

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**LIGHTHOUSE CORPORATION PTY LTD AND  
LIGHTHOUSE CORPORATION LTD, IBC**

Claimants

and

**DEMOCRATIC REPUBLIC OF TIMOR-LESTE**

Respondent

**ICSID CASE No. ARB/15/2**

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**AWARD**

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**Members of the Tribunal**

Professor Gabrielle Kaufmann-Kohler, President

Mr. Stephen Jagusch QC, Arbitrator

Professor Campbell McLachlan QC, Arbitrator

**Secretary of the Tribunal**

Ms. Lindsay Gastrell

**Assistant to the Tribunal**

Mr. Rahul Donde

Date of dispatch to the Parties: 22 December 2017

## REPRESENTATION OF THE PARTIES

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*Representing the Democratic Republic of Timor-Leste:*

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## LIST OF MAIN ABBREVIATIONS

Additional Evidence	Additional exhibits submitted by the Claimants under separate cover following meeting between the Claimants' new counsel and Mr. Jacobs.
Addendum, Nomination and Variation	Agreement dated 26 November 2010 titled "Addendum, Nomination & Variation for: TLZEBHSD20101022LEAJ9 / dated: 22nd - OCT-2010" (also the "Third Agreement")
Australia	Commonwealth of Australia
C-Mem	Claimants' Counter-Memorial on Preliminary Objections dated 19 August 2016
C-PHB	Claimants' Post-Hearing Brief dated 18 April 2017
C-RPHB	Claimants' Rebuttal Post-Hearing Brief dated 5 May 2017
Contribution Summary	Document dated 22 October 2010, titled "10.16 MW Diesel Generator Infrastructure Contribution Summary"
December General Terms	Document dated December 2010 titled "Lighthouse Energy General Terms and Conditions of Supply of Goods and Related Services"
Exh. C-	Claimants' exhibit
Exh. CL-	Claimants' legal authority
Exh. R-	Respondent's exhibit
Exh. RL-	Respondent's legal authority
FIL	The Timor-Leste Foreign Investment Law (Law No 05/2005)
First Agreement	The Supply Agreement and the Contribution Summary, each dated 22 October 2010
First Jacobs Email	First Email from Albert Jacobs to Sean Magee of 27 November 2010 with subject line 'Timor-Leste Fuel Supply Variation Documents for Execution' (Exhibit C-147)

Floating Storage Addendum	Agreement dated 18 November 2010 titled “Floating Storage Addendum & Nomination”
Fuel Supply Agreement	Agreements with reference number TLZEBHSD20101022LEAJ9
Further Jacobs Email	Email from Albert Jacobs to Sean Magee and Ambassador Abel Guterres of 7 December 2010 (Exhibit C-198)
Hearing	Hearing on preliminary objections held from 23 to 25 February 2017 at the Australian Disputes Centre in Sydney
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Lighthouse	Lighthouse Corporation Pty Ltd, a company incorporated under the laws of Australia
Lighthouse IBC	Lighthouse Corporation Ltd, IBC a company incorporated under the laws of the Seychelles
Mem.	Claimants' Memorial on the Merits dated 14 March 2016
Model Law	UNCITRAL Model Law on International Commercial Arbitration
October General Terms	Document dated October 2010 titled “Lighthouse Energy General Terms and Conditions of Supply of Goods and Related Services”
Observations on Bifurcation	Claimants' Observations on the Respondent's Application for Bifurcation dated 14 June 2016
PIL	Private Investment Law (Law No. 14/2011)
Preliminary Objections	Respondent's Memorial on Preliminary Objections to Jurisdiction and Request for Bifurcation dated 19 May 2016
Rej.	Claimants' Rejoinder on Preliminary Objections dated 27 January 2017

Reply	Respondent's Reply on Preliminary Objections dated 16 December 2016
Request for Arbitration	Claimants' request for arbitration to ICSID dated 4 December 2014
Respondent	Democratic Republic of Timor-Leste (also "Timor-Leste")
R-PHB	Respondent's Post-Hearing Brief dated 18 April 2017
Second Agreement	The Floating Storage Addendum and the Special Conditions, each dated 18 November 2010
Second Jacobs Email	Second Email from Albert Jacobs to Sean Magee of 27 November 2010 with subject line 'Timor-Leste Fuel Supply Variation Documents for Execution' (Exhibit C-148)
September General Terms	Document dated September 2010 titled "Lighthouse Energy General Terms and Conditions of Supply of Goods and Related Services"
SIA	Special Investment Agreement
Special Conditions	Agreement dated 18 November 2010 titled "Special Conditions of Contract for Supply of Goods & Related Services"
Standard Terms	Document with "Release Date: Oct-2010" titled "Lighthouse Energy Standard Terms and Conditions Applying to the Sale of Goods"
Supply Agreement	Agreement dated 22 October 2010, titled "Supply for Allocation & Contract"
Third Agreement	Agreement dated 26 November 2010 titled "Addendum, Nomination & Variation for: TLZEBHSD20101022LEAJ9 / dated: 22nd - OCT-2010" (also the "Addendum, Nomination and Variation")
Timor-Leste	Democratic Republic of Timor-Leste (also the "Respondent")

## **I. INTRODUCTION**

1. This is a dispute submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes (“ICSID”) on the basis of (a) a contractual arrangement for the supply of fuel and generators, (b) the Timor-Leste Foreign Investment Law (Law No 05/2005) (the “FIL”),<sup>1</sup> and (c) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”).

### **A. THE CLAIMANTS**

2. The Claimants are Lighthouse Corporation Pty Ltd (“Lighthouse”), a company incorporated under the laws of the Commonwealth of Australia (“Australia”), and Lighthouse Corporation Ltd, IBC (“Lighthouse IBC”), a company incorporated under the laws of the Seychelles (together, the “Claimants”).
3. The Claimants are represented by Mr. Tony Johnson and Mr. Nicholas Briggs of the law firm Johnson Winter & Slattery; by Dr. Gavan Griffith of 2301 Owen Dixon Chambers West; and by Professor Chester Brown of 7 Wentworth Selborne Chambers.

### **B. THE RESPONDENT**

4. The Respondent is the Democratic Republic of Timor-Leste (“Timor-Leste” or the “Respondent”). The Respondent has been an ICSID Contracting State since 22 August 2002.
5. The Respondent is represented by Mr. Liam Prescott and Mr. Joel Borgeaud of the law firm DLA Piper Australia; by Mr. Vernon Flynn QC of Essex Court Chambers; by Mr. Jonathan Kay Hoyle of 11 St James Hall Chambers; and by Mr. Shane Doyle QC of Level 27 Chambers (Brisbane), 5th Floor Selbourne Chambers (Sydney) and Essex Court Chambers (London)
6. The Claimants and the Respondent are collectively referred to as the “Parties”.

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<sup>1</sup> Exh. RL-047, FIL.

## II. OVERVIEW OF THE RELEVANT CONTRACTUAL ARRANGEMENTS

7. The following summary gives a general overview of the relevant contractual arrangements. It does contain an overview of the disputes, or describe all facts which may be of relevance. To the extent relevant or useful, additional facts will be discussed in the Tribunal's analysis.
8. The Claimants' case arises out of a contractual arrangement that, according to the Claimants, comprises three interrelated agreements with reference number TLZEBHSD20101022LEAJ9 entered into in October and November 2010 (collectively, the "Fuel Supply Agreement"). The first agreement on which the Claimants rely (the "First Agreement") consists of the following documents:
- An agreement dated 22 October 2010, titled "Supply for Allocation & Contract" (the "Supply Agreement").<sup>2</sup> It provides for the sale and shipment of high speed fuel from the Supplier (the Claimants) to the Buyer (the Respondent) on monthly terms, as well as the supply of eight diesel generators. It also sets out terms such as the quantity of the goods, their origin, delivery, price, margin, and payment. The Supply Agreement is executed by Prime Minister Kay Rala Xanana Gusmão and Mr. Januario da Costa Pereira, Secretary of State for Electricity, on behalf of the Respondent; Mr. Carlos Oliveria on behalf of Zebra Fuels; and Mr. Albert Jacobs on behalf of the Claimants.<sup>3</sup>
  - A document dated 22 October 2010, titled "10.16 MW Diesel Generator Infrastructure Contribution Summary" (the "Contribution Summary").<sup>4</sup> The Contribution Summary covers many topics, primarily relating to the energy market in Timor-Leste. It also states that "Lighthouse 'Standard Terms and Conditions Applying to the Sale of Goods' will apply".<sup>5</sup>
9. As explained further below, the Parties disagree on the relevance and effect of that reference to "Standard Terms and Conditions Applying to the Sale of Goods". The

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<sup>2</sup> Exh. C-088, Supply Agreement, 22 October 2010.

<sup>3</sup> Exh. C-088, Supply Agreement, 22 October 2010, pp. 5-6.

<sup>4</sup> Exh. C-087, Contribution Summary, 22 October 2010.

<sup>5</sup> Exh. C-087, Contribution Summary, 22 October 2010, p. 8.

Claimants' position, which the Respondent disputes, is that this language refers to a document with "Release Date: Oct-2010" titled "Lighthouse Energy Standard Terms and Conditions Applying to the Sale of Goods" (the "Standard Terms").<sup>6</sup> Clauses 17 and 18 of the Standard Terms address applicable law and dispute resolution as follows:

"17 APPLICABLE LAW

17.1 The Contract shall be interpreted in accordance with and in subjection to the laws of the Commonwealth of Australia, in the State of Victoria, unless stipulated otherwise in any applicable Special Conditions of Contract.

17.2 Any foreign court of law or tribunal of competent jurisdiction engaged by either party in any proceedings between the Seller and purchaser, shall apply the Applicable Law herein determined, or as specified in any Special Conditions of Contract.

18 RESOLUTION OF DISPUTES

18.1 The Purchaser and the Supplier shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the Contract.

18.2 Where a dispute cannot be resolved amicably by agreement, the parties agree the matter can be referred for arbitration to the International Centre for Settlement of Investment Disputes ("ICSID"), in accordance with the rules of the International Convention on the Settlement of Investment Disputes ("convention"), so long as the host countries of both parties are members to the convention, at the time of engagement or contract.

18.3 The preferred venue of both parties in the case of an ICSID proceeding shall be the Australian Centre for International Commercial Arbitration at Melbourne.

18.4 Both parties agree that the decision of ICSID shall be binding and final, and shall at all times comply fully with the rules of the convention, and the resulting ICSID award."

10. The second agreement on which the Claimants rely (the "Second Agreement") includes:

- An agreement dated 18 November 2010 titled "Floating Storage Addendum & Nomination" (the "Floating Storage Addendum").<sup>7</sup> It is executed by the individuals who executed the Supply Agreement.<sup>8</sup> Under the Floating Storage Addendum, the

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<sup>6</sup> Exh. C-192, Standard Terms, October 2010.

<sup>7</sup> Exh. C-092, Floating Storage Addendum, 18 November 2010.

<sup>8</sup> Exh. C-092, Floating Storage Addendum, 18 November 2010, p. 2.

Claimants are to provide high speed fuel “in accordance with the main supply contract noted above, (and in conjunction with our *Standard Terms & Conditions of Supply*, also attached hereto)”.<sup>9</sup> The Parties disagree as to the content, meaning and effect of that reference to “*Standard Terms & Conditions of Supply*”.

- An agreement dated 18 November 2010 titled “Special Conditions of Contract for Supply of Goods & Related Services” (the “Special Conditions”), which is executed by the individuals who executed the Supply Agreement and the Floating Storage Addendum.<sup>10</sup> According to the Claimants, the purpose of this document was to revise the Fuel Supply Agreement for consistency with the Floating Storage Addendum.<sup>11</sup> The Special Conditions provide that they must be “read in conjunction with”, *inter alia*, the “Lighthouse Energy – General Terms & Conditions of Supply”.<sup>12</sup>

11. The third agreement that the Claimants cite is dated 26 November 2010, titled “Addendum, Nomination & Variation for: TLZEBHSD20101022LEAJ9 / dated: 22nd - OCT-2010” (the “Third Agreement” or “Addendum, Nomination and Variation”).<sup>13</sup> Again, it is executed by the same individuals.<sup>14</sup> Like the Floating Storage Addendum, the Third Agreement contains a reference to “*Standard Terms & Conditions of Supply*”, the content, meaning and effect of which is disputed.<sup>15</sup>
12. Item F of the Addendum, Nomination and Variation provides that “the Supplier will commit to the engineering, manufacture, development and installation of a state-of-the-art fuel storage facility at Port Caravela”.<sup>16</sup>
13. Regarding its relationship to other contractual documents, the Third Agreement stipulates as follows:

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<sup>9</sup> Exh. C-092, Floating Storage Addendum, 18 November 2010, p. 2 (italics in original).

<sup>10</sup> Exh. C-093, Special Conditions, 18 November 2010. The copy on the record is not in fact signed by Mr. Albert Jacobs.

<sup>11</sup> Mem., para. 97.

<sup>12</sup> Exh. C-093, Special Conditions, 18 November 2010, p. 5.

<sup>13</sup> Exh. C-095, Addendum, Nomination and Variation, 26 November 2010.

<sup>14</sup> Exh. C-095, Addendum, Nomination and Variation, 26 November 2010, p. 10.

<sup>15</sup> Exh. C-095, Addendum, Nomination and Variation, 26 November 2010, p. 3.

<sup>16</sup> Exh. C-095, Addendum, Nomination and Variation, 26 November 2010, Item F.

“[T]he following documents are attached for your reference, and form integral part of the original Supply Contract and Agreement, TLZEBHSD20101022LEAJ9 I DATED: 22ND- OCT-2010:

1. LE - General Definitions for Petroleum Related Supply
2. LE - General Terms & Conditions of Supply
3. LE - Lighthouse Guide to Incoterms 2000
4. LE - Special Conditions of Contract dated 261h-Nov-2010 (v2)
5. LE - Bonus Period Election Form (Dated 261h-Nov-2010)

[...]

Any previous Addendum, Nomination and Variation is subject to this one, in all its parts, and any conflict in terms, definitions, charges, meanings or otherwise, shall surrender to those stipulated by this Addendum, Nomination and Variation. The Prevailing Special Conditions of Contract shall be the most recent version as executed by the parties, and all former Special Conditions of Contract shall be surrendered in so far as they conflict with the latest executed version.”<sup>17</sup>

14. As explained further below, the Respondent’s position is that the reference in the Addendum, Nomination and Variation to the “LE – General Terms & Conditions of Supply” is not to the Standard Terms, but rather to a document titled “Lighthouse Energy General Terms and Conditions of Supply of Goods and Related Services”. The Respondent relies on two versions of this document: one dated September 2010 (the “September General Terms”),<sup>18</sup> which was attached to the Second Agreement, and one dated October 2010 (the “October General Terms”),<sup>19</sup> which the Respondent received at some time later. Clause 17 of the September General Terms provides the following dispute resolution clause:

“17.1 The Purchaser and the Supplier shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the Contract.

17.2 Any Supplier that claims to have suffered loss or injury due to a breach of an obligation imposed on the procuring entity, by law may

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<sup>17</sup> Exh. C-095, Addendum, Nomination and Variation, 26 November 2010, p. 8; see also p. 9 (“By signing this Addendum, Nomination and Variation you acknowledge that you have received, read and understood all nine (9) documents referenced above, and further acknowledge they form an integral part of the aforementioned contract”). The other four documents referenced are “floating storage barge I vessel 088 Reports”.

<sup>18</sup> Exh. R-119, September General Terms, attached to Email from Sean Magee to Abrao Gabriel Oliveira (copying Ambassador Abel Guterres) of 19 November 2010, with subject ‘FINAL PACKAGE’.

<sup>19</sup> Exh. R-132, October General Terms.

seek review in accordance with the public procurement law of the Buyer.”<sup>20</sup>

15. Clause 17 of the October General Terms is identical, except that it adds the following language at the end of Clause 17.2: “or the standard laws applicable to Suppliers, under Commonwealth laws of Australia”.<sup>21</sup>
16. The Claimants’ position, disputed by the Respondent, is that the Claimants prepared a revised version of the General Terms and Conditions in late November 2010, which was dated December 2010 (the “December General Terms”).<sup>22</sup> Clause 17.2 of this version provides:

“Where a dispute cannot be resolved amicably by agreement, the parties agree the matter can be referred for arbitration to the International Centre for Settlement of Investment Disputes (“ICSID”), in accordance with the rules of the International Convention on the Settlement of Investment Disputes (“convention”), so long as the host countries of both parties are members to the convention, at the time of engagement or contract.”<sup>23</sup>

### **III. PROCEDURAL HISTORY**

17. On 16 December 2014, the Claimants filed with ICSID a request for arbitration dated 4 December 2014, together with Exhibits 1 through 10 (the “Request for Arbitration”). By letter of 18 December 2014, the ICSID Secretariat asked the Claimants to provide additional information relating to the Request for Arbitration, which the Claimants submitted on 29 December 2014.
18. In accordance with Article 36 of the ICSID Convention, the ICSID Secretary-General registered the Request for Arbitration on 14 January 2015 and so notified the Parties. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible pursuant to Articles 37 to 40 of the ICSID Convention.

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<sup>20</sup> Exh. R-119, September General Terms, Clause 17, attached to Email from Sean Magee to Abrao Gabriel Oliveira (copying Ambassador Abel Guterres) of 19 November 2010, ‘FINAL PACKAGE’.

<sup>21</sup> Exh. R-132, October General Terms, Clause 17.2.

<sup>22</sup> Exh. C-200, December General Terms.

<sup>23</sup> Exh. C-200, December General Terms, Clause 17(2).

19. On 25 March 2015, the Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention. Specifically, the Parties agreed that the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the two co-arbitrators.
20. On 19 April 2015, the Claimants appointed Mr. Stephen Jagusch, a national of New Zealand, as arbitrator, and Mr. Jagusch accepted his appointment on 22 April 2015. On 20 May 2016, the Respondent appointed Professor Campbell McLachlan QC, a national of New Zealand, as arbitrator, and Professor McLachlan accepted his appointment on 27 May 2015.
21. In accordance with the Parties' agreed method of constituting the Tribunal, on 15 June 2015, the co-arbitrators made a proposal for a President of the Tribunal and asked the Parties to confer and inform the ICSID Secretariat whether they had any objection. The Parties were unable to agree on the co-arbitrators' proposal. By correspondence of 24 June 2015, the Parties agreed that the co-arbitrators would have 30 additional days to make an alternate proposal.
22. On 30 July 2015, the co-arbitrators proposed the appointment of Professor Gabrielle Kaufmann-Kohler, a national of Switzerland, to serve as the President of the Tribunal. ICSID informed the Parties that Professor Kaufmann-Kohler had confirmed her independence, and that she was prepared to accept the appointment. ICSID also provided the Parties with Professor Kaufmann-Kohler's transparency statements. The co-arbitrators asked the Parties to confer and inform the ICSID Secretariat whether they had any objection to this proposal.
23. By letters of 4 and 5 August 2015, the Respondent and the Claimants confirmed that they had no objection to the appointment of Professor Kaufmann-Kohler.
24. On 7 August 2015, Professor Kaufmann-Kohler accepted her appointment. On the same date, in accordance with ICSID Arbitration Rule 6(1), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Lindsay Gastrell, ICSID Legal Counsel, was designated to serve as the Secretary of the Tribunal. ICSID provided the Parties with copies of the declarations required under ICSID Arbitration Rule 6(2),

signed by Professor Kaufmann-Kohler, Mr. Jagusch and Professor McLachlan, as well as Professor Kaufmann-Kohler's statement.

25. By letter of 14 August 2015, the Respondent's counsel notified the Tribunal that:

“1. our client will be filing a jurisdictional objection pursuant to Rule 41(1) of the ICSID Arbitration Rules;

2. our client currently expects to file a preliminary objection pursuant to Rule 41(5) of the ICSID Rules on the basis that some or all of the Claimants' claims are manifestly without legal merit. In the event that we receive final instructions to file such an objection it will be filed on or before 6 September 2015 (being 30 days after the constitution of the Tribunal, in accordance with Article 41(5)); and

3. our client anticipates that it will make an application for security in respect of its costs pursuant to Rule 39(1) of the ICSID Rules. Our client is conscious of the need to make such an application expeditiously.”

26. In response, on 26 August 2015, the Tribunal informed the Parties that the procedural modalities relating to any application under ICSID Arbitration Rule 41(5) or 39(1) would be discussed during the first session of the Tribunal.

27. At the same time, the Tribunal provided the Parties with a draft agenda for the first session and a draft procedural order addressing the conduct of the proceedings. The Parties were invited to confer and provide comments on these drafts. The Tribunal also proposed the appointment of Mr. Rahul Donde as Assistant to the Tribunal.

28. By letter of 10 September 2015, the Respondent advised that it would not be filing preliminary objections pursuant to ICSID Arbitration Rule 41(5), but that it would soon file an application for security for costs pursuant to ICSID Arbitration Rule 39(1).

29. On 29 September 2015, the Claimants filed an amended Request for Arbitration, correcting an inaccuracy in paragraph 10 and updating the list of the Claimants' legal representatives at paragraph 5.

30. Also on 29 September 2015, the Parties provided their joint comments on the draft agenda for the first session and the corresponding draft procedural order.

31. The first session was held by teleconference on 6 October 2015. During the teleconference, the Tribunal and the Parties discussed procedural matters, including the

applicable arbitration rules, modalities for written submissions, and the procedural calendar.

32. The Parties also confirmed that they had no objection to the appointment of Mr. Donde as Assistant to the Tribunal. Mr. Donde provided his signed declaration to the Parties on 6 October 2015.
33. On 9 October 2015, the Respondent submitted an Application for Provisional Measures, together with the Witness Statements of Ms. Kate Elizabeth Teixeira and Mr. Liam Thomas Prescott, Exhibits R-001 through R-082, and Legal Authorities RL-001 through RL-027.
34. That same day, the Tribunal invited the Claimants to submit their observations on the Application for Provisional Measures, in accordance with the briefing schedule agreed by the Parties during the first session.
35. On 13 October 2015, the Tribunal issued Procedural Order No. 1 concerning the procedural matters addressed during the first session. The Procedural Timetable was provided to the Parties in draft form on the same date and subsequently finalized.
36. By letter of 2 November 2015, the Claimants requested an extension until 17 November 2015 to file their observations on the Application for Provisional Measures. Upon the invitation of the Tribunal, the Respondent commented on 4 November 2015, informing the Tribunal that it agreed to the extension and would consent to giving the Claimants until 20 November 2015 to file their observations. In addition, the Respondent proposed that the Tribunal permit a short second round of written submissions. The Claimants responded to this proposal on the same day, opposing a further round of written submissions.
37. On 6 November 2015, the Tribunal confirmed the extended deadline of 20 November 2015 for the Claimants' observations on the Application for Provisional Measures. The Tribunal also informed the Parties that it would decide whether a short second round of written submissions would be useful after receiving the first round, and that it would give appropriate instructions at that time.
38. In accordance with the revised procedural calendar, the Claimants filed their Observations on the Application for Provisional Measures, dated 20 November 2015,

together with the Witness Statements of Mr. Albert Jacobs, Mr. James Podaridis, Mr. Sean Magee, and Mr. Alan Fraser, Exhibits C-001 through C-032, and Legal Authorities CL-001 through CL-009.

39. On 23 November 2015, the Tribunal advised the Parties that it had decided to allow a brief second round of written submissions. The Respondent was invited to submit a reply within ten days, and the Claimants were invited to submit a rejoinder ten days thereafter. The Tribunal limited the length of the submissions to eight pages.
40. At the same time, the Tribunal confirmed that the hearing on the Application for Provisional Measures would be held by teleconference and provided the Parties with an agenda for the hearing.
41. On 3 December 2015, the Respondent requested an extension until 5 December 2015 to file its Reply to the Claimants' Observations on the Application. The Claimants did not object, and the Tribunal therefore granted the Respondent's request. The Tribunal also noted that the Claimants would be granted a commensurate extension if they were to request it.
42. On 5 December 2015, the Respondent filed its Reply to the Claimants' Observations on the Application, together with the Witness Statement of Mr. Russell John Slocomb, the Second Witness Statement of Mr. Liam Thomas Prescott, and Exhibits R-083 through R-100.
43. On 8 December 2015, the Claimants complained to the Tribunal about the length of the Reply to the Claimants' Observations on the Application and requested an extension of time for their rejoinder. The Respondent did not agree with the Claimants' assertions, but had no objection to the extension sought. On 9 December 2015, the Tribunal confirmed that the filing date for the rejoinder was extended to 16 December 2015.
44. On 16 December 2015, the Claimants filed their Rejoinder on the Respondent's Application for Provisional Measures, together with the Second Witness Statement of Mr. Albert Jacobs and Exhibits C-033 through C-053.
45. On 20 December 2015, the Respondent requested that the scheduled teleconference hearing on provisional measures be postponed due to the illness of one of its counsel. The President of the Tribunal informed the Parties that, under the circumstances, the

Tribunal was inclined to grant the postponement, subject to any compelling objection by the Claimants. In response, the Claimants proposed that, rather than postpone the hearing, the Tribunal proceed to decide based on the written submissions. The Respondent, in turn, objected to this proposal.

46. On 21 December 2015, the Tribunal informed the Parties that the hearing would be rescheduled.
47. The hearing on provisional measures was held as rescheduled to 21 January 2016 and conducted by teleconference. At that hearing, the Tribunal heard the Parties' oral arguments in accordance with the agenda provided on 23 November 2015. An audio recording was made, and a court reporter prepared a written transcript of the recording. Copies of the recording and the transcript were subsequently distributed to the Tribunal and the Parties.
48. On 28 January 2016, the Claimants sought leave to file a legal authority that had not entered the public domain until after the hearing. In response, on 1 February 2016, the Tribunal informed the Parties that it had all the necessary information to issue the decision and did not wish to receive further materials.
49. On 11 February 2016, the Claimants transmitted to the Tribunal a revised version of the transcript of the hearing on provisional measures, reflecting the corrections agreed by the Parties.
50. On 13 February 2016, the Tribunal issued Procedural Order No. 2, containing the Tribunal's Decision on the Respondent's Application for Provisional Measures. The Tribunal denied the Respondent's application for security for costs, based on its finding that "the facts invoked by the Respondent are insufficient as the record currently stands to show the 'exceptional circumstances' required for an order for security for costs".
51. On 23 February 2016, the Claimants requested a 14-day extension until 18 March 2016 to submit their Memorial on the Merits, to which the Respondent had consented. On 24 February 2016, the Tribunal informed the Parties that the Tribunal could not accede to the Claimants' request in light of the date reserved for a potential hearing on preliminary objections. Instead, the Tribunal transmitted to the Parties a revised procedural timetable

providing a ten-day extension until 14 March 2016 for the Claimants to file their Memorial on Merits, and reflecting other adjustments to account for that extension.

52. In accordance with the revised schedule, the Claimants filed their Memorial on the Merits, dated 14 March 2016 (the “Mem.”), accompanied by:

- the Third Witness Statement of Mr. Albert Jacobs,
- the Second Witness Statement of Mr. Sean Magee,
- the First Witness Statement of Mr. Shane Tissera,
- the Second Witness Statement of Mr. James Podaridis,
- the First Witness Statement of Mr. Nelson Ribeiro,
- the First Expert Report of Mr. Brian Morris,
- Exhibits C-054 through C-196, and
- Legal Authorities CL-010 through CL-038.

53. On 3 and 18 May 2016, the Tribunal confirmed further amendments to the procedural calendar that had been agreed by the Parties.

