

**PCA Case No. 2017-37**

**IN THE MATTER OF AN ARBITRATION UNDER THE 2013 ARBITRATION  
RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL  
TRADE LAW AND THE 2011 COMPREHENSIVE ECONOMIC  
PARTNERSHIP AGREEMENT BETWEEN JAPAN AND  
THE REPUBLIC OF INDIA**

**BETWEEN**

**NISSAN MOTOR CO., LTD. (JAPAN)**

**The Claimant**

**and**

**THE REPUBLIC OF INDIA**

**The Respondent**

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**DECISION ON JURISDICTION**

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**29 April 2019**

**The Arbitral Tribunal**

Ms. Jean E. Kalicki (Presiding Arbitrator)

Prof. Dr. Kaj Hobér

Justice Jagdish Singh Khehar

**Registry**

The Permanent Court of Arbitration

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GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

<b>Amended Business Scheme</b>	A business scheme implemented by the R&N Consortium from 1 April 2012 until 30 June 2014
<b>BIT</b>	Bilateral Investment Treaty
<b>Capital Goods VAT Incentive</b>	A type of investment incentive provided under the 2008 MoU entitling the R&N Consortium to refunds of VAT it paid on capital goods purchased within Tamil Nadu during the Investment Period for use in the Project
<b>CEPA</b>	Comprehensive Economic Partnership Agreement between Japan and the Republic of India, dated 16 February 2011
<b>Claimed Incentives</b>	The incentives granted by the GoTN to the R&N Consortium under Clauses M.4.1(a), M.4.1(c), and M.5(iii) of the Schedule to the 2008 MoU
<b>Counter-Memorial</b>	Respondent's Counter-Memorial on Jurisdiction/Admissibility, dated 23 February 2018
<b>CST</b>	Central Sale Tax
<b>CST Act</b>	Central Sales Tax Act, 1956
<b>EC</b>	Eligibility Certificate
<b>Eligible Investment</b>	An investment of not less than Rs. 4,500 crores to be made by the R&N Consortium into the Project under the 2008 MoU
<b>FET</b>	Fair and equitable treatment
<b>First Sale</b>	The sale under the Amended Business Scheme in which RNAIPL sells all Nissan-branded vehicles to NMIPL and Renault-branded vehicles to RIPL in Tamil Nadu
<b>GoTN</b>	The Government of Tamil Nadu
<b>GO 1</b>	Government Order 1
<b>GO 43</b>	Government Order 43
<b>GO 52</b>	Government Order 52
<b>GO 80</b>	Government Order 80
<b>GO 124</b>	Government Order 124
<b>GO 220</b>	Government Order 220
<b>India</b>	The Republic of India (also referred to as the Respondent)
<b>India 2 Project</b>	A joint venture project to develop a car production facility in India that Renault and M&M started discussing in 2006
<b>Initial Business Scheme</b>	A business scheme implemented by the R&N Consortium from its inception until 31 March 2012
<b>Input VAT</b>	VAT paid by a dealer as a percentage of its purchases of from suppliers within Tamil Nadu pursuant to the TN VAT Act

<b>Input VAT Incentive</b>	A type of investment incentive under the 2008 MoU entitling the R&N Consortium to refunds of VAT it paid on all inputs, raw materials, consumables, packing materials, components, spare parts, accessories purchased within Tamil Nadu and used for manufacturing in the Project
<b>Investment Incentives Scheme</b>	The investment incentives granted by the GoTN to the R&N Consortium under the 2008 MoU
<b>Interim Relief Application</b>	Claimant's application for urgent interim relief dated 5 December 2017
<b>ILC Articles</b>	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts
<b>Investment Period</b>	The seven-year period from the date of the 2008 MoU
<b>ITC</b>	Input Tax Credit
<b>M&amp;M</b>	Mahindra & Mahindra Ltd.
<b>M&amp;M Consortium</b>	A consortium consisting of Renault, Nissan and Mahindra & Mahindra Ltd.
<b>MOU Cell</b>	Special Cell of the Commercial Taxes Department of the GoTN
<b>MOU Cell Certificate</b>	A certificate issued by the MOU Cell to certify the eligible sum paid to the R&N Consortium
<b>NAFTA</b>	North American Free Trade Agreement
<b>Nissan</b>	Nissan Motor Co., Ltd. (also referred to as the Claimant)
<b>NMIPL</b>	Nissan Motor India Private Limited
<b>Output VAT</b>	VAT charged by a dealer as a percentage of sales to a customer within Tamil Nadu under the TN VAT Act
<b>Output VAT and/or CST Incentives</b>	A type of investment incentive under the 2008 MoU entitling the R&N Consortium to refunds of Gross Output VAT + CST it paid on output sold within Tamil Nadu
<b>Parties</b>	Nissan (or the Claimant) and India (or the Respondent)
<b>PCA</b>	Permanent Court of Arbitration
<b>Project</b>	The integrated vehicle manufacturing or automobile plant (with an annual capacity of 400,000 vehicles) to be established either by Renault or Nissan or the R&N Consortium collectively under the 2008 MoU
<b>R&amp;N Consortium</b>	A consortium between Renault S.A.S. and Nissan Motor Ltd.
<b>Rejoinder</b>	Respondent's Rejoinder on Jurisdiction, dated 27 July 2018
<b>Renault</b>	Renault S.A.S.
<b>Reply</b>	Claimant's Reply on Jurisdiction, dated 24 May 2018
<b>Request</b>	Claimant's Request to the PCA Secretary-General to appoint the second arbitrator and presiding arbitrator under Article 96(11) of the CEPA, dated 1 May 2017
<b>RIPL</b>	Renault India Private Limited

<b>RNAIPL</b>	Renault Nissan Automotive Private Limited
<b>Second Sale</b>	A sale under the Amended Business Scheme in which NMIPL and RIPL sell vehicles to their respective dealers in Tamil Nadu
<b>SIPCOT</b>	State Industries Promotion Corporation of Tamil Nadu
<b>Statement of Claim</b>	Statement of Claim, dated 23 February 2017
<b>TN VAT Act</b>	Tamil Nadu Value Added Tax Act, 2006
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law 2013
<b>VAT</b>	Value Added Tax
<b>VCLT</b>	Vienna Convention on the Law of Treaties, dated 23 May 1969
<b>2007 MoU</b>	The Memorandum of Understanding between the M&M Consortium and the GoTN dated 26 February 2007
<b>2008 MoU</b>	The Memorandum of Understanding between the R&N Consortium and the GoTN dated 22 February 2008

## I. THE PARTIES AND THEIR REPRESENTATIVES

1. The Claimant is Nissan Motor Co., Ltd., a company incorporated in Japan, with its registered office at 2, Takara-cho, Kanagawa-ku, Yokohama-shi, Kanagawa 220-8623, Japan (“**Nissan**” or the “**Claimant**”). The Claimant is represented in this arbitration by Mr. Fabien Lesort (General Counsel), and the following counsel: Mr. Matthew Gearing QC, Ms. Sheila Ahuja, Mr. Matthew Hodgson, Ms. Joanne Lau, Mr. Arun Mal, Ms. Jae Hee Suh, Ms. Cammy Man, Mr. James Losari and Ms. Lanqiao Wang of Allen & Overy, 9<sup>th</sup> Floor, Three Exchange Square, Central, Hong Kong SAR; Ms. Zia Mody, Mr. Rajendra Barot of AZB & Partners, 4<sup>th</sup> Floor Sakhar Bhavan, Nariman Point, Mumbai 400021, India; and Mr. L. Badri Narayanan of Lakshmikumaran & Sridharan, 2<sup>nd</sup> Floor Unit B&C Cnergy, Old Standard Mill, Prabhadevi, Mumbai 400025, India.
2. The Respondent is the Republic of India, a sovereign state (“**India**” or the “**Respondent**,” together with the Claimant, the “**Parties**”). The Respondent is represented in this arbitration by Mr. Vishvajit Sahay (Joint Secretary of the Department of Heavy Industry, Government of India), Mr. Sunil Kumar Singh (Director of Department of Heavy Industry, Government of India), Dr. R.J.R. Kasibhatla (Deputy Legal Advisor of Department of Law and Justice, Government of India), Mr. V. Arun Roy (Additional Secretary of Industries Department, Government of Tamil Nadu), Dr. VD Sharma (Executive Secretary, Legal and Treaties, Ministry of External Affairs, Government of India), and Mr. George Pothan Poothicote (Consultant, Legal and Treaties, Ministry of External Affairs, Government of India) and the following counsel: Mr. Mark Clodfelter, Dr. Constantinos Salonidis, Mr. Sudhanshu Roy, Mr. Peter Tzeng, Ms. Kathern Schmidt, Mr. José Manuel García Rebolledo, and Mr. Oscar Norsworthy of Foley Hoag LLP, 1717 K Street NW, Washington, D.C., 20036, U.S.A; and Mr. Anand S. Pathak, Mr. Amit K. Mishra, Ms. Rohini Singh Sisodia, Mr. Harshad Pathak, and Mr. Ranjeev Khatana of P&A Law Offices, GopalDas Bhavan, 1<sup>st</sup> Floor, 28 Barakhamba Road, New Delhi 110001, India.

## II. PROCEDURAL HISTORY

### A. COMMENCEMENT OF THE ARBITRATION

3. By Statement of Claim dated 23 February 2017 (“**Statement of Claim**”), which also serves as its Notice of Arbitration, Nissan commenced arbitration proceedings against India pursuant to Article 96(4)(c) of the 2011 Comprehensive Economic Partnership Agreement between Japan and the Republic of India (the “**CEPA**”) and Articles 3 and 20 of the 2013 Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”).
4. The Statement of Claim included (i) Exhibits C-001 to C-197; (ii) Legal Authorities CLA-001 to CLA-058; and (iii) the witness statements of Mr. KVS Ramakrishnaiah dated 27 January 2017, of Mr. Marc Nassif, dated 1 February 2017, and of Mr. Rakesh Kochhar dated 22 February 2017.



**B. CONSTITUTION OF THE TRIBUNAL**

5. In its Statement of Claim, Nissan appointed Prof. Dr. Kaj Hobér, a Swedish national, as first arbitrator.
6. By letter dated 1 May 2017, Nissan requested that the Secretary-General of the Permanent Court of Arbitration (the “PCA”) “make an appointment of the party-appointed arbitrator of India and the presiding arbitrator of a three-member arbitral tribunal” pursuant to Article 96(11) of the CEPA.
7. On 30 October 2017, the Secretary-General of the PCA, acting as appointing authority, appointed the candidate proposed by India, Justice Jagdish Singh Khehar, an Indian national, as second arbitrator.
8. On 3 November 2017, using the list procedure as set out in Article 8(2) of the UNCITRAL Rules and in accordance with the relevant provisions of the CEPA, the Secretary-General of the PCA appointed Ms. Jean E. Kalicki, a national of the United States of America, as the Presiding Arbitrator.
9. The interim procedural steps leading to these various appointments are discussed in greater detail in Section V below, in the context of India’s Threshold Objection.

**C. INITIAL PROCEDURAL STEPS AND NISSAN’S APPLICATION FOR INTERIM RELIEF**

10. On 9 November 2017, the Tribunal circulated for discussion initial drafts of the Terms of Appointment and a first procedural order. By letter of the same date, India gave notice of its intention to object that the dispute was not within the Tribunal’s competence and requested that its objection be addressed and decided as a preliminary question pursuant to Article 96(21) of the CEPA. By letter dated 10 November 2017, India reiterated this request.
11. On 5 December 2017, Nissan submitted an application for urgent interim relief (“**Interim Relief Application**”) in relation to proceedings before the High Court of Judicature at Madras in India, commenced by the State of Tamil Nadu to seek an interlocutory injunction restraining Nissan from proceeding with this arbitration.
12. On 6 December 2017, upon the Tribunal’s invitation, India provided its response, requesting that the Tribunal deny Nissan’s Interim Relief Application. On the same date, the Tribunal issued its Order on Application for Urgent Interim Relief, directing the Parties to take all necessary steps to seek a deferment of any ruling in the Madras Court proceedings, at least until such time as the Tribunal first resolved, as a preliminary question, any objections to its jurisdiction that India in due course would present.
13. On 14 December 2017, the Tribunal held the first procedural meeting with the Parties via telephone conference to discuss the first procedural order and the timetable for proceedings.
14. On the basis of the Parties’ comments, the Tribunal adopted its Terms of Appointment on 16

December 2017. The Terms of Appointment established English as the sole language of the arbitration and Singapore as the place (legal seat) of the arbitration, and appointed the International Bureau of the PCA to act as Registry and administer the arbitral proceedings.

15. On 18 December 2017, the Tribunal issued Procedural Order No. 1, which recorded the Parties' agreement that the arbitration would begin with an initial jurisdictional phase and fixed the schedule and order for the submission of pleadings on jurisdiction, including document production requests.
16. Following discussion with the Parties, on 15 January 2018, the Tribunal issued Procedural Order No. 2, fixing the dates and venues for the Hearing on Jurisdiction and any Hearing on the Merits should the proceedings continue to that stage.

**D. WRITTEN PHASE AND REQUESTS FOR DOCUMENT PRODUCTION**

17. In accordance with Procedural Order No. 1, on 23 February 2018, India submitted its Counter-Memorial of Jurisdiction/Admissibility, which included (i) Exhibits R-1 to R-17; and (ii) Legal Authorities RLA-1 to RLA-47 ("**Counter Memorial**").
18. On 6 March 2018, the PCA simultaneously circulated to the Parties and to the Tribunal Nissan's and India's correspondence regarding their requests for production of documents relevant to jurisdiction/admissibility. In this correspondence, Nissan confirmed that it had no requests to make, and India submitted its requests in the form of a Stern Schedule.
19. On 20 March 2018, the PCA circulated to the Parties and to the Tribunal Nissan's response to India's requests for the production of documents.
20. By correspondence dated 20 and 21 March 2018, the Parties communicated to the Tribunal their agreed adjustments to the timetable contained in Procedural Order No. 1 related to production of documents relevant to jurisdiction/admissibility.
21. On 28 March 2018, India circulated its reply to Nissan's objections to India's request for production of documents.
22. On 4 April 2018, the Tribunal issued Procedural Order No. 3, deciding India's contested requests and ordering Nissan to produce the documents indicated therein in accordance with the agreed procedural timetable.
23. By letter dated 24 April 2018, Nissan confirmed with the Tribunal its production of documents responsive to the Tribunal's Procedural Order No. 3.
24. By letter dated 7 May 2018, India requested the Tribunal to order Nissan to "provide information and explanations necessary for fairly assessing the validity" of Nissan's privilege claims in relation to

certain documents that Nissan had withheld or redacted on privilege grounds.

