not raised by any party at all.”

²¹⁷ See above paragraph 248.

contains objective requirements [...].”²¹⁸ These have to be independently established. A tribunal cannot rely on a party’s conduct in this regard. A treaty which is not in force cannot be deemed in force due to the delay or silence of a party in this regard.

317. Article 4 of the Additional Facility Rules provides that consent of both parties “to the jurisdiction of the Centre under Article 25 of the Convention” is essential in order for access to the ICSID Additional Facility, and arbitration thereunder. Article 25 of the ICSID Convention provides that jurisdiction can be exercised only in the case of such “disputes” which are submitted by the parties’ “consent in writing.” In this matter, it is the BIT which is said to provide the consent of Respondent. Respondent, however, has submitted that the BIT was not in force and that being the case neither the Centre nor this Tribunal had any jurisdiction in the matter.
318. Claimant submits that the Tribunal has discretion in the matter of whether to consider its jurisdiction of its own accord under Article 45(3). This was suggested by the use of the word “may” in Article 45(3). According to Claimant, given the conduct of Respondent the Tribunal should not exercise this discretion in its favor. However, although the Tribunal is of the view that the considerable and inexcusable delay by the Respondent disentitles it to discretionary relief and from raising this objection under Article 45(2), once an objection of such a fundamental nature has been brought to its attention the Tribunal cannot decline to consider it *sua sponte*.
319. The use of the word “may” in Article 45(3) of the Arbitration Rules relates to the tribunal acting on its own initiative. It suggests that even where a party does not object to the competence of a tribunal, the tribunal may of its own initiative consider the question of its competence. It does not give a tribunal the discretion not to consider and examine its competence simply because an objection that raises an issue to the tribunal’s notice has been raised too late by a party.
320. The conduct of a respondent cannot confer jurisdiction on a tribunal where none exists. A matter which is beyond its competence cannot be brought within its remit simply because

²¹⁸ C. Schreuer, *The ICSID Convention: A Commentary* (2nd ed., 2009), p. 529, para. 50.

a respondent has not acted in a timely manner. The words “of its own initiative” render the conduct of a party irrelevant for the purpose of this Article. The duty is cast on the tribunal and it must be performed irrespective of how or by whom its attention has been drawn to an issue relating to its competence.

321. The use of the words “at any stage of the proceedings” in the Article do not leave the tribunal with any discretion to decline to consider an objection with regard to its competence because it has been brought to its attention with delay. Rather, the language of the Article renders the stage of the proceedings irrelevant for examining such an issue. The obligation to proceed with only those matters which are within its competence is of a continuing nature which begins when the tribunal is constituted and survives till it becomes *functus officio*.
322. It bears emphasis that Article 45(3) of the Arbitration Rules merely encapsulates what is in any event the duty of every international arbitration tribunal, regardless of the procedural framework within which it is operating. It must decide only such matters which are within its competence and render valid awards. That duty is inherent in the very nature of the function which the tribunal exercises and cannot be sidestepped for any reason whatsoever. This Tribunal, therefore, has no discretion in the matter. Once its attention has been drawn -- it does not matter how -- to the fact that the dispute may not be within its competence, it must consider and decide that question.
323. Article 52(1)(i) of the Arbitration Rules mandates that the award “shall contain: [...] the decision of the Tribunal on every question submitted to it [...].” Although not directly applicable, it is notable that this is consistent with the obligation of a tribunal under Article 48(3) of the ICSID Convention to “deal with every question submitted” to it in its award. These obligations must be discharged. The Tribunal cannot, therefore, refuse to decide a fundamental question with regard to its competence because it has been raised late by a party.
324. The Tribunal, therefore, rejects the submission of Claimant that the conduct of Respondent, the late stage of the proceedings and the circumstances of the case require that the Tribunal declines to consider whether the dispute before it is within its competence. The Tribunal,

having determined that it is required to examine its jurisdiction pursuant to Article 45(3), proceeds to do so in the following section.

(2) Respondent’s Objections to Jurisdiction Pertaining to the Entry into Force of the BIT

325. Respondent submits that the dispute is not within the competence of the Tribunal as (a) the BIT is not in force and (b) this arbitration also cannot proceed even under the MIL because the only basis for consent to arbitration under the Investment Law is the BIT. Each submission is addressed below.

a. Contention that the BIT is not in Force

326. The Respondent, to support its submission that the BIT is not in force, gives four independent reasons:

- (i) Both State parties have confirmed that the BIT is not in force;
- (ii) The notification required under Article 12(1) of the BIT (that the parties had complied with their respective constitutional requirements) was neither sent nor received by either country;
- (iii) The BIT was never ratified by South Africa as required under Section 231(2) of the South African Constitution; and
- (iv) The Chief Treasury Section of the Office of Legal Affairs of the UN also confirmed that there were no records that the BIT was submitted for registration.

327. The Tribunal is of the view that out of the above, “reason” (ii) is the most important. The Tribunal’s acceptance or rejection of this reason will determine whether Claimant has been able to establish that the BIT entered into force. The Tribunal will, therefore, examine it first. The other three reasons will be examined in numerical order, thereafter.

(i) *Neither State sent nor received a notification under Article 12(1) of BIT*

328. Paragraph (1) of Article 24 of the Vienna Convention provides:

A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.²¹⁹

329. The Vienna Convention, therefore, leaves both the manner and the date of the entry into force of a treaty to the parties thereto. It is for the State parties to a treaty to formulate the pre-requisites for its entry into force.²²⁰ They usually determine these by a provision within the treaty itself.

330. Paragraph (1) of Article 12 of the BIT is such a provision. It provides the mechanism and the date for the entry into force of the BIT:

The Contracting Parties shall notify each other promptly when their respective constitutional requirements for entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the day following the date of receipt of the last notification.²²¹

331. This language suggests that the State parties agreed to a formalistic approach to the entry into force of the BIT. The two States were to notify one another when their respective constitutional requirements for entry into force of the BIT (i.e., ratification) had been fulfilled. The agreement was not that the BIT would enter into force when the constitutional requirements for entry into force in both States were effected. The agreement was that it would enter into force “on the day following the date of receipt of the last notification” of compliance with such requirements.

332. Respondent submits that the language of Article 12 of the BIT is mandatory and requires delivery of notifications. It refers to and relies upon Claimant’s Mozambican law expert, Mr. Matlaba,²²² and Claimant’s South African law expert, Mr. Nonxuba.²²³ Both experts

²¹⁹ Vienna Convention (RL-0082), Art. 24(1).

²²⁰ M. Shaw, *International Law* (7th ed., 2014) (excerpt) (RL-0085), p. 658; J. Crawford, *Brownlie’s Principles of Public International Law* (8th ed., 2012) (excerpt) (RL-0087), p. 373.

²²¹ BIT (CL-0003 / RL-0077), Art. 12(1).

²²² Tr. Day 2, 347:9–348:18.

²²³ Tr. Day 2, 403:11–404:5.

confirmed that the BIT could enter into force only after the exchange of notifications as required by Article 12. Mr. Matlaba confirmed during cross-examination that he had not seen a notification by the Respondent under Article 12(1) of the BIT, though he added that he “would not have [had] the possibility to see it”.²²⁴ Mr. Nonxuba also testified that apart from Exhibit C-0169²²⁵ he was not aware of any document that would “constitute the actual notification by South Africa to Mozambique under the BIT.”²²⁶

333. Mr. Manhiça, in his evidence for Respondent, stated:

[...] this Agreement did not come into effect considering that the parts [*sic*] did not comply with the stipulated requirements by the Article 12(1) that requires notifications.

In other words, Mozambique never notified the South African Republic and, as well, the South African Republic never notified Mozambique of the ratification of the Agreement.²²⁷

334. Claimant maintains that Respondent had not made this submission earlier. Claimant submits that the evidence suggests that the two States had exchanged notifications and referred to a number of documents in this regard.²²⁸ The Tribunal will now proceed to examine these documents.

335. Claimant submits that CPI, a Mozambique Government institution, had been inviting investment by advertising for the past 19 years that the BIT was in force. It had also published a document titled “Laws and Regulations Related to Foreign Direct Investment in Mozambique” which expressly states that only three BITs concluded by Mozambique were not in force. The Mozambique-South Africa BIT was not one of them.