54. In accordance with the revised procedural timetable, the Respondent filed its Memorial on Preliminary Objections to Jurisdiction and Request for Bifurcation, dated 19 May 2016 (the “Preliminary Objections”), accompanied by:

- the First Witness Statement of Mr. Valentino Dariel Sousa,
- the First Witness Statement of Mr. Kay Rala Xanana Gusmão,
- the First Witness Statement of Mr. Noel Bernardo de Carvalho,
- the First Witness Statement of Mr. Arcanjo da Silva,
- the First Witness Statement of Mr. Jose dos Reis Francisco Abel,
- the First Witness Statement of Mr. Constantino Ferreira Soares,

- the First Witness Statement of Mr. Abel Guterres,
  - the First Witness Statement of Mr. Florencio da Conceicao Sanches,
  - the Third Witness Statement of Mr. Liam Prescott,
  - Exhibits R-101 through R-134, and
  - Legal Authorities RL-028 through RL-089.
55. Also in accordance with the revised procedural timetable, the Claimants then filed their Observations on the Respondent’s Application for Bifurcation, dated 14 June 2016 (the “Observations on Bifurcation”), together with Exhibits C-197 through C-200, and Legal Authorities CL-039 through CL-056.
56. By letter of 17 June 2016, the Respondent complained to the Tribunal that the Claimants had inappropriately introduced new and unsworn material into the proceedings in the Observations on Bifurcation. The Respondent claimed that the introduction of this new material prejudiced its position and requested that the Tribunal (a) not consider the new material, (b) make a ruling that it would not consider the new material, and (c) stay any decision in respect of the Request for Bifurcation until it had determined the status of the new material.
57. On 18 June 2016, the Tribunal invited the Claimants to comment on the Respondent’s letter of 17 June 2016. By letter of 24 June 2016, the Claimants requested that the Tribunal deny the relief sought by the Respondent.
58. On 8 July 2016, the Tribunal issued Procedural Order No. 3 on Bifurcation and Related Requests. It granted the request to bifurcate the proceedings into a first phase addressing the three jurisdictional objections and a second phase addressing other objections that may arise and the merits. In addition, it denied the Respondent’s 17 June 2016 request for relief.
59. On 8 August 2016, the Claimants requested a seven-day extension to file their counter-memorial on preliminary objections, which the Tribunal granted on the same date in light of the Respondent’s consent.

60. The Claimants filed their Counter-Memorial on Preliminary Objections on 19 August 2016 (“C-Mem.”), accompanied by:
- the Fourth Witness Statement of Mr. Albert Jacobs,
  - the First Witness Statement of Mr. Mark Beanie,
  - the First Witness Statement of Mr. Nickoloas Mitropoulos,
  - the First Expert Report of Mr. Filipe Alfaiate (with Exhibits AFG-1 through AFG-4, and Timor-Leste Legislation 1 through 17),
  - Exhibits C-201 through C-204, and
  - Legal Authorities CL-057 through CL-085.
61. The Parties exchanged document production requests on 5 September 2016, produced certain responsive documents, and objected to the production of others on 19 and 20 September 2016, and 4 October 2016. They conveyed their objections to the Tribunal on 7 October 2016.
62. On 21 October 2016, the Tribunal issued Procedural Order No. 4, on document production.
63. By letter of 25 November 2016, the Respondent informed the Tribunal that the Claimants had filed proceedings against it in the Melbourne Registry of Supreme Court of Victoria, and that, as a result, it may require an extension of the procedural timetable. The Respondent also raised the issue of confidentiality of the proceeding, stating that “[w]hile at present no application may be necessary, in the event that the Claimants take any further step that is inconsistent in the maintenance of confidentiality, the Respondent will apply to the Tribunal for the necessary provisional measures”.
64. On 29 November 2016, the Claimants informed the Tribunal that they did not accept the Respondent’s suggestion of 25 November 2016 that the Parties were bound by a general duty of confidentiality in the Victorian court proceedings.

65. On 1 December 2016, the Parties requested that several amendments be made to the procedural calendar. On 3 December 2016, the Tribunal agreed to the proposed modifications and sent a revised procedural timetable to the Parties.
66. The Respondent filed its Reply on Preliminary Objections on 16 December 2016 (the “Reply”), accompanied by:
- the Second Witness Statement of Mr. Abel Guterres,
  - the Fourth Witness Statement of Mr. Liam Thomas Prescott,
  - the First Expert Report of Mr. Darren Hopkins,
  - the Second Expert Report of Mr. Darren Hopkins,
  - the First Expert Report of Mr. Nuno Miguel Dos Santos Marrazes,
  - Exhibits R-135 through R-163, and
  - Legal Authorities RL-090 through RL-115.
67. The Claimants submitted their Rejoinder on Preliminary Objections dated 26 January 2017 (the “Rej.”), accompanied by:
- the Fifth Witness Statement of Mr. Albert Jacobs,
  - the Third Witness Statement of Mr. Sean Magee,
  - the First Witness Statement of Mr. Alan Harper,
  - the First Expert Report of Mr. Craig Macaulay,
  - Exhibits C-205 through C-219, and
  - Legal Authorities CL-086 through CL-111.
68. On 28 January 2017, the Claimants submitted the Second Expert Report of Mr. Filipe Alfaiate, together with Exhibits AFG-005 through AFG-008, which was also meant to accompany the Rejoinder.

69. On 30 January 2017, the Claimants informed the Tribunal that they had appointed Dr. Gavan Griffith QC to replace Mr. John Karkar QC as senior counsel. The Parties then exchanged several letters, copied to the Tribunal, concerning Dr. Griffith's connections with the Members of the Tribunal. Neither Party requested any order from the Tribunal in this regard.
70. In accordance with the procedural timetable, on 30 January 2017, each Party identified the witnesses and experts presented by the other Party whom it intended to cross-examine at the hearing.
71. On 1 February 2017, the Tribunal sent to the Parties a draft procedural order addressing the organization of the hearing, and informed the Parties that this draft would serve as the agenda for the pre-hearing teleconference.
72. The President, acting by delegation of her co-arbitrators, held the pre-hearing teleconference with the Parties on 3 February 2017. During the call, the President and the Parties discussed various matters of hearing organization, such as the daily schedule, allocation of time, order of testimony, and the sequestration of witnesses.
73. On 7 February 2017, the Tribunal issued Procedural Order No. 5 addressing the organization of the hearing, which contained the Parties' agreements and the Tribunal's decisions on matters discussed during the pre-hearing teleconference.
74. By letter of 10 February 2017, the Respondent informed the Tribunal that its lead counsel, Mr. Shane Doyle QC, would not be able to represent the Respondent at the hearing due to illness and that Mr. Vernon Flynn QC would appear in his place.
75. On 12 February 2017, the Claimants wrote to the Tribunal to request leave to submit additional witness statements prepared by Mr. Albert Jacobs (his Sixth Witness Statement) and Mr. Sean Magee (his Fourth Witness Statement), as well as additional exhibits (the "Additional Evidence"). The Claimants stated that when their new counsel, Dr. Griffith, met with Mr. Jacobs, additional relevant and material information had been revealed. The Claimants noted that they would provide the Additional Evidence to the Respondent under separate cover.
76. In response, the President of the Tribunal invited the Respondent to comment within 24 hours on the admissibility of the Claimants' request. Alternatively, the President

invited the Respondent to notify the Tribunal within 24 hours that it did not wish to comment on the admissibility of the request, and to instead comment on the request itself and the Additional Evidence within a further period of 24 hours.

77. By letter of 14 February 2017, the Respondent opposed the Claimants' request. It argued that the Additional Evidence was extensive and contained entirely new allegations, and that the Claimants had failed to provide any reasonable justification for waiting to submit the Additional Evidence until 10 days before the hearing. However, the Respondent acknowledged that it was for the Tribunal to decide whether to admit the Additional Evidence and invited the Tribunal to examine the Additional Evidence for that purpose. The Respondent also requested that, if the Tribunal were to admit the Additional Information, the following procedural adjustments be made: (a) the Respondent be granted an opportunity to respond and submit additional information by 22 February 2017; (b) the Respondent be allotted additional time to cross-examine Mr. Jacobs and Mr. Magee at the hearing; and (c) all factual witnesses be required to give their evidence under oath.
78. The Claimants responded later on the same day. They challenged the Respondent's objection to admitting the Additional Evidence into the record. However, they essentially agreed to the three procedural adjustments that the Respondent requested in the event the Additional Evidence were to be admitted.
79. After reviewing the Additional Evidence, the Tribunal ruled on the Claimants' request by email of 14 February 2017. The Tribunal agreed with the Respondent that the Additional Evidence should have been submitted earlier, but also found that the Additional Evidence appeared relevant and material to the issues in dispute. Therefore, the Tribunal admitted the Additional Evidence into the record. To avoid any prejudice, the Tribunal adopted all the Respondent's proposed procedural adjustments.
80. On 19 February 2017, the ICSID Secretariat received two emails from the Claimants' witness Mr. Sean Magee, stating that he feared for his safety and would not attend the hearing. He also stated: "EACH OF MY WRITTEN AFFIDAVITS / WITNESS STATEMENTS ARE HEREBY WITHDRAWN". After consulting the Tribunal, the Secretary of the Tribunal provided Mr. Magee's emails to the Parties, noting that the Tribunal would hear any submissions that the Parties wished to make on the matter at the commencement of the hearing.

81. By letter of 20 February 2017, the Claimants argued that “the Tribunal should regard Mr. Magee’s Witness Statements as having been regularly filed and forming part of the evidential record of these arbitration proceedings” because he had provided a valid reason for failing to appear at the hearing.
82. On 21 February 2017, in accordance with Procedural Order No. 5, the Claimants submitted a demonstrative exhibit to be used at the hearing. By separate letter of the same date, the Claimants informed the Tribunal that they intended to adduce oral testimony from their witness Mr. Jacobs at the hearing concerning two new matters. They also stated that they would be content to have Mr. Jacobs testify first.
83. By letter of the same date, the Respondent commented on two matters. Regarding Mr. Magee’s witness statements, the Respondent argued that “Mr Magee’s evidence is inadmissible as evidence of the truth of its contents. Mr Magee has specifically and emphatically disavowed all of his four witness statements”. Regarding the Claimants’ intention to have Mr. Jacobs give oral testimony on new matters, the Respondent stated that if Mr. Jacobs had *any* new evidence to adduce, it should be submitted by 22 February 2017 in the form of a written witness statement.
84. On the same day, the President of the Tribunal invited the Claimants to file a brief supplemental witness statement by Mr. Jacobs the following day. She also confirmed that Mr. Jacobs would be the first witness to testify.
85. By separate letter of 21 February 2017, the Claimants submitted a further email from Mr. Magee regarding his non-appearance at the hearing, which was addressed to the Claimants’ counsel.
86. On 22 February 2017, the Claimants submitted the Seventh Witness Statement of Mr. Albert Jacobs.
87. On the same day, in accordance with the Tribunal’s instructions of 14 February 2017, the Respondent submitted the Second Witness Statement of Prime Minister Gusmão, responding to the Sixth and Seventh Witness Statements of Mr. Jacobs. Later that day, the Claimants also submitted the Third Witness Statement of Ambassador Guterres and the Fifth Witness Statement of Mr. Prescott, relating to “matters including the recent emails from Mr. Magee”.

88. After receiving these witness statements, the Claimants wrote to the Tribunal to object to Mr. Prescott's Fifth Witness Statement, arguing that it fell entirely outside of the scope of leave granted by the Tribunal.
89. The hearing on preliminary objections was held on 23 through 25 February 2017 at the Australian Disputes Centre in Sydney (the "Hearing"). The following persons were present at the Hearing:

Tribunal

Professor Gabrielle Kaufmann-Kohler, President  
Mr. Stephen Jagusch QC  
Professor Campbell McLachlan QC

Assistant to the Tribunal

Mr. Rahul Donde, Lévy Kaufmann-Kohler

Secretary of the Tribunal

Ms. Lindsay Gastrell, ICSID Secretariat

Claimants

*Counsel:*

Dr. Gavan Griffith QC  
Professor Chester Brown  
Mr. Tony Johnson, Johnson Winter & Slattery  
Mr. Nicholas Briggs, Johnson Winter & Slattery

*Party/Witness:*

Mr. Albert Jacobs, Director, Lighthouse Corporation Pty Limited and Lighthouse Corporation Limited, IBC

*Experts:*

Mr. Craig Macaulay, Korda Mentha  
Mr. Filipe Alfaiate (by video link), AFG

Respondent

*Counsel:*

Mr. Vernon Flynn QC, Essex Chambers  
Mr. Jonathan Kay Hoyle, 11th Floor St. James Hall Chambers  
Mr. Liam Prescott, DLA Piper  
Mr. Joel Borgeaud, DLA Piper  
Ms. Emily Chalk, DLA Piper  
Mr. Stephen Webb, DLA Piper

*Parties:*

His Excellency Hermenegildo Augusto Cabral Pereira, Minister of State and of the Presidency of the Council of Ministers

*Witnesses:*

His Excellency Kay Rala Xanana Gusmão, Minister for Planning and Strategic Investment (Former Prime Minister of Timor-Leste)

His Excellency Ambassador Abel Guterres, Ambassador Extraordinary and Plenipotentiary of Timor-Leste to Australia

*Experts:*

Dr. Darren Hopkins, McGrathNicol

Mr. Nuno Marrazes, Da Silva Teixeira & Associados

90. At the opening of the Hearing, Mr. Jagusch QC and Professor McLachlan QC addressed the Parties' correspondence relating to their relationships with Dr. Griffith QC, whom the Claimants had recently retained as lead counsel. Mr. Jagusch QC and Professor McLachlan QC confirmed their independence and their ability to decide the Parties' dispute fairly and impartially. The Parties made no comments or reservations.
91. Before they proceeded to their opening statements, the Tribunal invited the Parties to make oral submissions on the following outstanding procedural matters: (a) the Claimants' objection to Mr. Prescott's Fifth Witness Statement, (b) proposed adjustments to the order of witness examination set out in Procedural Order No. 5, and (c) whether additional time would be needed for direct and/or cross-examination of Mr. Jacobs, Prime Minister Gusmão and possibly Mr. Prescott. The Tribunal also invited the Parties to address in their opening statements the consequences of Mr. Magee's non-appearance and withdrawal of his witness statements.
92. After hearing the Parties' positions on the admissibility of Mr. Prescott's Fifth Witness Statement, the Tribunal decided not to admit the statement because it constituted evidence that could have been submitted earlier, and allowing it into the record at such a late stage would give rise to due process concerns. However, the Tribunal admitted certain exhibits to the statement: Exhibits R-164, R-178 (the compare version of the General Conditions, admitted as a demonstrative exhibit), R-180 and R-184.
93. Following the Parties' opening statements, in which they addressed the consequences of Mr. Magee's non-appearance, the Tribunal decided that, because Mr. Magee had specifically indicated his intention to "withdraw" or "revoke" his witness statements, the Tribunal would disregard those statements, as well as the portions of the Parties' opening statements that referred to Mr. Magee's statements.
94. On the second day of the Hearing, the Tribunal and the Parties determined that the Hearing would need to continue into the following day, Saturday, 25 February 2017, which had been held in reserve.

95. The Hearing proceeded as planned and the Tribunal heard, in addition to opening statements, the testimony of Mr. Albert Jacobs, Mr. Filipe Alfaiate, Mr. Nuno Marrazes, His Excellency Ambassador Abel Guterres, His Excellency Kay Rala Xanana Gusmão, Mr. Craig Macaulay and Mr. Darren Hopkins.
96. At the close of the Hearing, the Tribunal and the Parties discussed the further procedural steps, including transcript corrections, post-hearing briefs, and cost submissions. On 7 March 2017, the Tribunal issued Procedural Order No. 6, memorializing the Tribunal's directions on these matters.
97. In accordance with Procedural Order No. 6, on 17 March 2017, the Parties submitted their agreed corrections to the transcript, which the court reporter subsequently entered into the final transcript.
98. On 18 April 2017, each Party submitted a Post-Hearing Brief ("C-PHB" and "R-PHB"). By letter of 25 April 2017, pursuant to Procedural Order No. 6, the Claimants applied for leave to file a Rebuttal Post-Hearing Brief to address two matters arising from the Respondent's Post-Hearing Brief. On the same day, the Respondent indicated that it would not seek leave to file a Rebuttal Post-Hearing Brief.
99. By letter of 27 April 2017, the Respondent sought leave to file an Answer to the Claimants' Rebuttal Post-Hearing Brief, if the Tribunal were to allow the Claimants to file such a Rebuttal.
100. Later on 27 April 2017, the Tribunal granted the Claimants' request to file a Rebuttal Post-Hearing Brief, limited to the two matters identified in the Claimants' letter of 25 April 2017 and to a length of 10 pages. The Tribunal denied the Respondent's request for leave to file an Answer to the Claimants' Rebuttal because Procedural Order No. 6 had not contemplated sur-rebuttals, and the Tribunal saw no reason to introduce the possibility at that stage. In accordance with the Tribunal's instructions, on 5 May 2017, the Claimants filed their Rebuttal Post-Hearing Brief ("C-RPHB").
101. On 24 May 2017, each Party submitted its Statement of Costs.
102. On 22 December 2017, the Tribunal declared the proceedings closed in accordance with ICSID Arbitration Rule 38(1).

#### **IV. THE PARTIES' REQUESTS FOR RELIEF**

##### **A. THE RESPONDENT'S REQUEST FOR RELIEF**

103. The Respondent seeks the following declarations and orders from the Tribunal:

“a) there has been no consent by the Respondent to ICSID arbitration (Objection 1);

b) there has been no “investment” for the purposes of the ICSID convention or the Timor-Leste Foreign Investment Law (Objection 2);

c) the Claimants are not a “Foreign Investor” and do not hold a Special Investment Agreement for the purpose of the Foreign Investment Law (Objection 3);

d) the Tribunal does not have jurisdiction to hear or determine the Claimants' claims in this arbitration;

e) the Claimants' claims in this arbitration be dismissed for want of jurisdiction; and

f) the Claimants pay to the Respondent its costs of the arbitration and pay the Tribunal's fees.”<sup>24</sup>

##### **B. THE CLAIMANTS' REQUEST FOR RELIEF**

104. The Claimants ask the Tribunal to decide that:

“a. it has jurisdiction over the Claimants' claims,

b. the Respondent's preliminary objections are rejected;

c. the arbitration should proceed to the merits phase; and

d. the Respondent be ordered to pay the Claimants' costs and the costs of the arbitration.”<sup>25</sup>

#### **V. PRELIMINARY MATTERS**

105. Prior to considering the merits of the Parties' positions, the Tribunal will address the scope of this Award (A); the maxim *iura novit curia* (B); and the relevance of previous decisions or awards (C).

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<sup>24</sup> R-PHB, para. 157; see Preliminary Objections, para. 6.

<sup>25</sup> Rej., para. 116; C-PHB, para. V; see C-Mem., para. 94.

**A. SCOPE OF THIS AWARD**

106. The present proceedings were bifurcated between jurisdiction/admissibility and merits in Procedural Order No. 3. The present Award thus addresses the Respondent's objections to the Tribunal's jurisdiction.
107. The Respondent has raised three objections to the Tribunal's jurisdiction: the first two of which concern the Respondent's consent to ICSID jurisdiction. The Respondent challenges that it consented to ICSID arbitration as part of the Parties' contractual arrangements. It also disputes having given its consent to ICSID arbitration through the FIL. As a third objection, the Respondent contends that the Claimants have made no investment within the meaning of Article 25(1) of the Convention.
108. If upheld, the objections concerning the Respondent's consent to ICSID jurisdiction are dispositive of the Claimants' case. Further, if the Tribunal concludes that the Respondent has not consented to ICSID, be it by contract or through the FIL, then it can dispense with determining whether the Claimants' investment satisfies the "investment" requirement of Article 25(1) of the Convention.

**B. IURA NOVIT CURIA**

109. When applying the governing law, the Tribunal is not bound by the arguments or sources invoked by the Parties. Under the maxim *iura novit curia* – or, better, *iura novit arbiter* – the Tribunal is required to apply the law of its own motion, provided always that it gives the Parties' an opportunity to comment if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate.<sup>26</sup>

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<sup>26</sup> *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 295 (“[...] an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, *sua sponte*, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it”). See also *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, Merits, Judgment, 25 July 1974, para. 18 (“[i]t being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court”); *Albert Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Case (“*Oostergetel*”), Award, 23 April 2012, para. 141; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 287.

## **C. RELEVANCE OF PREVIOUS DECISIONS AND AWARDS**

110. In support of their positions, the Parties have relied on previous decisions or awards, either to conclude that the same or similar approaches or solutions should be adopted in the present case or in an effort to explain why this Tribunal should depart from an approach or a solution reached by another tribunal.
111. The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it should pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it should be respectful of the reasoning and solutions established in a series of consistent cases. It also believes that, subject to the circumstances of an actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.

## **VI. ANALYSIS**

112. It is common ground that the Tribunal has the power to rule on its own jurisdiction and that the latter is governed by Article 25(1) of the ICSID Convention, which reads as follows:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

113. For a tribunal to have jurisdiction under Article 25(1) of the ICSID Convention, four conditions must be satisfied: (i) the arbitration must be between a Contracting State and a national of another Contracting State, (ii) there must be a legal dispute arising directly out of (iii) an investment, and (iv) the Contracting State and the investor must have consented in writing to ICSID arbitration. In addition, of course, the ICSID Convention must have been applicable at the relevant time.
114. Here, the Claimants submit that the Respondent expressed its consent to arbitrate the present dispute before ICSID through Clause 18 of the Standard Terms and through

Clause 17 of the December General Terms, both of which the Claimants' allege were incorporated into the Parties' contractual arrangements. The Claimants further allege that the Respondent also consented to ICSID arbitration in Article 23 of the FIL. The Respondent opposes both of these submissions, and adds that the Claimants' investment in Timor-Leste does not fall within the ambit of Article 25(1) of the Convention.

115. This section first discusses the law applicable to determine consent to ICSID jurisdiction (A), and then reviews the Respondent's arguments that it has not consented to ICSID jurisdiction ((B) and (C)) before turning to the Respondent's argument that the Claimants have not made an investment within the ambit of Article 25(1) of the Convention (D).

#### **A. LAW GOVERNING CONSENT TO ICSID JURISDICTION**

116. The Tribunal must first determine which law governs consent.

##### **1. The Parties' Positions**

###### **a. The Respondent's Position**

117. The Respondent's position is that "consent is to be assessed by reference to the terms of the ICSID Convention in accordance with international law and ICSID tribunal practice".<sup>27</sup> Article 42 of the ICSID Convention<sup>28</sup> specifies the law governing the merits and does not apply to jurisdiction under Article 25 of the ICSID Convention, as confirmed by numerous ICSID tribunals.<sup>29</sup>

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<sup>27</sup> Preliminary Objections, para. 52.

<sup>28</sup> Article 42(1) states: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

<sup>29</sup> Reply, paras. 7-8, *citing* Exh. RL-090, *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 430; Exh. RL-104, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 85; Exh. RL-037, *Ceskoslovenska Obchodni Banka SA v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, paras. 34-35; Exh. C-061, *Noble Energy Inc. and Machala Power Cia Ltd v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/06/12, Decision on Jurisdiction, 5 March 2008, para. 57; Exh. RL-065, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 200.

118. Based on a review of past ICSID cases, including in particular *CSOB v. Slovak Republic*<sup>30</sup> and *Plama v. Bulgaria*,<sup>31</sup> the Respondent proposes the following three principles of international law that are relevant to its jurisdictional objection:

“a) consent can be found only where the position is clear and unambiguous. Jurisdictional instruments (including, in this case, alleged contractual documents) should be construed neither restrictively nor expansively but in good faith by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged;

b) a State may not be compelled to submit disputes to arbitration without consent. Such consent cannot be assumed but must be established by an express declaration or by actions that demonstrate consent; and

c) in order to ascertain the common will (or intention) of the parties to incorporate an arbitration agreement by reference, the Tribunal may have regard to a range of factors, including the negotiating history of the parties and general interpretive principles.”<sup>32</sup>

119. For the Respondent, it follows that the Claimants, who bear the burden of establishing consent, must show the Respondent’s clear and unambiguous consent to ICSID arbitration based on all the circumstances.<sup>33</sup>

*i. Consent Through Incorporation by Reference*

120. In respect of the incorporation of (i) Clause 18 of the Standard Terms and (ii) Clause 17 of the December General Terms into the Parties’ contract, the Respondent insists that international law governs. The Claimants’ reliance on the law of the State of Victoria to determine consent, as well as their reference to the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”) is misplaced. The Model Law applies to commercial arbitration and is “of tenuous relevance” to ICSID arbitration.<sup>34</sup>

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<sup>30</sup> Exh. RL-037, *Ceskoslovenska Obchodni Banka SA v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999.

<sup>31</sup> Exh. RL-065, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

<sup>32</sup> Reply, para. 9; see Preliminary Objections, paras. 53-64.

<sup>33</sup> Reply, para. 10.

<sup>34</sup> Reply, para. 14.

121. The Respondent further submits that, under the applicable principles of international law, “a reference to something called the ‘Standard Terms and Conditions’ is not, and cannot be, determinative of whether the Respondent gave consent in the present case”.<sup>35</sup> It relies in particular on *Plama*, which stated that:

“a reference may in and of itself not be sufficient; the reference is required to be such as to make the arbitration clause part of the contract... This is another way of saying that the reference must be such that the parties’ intention to import the arbitration provision of the other agreement is clear and unambiguous.”<sup>36</sup>

122. The Respondent accepts that written arbitration agreements may be entered into indirectly by reference to another instrument, and that such incorporation by reference is well established in international commercial arbitration.<sup>37</sup> However, in this case, according to the Respondent, the “indirect” nature of the alleged incorporation is one factor, among others, that points toward *lack of consent*.<sup>38</sup>

123. In this context, the Respondent notes the requirement in Article II(2) of the New York Convention that an arbitration agreement must be in writing. While a specific reference to an arbitration agreement is likely to satisfy the writing requirement, a reference to general conditions that contain an arbitration agreement is much less likely to do so.<sup>39</sup> For the Respondent, in considering whether such a reference is effective, “[t]he particular circumstances of the entry into the contract and the nature of the documents themselves are paramount”.<sup>40</sup>

124. The Respondent’s alternative position is that, even if the Tribunal applies the law of the State of Victoria, the Claimants still have failed to establish consent to ICSID arbitration.<sup>41</sup> While a reference to a document containing the arbitration agreement (as opposed to an express reference to the arbitration agreement itself) may suffice to incorporate that

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<sup>35</sup> Reply, para. 10.

<sup>36</sup> Exh. RL-065, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 200. The Plama tribunal was considering the effect of an most-favored nation clause in the applicable bilateral investment treaty.

<sup>37</sup> Preliminary Objections, para. 56.

<sup>38</sup> Reply, para. 11.

<sup>39</sup> Preliminary Objections, para. 57.

<sup>40</sup> Preliminary Objections, para. 58.

<sup>41</sup> Reply, paras. 100 *et seq.*

arbitration agreement under Victorian law,<sup>42</sup> the latter requires that the language used to incorporate the document be clear and unambiguous.<sup>43</sup> In this regard, the Respondent cites to the New South Wales Supreme Court in *Charltons CJC Pty Ltd v Fitzgerald*:

“Whether a document is incorporated by reference is a question of construction. In effect, the court asks ‘What did the parties agree to?’ The approach to the resolution of that question requires the application of conventional principles. If the incorporated document is clearly identified, if the language of the incorporation is clear and if the objective intention is readily discernible, the court will usually be satisfied that the extraneous document has been incorporated.”<sup>44</sup>

125. In the Respondent’s view, authorities cited by Claimants also support this approach. For example, the Supreme Court of Victoria in *Bogart Lingerie Ltd v Steadmark Pty Ltd* held that reference to terms and conditions “may well be sufficient” to incorporate specific clauses into the main contract, but it did not hold that such a reference would *necessarily* be sufficient.<sup>45</sup> Instead, the court stated that “it must be clear, from an objective analysis of the documents constituting the sales contracts, that the parties intended that the [...] clause be incorporated into the sales contracts”.<sup>46</sup>
126. According to the Respondent, the Supreme Court of Western Australia in *Carob Industries Pty Ltd v Simto Pty Ltd*, held no contrary opinion when accepting that an arbitration clause contained in standard terms and conditions had been incorporated into a construction subcontract.<sup>47</sup> There, the contract at issue was a standard contract widely

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<sup>42</sup> Reply, para. 112.

<sup>43</sup> Reply, para. 112.

<sup>44</sup> Exh. RL-094, *Charltons CJC Pty Ltd v Fitzgerald*, [2013] NSWSC 350, para. 61.

<sup>45</sup> Reply, paras. 107-108, *quoting* Exh. CL-053, *Bogart Lingerie Ltd v Steadmark Pty Ltd*, [2013] VSC 212, para. 30.

<sup>46</sup> Reply, para. 109, *quoting* Exh. CL-053, *Bogart Lingerie Ltd v Steadmark Pty Ltd*, [2013] VSC 212, para. 30.