25. In response, on 16 May 2018, Nissan provided further details with respect to the relevant responsive documents and redacted content.
26. On 18 May 2018, India requested the Tribunal to order Nissan to provide further information relevant to the privilege claims.
27. Pursuant to Procedural Order No. 1, on 24 May 2018, Nissan filed its Reply on Jurisdiction/Admissibility, which included (i) Exhibits C-198 to C-222; and (ii) Legal Authorities CLA-059 to CLA-080 (“**Reply**”).
28. By letter dated 28 May 2018, Nissan provided further details regarding the relevant responsive documents and redacted content, and agreed to remove certain redactions.
29. On 1 June 2018, India made an application to the Tribunal to order removal of the remaining redactions and disclosure of the withheld documents, or alternatively, that Nissan make such redacted/withheld documents available to the Tribunal for inspection “so that the Tribunal can determine whether Claimant’s invocation of legal advice privilege with respect to those documents is justified in the circumstances.”
30. On 11 June 2018, upon further invitation by the Tribunal, Nissan provided its comments whereby it maintained its privilege claims and objected to India’s application.
31. On 25 June 2018, the Tribunal issued Procedural Order No. 4, upholding Nissan’s privilege claims in respect of the remaining redactions and withheld documents, and rejecting India’s alternative request.
32. On 22 July 2018, the Tribunal granted India’s request for an extension for the submission of its Rejoinder on Jurisdiction until 27 July 2018.
33. On 27 July 2018, India submitted its Rejoinder on Jurisdiction, which included (i) Exhibits R-9(*bis*), and R-18 to R-49; and (ii) Legal Authorities RLA-14(*bis*), RLA-37(*bis*), RLA-45(*bis*), and RLA-48 to RLA-76 (“**Rejoinder**”).
34. Pursuant to Procedural Order No. 1, a pre-hearing telephone conference between the Tribunal and the Parties was held on 3 October 2018.
35. On 13 October 2018, the Tribunal issued Procedural Order No. 5, which memorialized the Parties’ agreement and the Tribunal’s decisions with respect to various logistical matters relating to the Hearing on Jurisdiction, including *inter alia* the hearing schedule and sequence, hearing bundles, and post-hearing submissions. The Order included as Annex 1 a Notional Schedule for the Hearing.

36. By letter dated 1 November 2018, India proposed “a different sequence of the oral presentations of the jurisdictional objections” and an adjustment to the Notional Schedule.
37. Upon invitation by the Tribunal, Nissan responded by e-mail dated 5 November 2018, agreeing to “the revised sequence of the oral presentations suggested by [India],” and reporting *inter alia* that the Parties were continuing to confer and reach an agreement on certain additional procedural points in relation to the hearing.
38. By letter dated 6 November 2018, Nissan sought direction from the Tribunal on certain procedural proposals concerning the hearing on which the Parties had not been able to agree, including (i) Nissan’s request to use up to one hour for its initial case overview/introduction; (ii) Nissan’s introduction of new exhibits and legal authorities; and (iii) Nissan’s request that the Parties exchange their respective PowerPoint presentations and core bundles in advance of the hearing. By letter of the same date, India objected to Nissan’s introduction of new exhibits and legal authorities on the basis that Nissan had failed to seek leave in a timely manner; and to Nissan’s request to exchange presentations and core bundles in advance of the hearing on the basis that it was not consistent with Procedural Order No. 1 and “would be disruptive to [India’s] preparations [for the hearing].”
39. On the same date, the Presiding Arbitrator, writing on behalf of the Tribunal, granted Nissan’s requests to use up to one hour for its initial case overview/introduction and to introduce new legal authorities, and denied the remaining requests. The Presiding Arbitrator noted in the same letter that given the exigencies of time, and the fact that certain members of the Tribunal were then in transit, she took these decisions alone, pursuant to Article 4.5 of the Terms of Appointment.
40. On 8 November 2018, during the Hearing on Jurisdiction, India requested that the full Tribunal reconsider the decision taken by the Presiding Arbitrator on behalf of the Tribunal, pursuant to which Nissan had been granted leave to submit a Gujarat High Court decision as a new legal authority. Upon reconsideration, the full Tribunal upheld the Presiding Arbitrator’s decision on the same day, while noting that India remained free to address at the appropriate time the relevance and weight of this decision or to submit other Indian court decisions on the same issue.

**E. HEARING**

41. From 8 to 9 November 2018, the Hearing on Jurisdiction was held at Maxwell Chambers in Singapore. The following individuals were present:

The Tribunal

Professor Dr. Kaj Hobér  
Justice Jagdish Singh Khehar  
Ms. Jean E. Kalicki

For the Claimant

Mr. Fabien Lesort  
Mr. Matthew Gearing QC  
Ms. Sheila Ahuja  
Ms. Joanne Lau  
Ms. Jae Hee Suh  
Mr. Arun Mal  
Mr. James Losari  
Mr. Rajendra Barot  
Mr. L. Badri Narayanan

For the Respondent

Mr. Sunil Kumar Singh  
Dr. R. J. R. Kasibhatla  
Mr. V. Arun Roy  
Mr. Mark Clodfelter  
Dr. Constantinos Salonidis  
Mr. Sudhanshu Roy  
Mr. Peter Tzeng  
Ms. Kathern Schmidt  
Mr. José Manuel García Rebolledo  
Mr. Anand S. Pathak  
Mr. Amit K. Mishra  
Ms. Rohini Singh Sisodia  
Mr. Harshad Pathak  
Mr. Ranjeev Khatana

For the PCA

Ms. Christel Y. Tham

42. Oral submissions on behalf of Nissan were made by Mr. Matthew Gearing QC and Ms. Sheila Ahuja. Oral submissions on behalf of India were made by Mr. Mark Clodfelter and Dr. Constantinos Salonidis.<sup>1</sup>

**F. POST-HEARING SUBMISSIONS**

43. By letter to the Parties dated 19 November 2018, and further to discussions that took place at the Hearing on Jurisdiction, the Tribunal informed the Parties of its availability between 3 and 21 February 2020 and invited the Parties to confer with a view to reaching an agreement on a seven-day period within this window that could be held as a potential alternative for the Hearing on the Merits, until the Tribunal determined whether such a hearing would be necessary and whether the currently held dates from 5 to 13 November 2019 would be feasible. In the same letter, the Tribunal invited the Parties to investigate and confirm whether there exists any *travaux préparatoires* that could relate to the negotiation or acceptance of Article 10 of the CEPA or otherwise bear on the object and purpose of that Article, and if so, to submit such documents to the Tribunal.

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<sup>1</sup> Citations to the transcripts of the jurisdictional hearing are in the form “Tr. (Date), page:lines.”

44. On the same date, further to an agreement reached at the Hearing on Jurisdiction, the PCA transmitted to the Parties a list of correspondence regarding constitution of the Tribunal, and invited the Parties to review it and confirm whether they would have any issues with adding any of the unmarked documents into the record, in order to enable the Tribunal to review the sequence of events in its entirety.
45. On 23 November 2018, Nissan reiterated its preference to preserve the original hearing dates and indicated its willingness if necessary to shorten the allotted interval between from the filing of the Statement of Defence and its filing of its Reply on the Merits.
46. By e-mails dated 29 and 30 November 2018, respectively, India and Nissan confirmed their agreement to (i) hold 3 to 11 February 2020 as alternative of dates for the Hearing on the Merits; and (ii) add into the record all the documents regarding Tribunal constitution that had been annexed to the PCA's 19 November 2018 letter.
47. On 7 December 2018, India indicated that the Parties had jointly agreed to a ten-day extension of the deadline for the submission of their respective Submissions on Costs to 17 December 2018.
48. On 7 December 2018, Nissan informed the Tribunal that while it had located certain materials in relation to negotiation of the CEPA generally, "those materials do not relate to the negotiation or acceptance of Article 10 of the CEPA in particular, nor do they otherwise bear on the object and purpose of that Article." On the same date, India informed the Tribunal that it required an additional ten days to complete its searches and obtain the necessary administrative approvals for submission to the Tribunal of any responsive *travaux préparatoires*. By e-mail to the Parties on 8 December 2018, the Tribunal granted India's request for an extension. On 12 December 2018, further to the Parties' agreement, the PCA circulated an exhibit list containing correspondence pertaining to Tribunal constitution, which were added to the record as Exhibits AA-1 to AA-52. The PCA also circulated USB drives containing electronic copies of the documents to the Tribunal and the Parties. On 17 December 2018, India requested a further six-day extension of the deadline for submission of the requested *travaux préparatoires*, which the Tribunal granted on the same date.
49. On 23 December 2018, India requested an additional seven-day extension of the deadline for submission of the requested *travaux préparatoires*, and conveyed the Parties' agreement to defer the filing of their Submissions on Costs until after the Tribunal has completed its review of the *travaux préparatoires*, including any post submission procedures ordered by the Tribunal. On the same date, the Tribunal took note of the Parties' agreement to defer their Submissions on Costs, and granted India's request for an extension.
50. On 29 November 2018, India submitted the *travaux préparatoires* that it had identified as responsive to the Tribunal's request.

51. On 28 March 2019, the India invited the PCA to confirm whether the Tribunal had completed its review of the *travaux préparatoires* relevant to Article 10 of the CEPA, whether the Tribunal required any further post-hearing submissions in this regard, and whether the Parties could proceed with the filing of their Submissions on Costs.
52. On 30 March 2019, the Tribunal confirmed that it would not require post-hearing submissions from the Parties regarding the *travaux préparatoires*, and invited the Parties to submit their Submissions of Costs by 12 April 2019.
53. On 12 April 2019, the Parties submitted their respective Submissions on Costs, which were then simultaneously circulated by the PCA to both Parties and the Tribunal. With their respective submissions, Nissan submitted Exhibit C-223 and Legal Authorities CLA-084 to CLA-087, and India submitted Legal Authorities RLA-77 to RLA-79.

### **III. NATURE OF THE DISPUTE**

54. This dispute arises out of Nissan's investment in an "Ultra Mega Integrated Automobile Project" involving the establishment of a vehicle-manufacturing factory at Oragadam Industrial Park, near the city of Chennai, the capital of Tamil Nadu (the "**Project**"). The investment was made through Nissan's membership in a consortium with its French partner, Renault s.a.s. ("**Renault**") (together, the "**R&N Consortium**"). Other relevant entities with the R&N Consortium include Nissan Motor India Private Limited ("**NMIPL**"), a wholly owned subsidiary of Nissan International Holding B.V., a company incorporated in the Netherlands which, in turn, is a wholly owned subsidiary of Nissan; Renault India Private Limited ("**RIPL**"), an entity jointly owned by Renault and Renault Group B.V., an indirect, wholly owned subsidiary of Renault; and Renault Nissan Automotive Private Limited ("**RNAIPL**"), an entity jointly owned by Nissan (70% ownership interest) and Renault (30% ownership interest).<sup>2</sup>
55. In 2008, the Government of Tamil Nadu (the "**GoTN**") and the R&N Consortium entered into a Memorandum of Understanding (the "**2008 MoU**"), pursuant to which the R&N Consortium agreed to invest a minimum amount to "establish an integrated vehicle manufacturing and assembly facilities" and achieve a minimum production capacity within an investment period of seven years (the "**Investment Period**"),<sup>3</sup> and in turn the GoTN agreed to deliver to it various investment incentives, including fiscal incentives (the "**Investment Incentives Scheme**").
56. According to Nissan, in reliance on the promise of incentives contained in the 2008 MoU, it invested INR 6,092 crores (approximately USD 890 million) to establish a factory with an installed annual

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<sup>2</sup> Statement of Claim, ¶ 26.

<sup>3</sup> C-005, ¶ 2.1.

capacity of 400,000 vehicles within the Investment Period.<sup>4</sup> Nissan alleges, however, that the GoTN has failed to pay Nissan and the R&N Consortium certain of these incentives (the “**Claimed Incentives**”) in a timely manner, resulting in an outstanding amount of INR 2,057.36 crores that as of the date of the Statement of Claim had been payable to Nissan for almost two years.<sup>5</sup> Such failure, Nissan contends, was “clearly arbitrary” and without any “cogent or proper reason,”<sup>6</sup> and therefore constitutes a breach by India of the CEPA, specifically both its fair and equitable treatment (“**FET**”) clause (Article 87(1)) and its umbrella clause (Article 87(2)).<sup>7</sup> Nissan seeks full reparation for the non-payment of the Claimed Incentives and applicable interest.<sup>8</sup>

57. India denies any liability to Nissan.<sup>9</sup> As a threshold issue, however, India maintains that the Tribunal need not consider the issues on the merits because Nissan’s claims fall outside its jurisdiction and are inadmissible.<sup>10</sup> In this respect, India raises five objections to the Tribunal’s jurisdiction to adjudicate the present dispute, namely:<sup>11</sup> (i) the Tribunal is not competent to adjudicate this dispute because it has been improperly constituted; (ii) the Tribunal lacks jurisdiction because Nissan’s claims relate to taxation measures which fall outside the scope of the CEPA; (iii) Nissan’s claims are time-barred; (iv) Nissan’s claims under the CEPA are excluded by Clause 15 of the 2008 MoU; and (v) the Tribunal lacks jurisdiction because certain proceedings that Nissan initiated in India (and failed to withdraw) share the same fundamental basis with the claims asserted before the Tribunal. India requests the Tribunal to dismiss Nissan’s claims in their entirety.<sup>12</sup>

#### **IV. RELEVANT LEGAL PROVISIONS**

58. This part sets out the provisions in the CEPA, the UNCITRAL Rules, and the Vienna Convention on the Law of Treaties, dated 23 May 1969 (“**VCLT**”) that are immediately relevant to the Parties’ jurisdictional dispute before the Tribunal.

##### **A. THE CEPA**

59. Article 10(1) states as follows on “Taxation”:

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<sup>4</sup> Statement of Claim, ¶¶ 11-12; Reply, ¶¶ 4-5.

<sup>5</sup> Statement of Claim, ¶ 15.

<sup>6</sup> Statement of Claim, ¶ 14.

<sup>7</sup> Statement of Claim, ¶¶ 16-17.

<sup>8</sup> Statement of Claim, ¶¶ 20, 232.

<sup>9</sup> Counter-Memorial, ¶ 5.

<sup>10</sup> Counter-Memorial, ¶ 5.

<sup>11</sup> Counter-Memorial, ¶ 5.

<sup>12</sup> Counter-Memorial, ¶ 180.



Unless otherwise provided for in this Agreement, the provisions of this Agreement shall not apply to any taxation measures.

60. Article 87 states under the heading “General Treatment”:

1. Each Party shall accord to investments of investors of the other Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

2. Each Party shall observe any obligation it may have entered into with regard to investment activities in its Area of investors of the other Party.

61. Article 96 on “Settlement of Investment Disputes between a Party and an Investor of the Other Party” provides in relevant part:

1. For the purposes of this Chapter, an “investment dispute” is a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation under this Chapter and any other provisions of this Agreement as applicable with respect to the investor and its investments.

2. Nothing in this Article shall be construed so as to prevent an investor who is a party to an investment dispute (hereinafter referred to in this Article as “disputing investor”) from seeking settlement by domestic administrative or judicial fora of the Party that is the other party to the investment dispute (hereinafter referred to in this Article as “disputing Party”). However, in the event that the disputing investor has submitted the investment dispute for resolution under one of the international conciliations or arbitrations referred to in paragraph 4, no proceedings may be initiated by the disputing investor for the resolution of the investment dispute before courts of justice or administrative tribunals or agencies.