²²⁴ Tr. Day 2, 348:20–349:3.

²²⁵ Facsimile from South African High Commission to South African Department of Foreign Affairs dated February 4, 1998, attaching “a copy of a note sent to the Mozambican Ministry of Foreign Affairs and Cooperation regarding the [BIT]” (C-0169).

²²⁶ Tr. Day 2, 415:5-10.

²²⁷ Tr. Day 1, 169:1-8; *see also* 203:3-8; 207:11-14; 208:4-7.

²²⁸ *See above* paragraph 220.

336. In his answers to question about why CPI, an agency of Respondent, for many years continued to invite investment on the basis of the existence and validity of the BIT and published it in its official documents, Mr. Manhiça had stated that this was an error²²⁹ and CPI had no authority to bind Respondent in this regard.²³⁰
337. The representations made by CPI, over the years, including the publication of documents by it, in the opinion of the Tribunal, do not meet the requirements of Article 12(1) of the BIT. These representations and the publication, not being notifications under Article 12(1) of the BIT, could not have brought it in force.
338. Claimant also submits that the Official Gazette of the Mozambique Government also confirmed the status of the BIT. According to the Claimant, the Gazette confirmed that the Council of Ministers had, in the terms adopted therein, “ratified” the BIT and that its publication was approved by the Prime Minister.²³¹
339. In the Tribunal’s opinion, Mr. Manhiça gave no satisfactory explanation of the conduct of Respondent in the period after the process of ratification in Mozambique was complete. The ratification process included obtaining the approval of Parliament, obtaining signatures by or for and on behalf of the President and ensuring publication in the Gazette. There was no explanation why, after going through all these steps, Respondent did not send the notification to South Africa.²³² Mr. Manhiça also could not identify any other instance where Respondent had acted in like manner.²³³
340. The Tribunal is of the view that the signature of the President, approval of Parliament and publication in the Gazette prove that the BIT was ratified by Respondent. This was also not contested by Respondent:

²²⁹ Tr. Day 1, 199:2–201:5.

²³⁰ Tr. Day 1, 194:5–195:3; 198:11-14.

²³¹ Official Gazette of the Republic of Mozambique, Resolution No. 48/98 dated July 28, 1998 (unofficial English Translation) (CL-0092).

²³² Tr. Day 1, 211:6-15; 212:1–213:2.

²³³ Tr. Day 1, 213:3-12.

ARBITRATOR FORTIER: I didn't quite follow your exchange with Mr. Jefferys on this point. The Republic of Mozambique had ratified this particular Treaty. Yes or no?

[MR. MANHIÇA]: The answer is yes.²³⁴

341. Ratification, however, was not what was required for the entry in force of the BIT under its Article 12(1). The requirement was reciprocal notifications from Respondent to South Africa and vice versa that the BIT had been ratified. The BIT was to enter in force only a day after the last such notification was received. The Tribunal is of the view that ratification and the publication in the Official Gazette that the BIT was ratified, by Respondent, was, therefore, a step towards the entering into force of the BIT.
342. Claimant argues that Respondent did not raise any objection to the claim on the ground that it had failed to notify South Africa until such time that South Africa raised the issue.
343. The Tribunal notes that Mr. Manhiça did not have a satisfactory answer to repeated questions, both by Claimant²³⁵ and the Tribunal,²³⁶ as to why, if Mozambique had never issued the Article 12(1) notification, the attention of ICSID or the Tribunal was not drawn to it any earlier than in his Second Witness Statement:

ARBITRATOR FORTIER: [...] when you became aware that there was this claim filed against the Republic of Mozambique, what did you do? What was your first reaction?

[MR. MANHIÇA]: As far as it was being requested to us, we presented our intervention in the name or in representation of the Mozambican State. [...] we intervened, and that's why we are still in the proceedings up until today.²³⁷

²³⁴ Tr. Day 1, 210:4-7.

²³⁵ Tr. Day 1, 173:12-20; 174:3-18; 175:22-176:18; 177:2-21; 179:2-19; 181:17-22.

²³⁶ Tr. Day 1, 206:1-208:20.

²³⁷ Tr. Day 1, 205:9-22.

344. Frequent interruptions by counsel for Respondent during the cross-examination of Mr. Manhiça did not help matters.²³⁸
345. While the Tribunal has its reservations about the conduct of Respondent, in this regard, it is of the view that such conduct cannot lead it to the conclusion that a notification under Article 12(1) of the BIT was issued by Mozambique. There is also, as pointed out by Respondent’s South Africa law expert, Mr. van der Merwe, no evidence of a notification under Article 12(1) of the BIT sent by Respondent²³⁹ being received by South Africa.
346. Claimant submits that Mr. Manhiça’s evidence that the notification sent by South Africa could not be “located” in the records of Mozambique supports Claimant’s assertion that such a notification existed (but simply cannot be found).²⁴⁰ According to Claimant, the failure to locate the document could not justify the inference that it did not exist. Even if the Tribunal were to accept this submission, it could at best conclude that there was an element of uncertainty about the notification of ratification having been received by Respondent. Such uncertainty cannot lead it to the conclusion that the notification was received by Mozambique or that the BIT was in force.
347. Also according to Claimant, the UNCTAD and ICSID websites would not have stated that the BIT was in force without confirmation from a government source. Claimant submits that Respondent did not explain why both websites recorded the BIT as being in force.
348. The information on the ICSID and UNCTAD websites is subject to disclaimers and cannot found rights or subject parties to obligations. The Tribunal notes that Respondent did not protest the announcements on the ICSID and UNCTAD websites. If the information displayed was incorrect Respondent ought to have taken steps to have it corrected to save the users of the websites from being misled. Its neglect or failure to do so, however, cannot be regarded as meeting the requirements of a notification under Article 12(1) of the BIT or as entering it into force.

²³⁸ See, e.g., Tr. Day 1, 182:14–186:7. For interrupting the Tribunal, see Tr. Day 1, 206:1–207:1.

²³⁹ Tr. Day 1, 121:10-11.

²⁴⁰ Tr. Day 1, 173:1-8.

349. Claimant submits that South Africa had also ratified the BIT and notified Respondent. According to Claimant, South Africa did not have any documents in its possession which would support the view that the BIT never entered into force. Claimant further contends that, according to the DIRCO Guide, 18 to 26 documents needed to be executed before the President of South Africa signed a Presidential Minute; yet, all these documents were missing from DIRCO's records, and the South African Government neither investigated this loss nor made inquiries from UNCTAD or ICSID to resolve the issue.
350. Claimant's argument is evidently that the fact that documents which were necessarily in existence in order for the on-the-record Presidential Minute to have come into existence provides some support to the notion that the notification also existed but the records are no longer available.
351. Respondent's South African law expert, Mr. van der Merwe, however, denied that that was the case:

As I understand it, the position of the DTI and of DIRCO is that the Treaty is not in force.

There's no suggestion that they are missing documents. There is no suggestion in those affidavits that there was a whole host of documents they couldn't find.²⁴¹

352. The Claimant argues that Exhibit C-0169 confirms that Mozambique had received notification that South Africa had met its constitutional obligations. He submits that Ms. de Beer first stated that if provided this document she would be in a position to verify it. Claimant provided her the document. According to Claimant, she then changed her mind, took legal advice and stated, "Please note the letter [...] was an internal communication between the South African High Commission in Maputo and Head Office (The Department of Foreign Affairs now DIRCO)."²⁴²

²⁴¹ Tr. Day 1, 116:16-21; *see also* 144:11-17.

²⁴² Cl. Response to Motion, para. 5, citing Email from Ms. de Beer to Mr. Marto dated July 11, 2017 (C-0172).