<sup>47</sup> Exh. CL-052, *Carob Industries Pty Ltd v Simto Pty Ltd*, (1997) 18 WAR, paras. 1, 15, 19.

employed in that particular industry.<sup>48</sup> The opposite is true in the present case, which “centres on a series of bespoke contracts drafted by the Claimants”.<sup>49</sup>

*ii. Consent Through Domestic Law*

127. The Respondent contends that the practice of ICSID tribunals is relevant to the question of consent given through domestic law. In this case, the standing offer to arbitrate in Article 23 of the FIL is conditional, and the requirements contained therein are to be understood “both for the purposes of the FIL and for the purposes of consent under Article 25 of the ICSID Convention”.<sup>50</sup> The Respondent further submits that the Tribunal must turn to Timorese law to interpret the FIL.<sup>51</sup> Portuguese law may assist to fill gaps in areas where Timorese law does not provide clear answers.<sup>52</sup>
128. The Respondent rejects the approach adopted by the Claimants’ legal expert, Mr. Filipe Alfaiate. In particular, it disagrees with Mr. Alfaiate’s willingness to go beyond the legal text and his reliance on government practice.<sup>53</sup> For the Respondent, Mr. Alfaiate’s evidence is “a carefully structured attempt to reason backwards from the Claimants’ desired position”, which led him to offer “nothing more structured and principled than the proposition that the FIL could not be read literally and government practice was unclear”.<sup>54</sup>

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<sup>48</sup> Exh. CL-052, *Carob Industries Pty Ltd v Simto Pty Ltd*, (1997) 18 WAR, paras. 1, 15 (“the fact that a submission to arbitration is a collateral self-contained contract within a more comprehensive agreement between the parties is no justification for denying it incorporation by reference when parties engaged in the industry for which the standard form contract has been developed expressly agree to contract on the terms of the standard form, which includes an arbitration clause”).

<sup>49</sup> Reply, para. 106.

<sup>50</sup> Reply, para. 155.

<sup>51</sup> Reply, para. 154 (“Although the FIL controls the interaction between the Respondent and foreign inward investment, it does so as a matter of Timorese law. Timorese law will therefore be the principal basis on which to assess the meaning and effect of the foreign investment certificate requirements”).

<sup>52</sup> Marrazes ER 1, (“Portuguese laws, doctrine and jurisprudence are of the essence to help interpreting the Timorese laws and filling the gaps in those laws”); Tr. 244:11-26; R-PHB, para. 150.

<sup>53</sup> C-PHB, paras. 148-150. The Respondent states that in his testimony, “Mr Alfaiate sometimes appealed to, or hinted at reliance upon, special knowledge about government practice to which he was privy that was not in evidence, could not be tested, and was in some way determinative of what were legal questions”. *Id.*, para. 148, *citing*, Tr. 217:13-46.

<sup>54</sup> C-PHB, para. 153, *citing* Tr. 214:47-215:1.

**b. The Claimants' Position**

129. The Claimants put forward the following considerations to guide the Tribunal in analyzing the Respondent's consent under Article 25 of the ICSID Convention:

"a. The Tribunal should approach the issue of consent to the jurisdiction of ICSID in an even-handed way, i.e., adopting an approach which is neither expansive nor restrictive.

b. There is no requirement that the Parties' consent be "clear and unambiguous".<sup>[55]</sup>

c. It is permissible to incorporate an arbitration agreement by reference in international arbitration, including in ICSID arbitration, and in order to do so, it is not necessary that the arbitration agreement actually be provided.

d. In reaching its decision on consent, the Tribunal must take into account the nature of the instrument which confers jurisdiction on ICSID."<sup>56</sup>

*i. Consent Through Incorporation by Reference*

130. For the Claimants, the incorporation of Clause 18 of the Standard Terms and Clause 17 of the December General Terms into the Fuel Supply Agreement must be determined by application of Victorian law, which is the governing law of the Fuel Supply Agreement, the Standard Terms, and the General Terms.<sup>57</sup>

131. In this regard, the Claimants accept that Article 25(1) of the ICSID Convention must be interpreted in accordance with international law.<sup>58</sup> However, where the parties' consent is contained in a contract governed by domestic law, the relevant question is "whether the contract is an effective means of providing consent (as interpreted under the relevant system of domestic law) with the result that the question of consent for the purposes of

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<sup>55</sup> The Claimants reject the Respondent's reliance on the statement in *Plama v. Bulgaria* that consent must be "clear and unambiguous". Exh. RL-065, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 200. The Claimants state that the context of this decision (interpreting an MFN clause) is not applicable to the present case, and that, in any event, this statement has been "repeatedly disapproved". Rej., paras. 8-9.

<sup>56</sup> Rej., para. 12 (footnotes omitted); C-PHB, para. 87 (footnotes omitted).

<sup>57</sup> C-Mem., paras. 7-9; Exh. C-192, Standard Terms, October 2010, Clause 17.1; Exh. C-132, October General Terms, Clause 19.1; Exh. C-200, December General Terms, Clause 19.1.

<sup>58</sup> C-Mem., para. 7, citing Exh. RL-037, *Ceskoslovenska Obchodni Banka SA v Slovakia*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para. 35.

Article 25(1) of the ICSID Convention is satisfied”.<sup>59</sup> The Claimants submit that this approach is consistent with previous ICSID cases, including those cited by the Respondent.<sup>60</sup>

132. The Claimants note that the UNCITRAL Model Law,<sup>61</sup> which is enacted into the law of Victoria, covers arbitration agreements entered into by way of incorporation.<sup>62</sup> Specifically, Article 7(6) (Option 1), provides as follows:

“The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.”<sup>63</sup>

133. The Claimants then cite to the UNCITRAL Explanatory Note, which clarifies “that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made ‘by reference’”,<sup>64</sup> Which, for the Claimants, confirms that incorporation by reference is subject to the law of Victoria.<sup>65</sup>

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<sup>59</sup> C-Mem., para. 7.

<sup>60</sup> Rej., para. 6, *citing* Exh. RL-090, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 430 (stating that “the existence and validity of consent” is subject “to Article 25 ICSID Convention itself *and the instruments expressing such consent*”) (Claimants’ emphasis); Exh. RL-061, *Noble Energy Inc. and MachalaPower Cia Ltd. v. Ecuador*, ICSID Case No ARB/06/12, Decision on Jurisdiction, 5 March 2008, paras. 85-118 (analysing the terms of the applicable contractual agreements to determine jurisdiction).

<sup>61</sup> The Claimants cite the 1985 version of the UNCITRAL Model Law, as well as the revised version of 2006. Exh. CL-061, UNCITRAL Model Law (1985); Exh. CL-062, UNCITRAL Model Law (2006).

<sup>62</sup> C-Mem., paras. 11-12, *citing* Exh. CL-083, New York Convention, Article II(2) (providing examples of an “agreement in writing”, including “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”); Exh. CL-084, *International Arbitration Act 1974*, para. 16(1); Exh. CL-085, *Commercial Arbitration Act 2011* (Vic), para. 7(8).

<sup>63</sup> Exh. CL-062, UNCITRAL Model Law (2006), Article 7(6)(1). The Claimants state that Australia has adopted this Option 1. *See also* Exh. CL-061, UNCITRAL Model Law (1985), Article 7(2) (“The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract”).

<sup>64</sup> Exh. CL-063, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006 (2008), para. 19.

<sup>65</sup> C-Mem., para. 17.

134. The Claimants contend that Timor-Leste advances a “false distinction” between “express reference to an arbitration agreement and an indirect reference in standard terms”.<sup>66</sup> Timor-Leste is wrong, the Claimants say, for the following reasons:

- This distinction adopted in some English decisions, applies only in “two-contract cases”, which involve (i) one contract containing the substantive obligations between the parties to the dispute, and (ii) a second contract containing the arbitration agreement, which is between either one of the parties and a third party, or two third parties. The principle is applied to the question of whether the arbitration agreement in the second contract can be incorporated into the first. It is inapposite in the present case because there is only one contract at issue.<sup>67</sup>
- In any event, this approach has not been followed by Australian courts.<sup>68</sup>

135. The Claimants submit that under Australian law (including Victorian law) in cases involving one contract, arbitration agreements can be incorporated by a general reference, without the need for an express reference to the clause itself.<sup>69</sup> In *Carob Industries Pty Ltd v Simto Pty Ltd*, the Supreme Court of Western Australia held that an arbitration clause contained in a document called “Project General Conditions” was incorporated into the subcontract at issue:

“The fact that a submission to arbitration is a collateral self-contained contract within a more comprehensive agreement between the parties is no justification for denying its incorporation by reference when parties engaged in the industry for which the standard form contract has been developed expressly agree to contract on the terms of the standard form, which includes an arbitration clause.”<sup>70</sup>

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<sup>66</sup> C-Mem., paras. 18-39.

<sup>67</sup> C-Mem., paras. 18-31, citing Exh. CL-065, *TW Thomas & Co Ltd v Portsea Steamship Co Ltd (The Portsmouth)* [1912] AC 1; Exh. CL-066, *The Annefield* [1971] 168, 173 (Brandon J); Exh. CL-070, *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Athena)*, [2006] EWHC 2530 (Comm); Exh. CL-056, *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL*, [2010] EWHC 29 (Comm).

<sup>68</sup> C-Mem., para. 18.

<sup>69</sup> C-Mem., paras. 31-32, 39.

<sup>70</sup> Exh. CL-052, *Carob Industries Pty Ltd v Simto Pty Ltd* (1997) 18 WAR 1, 15.

136. Contrary to the Respondent's position, the Claimants argue that this principle is particularly relevant in the present case, in light of the widespread use of international arbitration in international energy contracts.<sup>71</sup>
137. The Claimants also point to the decision of the Supreme Court of Victoria in *Bogart Lingerie Limited v Steadmark Pty Ltd*, holding that an exclusive jurisdiction clause contained in standard terms was validly incorporated into a number of sales contracts through a general reference to the standard terms.<sup>72</sup> According to the Claimants, the same applies to arbitration agreements.<sup>73</sup> Commentators on Australian law state that "general words of incorporation are more likely to be effective to pick up an arbitration or jurisdiction clause" that is contained in standard terms than in a separate contract.<sup>74</sup> More generally, the Claimants rely on the following quotation from Gary Born's treatise on international commercial arbitration:

"The weight of authority rejects arguments that specific reference to an arbitration provision is necessary to incorporate it, instead finding a valid arbitration agreement based only on a general reference to another document containing an arbitration clause. That is true in both common law and civil law jurisdictions."<sup>75</sup>

*ii. Consent Through Domestic Law*

138. The Claimants submit that the Tribunal should construe the domestic requirements for its jurisdiction in a "liberal way", citing the tribunal in *Fraport v. Philippines*:

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<sup>71</sup> Rej., para. 20, *citing* Exh. CL-096, Tim Martin, "Dispute Resolution in the International Energy Sector: An Overview", *Journal of World Energy Law and Business*, 4(4), 2011, p. 339; Exh. CL-097, Doug Jones, "Construction Arbitrations Involving Energy Facilities: Power Plants, Offshore Platforms, LNG Terminals, Refineries and Pipelines", *Global Arbitration Review*, 2 October 2015 ("Arbitration is the most widely accepted and used dispute resolution method in the international energy sector"); Exh. CL-098, Doak Bishop et al, "The Breadth and Complexity of the International Energy Industry", *Global Arbitration Review*, 9 June 2016 ("the international energy industry is the single largest user of international arbitration").

<sup>72</sup> Exh. CL-053, *Bogart Lingerie Limited v Steadmark Pty Ltd* [2013] VSC 212, paras. 13, 30

<sup>73</sup> C-Mem., paras. 37-38, *citing* Exh. CL-053, *Bogart Lingerie Limited v Steadmark Pty Ltd* [2013] VSC 212, para. 35 ("the authorities emphasise that primary weight must be given to enforcing the bargain of the parties as to such matters as jurisdiction, in the same manner as the courts will tend to enforce terms requiring submission to arbitration, there must be a very good reason for a court to refuse to enforce an exclusive jurisdiction clause").

<sup>74</sup> C-Mem., para. 39, *citing* Exh. CL-075, Martin Davies, Andrew Bell, and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (8th ed., 2010), p. 136.

<sup>75</sup> C-Mem., para. 41, *citing* Exh. CL-079, Gary Born, *International Commercial Arbitration* (2nd ed., 2014), p. 827 (footnotes omitted).

“[W]hen the question is whether the investment is made in accordance with the law of the host State, considerable arguments maybe made in favour of construing jurisdiction *ratione materiae* in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host state may not be entirely clear and mistakes may be made in good faith.”<sup>76</sup>

139. According to the Claimants, this approach is particularly apposite in the present case because the Respondent’s “nascent legal system is still prone to omissions, contradictions, and in many cases, a marked distance between what is established in Law and the practice”.<sup>77</sup>
140. The Claimants agree with the Respondent that, in order to interpret the FIL, the Tribunal must resort to Timorese law.<sup>78</sup> However, they dismiss the Respondent’s literal interpretation of the FIL.<sup>79</sup> In the Claimants’ view, “you also have to take into account the structure of the legal system, custom and practice, among other things and its evolution since independence”.<sup>80</sup>

## **2. Analysis**

141. Article 25 of the ICSID Convention requires the parties to the dispute to ‘consent in writing’ to submit their dispute to the Centre. It does not further specify the manner in which such consent is to be given. In the present case, consent is alleged to be given through incorporation by reference into the relevant contracts of an ICSID arbitration clause contained in other documents (a below) and through a provision in domestic legislation (b below).

### **a. Consent Through Incorporation by Reference**

142. The requirement of written consent is embodied in an international treaty and is one of the conditions necessary to establish ICSID jurisdiction. The determination of whether this condition has been met is governed by international law. The tribunal in *CSOB v.*

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<sup>76</sup> Rej., para. 89, *citing* Exh. RL-048, *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No ARB/03/25, Award, 16 August 2007, para. 396.

<sup>77</sup> Rej., para. 90; Alfaiate ER 1, para. 21.

<sup>78</sup> Rej., para. 95; Alfaiate ER 1, para. 16 (“the solution should be found ... within the Timorese legal system rules and general principles of Law of Timorese Law”).

<sup>79</sup> Rej., paras. 94-97.

<sup>80</sup> C-PHB, para. 113.

*Slovakia*, for instance, so held. There, the parties had entered into a contract, the Consolidation Agreement, which provided that it would be governed by Czech law and by the bilateral investment treaty between the Czech Republic and the Slovak Republic. The treaty in turn provided for ICSID arbitration.<sup>81</sup> The CSOB tribunal applied international law to determine whether the reference to the treaty in the Consolidation Agreement was effective for the purposes of Article 25(1) of the Convention:

“The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention.”<sup>82</sup>

143. Here, the Claimants submit that the Respondent has consented to ICSID arbitration because the Standard Terms (and the December General Terms), which contain an ICSID arbitration clause, were incorporated into the relevant contractual framework. While the Respondent accepts that an arbitration agreement may be entered into by reference to another instrument,<sup>83</sup> it disagrees that it has consented to ICSID arbitration in this particular instance.
144. Incorporation by reference of an arbitration clause into a contract is indeed one of the methods by which contracting parties can express their agreement to arbitrate future disputes; in other words, it is a method of expressing consent.<sup>84</sup>
145. In the ICSID context, the CSOB tribunal referred to above held that the reference in the Consolidation Agreement to the bilateral investment treaty, which contained an ICSID dispute settlement provision, was sufficient to incorporate that provision into the relevant framework and fulfill the requirement of consent under Article 25(1) of the ICSID Convention. In reaching this conclusion, the tribunal paid particular attention to the parties' conduct while entering into the Consolidation Agreement, reviewing *inter alia* the

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<sup>81</sup> Exh. RL-037, *Ceskoslovenska Obchodni Banka SA v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 49.

<sup>82</sup> Exh. RL-037, *Ceskoslovenska Obchodni Banka SA v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 35.

<sup>83</sup> Reply, para. 10.

<sup>84</sup> The Parties appear to agree – and rightly so – that incorporation by reference is a substantive requirement of validity of the arbitration agreement, not a formal requirement (Mem., para. 63; C-Mem., para. 16). There is no dispute that there is a writing.

negotiating history of the agreement. It noted that the parties had discussed arbitration and that the respondent had specifically rejected domestic arbitration. Based on this analysis, the tribunal concluded that by referring to the BIT, the parties intended to incorporate into the Consolidation Agreement the ICSID arbitration clause of the BIT.<sup>85</sup> It found comfort in this conclusion from the fact that the provisions of the BIT were known to the contract negotiators on both sides.<sup>86</sup>

146. In *Plama*,<sup>87</sup> reviewing the incorporation of the dispute resolution provision of another treaty into the base treaty through a most-favored nation clause, the tribunal referred to the UNCITRAL Model Law's provision on incorporation (then Article 7(2) and now 7(6)), which reads as follows:

“The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”

147. The reference to the UNCITRAL provision is helpful because it shows a transnational consensus allowing for the conclusion of arbitration agreements by way of incorporation. The *Plama* tribunal read into that provision a requirement that the parties' incorporation intent must be “clear and unambiguous”.<sup>88</sup> This is not the meaning which UNCITRAL itself assigns to it.<sup>89</sup> Neither is it in line with the general rule in international law, set out

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<sup>85</sup> Exh. RL-037, *Ceskoslovenska Obchodni Banka SA v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 53 (“The negotiating history of the clause under consideration thus indicates that the issue of the dispute settlement method had been discussed by the parties and that the proposal to resort to domestic arbitration in the Czech Republic had been rejected by the Slovak party. These considerations support Claimant's contention that the parties eventually agreed on international arbitration. In the absence of a separate dispute resolution provision, the reference to the BIT satisfies the requirement that international arbitration, as specified in its Article 8, is the agreed dispute resolution mechanism”).

<sup>86</sup> Exh. RL-037, *Ceskoslovenska Obchodni Banka SA v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 55 (“The Tribunal concludes, therefore, that by referring to the BIT, the parties intended to incorporate Article 8 of the BIT by reference into the Consolidation Agreement, in order to provide for international arbitration as their chosen dispute-settlement method. *The soundness of this conclusion is confirmed by the fact that the provisions of the BIT were well known to the negotiators for both parties*”) (emphasis added).

<sup>87</sup> Exh. RL-065, *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

<sup>88</sup> Exh. RL-065, *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 200.

<sup>89</sup> For UNCITRAL, this provision “clarifies that applicable contract law” – in the context of ICSID arbitration, this must read international law – “remains available to determine the level of consent necessary for a party

among others in *Amco v. Indonesia*, *SPP v. Egypt* and *CSOB*, according to which an agreement to arbitrate “is not to be construed restrictively nor, as a matter of fact, broadly or literally. It is to be construed in a way that leads to find out and to respect the common will of the parties”.<sup>90</sup>

148. In its analysis below, the Tribunal will thus review the facts to determine whether it was “the common will” of the Parties to consent to ICSID jurisdiction. It will do so “neither restrictively” nor “broadly or literally”. The Tribunal recalls that consent cannot be presumed; it must be established by an express manifestation of intent or implicitly by conduct that demonstrates consent. Further, the burden of proving the existence of consent is on the Claimants, as they are the ones asserting jurisdiction.

**b. Consent Through Domestic Law**

149. The Claimants also argue that the Respondent consented to ICSID jurisdiction through Article 23 of the FIL, which the Respondent denies.
150. Here again, the Tribunal must start by determining the applicable legal principles to assess whether the FIL satisfies the requirement of consent under Article 25(1) of the ICSID Convention.
151. It is well established that legislation expressing consent to ICSID jurisdiction constitutes a unilateral declaration of a state formulated in relation to a treaty, and that it must therefore be interpreted as such. This means that – in the words of the *Tidewater* tribunal – “the declaration must be interpreted in good faith ‘as it stands, having regard to the words actually used’ and further ‘in a natural and reasonable way, having due regard to

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to become bound by an arbitration agreement allegedly made ‘by reference’”. Exh. CL-063, *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006* (2008), para. 19.

<sup>90</sup> Exh. RL-037, *Ceskoslovenska Obchodni Banka SA v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 34, quoting Exh. CL-030, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on Jurisdiction, 25 September 1983; see also Exh. RL-076, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1998, paras. 143-144 and *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, paras. 129 *et seq.*

the intention of the State concerned.”<sup>91</sup> In this context, domestic law may play a “useful role”<sup>92</sup> in determining the intention of the state.

152. The Claimants insist that jurisdictional provisions should be construed liberally, relying on *Fraport*, which was quoted above and advocates in favor of a “liberal” interpretation, “generous to the investor”.<sup>93</sup> The Tribunal believes that the relevant provisions of the FIL, which are reproduced below, are clear, with the consequence that there is no need to resort to any interpretation of the legislators’ intent. The Tribunal can simply apply the language of the legislation as it reads.<sup>94</sup>
153. This said, the Tribunal has not ignored Mr. Alfaiate’s cautionary observation that a literal interpretation may lead to “results that are not in line with the system”.<sup>95</sup> In its analysis, the Tribunal has been careful to avoid this outcome, in particular by considering the intentions of the state, by giving due regard to the context of the FIL and by considering relevant subsequent practice.
154. Having set out the applicable law to determine whether the Respondent has consented to ICSID jurisdiction, the Tribunal now proceeds to review the Respondent’s jurisdictional objections in sections (B)-(D) below.

## **B. CONSENT TO ICSID ARBITRATION IN THE FUEL SUPPLY AGREEMENT**

### **1. The Parties’ Positions**

#### **a. The Respondent’s Position**

155. The Respondent’s first objection is that it did not consent to ICSID arbitration in the Fuel Supply Agreement. The Respondent argues that (i) the contractual documents upon which the Claimants rely do not show that the Parties agreed to incorporate the Standard

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<sup>91</sup> Exh. RL-0079, *Tidewater Inc & Others v. Bolivarian Republic of Venezuela*, ICSID Case No.ARB/10/5, Decision on Jurisdiction, 8 February 2013, para. 102(5).

<sup>92</sup> Exh. CL-12, *Mobil Corporation, Venezuela Holdings BV and others v. Bolivarian Republic Of Venezuela*, ICSID Case No. ARB/07/27, para. 96(i).

<sup>93</sup> Exh. RL-048, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 396.

<sup>94</sup> The *Desert Line* Tribunal also suggested that there was no need for interpretation when the relevant provisions were clear, i.e. when they identified the type of document required for a foreign entity to qualify as a foreign investor and identified the department issuing the document. Exh. RL-045, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 109.

<sup>95</sup> Tr. Day 2, 211:4-19.

Terms into the Fuel Supply Agreement; (ii) there is no evidence that the Respondent was ever made aware of the Standard Terms; and (iii) the ICSID arbitration provision in the Standard Terms was superseded by Clause 18 of the General Terms.<sup>96</sup> It also disputes the existence of the Standard Terms and the December General Terms in the period between October and December 2010.

*i. Whether the Standard Terms were Incorporated into the Fuel Supply Agreement*

156. The Respondent argues that the Claimants have failed to establish that the Standard Terms and the ICSID arbitration clause they contain were incorporated by reference into the Fuel Supply Agreement.<sup>97</sup> More specifically, the Respondent offers the following support for this claim:

- The Respondent did not sign or initial the Standard Terms or any other document to which the Standard Terms were attached.<sup>98</sup>
- The first reference to the Standard Terms on which the Claimants rely is in an unsigned ancillary document, the Contribution Summary, which states that “Lighthouse ‘Standard Terms and Conditions Applying to the Sale of Goods’ will apply”.<sup>99</sup> The Claimants allege an obscure two-step incorporation: first, incorporation of the Standard Terms into the Contribution Summary and, second, incorporation of the Contribution Summary into the Supply Agreement.<sup>100</sup> The Standard Terms were not attached to either document.<sup>101</sup>

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<sup>96</sup> Preliminary Objections, para. 52.

<sup>97</sup> Reply, paras. 20 *et seq.* The references on which the Claimants rely are set out in Section VI.B.1.b below.

<sup>98</sup> Preliminary Objections, para. 67, 69.

<sup>99</sup> Exh. C-087, Contribution Summary, 22 October 2010, p. 8.

<sup>100</sup> Reply, para. 21, *citing* Mem., paras. 218-219.

<sup>101</sup> Reply, para. 21, *citing* Exh. C-087, Contribution Summary, 22 October 2010 (attached to an Email from Albert Jacobs to Ambassador Abel Guterres and Abrao Gabriel Oliveira, “RE: Letter to RDTL - Hon. PM, regarding Power Generators & Fuel Supply - from LE”, 22 October 2010).

- The references in the Second and Third Agreements are to an “attached” document titled “*Standard Terms & Conditions of Supply*”.<sup>102</sup> However, the Standard Terms were not attached to either the Second or Third Agreement.<sup>103</sup>
- As described further below, the Respondent never received the Standard Terms.<sup>104</sup> In addition, there is no contemporaneous document that refers to any specific clause of the Standard Terms. Thus, there is no evidence that the Standard Terms existed in November or December 2010, other than Mr. Jacob’s testimony which is not to be believed, and emails from Mr. Albert Jacobs, which are inauthentic.<sup>105</sup>
- There is no evidence that the Parties ever discussed the resolution of disputes through ICSID arbitration.<sup>106</sup>

157. To the extent that the three references on which the Claimants rely had any effect, the Respondent’s view is that they were more likely references to the September or October General Terms or to the First Agreement, for the following reasons:

- The General Terms define themselves as the “standard terms and conditions of contract for Goods”.<sup>107</sup>
- The First Agreement states that it contains the “Terms & Conditions” of the Claimants’ offer.<sup>108</sup>
- The Addendum, Nomination and Variation refers to “nine (9) documents” that “form an integral part” of “contract TLZEBHSD20101022LEAJ9”.<sup>109</sup> The list of nine

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<sup>102</sup> Exh. C-092, Floating Storage Addendum, 18 November 2010, p. 9; Exh. C-095, Addendum, Nomination and Variation, 26 November 2010, p. 3.

<sup>103</sup> Reply, para. 22, *citing* Exh. R-119, Email from Sean Magee to Abrao Oliveira (copying Ambassador Abel Guterres) of 19 November 2010 (attaching the Second Agreement); Exh. R-120, Email from Sean Magee to Ambassador Abel Guterres of 28 November 2010 (attaching the Third Agreement).

<sup>104</sup> See Section VI.B.1.a.ii below.

<sup>105</sup> Reply, para. 28; see Section VI.B.1.a.iv below.

<sup>106</sup> Preliminary Objections, para. 75.

<sup>107</sup> Reply, para. 26; Exh. R-132, October General Terms, Clause 1.1.

<sup>108</sup> Reply, para. 26; Exh. C-088, Supply for Allocation & Contract, 22 October 2010, p. 1.

<sup>109</sup> Preliminary Objections, para. 71(a); Exh. C-095, Addendum, Nomination and Variation, 26 November 2010, p. 8.

documents does *not* include the Standard Terms, but it does include the General Terms.

- The list of nine documents also includes the document titled “LE-Special Conditions of Contract dated 26th-Nov-2010 (v2)”.<sup>110</sup> These Special Conditions state that they are to be read in conjunction with the General Terms.<sup>111</sup>
- Clause 1.2 of the General Terms defines “contract” as “the agreement of Contract Name and Contract Number identified in the Special Conditions”.<sup>112</sup> In turn, Section 1.02 of the Special Conditions identifies the Fuel Supply Agreement.<sup>113</sup> The General Terms were thereby incorporated into the Fuel Supply Agreement.<sup>114</sup>
- The September General Terms and the First Agreement were both attached to the Second Agreement.<sup>115</sup>
- In a 27 October 2010 email, Mr. Jacobs refers to the First Agreement as the “standard terms and conditions”.<sup>116</sup> He states: “According to the contractual standard terms and conditions, Page 2 stipulates under HOLD FEE that if floating storage is required, then the cost of barge and management of same is for the Buyer, RDTL or EDTL. This is again referred to on Page 3, under STORAGE”. While the Standard Terms do not contain any such provisions, they appear on pages 2 and 3 of the First Agreement.<sup>117</sup>
- Similarly, the letter of 8 February 2011 from the Claimants to the Respondent mentions specific provisions contained in the “Standard Terms & Conditions

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<sup>110</sup> Preliminary Objections, para. 71(a); Exh. C-095, Addendum, Nomination and Variation, 26 November 2010, p. 8.

<sup>111</sup> Exh. C-093, Special Conditions, 18 November 2010, p. 5.

<sup>112</sup> Exh. R-132, October General Terms, Clause 2.1.

<sup>113</sup> Exh. C-093, Special Conditions, 18 November 2010, para. 1,02.

<sup>114</sup> Reply, para. 71(c).

<sup>115</sup> Exh. R-119, Email from Sean Magee to Abrao Gabriel Oliveira (copying Ambassador Abel Guterres) of 19 November 2010, with subject ‘FINAL PACKAGE’ (attaching the Second Agreement).

<sup>116</sup> Reply, para. 23(a); Exh. R-137, Email from Albert Jacobs to Sean Magee of 27 October 2010.

<sup>117</sup> Exh. C-088, Supply Agreement, 22 October 2010, pp. 1-2.