[...]

4. If the investment dispute cannot be settled through [...] [consultation or negotiation within six months of a request] [...] the disputing investor may submit the investment dispute to one of the following international conciliations or arbitrations:

(a) conciliation or arbitration in accordance with the [ICSID Convention if in force between the Parties] [...];

(b) conciliation or arbitration under the [ICSID Additional Facility Rules] [...];

(c) conciliation [...] or arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law; or

(d) any arbitration in accordance with other arbitration rules if agreed with the disputing Party.

5. The applicable conciliation or arbitration rules shall govern the conciliation or arbitration set forth in paragraph 4 except to the extent modified in this article.

6. No investment dispute may be submitted to international conciliation or arbitration referred to in paragraph 4 if the disputing investor has initiated any proceedings for the resolution of the investment dispute before courts of justice or administrative tribunals or agencies. However, in the event that those proceedings are withdrawn within 30 days from the date of filing the case, the disputing investor may submit the investment dispute to such international conciliations or arbitrations.

[...]

9. Notwithstanding paragraph 8, no investment dispute may be submitted to conciliation or arbitration set forth in paragraph 4, if more than three years have

elapsed since the date on which the disputing investor acquired or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred loss or damage referred to in paragraph 1.

[...]

11. Unless the disputing parties agree otherwise, an arbitral tribunal established under paragraph 4 shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. If the disputing investor or the disputing Party fails to appoint an arbitrator or arbitrators within 60 days from the date on which the investment dispute was submitted to arbitration, the Secretary-General of the International Centre for Settlement of Investment Disputes in the case of arbitration referred to in subparagraph 4 (a) or (b), or the Secretary-General of the Permanent Court of Arbitration, at The Hague in the case of arbitration referred to in subparagraph 4 (c) or (d), may be requested by either of the disputing parties, to appoint the arbitrator or arbitrators not yet appointed, subject to the requirements of paragraph 12.

12. Unless the disputing parties agree otherwise, the third arbitrator shall not be a national of Japan nor citizen of India, nor have his or her usual place of residence in either Party, nor be employed by either of the disputing parties, nor have dealt with the investment dispute in any capacity.

[...]

21. An arbitral tribunal shall address and decide as a preliminary question any objections by the disputing Party that the investment dispute is not within the competence of the arbitral tribunal, provided that the disputing Party so requests immediately after the establishment of the arbitral tribunal.

## **B. THE UNCITRAL RULES**

62. Article 1(1) of the UNCITRAL Rules provides as follows:

Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.

63. Article 9 of the UNCITRAL Rules provides the procedure for the appointment of arbitrators in a three-member tribunal:

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as the sole arbitrator would be appointed under Article 8.

64. Article 32 of the UNCITRAL Rules provides with respect to "Waiver of right to object":

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

**C. THE VCLT**

65. Article 31 of the VCLT sets forth the Convention's general rule of treaty interpretation:
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
  2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
    - a. any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
    - b. any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
  3. There shall be taken into account, together with the context:
    - a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
    - b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
    - c. any relevant rules of international law applicable in the relations between the parties.
  4. A special meaning shall be given to a term if it is established that the parties so intended.

66. Article 32 of the VCLT states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a. Leaves the meaning ambiguous or obscure; or
- b. Leads to a result which is manifestly absurd or unreasonable.

**V. INDIA'S THRESHOLD OBJECTION: THE TRIBUNAL WAS IMPROPERLY CONSTITUTED**

67. India's First Objection is that the Tribunal lacks competence to adjudicate this dispute because it was not constituted in accordance with Article 96 of the CEPA and Article 9 of the UNCITRAL Rules. India contends that the PCA Secretary-General as appointing authority failed to follow the prescribed procedure for appointment of a presiding arbitrator, thereby causing India prejudice and resulting in the improper constitution of the Tribunal. Nissan, by contrast, maintains that the Presiding Arbitrator was appointed in full accordance with the Article 96 of the CEPA and the relevant UNCITRAL Rules.

68. The Tribunal sets forth below the core facts relevant to the Tribunal’s constitution, including appointment of the Presiding Arbitrator. It also sets forth the procedural history confirming the Parties’ shared understanding that India’s objection to Tribunal constitution would be presented: (a) as a jurisdictional issue for the Tribunal itself to resolve, not as an arbitrator challenge to be decided by the appointing authority under the UNCITRAL Rules, and (b) in tandem with India’s other jurisdictional objections, not on an accelerated basis to be resolved prior to the other objections. This procedural history is followed by a more detailed summary of the Parties’ respective positions and the Tribunal’s analysis.

**A. RELEVANT FACTS**

69. On 1 May 2017, the PCA Secretary-General received a request from Nissan to “make an appointment of the party-appointed arbitrator of India and the presiding arbitrator of a three-member arbitral tribunal” (the “**Request**”) “pursuant to Article 96(11) of the CEPA.”<sup>13</sup>
70. In its Request, Nissan asserted that in accordance with Articles 2(5) and 3(2) of the UNCITRAL Rules, the arbitration is deemed to have commenced on 27 February 2017, the date the Statement of Claim was delivered by courier to India’s Prime Minister’s Office and Ministry of Law and Justice.<sup>14</sup> Nissan made its request to the PCA Secretary-General on the basis that the 60-day deadline under Article 96(11) of the CEPA had expired on 28 April 2017, without India having appointed its arbitrator or participated in discussions of the appointment of the presiding arbitrator.<sup>15</sup>
71. After receiving comments from the Parties both on the Request and on India’s request for an extension of at least 90 days to convey a formal response to the Request, by letter dated 23 May 2017, the PCA Secretary-General stated that “in the absence of an agreement by the Parties otherwise, [he] is obliged to proceed with the requested appointment” in accordance with Article 96(11) of the CEPA.<sup>16</sup> With respect to appointment of the second arbitrator, the PCA provided India with an opportunity to propose “the name of a potential candidate for appointment.”<sup>17</sup> Concerning appointment of the presiding arbitrator, the Parties were informed that the PCA Secretary-General would generally follow the list procedure set out under Article 8(2) of the UNCITRAL Rules, but that the Parties could agree on an alternative modified list procedure. The Parties were invited to inform the PCA of their preferred method of conducting the list procedure and to “submit [...] any comments they may have on the desired profile of the presiding arbitrator or any other circumstances that should be taken into

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<sup>13</sup> R-14, p. 1.

<sup>14</sup> R-14, ¶ 2.

<sup>15</sup> R-14, p. 3.

<sup>16</sup> C-204, p. 2.

<sup>17</sup> C-204, p. 2.

account.”<sup>18</sup>

72. Following several extensions granted by the PCA to the extent agreed to between the Parties,<sup>19</sup> on 21 August 2018, India nominated Justice C.K. Prasad for consideration by the PCA Secretary-General as candidate for the second arbitrator.<sup>20</sup>
73. By separate correspondence dated 23 August 2017, the Parties submitted their respective comments concerning the desired profile of the presiding arbitrator and the circumstances they wished the PCA Secretary-General to take into consideration when making the appointment.<sup>21</sup> Following Nissan’s letter dated 25 August 2017, in which it agreed to adopt India’s preferred list mechanism despite not sharing India’s preference, the Parties were in agreement as to the method of conducting the list procedure for appointment of the presiding arbitrator.<sup>22</sup>
74. Meanwhile, on 29 August 2017, the PCA notified Justice Prasad that India had proposed his name as the second arbitrator, and inquired as to his availability, independence and impartiality, including any disclosures where necessary.<sup>23</sup> Pending receipt of that information, the PCA began the process of canvassing the availability of various candidates (including Ms. Jean E. Kalicki) for inclusion on a list of potential presiding arbitrators to be submitted to the Parties. The letters to candidates stated that the PCA Secretary-General was in the process of ascertaining Justice Prasad’s availability and independence, but requested any applicable disclosures.<sup>24</sup> On 1 September 2017, Ms. Kalicki communicated her willingness to be included in the presiding arbitrator list and provided various disclosures, none of which concerned Justice Prasad.<sup>25</sup>
75. On 2 September 2017, Justice Prasad advised the PCA that he had been nominated as arbitrator in “a few other cases” by Ministries of the Government of India.<sup>26</sup> On 11 September 2017, Nissan requested further information regarding the circumstances of these other appointments, which the PCA forwarded to Justice Prasad.<sup>27</sup> Following Justice Prasad’s response to the inquiry, which was conveyed to the Parties, Nissan requested on 15 September 2017 that Justice Prasad “confirm that he is prepared to notify the parties before accepting any future arbitral appointments in cases involving

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<sup>18</sup> C-204, p. 3. *See also* Reply, ¶ 51 referring to C-205; C-206; C-207; C-208.

<sup>19</sup> *See* AA-7; AA-10; AA-13.

<sup>20</sup> *See* C-209.

<sup>21</sup> *See* C-211. *See also* Reply, ¶ 52.

<sup>22</sup> *See* AA-18; AA-20.

<sup>23</sup> AA-19.

<sup>24</sup> AA-21.

<sup>25</sup> AA-24.

<sup>26</sup> AA-25.

<sup>27</sup> AA-32; AA-34.

Government entities [...] throughout the course of these proceedings.” Nissan stated that provided Justice Prasad so confirmed, then it would be “content for the PCA to confirm the appointment of Justice Prasad and look forward to receiving the list of potential candidates for the presiding arbitrator as soon as possible.”<sup>28</sup>

76. While this inquiry was pending, on 20 September 2017, in accordance with Article 8(2) of the UNCITRAL Rules, the PCA circulated to the Parties a list of ten candidates for presiding arbitrator, requesting that the Parties return the list within fifteen days after having deleted any names to which they objected and numbered the remaining names in order of preference.<sup>29</sup>
77. On 21 September 2017, India, citing Article 96(11) of the CEPA, invited Nissan to “attempt to appoint a presiding arbitrator, by mutual agreement.”<sup>30</sup> Nissan responded the same day, accepting India’s invitation on the condition that the list procedure continue in parallel with the Parties’ discussions, thereby ensuring that that process would not be delayed in the event the parties failed to reach agreement.<sup>31</sup> On 29 September 2017, India responded that “given [Nissan’s] refusal to extend the timelines for arriving at a mutual agreement, [India] now sees no alternative but to proceed with the list procedure provided by the PCA.”<sup>32</sup> On 30 September 2017, India wrote to the PCA, objecting to Nissan’s refusal to suspend the list procedure, arguing that Nissan’s request to the PCA for appointment of the presiding arbitrator was “clearly premature” under the UNCITRAL Rules, and requesting that the PCA suspend the list procedure “until the expiry of the deadline under the UNCITRAL Rules.”<sup>33</sup>
78. Meanwhile, with respect to appointment of the second arbitrator, Justice Prasad advised the PCA on 29 September 2017 that “I refuse to make any [...] commitment” to advance notification of any additional arbitrator appointments by India, but would notify the Parties of any such additional appointments after they occurred.<sup>34</sup> On 3 October 2017, Nissan wrote to the PCA objecting in these circumstances to Justice Prasad’s nomination as the second arbitrator, and requesting that the PCA decline to appoint him and invite India to suggest alternative candidates for consideration. In the same letter, Nissan also objected to India’s request for suspension of the list procedure, but nevertheless suggested that the PCA only formalize the appointment of the presiding arbitrator after appointment of the second arbitrator, given that the nationality of the second arbitrator might affect the choice of the

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<sup>28</sup> AA-35.

<sup>29</sup> R-16.

<sup>30</sup> C-212, p. 1. *See also* Reply, ¶ 53(a).

<sup>31</sup> *See* C-213, p. 1. *See also* Reply, ¶ 53(b).

<sup>32</sup> C-216.

<sup>33</sup> R-49, pp. 6-7.

<sup>34</sup> AA-37.

presiding arbitrator.<sup>35</sup>

79. On 4 October 2017, the PCA notified Justice Prasad of Nissan’s objection to his nomination as second arbitrator, and inquired whether he wished to reconsider his response to Nissan’s letter of 15 September 2017.<sup>36</sup> Justice Prasad replied that he was “not at all willing to reconsider” his earlier response.<sup>37</sup>
80. On 5 October 2017, the PCA confirmed that, while it would not appoint Justice Prasad as the second arbitrator, the list procedure for the appointment of the presiding arbitrator would proceed as scheduled.<sup>38</sup> On the same date, by separate letters, the Parties returned the list with their preferences for presiding arbitrator.<sup>39</sup> India stated that it was submitting the list “under protest and without prejudice to the prior objections raised pertaining to the parallel process of the list procedure,” and requested that the presiding arbitrator not be appointed “until the appointment of the second arbitrator.”<sup>40</sup> On 6 October 2017, the PCA took note of the Parties’ comments, stating that it would “confirm the appointment of the presiding arbitrator in due course, but not before formalizing the appointment of [the] second arbitrator,” and “look[ed] forward to receiving India’s suggested alternative candidate for the second arbitrator.”<sup>41</sup>
81. On 20 October 2017, India proposed Justice Jagdish Singh Khehar as its alternative candidate for appointment as the second arbitrator.<sup>42</sup> On 23 October 2017, the PCA approached Justice Khehar to inquire about his availability, independence and impartiality, and advised him that “the Presiding Arbitrator has not yet been appointed but the PCA Secretary-General has carried out a list procedure consulting the Parties on several candidates and it is anticipated that the Presiding Arbitrator will be appointed shortly after the appointment of the arbitrator on behalf of India.”<sup>43</sup> The same day, the PCA notified Ms. Kalicki that she “remain[ed] one of the candidates in contention for appointment” as presiding arbitrator, advised her of the developments regarding Justice Prasad and Justice Khehar, and requested if she had any further disclosures to make.<sup>44</sup> Ms. Kalicki confirmed that she had no disclosures regarding Justice Khehar.<sup>45</sup>

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<sup>35</sup> See **C-217**.

<sup>36</sup> **AA-38**.

<sup>37</sup> **AA-39**.

<sup>38</sup> **C-219**.

<sup>39</sup> **AA-40; AA-42**.

<sup>40</sup> **AA-42**.

<sup>41</sup> **C-220**, p. 2.

<sup>42</sup> See **AA-43**.

<sup>43</sup> **AA-44**.

<sup>44</sup> **AA-46**.

<sup>45</sup> **AA-47**.