353. Claimant submitted that Ms. van der Walt of DIRCO initially accepted that the “lack of documentation in their files [...] was ‘probably’ the reason why the Treaty is now regarded by them as not in force;” Claimant, however, then admits that Ms. van der Walt subsequently contradicted this statement and denied that any records were missing.²⁴³ Claimant submits that given “the ramifications of the action taken by officials in the employ [of] the DTI and DIRCO to hold that Treaty never entered into force, for reason of poor record keeping, it appears they are now closing ranks”²⁴⁴ as “the Treaty is in fact in force.”²⁴⁵
354. Respondent asserts that Exhibit C-0169 was not a notification under Article 12(1) of the BIT but was just an internal communication.²⁴⁶ Mr. van der Merwe, the South African law expert of Respondent, also stated that it was a draft as it was not signed or stamped. According to him, “Government documents are generally signed and stamped.”²⁴⁷ Mr. van der Merwe maintains that there was “absolutely no evidence that this was ever sent”²⁴⁸ and insofar as the BIT was concerned there “was absolutely no evidence that it had come into force.”²⁴⁹ His evidence was that there was no evidence of an Article 12(1) notification sent by South Africa being received by Respondent.²⁵⁰ According to him, therefore, the assertion that the BIT is in force fails at two levels.²⁵¹
355. Respondent submits that three years before the commencement of this arbitration, Claimant, through his counsel Mr. Jefferys, knew that the position of South Africa was that the BIT was not in force.²⁵² On December 1, 2011, according to Respondent, the Chief

²⁴³ Cl. Response to Motion, para. 4.4.

²⁴⁴ Cl. Response to Motion, para. 4.5.

²⁴⁵ Cl. Response to Motion, para. 4.3.

²⁴⁶ Tr. Day 1, 29:14-17; *see also* 38:8-10.

²⁴⁷ Tr. Day 1, 87:7-8; 120:5-11.

²⁴⁸ Tr. Day 1, 87:13-14.

²⁴⁹ Tr. Day 1, 89:8-15.

²⁵⁰ Tr. Day 1, 92:13-17; 93:3-5; 96:4-11.

²⁵¹ Tr. Day 1, 93:5.

²⁵² Tr. Day 1, 23:7-10.

State Law Advisor in the South African Treaty Section of DIRCO informed counsel for Claimant that the BIT was not in force:

[...] my official record indicates that the bilateral investment agreement between South Africa and Mozambique is not in force.²⁵³

356. According to Respondent, this email falsifies Claimant's case that there were a number of documents missing from the records of South Africa, or that there was collusion between the various officers of South Africa to avoid repercussions or collusion between the Governments of South Africa and Mozambique.
357. Respondent takes the position that Ms. van der Walt did not say at the time of this 2011 email exchange with Mr. Jefferys that there were any missing records and, in Respondent's words, "there was no collusion [...] no funny business going on between Mozambique and South Africa."²⁵⁴ Mr. van der Merwe also gave evidence that the 2011 email made clear the intention of the contracting parties that the BIT had not come into force. That would be so unless Mr. Jefferys' submission that the email was a forgery was accepted.²⁵⁵
358. Mr. Dror Besserglik admitted in his cross-examination that Mr. Jefferys was Claimant's lawyer since before 2011²⁵⁶ and that the email carried his then and current email address.²⁵⁷
359. Respondent submits that Claimant offered various excuses with regard to this email, none of which explained why this email was not disclosed at the time of filing of the Request.
360. Mr. Jefferys asserted, during his Opening Statement at the Hearing, that he had "absolutely no recollection of ever receiving such an email;"²⁵⁸ according to him there was no such email "in any of [his] records."²⁵⁹ He said that he was not on the brief at that stage, that he was trying to establish "what happened" and whether he "even knew Mr. Besserglik had a

²⁵³ Email from Ms. Rika van der Walt to Mr. Patrick Jefferys dated December 1, 2011 (**R-0021**).

²⁵⁴ Tr. Day 1, 24:2-9; 26:14-18.

²⁵⁵ Tr. Day 1, 88:5-10.

²⁵⁶ Tr. Day 2, 296:17-297:1.

²⁵⁷ Tr. Day 2, 297:16-298:5.

²⁵⁸ Tr. Day 1, 53:1-2.

²⁵⁹ Tr. Day 1, 53:11-12.

claim at that stage.”²⁶⁰ He stated that it was possible that he might have been asked to inquire whether the Treaty was in force. The alternative was that the email may be fraudulent: “One or the other, but I can’t say that.”²⁶¹ Mr. Jefferys, however, dismissed as nonsense the submission by Respondent that he had concealed the email.²⁶²

361. The Tribunal is of the view that the evidence of the Parties, in this regard, is contradictory and unsatisfactory. It is, to say the least, uncertain whether Exhibit C-0169 is a notification by South Africa under Article 12(1) of the BIT or a mere draft. Mr. Jefferys has not been able to satisfactorily explain his position with regard to the December 1, 2011 email. That email casts doubt on Claimant’s submissions and evidence that there was collusion between South African officials and also between the Governments of South Africa and of Respondent to conceal that South Africa had issued the Article 12(1) notification under the BIT.
362. It is easy to allege collusion or conspiracy, but the allegation is not that easy to prove. It has to be specifically alleged, its particulars have to be pleaded and each particular proved. The standard of proof for a conspiracy involving a component of bad faith is a demanding one.²⁶³ The same is true for collusion. This is even more so when the allegation is made by an investor against the host State as well as his home State. The Tribunal is not satisfied that that standard has been met by Claimant.
363. Claimant further submits that the evidence of Respondent was inconsistent and weak and that of Claimant coherent and consistent. The Tribunal has already discussed some of the evidence. It does not consider it necessary to discuss the evidence of all witnesses, for even if it accepted the submission of Claimant, this evidence would not be sufficient to prove that the BIT is in force.

²⁶⁰ Tr. Day 1, 53:15-18.

²⁶¹ Tr. Day 1, 54:14-16.

²⁶² Tr. Day 1, 54:17-18.

²⁶³ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009 (**RL-0038**), para. 223.

364. If the Tribunal has followed it correctly, Claimant's submission appears to be that Respondent, Mozambique, took all the steps that were required after the signing of the BIT to issue and serve the notification on South Africa for bringing the BIT into force. Likewise, a number of steps were taken by South Africa. Further, if Claimant's argument about the applicable constitutional provision for the ratification of the BIT is accepted, South Africa too took all the steps necessary for issuing the notification. It is also not disputed that the President of South Africa signed the Presidential Minute. According to Claimant, 18 to 26 documents have to be executed before such a minute is signed. Claimant's argument appears to be that there is no satisfactory explanation why the two States would go through the trouble and expense of taking a number of steps which were completely unnecessary if they had no intention of or had decided not to issue and serve the notifications.
365. Claimant apparently is taking the line that the above facts, together with the alleged change in the stance of the officials of South Africa, the failure to produce the 18 to 26 documents, the representation, over the years, by an official agency of Respondent that the BIT was in force, the failure by either of the two State parties to take any step to have the ICSID and UNCTAD websites corrected, is circumstantial evidence that the exchange of notifications in fact took place and that the BIT is indeed in force.
366. The Tribunal would like to recall that Claimant bears the burden of establishing jurisdiction under the ICSID Convention and the BIT.²⁶⁴ As jurisdiction rests on the existence of certain facts, they have to be proved at the jurisdictional stage. The burden of proof of such facts is on Claimant insofar as Respondent contests them.²⁶⁵

²⁶⁴ *Cortec v. Kenya*, para. 250.

²⁶⁵ *M.C.I. Power Group L. C & New Turbine, Inc. v Republic of Ecuador* ICSID Case No. ARB/03/6, Award, July 31, 2007 (**RL-0080**), para. 323; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010 (available at: <https://www.italaw.com/sites/default/files/case-documents/ita0396.pdf>), para. 143; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, June 1, 2012 (**RL-0089**), paras. 2.8-2.9; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, April 26, 2017 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw8768.pdf>), para. 66; *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Award, December 22, 2017 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9450.pdf>), para. 148.