Applying to the Sale of Goods” that do not appear in the Standard Terms, but are in fact contained in the First Agreement and the General Terms.<sup>118</sup>

158. The Respondent concludes that the Claimants have failed to show that the three references to “Standard Terms & Conditions” identify the Standard Terms without ambiguity.<sup>119</sup> Thus, there is no basis on which to conclude that the Respondent consented to ICSID arbitration under international law.
159. The Respondent submits that the language of the three references on which the Claimants rely is insufficiently clear to establish the objective intention of the Parties to incorporate the Standard Terms.
160. In particular, the Respondent denies that the Contribution Summary was incorporated into the Supply Agreement by the language: “please evaluate this proposal in conjunction with our state-of-the-art [Contribution Summary], attached as an addendum to this document”.<sup>120</sup> It advances the following facts in support for this position:
- The reference to the Contribution Summary is expressed as a polite request, rather than binding, contractual language.<sup>121</sup> The meaning of the words is to invite the Respondent to consider the Contribution Summary.
  - The documents do not use the word “incorporation” or any similar term.<sup>122</sup>

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<sup>118</sup> Reply, para. 23; Exh. C-104, Letter from Albert Jacobs to Prime Minister Gusmão and others of 8 February 2011, titled ‘Request for Performance and LC Issuance’, p. 3 (referring to “Standard Terms & Conditions Applying to the Sale of Goods” and stating that “[o]n page two (2) and at item ‘PAYMENT’, delivery is conditional upon receiving acceptable and valid letter/s of credit as payment instrument from the Buyer’s nominated banker, guaranteeing payment of the supply contract”); Exh. C-088, Supply Agreement, 22 October 2010, p. 3 (item “PAYMENT” provides that payment is to be made by way of letter of credit against normal shipping document).

<sup>119</sup> Reply, para. 27.

<sup>120</sup> Reply, para. 119; Exh. C-088, Supply Agreement, 22 October 2010, p. 4.

<sup>121</sup> Reply, para. 119.

<sup>122</sup> Reply, para. 119(e).

- The content of the Contribution Summary shows that the Parties could not have intended to incorporate it into the Supply Agreement as contractual terms.<sup>123</sup>
- The language of the Supply Agreement itself “raises considerable doubt about whether, on its own terms, [it] was binding or whether it was simply to form an integral part of future contracts”.<sup>124</sup>

161. Regarding the references to “Standard Terms & Conditions” in the Second and Third Agreements, the Respondent argues that these ambiguous references cannot establish the Parties’ objective intent to incorporate the Standard Terms, as required under Victorian law.<sup>125</sup>

162. Finally, the Respondent submits that, because the Claimants drafted the Fuel Supply Agreement in ambiguous language, the *contra proferentem* rule should operate against Claimants’ proposed interpretation.<sup>126</sup>

*ii. Whether the Respondent was Aware of the Standard Terms*

163. The Respondent further submits that it was never provided with or made aware of the Standard Terms (or the December General Terms) containing the ICSID arbitration clause.<sup>127</sup>

164. According to the Respondent, it is undisputed that the Standard Terms were not attached to the First, Second or Third Agreement.<sup>128</sup> In addition, the Respondent asserts that it

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<sup>123</sup> Reply, para. 119(d). The Contribution Summary includes, for example, a proposal relating to solar power and a summary of Respondent’s current energy needs, as well as a forecast of future needs. Exh. C-087, Contribution Summary, 22 October 2010.

<sup>124</sup> Reply, para. 119(f); Exh. C-088, Supply Agreement, p. 4 (“This document is a formal basis for transferring by the Buyer or Government Authority of the accepted name/s and particulars, including volumes, to the draft contract, and it is an integral part of the future Contracts and is valid for FIVE (5) international business days from the date of this SFA”).

<sup>125</sup> Reply, para. 120.

<sup>126</sup> Reply, para. 121, *citing* Exh. RL-098, *Darlington Futures Ltd v Delco Australia Pty Ltd*, (1986) 161 CLR 500, para. 510.

<sup>127</sup> Preliminary Objections, paras. 76 *et seq.*; Reply, paras. 36 *et seq.*; R-PHB, paras. 43 *et seq.*

<sup>128</sup> Reply, para. 97; Exh. C-087, Contribution Summary, 22 October 2010 (attached with the Supply Agreement to an Email from Albert Jacobs to Ambassador Abel Guterres and Abrao Gabriel Oliveira, with subject ‘RE: Letter to RDTL - Hon. PM, regarding Power Generators & Fuel Supply - from LE’); Exh. R-119, Email from Sean Magee to Abrao Oliveira (copying Ambassador Abel Guterres) of 19 November 2010 (attaching the Second Agreement and stating “Attached is a complete set of the Lighthouse Documentation Pack for the Delivery of Generators and Diesel Fuel pursuant to the Agreement of 22 October 2010”); Exh.

“has no record of receiving a copy of the Standard Terms and does not have a copy of the document in its possession”.<sup>129</sup>

165. The Respondent rejects the Claimants’ allegations that the Respondent received the Standard Terms in a “blue folder” during the meeting in Dili on 20 October 2010; by email from Mr. Magee to Ambassador Guterres on or around 27 November 2010, which forwarded an email from Mr. Jacobs (the “Second Jacobs E-mail”) (Exhibit C-148); and by email from Mr. Jacobs to Mr Magee and Ambassador Guterres on 7 December 2010 (the “Further Jacobs Email”) (Exhibit C-198).<sup>130</sup>

- The Blue Folder and the 20 October 2010 Meeting

166. The Respondent does not contest that a meeting took place in Dili on 20 October 2010.<sup>131</sup> It denies however that Mr. Jacobs provided Prime Minister Gusmão with a copy of the Standard Terms during that meeting. It draws particular attention to the testimony of Prime Minister Gusmão, who could not recall being provided with a blue folder or the Standard Terms.<sup>132</sup>

167. The Respondent dismisses Mr. Jacobs’ testimony on this point, asserting that his recollection of providing the Standard Terms to the Prime Minister is unsupported.<sup>133</sup> Moreover, he has offered the following three different versions of the meeting:<sup>134</sup>

- In his Third and Fourth Witness Statements, Mr. Jacobs’ testimony was that he printed the contractual documents at a local printer in Dili and put them in a blue folder, which he took to the meeting and gave to Prime Minister Gusmão. Mr. Jacobs stated that he went over the documents with the Prime Minister, but did not mention any discussion of the ICSID clause.<sup>135</sup>

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R-120, Email from Sean Magee to Ambassador Abel Guterres of 28 November 2010 (attaching the Third Agreement).

<sup>129</sup> Preliminary Objections, para. 83; Prescott WS 3, 7; Guterres WS 1, paras. 8, 12.

<sup>130</sup> Reply, para. 36; R-PHB, paras. 42-84.

<sup>131</sup> Reply, para. 37.

<sup>132</sup> Gusmão WS, paras. 8-12; Tr. 317:26-320:11.

<sup>133</sup> Reply, para. 38, *citing* Jacobs WS 4, paras. 4-7.

<sup>134</sup> R-PHB, paras. 79-80.

<sup>135</sup> R-PHB, para. 82, *citing* Jacobs WS 4, paras. 6-7.

- In his Sixth Witness Statement and at the Hearing, Mr. Jacobs testified that he and Mr. Magee printed the documents using a printer they purchased in Dili, after trying unsuccessfully to have them commercially printed. Mr. Jacobs allegedly brought five blue folders to the meeting, and discussed the documents one by one with the Prime Minister for two hours, specifically noting the importance of the ICSID arbitration clause. Mr. Jacobs also stated that he left the meeting with a copy of the documents, showing annotations that he and the Prime Minister had made.<sup>136</sup>
- On the day before the Hearing, Mr. Jacobs offered for the first time a new detail (presumably to explain why the documents allegedly provided to the Respondent on 20 October 2010 were dated 22 October 2010): the Prime Minister planned to hold a signing ceremony two days after the 20 October 2010 meeting.<sup>137</sup>

168. In the Respondent's view, this "story is constructed on a large number of implausibilities, inconsistencies and contradictions", such as the method of printing, the number of folders, the annotations on the documents and the purpose of the meeting.<sup>138</sup> Thus, the Respondent states that Mr. Jacobs' evidence is "at the very least, unreliable" and must be disregarded.<sup>139</sup>

- Second Jacobs Email (Exhibit C-148)

169. The Respondent also rejects the Claimants' allegation that Mr. Jacobs sent the Second Jacobs Email to Mr. Magee on 27 November 2010 with a copy of the Standard Terms attached (Exhibit C-148),<sup>140</sup> and that Mr. Magee then forwarded that email to Mr. Oliveira.<sup>141</sup> The Respondent denies that Mr. Magee ever provided Mr. Oliveira with the

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<sup>136</sup> R-PHB, para. 83.

<sup>137</sup> R-PHB, para. 84; see Jacobs WS 7, paras. 8-9.

<sup>138</sup> R-PHB, para. 49.

<sup>139</sup> R-PHB, para. 45.

<sup>140</sup> Exh. C-148, Email from Albert Jacobs to Sean Magee of 27 November 2010, with subject 'Timor-Leste Fuel Supply Variation Documents for Execution'.

<sup>141</sup> Mr. Jacobs sent the first email of 27 November 2010 at 9:14 am. It states that he is attaching "essential documentation for execution" and attaching (i) the Addendum, Nomination & Variation Agreement, (ii) the Special Conditions, and (iii) the "Bonus Period Election Form". Exh. C-147, Email from Albert Jacobs to Sean Magee titled of 27 November 2010, with subject 'Timor-Leste Fuel Supply Variation Documents for Execution'. The second email, allegedly sent at 9:18 am, requests Mr. Magee to provide additional documents to Mr. Abrao Oliveira and attaches (i) a document entitled "General Definitions", (ii) the Standard Terms, and (iii) a "Lighthouse Energy Guide to I.C.C Incoterms 2000". Exh. C-148, Email from Albert Jacobs

attachments to the Second Jacobs Email<sup>142</sup> and stresses that the Claimants have presented no documentary evidence in support of this allegation.<sup>143</sup>

170. In any event, the Respondent submits that the Second Jacobs Email is fabricated and did not exist on 27 November 2010, when it was allegedly sent.<sup>144</sup> In the Respondent's view, the Claimants' evidence is internally inconsistent, inherently implausible and irreconcilable with the expert evidence.<sup>145</sup>
171. As to the alleged inconsistency, the Respondent highlights details of Mr. Jacobs' "first version of events" set out in his Fifth Witness Statement: Mr. Jacobs stated that after he sent his first email of 27 November 2010 to Mr. Magee (the "First Jacobs Email"), he left the St. Kilda office to go to a meeting at the Winsor Hotel, for which he was late; on his way, he called one of his staff members, Yuliana, and dictated the Second Jacobs Email with instructions to send it Mr. Magee on Mr. Jacobs' behalf.<sup>146</sup>
172. The Respondent argues that Mr. Jacobs' testimony at the Hearing added critical details that were absent from, and inconsistent with, his written statements. For example, he testified that before calling Yuliana from his car, he received a call from Mr. Magee requesting documents missing from the First Jacobs Email; his meeting was at the Westin Hotel, not the Winsor; and Yuliana drafted the email herself.<sup>147</sup>
173. More generally, the Respondent argues that the whole account of what happened between 9:14 am, when Mr. Jacobs sent the First Jacobs Email, and 9:18 am, when Yuliana allegedly sent the Second Jacobs Email, is inherently implausible:

"The essence of that implausibility is that Mr Jacobs asks the Tribunal to accept that, ***within a period of 240 seconds***, he was able to go to

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to Sean Magee of 27 November 2010, with subject 'Timor-Leste Fuel Supply Variation Documents for Execution'.

<sup>142</sup> According to the Respondent, the evidence shows that Mr. Magee emailed the documents attached to Mr. Jacob's *first* email to Ambassador Guterres on 28 November 2010. Preliminary Objections, para. 85; Reply, para. 45; Exh. R-120, Email from Sean Magee to Ambassador Abel Guterres of 28 November 2010. However, the Claimants are unable produce a copy of the Second Jacobs Email from Mr. Magee's inbox.

<sup>143</sup> Reply, paras. 43-44.

<sup>144</sup> Reply, paras. 62, 68 *et seq.*; R-PHB, paras. 48 *et seq.*

<sup>145</sup> R-PHB, para. 56 and Schedule A, 33-36.

<sup>146</sup> R-PHB, paras. 48-50.

<sup>147</sup> R-PHB, para. 56.

his car, start driving, receive a call from Mr Magee whilst driving, discuss with Mr Magee the specific documents that needed to be sent, make a new call to Yuliana, inform her of what needed to be done and Yuliana then access [sic] the relevant documents, identify the previous email Mr Jacobs had sent, select the Monash University Address signature, draft the email and send it.”<sup>148</sup>

174. Furthermore, the Respondent relies on a report of its forensic expert Darren Hopkins to advance, *inter alia*, the following allegations of technological irregularities with the Second Jacobs Email:

- The Claimants’ office address as it appears in the Second Jacobs Email is different from the address used in the First Jacobs Email. The Claimants did not occupy the address indicated in the Second Jacobs Email (at Monash University) until mid- or late 2011.<sup>149</sup> As of the date of the Second Jacobs Email, an unrelated third party occupied that address.<sup>150</sup> Subsequent emails that Mr. Jacobs sent did not display the address at Monash University.<sup>151</sup> The first email which the Respondent received with this address was dated 30 June 2013.<sup>152</sup>
- There are several other discrepancies between the Second Jacobs Email and authentic contemporaneous emails sent by Mr. Jacobs, such as the formatting of

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<sup>148</sup> R-PHB, para. 55 (emphasis in original; footnotes omitted).

<sup>149</sup> Reply, paras. 68-69; Exh. C-147, Email from Albert Jacobs to Sean Magee of 27 November 2010, with subject ‘Timor-Leste Fuel Supply Variation Documents for Execution’ (displaying the address “499 St Kilda Road, Ground Floor, Melbourne, Victoria, Australia 3004”); Exh. C-148, Email from Albert Jacobs to Sean Magee of 27 November 2010, with subject ‘Timor-Leste Fuel Supply Variation Documents for Execution’ (displaying the address “G50, Building 10, 1-131 Wellington Rd, Victoria, 3800”); Jacobs WS 1, para. 54 (stating that the Claimants occupied the St Kilda Road Address until December 2011); para. 59 (stating that one of Mr. Jacobs’ catering companies, Lighthouse Monash, entered into a lease with Monash University in respect of the Monash University Address on 7 November 2011); Exh. C-010, Lease Between Monash University and Lighthouse and Mr. Jacobs, 7 November 2011, pp. 54-55.

<sup>150</sup> Reply, para. 69; Exh. R-028, Photos of G50-G53, Bld 10, Monash University, Clayton, 8 September 2015; Exh. R-063, Current and historical business name extract (Lighthouse Monash and Lighthouse Holding Trust), 8 September 2015; Exh. R-150, Current company extract - Unicorp Investments 2 Pty Lt, 12 February 2015.

<sup>151</sup> Prescott WS 4, paras. 29-30; Guterres WS 2, para. 7; Exh. R-135, Email from Albert Jacobs to Sean Magee of 7 December 2010 (9:21 pm); Exh. R-136, Email from Albert Jacobs to Sean Magee of 7 December 2010 (9:26 pm).

<sup>152</sup> Prescott WS 4, paras. 29-30.

the email addresses, the language (US English rather than Australian English), the time zone, and the font.<sup>153</sup>

- The underlying metadata of the Second Jacobs Email reveals that the attachments to the Second Jacobs Email were attached on 21 April 2016, which is clearly inconsistent with the date on which it was allegedly sent.<sup>154</sup>
- Mr. Jacobs' testimony that the time stamp on the Second Jacobs Email was the time that it left the outbox, rather than the time it was sent, is contradicted by the experts' joint evidence given at the Hearing.<sup>155</sup>

- Further Jacobs Email (Exhibit C-198)

175. The Respondent also disputes the Claimants' allegation that it received a copy of the Standard Terms (and the December General Terms) via the Further Jacobs Email, which Mr. Jacobs purportedly sent on 7 December 2010 to Mr. Magee, copying Ambassador Guterres (Exhibit C-198).<sup>156</sup>
176. Ambassador Guterres testified that he never received the Further Jacobs Email.<sup>157</sup> In addition, the Respondent finds it suspicious that the Claimants submitted the Further Jacobs Email for the first time with the Counter-Memorial, after the Respondent had raised its Preliminary Objections.<sup>158</sup>
177. According to the Respondent, the Further Jacobs Email and its attachments did not even exist on the date they were allegedly sent:

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<sup>153</sup> Reply, para. 71; see Hopkins ER 1, Appendices G and H.

<sup>154</sup> Hopkins ER 1, para. 2.6.

<sup>155</sup> R-PHB, paras. 58-60 and Schedule B.

<sup>156</sup> Reply, paras. 47 *et seq.*; R-PHB, paras. 61 *et seq.*; Exh. C-198, Email from Albert Jacobs to Sean Magee and Ambassador Abel Guterres of 7 December 2010.

<sup>157</sup> Guterres WS 2, paras. 7(a) and 8; Tr. 404:4-406:19; Tr. 405:12-406:7.

<sup>158</sup> Reply, para. 51; R-PHB, paras. 61-64.

- As with the Second Jacobs Email, the Further Jacobs Email displays an address which is not shown on contemporaneous emails and at premises which the Claimants did not occupy in December 2010.<sup>159</sup>
- An attachment to the Further Jacobs Email displays a DOC ID number in a format that does not appear on any of the Claimants' documentation from that time. The Claimants did not begin to insert that form of DOC ID until 2012.<sup>160</sup>
- There are multiple formatting inconsistencies between the attachments contained in the PDF version of the Further Jacobs Email that Claimants submitted as Exhibit C-198 and the electronic copy that Claimants subsequently produced.<sup>161</sup>
- The underlying metadata of the Further Jacobs Email reveals that the attachments were attached on 16 June 2016.<sup>162</sup>
- There are several other discrepancies between the Further Jacobs Email and authentic contemporaneous emails sent by Mr. Jacobs, such as the formatting of the email addresses, language, time zone, and font.<sup>163</sup>

178. The Respondent challenges Mr. Jacobs' evidence relating to the Further Jacobs Email. Mr. Jacobs' written testimony contained no detail in this regard.<sup>164</sup> Then, at the Hearing, he offered "an entirely new story" that he created the Further Jacobs Email by forwarding the Second Jacobs Email.<sup>165</sup> The Respondent alleges that Mr. Jacobs invented this story only to explain why the characteristics of those two emails differ from all the other emails

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<sup>159</sup> Reply, para. 82; Exh. C-198, Email from Albert Jacobs to Sean Magee and Ambassador Abel Guterres of 7 December 2010.

<sup>160</sup> Reply, para. 83; Exh. R-151, Letter from Johnson Winter Slattery to Collaery Lawyers of 16 April 2014.

<sup>161</sup> Prescott WS 4, paras. 43-48. See Exh. C-198, Email from Albert Jacobs to Sean Magee and Ambassador Abel Guterres of 7 December 2010.

<sup>162</sup> Hopkins ER 2, para. 2.6.7.

<sup>163</sup> Reply, para. 93; Hopkins ER 2, para. 2.6.

<sup>164</sup> R-PHB, paras. 65-66.

<sup>165</sup> R-PHB, para. 68.

that the Claimants sent.<sup>166</sup> Furthermore, that story fundamentally contradicts Mr. Jacob's testimony about Yuliana sending the Second Jacobs Email.<sup>167</sup>

179. The Respondent concludes that there is no credible evidence showing that it was ever provided with a copy or made aware of the Standard Terms (or the December General Terms); in such circumstances, the Tribunal cannot find that the Respondent consented to ICSID arbitration.<sup>168</sup>

*iii. Whether the General Terms Displaced the Standard Terms*

180. The Respondent's alternative position is that, even if the Standard Terms were somehow incorporated into the Fuel Supply Agreement (which it denies), the Standard Terms were displaced by the September or October General Terms, which do *not* contain an ICSID arbitration clause.<sup>169</sup>
181. For the Respondent, it is telling that the Claimants created the General Terms by modifying the Respondent's General Conditions of Contract, as made evident by a comparison of the documents.<sup>170</sup> The September and October General Terms provide for the resolution of disputes by means other than arbitration, which the Respondent considers consistent with the dealings between the Parties in 2010 before they entered into the Fuel Supply Agreement.<sup>171</sup>
182. The Respondent argues that the September or October General Terms were incorporated by reference into the Addendum, Nomination and Variation, and that the latter prevail because the Addendum, Nomination and Variation was executed last in time, and by its terms, the Addendum, Nomination and Variation prevails over prior

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<sup>166</sup> R-PHB, paras. 66-71, n. 64.

<sup>167</sup> R-PHB, paras. 72-76. The Respondent states that the metadata of Exh. C-148 and Exh. C-198 suggests that they were sent from the same computer; yet, Mr. Jacobs' testimony is that Yuliana sent Exh. C-148 from her own computer and that he sent Exh. C-198 from his computer.

<sup>168</sup> Preliminary Objections, para. 76.

<sup>169</sup> Preliminary Objections, paras. 72 *et seq.*; Reply, paras. 30 *et seq.*

<sup>170</sup> Preliminary Objections, paras. 72-74; R-PHB, paras. 106-107; Exh. R-178, Comparison between Government's General Conditions of Contract and General Terms (September). The Respondent argues that this comparison undermines Mr. Jacobs' testimony that the General Terms arose out of the relationship with Cummins, and were not based on the Respondent's standard terms. R-PHB, paras. 106-107.

<sup>171</sup> Preliminary Objections, para. 75; Exh. R-118, Email from Ambassador Abel Guterres to Sean Magee of 12 April 2010.

inconsistent terms.<sup>172</sup> Indeed, on the Claimants' own case, the Second and Third Agreements referred to and attached the General Terms.<sup>173</sup>

183. The Respondent challenges the Claimants' contention that Clause 2.2 of the Standard Terms overrides the dispute resolution clause in the General Terms.<sup>174</sup> The words "protections at law" contained in that provision refer only to protections arising by *operation of law*. This would not include the Parties' alleged consent to ICSID arbitration, because such consent through a commercial agreement would arise by *operation of contract*.<sup>175</sup>
184. The Respondent also rejects the Claimants' reliance on the December General Terms, which included an ICSID arbitration clause.<sup>176</sup> First, it emphasizes that the Claimants did not raise this alleged basis of the Parties' consent to ICSID arbitration in the Request for Arbitration, or in any other submission before the Counter-Memorial.<sup>177</sup>
185. Second, the Respondent points out that, on the Claimants' own case, the December General Terms were not provided to the Respondent with the Third Agreement on 27 November 2010. In an attempt to show that the Respondent was made aware of the December General Terms before the execution of the Third Agreement, Mr. Jacobs offers the vague assertion that the December General Terms were "provided to Timor-Leste on or about Monday, 29 November 2010".<sup>178</sup> This assertion is denied and considered inconsistent with the date of the December General Terms.<sup>179</sup>

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<sup>172</sup> Preliminary Objections, paras. 70-71, *citing* Exh. C-095, Addendum, Nomination and Variation, 26 November 2010 ("Any previous Addendum, Nomination and Variation is subject to this one, in all its parts, and any conflict in terms, definitions, charges, meanings or otherwise, shall surrender to those stipulated by this Addendum, Nomination and Variation").

<sup>173</sup> Reply, para. 32.

<sup>174</sup> Reply, para. 33. Exh. C-192, Standard Terms, Clause 2.2 ("Application of these Standard Terms & Conditions shall not detract from the provision of other applicable terms and conditions provided by the Seller, in so far as a conflict does not occur. When any conflict occurs, the specific terms shall override these standard terms, so long as they do not remove the afforded protections at law provided by these minimum standard terms and conditions herein").

<sup>175</sup> Reply, para. 33.

<sup>176</sup> Reply, paras. 47 *et seq.*; Exh. C-200, General Terms, December 2010.

<sup>177</sup> Reply, para. 57; R-PHB, paras. 25-29.

<sup>178</sup> Reply, para. 55, *quoting* Jacobs WS 4, para. 13.

<sup>179</sup> Reply, n. 73.

186. Third, the Respondent states that there is no evidence of any negotiations or agreement concerning the amendment of the October General Terms to include an entirely new dispute resolution clause.<sup>180</sup>

187. Fourth, the Respondent disputes that Mr. Jacobs provided the December General Terms to Ambassador Guterres (along with the Standard Terms) in the Further Jacobs Email.<sup>181</sup> Its position is that the Further Jacobs Email was fabricated, and that the December General Terms did not exist at the relevant time.<sup>182</sup>

*iv. Whether the Standard Terms and December General Terms Existed in October-December 2010*

188. The Respondent submits that, in light of the fabrication of the Second and Further Jacobs Emails, the Tribunal should find that neither the Standard Terms nor the December General Terms existed in the relevant period of October to December 2010; therefore, these documents cannot establish the Respondent's consent to ICSID arbitration.<sup>183</sup>

189. In addition to the arguments summarized above, the Respondent asserts that the Claimants never mentioned the Standard Terms or the December General Terms in any correspondence with the Respondent or third parties.<sup>184</sup> To cite one example, the document that Mr. Magee sent to Mr. Jacobs on 4 February 2011 titled "RDTL – Lighthouse Summary of Agreement Documents" summarizes every contractual document except the Standard Terms and December General Terms.<sup>185</sup>

190. The Respondent challenges the oral testimony of Mr. Jacobs on this issue. Mr. Jacobs characterized the Standard Terms (and the ICSID arbitration clause) as part of the

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<sup>180</sup> Reply, paras. 55-56.

<sup>181</sup> Reply, paras. 59, 81 *et seq.*

<sup>182</sup> See Section VI.B.1.a.ii above and Section VI.B.1.a.iv below.

<sup>183</sup> Reply, paras. 95 *et seq.*; R-PHB, paras. 97 *et seq.* and Schedule A, 18-31.

<sup>184</sup> Reply, para. 96.

<sup>185</sup> Exh. R-141, Email from Sean Magee to Albert Jacobs of 4 February 2011. See also Exh. R-140, Email from Sean Magee to Fernando Torrao of 14 December 2010, with subject "Folder 3 of 4 Complete executed set of RDTL - Lighthouse contracts" (sending a bank representative all of the contractual documents (including the September General Terms), except the Standard Terms and December General Terms); Exh. R-121, Email from Mr. Magee to Ambassador Guterres of 21 December 2010 (stating that "[t]here are a total of NINE documents which constitute the Contract, together, they represent the ENTIRE CONTRACT" and listing nine documents, not including the Standard Terms and December General Terms).

Claimants' long-established practice in fuel trading transactions.<sup>186</sup> However, certain "difficulties" are identified by the Respondent:

- The Standard Terms are derived directly from the Cummins "Terms and Conditions Applying to the Sale of Goods", which are part of a Cummins Commercial Trading Supply Application form that Mr. Jacobs signed on 23 March 2011.<sup>187</sup>
- The Standard Terms "are cast in terms that are consistent with the Australian domestic market ... and unsuitable for the international market".<sup>188</sup>
- Many of the terms in the Standard Terms are inconsistent with fuel trading transactions.<sup>189</sup>
- The Claimants apparently applied the Standard Terms (and the ICSID clause) in transactions with private parties, as Mr. Jacobs had no recollection of contracting with a State.<sup>190</sup>

191. Thus, for the Respondent, the Standard Terms are "a hastily assembled borrowing of domestic commercial standard terms, adopted long after the time of the proposed contract to which they purported to relate and never actually provided to the Respondent".<sup>191</sup>

192. The Respondent similarly rejects Mr. Jacobs' evidence about the General Terms, as summarized above.<sup>192</sup>

193. More generally, the Respondent argues that the following correspondence from the Claimants regarding this dispute is inconsistent with the existence of an ICSID arbitration clause:

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<sup>186</sup> R-PHB, para. 99, *citing* Tr. 83:17-103:35.

<sup>187</sup> R-PHB, paras. 101-102; Exh. R-078, Cummins, Commercial Trading Supply Application Terms of Trade Agreement, 23 March 2011. Respondent identifies several clauses in the Standard Terms that are identical, or nearly identical, to the Cummins Terms and Conditions.

<sup>188</sup> R-PHB, para. 103.

<sup>189</sup> R-PHB, para. 104.

<sup>190</sup> R-PHB, para. 104(b)-(c).

<sup>191</sup> R-PHB, para. 105.

<sup>192</sup> See Section VI.B.1.a.iii above.