82. On 25 October 2017, Justice Khehar declared his willingness to serve as the second arbitrator and indicated he had no disclosures to make, and the PCA promptly notified the Parties.<sup>46</sup> Nissan thereafter confirmed that it had no objections to his appointment.<sup>47</sup> On 30 October 2017, the PCA Secretary-General appointed Justice Khehar as the second arbitrator.<sup>48</sup>
83. Subsequently, on the basis of the lists returned by the Parties, on 3 November 2017, the PCA Secretary-General appointed Ms. Kalicki as the Presiding Arbitrator.<sup>49</sup>
84. The newly constituted Tribunal began work immediately thereafter, *inter alia* by circulating to the Parties on 9 November 2017 a proposed draft of the Terms of Appointment. On 20 November 2017, in the context of commenting on this draft, India informed the Tribunal that it reserved its right to object that the Tribunal had not been validly constituted. Nissan took the position on the same date that “[i]f the Respondent wishes to challenge the constitution of the Tribunal, pursuant to Art 96(21) of the CEPA, it must raise it together with its other jurisdictional objections to be decided by the Tribunal as a preliminary question in the jurisdiction phase.”<sup>50</sup>
85. On 14 December 2017, during the first procedural conference, the Presiding Arbitrator requested that India clarify whether it was maintaining its objection regarding Tribunal constitution, and stated that if so, it was important to discuss earlier rather than later the appropriate procedure and appropriate decisionmakers to address this objection. India responded that it reserved its right to maintain this objection, but committed to clarify its position (including as to the appropriate process and decisionmakers) no later than the date of its submission of jurisdictional objections under Article 96(21) of the CEPA.<sup>51</sup>
86. The final Terms of Appointment adopted on 16 December 2017 stated in paragraph 3.4 that “[w]ith respect to the process by which the Tribunal was constituted [...] the Parties will identify any resulting challenges to the Tribunal or any of its members, and will set forth their positions with respect to the appropriate procedures to follow in the event of any such challenges, in their scheduled filings with respect to jurisdiction.”<sup>52</sup> Consistent with this agreement, Procedural Order No. 1 issued on 18 December 2017 provided a single schedule for briefing and hearing all objections to jurisdiction or admissibility, without distinguishing the issue of Tribunal constitution or providing for this issue to be

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<sup>46</sup> AA-48; AA-49.

<sup>47</sup> AA-50.

<sup>48</sup> C-220, p. 2; AA-51.

<sup>49</sup> See AA-52.

<sup>50</sup> Parties’ joint comments on draft Terms of Appointment, 20 November 2017, comments on ¶¶ 3.1, 3.4.

<sup>51</sup> Audio transcript of first procedural transcript, discussion at minutes 9:00-17:13.

<sup>52</sup> Terms of Appointment, ¶ 3.4.



decided on an accelerated schedule before any other objections.<sup>53</sup>

87. On 23 February 2018, India submitted its Counter-Memorial on Jurisdiction/Admissibility, which presented *inter alia* its objection to the Tribunal's constitution. India framed the objection expressly as one about the Tribunal's "competen[ce] to adjudicate the present dispute,"<sup>54</sup> in other words as an objection to jurisdiction rather than as a challenge to any member of the Tribunal.

## B. THE POSITIONS OF THE PARTIES

### (a) India's Position

88. India argues that the Tribunal is not competent to adjudicate this dispute because it has been improperly constituted. In particular, India challenges the procedure by which the Presiding Arbitrator was appointed, alleging that the PCA Secretary-General, acting as appointing authority, failed to follow the procedure prescribed in Article 96(11) of the CEPA, read together with Article 9 of the UNCITRAL Rules.<sup>55</sup>
89. India does not dispute Nissan's claim that, pursuant to Article 96(5) of the CEPA, the UNCITRAL Rules govern this arbitration "except to the extent modified" by Article 96 of the CEPA.<sup>56</sup> Contrary to Nissan's interpretation, however, India asserts that Article 96(11) of the CEPA requires that the presiding arbitrator be appointed, in the first instance, "by agreement of the disputing parties," and that any default appointment mechanism can be invoked only if no such agreement is reached.<sup>57</sup>
90. Furthermore, India points out that the second sentence of Article 96(11) does not specify the default procedure for appointment of the presiding arbitrator in the absence of agreement between the disputing parties, and contends that the PCA Secretary-General therefore should have followed the default appointment procedure provided under Article 9 of the UNCITRAL Rules.<sup>58</sup> Under the UNCITRAL Rules, the appointing authority may step in to appoint the presiding arbitrator only if "within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator."<sup>59</sup> On India's interpretation, therefore, the combined effect of Article 96(11) of the CEPA and Article 9 of the UNCITRAL Rules is that the appointing authority may appoint the presiding arbitrator only if he or she failed to be appointed within 30 days after appointment of the second arbitrator, by agreement of the Parties and the two co-arbitrators.

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<sup>53</sup> Procedural Order No. 1, Annex A.

<sup>54</sup> Counter-Memorial, Section III and ¶ 59.

<sup>55</sup> Counter-Memorial, ¶ 59.

<sup>56</sup> Rejoinder, ¶ 209 *citing* CEPA, Art. 96(5) (CLA-043).

<sup>57</sup> Counter-Memorial, ¶ 62 *citing* CEPA, Art. 96(11) (CLA-043); Rejoinder, ¶ 210 *citing* Counter-Memorial, ¶ 62.

<sup>58</sup> Rejoinder, ¶ 210.

<sup>59</sup> Counter-Memorial, ¶ 62 *citing* UNCITRAL Rules, Art. 9 (RLA-37).

91. Applying this to the facts of the case, India submits that constitution of this Tribunal was irregular because the appointing authority failed to follow the proper appointment procedure with respect to the presiding arbitrator in two ways.<sup>60</sup> First, India alleges that the PCA Secretary-General commenced the list procedure without first “giving the [Parties] [...] an opportunity to agree on the person of the [presiding arbitrator], as provided in Article 96(11) of the CEPA.”<sup>61</sup> Second, India claims that he proceeded with the list procedure even after Justice Prasad “had been removed by the Appointing Authority over Claimant’s concerns regarding the disclosure of any future arbitral appointments by India,” in “blatant contradiction with Article 9 of the [UNCITRAL Rules]” which implicitly requires confirmation of appointment of the second arbitrator before any procedure for appointment of the presiding arbitrator may be commenced.<sup>62</sup>
92. As a result of this allegedly irregular appointment of the presiding arbitrator, India contends that it has been prejudiced in these proceedings, in particular because it was “denied an opportunity to review potential conflicts of interest” between the candidates for presiding arbitrator and the arbitrator appointed on its behalf.<sup>63</sup> In response to Nissan’s argument that India did not suffer any prejudice because there is no reason to think that any such conflicts of interest would have gone unnoticed, India insists that its subjective understanding should be given priority in determining any issues of conflict.<sup>64</sup> Accordingly, India argues, the continuation of the list procedure while the second arbitrator had not been appointed “deprived [India] from forming its own subjective opinion independent of the arbitrator’s determination” with respect to potential conflicts of interest.<sup>65</sup>
93. In addition, India denies Nissan’s allegation that it waived its right to object to the list procedure under Article 32 of the UNCITRAL Rules, by failing to raise the issue promptly, participating in the PCA appointment process, and expressly noting that it would proceed with the list procedure.<sup>66</sup> According to India, any such waiver must be “clear” and “unambiguous” and may not be implied merely by virtue of the fact that the objection could have been raised earlier.<sup>67</sup> This interpretation, India contends, is consistent with Article 32 of the UNCITRAL Rules which recognizes that there may be

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<sup>60</sup> Counter-Memorial, ¶ 63; *see also* Rejoinder, ¶ 210.

<sup>61</sup> Counter-Memorial, ¶ 64; *see also* Rejoinder, ¶ 211.

<sup>62</sup> Counter-Memorial, ¶ 64 *referring to R-17*; *see also* Rejoinder, ¶ 211.

<sup>63</sup> Counter-Memorial, ¶ 65; *see also* Rejoinder, ¶ 216.

<sup>64</sup> Rejoinder, ¶ 216. *See also* fn. 395 *citing* C. Croft, UNCITRAL Arbitration Rules (2013), pp. 133-134 (**RLA-69**).

<sup>65</sup> Rejoinder, ¶ 216.

<sup>66</sup> Rejoinder, ¶ 213-214.

<sup>67</sup> Rejoinder, ¶ 213 *citing* *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (27 September 2017), ¶ 324 (**RLA-75**); *referring to Helnan International Hotel A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award (7 June 2008) (**RLA-61**); C. Croft, UNCITRAL Arbitration Rules (2013), pp. 133-134 (**RLA-69**).

circumstances which justify a failure to object “promptly,” in which event there will be no waiver.<sup>68</sup>

94. In any event, India notes that it formally objected to continuation of the list procedure as soon as it commenced.<sup>69</sup> Furthermore, India disputes that it actively participated in the appointment process, noting that the Parties “were negotiating with a view to achieving an amicable settlement” and for that reason India did not formally participate in the process until three months after the PCA Secretary-General invited the Parties to indicate their preference with respect to the method of conducting the list procedure.<sup>70</sup> Indeed, India emphasizes, it was “constrained to participate in the appointment process under protest only after the Appointing Authority categorically refused to suspend the list procedure.”<sup>71</sup>
95. India therefore submits that, owing to its improper constitution, the Tribunal does not have competence to hear this dispute.<sup>72</sup>

*(b) Nissan’s Position*

96. Nissan submits that India’s objection is “baseless” for three reasons.<sup>73</sup>
97. First, Nissan contends that India’s interpretation of the procedure for appointment of the presiding arbitrator is incorrect because it is based on “a fundamental misconception” that such procedure must comply with both Article 96(11) of CEPA and Article 9 of the UNCITRAL Rules.<sup>74</sup> According to Nissan, India’s understanding is erroneous because in accordance with Article 96(5) of the CEPA, the UNCITRAL Rules govern this arbitration only to the extent not modified by Article 96 of CEPA.<sup>75</sup> In this respect, Nissan points out that India itself “does not dispute that pursuant to Article 96(5) of the CEPA, the CEPA prevails over the UNCITRAL Rules.”<sup>76</sup> Accordingly, Nissan submits, Article 96(11) of the CEPA prevails over Article 9 of the UNCITRAL Rules with respect to the procedure for appointment of the presiding arbitrator,<sup>77</sup> and according to its wording, “whilst the parties may agree on the appointment of the presiding arbitrator, if any arbitrator (which necessarily includes the presiding arbitrator) is not yet appointed within 60 days from the date on which the investment dispute

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<sup>68</sup> Rejoinder, ¶ 213 *citing* UNCITRAL Rules, Art. 32 (**RLA-37**).

<sup>69</sup> Rejoinder, ¶ 214 *referring to* Reply, Appendix 1: Chronology of Events in Relation to the Constitution of the Tribunal, pp. 63-64, ¶ (g). *See also* **C-214; R-48**.

<sup>70</sup> Rejoinder, ¶ 214 *referring to* **R-44; R-42; R-43; C-205; C-206; C-207; C-208**.

<sup>71</sup> Rejoinder, ¶ 214 *referring to* **R-49; C-220**.

<sup>72</sup> Counter-Memorial, ¶ 66.

<sup>73</sup> Reply, ¶ 41.

<sup>74</sup> Reply, ¶ 43 *citing* Counter-Memorial, ¶ 66.

<sup>75</sup> Reply, ¶ 44.

<sup>76</sup> Tr., 9 November 2018, 362:11-17.

<sup>77</sup> Reply, ¶ 44.

was submitted to arbitration, either party is entitled to invoke the default appointment mechanism” described in the second sentence of Article 96(11).<sup>78</sup> Thus Nissan maintains, the PCA Secretary-General was “obliged” to process Nissan’s Request, which was ripe given the expiry of the 60-day period contained in Article 96(11) without any response or participation by India in the appointment process.<sup>79</sup>

98. Second, and in any event, Nissan argues that pursuant to Article 32 of the UNCITRAL Rules, India has waived its right to object to commencement and continuation of the list procedure because it actively participated in and failed to timely object to that procedure.<sup>80</sup> In particular, Nissan points out that in India’s correspondence to the PCA after 23 May 2017, when it became aware that the PCA was making preparations for commencement of the list, India “made no complaint as to not being given adequate opportunity to agree on a presiding arbitrator” and “merely requested that the PCA provide more time” for it to comment on the proposed procedure.<sup>81</sup> In addition, Nissan notes that by August 2017 India had taken active steps in the appointment process, including expressing its preference for the method of conducting the list procedure and setting out factors for consideration by the PCA Secretary-General.<sup>82</sup> Moreover, Nissan points out that in correspondence dated 29 September 2017, India expressly noted that it would “proceed with the list procedure by the PCA.”<sup>83</sup> Indeed, Nissan observes, India’s correspondence of 30 September 2017 was the first time that it objected to the list procedure “on the basis that it was not given an adequate opportunity to agree on the presiding arbitrator with the Claimant.” This, according to the Nissan, was “too late.”<sup>84</sup>
99. Moreover, Nissan notes that according to India’s own authority, any objection should be considered untimely if it is raised after the party making the objection has already taken an inconsistent step in the proceedings.<sup>85</sup> In Nissan’s view, India took an inconsistent step by agreeing to the list procedure, and for that reason, its objection is untimely.<sup>86</sup>
100. Nissan additionally dismisses as “not on point” the legal authorities on which India relies for its argument that any waiver of a right to challenge a tribunal’s jurisdiction must be based on a clear and unambiguous statement.<sup>87</sup> According to Nissan, its waiver argument does not, as India seems to

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<sup>78</sup> Reply, ¶ 46.

<sup>79</sup> Reply, ¶¶ 46-49.

<sup>80</sup> Reply, ¶ 54 *referring to* UNCITRAL Rules, Art. 32 (**RLA-37**); Tr., 9 November 2018, 363: 20-22.

<sup>81</sup> Reply, ¶ 51 *referring to* **C-205; C-206; C-207; C-208**.

<sup>82</sup> Reply, ¶ 52 *referring to* **C-211**.

<sup>83</sup> Reply, ¶ 53(c) *citing* **C-216**.

<sup>84</sup> Reply, ¶ 54.

<sup>85</sup> Tr., 9 November 2018, 363:12-19.

<sup>86</sup> Tr., 9 November 2018, 363:20-22.

<sup>87</sup> Tr., 9 November 2018, 365:1-4.

assume, relate to the “timing of [India’s] objection to the [Tribunal’s] jurisdiction,” but rather to “the timing of the appointment procedure.”<sup>88</sup> Since the two authorities cited by India address the former situation and not the latter, Nissan maintains that the Tribunal “shouldn’t trouble [it]self with them.”<sup>89</sup>

101. Third, Nissan rejects India’s objection to continuation of the list procedure pending the challenge to the second arbitrator, and disagrees that this was prejudicial to India in any way. Nissan maintains that the removal of Justice Prasad did not bar continuation of the list procedure as Article 9 of the UNCITRAL Rules was not applicable.<sup>90</sup> In any event, Nissan points to the fact that the PCA adopted the Parties’ suggestion and only confirmed appointment of the presiding arbitrator after appointment of the second arbitrator, Justice Khehar.<sup>91</sup> From Nissan’s perspective, there should be no issue as to hidden conflicts of interest between the presiding arbitrator and the second arbitrator because any arbitrator, prior to appointment, should have disclosed any such conflicts, and is under a continuous duty to do so thereafter.<sup>92</sup>
102. Accordingly, because the Tribunal was properly constituted in accordance with the relevant provisions of the CEPA and UNCITRAL Rules, Nissan requests that the Tribunal reject India’s claim that it lacks competence to adjudicate this dispute.