367. The BIT being in force is a jurisdictional fact. On it rests the consent of Respondent to this arbitration. In the absence of proof that the BIT is in force, this Tribunal has no authority to arbitrate this dispute. As Respondent has contested that the BIT is in force and consequently contested the consent of Respondent to this arbitration, it is for Claimant to prove these facts.
368. The Tribunal notes that, in the case of the issuance and service of notifications that bring a BIT into force, direct evidence can only be in the possession of the two States. That, however, would not justify accepting as proof documents produced by Claimant, the accuracy of which is denied by Respondent. It would also not justify basing a conclusion about the BIT being in force on the long silence of one of the two States, i.e., Respondent.²⁶⁶
369. In this case, not only Respondent but also South Africa has contested that the BIT is in force. Both States have denied that the notifications in question were issued. South Africa has also resisted the litigation commenced by its citizen, Claimant, in its courts to discover evidence with regard to any notification of the fulfillment of the constitutional requirements for entry into force for the BIT. Its officials and a Minister have sworn affidavits in that litigation which cast doubt on the circumstantial evidence produced by Claimant. Even if the Tribunal were to give some weight to the circumstantial evidence about Respondent issuing the notification, that would not take matters very far. There is no evidence by anyone who can claim to have seen either or both notifications in the records of either of the two States. No plausible explanation has been offered as to why South Africa would go to such lengths to support Respondent and undermine the claim of its citizen.
370. The Tribunal can envisage circumstantial evidence which might enable it to conclude that the notifications were exchanged despite the absence of copies of the notifications themselves. Such a conclusion must be supported by clear, cogent, consistent and convincing evidence. The evidence before the Tribunal does not reach that threshold. As

²⁶⁶ See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, January 31, 2006 (available at: <https://www.italaw.com/sites/default/files/case-documents/ita0737.pdf>), paras. 96-99.

observed by the *Lao Holdings v. Laos* tribunal, “[a] Tribunal must be careful not to shift the onus of proof from the Claimant to the Respondent Government or to bend over backwards to read in inferences against ‘the sovereign state’ that are simply not justified in the context of the whole case.”²⁶⁷

371. The Tribunal, therefore determines that it cannot, on the basis of the evidence on the record, conclude that the BIT is in force. This conclusion suffices to resolve the case before it. Nevertheless, for the sake of completeness, the Tribunal proceeds to consider the three other reasons Respondent has given in support of its submission that the BIT is not in force.

(ii) Both State parties have confirmed that the BIT is not in force

372. The Respondent has placed great emphasis on:

(i) The Diplomatic Note by Mozambique to South Africa of November 20, 2017;²⁶⁸
and

(ii) The Diplomatic Note by South Africa to Mozambique of November 27, 2017.²⁶⁹

373. In its Diplomatic Note, Mozambique states that its official position is that the “BIT has not gone onto [*sic*] force.”²⁷⁰ It requested confirmation of this position from South Africa. On November 27, 2017, South Africa confirmed that the BIT had “not entered into force.”²⁷¹

374. States commonly employ diplomatic notes to invoke rights which they claim to possess or to deny claims made by others. The two State parties to the BIT have confirmed, through their Notes, that the BIT is not in force. Both Diplomatic Notes are on the record.

375. In its opening submissions at the Hearing, Respondent referred to the two Diplomatic Notes to submit that this was all that this Tribunal needed to rely on in order to accept the Motion

²⁶⁷ *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on the Merits, June 10, 2015 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw4333.pdf>), para. 11.

²⁶⁸ Mozambique Diplomatic Note (R-0017).

²⁶⁹ South Africa Diplomatic Note (R-0018).

²⁷⁰ Mozambique Diplomatic Note (R-0017).

²⁷¹ South Africa Diplomatic Note (R-0018).

to Dismiss.²⁷² It submitted: “You can stop right here. You don’t need to go any further because the Diplomatic Notes are the means by which [S]tates correspond with each other, the means by which [S]tates communicate with each other.”²⁷³

376. Respondent submits that the two Diplomatic Notes are “self-authenticating, so they can be admitted on their own when they are signed—as these two are—and sealed.”²⁷⁴ According to Respondent, Mr. Manhiça in his Second Witness Statement authenticated the two Diplomatic Notes²⁷⁵ because Claimant had raised some objection to their admission.²⁷⁶ Mr. van der Merwe in his testimony also referred to these two Diplomatic Notes.²⁷⁷

377. Claimant has not produced any document and none of its witnesses has said anything which casts doubt on the authenticity of these documents. Claimant asked a number of questions of these two witnesses in cross-examination requiring them to explain why either Respondent or South Africa had not earlier stated that the BIT was not in force. No question, however, was asked and no submission made by Claimant in the pleadings, cross-examination or in the post-hearing briefs which casts doubt on the authenticity of the two documents. Even if the Tribunal does not take any of the other documents produced by Respondent into consideration and further, even if the Tribunal is persuaded to draw an adverse inference against Respondent from not producing the DIRCO and DTI personnel to give evidence, that would not cast a doubt on the authenticity of the two Diplomatic Notes.

378. The Tribunal notes that four other documents relied on by Respondent are the subject of an argument from Claimant that the rule against hearsay prevents their consideration. These documents are:

²⁷² Tr. Day 1, 15:9-19.

²⁷³ Tr. Day 1, 15:21–16:2.

²⁷⁴ Tr. Day 1, 18:2-5.

²⁷⁵ Tr. Day 1, 169:9-13.

²⁷⁶ Tr. Day 1, 17:10–18:2.

²⁷⁷ Tr. Day 1, 91:1-8.

- (i) Email dated June 12, 2017 by Mr. Jerry Mathye, Deputy Director of Southern Africa Trade and Investment of DTI, to the law firm of Mr. van der Merwe;²⁷⁸
- (ii) Letter dated June 20, 2017 by Mr. Steven Mathate, DTI Deputy Director Legal for International Trade and Investment of South Africa, to Mr. van der Merwe's law firm;²⁷⁹
- (iii) Letter dated July 26, 2017 from Ms. de Wet, the Chief Law Advisor (International Law) of DIRCO, through a letter to Mr. van der Merwe;²⁸⁰ and
- (iv) Letter dated February 5, 2018 from Ms. de Wet to Ms. Anna Holloway.²⁸¹

379. A ruling on whether these documents should be considered or excluded by applying the rule against hearsay may be necessary only if the issue cannot be decided by an examination of the other documents and evidence. Here, even if these documents are excluded from consideration, it would not undermine the conclusions reached by the Tribunal on the basis of the Diplomatic Notes. Accordingly, the Tribunal does not need to address the merits of Claimant's arguments with respect to hearsay.

380. The Tribunal has also not seen any document on the record which would persuade it to regard the two Diplomatic Notes as lacking in authenticity.

381. These two Diplomatic Notes are also consistent with the view of the two States that the BIT has not entered into force. The documents which may have cast a doubt on these Diplomatic Notes were notifications under Article 12(1) of the BIT. As already noted, these are not on the record.

382. From the above, the Tribunal may not be understood to support the notion that a treaty which is in force can be brought to an end by the exchange of such diplomatic notes. A

²⁷⁸ Resp. Motion to Dismiss, p. 3; Email from Mr. Jerry Mathye to Ms. Sharmila Naidoo dated June 12, 2017 (**R-0009**).

²⁷⁹ Resp. Motion to Dismiss, p. 3; Letter from Mr. Steven Mathate to Ms. Sharmila Naidoo dated June 20, 2017 (**R-0008**).

²⁸⁰ Resp. Reply on Motion, para. 52; Letter from Ms. de Wet to Shepstone & Wylie Attorneys dated July 26, 2017 (**R-0013**).

²⁸¹ Letter from Ms. de Wet to Ms. Anna Holloway dated February 5, 2018 (**R-0019**).

treaty can be terminated by an application of the provisions of the treaty itself or Article 42(2) of the Vienna Convention. Article 12(2) provides the duration and the method of termination of the BIT. This BIT, if in force, could not, therefore, have been terminated by an exchange of diplomatic notes.

383. The Tribunal, therefore, holds that through these two Diplomatic Notes, South Africa and Respondent lend support to the Tribunal's determination that it cannot, on the evidence before it, conclude that the BIT is in force.

(iii) Non-Ratification of the BIT by South Africa

384. After submitting that the BIT did not enter into force for want of notifications by both Respondent and South Africa, Respondent moved a step back and submitted that the requirements under Section 231(2) of the Constitution of South Africa were not met. This provision requires approval by both the National Assembly and the National Council of Provinces in order for an international agreement to which the provision applies to be ratified.
385. Claimant argues that the constitutional requirements were met as the applicable provision was Section 231(3) of the South African Constitution. This provision does not require approval by the National Assembly and the National Council of Provinces. It only requires that the international agreement in question be tabled before these bodies. Claimant submits that the process required by this provision was complied with.
386. As noted above, the relevant source for determining whether a treaty is in force or not under international law is Article 24 of the Vienna Convention. Article 24 gives the parties a completely free hand to fix the date on and the manner in which a treaty will come into force. The parties usually do this by an express provision in the treaty. This is what Respondent and South Africa did in Article 12(1) of the BIT. The date which they fixed was not the date when their respective constitutional requirements for entry into force of the BIT were "fulfilled". Rather, the date was the day following the "date of receipt of the last such notification that their respective constitutional requirements for entry into force"

of the BIT” have been “fulfilled.”²⁸² It is repetitious but it is worth repeating that the critical date for the entry into force of the BIT was, therefore, not the date when the constitutional requirements were fulfilled by both States. The critical date was when the last such notification by a State, of having complied with its “constitutional requirements for entry into force” of the BIT was received by the other State.