- An email of 30 January 2011 from Mr. Magee to Ambassador Guterres, stating that the Claimants would “immediately seek Judgement for Specific Performance” in the Supreme Court of Victoria”.<sup>193</sup>
- An email of 8 February 2011 from the Claimants to the Respondent stating that failure to perform contractual obligations would require “lawful remedy in the appropriate Court of Law, within the appropriate jurisdiction as provided by the contract and conjunctive agreements”.<sup>194</sup>
- Letters of demand of 4 and 7 August 2011 from Mr. Jacobs to the Respondent, threatening to “issue proceedings” but not mentioning ICSID.<sup>195</sup>
- A letter of 22 August 2011 from the Claimants’ former Counsel to the Respondent, stating that the firm had instructions to “issue proceedings forthwith and to seek summary judgment for and in respect of such proceedings”.<sup>196</sup>

194. According to the Respondent, the Claimants did not mention ICSID until 25 October 2011, when their former counsel requested that the Respondent execute a document titled “Consent to Arbitration under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States”.<sup>197</sup> This document did not refer to an ICSID arbitration clause in the Fuel Supply Agreement or to the Parties’ subsequent acceptance of the December General Terms.<sup>198</sup> For the Respondent, the Claimants’ request would have been unnecessary if the Respondent had already consented to ICSID arbitration.

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<sup>193</sup> Exh. R-143, Email from Sean Magee to Ambassador Abel Guterres of 30 January 2011, pp. 11-12.

<sup>194</sup> Exh. C-104, Letter from Albert Jacobs to Prime Minister Gusmão and others of 8 February 2011, titled ‘Request for Performance and LC Issuance’.

<sup>195</sup> Exh. C-118, Letter from Albert Jacobs to Prime Minister Gusmão and Januario da Costa Pereira of 4 August 2011; Exh. C-124, Letter from Albert Jacobs to Prime Minister Gusmão and Januario da Costa Pereira of 17 August 2011; *see also* Exh. C-110, Letter from Albert Jacobs to Prime Minister Gusmão and others of 20 May 2011, titled ‘Supply for Allocation and Contract Generator Provision’.

<sup>196</sup> Exh. C-128, Letter from Marshalls + Dent to Bernard Collaery of 22 August 2011, titled ‘Claim against the Government of the Democratic Republic of Timor-Leste’.

<sup>197</sup> Reply, para. 99; R-PHB, paras. 12-14; Exh. C-129, Letter from Marshalls + Dent to Prime Minister Gusmão of 25 October 2011.

<sup>198</sup> For the Respondent, the fact that Mr. Jacobs had pre-signed this document disproves the Claimants’ argument that their former counsel sent this correspondence in error. R-PHB, para. 15, *citing* Tr. 51:41-46.

195. When the Claimants first asserted the existence of an ICSID arbitration clause in the Standard Terms in 2014, two years had elapsed since the Respondent's rejection of the Claimants' request for consent.<sup>199</sup> Moreover, the Claimants relied on the December General Terms as a separate basis of consent only after the Respondent raised its preliminary objections in this proceeding.<sup>200</sup> The Respondent concludes that "the manner in which the issues have been raised by the Claimants makes the entirety of their case inherently improbable from the outset".<sup>201</sup>

***b. The Claimants' Position***

196. The Claimants submit that the Tribunal must dismiss the first objection to jurisdiction because the Respondent consented to ICSID arbitration in the Fuel Supply Agreement. The Claimants' position is that (i) the ICSID arbitration provision in Clause 18.2 of the Standard Terms was incorporated into the Fuel Supply Agreement; (ii) the Respondent received the Standard Terms; (iii) the General Terms do not replace the Standard Terms; and (iv) the Respondent has failed to substantiate its allegations that the Standard Terms and the December General Terms did not exist in the period between October and December 2010.

*i. Whether the Standard Terms were Incorporated into the Fuel Supply Agreement*

197. The Claimants' case is that the Standard Terms, including the ICSID arbitration clause, were incorporated by reference into the Fuel Supply Agreement. The Claimants rely in particular on three references to the Standard Terms in contractual documents.<sup>202</sup>

198. First, the Claimants point to the Contribution Summary, which states that "Lighthouse 'Standard Terms and Conditions Applying to the Sale of Goods' will apply. Copy of terms

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<sup>199</sup> R-PHB, para. 18; Exh. C-133, Letter from Johnson Winter & Slattery to Bernard Collaery of 3 March 2014, titled 'Lighthouse Corporation – Claims Against Timor-Leste'.

<sup>200</sup> R-PHB, para. 25.

<sup>201</sup> R-PHB, para. 5.

<sup>202</sup> Exh. C-224, Demonstrative Exhibit for the Claimants' Opening Submissions (identifying references to the Standard Terms in the Fuel Supply Agreement).

and conditions available on request”.<sup>203</sup> The Claimants consider this a clear statement incorporating the Standard Terms into the main contract.<sup>204</sup>

199. According to the Claimants, the Contribution Summary “forms an integral part” of the Fuel Supply Agreement.<sup>205</sup> In this regard, the Claimants highlight the following language of the Fuel Supply Agreement:

- Claimants “make herein an offer of continuing supply, and associated extensive infrastructure investment”;<sup>206</sup>
- “Investmnt [sic] Contributn [sic]” is “\$7.5 - \$8.0 million”;<sup>207</sup> and
- “Please evaluate this proposal in conjunction with [the] Contribution Summary, attached as an addendum to this document”.<sup>208</sup>

200. Further, the Claimants cite the following language of the Contribution Summary:

- “To be read in conjunction with “TLZEBHSD20101022LEAJ9 / DATED: 22ND – OCT – 2010”;<sup>209</sup>
- the header on each page that states “Supply for Allocation & Contract TLZEBHSD20101022LEAJ9/ DATED: 22ND – OCT – 2010”; and
- “Execution of TLZEBHSD20101022LEAJ9 / DATED 22ND – OCT – 2010 is strictly in conjunction with this document”.<sup>210</sup>

201. For the Claimants, to the extent that language of incorporation must be “both clear and unambiguous”, as proposed by the Respondent, the test is amply satisfied with respect

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<sup>203</sup> Exh. C-087, Contribution Summary, 22 October 2010, p. 8.

<sup>204</sup> Rej., para. 16(b). The Claimants state that this is not undermined by the fact that they are “available on request”, especially because the Standard Terms were in fact provided to Respondent.

<sup>205</sup> Rej., para. 16.

<sup>206</sup> Exh. C-088, Supply Agreement, 22 October 2010, p. 1.

<sup>207</sup> Exh. C-088, Supply Agreement, 22 October 2010, p. 4.

<sup>208</sup> Exh. C-088, Supply Agreement, 22 October 2010, p. 4.

<sup>209</sup> Exh. C-087, Contribution Summary, 22 October 2010, p. 1.

<sup>210</sup> Exh. C-087, Contribution Summary, 22 October 2010, p. 10.

to the incorporation of the Contribution Summary into the Supply Agreement.<sup>211</sup> It follows that the clear reference in the Contribution Summary to the Standard Terms incorporated that latter document into the Fuel Supply Agreement.<sup>212</sup>

202. The Claimants also rely on the following reference contained both in the Floating Storage Addendum and in the Addendum, Nomination and Variation:

“We note for reference that in accordance with the main supply contract noted above (and in conjunction with our Standard Terms & Conditions of Supply, also attached hereto), we are to supply the following [...]”<sup>213</sup>

203. The Claimants reject the Respondent’s argument that these statements refer to the September or October General Terms.<sup>214</sup> In the Claimants’ view, once the Respondent was provided with the Standard Terms at a meeting on 20 October 2010,<sup>215</sup> “subsequent references to the ‘Standard Terms and Conditions’ should properly be understood as a reference to that document”.<sup>216</sup> This is supported by references to Standard Terms in correspondence from that period.<sup>217</sup>

204. Similarly, the Claimants challenge the Respondent’s reliance on two pieces of correspondence to try to show that they were in fact using the terms “standard terms and conditions” to refer to the Supply Agreement or the General Terms.<sup>218</sup>

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<sup>211</sup> Rej., paras. 25-26, *citing* Reply, paras. 112-114; see R-PHB, para. 88.

<sup>212</sup> Rej., para. 16(b).

<sup>213</sup> Exh. C-092, Floating Storage Addendum, 18 November 2010, p. 2; Exh. C-095, Addendum, Nomination & Variation, 26 November 2010, p. 3.

<sup>214</sup> Rej., para. 19.

<sup>215</sup> See Section VI.B.1.b.ii below.

<sup>216</sup> Rej., para. 19.

<sup>217</sup> Rej., para. 19, *citing* Exh. C-104, Letter from Albert Jacobs to Prime Minister Gusmão and others of February 2011, titled ‘Request for Performance and LC Issuance’; Exh. C-107, Letter from Albert Jacobs to Prime Minister Gusmão and others of 20 April 2011, titled ‘Supply for Allocation and Contract Generator Provision’; Exh. C-217, Email from Sean Magee to Albert Jacobs of 10 February 2011, with subject ‘RDTL Lawyer – Schedule of Information provided to Ambassador and PM’; Exh. C-219, Email from Sean Magee to Albert Jacobs of 8 February 2011.

<sup>218</sup> Rej., para. 17, *citing* Reply, para. 23.

- In the email of 27 October 2010 cited by the Respondent, Mr. Jacobs' reference to "the contractual standard terms and conditions" is in fact to Clause 11.2(d) of the Standard Terms.<sup>219</sup>
- In their letter of 8 February 2011, the Claimants erroneously referred to a "Payment" provision in the Standard Terms, a minor error which is to be expected in lengthy commercial documents.<sup>220</sup>

*ii. Whether the Respondent was Aware of the Standard Terms*

205. The Claimants dispute the Respondent's assertion that it was not made aware of the Standard Terms.<sup>221</sup> They provided the Standard Terms to the Respondent on at least three occasions: at the meeting in Dili on 20 October 2010; by the Second Jacobs Email of 27 November 2010; and by the Further Jacobs Email of 7 December 2010.

- The 20 October 2010 Meeting

206. According to the Claimants, Mr. Jacobs gave the Respondent all the relevant contractual documents, including the Standard Terms, at a meeting in Dili on 20 October 2010.<sup>222</sup> Their account of the meeting is as follows:

- After months of negotiations between the Claimants and the Respondent's officials, Prime Minister Gusmão personally invited the Claimants to meet in Dili on 20 October 2010.<sup>223</sup>
- Mr. Jacobs arrived in Dili in the morning of 20 October 2010. Present at the meeting were Mr. Jacobs, Mr. Magee, Mr. Oliveira and the Secretary of State for Power, Water and Urbanisation, Mr. da Costa Pereira.<sup>224</sup>

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<sup>219</sup> Rej., para. 17(a); Jacobs WS 5, para. 7.

<sup>220</sup> Rej., para. 17(b); Jacobs WS 5, para. 8.

<sup>221</sup> C-Mem., paras. 44-45; Rej., para. 19.

<sup>222</sup> C-Mem., para. 44; Rej., para. 20; R-PHB, para. 58; Jacobs WS 3, para. 84; Jacobs WS 4, para. 6; Jacobs WS 6; Jacobs WS 7, paras. 3-7.

<sup>223</sup> R-PHB, para. 61; Jacobs WS 3, paras. 34-87; Exh. C-086, Letter from Prime Minister Gusmão to Albert Jacobs of 18 October 2010.

<sup>224</sup> R-PHB, para. 62; Jacobs WS 3, paras. 83-84.

- The “key evidence is that Mr. Jacobs took with him to the meeting five blue folders, each of which contained the relevant contractual documentation, including the Standard Terms and Conditions”.<sup>225</sup> He gave one folder to the Prime Minister, one to Secretary da Costa Pereira, and left one on the desk of the Prime Minister’s secretary, Ms. Calapes. Mr. Jacobs and Mr. Magee each retained a folder.<sup>226</sup>
- Mr. Jacobs then knelt on the floor next to the Prime Minister and “explained the purpose and content of each document, page by page” for almost two hours.<sup>227</sup> During this time, Mr. Jacobs, the Prime Minister and Secretary da Costa Pereira made various annotations on Mr. Jacobs’ copy of the documents, as can be seen on Exhibit C-221.<sup>228</sup> Notably, Mr. Jacobs wrote “IMPORTANT” on the Contribution Summary next to the reference to the Standard Terms, and placed an asterisk next to the ICSID arbitration clause in the Standard Terms.<sup>229</sup>
- The Prime Minister was pleased with the arrangement, and over the next five days, without further negotiation, the Fuel Supply Agreement was executed.<sup>230</sup>

207. The Claimants submit that this version of events is supported by Mr. Jacobs’ consistent and detailed testimony, as well as by contemporaneous documentation, including the annotated blue folder submitted as Exhibit C-221.<sup>231</sup>

208. Furthermore, the Claimants argue that this account “was not directly contradicted by Prime Minister Gusmão although he claimed that he did not remember any details of the meeting”.<sup>232</sup> In the Claimants’ view, the Tribunal need not find that the Prime Minister has made false denials; it is sufficient to find that he was not engaged with the details and did not recollect them.<sup>233</sup> Prime Minister Gusmão’s detachment is demonstrated by the fact that he could not recall that he had overseen Timor-Leste’s accession to the

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<sup>225</sup> C-PHB, para. 64; see Jacobs WS 6, paras. 5-6, 10.

<sup>226</sup> Jacobs WS 6, para. 11.

<sup>227</sup> Jacobs WS 6, para. 12.

<sup>228</sup> Exh. C-221, Replica of the blue folder with annotations.

<sup>229</sup> C-PHB, paras. 83-83; Exh. C-221, Replica of the blue folder with annotations.

<sup>230</sup> C-PHB, para. 72.

<sup>231</sup> C-PHB, para. 70; Exh. C-221, Replica of the blue folder with annotations.

<sup>232</sup> C-PHB, para. 67, *citing* Tr. 312:8-10.

<sup>233</sup> C-PHB, para. 71.

ICSID Convention after independence, even before the State joined the United Nations.<sup>234</sup>

209. The Claimants find it telling that the Respondent elected not to file witness testimony from Secretary da Costa Pereira, Mr. Oliveira or Ms. Calpes regarding the 20 October 2010 meeting. They ask the Tribunal to infer that such testimony “would not have assisted, and indeed [would] have been adverse or otherwise unhelpful to the Respondent’s denial of the detail of Mr Jacob’s evidence”.<sup>235</sup>

- Second Jacobs Email (Exhibit C-148)

210. The Claimants allege that, on 27 November 2010, Mr. Jacobs sent the Second Jacobs Email to Mr. Magee containing the Addendum, Nomination and Variation and the Standard Terms, and that Mr. Magee then provided those documents to Mr. Abrao Oliveira.<sup>236</sup>

211. The Claimants oppose the Respondent’s allegation that the Second Jacobs Email is fabricated<sup>237</sup> and submit that the “Respondent bears the burden of proof for its allegations of fraud, and a stricter standard of proof applies in such cases”. They add that the Respondent has not discharged that burden.<sup>238</sup>

212. The Claimants explain the origin of the Second Jacobs Email as follows: on the morning of 27 November 2010, Mr. Jacobs was at the St. Kilda office and sent Mr. Magee the First Jacobs Email, attaching the Bonus Period Election Form, the Special Conditions of Contract, and the Addendum Nomination & Variation Agreement (Exhibit C-147). He then left the office to attend a meeting at the Windsor hotel. On the way, Mr. Jacobs received a call from Mr. Magee, informing him that he had not attached certain documents to his email (including the Standard Terms). Mr. Jacobs then called his

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<sup>234</sup> Tr. 304:17-305:11; C-PHB, para. 73.

<sup>235</sup> C-PHB, paras. 69-70.

<sup>236</sup> C-Mem., para. 45; Rej., para. 21(a); Jacobs WS 3, para. 101; Exh. C-148, Email from Albert Jacobs to Sean Magee of 27 November 2010, with subject ‘Timor-Leste Fuel Supply Variation Documents for Execution’.

<sup>237</sup> Rej., paras. 28 *et seq.*; C-PHB, paras. 9 *et seq.*

<sup>238</sup> C-PHB, para. 53. The Claimants further argue that if they “were seriously minded to engage in fraudulent activity to support their case on jurisdiction, it would appear that they would have come up with something other than these two emails [the Second Jacobs Email and the December Jacobs Email]”. C-PHB, para. 55.

assistant, Yuliana, and asked her to send Mr. Magee the requested documents. Yuliana composed the Second Jacobs Email and sent it on behalf of Mr. Jacobs from a different computer than the one from which Mr. Jacobs sent the First Jacobs Email.<sup>239</sup>

213. For the Claimants, “[t]his explanation of events is entirely plausible as the innocuous truth”.<sup>240</sup> They raise several points to respond to the Respondent’s allegations, including:

- The Respondent’s forensic expert, Mr. Hopkins, based his analysis on the false assumption that “the Second Jacobs Email was sent using the same email address, the same computer, using Microsoft Outlook” as the other emails he reviewed, which undermines his findings.<sup>241</sup> The discrepancies between the Second Jacobs Email and contemporaneous emails (formatting of the email addresses, language, the time zone, and font) are explained by the fact that the Claimants had at least seven computers at two different addresses at the time, and Mr. Jacobs could send emails, or have emails sent on his behalf, from any of those computers.<sup>242</sup> The Second Jacobs Email was sent from Yuliana’s computer.
- “[T]here is nothing untoward or surprising about the fact that Yuliana used a different email signature for Exhibit C-148 from the email signature which Mr. Jacobs used for Exhibit C-147”.<sup>243</sup> Yuliana likely selected the email signature with the Monash address because it included the “Lighthouse Energy” logo.
- At the time, the Claimants did in fact occupy the address indicated on the Second Jacobs Email (at Monash University), as well as the address indicated in the First Jacobs Email.<sup>244</sup>
- The Respondent’s submissions regarding the timing between the First and Second Jacobs Emails are misplaced, because Mr. Jacobs’ computer and Yuliana’s

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<sup>239</sup> C-PHB, para. 18; Tr. 169:21-176:42.

<sup>240</sup> C-PHB, para. 19.

<sup>241</sup> Rej., para. 40, *quoting* Hopkins ER 1, para. 2.5.4; C-PHB, paras. 12-14.

<sup>242</sup> Jacobs WS 5, paras. 18-20.

<sup>243</sup> C-PHB, para. 18(e).

<sup>244</sup> Rej., para. 31; Jacobs WS 5, para. 11. Mr. Jacobs states that the Claimants occupied the Monash University address pursuant to a license agreement with Unicorp Investments 2 Pty Limited. Exh. C-209, License Agreement for use of Office Premises, 14 January 2010.

computer could have been set to different times, as confirmed by the Parties' experts. Thus, "the apparent four (or five) minute window ... could actually have been a significantly longer period of time".<sup>245</sup>

- Regarding the metadata of the Second Jacobs Email, the Claimants' forensic expert Craig Macauley explains that, when the Claimants provided the Second Jacobs Email to Johnson Winter & Slattery as an attachment to another email, the Claimants' IT system "updated the file system metadata". This made it appear as if the attachments to the Second Jacobs Email were attached at that time, rather than when they were originally attached.<sup>246</sup>

214. The Claimants reject the Respondent's answer on these points; namely that the Claimants should have provided access to all of the relevant metadata (including from Yuliana's computer and Mr. Magee's email account).<sup>247</sup> According to the Claimants, they "no longer have the computers which were in use in 2010, and the Claimants' server which relates to that period is in storage and has deteriorated".<sup>248</sup> Similarly, Mr. Magee no longer has access to the relevant email account.<sup>249</sup> Therefore, "the Tribunal can draw no conclusions whatsoever as to the absence of any further evidence concerning the metadata".<sup>250</sup>

- Further Jacobs Email (Exhibit C-198)

215. The Claimants state that on 7 December 2010, Mr. Jacobs sent Ambassador Guterres the Further Jacobs Email containing the Standard Terms, as well as the December General Terms.<sup>251</sup>

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<sup>245</sup> C-PHB, para. 20; see *Id.* paras. 21-24; C-RPHB, para. 14.

<sup>246</sup> Macauley ER 1, para. 55. The Claimants also state that the "attachments to the Second Jacobs Email were not attached on 21 April 2016 because Johnson Winter & Slattery was first provided with a copy of it weeks prior to that date". Rej., para. 37; see C-RPHB, para. 16.

<sup>247</sup> C-PHB, *citing* Tr. 37:19-36 (Mr. Flynn).

<sup>248</sup> C-PHB, para. 31. Mr. Malcolm Swansson of LTA Systems and Consulting Pty Ltd. (an IT consultancy) confirmed that there was little chance of retrieving data from the server. Exh. R-163, Letter from Malcolm Swansson to Johnson Winter & Slattery of 4 November 2016.

<sup>249</sup> C-PHB, para. 34.

<sup>250</sup> C-PHB, para. 35.

<sup>251</sup> Rej., para. 21(b); Exh. C-198, Email from Albert Jacobs to Sean Magee and Ambassador Abel Guterres of 7 December 2010. Claimants also state that "[t]here is evidence that the Standard Terms & Conditions were provided again to the Respondent in February [2011], including to the Respondent's solicitors and to

216. As with the Second Jacobs Email, the Claimants deny that the Further Jacobs Email is fabricated, asserting that the Respondent has failed to meet the high burden of proving fraud.<sup>252</sup>
217. At the Hearing, Mr. Jacobs explained that he created the two emails sent on 7 December 2010 as follows: he opened the First Jacobs Email (Exhibit C-147) and the Second Jacobs Email (Exhibit C-148) to use as templates. He clicked “forward” and changed the subject lines to read “Electronic copies of agreements – RDTL – LE” and “Electronic copies of agreements – RDTL – LE -2-”, respectively.<sup>253</sup> Then Mr. Jacobs attached three additional documents (including the December General Terms) to the second email and clicked “send”. The forwarded version of the First Jacobs Email is Exhibit C-197, and the forwarded version of the Second Jacobs Email is Exhibit C-198 (the Further Jacobs Email).<sup>254</sup>
218. The Claimants seek to rebut the Respondent’s allegation that the Further Jacobs Email did not exist at the time it was purportedly sent:
- As explained in respect of the Second Jacobs Email, the Claimants had several computers from which Mr. Jacobs could send emails at the time, which clarifies why there may be differences between the Further Jacobs Email and others sent by Mr. Jacobs during that period.<sup>255</sup> The assumptions underlying Mr. Hopkins’ analysis are wrong.<sup>256</sup>

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senior government officials”. Rej., para. 22, *citing* Exh. C-217, Email from Sean Magee to Albert Jacobs of 10 February 2011, with subject ‘RDTL Lawyer – Schedule of Information provided to Ambassador and PM’; Exh. C-218, Email from Albert Jacobs to Sean Magee of 10 February 2011, with subject “RE: Update please” (“I want to know if you have presented all the documents to the Secretary Agio, and also the Legal Adviser in the Ministry of Finance, and also the Hon. Prime Minister himself?”).

<sup>252</sup> C-PHB, para. 52.

<sup>253</sup> Tr. 278:16-27; C-PHB, paras. 40-44.

<sup>254</sup> Tr. 278:3-14, 279:20-280:42; C-PHB, para. 43.

<sup>255</sup> Rej., paras. 64-69; C-PHB, para. 37.

<sup>256</sup> C-PHB, para. 40.

- Because Mr. Jacobs forwarded the Second Jacobs Email (sent by Yuliana) to create the Further Jacobs Email, it makes sense that these two emails share the same metadata, which differ from that of other contemporaneous emails.<sup>257</sup>
- The fact that the attachments to the Further Jacobs Email appear in a different order than the attachments to the Second Jacobs email cannot be considered evidence of fabrication, given that the Parties' experts could not confirm that the order of attachments would remain the same when additional documents are attached.<sup>258</sup>
- Because the PDF conversion process can create formatting irregularities, it is not surprising that there are inconsistencies in formatting between the printed and electronic version of the Further Jacobs Email.<sup>259</sup>
- The DOC ID on one of the attachments to the Further Jacobs Email was not inserted in 2012, as alleged by the Claimants. Similar DOC IDs do not appear on other documents sent by Claimants during that period because Mr. Jacobs usually deletes the document numbers before sending documents to counterparties, but he forgot to do so in this instance.<sup>260</sup>
- Regarding the metadata of the Further Jacobs Email, Mr. Macauley explains that, as with the Second Jacobs' Email, Claimants' IT system updated the metadata to the date on which Claimants sent the email to their counsel.<sup>261</sup>

219. Further, the Claimants do not accept Ambassador Guterres' testimony that he never received the document.<sup>262</sup> Ambassador Guterres testified that he invited the Respondent's legal representatives to search his inbox in 2016.<sup>263</sup> However, as confirmed by both Parties' experts, if he had deleted the email, it is highly unlikely that a

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<sup>257</sup> C-PHB, paras. 401-41.

<sup>258</sup> Tr. 434:25-435:16; C-PHB, paras. 45-48.

<sup>259</sup> Rej., paras. 62-63; Macauley ER 1, para. 121.

<sup>260</sup> Rej., para. 57; Jacobs WS 5, para. 23.

<sup>261</sup> Macauley ER 1, paras. 86-89; C-RPHB, para. 16.

<sup>262</sup> Rej., para. 71.

<sup>263</sup> C-PHB, para. 50, *citing* Tr. 404:14-406:22.

search of his Gmail account carried out six years after the fact could show whether that email existed.<sup>264</sup>

220. Thus, the Claimants conclude that the Respondent received the Standard Terms and the General Terms on multiple occasions. In any event, they argue that it is irrelevant as a legal matter whether the Respondent received these documents.<sup>265</sup> They explain that Australian courts have held that, to be applicable, terms and conditions do not need to be provided to the parties, if they are referred to in contractual documentation.<sup>266</sup> Thus, the Standard Terms apply to the Fuel Supply Agreement whether or not the Respondent actually received them.<sup>267</sup>

*iii. Whether the General Terms Displaced the Standard Terms*

221. The Claimants further contest the Respondent's allegation that the Standard Terms were superseded by the September or October General Terms, which contain no ICSID arbitration clause.<sup>268</sup> In the Claimants' view, the Respondent's interpretation must be rejected because the Addendum, Nomination and Variation expressly refer to the Standard Terms.<sup>269</sup>

222. In addition, the Claimants rely on Clause 2.2 of the Standard Terms, which states that specific agreed terms may not "remove the afforded protections at law provided by these minimum standard terms and conditions herein".<sup>270</sup> According to the Claimants, the ICSID arbitration provision in Clause 18 of the Standard Terms is an important "protection" that falls within the meaning of Clause 2.2 and therefore cannot be displaced.<sup>271</sup>

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<sup>264</sup> Tr. 435:18-28; C-PHB, paras. 49-51.

<sup>265</sup> C-Mem., paras. 46-51.

<sup>266</sup> C-Mem., paras. 46-51, *citing inter alia* Exh. CL-080, *Venter v Ilona MY Ltd* [2012] NSWSC 1029; Exh. CL-081, *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18.

<sup>267</sup> C-Mem., para. 46.

<sup>268</sup> C-Mem., paras. 52-62; Rej., paras. 73-74, paras. 131-132.

<sup>269</sup> Exh. C-095, Addendum, Nomination and Variation, 26 November 2010, p. 3 ("in accordance with the main supply contract noted above (and in conjunction with our *Standard Terms & Conditions*, also attached hereto), we are to supply the following").

<sup>270</sup> Exh. C-192, Standard Terms, October 2010, Clause 2.2.

<sup>271</sup> C-Mem., para. 54, *citing* Exh. CL-082, *RosInvest Co UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, October 2007, paras. 131-132.

223. In any event, the Claimants argue that, even if the General Terms superseded the Standard Terms, the Respondent has consented to ICSID arbitration because the General Terms were revised in late November 2010, and the revised version (dated December 2010 and defined herein as the “December General Terms”) includes an ICSID arbitration clause.<sup>272</sup> When there are multiple versions of contractual terms and conditions available, “the latest edition is to be taken as having been incorporated in the contract”.<sup>273</sup> Therefore, the December General Terms became part of the Fuel Supply Agreement via the Addendum, Nomination and Variation.<sup>274</sup>
224. The Claimants assert that the December General Terms were sent to the Respondent with the Further Jacobs Email.<sup>275</sup> As summarized above, they deny the Respondent’s allegation that this email did not exist at the time it was purportedly sent.<sup>276</sup>
225. More generally, the Claimants argue that “it is not open for the Tribunal to find that explicitly or implicitly Mr Jacobs elected to abandon the international disputes resolution mechanism he deliberately included in Clause 18 of the Standard Terms and Conditions”.<sup>277</sup> Mr. Jacobs stipulated ICSID arbitration in his contractual documents based on his connection with Mr. Ioannis Kardassopoulos, the Claimant in the ICSID case *Kardassopoulos v. Georgia*.<sup>278</sup> Even if these are “somewhat confused reasons” to select ICSID, Mr. Jacobs would not have subsequently agreed to delete or substitute that clause.<sup>279</sup>

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<sup>272</sup> C-Mem., para. 55; Rej., para. 74; Exh. C-200, December General Terms, Clause 17.