### **C. THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS**

103. Although conceptually, the propriety of the Tribunal’s constitution is a prerequisite for its competence to decide all other jurisdictional objections, neither Party requested that this issue be resolved earlier than the other objections. To the contrary, as noted above, the Parties agreed that it would be briefed, argued and resolved in a single jurisdictional phase with all other objections. The Tribunal nonetheless considers it appropriate to address this issue first, and does so in this Decision.
104. As a threshold matter, because India framed its objection as one of jurisdiction, rather than as a challenge to one or more arbitrators under Articles 11-13 of the UNCITRAL Rules, the Tribunal is the appropriate body to resolve the matter. The fact that this requires assessing the actions of the PCA Secretary-General as appointing authority does not alter this conclusion. The Tribunal’s authority to rule on its own competence is expressly confirmed in both Article 96(21) of the CEPA and Article 23(1) of the UNCITRAL Rules. Prior tribunals acting under analogous rules have addressed challenges to the actions of an appointing authority as jurisdictional objections within the scope of

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<sup>88</sup> Tr., 9 November 2018, 364:13-25.

<sup>89</sup> Tr., 9 November 2018, 365:1-4.

<sup>90</sup> Reply, ¶ 56.

<sup>91</sup> Reply, ¶ 58 *referring to C-220*.

<sup>92</sup> Reply, ¶ 59.

their competence.<sup>93</sup> The Tribunal moreover considers the validity of its constitution *de novo*, without being bound by or giving deference to the judgments of the appointing authority which constituted it.<sup>94</sup>

105. The procedures for constitution of a CEPA tribunal are set forth in the CEPA itself, and notably differ in several respects from the default procedures of the UNCITRAL Rules. In such circumstances, the CEPA procedures for tribunal constitution take precedence over conflicting UNCITRAL Rules procedures, consistent with the order of precedence provided both in Article 96(5) of the CEPA (“The applicable [...] arbitration rules shall govern the [...] arbitration [...] *except to the extent modified in this article*”) and Article 1(1) of the UNCITRAL Rules (“disputes shall be settled in accordance with these Rules *subject to such modification* as the parties may agree.”)<sup>95</sup> Otherwise stated, the UNCITRAL Rules procedures for tribunal constitution become relevant only to the extent necessary to fill a gap in the CEPA provisions, and not to the extent they are inconsistent with the CEPA provisions. The fact that a claimant investor has the right under CEPA Article 96(4)(c) to elect to proceed under the UNCITRAL Rules does not mean that such Rules thereby supplant other provisions of the CEPA, any more than a decision to proceed under the ICSID Convention under CEPA Article 96(4)(a) would allow the ICSID Arbitration Rules to displace other CEPA provisions.
106. The first relevant inconsistency between the CEPA and the UNCITRAL Rules relates to *the mechanism* for appointing the presiding arbitrator. Under Article 96(11) of the CEPA, the presiding arbitrator shall be “appointed by agreement of the disputing parties,” which is notably different from Article 9(1) of the UNCITRAL Rules, under which the presiding arbitrator is to be chosen by “[t]he two arbitrators thus appointed,” and not by the parties themselves.
107. Second, the CEPA and UNCITRAL Rules differ on *the timetable* for making arbitrator appointments, and accordingly the date after which a party may request assistance from the appointing authority with respect to any arbitrators not timely appointed. Under CEPA Article 96(11), there is only one time period specified before resort may be had to the appointing authority, and this time period relates to the duties of the parties themselves, with respect to appointment not only of their own arbitrator but also of the presiding arbitrator who is to be appointed by party agreement. This conclusion flows from the double use of the plural phrase “or arbitrators,” relating to the timetable applicable to each party

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<sup>93</sup> See, e.g., *Econet Wireless Ltd. v. First Bank of Nigeria, et al.*, Award, 2 June 2005, in A. J. van den Berg (ed.), Yearbook Commercial Arbitration 2006 - Volume XXXI, Yearbook Commercial Arbitration, Volume 31 (2006) (“*Econet*”), pp. 49-65, at ¶¶ 4-6, 43 (considering and accepting objection to its jurisdiction on the basis that the PCA had no authority to select the ICC as a substitute appointing authority, in place of the Chief Judge of the Federal High Court of Nigeria designated in the parties’ contract); *AIG Capital Partners Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, Section 8 (pp. 22-28) (considering and rejecting a challenge to its competence on the basis that ICSID allegedly had not communicated with the proper representatives of the respondent, in designating the tribunal).

<sup>94</sup> See *Econet*, ¶¶ 5-6 (declining any deference to the prior opinions of the PCA and ICC regarding tribunal constitution, as those institutions had examined the question on a purely prima facie basis, and “the primary responsibility to determine the extent of the Tribunal’s jurisdiction lies with the Tribunal itself”).

<sup>95</sup> CEPA, Art. 96(5) (**CLA-043**) (emphasis added); UNCITRAL Rules, Art. 1(1) (**RLA-37**) (emphasis added).

singularly (and not the parties collectively): “If the disputing investor *or* the disputing Party fails to appoint an arbitrator *or arbitrators* within 60 days from the date on which the investment dispute was submitted to arbitration,” then the appointing authority “may be requested by either of the disputing parties, to appoint the arbitrator *or arbitrators* not yet appointed [...]”<sup>96</sup> The only logical way to read this reference to a scenario in which a single party fails to appoint “arbitrators” (plural) within a 60-day period is that this period applies both to its unilateral appointment of its own arbitrator, and to the parties’ joint attempts at appointing the presiding arbitrator. Moreover, in both circumstances the 60-day clock begins to run on “the date on which the investment dispute was submitted to arbitration,” which is the only accrual date referenced in the provision. There is no suggestion in the text of any separate or different timetable applicable to agreement on the presiding arbitrator, or that the timetable for reaching such agreement only begins to run after the first two arbitrators have been duly appointed.

108. This provision differs in virtually all respects from the procedure in the UNCITRAL Rules, which expressly provides for two separate appointment time periods, accruing on two separate dates and running sequentially and not in tandem. First, in Article 9(2) of the UNCITRAL Rules, a party has “30 days after the receipt of [the other] party’s notification of the appointment of an arbitrator” to notify its selection of its own arbitrator, failing which “the first party may request the appointing authority to appoint the second arbitrator.” Second, in Article 9(3) and expressly beginning only “after the appointment of the second arbitrator,” the *two co-arbitrators* have another 30-day period to reach agreement on the choice of a presiding arbitrator, failing which the presiding arbitrator “shall be appointed by the appointing authority [...]”
109. In the UNCITRAL Rules, this consecutive running of two separate time periods is logical, because the authority to appoint the third arbitrator rests with the first two arbitrators, not with the parties themselves. Self-evidently the co-arbitrators’ time to act cannot begin until they themselves have been appointed. No such provision is required in the CEPA framework, where the parties (and not the co-arbitrators) have the power to appoint the presiding arbitrator. As noted above, the single accrual period, the single time period, and the use of the word “arbitrators” (plural) in Article 96(11) of the CEPA all confirm an intent that the parties work to achieve agreement on the presiding arbitrator within the same 60-day period in which they are required to appoint their own co-arbitrators. After the expiry of that 60-day period, either party may seek assistance from the appointing authority.
110. In the Tribunal’s view, this plain textual reading of the applicable CEPA framework disposes of India’s first jurisdictional objection. There is no question that India missed the 60-day deadline for appointing its own arbitrator, but there is equally no question that at the same point (60 days) the Parties jointly had failed to reach agreement on the presiding arbitrator. From that point on, Nissan was permitted by the plain text of the CEPA to request that the PCA Secretary-General “appoint the

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<sup>96</sup> CEPA, Art. 96(11) (CLA-043) (emphasis added).

arbitrator *or arbitrators* not yet appointed [...],”<sup>97</sup> and the Secretary-General equally was permitted to act on such a request.

111. The Secretary-General acted consistently with the CEPA procedure by proceeding in tandem both with the appointment of the second arbitrator (in consideration of the candidates India nominated) and with the use of a list mechanism to determine mutually acceptable candidates for presiding arbitrator. At the same time, the Secretary-General made clear that he would defer the final appointment of a presiding arbitrator until after he formalized the appointment of the second arbitrator.<sup>98</sup> This was logical not only to prevent the appointment of tribunal members with the same nationality, but also to allow the candidates for presiding arbitrator (including Ms. Kalicki) to check for any conflicts or necessary disclosures involving the second arbitrator. Mr. Kalicki did precisely that with respect to Justice Prasad.<sup>99</sup> However, there was no requirement that the PCA suspend the ongoing list procedure when Justice Prasad’s nomination was rejected following Nissan’s objection, since the Secretary-General’s authority to appoint the presiding arbitrator under CEPA Article 96(11) was independent of his authority to appoint the second arbitrator under the same provision.
112. Nor was there any requirement that the PCA re-start the running of some clock upon the appointment of Justice Khehar as an alternative to Justice Prasad, since under the CEPA (unlike the UNCITRAL Rules), the authority to appoint the presiding arbitrator never vested in the two co-arbitrators in the first place. While this authority originally belonged to the Parties themselves, it was transferred to the PCA Secretary-General after the Parties failed to reach agreement on the presiding arbitrator within the 60-day deadline, and Nissan invoked its right under the CEPA to request the appointing authority’s assistance. Nothing in the CEPA suggests that the Secretary-General was required to offer the Parties a second opportunity to try to reach agreement on the presiding arbitrator, after the appointment of the second arbitrator (Justice Khehar) was confirmed. As noted above, the CEPA (unlike the UNCITRAL Rules) does not provide for a sequential process in which a new set of deadlines runs only from appointment of the second arbitrator. It was sufficient for the PCA to verify, as it did, that the candidate whose name had emerged through the list process (Ms. Kalicki) had no conflicts or disclosures to make regarding Justice Khehar.<sup>100</sup>
113. For these reasons, the Tribunal concludes that the PCA Secretary-General acted in accordance with the procedures specified in CEPA Article 96(11), and the Tribunal accordingly was duly and validly constituted. In these circumstances, there is no need to address Nissan’s contention that India waived its right to object to improper constitution. Nor is there logically any need to assess India’s claim that it suffered prejudice, because the issue of prejudice is implicated only where an error of procedure has

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<sup>97</sup> CEPA, Art. 96(11) (**CLA-043**) (emphasis added).

<sup>98</sup> **C-220**, p. 2.

<sup>99</sup> **AA-21**; **AA-24**.

<sup>100</sup> **AA-46**; **AA-47**.



been shown to have occurred.

114. For avoidance of doubt, however, the Tribunal confirms that it sees no demonstrated prejudice in this case. The presiding arbitrator was selected through a list mechanism that gave both Parties the opportunity to research ten candidates, to object to as many of those candidates as they wished, and to indicate preferences among the remaining candidates. The Parties submitted their rankings to the PCA on 5 October 2017, after Nissan's objections to Justice Prasad already had been lodged, and a full 15 days before India nominated Justice Khehar as its alternative candidate on 20 October 2017. Nothing prevented India during that time from reaching out to Justice Khehar – or any other potential second arbitrator candidates it may have been considering – to determine whether there were any conflicts or strong views regarding the various presiding arbitrator candidates on the PCA list, which might justify India in asking the PCA for an opportunity to revise its previously submitted rankings. Nor was there anything preventing India from requesting such an opportunity during the 10 additional days after it nominated Justice Khehar and before he was confirmed by the PCA Secretary-General on 30 October 2017. At no time, however, did India signal to the PCA that it had changed its views regarding either the presiding arbitrator candidates to whom it had objected on 5 October 2017, or its preferences among the remaining candidates that it had communicated to the PCA the same day.
115. Finally, even to this day India has not raised any suggestion that it would have responded any differently to the PCA list, in terms of either strikes or ranks, had it had been provided a formal opportunity to reconsider its response to the list after Justice Khehar's appointment. Certainly, India has never suggested that there was some nascent or undisclosed conflict involving Justice Khehar and Ms. Kalicki that should have removed her from consideration, or that would have materially changed India's strikes and rankings on the list more broadly such as to render her eventual selection as presiding arbitrator unlikely. In these circumstances, any discussion of prejudice – even had the PCA Secretary-General acted precipitously, which he did not – is entirely theoretical rather than real.
116. India's First Jurisdictional Objection accordingly is denied.

## **VI. PLEADED FACTS RELEVANT TO INDIA'S OTHER JURISDICTIONAL OBJECTIONS**

117. Having confirmed its authority to adjudicate this dispute, the Tribunal next sets out the background facts pleaded by the Parties that appear relevant to understanding and resolving India's other jurisdictional objections. These pleaded facts are described in some detail to provide context to the subsequent discussions. The Tribunal emphasizes, however, that at this juncture, the statements below are merely reflective of the Parties' pleadings to this point, and do not constitute final findings of fact regarding any disputed issues. Nothing in this Section VI should be taken as precluding either Party, in the proceedings that follow, from presenting contentions of fact other than as set out below.
118. The Tribunal organizes the background facts according to the following eight subjects: (i) the Indian

taxation regime; (ii) the GoTN's Investment Incentives regime; (iii) background to Nissan's investment and the Investment Incentives Scheme under the 2008 MoU;<sup>101</sup> (iv) the "Claimed Incentives" at issue in this case; (v) the mechanism for disbursement of the Claimed Incentives; (vi) the R&N Consortium's change in its "Business Scheme"; (vii) the GoTN's official reaction to the "Amended Business Scheme"; and (viii) the GoTN's non-payment of the Claimed Incentives.

## **1. The Indian Taxation Regime**

119. Under the Constitution of India, the Central Government controls imposition of taxes on the sale and purchase of goods "in the course of inter-State trade or commerce,"<sup>102</sup> while State Governments, such as the GoTN, are endowed with power to "impose taxes on the sale or purchase of goods within their territories."<sup>103</sup> State Governments may exercise such powers either through their legislative branches, in the form of tax laws enacted by their Legislative Assemblies, or through their executive branches, in the form of government orders issued under executive powers pursuant to Article 162 of the Constitution.<sup>104</sup> According to the Supreme Court of India, the latter have "the effect of law so long as [they] do[] not contravene any legislation by the State Legislature already covering the field."<sup>105</sup>
120. Pursuant to its power under the Constitution, the Central Government enacted the Central Sales Tax Act, 1956 (the "**CST Act**") to regulate the inter-State sale or purchase of goods.<sup>106</sup> Under the CST Act, the CST is charged by the seller to the buyer as a percentage of the sale price, and then deposited by the seller with the State in which the inter-State sale began.<sup>107</sup> The State then collects this tax on behalf of the Central Government.<sup>108</sup> The CST rate in India is 2%.<sup>109</sup> Under Section 8(5) of the CST Act, State Governments are also empowered to grant tax exemptions.<sup>110</sup> Section 8(5) provides in relevant part:

(8) Rates of tax on sales in the course of inter-State trade or commerce.