387. Complying with the constitutional requirements for entry into force was a step which South Africa had to take prior to the notification. What matters for the entry into force of the BIT is whether such reciprocal notifications were received by both States.
388. Had notifications issued by the Republic of South Africa and received by Respondent and *vice versa* been on the record, it may have been necessary for the Tribunal to examine the issue, if raised, whether South Africa fulfilled the constitutional requirements envisaged by Article 12(1) of the BIT. In the absence of such notifications being on the record, no purpose would be served by making any observations in this regard.
389. Insofar as Exhibit C-0169 is concerned, the Tribunal notes that Respondent has asserted that it was only a draft. Even if the Tribunal were to accept the submission of Claimant that it is the notification issued by South Africa and received by Mozambique, that may not suffice. To be persuaded to find that the BIT has entered into force the Tribunal must also have before it evidence of a reciprocal notification issued by Respondent and received by South Africa. Such a document is not on the record. The Tribunal is also not satisfied that the circumstantial evidence on the record proves that Respondent issued and served such a notification on South Africa.
390. The Tribunal, in view of these difficulties, has already observed that it is not possible for it to conclude that it has sufficient evidence before it to hold that the BIT entered into force. This conclusion renders academic the issue whether Section 231(2) or Section 231(3) was the applicable provision to meet the requirements with regard to the BIT under the

²⁸² BIT (CL-0003 / RL-0077), Art. 12(1).

Constitution of South Africa. The Tribunal is, therefore, not inclined to record a finding in this regard.

(iv) There are no records that the Treaty was registered with the United Nations

391. Finally, Respondent finds support in the fact that there is no record that the BIT was registered with the UN.
392. Article 102(1) of the UN Charter requires that every treaty and every international agreement entered into by any Member of the UN, be registered as soon as possible with the Secretariat. Article 102(2) provides that no party to any such treaty or international agreement which has not been so registered may invoke that treaty or international agreement before any organ of the UN.
393. The Tribunal has noted the respective contentions of the Parties in this regard.
394. The Tribunal, having already concluded that it is not satisfied that the documents on the record establish that the BIT entered into force, is of the view that it is not necessary for it to determine whether it was registered with the UN.
395. The Tribunal may, however, observe that if the BIT was in force, such non-registration would not have had any effect on the validity or continuity of this arbitration. It accepts as correct the submission by Claimant that only parties to the UN Charter are affected by the sanction of Article 102. Article 102 does not prevent a third party, like Claimant, from bringing a claim under an unregistered treaty or international agreement.²⁸³ The Tribunal is also of the view that the restriction is against invoking an unregistered treaty or agreement before an organ of the UN. This Tribunal, not being an organ of the UN, would not have been prevented from proceeding with the arbitration due to the BIT's non-registration, had it concluded that the BIT was in force.

²⁸³ Cl. Amended PHB, paras. 43.1-43.3.

396. The Tribunal is, however, not persuaded by the evidence on the record that it can conclude the BIT is in force.

b. Claimant's Claims under the Mozambique Investment Law

397. Claimant refers to the MIL²⁸⁴ to submit that it had a claim under it as well. The reliance was fleeting and Claimant did not develop the submission.

398. Respondent submits that the only basis for the consent to arbitration under the MIL identified by Claimant was the BIT. According to Respondent, therefore, if the Tribunal concludes that the BIT was not in force, the claim under MIL would fail too.²⁸⁵

399. The Tribunal notes that this case was brought under the ICSID Additional Facility. As such, the Claimant first sought, on March 24, 2014, to apply for Approval of Access to the ICSID Additional Facility, pursuant to Article 4 of the Additional Facility Rules. The Application for Approval of Access was submitted on the basis of the Mozambique-South Africa BIT. Access to the Additional Facility, with respect to the dispute identified in the Application, was granted on April 17, 2014.

400. The Request for Arbitration was then filed on June 9, 2014. The request set forth the following basis for jurisdiction:

The Agreement to Refer the Dispute to Arbitration

The dispute between the Claimant and Mozambique arises directly out of an investment. Consent, and accordingly agreement, to arbitrate such a dispute may, first of all, be found in Article 25(2) of the Mozambique Investment Law 3/93 which is annexed hereto as annexure "B".

....

Consent to arbitration under the ICSID may also be construed from Article 7 of an Agreement concluded between the Government of the Republic of South Africa and the Government of the Republic of Mozambique for the Promotion and Protection of Investments ("the Bilateral Investment Treaty" of [*sic*] "BIT"), on 6 May 1997, annexed as annexure "C".

²⁸⁴ Mozambique Investment Law (CL-0004). An extract has also been filed as RL-0079.

²⁸⁵ Resp. PHB, paras. 83-88; Tr. Day 1, 10:15-18; 43:10-19; 47:11-16.

....

Both the Mozambique Investment Law 3/93 and the BIT evidence unequivocal consent, and agreement, by the Mozambique Government to be bound by the ICISD [*sic*].²⁸⁶

401. Given that the Request identified an additional basis for jurisdiction, on June 25, 2014 ICSID wrote to the Claimant, requesting “Information concerning whether, for the purposes of Article 25(2) [of the MIL], ‘express agreement of both parties’ has been reached concerning the possible recourse of disputes to, relevantly, the ICSID Additional Facility Rules.”

402. Claimant responded by letter on June 26, 2014, stating:

The Bilateral Investment Treaty (the ‘BIT’) concluded between South Africa and Mozambique constitutes specific consent between two countries entitling foreign investors to resort to the ICSID. It will be noted that the Investment Law No 3/93 was approved on 24 June 1993 whilst the BIT was concluded on 6 May 1997, four years later. The Mozambican authorities were aware, at all material times, that *the BIT would constitute the necessary consent and agreement predicated under [A]rticle 25 (2) [of the MIL]* and so it is understood by South African investors in Mozambique.²⁸⁷

403. On the basis of this, on July 3, 2014 ICSID approved access to the Additional Facility in respect of the dispute under the MIL as well; that same day, the Request was registered.

404. Claimant filed his Memorial on January 8, 2016. This submission summarized the MIL in a section on “relevant laws” but did not address the issue of what the consent to arbitrate under the MIL was.²⁸⁸

405. On October 14, 2016, Claimant filed his Reply; reference is made herein to both the MIL and BIT (but again, the issue of what the consent to arbitrate under the BIT was not addressed).

²⁸⁶ Cl. Request, pp. 2-3.

²⁸⁷ Letter from Claimant to ICSID., dated June 26, 2014. *See also* Resp. Opening Statement, slide 44.

²⁸⁸ Cl. Mem., paras. 73-74.

406. Respondent, for the first time in its Motion to Dismiss on June 20, 2017, submitted that the BIT is not in force. Respondent was also clear, in this Motion, in its submission that there was no consent under the MIL, stating:

In addition, ICSID also committed an error in registering these proceedings pursuant to the Mozambique Investment Law (“MIL”). The MIL requires the consent of the Respondent to arbitration before ICSID. *Claimant asserted that said consent was found in the SA-MZ BIT. However, there can be no such consent because the SA-MZ BIT is not in force.*²⁸⁹

407. Claimant’s July 14, 2017 Response on Motion appeared to acknowledge this argument, in that its summary of the “Respondent’s Averments” expressly summarizes Respondent’s argument as including the submission that “[t]he MIL requires the consent of the Respondent to arbitration before the ICSID and no such consent was given as the BIT is not in force.”²⁹⁰ The argument was summarized in longer form:

The Claimant invoked the SA-MZ BIT as evidence of the Respondent’s consent to the ICSID. On 3 July 2014 under the misunderstanding that the SA-MZ BIT was in force, the ICSID mistakenly registered these proceedings under the MIL. The MIL requires the “express agreement of both parties” and the SA-MIZ BIT cannot constitute “express agreement” or consent to arbitration because it does not enter into force until after the constitutional requirements for ratification have been satisfied. South African (sic) did not ratify.²⁹¹

408. Claimant’s response in its July 14, 2017 submission to this point was simply that the BIT was in force and, “[o]nce a finding is made that the Treaty is in force then, ergo, Claimants[’] reliance on the MIL stands.”²⁹² No alternative argument was made.