<sup>273</sup> C-Mem., para. 60, citing Exh. CL-081, *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, 25 (Lord Fraser of Tullybelton).

<sup>274</sup> C-Mem., para. 56. Although the Addendum, Nomination Variation is dated 26 November 2010, Claimants state that it was signed on or about 2 December 2010.

<sup>275</sup> C-Mem., para. 58; Rej., para. 73; Exh. C-198, Email from Albert Jacobs to Sean Magee and Ambassador Abel Guterres of 7 December 2010.

<sup>276</sup> Rej., paras. 54-72; see Section VI.B.1.b.ii above.

<sup>277</sup> C-PHB, para. 78.

<sup>278</sup> C-PHB, para. 78. The Claimants assert that ICSID also happens to be “Respondent’s international disputes procedure of choice”. C-PHB, para. 74.

<sup>279</sup> C-PHB, paras. 78-79.

*iv. Whether the Standard Terms and December General Terms Existed in October-December 2010*

226. As summarized above, the Claimants submit that the Tribunal must reject the Respondent's allegation that they fabricated two emails sent by Mr. Jacobs.<sup>280</sup> There is no evidence of fraud, and hence no basis for a finding that the Standard Terms or the December General Terms did not exist in October-December 2010.

227. In any event, the Claimants argue that the Respondent's position is unreasonable in light of the numerous references to the Standard Terms in the Fuel Supply Agreement and in contemporaneous correspondence.<sup>281</sup> Furthermore, metadata extracted by the Respondent's own expert shows that the Standard Terms were created on 10 October 2010, and the December General Terms on 1 December 2010.<sup>282</sup>

## **2. Analysis**

228. The Claimants submit that the Respondent consented to ICSID arbitration under Clause 18 of the Standard Terms and Clause 17 of the December General Terms, the text of which has been reproduced above in paragraphs 9 and 16.

229. In particular, the Claimants assert that the Standard Terms were incorporated into the contractual framework by means of three references:

- a reference in the Contribution Summary, a document ancillary to the Supply Agreement, to "Standard Terms & Conditions Applying to the Sale of Goods";
- a reference in the Floating Storage Addendum to an "attached" document, the "Standard Terms & Conditions of Supply; and
- a reference in the Third Agreement to an "attached" document, the "Standard Terms & Conditions of Supply".

230. The Claimants also allege that the Respondent was aware of the Standard Terms, as it received a copy of that document on three occasions:

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<sup>280</sup> See Section VI.B.1.b.ii above.

<sup>281</sup> C-PHB, para. 89, *citing* Exh. C-104, Letter from Albert Jacobs to Prime Minister Gusmão and others of 8 February 2011, titled 'Request for Performance and LC Issuance'.

<sup>282</sup> C-PHB, para. 89, *citing* Hopkins ER 2, Annex F, p. 25; C-RPHB, para. 7.

- directly, in a blue folder handed over at a meeting with Prime Minister Gusmão on 20 October 2010;
- indirectly, via an email with attachments that included the Standard Terms, sent on 27 November 2010 at 9:18 a.m. from Mr. Jacobs to Mr. Magee (the Second Jacobs Email). Mr. Jacobs allegedly asked Mr. Magee to provide the attached documents to Mr. Oliveira so that the latter could hand them over to the Respondent; and
- indirectly, via an email with attachments that included the Standard Terms, sent on 7 December 2010 at 5:23 p.m. from Mr. Jacobs to Mr. Magee (the Further Jacobs Email). Ambassador Guterres was allegedly copied on this email.

231. Finally, the Claimants argue that the Further Jacobs Email also attached the December General Terms, which also contained an ICSID arbitration provision.

232. The Tribunal reviews these submissions below to determine whether the Claimants have established that the Respondent has consented to ICSID jurisdiction because of the incorporation of Clause 18 of the Standard Terms or Clause 17 of the December General Terms into the Parties' contractual framework. Before it does so however, the Tribunal makes some preliminary observations.

**a. Preliminary Observations**

233. On reviewing the record, the Tribunal finds that the Claimants have not established that there was a "common intent" to submit to ICSID jurisdiction. To the contrary, the record evidences an intent to resolve disputes through domestic court litigation, not through arbitration, let alone ICSID arbitration.

234. On 12 April 2010, more than four months before the Parties entered into the Supply Agreement, Ambassador Guterres sent Mr. Magee an e-mail attaching a document setting out the general terms used by Timor-Leste for procurement and investment transactions.<sup>283</sup> Clause 17 of that document contained the following dispute resolution clause:

"17 Resolution of Disputes

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<sup>283</sup> Exh. R-118, Email from Ambassador Abel Guterres to Sean Magee of 12 April 2010.

17.1 The Purchaser and the Supplier shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the Contract.

17.2 Any Supplier that claims to have suffered loss or injury due to a breach of an obligation imposed on the procuring entity by Law may seek review in accordance with the applicable public procurement law of the Democratic Republic of Timor Leste.”

235. Thus, the only dispute resolution mechanism contemplated by the Parties before signing the Supply Agreement on 22 October 2010 was a form of domestic law review provided under the law of the Respondent, i.e. domestic court litigation.<sup>284</sup>

236. On 19 November 2010, i.e. a day after the Parties entered into the Floating Storage Addendum, Mr. Magee sent an email to Mr. Oliveira, with a copy to Ambassador Guterres, attaching the September General Terms.<sup>285</sup> Clause 17 of this document contained a dispute resolution clause almost identical to the one reproduced above, except that the words “Democratic Republic of Timor Leste” were substituted by “Buyer”:

“17.1 The Purchaser and the Supplier shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the Contract.

17.2 Any Supplier that claims to have suffered loss or injury due to a breach of an obligation imposed on the procuring entity, by law may seek review in accordance with the public procurement law of *the Buyer, or the standard laws applicable to Buyers.*<sup>286</sup>

237. Therefore, even after signing the Supply Agreement and the Floating Storage Addendum, the only dispute resolution mechanism contemplated by the Parties was remedies available under domestic law.<sup>287</sup>

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<sup>284</sup> The Claimants’ allegation that Mr. Jacobs discussed ICSID arbitration with Prime Minister Gusmão at the meeting of 20 October 2010 and that he handed the Standard Terms to Mr. Gusmão at the meeting is examined below. Similarly, the Claimants’ argument that mere reference to the Standard Terms in the relevant contractual documents is sufficient for the purposes of incorporating ICSID arbitration between the Parties is also examined below.

<sup>285</sup> Exh. R-119, September General Terms, Clause 17, attached to Email from Sean Magee to Abrao Gabriel Oliveira (copying Ambassador Abel Guterres) of 19 November 2010, ‘FINAL PACKAGE’.

<sup>286</sup> Exh. R-119, September General Terms, Clause 17 (emphasis added).

<sup>287</sup> The Claimants’ allegation that Mr. Jacobs discussed ICSID arbitration with Prime Minister Gusmão at the meeting of 20 October 2010 and that he handed the Standard Terms to Mr. Gusmão at the meeting is examined below. Similarly, the Claimants’ argument that mere reference to the Standard Terms in the relevant contractual documents is sufficient for the purposes of incorporating ICSID arbitration between the Parties is also examined below.

238. On or around 2 December 2010, the Parties entered into the Third Agreement. Attached to the Third Agreement were the October General Terms. Clause 17 of this document was identical to Clause 17 of the September General Terms (which, as mentioned above, was identical to the dispute resolution clause contained in the document supplied by the Respondent), except that the words “standard laws applicable to Suppliers, under Commonwealth laws of Australia” were added at the end:

“17.1 The Purchaser and the Supplier shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the Contract.

17.2 Any Supplier that claims to have suffered loss or injury due to a breach of an obligation imposed on the procuring entity, by law may seek review in accordance with the public procurement law of the Buyer, *or the standard laws applicable to Suppliers, under Commonwealth laws of Australia.*”<sup>288</sup>

239. Accordingly, until at least 2 December 2010, the only dispute resolution mechanism contemplated by the Parties were domestic court remedies.<sup>289</sup>

240. The following month, on 30 January 2011, Mr. Magee wrote to Mr. Guterres that failing resolution of the parties’ then existing dispute, the Claimants would “immediately seek Judgement for Specific Performance” in the Supreme Court of Victoria”.<sup>290</sup>

241. Nine days later, on 8 February 2011, the Claimants’ sent a letter to the Respondent stating that:

“[F]ailing to undertake and fulfil necessary contractual obligations and responsibilities will cause RDTL / EDTL to unlawfully default, *requiring lawful remedy in the appropriate Court of Law, within the appropriate jurisdiction as provided by the contract and conjunctive agreements.*

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<sup>288</sup> Exh. C-095, Addendum, Nomination and Variation, 26 November 2010, read with Exh. R-132, October General Terms (emphasis added).

<sup>289</sup> The Claimants’ allegation that Mr. Jacobs discussed ICSID arbitration with Prime Minister Gusmão at the meeting of 20 October 2010 and that he handed the Standard Terms to Mr. Gusmão at the meeting is examined below. Similarly, the Claimants’ argument that mere reference to the Standard Terms in the relevant contractual documents is sufficient for the purposes of incorporating ICSID arbitration between the Parties is also examined below.

<sup>290</sup> Exh. R-143, Email from Sean Magee to Ambassador Abel Guterres of 30 January 2011, pp. 11-12.

[We] shall have no hesitation in using this letter as evidence in a *court of law*.”<sup>291</sup>

242. The words used show that, in February 2011, months after the alleged incorporation of the Standard Terms and the December General Terms, the Claimants were of the opinion that the applicable dispute resolution mechanism referred them to domestic courts. They did not consider that the Parties had consented to ICSID arbitration.
243. Six months later, on 22 August 2011, the Claimants’ former counsel wrote to the Respondent demanding payment for generators delivered in April 2011.<sup>292</sup> That letter similarly stated that “our instructions are to issue proceedings forthwith and to seek *summary judgment* for and in respect of such proceedings”,<sup>293</sup> suggesting once more that the Claimants were contemplating court proceedings. Indeed, “summary judgment” is known in domestic litigation in Australia and is not a term associated with ICSID arbitration.
244. The most telling conduct of the Claimants occurred on 25 October 2011, i.e. a year after the signature of the Fuel Supply Agreement, when it is alleged that the Standard Terms were incorporated into the Parties’ contractual arrangements. On that day, the Claimants’ then counsel sent the Respondent a document entitled “Consent to Arbitration under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States” and requested that the Respondent execute that document.<sup>294</sup> No mention was made of the fact that an ICSID arbitration clause was already present in the Parties’ contractual arrangements. Hence, continuing until October 2011, the Claimants still did not consider that the Respondent had consented to ICSID arbitration. Had the Claimants considered that the Respondent had previously consented to ICSID arbitration, then one might have expected their letter to have mentioned that the Respondent had already consented to ICSID jurisdiction through the Standard Terms and/or the December General Terms, and explained why it was thought that some

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<sup>291</sup> Exh. C-104, Letter from Albert Jacobs to Prime Minister Gusmão and others of 8 February 2011, titled ‘Request for Performance and LC Issuance’ (emphasis added).

<sup>292</sup> Exh. C-128, Letter from Marshalls + Dent to Bernard Collaery of 22 August 2011, titled ‘Claim against the Government of the Democratic Republic of Timor-Leste’.

<sup>293</sup> Exh. C-128, Letter from Marshalls + Dent to Bernard Collaery of 22 August 2011, titled ‘Claim against the Government of the Democratic Republic of Timor-Leste’ (emphasis added).

<sup>294</sup> Exh. C-129, Letter from Marshalls + Dent to Prime Minister Gusmão of 25 October 2011.

confirmation was needed. Yet, the letter is silent as to the prior consent upon which the Claimants now rely.

245. The Claimants' explanation that this letter was sent in error due to poor legal advice at the time is unavailing. For one, the Claimants have not supplied any cogent evidence justifying such a conclusion. Moreover, Mr. Jacobs himself had pre-signed the document requesting the Respondent's consent, making it clear that he too believed that the Respondent had not consented to ICSID arbitration until that date.
246. These facts suffice to conclude that neither before nor after the conclusion of the Fuel Supply Agreement did the Parties intend to incorporate ICSID arbitration into their contract. This conclusion is strengthened by a review of the alleged incorporation of the Standard Terms and the December General Terms ((b) below) and of the alleged provision of these documents to the Respondent ((c) below).

***b. Incorporation of the Standard Terms and the December General Terms into the Parties' Contractual Framework***

247. As mentioned above, the Claimants contend that the references in the Parties' contractual documents to the Standard Terms are sufficient to incorporate the ICSID arbitration and thus to conclude that the Respondent has "consented in writing" to ICSID jurisdiction as required by Article 25(1) of the Convention. In particular, the Claimants rely on references to the Standard Terms in (i) the Contribution Summary; (ii) the Floating Storage Addendum; and (iii) Addendum, Nomination and Variation Agreement.

*i. Reference in the Contribution Summary*

248. The Parties entered into the Supply Agreement on 22 October 2010. In the concluding paragraphs of that agreement, a potential buyer (in this case, the Respondent) was advised to "*please evaluate* this proposal in conjunction with our state-of-the-art 10.16 MW Diesel Generator Infrastructure Contribution Summary", which was stated to be attached to the Supply Agreement.<sup>295</sup>
249. The Contribution Summary contains the following statement:

"TERMS AND CONDITIONS

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<sup>295</sup> Exh. C-088, Supply Agreement, 22 October 2010 (emphasis added).

Lighthouse “*Standard Terms and Conditions Applying to the Sale of Goods*” will apply.

Copy of terms and conditions available on request”<sup>296</sup>

250. The Claimants’ case is that the reference to “Lighthouse ‘Standard Terms and Conditions’” in the Contribution Summary – which is an attachment to the Fuel Supply Agreement that was executed by the Government – shows that the Parties consented to ICSID arbitration. The Tribunal does not agree for the following reasons.

251. First, the reference to the Standard Terms document itself is vague, and does not clearly express an intent to incorporate that document:

- There is no direct language of incorporation in the Supply Agreement. The Contribution Summary had the stated purpose to “evaluate” the Claimants’ technical proposal. The Supply Agreement does not provide that the Contribution Summary is “incorporated”, “made a part of the Agreement”, or use any other terminology of incorporation. The Tribunal does not accept that the stated request (“please”) and the stated purpose (“evaluate”) are words of incorporation.
- The Tribunal is comforted in this finding by the fact that the Contribution Summary contains references which are unlikely to have been intended to be incorporated as contractual terms. For example, the Contribution Summary contains a summary of information about the power generation needs of Timor-Leste, an analysis of use and delivery of power in Timor-Leste, and a forecast of future energy needs and further growth in output.

252. Second, the Tribunal is not satisfied that the Standard Terms were supplied to the Respondent by the time of signing the Supply Agreement.<sup>297</sup>

253. Third, evidence of events shortly after the Supply Agreement was signed casts significant doubt on whether the Respondent could have known that the Standard Terms document existed at the time, or that it was incorporated into the Parties’ agreement. Five days after the signature of the Supply Agreement, on 27 October 2010,<sup>298</sup> Mr. Jacobs sent an

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<sup>296</sup> Exh. C-087, Contribution Summary, 22 October 2010, p. 8 (emphasis added).

<sup>297</sup> The Tribunal is aware of the Claimants’ allegation that the Standard Terms and Conditions document was handed over to the Respondent at the meeting of 20 October 2010. This allegation is examined below.

<sup>298</sup> The Second Agreement comprised of the Floating Storage Addendum and the Special Conditions.

email to the Respondent referring to a meeting in Dili between himself and representatives of the Respondent. In that email, he stated:

“[a]ccording to the *contractual standard terms and conditions*, Page 2 stipulates under HOLD FEE that if floating storage is required, then the cost of barge and management of same is for the Buyer, RDTL or EDTL. This is again referred to on Page 3, under STORAGE.”<sup>299</sup>

254. The Standard Terms do not contain such provisions on pages 2, 3 or elsewhere within the document. However, these provisions do appear on pages 2 and 3 of the Supply Agreement. The use of the capitalized term “HOLD FEE”, the specific references to page numbers (“Page 2” and “Page 3”), and another capitalized term (“STORAGE”), would suggest that that the references were actually to the Supply Agreement.
255. As was discussed above, for there to be consent to ICSID jurisdiction through incorporation by reference, it must be demonstrated that the Parties intended to incorporate ICSID arbitration into their arrangements. Here, it has not been demonstrated to the Tribunal’s satisfaction that the Parties agreed to refer their disputes to ICSID arbitration. Moreover, not only is the reference to the document containing the ICSID dispute settlement clause ambiguous as to its intent, but it also has not been sufficiently established that the Respondent knew that the document existed or that it was supplied to the Respondent, or that it was discussed with the Respondent.
256. In the circumstances, the Tribunal determines that the Claimants have failed to demonstrate consent to ICSID arbitration as required under Article 25(1) of the Convention at the time of entering into the Supply Agreement. The Tribunal cannot agree that the “double incorporation” claimed (the Supply Agreement allegedly incorporates the Contribution Summary, and the Contribution Summary then allegedly incorporates the Standard Terms, which in turn contain the ICSID jurisdiction clause) fulfils the requirement of consent under Article 25(1) of the Convention.

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<sup>299</sup> Exh. R-137, Email from Albert Jacobs to Sean Magee of 27 October 2010 (emphasis added).

*ii. Reference in the Floating Storage Addendum*

257. On 18 November 2010, the Parties entered into the Floating Storage Addendum in which the Claimants agreed to provide a barge for interim storage of the diesel fuel supplied by the Claimants.<sup>300</sup> This Addendum states in relevant part:

“FLOATING STORAGE BARGE/ VESSEL

Subsequent letters of instruction from EDTL, dated 29th October 2010 (reference numbers 380 /SEAU /X/2010), to our corporate attention, stipulate storage facilities are not currently available in Dili, Timor Leste, and that we are to provide interim storage facilities in Port Caravela. We note for reference that in accordance with the main supply contract noted above, (and in conjunction with our Standard Terms & Conditions of Supply, also attached hereto), we are to supply the following [...]”<sup>301</sup>

258. While the relevant text says “Standard Terms and Conditions of Supply, also attached hereto”, the Standard Terms were not attached.<sup>302</sup> What was attached was the September General Terms, which do not provide for ICSID arbitration.
259. In the present factual context, this mere reference to the unattached Standard Terms is insufficient to prove a common intent to incorporate a dispute settlement clause. This is all the more so here as this alleged reference postdates the conclusion of the Supply Agreement and it is included in a distinct contract with a limited scope.

*iii. Reference in Addendum, Nomination and Variation Agreement*

260. The Parties entered into the Third Agreement, also referred to as Addendum, Nomination and Variation Agreement, on or around 2 December 2010.<sup>303</sup> In relevant part, the Third Agreement provides as follows:

“(ITEM C). FLOATING STORAGE BARGE/ VESSEL

Subsequent letters of instruction from EDTL, dated 29th October 2010 (reference numbers 380 / SEAU /X/2010), to our corporate attention, stipulate storage facilities are not currently available in Dili, TimorLeste, and that we are to provide interim storage facilities in Port Caravela. We note for reference that in accordance with the main supply contract

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<sup>300</sup> Exh. C-092, Floating Storage Addendum, 18 November 2010.

<sup>301</sup> Exh. C-092, Floating Storage Addendum, 18 November 2010, p.2.

<sup>302</sup> Exh. R-0119, Email from Sean Magee to Abrao Oliveira copied to Ambassador Abel Guterres (19.11.10).

<sup>303</sup> Exh. C-095, Addendum, Nomination and Variation, 26 November 2010. This agreement is dated 26 November 2010 but was executed on or around 2 December 2010. See Jacobs WS 4, para. 15.

noted above, (and in conjunction with our Standard Terms & Conditions of Supply, also attached hereto), we are to supply the following [...]”<sup>304</sup>

261. This is a supplemental contract which provided *inter alia* that Timor-Leste would not have to pay storage costs for diesel fuel and referred to a commitment on the part of the Claimants to design, construct and install a fuel storage facility at Port Caravela. The Tribunal does not consider that this is capable of being construed as an expression of a common intent to submit disputes arising from the earlier signed Supply Agreement or the Floating Storage Addendum to ICSID arbitration.
262. As with the Supply Agreement and the Floating Storage Addendum, the contemporaneous evidence does not establish that the Respondent could be expected to know that a document like the Standard Terms was incorporated into the Parties’ contractual arrangements.
263. Indeed, in contemporary correspondence, the Claimants referred to “contractual Standard Terms & Conditions”, which actually turned out to be references to other contractual documents.
264. For instance, on 8 February 2011, the Claimants sent a letter to the Respondent which contained three references to the Standard Terms:

“Further, I draw attention to the following agreements and documents which form an integral part of this supply contract abovementioned, and are the latest in their respective versions:

[...]

3. STANDARD TERMS AND & CONDITIONS APPLYING TO THE SALE OF GOODS

[...]

B) 10.16 MW DIESEL GENERATOR INFRASTRUCTURE CONTRIBUTION SUMMARY

[...]

On page eight (8) and at item “TERMS AND CONDITIONS”, application of the Standard Terms & Conditions Applying to the Sale of Goods is made.

[...]

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<sup>304</sup> Exh. C-095, Addendum, Nomination and Variation, 26 November 2010, p.3.

D) STANDARD TERMS & CONDITIONS APPLYING TO THE SALE OF GOODS,

On page two (2) and at item "PAYMENT", delivery is conditional upon receiving acceptable and valid letter/s of credit as payment instrument from the Buyer's nominated banker, guaranteeing payment of the supply contract."<sup>305</sup>

265. The third reference provides details of what should be found on page 2 of the Standard Terms. However, the Standard Terms on which the Claimants rely does not contain any such provision on page 2 or elsewhere. By contrast, these provisions appear in the Supply Agreement and the October General Terms & Conditions.
266. It follows from the above that the Respondent did not know nor could it have known that the Standard Terms document was an altogether different document, much less that that different document would contain an ICSID arbitration clause.
267. On the basis of the foregoing, the Tribunal concludes that the references that are alleged by the Claimants to incorporate the Standard Terms into the Parties' contractual arrangements are insufficient to demonstrate that the Parties have consented to ICSID arbitration.

***c. Provision of the Standard Terms and the December General Terms to the Respondent***

268. Having reached this conclusion, the Tribunal could dispense with reviewing the Claimants' allegations that they provided a copy of the Standard Terms to the Respondent on three occasions, namely (i) in a blue folder at a meeting with the Prime Minister on 20 October 2010; (ii) indirectly, via the Second Jacobs Email and (iii) indirectly, via the Further Jacobs Email. Indeed, even if these facts were proven, provision of the Standard Terms to the Respondent would be insufficient to establish the latter's consent to ICSID arbitration. Merely supplying a document with an ICSID arbitration clause, without more (for instance, without evidence of acceptance of such a clause), would not meet the requirement of consent under the ICSID Convention.<sup>306</sup>

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<sup>305</sup> Exh. C-104, Letter from Albert Jacobs to Prime Minister Gusmão and others of 8 February 2011, titled 'Request for Performance and LC Issuance'.

<sup>306</sup> For the same reason, the Tribunal need not examine the Claimants' argument that it is not necessary that an arbitration agreement which is incorporated into another agreement actually be supplied to the other

269. Nevertheless, for the sake of completeness, the Tribunal will briefly examine the merits of the Claimants' allegations.

*i. At the Meeting of 20 October 2010*

270. The Claimants insist that Mr. Jacobs provided a copy of the Standard Terms to Prime Minister Gusmão at the meeting of 20 October 2010. The Tribunal is unable to rely on Mr. Jacobs' testimony to this effect. For one, Prime Minister Gusmão not only denies having discussed ICSID arbitration with Mr. Jacobs, but also denies receiving the Standard Terms at the meeting on 20 October 2010 (or at any other time).<sup>307</sup> The Claimants have not provided any cogent corroborating evidence in support of Mr. Jacob's testimony in response. Further, Mr. Jacobs' initial witness statement discussing the meeting with Mr. Gusmão did not say that he discussed the ICSID arbitration clause in the Standard Terms with the Prime Minister.<sup>308</sup> He only stated that he brought a blue folder containing documents to the meeting. Similarly, in his very next statement, even though he mentioned other discussions that took place at the meeting, Mr. Jacobs made no mention of ICSID arbitration.<sup>309</sup> It was only in his Sixth Witness Statement that Mr. Jacobs gave evidence that the ICSID arbitration clause was discussed at the meeting.<sup>310</sup> Moreover, the Claimants' insertion of a choice of court clause in the September and October General Terms appears difficult to reconcile with Mr. Jacobs' version of the October meeting. In the circumstances, the Tribunal cannot accept Mr. Jacobs' testimony that he discussed ICSID arbitration with the Prime Minister at their meeting on 20 October 2010 or that he provided a copy of the Standard Terms to Prime Minister Gusmão at the meeting.

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party. Indeed, this argument is predicated on the Tribunal finding that the arbitration agreement contained in the Standard Terms was, in fact, incorporated into the Parties' contractual framework, which is not the case here. In any event, in the Tribunal's view, one should be cautious when considering the incorporation of a private document that is not within the possession of the party against whom it is invoked. Here, neither the Standard Terms nor the December General Terms were publicly available and it is disputed that they were ever in the possession of the Respondent.

<sup>307</sup> Gusmão WS 1, paras. 8-11.

<sup>308</sup> Jacobs WS 3, para. 84.

<sup>309</sup> Jacobs WS 4, para. 6.

<sup>310</sup> Jacobs WS 6, para13.

*ii. Through the Second Jacobs Email*

271. The Claimants allege that they provided a copy of the Standard Terms to the Respondent indirectly as an attachment to the Second Jacobs Email. On 27 November 2010, Mr. Jacobs allegedly sent two emails to Mr. Magee:

- the first one at 9:14 a.m., to which Mr. Jacobs attached the “essential documentation for execution” which included the Third Agreement; the Special Conditions; and a “Bonus Period Election Form” to extend the term of the Supply Agreement by a year (the First Jacobs Email); and
- the second one at 9:18 a.m., in which Mr. Jacobs asked Mr. Magee to ensure that Mr. Oliveira deliver the documents attached “with the execution documents” (the Second Jacobs Email).<sup>311</sup> This e-mail attached a document entitled “General Definitions”, the Standard Terms, and a document entitled “Lighthouse Energy Guide to I.C.C Incoterms 2000”.

272. The record does not bear out the Claimants’ contentions:

- Mr. Jacobs testifies that the documents (including the Standard Terms) were sent to Mr. Oliveira so that he could hand them over to the Respondent.<sup>312</sup> However, there is no corroborating evidence that Mr. Oliveira did so. On their part, Prime Minister Gusmão and Ambassador Guterres both testify that they have never received the Standard Terms.<sup>313</sup> The Respondent’s solicitor testifies that the email has not been received by any of the relevant government departments either.<sup>314</sup> In the absence of evidence showing that Mr. Magee forwarded the Second Jacobs Email to Mr. Oliveira, it is difficult to accept that the Standard Terms were provided to the Respondent on 27 November 2010.
- The Claimants have not produced a copy of the Second Jacobs Email from Mr. Magee’s email inbox and (at the witness’s own request and in the circumstances

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<sup>311</sup> Exh. C-148, Email from Albert Jacobs to Sean Magee of 27 November 2010, with subject ‘Timor-Leste Fuel Supply Variation Documents for Execution’.

<sup>312</sup> Jacobs WS 3, para. 101.

<sup>313</sup> Gusmão WS 1, paras. 8-12; Guterres WS 1, paras. 8-12, 15.

<sup>314</sup> Prescott WS 3, paras. 5-7.

described above at paragraph 80 *et seq.*) Mr. Magee's testimony has been excluded from the record. There is consequently no evidence that Mr. Magee even received the Second Jacobs Email. In fact, on the next day, i.e. on 28 November 2010, Mr. Magee sent a copy of the documents attached to the First Jacobs Email and other documents to Ambassador Guterres with a request that they be passed on to the Prime Minister for execution.<sup>315</sup> None of the attachments to the Second Jacobs Email (including the Standard Terms) were attached to Mr. Magee's email of 28 November 2010 to Ambassador Guterres.<sup>316</sup>

*iii. Through the Further Jacobs Email*

273. The Claimants allege that they provided the Standard Terms directly to the Respondent as an attachment to the Further Jacobs Email. They further submit that the Respondent received the December General Terms, which also contain an ICSID arbitration clause, with that same email message.