[...]

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<sup>101</sup> See *infra* ¶ 132 below.

<sup>102</sup> Counter-Memorial, ¶ 18 *citing* Constitution of India, Seventh Schedule, List I, Entry 92A, 93B (**RLA-45**).

<sup>103</sup> Counter-Memorial, ¶ 18 *referring to* Constitution of India, Seventh Schedule, List II, Entry 54 (**RLA-45**).

<sup>104</sup> Counter-Memorial, ¶¶ 22-23 *citing* Constitution of India, Art. 162 (**RLA-45**); *P.H. Paul Manoj Pandian v. Mr. P. Veldurai*, Supreme Court of India, Judgement, AIR 2011 SC 1660 (13 March 2011), ¶ 19 (**RLA-43**).

<sup>105</sup> Counter-Memorial, ¶ 24 *citing* *Indian Medical Association v. Union of India (UOI) and Ors.*, Supreme Court of India, Judgement, AIR 2011 SC 2365 (12 June 2011), ¶ 40 (**RLA-44**).

<sup>106</sup> Counter-Memorial, ¶ 19.

<sup>107</sup> Statement of Claim, ¶ 68(b); Witness Statement of Mr. KVS Ramakrishnaiah, 27 January 2017, ¶ 4.3(b) ("**Ramakrishnaiah Statement**").

<sup>108</sup> Counter-Memorial, ¶ 19; Statement of Claim, ¶ 68(b); Ramakrishnaiah Statement, ¶ 4.3(b).

<sup>109</sup> **R-7**, Section 8(1), as before substitution by the Taxation Laws (Amended) Act, 2007 (16 of 2007), w.e.f. 1.4.2007. See also Statement of Claim, ¶ 68(b); Ramakrishnaiah Statement, ¶ 4.3(b); Counter-Memorial, ¶ 45.

<sup>110</sup> **R-7**, Section 8(5).

(5) Notwithstanding anything contained in this section, the State Government may on the fulfillment of the requirements laid down in sub-section (4) by the dealer if it is satisfied that it is necessary so to do in the public interest, by notification in the Official Gazette, and subject to such conditions as may be specified therein, direct,-

(a) that no tax under this Act shall be payable by any dealer having his place of business in the State in respect of the sales by him, in the course of inter-State trade or commerce, to a registered dealer from any such place of business of any such goods or classes of goods as may be specified in the notification, or that the tax on such sales shall be calculated at such lower rates than those specified in sub-section (1) as may be mentioned in the notification;

(b) that in respect of all sales of goods or sales of such classes of goods as may be specified in the notification, which are made, in the course of inter-State trade or commerce, to a registered dealer by any dealer having his place of business in the State or by any class of such dealers as may be specified in the notification to any person or to such class of persons as may be specified in the notification, no tax under this Act shall be payable or the tax on such sales shall be calculated at such lower rates than those specified in sub-section (1) as may be mentioned in the notification.<sup>111</sup>

121. Separately, the GoTN passed the Tamil Nadu Value Added Tax Act, 2006 (the “**TN VAT Act**”) to govern the sale or purchase of goods within Tamil Nadu.<sup>112</sup> Under the TN VAT Act, valued added tax (“**VAT**”) is both charged by a dealer as a percentage of sales to customers (“**Output VAT**”), and paid by a dealer as a percentage of its purchases from suppliers (“**Input VAT**”).<sup>113</sup> The VAT rate in Tamil Nadu was 12.5% before 11 July 2011 and 14.5% thereafter.<sup>114</sup>
122. Section 19 of the TN VAT Act also provides for an input tax credit (“**ITC**”) scheme which creates the possibility for a dealer to obtain refunds of ITC. ITC is calculated by off-setting Input VAT against Output VAT and/or CST payable.<sup>115</sup> If the latter is lower than the former, the excess (or unutilized) ITC would be refunded after an assessment by the tax authorities.<sup>116</sup>
123. Similar to the CST Act, Sections 30(1)(a) and 33(3) of the TN VAT Act empower the GoTN to make certain tax exemptions. Section 30(1)(a) provides in relevant part:<sup>117</sup>

30. Power of Government to notify exemption or reduction of tax.

(1) The Government may, by notification, whether prospectively or retrospectively make an exemption, or reduction in rate, in respect of any tax payable under this Act—

(a) on the sale or purchase of any specified goods or class of goods, at all points or at a specified point or points in the series of sales by successive dealers; or

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<sup>111</sup> **R-7**, Section 8(5).

<sup>112</sup> Counter-Memorial, ¶ 21.

<sup>113</sup> Statement of Claim, ¶ 68(a); Ramakrishnaiah Statement, ¶ 4.3(a).

<sup>114</sup> Statement of Claim, ¶ 68(a); Ramakrishnaiah Statement, ¶ 4.3(a); Counter-Memorial, ¶ 45.

<sup>115</sup> **CLA-025**, Section 19(1). *See also* Statement of Claim, ¶ 68(c)(i).

<sup>116</sup> **CLA-025**, Section 19(18). *See also* Statement of Claim, ¶ 68(c)(ii).

<sup>117</sup> **CLA-025**, Section 30(1)(a). *See also* Counter-Memorial, ¶ 21.

(b) by any specified class of persons, in regard to the whole or any part of their turnover; or

(c) on the sale or purchase of any specified classes of goods by specified classes of dealers in regard to the whole or part of their turnover.

(2) Any exemption from tax, or reduction in the rate of tax, notified under sub-section (1)—

(a) may extend to the whole State or to any specified area or areas therein; or

(b) may be subject to such restrictions and conditions as may be specified in the notification.

(3) The Government may, by notification, cancel or vary any notification issued under subsection(1).

124. Section 33(3) provides in relevant part:<sup>118</sup>

33. Remission of tax deemed to be deferred payment of tax.

[...]

(3) Notwithstanding any thing contained in this Act, the Government may, in such circumstances and subject to such conditions as may be prescribed, by notification, exempt the whole or any part of the tax payable for any period and sale of goods made to or purchase of goods made by a new industrial unit, in respect of which the Government have already notified exemption of tax under the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act I of 1959) and such exemption on purchases or sales shall be by way of refund of tax paid on purchases made by or sales made to such industrial unit in the manner prescribed.

## 2. The GoTN's Investment Incentives Regime

125. In 1992, “in light of the wave of economic liberalization in the early 1990s,” the GoTN adopted a New Industrial Policy.<sup>119</sup> This policy was implemented by Government Order 43 (“GO 43”) which provided for incentives to “industries set up in Tamil Nadu having an investment of Rs. 50 crores or more,”<sup>120</sup> in the form of waivers of capital subsidies and sales tax granted. On 2 January 1996, the GoTN issued Government Order 1 (“GO 1”) granting similar incentives to “Super Mega Projects,” namely, “investments in fixed assets exceed[ing] Rs. 1,500 crores.”<sup>121</sup> Under the schemes of GO 43 and GO 1, in 1996, Ford and Hyundai set up manufacturing facilities in Tamil Nadu.<sup>122</sup>

126. On 26 February 2007, the GoTN issued Government Order 52 (“GO 52”) authorizing the issuance of incentives to “Ultra Mega Integrated Automobile Projects,” that is, “automobile projects [...] with an investment of not less than Rs. 4000 crores to be made in 7 years from the date of Memorandum of

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<sup>118</sup> CLA-025, Section 33(3). See also Counter-Memorial, ¶ 21.

<sup>119</sup> Counter-Memorial, ¶ 25 referring to R-1. See also Statement of Claim, ¶ 35.

<sup>120</sup> Counter-Memorial, ¶ 26. See also Statement of Claim, ¶ 35.

<sup>121</sup> Counter-Memorial, ¶ 27 citing C-007; Statement of Claim, ¶ 35.

<sup>122</sup> Statement of Claim, ¶ 35 referring to C-009; C-011; Counter-Memorial, ¶ 28.

understanding with the Government or any other date specified by the Government.”<sup>123</sup> GO 52 provides in relevant part:<sup>124</sup>

3. In this backdrop, the Government felt it necessary to bring out an exclusive policy for encouraging the setting up of major integrated automobile projects in Tamil Nadu. Accordingly, the Government is pleased to formulate and adopt an 'Ultra Mega Integrated Automobile Projects Policy' as hereunder:-

[...]

(2) The Ultra Mega Integrated Automobile Projects will be extended the following concessions:

[...]

(ii) 100% exemption from Stamp Duty.

[...]

(iv) Exemption from Electricity tax for ten (10) years both for TNEB and captive Power.

(v) Refund of Gross output Value Added Tax (VAT) and Central Sales Tax (CST) (without any set off) for 21 years or up to 115% of eligible investment, whichever is earlier. Eligible investment would mean actual investment made in eligible fixed assets and in intangibles (not exceeding 10% of total investment) in 7 years, subject to fulfilling minimum limit of Rs.4000 crores.

vi) Input tax refund will run parallel with Gross output VAT and CST refund. Since input tax is being refunded, there will be no set off. Input tax refund will not be taken into account for calculation of ceiling of Gross output VAT and CST refund.

(vii) The nomenclature of VAT / CST / Input tax refund will be Investment Promotion Subsidy.

[...]

(ix) Exemption from entry tax, VAT on capital goods, works contract tax, Octroi (if any) and other State levies. Wherever exemption cannot be given, it will be replaced by tax refund. The benefit in respect of capital goods and works contract tax will be limited to the investment period. These exemptions / refund will not be taken into account for calculating the ceiling of output VAT and CST refund.

4. The investment proposals seeking Ultra Mega Integrated Automobiles Projects status should be sent to the Government with a copy each to SIPCOT and Tamil Nadu Industrial Guidance & Export Promotion Bureau (Guidance). Each such proposal will be examined with reference to fulfilment of eligibility criteria, and order will be issued by the Government. At the end of the investment period, SIPCOT shall verify whether the investment in eligible fixed assets and in intangibles has actually been made and the projects have fulfilled all the criteria required for Ultra Mega Integrated Automobile Projects.

127. Subsequently, on 26 March 2008, the GoTN issued Government Order 80 (“GO 80”) establishing the procedure for processing the incentives under GO 52.<sup>125</sup> GO 80 provides in relevant part:<sup>126</sup>

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<sup>123</sup> C-010, Clause 3(1). See also Statement of Claim, ¶ 36; Counter-Memorial, ¶ 29.

<sup>124</sup> C-10, Clauses 3(2), 4.

<sup>125</sup> R-4, Clause 1. See also Counter-Memorial, ¶ 29.

1. [...] Certain companies who have executed MoU with the Government of Tamil Nadu have requested the Government to issue notification, so as to enable to get refund/soft loan against the taxes paid by them for the period from January 2007 till date. It is necessary to formulate a mechanism to operate the Tax incentive package in the VAT regime. [...]

[...]

3. The Government, after careful examination, orders as follows:

a) To make the existing schemes of incentives to the Industry compatible with VAT regime, wherever, the unit was availing exemption or waiver the unit would be paid an Investment promotion subsidy equivalent to the amount of VAT paid subject to sliding scale and other conditions, wherever applicable. Similarly, wherever the unit was availing deferral under the scheme the unit would be paid Investment Promotion soft loan equivalent to the amount of VAT paid subject to sliding scale and other conditions, wherever applicable. These payments will be made from the budget of Industries Department.

b) Formation of a cell especially for the purpose of collecting the taxes and issuing necessary certificates for refund and soft loan for MOU companies. The cell will consist of one Deputy Commissioner, one Assistant Commissioner, two Commercial Taxes Officers and three system Operators. The cell would operate in SIPCOT and the officials would be under the control of Commissioner of Commercial Taxes.

c) Necessary certificate for making refund and soft loan to the MOU companies will be issued by this cell, after receiving tax from MOU companies.

128. These government orders thus created a three-tier structure with different investment incentive schemes applied to different sizes of investment, namely: (i) those below Rs. 1,500 crores; (ii) those between Rs. 1,500 crores and 4,000 crores (Super Mega Projects); and (iii) those greater than Rs. 4,000 crores (Ultra Mega Integrated Automobile Projects).<sup>127</sup>

### **3. Nissan's Investment in India and the Investment Incentives Scheme under the 2008 MoU**

129. Prior to Nissan's involvement in the project in Tamil Nadu, in mid-2006, Renault and Mahindra & Mahindra Ltd. ("M&M") were exploring a joint venture project to develop a car production facility in India (the "**India 2 Project**").<sup>128</sup> In October 2006, Nissan approached Renault and M&M with a view to join the India 2 Project, and its participation was approved on 30 October 2006.<sup>129</sup> Following an evaluation of different sites across India, in December 2006, Renault, M&M, and Nissan (the "**M&M Consortium**") decided, in principle, to proceed with a site in Chennai, Tamil Nadu on the basis, *inter alia*, of the GoTN's incentive proposals in relation to their investments.<sup>130</sup>

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<sup>126</sup> **R-4**, Clauses 1, 3(a)-(c).

<sup>127</sup> Statement of Claim, ¶ 37.

<sup>128</sup> Statement of Claim, ¶ 28 referring to Witness Statement of Mr. Mark Nassif, 1 February 2017, ¶ 3.1 ("**Nassif Statement**").

<sup>129</sup> Statement of Claim, ¶ 28 referring to Nassif Statement, ¶¶ 3.2, 3.5.

<sup>130</sup> Statement of Claim, ¶¶ 31-33 referring to Nassif Statement, ¶¶ 4.4, 4.6-4.10.

130. On 26 February 2007, the M&M Consortium entered into a memorandum of understanding with the GoTN with respect to the former's investment in Tamil Nadu (the "2007 MoU").<sup>131</sup> On 27 July 2007, the GoTN issued Government Order 220 ("GO 220") implementing the incentives under GO 52 to the M&M Consortium in relation to its project in Tamil Nadu.<sup>132</sup>
131. In early October 2007, owing to disagreements between M&M and the remaining members of the M&M Consortium relating to key areas of operation, M&M decided to "defer its investment."<sup>133</sup> As a result, pursuant to the terms of the 2007 MoU, the remaining members and the GoTN commenced negotiations for a new memorandum of understanding to "finalize the support package."<sup>134</sup> On 22 February 2008, M&M formally left the project,<sup>135</sup> and Nissan, Renault, and the GoTN entered into a second memorandum of understanding, the 2008 MoU.<sup>136</sup>
132. Under the 2008 MoU, the R&N Consortium agreed to "establish[] the proposed integrated automobile project [...] with an annual rated capacity of 400,000 vehicles with an Eligible Investment of not less than Rs 4,500 crores" (the "**Eligible Investment**") in order to qualify "to be classified as 'Ultra Mega Integrated Automobile Project' and [qualify] for a package of support as per this New Policy."<sup>137</sup> This "package of support" referred to in the MoU entitles the R&N Consortium to a scheme of incentives for its investment in Tamil Nadu, namely, the Investment Incentives Scheme. As detailed in the Schedule to the MoU, the Investment Incentives Scheme provided the R&N Consortium with, *inter alia*, fiscal incentives, as well as incentives related to the procurement of land, power, and water supplies.<sup>138</sup> According to Nissan, the incentives offered by the GoTN under the 2008 MoU "were intended to, and did, induce the R&N Consortium to invest in Tamil Nadu."<sup>139</sup>
133. On 2 June 2008, the GoTN passed Government Order 124 ("GO 124") detailing and giving effect to the package of support to the R&N Consortium promised in the 2008 MoU.<sup>140</sup> GO 124 provides in relevant part:

(9) Fiscal Incentives:

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<sup>131</sup> Statement of Claim, ¶ 34 referring to C-003.