409. Respondent’s August 3, 2017 Reply on Motion was also clear:

[T]he Claimant’s claims under the Mozambique Investment Law (“MIL”) also are inadmissible and must be dismissed because,

²⁸⁹ Resp. Motion to Dismiss, p. 1 (emphasis added).

²⁹⁰ Cl. Response on Motion, para. 2.3.

²⁹¹ Cl. Response on Motion, para. 2.21.

²⁹² Cl. Response on Motion, para. 11.

without the SA-MZ BIT, there is no agreement to arbitrate under the MIL. Claimant does not dispute that dismissal of his claims is the mandated result if the SA-MZ BIT is not in force. As such, this Tribunal also lacks jurisdiction.

[...]

Article 25(2) of the MIL requires an “express agreement of both parties” referring the dispute to the ICSID Additional Facility. [...] Claimant pointed to the SA-MZ BIT as such agreement.²⁹³

410. Again, Claimant’s September 27, 2017 Rejoinder on Motion submission expressly addressed Respondent’s submission on the MIL, but declined to provide any alternative argument. It stated:

In the event that the treaty is found to be in force the Respondent’s attack upon the [MIL] automatically falls away.²⁹⁴

411. The issue was not addressed at all by Claimant in his Skeleton Brief submitted on March 8, 2018; by contrast, it was expressly raised again by the Respondent in its Skeleton Brief (emphasizing again that “Claimant’s only alleged basis for Mozambique’s consent [under the MIL] was the SA-MZ BIT” and that “Claimant does not cite to any other document as the alleged grounds for Mozambique’s consent under the MIL.”²⁹⁵).

412. Finally, Respondent made its position clear at the Hearing.²⁹⁶ Claimant’s counsel did not address the point at all.

413. Respondent also presented evidence of Ms. Muenda on the matter at the Hearing, who stated in direct examination:

If we look at the Foreign Investment Law, we also conclude that, if the Bilateral Agreement is not applicable for this Tribunal to be the jurisdiction, we could resort to the Investment Law. But from the reading of Number 2 of Article 25, we also ascertain that it requires that, for litigations between the Mozambican State and foreign investors--for this litigation to be referred to the ICSID, there should

²⁹³ Resp. Reply on Motion, paras. 8, 107.

²⁹⁴ Cl. Rej. on Motion, para. 12.

²⁹⁵ Resp. Skeleton Brief, paras. 7, 60-64.

²⁹⁶ See Resp. Opening Statement, slide 44.

be express consent, mutual consent. And I could not find--unless there is another Opinion--any document that would be considered mutual consent of the Parties. Therefore, as from what I said so far, I can only conclude that neither based on the Bilateral Agreement or the Law of Investment, there is no jurisdiction for this Tribunal to decide on this.²⁹⁷

414. Claimant's counsel did not cross-examine Ms. Muenda on this point, focusing all his questions on the issue of the entry into force of the BIT.
415. Finally, Claimant again did not address the point in its Post Hearing Brief; Respondent, by contrast, summarized its arguments on the issue in its Post Hearing Brief.²⁹⁸
416. In view of the above and due to the repeated failure of Claimant's counsel, in spite of having several opportunities to do so, to submit any cogent pleadings in this regard or to respond to the submissions of counsel for Respondent or to cross-examine on this point, the Tribunal has no alternative but to accept the submission of Respondent that the only basis upon which Claimant has asserted a claim under the MIL is the consent given by Mozambique under the BIT. That is also clear from the submissions of Claimant.²⁹⁹
417. The Tribunal has ruled that, as the notifications required to be issued and received by the two States under Article 12(1) of the BIT are not on the record, it cannot on the evidence before it conclude that the BIT is in force. As, according to Claimant, the BIT is the only basis for consent under the MIL claim, this claim too must therefore fail.

²⁹⁷ Tr. Day 1, 219:11-220:4.

²⁹⁸ Resp. PHB, paras. 1, 9, 83-89.

²⁹⁹ See letter from Claimant to ICSID dated June 26, 2014 (responding to the letter from ICSID to Claimant dated June 25, 2014 requesting "Information concerning whether, for the purposes of Article 25(2) [of the MIL], 'express agreement of both parties' has been reached concerning the possible recourse of disputes to, relevantly, the ICSID Additional Facility Rules":

"The Bilateral Investment Treaty (the 'BIT') concluded between South Africa and Mozambique constitutes specific consent between two countries entitling foreign investors to resort to the ICSID. It will be noted that the Investment Law No 3/93 was approved on 24 June 1993 whilst the BIT was concluded on 6 May 1997, four years later. The Mozambican authorities were aware, at all material times, that the BIT would constitute the necessary consent and agreement predicated under [A]rticle 25 (2) and so it is understood by South African investors in Mozambique."

See also Resp. Opening Statement, slide 44.

c. Claimant's Estoppel Defense to Respondent's Objections

418. Claimant submits that if the Tribunal were to find that the BIT had not entered into force, it should hold that Respondent, having represented to investors for years that the BIT was in force, should be estopped from denying this position. In other words, it is the submission of Claimant that, in spite of the absence of notifications under Article 12(1) of the BIT, the Tribunal should apply the doctrine of estoppel to give effect to the BIT, at least vis-à-vis Claimant. According to Claimant, the Tribunal has the jurisdiction to hear a case not only against a State which has expressly consented to its jurisdiction but also against a State which has implicitly consented to its jurisdiction through words, conduct or silence. According to Claimant, the doctrine of estoppel derives from general principles of good faith and is well established in international law.³⁰⁰
419. Respondent argues that the applicable law is the Vienna Convention, which did not authorize the Tribunal to hold that, irrespective of Article 24 of the Vienna Convention and the requirements in the BIT for its coming into force, the BIT could be brought into force by estoppel. There could not be consent by estoppel, according to Respondent.³⁰¹
420. Respondent further submits that there was no evidence that Claimant had made the investment acting on the representation made by CPI. The representations referred to by Claimant were made years after the investment of Claimant and therefore, it could not be said that the investment had been made as a consequence of such representations. Further, these representations were made with disclaimers and, therefore, did not give rise to any actionable claims for financial loss.³⁰²
421. The Tribunal is of the view that the requirement of reciprocal notifications under Article 12(1) of the BIT, which, when read with Article 24 of the Vienna Convention, are essential for its entry into force, cannot be presumed to be in existence by invoking the doctrine of estoppel.

³⁰⁰ Cl. Amended PHB, paras. 13-18.

³⁰¹ Resp. PHB, para. 91.

³⁰² See above paragraph 214.

422. The jurisdiction of the Tribunal and the BIT being in force is a matter of law. Just as the jurisdiction of the Tribunal cannot be created by invoking the doctrine of estoppel, neither can a treaty which is not in force be given effect by an argument based on estoppel.
423. Even if estoppel were, in principle, capable of giving rise to jurisdiction, the Tribunal is not convinced that the factual predicates for an estoppel exist here. In international law, estoppel is a general principle which rests on the foundations of the principles of good faith and consistency. The essentials of estoppel in international law are:
- (i) An unambiguous statement of fact;
 - (ii) Which is voluntary, unconditional and authorized; and
 - (iii) Which is relied on in good faith to the detriment of the other party or to the advantage of the party making the statement.³⁰³
424. Sir Ian Brownlie regarded the “essence of estoppel” to be “the element of conduct which causes the other party, in reliance on such conduct, detrimentally to change its position or to suffer some prejudice.”³⁰⁴ Without prejudice or detriment, the specific protections of legitimate and settled expectations, provided by the doctrine of estoppel, are not triggered.
425. The Tribunal is not satisfied that Claimant has been able to prove that it relied on any representation made by the Respondent prior to the making of the investment and suffered as a consequence. Claimant refers to a publication and PowerPoint presentation of CPI, but both these are of a date subsequent to the initiation of the arbitration.³⁰⁵ Claimant was also not able to prove that that CPI had any authority to bind Respondent.