274. On 7 December 2010, the following electronic messages were exchanged:<sup>317</sup>

- An email at 4:18 pm from Mr. Jacobs to Mr. Magee, attaching a document entitled "Addendum, Nomination & Variation (Dec 2010)-RDTL.pdf"; a document entitled "Bonus Period Election Form-RDTL (Dec2010).pdf"; and a document entitled "Special Conditions of Contract (Dec 2010)-RDTL.pdf". Mr. Guterres was copied on this email.<sup>318</sup>

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<sup>315</sup> Exh. R-120, Email from Sean Magee to Ambassador Abel Guterres of 28 November 2010.

<sup>316</sup> Exh. R-120, Email from Sean Magee to Ambassador Abel Guterres of 28 November 2010.

<sup>317</sup> See Guterres WS 2, para. 7, where he acknowledges receipt of three emails on the 7 December 2010. He insists that he never received any other email on that day, particularly the Further Jacobs email. *Id.*, paras. 8-9.

<sup>318</sup> Exh. C-197, Email from Albert Jacobs to Sean Magee of 7 December 2010 (4:18 pm). This email was received by Ambassador Guterres at 5:18 pm, because of Australian daylight saving time.

- An email at 4:22/4:23<sup>319</sup> pm from Mr. Jacobs to Mr. Magee, attaching the Standard Terms and the December General Terms (the Further Jacobs Email). Mr. Guterres was allegedly copied on this email.<sup>320</sup>
- An email at 9:21 pm from Mr. Jacobs to Mr. Magee, attaching certain documents. Mr. Guterres and Mr. Oliveira were copied on this email.<sup>321</sup>
- An email at 9:26 pm from Mr. Jacobs to Mr. Magee and Mr. Oliveira. Mr. Guterres was copied on this email.<sup>322</sup>

275. It is notable that the Further Jacobs Email was only introduced into the record by the Claimants with the Reply. In Procedural Order No. 3, the Tribunal decided to allow the Further Jacobs Email and related submissions as it would not prejudice the Respondent.<sup>323</sup> It remains, however, that prior to the Reply, the Claimants did not reference the Further Jacobs Email in any of their pleadings. Yet, they could have done so on a number of occasions, including:

- in late 2011, when the Claimants' former counsel requested the Respondent's consent to submit the dispute to ICSID arbitration and the Respondent's counsel advised that ICSID did not have jurisdiction;<sup>324</sup>
- in early 2014, when the Claimants' current counsel, for the first time, raised the allegation that the parties had consented to ICSID arbitration by virtue of the Standard Terms;<sup>325</sup>

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<sup>319</sup> The time appearing on the electronic version of the Further Jacobs Email produced by the Claimants on 17 June 2016 is different from the PDF version of the Further Jacobs Email (Exh. C-198), which is 5:23 pm. The electronic version displays 4:22 pm. While the discrepancy of one hour might be attributable to daylight saving time in Australia, the reason for the further discrepancy of one minute is unclear.

<sup>320</sup> Exh. C-198, Email from Albert Jacobs to Sean Magee and Ambassador Abel Guterres of 7 December 2010 (4:22/4:23 pm).

<sup>321</sup> Exh. R-135, Email from Albert Jacobs to Sean Magee of 7 December 2010 (9:21 pm).

<sup>322</sup> Exh. R-136, Email from Albert Jacobs to Sean Magee of 7 December 2010 (9:26 pm).

<sup>323</sup> PO 3, paras. 29-30.

<sup>324</sup> Exh. C-129, Letter from Marshalls + Dent to Prime Minister Gusmão of 25 October 2011; Exh. C-130.

<sup>325</sup> Exh. C-133, Letter from Johnson Winter & Slattery to Bernard Collaery of 3 March 2014, titled 'Lighthouse Corporation – Claims Against Timor-Leste'. This time period is particularly relevant as Rule 2(c) of the ICSID Arbitration Rules requires disclosure of the documents containing the parties' consent to ICSID arbitration.

- on 4 December 2014, when the Claimants filed their Request for Arbitration alleging that the Respondent's consent to ICSID arbitration was contained in the Standard Terms;<sup>326</sup>
- on 29 December 2014, when, in response to a query from the ICSID Secretariat about the Respondent's consent to ICSID jurisdiction, the Claimants advised that such consent was contained in the Standard Terms;<sup>327</sup>
- on 28 September 2015, when the Claimants filed their Amended Request for Arbitration which maintained their allegation that the Respondent's consent to ICSID arbitration was contained in the Standard Terms;<sup>328</sup> and
- on 14 March 2016, when the Claimants filed their Memorial on the Merits, again alleging that the Respondent's consent to ICSID arbitration (at least insofar as their contractual claims) was contained in the Standard Terms.<sup>329</sup>

276. However, the Claimants did not mention the Further Jacobs Email on any of these occasions.

277. Other evidence contradicts and is inconsistent with the Claimants' alleged version of events:

- The first email of 4:18 p.m. appears to have been sent about four minutes before the second email of 4:23 p.m., and attached some contractual documents.<sup>330</sup> It does not contemplate that Mr. Jacobs would send additional documents. The third email does not refer to the second email.
- Mr. Guterres received the first email of 4:18 pm, but denies receiving the Further Jacobs Email of 4:22/4:23 pm. Both emails purportedly attached contractual documents. It is reasonable to expect that, if Mr. Guterres had received the Further

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<sup>326</sup> Request for Arbitration, paras. 63-68.

<sup>327</sup> Exh. R-145, Letter from ICSID to Johnson Winter & Slattery of 18 December 2014; Ex. C-181, Letter from Johnson Winter & Slattery to ICSID of 29 December 2014.

<sup>328</sup> Request for Arbitration, paras. 63-68.

<sup>329</sup> Mem., paras. 216-223.

<sup>330</sup> Exh. C-197, Email from Albert Jacobs to Sean Magee of 7 December 2010 (4:18 pm).

Jacobs Email, he would have made some comments on the Standard Terms (which he had not received earlier),<sup>331</sup> and also on the need for the December General Terms. This is all the more so as the Parties had agreed on the October General Terms, and no correspondence after that indicated that they would be revised. Moreover, up to that point in time, no discussion appears to have taken place about resolving disputes through ICSID.<sup>332</sup> Since the only change in the December General Terms from the October General Terms was the replacement of the choice of local courts with ICSID arbitration, Mr. Guterres could reasonably be expected to question the change.

- In response to the Respondent's allegation that it had never received the December General Terms, the Claimants assert that the December General Terms were prepared over the course of 26-28 November 2010.<sup>333</sup> Mr. Jacobs alleges that the December General Terms were "provided to Timor-Leste on or about Monday, 29 November 2010".<sup>334</sup> He does not say when precisely the document was handed over, nor where, nor to whom.
- The Claimants allege that "[t]he fact that Timor-Leste received the General Terms and Conditions (Dec 2010) is confirmed by Ambassador Guterres's request, in February 2011, that the 'General Terms and Conditions (Oct 2010)' be provided to him anew, presumably for the purpose of comparing the October 2010 version with the December 2010 version".<sup>335</sup> This is speculative and denied by Mr. Guterres.<sup>336</sup>

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<sup>331</sup> The Claimants' allegation that Mr. Jacobs discussed ICSID arbitration with Prime Minister Gusmão at their meeting of 20 October 2010 and that he provided a copy of the Standard Terms to the Prime Minister at the meeting has been examined above.

<sup>332</sup> The Tribunal has explained that it is not persuaded by Mr. Jacob's evidence that this was discussed at the meeting on 20 October 2010. See para. 270 above.

<sup>333</sup> The Claimants delivered the Third Agreement to the Respondent on 26 November 2010. This means that they sent the Third Agreement and its attachments to Mr. Magee to provide to the Respondent on 27 November 2010 without the December General Terms.

<sup>334</sup> Jacobs WS 4, para. 13.

<sup>335</sup> C-Mem., para. 58, *citing* Exh. C-199, Email from Albert Jacobs to Sean Magee of 8 February 2011 (reproduced in Exh. R-138).

<sup>336</sup> Guterres WS 2, paras. 17-18.

In any event, the document attached to Mr. Jacobs' email was the October General Terms.<sup>337</sup>

278. As a consequence, the Tribunal reaches the conclusion that the Claimants have not established that they provided a copy of the Standard Terms to the Respondent. Neither have they proven that they supplied the December General Terms to the Respondent.<sup>338</sup> This conclusion confirms the finding already made above that no ICSID arbitration clause was incorporated into the Parties' contractual arrangements.

279. Certain additional facts buttress this conclusion even further. First, in correspondence with the Respondent or other third parties addressing the contract documentation regarding the Fuel Supply Agreement, the Claimants systematically omitted the Standard Terms and the December General Terms:

- On 14 December 2010, i.e. one week after he allegedly received the Further Jacobs Email, Mr. Magee sent several emails to Banco Nacional Ultramarino to arrange a trade finance facility to issue letters of credit. The first of these emails stated that "[t]he third file (to follow) contains the FULL LEGAL DOCUMENTATION between RDTL and Lighthouse Corporation Ltd".<sup>339</sup> The third email also referred to the complete contract documentation in the following terms: "Attached is the complete set of executed documents between the Government (RDTL) and Lighthouse Corporation in respect of the agreed fuel supplies for the next 7 years".<sup>340</sup> The contractual documents were indeed attached, but not the Standard Terms and the December General Terms & Conditions.
- On 21 December 2010, i.e. two weeks after he allegedly received the Further Jacobs Email, Mr. Magee sent an email to Ambassador Guterres writing that "[t]here are a total of NINE documents which constitute the Contract, together, they

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<sup>337</sup> Exh. C-199, Email from Albert Jacobs to Sean Magee of 8 February 2011 (reproduced in Exh. R-138) ("[P]lease find a copy of the official LE - GENERAL TERMS AND CONDITIONS OF SUPPLY, as released October 2010").

<sup>338</sup> Having reached these conclusions, the Tribunal not need to consider the Respondent's allegations that the Second Jacobs Email and/or the Further Jacobs Email "did not exist" in November and December 2010.

<sup>339</sup> Exh. R-139, Email from Sean Magee to Fernando Alves of 14 December 2010 (8:46 am).

<sup>340</sup> Exh. R-140, Email from Sean Magee to Fernando Alves of 14 December 2010 (9:03 am).

represent the ENTIRE CONTRACT”.<sup>341</sup> The nine documents listed in that email did not include the Standard Terms nor the December General Terms & Conditions.

- On 2 February 2011, i.e. nearly two months after he allegedly sent the Second Jacobs Email, Mr. Jacobs sent a series of six emails to Ambassador Guterres. With the first of these emails, he was sending “some of the important documentation, communication and agreements in place with RDTL and EDTL”.<sup>342</sup> None of these emails attached the Standard Terms or the December General Terms & Conditions.
- Two days later, on 4 February 2011 Mr. Magee sent an email to Mr. Jacobs attaching a document entitled “RDTL - Lighthouse Summary of Agreement Documents”.<sup>343</sup> In this email, Mr. Magee specified that: “[t]he Summary provides a 15 page review of the documents with key points of each document highlighted and indexed to the chronology of documents”. The summary attached describes the contractual documents and relevant correspondence between the Claimants and the Respondent, but not the Standard Terms or the December General Terms.

280. Second, none of the few documents that do mention the Standard Terms to which the Claimants draw attention date from 2010. Neither do they establish that the Standard Terms were supplied to the Respondent:

- The email of 10 February 2011 from Mr. Magee to Mr. Jacobs and others<sup>344</sup> is an internal communication, not addressed or copied to the Respondent.
- The letter of 8 February 2011 from Mr. Jacobs to Prime Minister Gusmão<sup>345</sup> has been examined above, and the Tribunal has found that the reference to the “Standard Terms & Conditions” therein is a reference to the Supply Agreement and the October General Terms.

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<sup>341</sup> Exh. R-121, Email from Sean Magee to Ambassador Abel Guterres of 21 December 2010.

<sup>342</sup> Exh. R-122, Email from Albert Jacobs to Ambassador Abel Guterres of 2 February 2011.

<sup>343</sup> Exh. R-141, Email from Sean Magee to Albert Jacobs of 4 February 2011.

<sup>344</sup> Exh. C-217, Email from Sean Magee to Albert Jacobs of 10 February 2011.

<sup>345</sup> Exh. C-104, Letter from Albert Jacobs to Prime Minister Gusmão and others of 8 February 2011, titled ‘Request for Performance and LC Issuance’.

- The email of 8 February 2011 from Mr. Magee to Mr. Jacobs, requesting the latter to forward “a copy of the Lighthouse ‘Standard Terms & Conditions applying to the SALE OF GOODS’”<sup>346</sup> is not clear. It is not established that Mr. Jacobs did actually forward the Standard Terms, nor to whom he did, and whether the reference was to the Fuel Supply Agreement or the September/October General Terms.
- The email of 11 February 2011 from Mr. Jacobs to Mr. Oliveira and others is an internal communication; it is not addressed/copied to the Respondent.<sup>347</sup>
- The letter of 20 April 2011 from Mr. Jacobs to Prime Minister Gusmão has two generic references to “Standard Terms & Conditions”.<sup>348</sup> Again, it is not clear whether the reference was to the Fuel Supply Agreement or the September/October General Terms.

281. The foregoing analysis buttresses the Tribunal’s prior conclusion that the Claimants have not established that ICSID arbitration was incorporated into the Parties’ contractual arrangements and that in consequence, the Claimants have not established that the Respondent has agreed by contract to arbitrate the present dispute before ICSID.

282. For the sake of completeness, the Tribunal notes that the Claimants’ case would fail for another independent reason. The Standard Terms – which contained the ICSID dispute arbitration clause – allegedly existed before the Supply Agreement was signed. The Third Agreement was the last agreement executed between the Parties. Attached to the Third Agreement was the October General Terms which provided for dispute resolution in local courts.<sup>349</sup> In the circumstances – on the basis that later agreements between the

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<sup>346</sup> Exh. C-219, Email from Sean Magee to Albert Jacobs of 8 February 2011.

<sup>347</sup> Exh. C-218, Email from Albert Jacobs to Sean Magee of 10 February 2011.

<sup>348</sup> Exh. C-107, Letter from Albert Jacobs to Prime Minister Gusmão and others of 20 April 2011, titled ‘Supply for Allocation and Contract Generator Provision’. In relevant parts, the letter reads: “We also note that under Standard Terms & Conditions the generators cannot be released for use until the LC is drawn down, which is therefore dependent on the delivery of the fuel supply. [...] As per the terms of the original agreement noted above, and as per our standard terms of supply, a mandatory regular maintenance, inspection and service plan, as approved by the manufacturer, must be followed for a continuous period of no less than eighty-four (84) calendar months from delivery of the first fuel supply pursuant to the contract”.

<sup>349</sup> The only document that contains a dispute resolution provision after the October General Terms is the December General Terms. For the reasons mentioned above in Section VI.2.c.iii, the Tribunal has concluded that the Claimants have not established that they supplied the December General Terms to the Respondent.

Parties would prevail over previous agreements<sup>350</sup> – even if the ICSID arbitration clause was incorporated into the Parties’ contractual documents, *quod non*, it was later replaced by the October General Terms, which provided for dispute settlement through local courts.

## **C. CONSENT TO ICSID ARBITRATION THROUGH THE FOREIGN INVESTMENT LAW**

### **1. The Parties’ Positions**

#### **a. The Respondent’s Position**

283. The Respondent submits that the Tribunal lacks jurisdiction over the claim that the Respondent expropriated the Fuel Supply Agreement in violation of the FIL.<sup>351</sup> According to the Respondent, the Claimants cannot rely on the offer of ICSID arbitration contained in Article 23 of the FIL because they do not qualify as a “foreign investor” under the FIL ((i) below), and the Fuel Supply Agreement does not constitute a “special investment agreement” under the FIL ((ii) below).<sup>352</sup> The Respondent also challenges the Claimants’ alternative FIL argument ((iii) below).

#### *i. Foreign Investor’s Certificate*

284. The Respondent’s position is that the Claimants cannot rely on the offer of ICSID arbitration in Article 23 of the FIL because that offer “is conditional: it only applies to disputes with ‘foreign investors’ as that term is to be understood, both for the purposes of the FIL and for the purposes of consent under Article 25 of the ICSID Convention”.<sup>353</sup> Under the FIL, the Claimants are not foreign investors.

285. The Respondent points to Article 3(f) of the FIL, which defines “foreign investor” as a “foreign individual or collective person or non-resident Timorese national, that holds a foreign investor’s certificate”.<sup>354</sup> The Claimants do not fall within this definition because,

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<sup>350</sup> The Claimants agree. See Rej., para. 74 (“Further, where there are multiple versions of a set of contractual terms and conditions, it is clear on the basis of settled authority that the most recent version is the one which prevails”).

<sup>351</sup> Preliminary Objections, para. 176 *et seq.*; See, Exh. RL-047, FIL.

<sup>352</sup> Preliminary Objections, para. 176.

<sup>353</sup> Reply, para. 155.

<sup>354</sup> Exh. RL-047, FIL, Article 3(f).

as the Claimants acknowledge, they have never applied for or obtained a foreign investor's certificate.<sup>355</sup>

286. The Respondent accepts that in cases of genuine uncertainty or ambiguity about the application of the legal requirement, ICSID tribunals may adopt a liberal interpretation for the benefit of the investor.<sup>356</sup> Yet, “the legality provisions in the FIL are sufficiently clear to be construed in a way that requires strict compliance by investors”.<sup>357</sup> In this context, the Respondent cites to several provisions of the FIL:

- Article 3(b) expressly defines “foreign investor’s certificate” and indicates that foreign investor’s certificates are issued by “the competent authority”.<sup>358</sup> The “competent authority” was TradeInvest, created in 2005 to promote and monitor foreign investment.<sup>359</sup>
- Article 19 states that foreign investments made under the FIL are “subject to authorization and approval by the competent government authorities”, which is given “under the terms of applicable legislation”.<sup>360</sup>

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<sup>355</sup> Preliminary Objections, para. 196; Reply, para. 252, *citing* C-Mem., paras. 80-82. Indeed, the Respondent alleges that “Claimants were advised by the Respondent’s representative in July 2010 about the Government’s procurement and investment procedures, including the recommendation of submitting any investment proposal to TradeInvest” but took no action on this advice. Preliminary Objections, para. 207, *citing* Abel WS 1, paras. 8-16; Exh. R-109, Email chain between Jose Dos Reis Francisco Abel, Sean Magee and Ambassador Abel Guterres of 14 July 2010; Exh. R-110, Email exchange between Sean Magee and Ambassador Abel Guterres of 15 July 2010; Exh. R-113, Email from Jose Dos Reis Francisco Abel to Sean Magee of 28 July 2010.

<sup>356</sup> Reply, para. 156, *citing* Exh. RL-048, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phillipines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 (reasoning that jurisdiction may be construed liberally where “the law in question of the host state may not be entirely clear and mistakes may be made in good faith”).

<sup>357</sup> Reply, para. 156. The Respondent points to the example provided by the tribunal in Exh. RL-045, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 109 (“Indeed, if an imperative formality were intended to be required, it would have been appropriate, if not indispensable to identify the type of document required in each of the two countries and to identify the issuing department or at least direct the attention of the readers of the Treaty - prospective investors - to the proposition that the precise nature of the required certificates is to be determined by “specific regulations in force from time to time”).

<sup>358</sup> Exh. RL-047, FIL, Article 3(b) (defining “foreign investor’s certificate” as “a document issued to a foreign investor by the competent authority, certifying the investor’s foreign status”).

<sup>359</sup> Preliminary Objections, para. 186; Carvalho WS, paras. 9-10.

<sup>360</sup> Exh. RL-047, FIL, Article 19.

- Article 20 provides that a “foreign investment shall be registered with the competent authority ... under the terms of this law and applicable regulations”.<sup>361</sup>

287. In the Respondent’s view, these provisions unambiguously put the Claimants on notice that, to gain the protections of the FIL, they need to obtain a foreign investor’s certificate, or at the very least “make reasonable enquiries with the Respondent as to the identity of the ‘competent authority’ and how they might apply for and obtain a foreign investors certificate”.<sup>362</sup> As a matter of Timorese law, the Respondent asserts that the foreign investor certificate requirement is both substantive and clear.<sup>363</sup>

288. The Respondent also accepts that ICSID tribunals have not demanded strict compliance with “legality requirements” that are found to be “purely formal” or designed to deprive investors of investment protection.<sup>364</sup> However, it argues that the requirement for a foreign certificate in the FIL is a genuine requirement aimed at allowing the Respondent to exercise control over protected investments.<sup>365</sup>

289. The Respondent dismisses Mr. Alfaiate’s opinion that the FIL does not require a foreign investor’s certificate, as long as investors comply with the “material requirements” of the law.<sup>366</sup> This interpretation is inconsistent with the principle that the words “foreign investor’s certificate” in Article 3 must be given meaning.<sup>367</sup>

290. In the Respondent’s view, Mr. Alfaiate fails to recognise that the Constitution of Timor-Leste requires that mechanisms be put in place to ensure effective control over foreign investment to protect the national interest.<sup>368</sup> This is the role of the foreign investor’s

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<sup>361</sup> Exh. RL-047, FIL, Article 20.

<sup>362</sup> Preliminary Objections, para. 206.

<sup>363</sup> Reply, para. 157.

<sup>364</sup> Reply, para. 208, *citing* Exh. RL-045, *Desert Line Projects LLC v. the Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 106.

<sup>365</sup> Preliminary Objections, para. 209. Respondent cites a number of provisions of the FIL to show that Respondent sought to exercise control over investments, such as Article 8, which reserved the Respondent's right to prohibit or restrict foreign investment in certain areas or sectors of economic activity, and Article 19, which required foreign investments to comply with the objectives of the National Development Plan. Exh. RL-047, FIL, Articles 8, 19; *see also* Articles 2(2), 9, 20-22, 24.

<sup>366</sup> Reply, paras. 159-160, *citing* C-Mem., paras. 80-81.

<sup>367</sup> Reply, para. 160; Marrazes ER 1, para. 39, 74-84.

<sup>368</sup> Reply, para. 160; Marrazes ER 1, paras. 53-55; *See* Exh. CL-108, Constitution of the Democratic Republic of Timor-Leste, para. 140 (“The State shall promote national investment and establish conditions to attract foreign investment, taking into consideration the national interests, in accordance with the law”).

certificate. The importance of that certificate is also reflected in Government Decree 6/2005, which establishes detailed rules and procedures governing the application process, issuance and revocation of certificates.<sup>369</sup>

291. Further, the Respondent disputes Mr. Alfaiate's opinion that there is a contradiction between Articles 2 and 3 of the FIL. These provisions "can and should be read together: Article 2 applies to 'foreign investments' which, by virtue of Articles 3(g) and 3(b), are made by 'foreign investors' who have been issued with a 'foreign investor's certificate'".<sup>370</sup>
292. Finally, the Respondent challenges the Claimants' reliance on the Prime Minister's "call-back" power under the Government Organic Law.<sup>371</sup> The call-back power is limited to matters within the competence of a Ministry or Secretariat of State. Therefore, the Prime Minister could not use this power to override the FIL, Government Decree 06/2005, and TradeInvest's authority to issue foreign investor's certificates.<sup>372</sup>

*ii. Special Investment Agreement*

293. The Respondent opposes the Claimants' contention that the Fuel Supply Agreement constitutes a "special investment agreement" under Articles 18(1) and 18(2) of the FIL ("SIA").<sup>373</sup> It points to Article 18(2) of the FIL, which provides that SIAs "shall be authorised by resolution of the Council of Ministers, clearly specifying the special conditions justifying the agreement, together with the special system applicable to the agreement".<sup>374</sup> The Claimants offer no evidence of such resolution.<sup>375</sup> Nor have they addressed why they failed to act on the Respondent's advice and did not apply for a SIA through TradeInvest.<sup>376</sup>

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<sup>369</sup> Reply, para. 160; Exh. RL-101, Government Decree No. 6/2005 (Timor-Leste), Chapter III. For Respondent, Mr. Alfaiate's testimony at the Hearing regarding Government Decree 6/2005 (that it is invalid to the extent it requires a foreign investment certificate) is an example of his willingness to disregard the text of the FIL and the Decree altogether. R-PHB, para. 151 and n. 158, *citing* Tr. 222:32-47; Tr. 223:1-27.

<sup>370</sup> Reply, para. 160.

<sup>371</sup> Reply, para. 162, *citing* Alfaiate ER 1, paras. 47-53.

<sup>372</sup> Reply, para. 162; Marrazes ER 1, paras. 93-111.

<sup>373</sup> Preliminary Objections, paras. 211-215; Reply, paras. 163-168.

<sup>374</sup> Preliminary Objections, para. 213(b); Exh. RL-047, FIL, Article 18(2).

<sup>375</sup> Preliminary Objections, para. 213(b); Reply, para. 164.

<sup>376</sup> Reply, para. 167.

294. The Respondent also disputes the Claimants' submissions that the Council of Ministers knew of the Fuel Supply Agreement and did not oppose it.<sup>377</sup> The "relevant enquiry must be whether the Council of Ministers has *passed a resolution* authorising a special investment agreement for the purposes of Article 18(2)".<sup>378</sup> This is not merely a formal requirement; it allows the Council of Ministers to exercise qualitative control over significant investments in the country.<sup>379</sup>
295. Nor does the Respondent accept Mr. Alfaiate's opinion that the requirement for a resolution of the Council of Ministers should be construed "*cum grano salis*" because of "challenges" of the developing legal system and "the non-compliant practice of the Timorese Government".<sup>380</sup> The Respondent contends that Mr. Alfaiate has offered no evidence of these alleged "challenges"; nor have the Claimants explained "how and to what extent government practice could properly modify or change matters of legal principle".<sup>381</sup> Moreover, Mr. Alfaiate's examples of purported SIAs are consistent with the Respondent's interpretation of the FIL and Government Decree 06/2005.<sup>382</sup> They show that there is an established practice of authorising SIAs by resolution of the Council of Ministers.<sup>383</sup>
296. Therefore, the Respondent concludes that there is no basis on which the Fuel Supply Agreement could constitute a SIA.

*iii. Entitlement to Protection under the FIL*

297. Finally, the Respondent rejects the Claimants' alternative argument that they are "foreign investors who are in any event entitled to the protection of the Foreign Investment Law, including the ICSID clause in Article 23".<sup>384</sup> The Respondent's answer is that Article 23 of the FIL expressly states that ICSID arbitration is available only with respect to

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<sup>377</sup> Reply, para. 166, *citing* Alfaiate ER 1, para. 92.

<sup>378</sup> Reply, para. 166(d).

<sup>379</sup> Reply, para. 166(c).

<sup>380</sup> Reply, para. 165, *citing* C-Mem., para. 90.

<sup>381</sup> R-PHB, para. 149.

<sup>382</sup> Tr. 226:8-227:24; R-PHB, para. 152. See Reply, para. 166, *citing* Alfaiate ER 1, para. 85 and Exh. AFG-2, Government Resolution 22/2010 (approving a SIA with ENSUL MECI).

<sup>383</sup> Reply, para. 166, *citing* Alfaiate ER 1, para. 86 and Exh. AFG-4.

<sup>384</sup> Reply, paras. 169 *et seq.*

“disputes between the State and foreign investors”.<sup>385</sup> Without a foreign investor’s certificate, the Claimants do not qualify as a “foreign investor” under Article 3(f). As a result, this dispute does not fall within Article 23.<sup>386</sup>

***b. The Claimants’ Position***

298. It is the Claimants’ submission that they are entitled to resort to ICSID arbitration pursuant to Article 23 of the FIL.<sup>387</sup> They argue that they do not need a foreign investor’s certificate to benefit from the FIL ((i) below); the Fuel Supply Agreement falls within the protection of the FIL as a SIA ((ii) below); and the Claimants would be entitled to protection as “foreign investors” under the FIL in any event ((iii) below).

*i. Foreign Investor’s Certificate*

299. The Claimants disagree with the Respondent’s assertion that the “foreign investor’s certificate” is an absolute requirement such that non-compliance deprives an investor of the protections of the FIL.<sup>388</sup> Relying on their legal expert, the Claimants submit that there is a contradiction between Article 2 of the FIL (providing that the FIL applies to “foreign investments made in Timor-Leste by foreign individuals or collective persons...”) and Article 3(f) (defining “foreign investor” as a “foreign individual or collective person ... that holds a foreign investor’s certificate”). Requiring a foreign investor’s certificate to access the benefits of the FIL would be “inconsistent with the unity of the Timorese legal system, and result in inconsistent terminology being used throughout the rest of the Foreign Investment Law”.<sup>389</sup>

300. Rather, the Claimants’ interpretation is that the “foreign investor’s certificate” is issued to certify the investor’s foreign status so that the investor “is exempt from proving the investment and its foreign status”.<sup>390</sup> Foreign investors without such a certificate

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<sup>385</sup> Reply, para. 171, *quoting* Exh. RL-047, FIL, Articles 3(f), 13.