<sup>132</sup> Counter-Memorial, ¶ 34 referring to R-3.

<sup>133</sup> Statement of Claim, ¶ 43.

<sup>134</sup> Statement of Claim, ¶¶ 44-45.

<sup>135</sup> Statement of Claim, ¶ 47 referring to C-006.

<sup>136</sup> Statement of Claim, ¶ 47.

<sup>137</sup> C-005, Schedule, Clause M.3.

<sup>138</sup> C-005, Schedule, Clauses A-C, G, M.

<sup>139</sup> Statement of Claim, ¶¶ 50-52.

<sup>140</sup> Statement of Claim, ¶ 53 referring to C-012; Counter-Memorial, ¶ 35.

(a) **Stamp Duty Exemption:** Full exemption will be given towards stamp duty, transfer duty if any payable by R&N Consortium or any of the consortium members for the land transfer during the Investment period.

[...]

(c) **Output VAT Refund:** R&N Consortium and its members will be given gross output VAT and CST refund (without any set off for Input VAT as it is refunded separately) on output sold In Tamil Nadu both in case of vehicles manufactured in the proposed project in Tamil Nadu as well as for vehicles manufactured outside Tamil Nadu (including imports) in the form of Investment Promotion Subsidy [...]

(d) **Refund of Input VAT on building materials:** The input VAT paid by R&N Consortium and any of its members on cement, steel and roof sheets directly purchased by R&N Consortium within Tamil Nadu during the Investment period for use in the construction or the building or the project will be refunded. This refund will be eligible only if the building material purchased is not a subject matter or Output VAT related Incentives to its manufacturer or supplier. This refund form part of the overall ceiling at 115% of the Eligible Investment. There will be no set-off benefit available for the input tax paid on building material, which are refunded.

(e) **Refund of VAT on Input purchases:** R&N Consortium will be given Input VAT refund irrespective of whether the vehicles are sold within or outside Tamil Nadu for the period co-terminus with gross output VAT and CST refund without any set off benefit in the output VAT and CST. Refund on Inputs purchased will be eligible only if the commodity purchased is not a subject matter of Output VAT related Incentives to its manufacturer or supplier.

(f) **Refund of VAT on Capital Goods purchases:** VAT paid by R&N Consortium on capital goods purchased within Tamil Nadu during Investment period will be refunded to R&N Consortium. No set-off benefit for this VAT refund will be available. This refund will be eligible only if the capital goods purchased is not a subject matter of Output VAT related Incentives to its manufacturer or supplier.

(g) **Refund of Works Contract Tax:** The works contract tax paid by R&N Consortium within Tamil Nadu during Investment period will be refunded to R&N Consortium.

(h) **Refund of Entry Tax:** Entry tax if actually paid by the R&N Consortium will be refunded (i) on capital goods manufactured outside Tamil Nadu, anywhere in India or Imported from outside India during the Investment period (ii) on parts and components used for manufacturing in the project in Tamil Nadu, co-terminus with the period of Input VAT refund (iii) on vehicles manufactured by R&N Consortium outside Tamil Nadu but within India for sale in Tamil Nadu, co-terminus with the period of Gross VAT refund for “outside vehicles” and (iv) on vehicles imported by Renault and Nissan for sale in Tamil Nadu, co-terminus with the period of Gross VAT refund for “imported vehicles”. Since entry tax is refunded, there will not be any set-off benefit for entry tax paid.

134. On 12 January 2009, the GoTN issued Government Order 5 (“GO 5”) to, *inter alia*, provide for the mechanism for disbursement of the investment incentives.<sup>141</sup> In particular, Section B(1)(b) of GO 5 provides:

Release of Soft Loan or Investment Promotion Subsidy will be done on a monthly basis with reference to the balance available under the overall cap and period as applicable. The first release shall take place only after the first Eligibility Certificate is issued to the Project by SIPCOT and the charge on assets is created. The Project

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<sup>141</sup> Statement of Claim, ¶ 92, referring to C-013; Counter-Memorial, ¶ 35.



should pay VAT /CST as applicable to Commercial Taxes Department and obtain a certificate for having made such payment from Special Cell of Commercial Taxes Department every month. Commercial Taxes Department will issue the certificate indicating the amount eligible for refund/loan in terms of the G.O. sanctioning the package of assistance normally within 10 working days from the date of payment of taxes by the Project. This certificate should not simply state the tax remitted but should indicate the amount eligible as incentive after deducting the ineligible amounts. The Project can apply to SIPCOT for release of Soft loan or Investment Promotion Subsidy with original copies of such certificates. SIPCOT will then release Soft Loan or Investment Promotion subsidy, as applicable and eligible in the Package, within 15 working days from the date of receipt of such application and certificate, subject to availability of funds.

#### **4. The “Claimed Incentives” At Issue in This Case**

135. This case concerns only a subset of the “Fiscal Incentives” described in the 2008 MoU, all of which are detailed in Section M of the Schedule to the 2008 MoU.<sup>142</sup> Specifically, Nissan’s claims arise out of GoTN’s alleged failure to pay three types of incentives (collectively the “**Claimed Incentives**”): (i) the Output VAT and/or CST Incentives; (ii) the Input VAT Incentives; and (iii) the Capital Goods VAT Incentives.<sup>143</sup> These are described further below.

*(a) Output VAT and/or CST Incentives*

136. Clause M.4.1(a) of the Schedule to the 2008 MoU provides for the R&N Consortium’s entitlement to Output VAT and/or CST Incentives as follows:<sup>144</sup>

GoTN shall provide a refund of Gross Output VAT + CST paid by R&N Consortium and its members (without set-off of input VAT as it is refunded separately) on output sold within Tamil Nadu in the form of Investment Promotion Subsidy to the R&N Consortium [...]

137. More precisely, this category of incentives entitles the R&N Consortium to seek:

- a. A refund of Output VAT paid on the sale of vehicles manufactured by the R&N Consortium within Tamil Nadu and/or CST paid in respect of the sale of such vehicles outside of Tamil Nadu (Clause M.4.1(a) of the Schedule to the 2008 MoU);
- b. A refund of Output VAT paid in relation to the sale of spare parts manufactured by the R&N Consortium in Tamil Nadu and/or CST paid in the sale of such spare parts outside Tamil Nadu (Clause M.4.3);
- c. A refund of Output VAT paid in Tamil Nadu in respect of the sale of outside and imported vehicles manufactured by the R&N Consortium outside Tamil Nadu, subject to such claim

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<sup>142</sup> Statement of Claim, ¶ 65 referring to **C-005**, Schedule, Clause M.

<sup>143</sup> Statement of Claim, ¶ 66.

<sup>144</sup> **C-005**, Schedule, Clause M.4.1(a).

being limited to no more than 30% of the total Eligible Investment (Clauses M.4.2 and M.4.4); and

- d. A refund of Input VAT paid on the purchase of building materials within Tamil Nadu and used for the construction of the facility pursuant to the investment Project (Clause M.8).

138. These incentives were to be available from the date of commercial production of vehicles for the Project, namely, the date on which the first vehicle is produced in the Chennai manufacturing facility.<sup>145</sup>
139. The Output VAT and/or CST Incentives are subject to a ceiling, as provided in Clause M.4.1(a) of the Schedule to the 2008 MoU. This ceiling is reached at the earlier of either (i) when 21 years have passed since the date of commercial production; or (ii) when the total amount of Gross Output VAT+CST and Input VAT incentives accorded to the R&N Consortium reaches 115% of its Eligible Investment.<sup>146</sup>
140. In addition, Clause M.4.1(d) requires that the Output VAT and/or CST Incentives may not exceed the amount of actual Eligible Investments made by the R&N Consortium.<sup>147</sup> However, pursuant to Clause 2.5 of the 2008 MoU, if the R&N Consortium made Eligible Investments in excess of its commitment of Rs. 4,500 crores, it would be entitled to benefits which correspond to the level of the actual investments without any upper limit.<sup>148</sup>

*(b) Input VAT Incentives*

141. Under Clause M.5(iii) of the Schedule to the 2008 MoU, the R&N Consortium is entitled to Input VAT Incentives, which are in the form of a “refund of VAT paid by the R&N Consortium or any of the consortium members on all inputs, raw materials, consumables, packing materials, components, spare parts, accessories purchased within Tamil Nadu and used for manufacturing in the Project.”<sup>149</sup> These incentives were calculated by reference to the gross amount of Input VAT and not set off against Output VAT or CST payable.<sup>150</sup>
142. The R&N Consortium could claim Input VAT Incentives whether or not the final vehicles and spare parts that were manufactured using the above materials were sold within or outside Tamil Nadu, or

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<sup>145</sup> Statement of Claim, ¶ 72 referring to C-005, Schedule, Clause M.4.1(b).

<sup>146</sup> Statement of Claim, ¶ 73 referring to C-005, Schedule, Clause M.4.1(a).

<sup>147</sup> Statement of Claim, ¶ 75 referring to C-005, Schedule, Clause M.4.1(d). See also C-012, Clause 5(9)(c)(iii); C-013, Clause B(i)(b).

<sup>148</sup> Statement of Claim, ¶ 76 citing C-005, Clause 2.5.

<sup>149</sup> Statement of Claim, ¶ 77 citing C-005, Schedule, Clause M(5)(iii).

<sup>150</sup> Statement of Claim, ¶ 79 referring to C-005, Schedule, Clauses M(5)(ii) and M(5)(iii).

transferred to a branch outside of Tamil Nadu for sale.<sup>151</sup> Nevertheless, under GO 124, such incentives were only available if the supplier of the relevant materials supplied to the R&N Consortium had not itself claimed Output VAT and/or CST Incentives on the goods supplied under any other investment incentives scheme as provided for under GO 43 and GO 1.<sup>152</sup> In such case, the R&N Consortium would only be entitled to claim refunds under the ITC scheme.

143. Similar to the Output VAT and/or CST Incentives, these Input VAT Incentives were available from the date of commercial production of vehicles for the Project.<sup>153</sup> While the latter incentives are not subject to the same ceiling as the former incentives,<sup>154</sup> they are “*co-terminus*” in the sense that the Input VAT Incentives “run [parallel] and concurrently with the [Output VAT+CST Incentive].<sup>155</sup> In effect, the R&N Consortium’s entitlement to both types of Incentives would cease at the same time.<sup>156</sup>

*(c) Capital Goods VAT Incentives*

144. The Capital Goods VAT Incentives are defined by Clause M.6 of the Schedule to the 2008 MoU as refund of VAT paid by the R&N Consortium “on capital goods purchased within Tamil Nadu during the Investment Period for use in the Project.”<sup>157</sup> For this purpose, ‘capital goods’ are defined as “equipment and machinery purchased and used for establishment of the Project.”<sup>158</sup>
145. These Incentives were subject to the same restriction under GO 124 as the Input VAT Incentives, namely that they were available to the R&N Consortium only if the supplier of the relevant capital goods had not itself claimed Output VAT and/or CST Incentives on the same capital goods under any other investment incentives scheme as provided for under GO 43 and GO 1.<sup>159</sup> In that scenario, the R&N Consortium would only be able to claim such Input VAT under the ITC scheme.<sup>160</sup>

## **5. The Mechanism for Disbursement of the Claimed Incentives**

146. Under GO 5 and GO 124, the mechanism for disbursement of the incentives is comprised of two processes: (i) application for the paperwork to demonstrate the R&N Consortium’s entitlement to the

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<sup>151</sup> Statement of Claim, ¶ 78 referring to C-005, Schedule, Clause M(5)(iii).

<sup>152</sup> Statement of Claim, ¶ 80 citing C-012, Clause 9.

<sup>153</sup> Statement of Claim, ¶ 81 referring to C-005, Schedule, Clause M(5)(iii).

<sup>154</sup> Statement of Claim, ¶ 82 referring to C-005, Schedule, Clause M(5)(iii)(b).

<sup>155</sup> Statement of Claim, ¶ 83 citing C-005, Schedule, Clause M(5)(iii)(a).

<sup>156</sup> Statement of Claim, ¶ 83 citing C-005, Schedule, Clause M(5)(iii)(a).

<sup>157</sup> Statement of Claim, ¶ 86 citing C-005, Schedule, Clause M(6).

<sup>158</sup> Statement of Claim, ¶ 87 citing C-005, Schedule, Clause M.6(a).

<sup>159</sup> Statement of Claim, ¶ 89 citing C-012, Clause 9(f).

<sup>160</sup> Statement of Claim, ¶ 89.

incentives under the 2008 MoU; and (ii) the actual disbursement process.<sup>161</sup>

147. In relation to the first process, four steps are envisaged. First, the R&N Consortium would make an application to the State Industries Promotion Corporation of Tamil Nadu (“SIPCOT”), an agency under the aegis of the Industries Department. SIPCOT would verify and determine the amount of actual Eligible Investments made by the R&N Consortium at the time, and thereby, the current Output VAT and/or CST Incentives ceiling (*i.e.*, 115% of the actual Eligible Investments). SIPCOT would then issue an eligibility certificate (“**Interim EC**”) which stipulated these figures, and ensured that, in accordance with the 2008 MoU, the amount of incentives disbursed to the R&N Consortium did not exceed this ceiling.<sup>162</sup> Under the terms of GO 5, SIPCOT was required to issue the Interim EC within 45 days of the application.<sup>163</sup> Second, as prescribed by the Interim EC, the R&N Consortium would enter into a “deed of agreement” with and provide certain deeds of corporate guarantee in favor of SIPCOT.<sup>164</sup> Third, the R&N Consortium would apply for the disbursement of investment incentives as detailed in the Interim EC.<sup>165</sup> The final step is the application for the final eligibility certificate (the “**Final EC**”) at the end of the seven-year Investment Period, which covers “the entirety of the Eligible Investments in that period.”<sup>166</sup>
148. With respect to the second process (the actual disbursements), there are also four steps involved. First, the R&N Consortium entities were required to pay applicable taxes to the Commercial Taxes Department of the GoTN.<sup>167</sup> Second, they would apply to a “Special Cell of the Commercial Taxes Department” (the “**MOU Cell**”) for a certificate (“**MOU Cell Certificate**”).<sup>168</sup> According to GO 5, this certificate “should not simply state the tax remitted but should indicate the amount eligible as an incentive after deducting the ineligible amounts.”<sup>169</sup> Third, following necessary assessment and verification, the MOU Cell would issue an MOU Cell Certificate within ten days from the date of payment of taxes by the relevant R&N Consortium entity.<sup>170</sup> Finally, upon receipt of the application for disbursement of investment incentives with an original copy of the MOU Cell Certificate, SIPCOT was required to make payment to the R&N Consortium entity within fifteen working days.<sup>171</sup>

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<sup>161</sup> Statement of Claim, ¶ 94.