³⁰³ J. Crawford, *Brownlie’s Principles of Public International Law* (8th ed., 2012), p. 420.

³⁰⁴ J. Crawford, *Brownlie’s Principles of Public International Law* (8th ed., 2012), p. 420.

³⁰⁵ CPI Presentation, “Laws and Regulations Related to Foreign Direct Investment in Mozambique” (December 2016) (C-0177); CPI PowerPoint, “Unlocking Investment Opportunities in Mozambique: Japan-American Business Forum” (June 21, 2014) (C-0192). The Tribunal notes, further, that the majority of the actions that Claimant undertook to acquire his investment occurred prior to the signing of the BIT. Indeed, Claimant’s own evidence was that he made his investment “given th[e] assurance” from a staff member at the South African High Commission that “negotiations [were] underway with Mozambique” for an agreement “provid[ing] for the protection of South African investors in Mozambique and the [agreement] would be concluded shortly.” Besserglik Seventh Witness Statement, paras. 5.1-5.2.

426. In the absence of any proof that any representation was made by an authority competent to bind Respondent, and that Claimant relied on, and suffered a detriment as a consequence of, such representation, the essential elements of estoppel are not established.
427. The Tribunal is, therefore, not inclined to accept the submission of Claimant that in the circumstances of the case the Tribunal can assume jurisdiction by an application of the doctrine of estoppel. The submission of Claimant based on the doctrine of estoppel is accordingly rejected.

VI. COSTS

A. CLAIMANT’S COSTS SUBMISSION

428. Claimant submits that if the Tribunal *dismisses* Respondent’s Motion to Dismiss, it should order Respondent to pay Claimant’s costs of US\$ 636,935.72 incurred in responding to and arguing the Motion.³⁰⁶
429. Alternatively, Claimant submits that, if the Tribunal decides to dismiss Claimant’s claim on grounds of lack of jurisdiction then it should order Respondent to pay Claimant’s total costs of US\$ 2,262,630.04 incurred in the arbitration because of: (i) Respondent’s conduct in this arbitration; and (ii) the delay with which Respondent filed the Motion to Dismiss (and should also order the Respondent to bear its own costs).³⁰⁷
430. The amount of US\$ 2,262,630.04 includes the following (items (i) through (ix) include both attorneys’ fees and miscellaneous expenses):³⁰⁸
- (i) US\$ 975,186.95 incurred on the “Main Application” (i.e., Memorial, Counter-Memorial, preparing bundles, etc.);

³⁰⁶ Cl. Amended SoC, para. 6.2.

³⁰⁷ Cl. Amended SoC, para. 6.3.

³⁰⁸ Cl. Amended SoC, pp. 7-11.

- (ii) US\$ 95,123.39 incurred on the request for production of documents;
- (iii) US\$ 96,539.68 incurred on the Reinstatement Application filed at the Pretoria High Court;
- (iv) US\$ 183,844.30 incurred in respect of additional statements (e.g., additional witness statements, Claimant’s Response to Respondent’s Motion to Dismiss, etc.);
- (v) US\$ 131,958.72 incurred on the Respondent’s Motion to Dismiss;
- (vi) US\$ 57,440.27 incurred on the High Court Application for DIRCO evidence (November 2017);
- (vii) US\$ 37,756.00 incurred on the High Court Application for DIRCO and DTI access to information (January 2018);
- (viii) US\$ 48,050.00 incurred on the High Court Application for DIRCO and DTI access to information (February 2018);
- (ix) US\$ 361,730.13 incurred on the Hearing held in Washington, D.C. in March 2018; and
- (x) US\$ 275,000.00 in ICSID fees.

431. In support of its request, Claimant argues that “where one party had acted frivolously, in bad faith or otherwise irresponsibly, arbitrators ought to award full costs to the other party. Conduct that is ‘irresponsible’ will suffice [...] Respondent unnecessarily increased the length and complexity of this arbitration which has impacted heavily on the costs.”³⁰⁹ Claimant alleges that there was “considerable bad faith, if not fraud” by Respondent, and that Respondent’s witnesses were “dishonest.”³¹⁰

³⁰⁹ Cl. Amended PHB, para. 44.3-45.2.

³¹⁰ Cl. Amended PHB, para. 45.2.

432. With regard to Respondent’s objections to Claimant’s statement of costs, Claimant addresses, in his submission, some of the factual matters relied on by Respondent in its costs submission, as follows:

- (i) Claimant states that there was no evidence that the email from December 2011 allegedly sent to Claimant’s counsel was in fact sent to Claimant’s counsel. The email was, in any case, hearsay evidence since Ms. Rika van der Walt, who is an employee of South Africa and produced the email in the South African judicial proceedings, failed to submit an affidavit confirming the email.³¹¹
- (ii) Even if the email had been sent to counsel Claimant argues, Mr. Jefferys was not working on this brief when he received the email nor was he aware of Claimant’s intention to initiate this arbitration. In any case, Claimant was not aware of this email.³¹²
- (iii) Claimant did not take it upon himself to determine whether the BIT was in force. He engaged an attorney who referred him to Mr. de Gama at DTI. Mr. de Gama confirmed to him that the BIT was in force.³¹³
- (iv) Claimant also argues that there was no “*overwhelming evidence*”, as claimed by Respondent, that the BIT was not in force. The BIT was advertised on the ICSID and UNCTAD websites for some 19 years. Neither State objected to this nor did they take any steps to have these websites corrected until shortly before the arbitral hearing scheduled for August 2017. Similarly, during the same period, CPI internationally advertised the fact that the BIT was in force. These facts cannot be ignored. Ms. de Beer confirmed that South Africa had sent a notification to Mozambique under Article 12(1) of the BIT. Subsequently she was barred from speaking to Claimant’s legal representatives by Ms. de Wet and suffered an “unfortunate loss of memory.” Similarly, Mr. de Gama confirmed that the BIT was in force and a notification under Article 12(1) of the BIT had been sent by South

³¹¹ Cl. Amended SoC, para. 2.1.

³¹² Cl. Amended SoC, para. 2.2.

³¹³ Cl. Amended SoC, para. 3.

Africa to Mozambique but subsequently, under pressure from his employer—the State of South Africa—changed his testimony. Finally, Mozambique itself never raised the objection that it had failed to notify South Africa. This objection was only raised when it realized that this was the position being taken by South Africa.³¹⁴

B. RESPONDENT’S COST SUBMISSION

433. Respondent submits that the Tribunal should direct Claimant to reimburse Respondent for its fees and costs incurred in these proceedings for the following reasons:³¹⁵

- (i) Claimant initiated these proceedings despite his counsel being informed by South Africa through an email sent in December 2011 that the BIT was not in force.³¹⁶
- (ii) Claimant did not disclose this email. The email came to light when it was submitted by South Africa in the South African judicial proceedings initiated by Claimant.³¹⁷
- (iii) At the Hearing, Claimant conceded that, even though he is not a lawyer, he took it upon himself to determine whether the BIT was in force.³¹⁸
- (iv) Despite the overwhelming evidence that the BIT was not in force (e.g., the exchange of Diplomatic Notes between South Africa and Mozambique confirming that the BIT was not in force, affidavits deposed by South African officials in judicial proceedings that the BIT was not in force, etc.) Claimant refused to withdraw his claim.³¹⁹

³¹⁴ Cl. Amended SoC, para. 4.

³¹⁵ Resp. PHB, para. 118.

³¹⁶ Resp. PHB, para. 119.

³¹⁷ Resp. PHB, para. 119.

³¹⁸ Resp. PHB, para. 120.

³¹⁹ Resp. PHB, para 121.