<sup>386</sup> Reply, para. 171.

<sup>387</sup> C-Mem., paras. 77 *et seq.*; Rej., paras. 88 *et seq.*; C-PHB, paras. 108 *et seq.*

<sup>388</sup> C-Mem., paras. 80-82; Rej., paras. 98-107.

<sup>389</sup> Rej., para. 98.

<sup>390</sup> C-Mem., para. 80; Alfaiate ER 1, para. 46.

nevertheless fall within the ambit of the FIL, as long as the investment at issue fulfilled the “material requirements” of the FIL, which are set forth in Articles 2, 6 and 7.<sup>391</sup>

301. For the Claimants, they have clearly satisfied these “material requirements” and therefore, the lack of a foreign investor’s certificate is irrelevant.<sup>392</sup> The Claimants dismiss the Respondent’s reliance on the Timor-Leste Constitution to underline the alleged importance of foreign investor’s certificate.<sup>393</sup> They argue that the constitutional provision which the Respondent invokes merely confirms the Respondent’s competence to enact legislation in relation to foreign investments; it says nothing about any particular form or requirement.<sup>394</sup>

302. Alternatively, the Claimants submit that even if the FIL does require a foreign investor’s certificate, that requirement was overridden in this case by the Prime Minister’s “call back” power under the Government Organic Law.<sup>395</sup> Article 6(3) provides that “the Prime Minister has the power to issue instructions to any member of Government and to make decisions on matters included in the areas of responsibility of any Ministry or Secretariat of State”.<sup>396</sup> By directly negotiating and signing the Fuel Supply Agreement, the Prime Minister validly exercised this “call back” power, which superseded the need for a foreign investor’s certificate.<sup>397</sup>

*ii. Special Investment Agreement*

303. The Claimants’ further argument is that the debate about the foreign investor’s certificate is irrelevant because the Fuel Supply Agreement constitutes a SIA within the meaning of Article 18 of the FIL.<sup>398</sup>

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<sup>391</sup> C-Mem., para. 81; Alfaiate ER 1, para. 64; C-PHB, para. 119.

<sup>392</sup> C-Mem., para. 82.

<sup>393</sup> Rej., para. 101; Alfaiate ER 2, para. 36.

<sup>394</sup> Rej., para. 101; Alfaiate ER 2, para. 36; Exh. CL-108, Constitution of the Democratic Republic of Timor-Leste, para. 140.

<sup>395</sup> Rej., paras. 104-107; Alfaiate ER 2, paras. 42-49; C-PHB, para. 120; Tr. 224:34-38; Exh. CL-109, Decree-Law No 14/2009, Article 6(3).

<sup>396</sup> Exh. CL-109, Decree-Law No 14/2009, Article 6(3).

<sup>397</sup> Rej., paras. 105-106; Alfaiate ER 1, para. 49.

<sup>398</sup> C-Mem., paras. 83 *et seq.*; Rej., paras. 108 *et seq.*; C-PHB, para. 121.

304. According to the Claimants, the Fuel Supply Agreement falls within Article 18(1) of the FIL because Prime Minister Gusmão signed the agreement under his emergency powers; the Claimants were granted concessions such as tax incentives and waiver of port fees; the Fuel Supply Agreement had significant “economic, social, environmental, or technological impact”; and it was of “great interest to the country under the national development strategy”.<sup>399</sup>
305. The Claimants acknowledge that Article 18(2) refers to the authorisation of SIAs by resolution of the Council of Ministers. However, they refer to Mr. Alfaiate’s opinion that this formal requirement should be interpreted “*cum grano salis*” in consideration of the “challenges of the nascent and still developing Timorese Legal System”,<sup>400</sup> and because the Government’s “practice in this regard has been rather flexible and non-compliant”.<sup>401</sup> According to Mr. Alfaiate, only one Government Resolution regarding a SIA was published between the FIL’s entry into force and 2014, and it did not include an “indication of the special conditions justifying the agreement, and of the special regime that applies to the agreement” as required by Article 18(2).<sup>402</sup>
306. The Claimants further rely on Mr. Alfaiate’s opinion to substantiate their argument that the Fuel Supply Agreement “materially qualifies” as a SIA.<sup>403</sup> Specifically, they submit the following:
- As explained above, the Fuel Supply Agreement complies with the requirements of a SIA under Article 18.1.<sup>404</sup>

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<sup>399</sup> C-Mem., para. 84, *quoting* Exh. RL-047, FIL, Article 18(1); Alfaiate ER 2, para. 82.

<sup>400</sup> As evidence of the “challenges” of Respondent’s legal system, the Claimants cite the World Bank’s annual “Doing Business” Report, ranking Respondent low in the area of enforcement of contracts. Exh. AFG-6, p. 157 (2010), Exh. AFG-7, p. 199 (2011) and Exh. AFG-8, p. 131 (2012). They also rely on the Preamble of the FIL, which states that “Timor-Leste (East Timor) faces enormous challenges arising from its historical process to gain independence that have affected the majority of its infrastructures...”. Exh. RL-047, FIL, Preamble.

<sup>401</sup> Alfaiate ER 1, paras. 84, 91-92.

<sup>402</sup> Alfaiate ER 2, para. 103; Exh. AFG-2, Government Resolution no. 22/2010 (approving the SIA with ENSUL MECl.). Mr. Alfaiate also submitted Government Resolution 17/2009, which he also considers non-compliant. Exh. AFG-3, Government Resolution 17/2009 (approving the SIA with the Paradise Group Limited).

<sup>403</sup> Rej., para. 112; Alfaiate ER 2, para. 115.

<sup>404</sup> C-Mem., para. 90; Alfaiate ER 1, paras. 91-92.

- It can be inferred that the Council of Ministers knew of the Fuel Supply Agreement and viewed it favorably. In fact, the Fuel Supply Agreement “was going to be subject to a Resolution of the Council of Ministers, which was meant to happen in December 2010 or January 2011”.<sup>405</sup>
- The Council of Ministers indicated its agreement with the Fuel Supply Agreement to third parties. In particular, it “apparently agreed to issue a Letter of Comfort to [Banco Nacional Ultramarino] in May 2011 in the context of the agreement between the State, Lighthouse and Zebra Fuels”.<sup>406</sup>

*iii. Entitlement to Protection under the FIL*

307. In the further alternative, the Claimants submit that they are in any event “foreign investors” entitled to the protections of the FIL.<sup>407</sup> In this regard, they warn against a strict interpretation of the FIL,<sup>408</sup> and point to various characteristics of the Fuel Supply Agreement that, in their view, bring it within the scope of the FIL.<sup>409</sup>
308. For all of these reasons, the Claimants ask the Tribunal to dismiss the Respondent’s third jurisdictional objection.

**2. Analysis**

309. The Tribunal will first review the applicable legal framework ((a) below), then analyze the Respondent’s objections ((b)-(d) below), and finally set out its conclusion ((e) below).

**a. Legal Framework**

310. The FIL provides a legal framework for foreign investments in Timor-Leste:

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<sup>405</sup> C-Mem., para. 88; Alfaiate ER 1, para. 87, *citing* Exh. C-102, Letter from Prime Minister Gusmão to Fernando Torrao Alves (Caixa Geral De Depositos) of 23 December 2010, titled “Trade Finance Facility”.

<sup>406</sup> Alfaiate ER 1, para. 87, *citing* Exh. C-108, Email correspondence between Sean Magee and Albert Jacobs of 6 May 2011 regarding Banco Nacional Ultramarino.

<sup>407</sup> C-Mem., para. 92; Rej., paras. 113-114; C-PHB, para. 126.

<sup>408</sup> Rej., para. 113, *citing* Exh. CL-107, Law No 10/2003, Preamble.

<sup>409</sup> C-Mem., para. 92; Alfaiate ER 1, para. 102.

“[T]his law shall apply to foreign investments made in Timor-Leste by foreign individuals or collective persons, or by non-resident Timorese nationals.”<sup>410</sup>

311. A “foreign investment” under the FIL is an investment made by a “foreign investor” and which satisfies the following criteria:

“[A]ny direct investment made with financial resources, or subject to pecuniary assessment, originating from abroad at the risk and expense of a foreign investor.”<sup>411</sup>

312. A “foreign investor” under the FIL is a foreign individual, “collective person” or non-resident Timorese national who holds a “foreign investor’s certificate”:

“[A]ny foreign individual or collective person or non-resident Timorese national, that holds a foreign investor’s certificate.”<sup>412</sup>

313. Article 3(b) of the FIL defines a “foreign investor’s certificate” as follows:

“a document issued to a foreign investor by the competent authority, certifying the investor’s foreign status.”<sup>413</sup>

314. At the time when the Fuel Supply Agreement was executed, the “competent authority” responsible for issuing foreign investor’s certificates pursuant to the FIL was “TradeInvest”, created in 2005 for the purposes of promoting, coordinating, facilitating and monitoring foreign investment.<sup>414</sup>

315. Articles 19 and 20 of the FIL require all “foreign investments” under the terms of the FIL to be authorized and approved by the Government and registered with TradeInvest:

“Article 19

1. Foreign investments to be made in the country under the terms of this law shall be subject to authorization and approval by the competent government authorities, under the terms of applicable legislation.

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<sup>410</sup> Exh. RL-047, FIL, Article 2(1). The FIL was not the only mechanism through which foreign investors could make an investment in Timor-Leste. Further, the FIL was repealed and replaced by the Private Investment Law (Law No. 14/2011) (“PIL”) in or around September 2011. This said, the Parties’ experts appear to agree that the Claimants’ investment would be governed by the FIL and not the PIL.

<sup>411</sup> Exh. RL-047, FIL, Article 3(g).

<sup>412</sup> Exh. RL-047, FIL, Article 3(f).

<sup>413</sup> Exh. RL-047, FIL, Article 3(b).

<sup>414</sup> Carvalho WS, para. 9.

2. The authorization referred to in Paragraph 1 above shall be granted so long as the applicant meets the legally required conditions and the proposed investment complies with the objectives of the National Development Plan.

#### Article 20

1. Once a request has been granted under the terms of Article 19, a foreign investment shall be registered with the competent authority, under the terms of this law and applicable regulations.

2. The registration referred to in Paragraph 1 above shall be separate from the commercial registration of a business, under the terms of applicable commercial legislation.”

316. Article 18 of the FIL provides for a different type of foreign investment, where the state enters into a SIA with a foreign investor:

#### “Article 18

##### Special Investment Agreements

1. The government may establish special investment agreements with potential foreign investors defining special legal systems applicable to economic activities that, by their scale or nature, or by their economic, social, environmental or technological impact, prove to be of great interest to the country under the national development strategy, thereby justifying the adoption of special treatment or conditions beyond the general foreign investment system established by this law.

2. The conclusion of the special investment agreements referred to in Paragraph 1 above shall be authorized by resolution of the Council of Ministers, clearly specifying the special conditions justifying the agreement, together with the special system applicable to the agreement.”

317. Under the FIL, the process for obtaining a SIA is the same as for obtaining a foreign investor's certificate, except that when applying for approval through TradeInvest, the potential foreign investor must submit a request for a SIA. That request must then be considered by the Council of Ministers.

318. Disputes between the State and “foreign investors” under the FIL are settled through ICSID arbitration:

#### “Article 23 Conciliation and arbitration

1. Disputes between the State and foreign investors arising from the interpretation and application of this law and its regulations shall be settled by conciliation, in accordance with Timorese legislation, unless otherwise established in international agreements to which the

Democratic Republic of Timor-Leste is a party, or in agreements between Timor-Leste and the foreign investor in question.

2. Disputes between the State and foreign investors of foreign nationality that cannot be resolved under the terms of Paragraph 1 above shall be settled by way of arbitration in accordance with the rules of the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), unless there is an agreement to the contrary.

3. The provisions of Paragraphs 1 and 2 above shall not prejudice the right to appeal to the competent courts of the Democratic Republic of Timor-Leste whenever both parties decide to do so.”<sup>415</sup>

**b. Foreign Investor’s Certificate**

319. The Claimants concede that they do not have a foreign investor’s certificate. However, relying on their expert on Timorese law, they submit that the FIL does not require a foreign investor to hold a foreign investor’s certificate in order to obtain the benefits of the FIL, provided that the foreign investor fulfils the “material requirements” of the FIL.<sup>416</sup> For the Claimants, the “material requirements” are those provided in Articles 2 (scope of application of FIL), 6 (composition of foreign investment), and 7 (forms of foreign investment).
320. The Tribunal cannot accept this submission. No authority is referred to for the Claimants’ proposition other than their own expert. Yet, even Mr. Alfaiate does not cite instances where the explicit language of the FIL was disregarded because an investor fulfilled the “material requirements” of the FIL. Moreover, Mr. Alfaiate’s interpretation deprives of any meaning the words “foreign investor’s certificate” in Article 3 of the FIL. While these reasons are sufficient to reject the theory advanced by the Claimants and their expert, there are still other reasons for doing so.
321. First, it is clear that the Respondent intended to exercise administrative control on incoming foreign investments. This is evident from the Timorese Constitution,<sup>417</sup> the

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<sup>415</sup> Exh. RL-047, FIL, Article 23.

<sup>416</sup> C-Mem., paras. 80-81.

<sup>417</sup> See Exh. CL-108, Constitution of the Democratic Republic of Timor-Leste, para. 140 (“The State shall promote national investment and establish conditions to attract foreign investment, taking into consideration the national interests, in accordance with the law”).

FIL<sup>418</sup> – which was enacted to ensure administrative control on incoming foreign investments<sup>419</sup> – and from other legislation enacted at the time. Indeed, shortly after the enactment of the FIL, Timor-Leste issued an implementing regulation, namely Government Decree 6/2005, entitled “Foreign Investment Procedures Regulation”, which details the procedures and practical measures under the FIL, particularly the application process, and issuance as well as revocation of foreign investment certificates.<sup>420</sup> As foreign investment certificates are strictly regulated, it seems counterintuitive to suggest that an investor who does not comply with clear administrative requirements may nevertheless benefit from the FIL. The various provisions of the FIL, constituted with the existence of a Decree setting out the detailed rules, requirements and procedures for the application, assessment, approval or denial, and revocation of foreign investor’s certificates in Timor-Leste suggest that the requirement of these certificates is not to be disregarded.<sup>421</sup>

322. Second, Mr. Alfaiate opines that it would be inconsistent with “the unity of the Timorese legal system” to require a foreign investor to hold a certificate for him to have access the protections of the FIL.<sup>422</sup> Such a requirement would “result in inconsistent terminology being used throughout the rest of the Foreign Investment Law”.<sup>423</sup> The Tribunal does not agree. There is no contradiction between Articles 2 and 3 of the FIL. These provisions make sense when read together: Article 2 applies to “foreign investments” which, by

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<sup>418</sup> See for instance Article 8 of the FIL (reserving the Respondent’s right to prohibit or restrict foreign investment in certain areas or sectors of economic activity), Article 19 of the FIL (requiring foreign investments to comply with the objectives of the National Development Plan, and stating that foreign investments made under the FIL are “subject to authorization and approval by the competent government authorities”, which is given “under the terms of applicable legislation”) and Article 20 of the FIL (providing that a “foreign investment shall be registered with the competent authority [...] under the terms of this law and applicable regulations”).

<sup>419</sup> Pedro Barcelar Vasconsuelos, Timorese constitutional law specialist, quoted in Marrazes ER 1, para. 54.

<sup>420</sup> Exh. RL-101, Government Decree No. 6/2005 (Timor-Leste).

<sup>421</sup> For the same reason, the Claimants’ reliance on decisions of ICSID tribunals that have not demanded strict compliance with “purely formal” legality requirements that are found to be or designed to deprive investors of investment protection is irrelevant.

<sup>422</sup> Alfaiate ER 1, paras. 37-39.

<sup>423</sup> Alfaiate ER 1, para. 40.

virtue of Articles 3(g) and 3(b), are made by “foreign investors” who have been issued a “foreign investor’s certificate”.<sup>424</sup>

323. The Tribunal therefore considers that a foreign investor was required to have its foreign investment approved and authorized in accordance with Articles 19 and 20 of the FIL and to receive a foreign investor’s certificate issued by TradeInvest, in order to enjoy the benefits offered by the FIL.

324. The Claimants additionally argue that, if the Tribunal were to hold that they need a “foreign investor’s certificate”, the absence of a certificate is cured by the Prime Minister’s exercise of the call back power under Article 6(3) of the Government Organic Law in force at the relevant time.<sup>425</sup>

325. Article 6(3) of the Government Organic Law reads as follows:

“[T]he Prime Minister has the power to issue instructions to any member of Government and to make decisions on matters included in the areas of responsibility of any Ministry or Secretariat of State, as well as to create permanent or temporary committees or workgroups for any matters under the Government’s purview.”<sup>426</sup>

326. The language makes clear that the so-called call-back power is limited to matters within the responsibility of a Ministry or Secretariat of State. There is no cogent evidence that this provision empowers the Prime Minister to make decisions in areas that are within the competence of entities that are not mentioned, such as TradeInvest; nor is there any cogent evidence that this call-back power enables the Prime Minister to override the FIL and Government Decree 06/2005. The Tribunal therefore dismisses this argument.

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<sup>424</sup> This conclusion (which is also put forward in Marrazes ER 1, paras. 74-84) is reached on the basis of the understanding of the text of the FIL.

<sup>425</sup> Alfaiate ER 1, paras. 47-53, *citing* Exh. CL-109, Decree-Law No 14/2009, Art. 6(3).

<sup>426</sup> English translation Decree-Law No 14/2009, Art. 6(3) in Marrazes ER 1, para. 94. Mr. Marrazes testifies that on the date of signature of the Fuel Supply Agreement, i.e. 22 October 2010, the version of the Government Organic Law in force was the one amended by Decree Law 15/2010, of 20 October 2010 (6<sup>th</sup> amendment).

**c. Special Investment Agreement**

327. In the alternative, the Claimants contend that they may benefit from the FIL protections because the Fuel Supply Agreement constitutes a “special investment agreement” (defined herein as “SIA”) for purposes of Article 18(1) and (2) of the FIL.<sup>427</sup>
328. The provisions reproduced above show that Article 18(1) of the FIL empowers the government to enter into SIAs with potential foreign investors. It does not define which agreements may qualify as SIAs. Article 18(2), provides that a SIA requires a resolution of the Council of Ministers. Mr. Alfaiate, the Claimants’ expert,<sup>428</sup> acknowledges this requirement, and the Claimants concede that no Council of Minister resolutions approved the Fuel Supply Agreement as a SIA.<sup>429</sup> In the circumstances and in light of the clear text of Article 18 of the FIL, the Tribunal has no basis to conclude that the Fuel Supply Agreement is a SIA.
329. The Claimants seeks to counter this conclusion with the argument that the Council of Ministers resolution is not a mandatory requirement. They cite cases in support,<sup>430</sup> which, however, do not support the Claimants’ position. In the case of ENSUL MECI, a SIA was approved by the Council of Ministers through Government Resolution 22/2010.<sup>431</sup> Similarly, six years later, a SIA was approved in respect of TL Cement, Lda. through Government Resolution 14/2016.<sup>432</sup> While the text of these Resolutions is different, and

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<sup>427</sup> Rej., para. 108.

<sup>428</sup> Alfaiate ER 1, paras. 83-84.

<sup>429</sup> See for instance, C-Mem., para. 88 *et seq.* where the Claimants submit that “the Council of Ministers indeed considered the Fuel Supply Agreement and it can be inferred that the Council viewed it favourably” without mentioning that the Council of Ministers resolved to approve the Fuel Supply Agreement as a SIA.

<sup>430</sup> Reply, para. 166. The case of Pelican Paradise Group Limited relied on by the Claimants is irrelevant and not considered here as it does not ostensibly relate to any SIA. See Exh. AFG-003 (“Thus, the Government resolves, in accordance with article 116, e) of the Constitution of the Republic, the following: [...] To approve the project for the construction of a hotel complex in Tasi Tolu / Tibar, to be undertaken by the Pelican Paradise Group Limited”).

<sup>431</sup> Exh. AFG-002 (“The Government decides, in the terms of letter e) of article 116 of the Constitution of the Republic, the following: To approve the draft Special Investment Agreement to be signed with the company ENSUL MECI-GESTAO DE PROJECTOS DE ENGENHARIA, SA, regarding the construction of a real estate complex in Colmeia, between Presidente Nicolau Lobato Avenue, Rua Dr Antonio Machado and Rua D Sebastião da Costa”) (the Claimants’ English translation).

<sup>432</sup> Exh. AFG-004 (“The Government hereby decides, in accordance with Article 116 (e) of the Constitution of the Republic and Article 29 (2) of Law No 14/2011, of 28 September, the following: 1. To approve the investment project presented by TL Cement. Lda. and the draft of the Special Investment Agreement to be entered into with TL Cement, Lda. for the construction of a cement production unit located in the Municipality

while the Tribunal could agree with Mr. Alfaiate that “progress has been made in this area since 2010”,<sup>433</sup> these cases demonstrate that a resolution of the Council of Ministers is required for an agreement to qualify as a SIA under the FIL.

330. The Claimants also allege that the Respondent is estopped from claiming that the Fuel Supply Agreement was not endorsed by the Council of Ministers.<sup>434</sup> However, the Tribunal considers that Article 18(2) of the FIL clearly requires a resolution of the Council of Ministers for an agreement to be considered as a SIA, which is also borne out by the implementation of the provision. In these circumstances, the Tribunal cannot sustain an argument on estoppel, all the more so because the Claimants have not cited any authorities in support.
331. Finally and in any event, even if the Fuel Supply Agreement were to be considered a SIA, that would not be of any assistance to the Claimants. Article 23 of the FIL, reproduced above, limits access to ICSID arbitration to “foreign investors”, i.e. investors who hold a “foreign investor’s certificate”. The Claimants do not meet this requirement.
332. On this basis, the Tribunal holds that neither of the Claimants qualifies as “foreign investor” under the FIL, and that the Fuel Supply Agreement does not constitute a “special investment agreement” under that same legislation.

***d. Entitlement to Protection under the FIL***

333. Invoking various characteristics of the FIL, the Claimants argue that, despite not complying with the specific requirements of the FIL, they should be deemed “foreign investors” and benefit from the protections of the FIL. For the reasons already provided, the Tribunal considers that the FIL sets out a specific framework of administrative control on inbound foreign investments. The benefits granted through the FIL, particularly consent to ICSID arbitration, are available only to those investors complying with the law’s requirements. That does not include the Claimants.

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of Baucau, published attached to this Resolution and forming an integral part thereof”) (the Claimants’ English translation).

<sup>433</sup> Alfaiate ER 1, para. 86.

<sup>434</sup> R-PHB, para. 122.

**e. Conclusion**

334. On the basis of the foregoing analysis, the Tribunal concludes that Article 23 of the FIL does not provide a basis for the Respondent's consent to ICSID jurisdiction.

**D. INVESTMENT WITHIN THE AMBIT OF ARTICLE 25(1) OF THE ICSID CONVENTION**

335. The Respondent's third jurisdictional objection is that this dispute does not "arise [...] directly out of an investment" as required by Article 25 of the ICSID Convention.<sup>435</sup> The Respondent argues that the meaning of "investment" under the ICSID Convention is objective and excludes ordinary commercial transactions and that the transaction in question is not an investment but rather an exchange of goods and services for payment.

336. Whatever the outcome of this third objection, it would make no difference to the final assessment of the Tribunal's jurisdiction. If the objection is well founded, it reinforces the Tribunal's findings against jurisdiction. If it is ill-founded, the Claimants have still failed to overcome the absence of consent to ICSID arbitration. Therefore, for reasons of judicial and procedural economy, the Tribunal will dispense with determining this additional objection.

**E. CONCLUSION**

337. As a result of the foregoing analysis, the Tribunal lacks jurisdiction over the claims of the Claimants in these proceedings.

**VII. COSTS**

338. Each Party has requested an award of costs covering its legal fees and expenses and the costs it incurred in connection with this arbitration. Pursuant to Procedural Order No. 6, the Parties filed statements quantifying their fees and costs, which are summarized in the following Sections ((A) and (B)), before the Tribunal discusses the allocation of costs in Section (C).

**A. THE CLAIMANTS' COSTS**

339. The Claimants' total costs and expenses incurred in connection with this arbitration amount to USD 1,669,194.80, which include (i) the ICSID lodging fee of USD 25,000; (ii)

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<sup>435</sup> Preliminary Objections, para. 87.

advance payments to ICSID of USD 325,000 and (iii) legal fees and expenses of USD 1,319,184.80.<sup>436</sup>

**B. THE RESPONDENT'S COSTS**

340. The Respondent's total costs and expenses incurred in connection with this arbitration amount to USD 3,432,328, which include (i) advance payments to ICSID of USD 325,000; and (ii) legal fees and expenses of USD 3,107,328.<sup>437</sup>

**C. ANALYSIS**

341. The costs of this arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):<sup>438</sup>

Arbitrators' fees and expenses	
Professor Gabrielle Kaufmann-Kohler	165,006.96
Mr. Stephen Jagusch QC	103,312.02
Professor Campbell McLachlan QC	57,563.74
Assistants' fees and expenses	74,597.96
ICSID's administrative fees	106,000.00
Direct expenses	40,387.83
<b>Total</b>	<b><u>546,868.51</u></b>

342. In accordance with ICSID Financial Regulation 14(3)(d) and paragraph 10 of Procedural Order No. 1, these arbitration costs have been paid out of advances made by the Parties in equal parts (50% by the Claimants and 50% by the Respondent). As a result, the Claimants' share of the arbitration costs amounts to USD 273,434.26, and the Respondent's share also amounts to USD 273,434.26.

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<sup>436</sup> Claimants' Statement of Costs, p. 1. The unused portion of the USD 325,000.00 in advance payments will be refunded to the Claimants.

<sup>437</sup> Respondent's Statement of Costs, para. 1.2.1. The unused portion of the USD 325,000.00 in advance payments will be refunded to the Respondent.

<sup>438</sup> The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account.

343. The Tribunal has broad discretion in allocating the costs of the arbitration and the Parties' costs, including legal fees and expenses pursuant to Article 61(2) of the ICSID Convention which provides:

“[T]he Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.”

344. The Tribunal has considered the Parties' arguments as well as the circumstances of this case. It observes that the issues involved in this case were complex, requiring extensive factual evidence. Nevertheless, on most issues, the Tribunal has found that the Claimants have failed to make out their case. Further, the Claimants raised additional arguments and filed new evidence just before the Hearing, which added complexity. In light of these factors and on an overall assessment of the course and outcome of this proceeding, the Tribunal concludes that it is fair for the Claimants to bear the entirety of the ICSID arbitration costs, i.e. the fees and expenses of the Tribunal and ICSID's administrative fees. The Claimants shall thus bear the direct costs of these proceedings, i.e. USD 546,868.51. They shall therefore pay to the Respondent USD 273,434.26.

345. For the remainder of costs, the Tribunal considers it fair for the Claimants to bear a reasonable portion of the Respondent's legal fees and expenses. The Tribunal is bound to observe that the amount of costs of USD 3.1 million that the Respondent claims (excluding its contribution to the fees and expenses of the Centre) is more than double the amount incurred by the Claimants. The Tribunal considers this a very high amount for a jurisdictional challenge in which the hearing itself lasted three days and the issues were relatively confined. In recognition of this, the Tribunal considers that the Claimants should reimburse the Respondent for USD 1,300,000 in respect of its legal representation, i.e. an amount in the range of the one which the Claimants themselves incurred for their representation.

346. In conclusion, the Claimants shall bear the costs of this arbitration, as well as USD 1,300,000 in respect of the Respondent's fees and expenses of legal representation.

## **VIII. AWARD**

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

- (i) The Tribunal lacks jurisdiction over the present dispute;
- (ii) The Claimants shall bear the entirety of the costs of this arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees, and direct expenses, and thus pay to the Respondent USD 273,434.26;
- (iii) The Claimants shall pay USD 1,300,000 on account of the Respondent's legal fees and expenses incurred in connection with this arbitration;
- (iv) All other requests for relief are dismissed.

[signed]

Stephen Jagusch

Arbitrator

Date: 12 November 2017

[signed]

Professor Campbell McLachlan, QC

Arbitrator

Date: 3 November 2017

[signed]

Professor Gabrielle Kaufmann-Kohler

President of the Tribunal

Date: 7 November 2017