434. Respondent seeks reimbursement of costs and fees amounting to US\$ 1,910,442.19.³²⁰ These include:³²¹
- (i) US\$ 1,271,737.79 in attorney's fees.
 - (ii) US\$ 284,863.05 in fees for Respondent's Mozambican law expert.
 - (iii) US\$ 65,664.55 in fees for Respondent's South African law expert.
 - (iv) US\$ 38,176.80 in general disbursements (including travel, lodging, transportation, translators, printing, etc.) apart from fees paid to ICSID; and
 - (v) US\$ 250,000.00 paid to ICSID.
435. Respondent argues that these costs were incurred to defend these proceedings and are reasonable given that the total claim made by Claimant is almost US\$ 100 million.³²²
436. At the same time, Respondent argues that, for the same reasons as summarized above, Claimant should bear his own fees and costs incurred in this arbitration.³²³ Respondent further objects to Claimant's costs submission (as originally filed) on two grounds.
- (i) Claimant did not attach any billing invoices or back-up documentation to support his statement of costs and establish that these costs were actually incurred and paid. Respondent submits, that on this basis, the entire statement of costs should be struck out and disregarded.³²⁴
 - (ii) Claimant hired two different counsel—Mr. Jefferys and Mr. Marto. The fees of the latter should be excluded because the former was Claimant's counsel throughout these proceedings; the latter did not participate as a counsel in the Hearing. Instead,

³²⁰ Resp. PHB, para. 125.

³²¹ Resp. PHB, Schedule A.

³²² Resp. PHB, para. 123.

³²³ Resp. PHB, para. 124.

³²⁴ Resp. Response to Cl. SoC, para. 2.

he testified as a South African law expert, when Claimant already had a South African law expert who appeared at the Hearing.³²⁵

437. Respondent did not provide additional submissions regarding Claimant's Amended Statement of Costs.

C. THE TRIBUNAL'S DECISION ON COSTS

438. Respondent had objected to the jurisdiction, first, of the Centre and, later, of this Tribunal right from the very beginning and even before this Tribunal was constituted. On August 26, 2014 H. E. Victor Manuel Borges, Minister of Fisheries of Mozambique wrote to the Secretary-General raising objections to jurisdiction and in particular objected to the invocation of the MIL.³²⁶ The same Minister on November 5, 2014 raised similar objections.³²⁷ On neither occasion did this member of the Cabinet of Respondent even hint that the BIT was not in force as the conditions stated in its Article 12 had not been met.

439. As is apparent from the procedural history of this case, Respondent vociferously objected to the jurisdiction of the Tribunal and raised multiple objections but did not, until the filing of the Motion to Dismiss, contest that the BIT was in force. Objections to jurisdiction were raised in the very first session of the Tribunal on December 15, 2015 and continued to be raised. It was on Respondent's insistence that the proceedings were bifurcated with the first phase being restricted to objections to jurisdiction and liability. Respondent filed an extensive Counter-Memorial on Jurisdiction and Liability on April 22, 2016 without a word on the BIT not being in force. Six months later, when Respondent filed its detailed Rejoinder on Jurisdiction and Liability, the position remained unchanged. The Hearing on Jurisdiction and Liability was twice derailed by agreement of the Parties.

440. It was only on June 20, 2017 when Respondent filed its Motion to Dismiss, that it, for the first time, raised the objection that the Tribunal lacked jurisdiction on the basis that the

³²⁵ Resp. Response to Cl. SoC, paras. 3-4.

³²⁶ Letter from H. E. Victor Manuel Borges, Cabinet Minister, Ministry of Fisheries to ICSID Secretary General dated August 26, 2014, raising objections to jurisdiction.

³²⁷ Letter from H. E. Victor Manuel Borges, Cabinet Minister, Ministry of Fisheries to ICSID Secretary General dated November 5, 2014, again raising objections to jurisdiction.

requirements of Article 12 of the BIT had not been complied with, and hence the BIT was not in force.

441. No plausible reason has been offered as to why it took Respondent so long to raise this objection in this arbitration. That Respondent had neither issued a notification and sent it to South Africa nor received a notification from South Africa was not something which required years to dig up. A glance at the file of the relevant Ministry would have revealed this information. There is also no worthwhile explanation proffered for Respondent not protesting the information displayed on the ICSID and UNCTAD websites. Curiously enough, the ICSID website even today continues to display this information.³²⁸ Respondent has not informed the Tribunal of any corrective action that it may have taken in this regard. That is not all. The departments or at the very least agencies and instrumentalities of Respondent have been inviting investment. In their presentations, they have mentioned the BITs which are not in force.³²⁹ The Mozambique-South Africa BIT is not listed as a BIT not in force in these presentations.
442. This conduct of Respondent, while insufficient to be a substitute for notifications under Article 12(1) to bring the BIT into force, is sufficient to disentitle them to the costs of these proceedings. Respondent could have brought these proceedings to an end by acting with diligence and seeking a termination of these proceedings in 2014. A letter to the Secretary-General to this effect would have resulted in either the Request not being registered or the Tribunal taking it up and deciding it immediately and to the exclusion of all else. Respondent cannot be absolved of the responsibility for the unnecessary continuation of these proceedings. The Tribunal is, therefore, of the view that Respondent is not entitled to the costs of these proceedings.

³²⁸ Given that the ICSID website states that the information contained therein is “based on information provided by governments or found on governmental websites,” the Tribunal can only conclude that Respondent has not sought to request correction of the information through the appropriate channels.

³²⁹ CPI, “Workshop on Responsible Investment in the Agricultural Sector” (April 23, 2015) (C-0167); CPI Presentation, “Laws and Regulations Related to Foreign Direct Investment in Mozambique (December 2016) (C-0177). See also Tr. Day 1, 49:14-17: “[I]f one has recourse to the CPI website today, it will be seen that Mozambique still advertises through its governmental body the fact that this Treaty is in force.”

443. Having concluded that Respondent is not entitled to costs, the Tribunal will now examine whether Respondent should be held responsible for all or some of the legal and administrative costs incurred by Claimant.
444. A serious impediment to the success of Claimant in this regard is the email of December 1, 2011 addressed to Claimant's counsel, Mr. Jefferys.
445. In this email, South Africa informed Mr. Jefferys that the BIT was not in force. It was not disputed by Mr. Dror Besserglik in his evidence that Mr. Jefferys was, at the relevant time, a Senior Advocate, working for Claimant. It was also admitted that the email address on the email was that of Mr. Jefferys.
446. Mr. Jefferys neither filed a witness statement of his own, nor that of anyone else from his law firm, explaining his position. He neither admitted nor firmly denied receiving the email. He dealt with the matter in his submissions. He was of the view that at that time he was not entrusted with this case by Claimant. Another counsel was examining it. He submitted that he did not recollect receiving the email. He further submitted that he may have sought this information as he may have been asked to do so or the email may be fraudulent. He provided no particulars of this allegation of fraud.
447. Mr. Jefferys could have either retained an expert to check his email records or requested a clerk or member of his Chambers to do that. That person then could have filed a witness statement in the proceedings and given evidence of whether the email was in the records of Mr. Jefferys or not. This he did not do.
448. Given these facts, it is difficult for the Tribunal to conclude with any degree of certainty that Mr. Jefferys, as counsel for Claimant, was unaware in December 1, 2011 that the BIT was not in force. In view of this conduct, the Tribunal is not inclined to order Respondent to pay the legal and administrative costs of Claimant.
449. The Tribunal, therefore, directs that both Parties will bear their own legal costs and the administrative costs of these proceedings will be equally shared between the Parties.

450. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):³³⁰

Arbitrators' fees and expenses	
Makhdoom Ali Khan (President)	\$110,858.94
Claus von Wobeser	\$108,635.95
Yves Fortier	\$63,659.49
ICSID's administrative fees	\$180,000.00
Direct expenses (estimated) ³³¹	\$26,774.88
Total	<u>\$489,929.26</u>

451. The above costs have been paid out of the advances made by the Parties in equal parts.³³² As a result, each Party's share of the costs of arbitration amounts to **USD 244,964.63**.

VII. AWARD

452. For the reasons set forth above, the Tribunal decides as follows:

- (1) That the Tribunal has no jurisdiction in the matter, the Motion to Dismiss is, therefore, accepted and Claimant's claim dismissed.
- (2) Each party will bear its own legal costs and the administrative costs will be shared by them equally.

³³⁰ The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

³³¹ This amount includes estimated charges relating to the dispatch of this Award (courier, printing and copying).

³³² The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

[signed]

The Honourable L. Yves Fortier CC, QC
Arbitrator

Date: **OCT 24 2019**

[signed]

Dr. Claus von Wobeser
Arbitrator

Date: **OCT 25 2019**

[signed]

Mr. Makhdoom Ali Khan
President of the Tribunal

Date: **OCT 28 2019**