<sup>162</sup> Statement of Claim, ¶ 95(a) *referring to* Witness Statement of Mr. Rakesh Kocchar, 22 February 2017, ¶ 3.9 (“**Kochhar Statement**”).

<sup>163</sup> Statement of Claim, ¶ 95(a) *citing* C-013, Clause B(i)(c)(1).

<sup>164</sup> Statement of Claim, ¶ 95(b) *referring to* C-020, Clause 7; C-021, Clause 7.

<sup>165</sup> Statement of Claim, ¶ 95(c) *referring to* C-013, Clause B(i)(b); Kochhar Statement, ¶ 3.9.

<sup>166</sup> Statement of Claim, ¶ 95(d) *referring to* C-013, Clauses B(i), B(i)(c)(2).

<sup>167</sup> Statement of Claim, ¶ 96(a) *referring to* Kochhar Statement, ¶ 3.10.

<sup>168</sup> Statement of Claim, ¶ 96(b) *referring to* Kochhar Statement, ¶ 3.10; C-013, Clause B(i)(b).

<sup>169</sup> C-013, Clause B(i)(b).

<sup>170</sup> Statement of Claim, ¶ 96(c) *referring to* C-013, Clause B(i)(b).

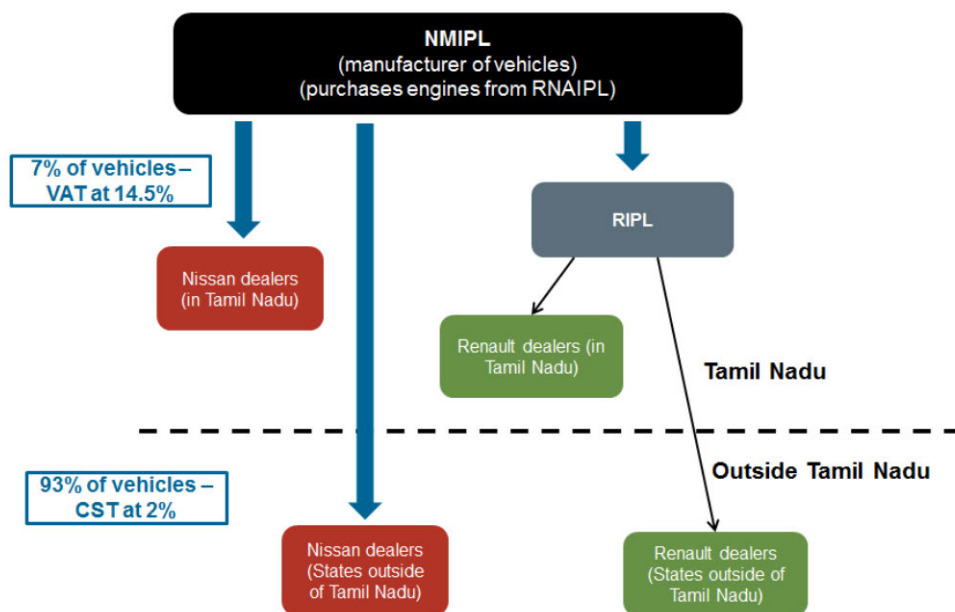
<sup>171</sup> Statement of Claim, ¶ 96(d) *referring to* C-013, Clause B(i)(b).

149. As a general timing requirement under the 2008 MoU and the GO 124, the GoTN was obliged to disburse payment of investment incentives to the R&N Consortium “on best efforts basis within one month from the date of filing application (with proof of payment of such tax) for refund by R&N Consortium.”<sup>172</sup>

## 6. The R&N Consortium’s Change in its “Business Scheme”

150. From its inception until 31 March 2012, the R&N Consortium implemented a business scheme (“**Initial Business Scheme**”) which involved “RNAIPL manufacturing engines and NMIPL purchasing those engines and manufacturing the complete vehicles.”<sup>173</sup> This manufacturing process produced both Nissan-branded and Renault-branded vehicles. Under this business scheme, Nissan-branded complete vehicles would be exported, or sold by NMIPL to dealers in Tamil Nadu (approximately 7%) or in other States (approximately 93%),<sup>174</sup> while Renault-branded vehicles “were on-sold by NMIPL to RIPL in Tamil Nadu.”<sup>175</sup> The tax consequences of this scheme were that the 7% intra-State sales would attract 14.5% VAT whereas the 93% inter-state sales would attract 2% CST.<sup>176</sup> Therefore, the average tax that the sales of Nissan-branded vehicle would attract is 2.9%.<sup>177</sup>

151. The operation of the Initial Business Scheme is demonstrated in the diagram below:<sup>178</sup>



<sup>172</sup> Statement of Claim, ¶ 97 citing C-005, Schedule, Clause 12(a).

<sup>173</sup> Statement of Claim, ¶ 98(a); Counter-Memorial, ¶ 44.

<sup>174</sup> Statement of Claim, ¶ 98(a); Counter-Memorial, ¶ 44.

<sup>175</sup> Statement of Claim, ¶ 98(a); Counter-Memorial, ¶ 44.

<sup>176</sup> Counter-Memorial, ¶ 45.

<sup>177</sup> Counter-Memorial, ¶ 45.

<sup>178</sup> See Statement of Claim, p. 28, Figure 3.

152. As noted above, through the 2008 MoU, the GoTN had agreed to relieve the R&N Consortium of the amounts of VAT and CST that it would owe in connection with its vehicle-manufacturing operation. The 2008 MoU provides in relevant part:

GOTN shall provide a refund of Gross Output VAT + CST paid by R&N Consortium and its members (without set-off of input VAT as it is refunded separately) on output sold within Tamil Nadu in the form of Investment Promotion Subsidy to the R&N Consortium up to a maximum period of twenty one years (from the Date of Commercial Production) or till the cumulative availment of the refund of the Gross Output VAT+CST and Input VAT on Building materials (as mentioned in clause 9 of the schedule below) reaches 115% of the Eligible Investment made within the Investment Period, whichever is earlier.<sup>179</sup>

153. India notes that under this provision, the refund ceiling would be hit upon satisfaction of either of the following two conditions: (i) the lapse of 21 years from the Date of Commercial Production; or (ii) the cumulative availment of refunds of Gross Output VAT+CST and Input VAT on Building materials reached 115% of the Eligible Investment made within the Investment Period.<sup>180</sup>
154. On 1 April 2012, the R&N Consortium implemented a new business scheme (the “**Amended Business Scheme**”).<sup>181</sup> Under this business scheme, both Nissan-branded and Renault-branded vehicles would be produced by RNAIPL,<sup>182</sup> while NMIPL and RIPL would act as sales and marketing companies of their respective branded vehicles.<sup>183</sup> Within the domestic market, RNAIPL would sell all Nissan-branded vehicles to NMIPL and Renault-branded vehicle to RIPL in Tamil Nadu (“**First Sale**”).<sup>184</sup> These companies “would then on-sell the vehicles to their respective dealers in Tamil Nadu or other States (“**Second Sale**”).<sup>185</sup>
155. With respect to Nissan-branded vehicles, because the First Sale involves the intra-State sales of 100% of vehicles, it would attract 14.5% VAT, instead of an average tax of 2.9% as under the Initial Business Scheme.<sup>186</sup> As a result of the Amended Business Scheme, the R&N Consortium therefore began paying significantly more taxes for the sale of Nissan-branded vehicles, and accordingly began claiming entitlement to more Output VAT/or CST Incentives under the 2008 MoU.<sup>187</sup> The consequence was that the rate at which the Gross Output VAT + CST accrued significantly increased, and accordingly the time within which the ceiling would be reached would be significantly

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<sup>179</sup> Counter-Memorial, ¶ 46; C-005, Schedule, Section (M), Clause 4.1(a)(1).

<sup>180</sup> Counter-Memorial, ¶ 47.

<sup>181</sup> Statement of Claim, ¶ 98.

<sup>182</sup> Statement of Claim, ¶ 98(b); Counter-Memorial, ¶ 48.

<sup>183</sup> Statement of Claim, ¶ 98(b); Counter-Memorial, ¶ 48.

<sup>184</sup> Statement of Claim, ¶ 98(b); Counter-Memorial, ¶ 48.

<sup>185</sup> Statement of Claim, ¶ 98(b); Counter-Memorial, ¶ 48.

<sup>186</sup> Statement of Claim, ¶ 98(b)(i); Counter-Memorial, ¶ 50.

<sup>187</sup> Statement of Claim, ¶ 98(b)(i); Counter-Memorial, ¶ 50.

shortened.<sup>188</sup>

156. India sees these “accelerated refunds” as a “drastic consequence.” India explains that the GoTN chose the 21-year period for the refund ceiling under the 2008 MoU on the basis of its calculation that it would take that many years for the ceiling to be met.<sup>189</sup> The purpose of this period, therefore, was to ensure long-term benefits to the State of Tamil Nadu and to enable the GoTN to arrange its budget to “accommodate the payment of the tax refunds.”<sup>190</sup> However, in India’s view, the way in which the Amended Business Scheme operated “defeated entirely the GoTN’s calculations and expectations.”<sup>191</sup>
157. Nissan, for its part, rejects the “purported link between the 21-year time limitation and the overcall cap of the Investment Incentives,” on the basis that “it is not supported by the wording of [the 2008 MoU].”<sup>192</sup> Furthermore, Nissan points out, the economic benefits that the State of Tamil Nadu was to receive are linked to the R&N Consortium’s commitment to invest, rather than to the rate at which the investment incentives would be disbursed.<sup>193</sup>
158. In addition to the “accelerated refund” problem, India alleges that the Amended Business Scheme created a “double benefit problem,” resulting from the fact that the investment scheme under the 2008 MoU co-exists with the ITC scheme under Section 19 of the TN VAT Act.<sup>194</sup> For the First Sale under the Amended Business Scheme, NMIPL and RIPL would have to pay an Input VAT for the purchase of the vehicles from RNAIPL.<sup>195</sup> This amount is exactly the same as the amount of Output VAT that RNAIPL would have to pay for the sale of the same vehicles within Tamil Nadu, *i.e.* 14.5%.<sup>196</sup> However, for the Second Sale, because 93% of the vehicles would be sold to dealers in other States, attracting a 2% CST tax rather than a 14.5% Output VAT tax, on average NMIPL and RIPL would have to pay only 2.9% in combined Output VAT and CST.<sup>197</sup> Meanwhile, the difference between the Input VAT in the First Sale and the Output VAT in the Second Sale generates an accumulation of unutilized ITC which are entitled to refunds under the TN VAT Act.<sup>198</sup>

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<sup>188</sup> Counter-Memorial, ¶ 52.

<sup>189</sup> Counter-Memorial, ¶ 47.

<sup>190</sup> Counter-Memorial, ¶ 47.

<sup>191</sup> Counter-Memorial, ¶ 52.

<sup>192</sup> Reply, ¶ 36.

<sup>193</sup> Reply, ¶ 36.

<sup>194</sup> Counter-Memorial, ¶ 53.

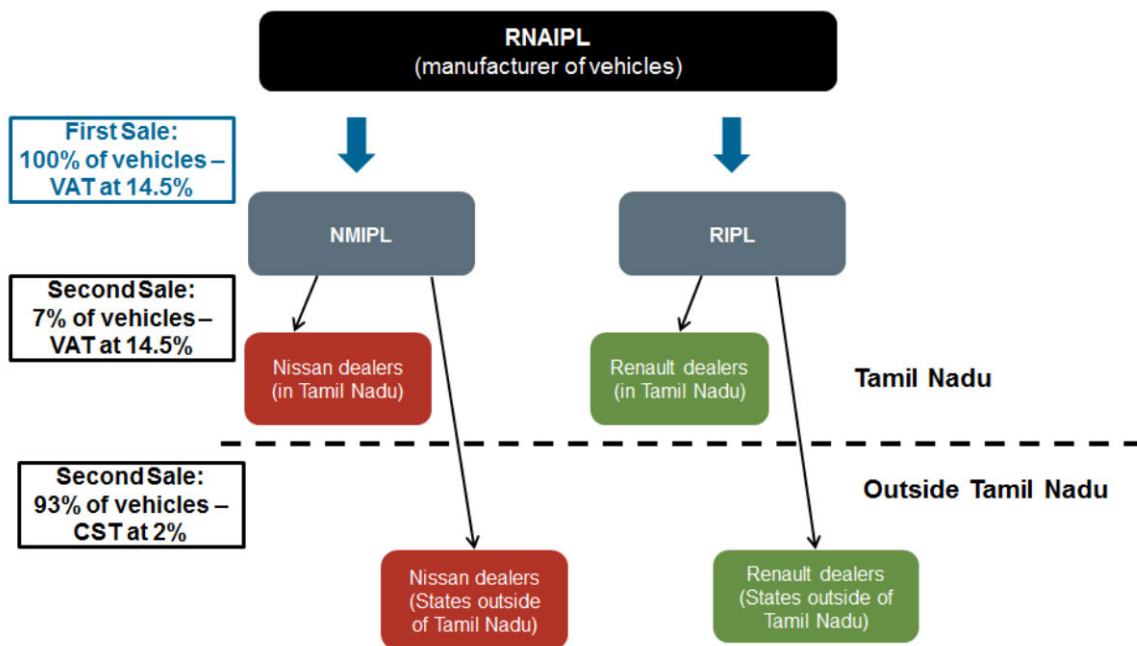
<sup>195</sup> Statement of Claim, ¶ 98(b)(ii).

<sup>196</sup> Counter-Memorial, ¶ 53.

<sup>197</sup> Counter-Memorial, ¶ 53.

<sup>198</sup> Statement of Claim, ¶ 98(b)(ii).

159. The operation of the Amended Business Scheme is illustrated in the below diagram:<sup>199</sup>



160. From India’s perspective, this operation creates a problem because NMIPL could claim excess ITC under the TN VAT Act, while RNAIPL could claim “the very same amount for the very same tax paid under the 2008 MoU.”<sup>200</sup> As NMIPL and RNAIPL are both part of the R&N Consortium, the result is that the R&N Consortium *taken as a whole* allegedly would receive double refunds for the same tax paid.

161. Nissan, however, considers that the “double benefit” problem as articulated by India is “misguided.”<sup>201</sup> According to Nissan, the ITC scheme under the TN VAT Act and the Investment Incentives Scheme under the 2008 MoU are completely separate.<sup>202</sup> The former is aimed at refunding a dealer’s unutilized ITCs, in circumstances where its output tax liability is lower than its input tax liability.<sup>203</sup> The latter, on the other hand, is calculated “by reference to the gross amount of output VAT and input VAT paid.”<sup>204</sup> Nissan emphasizes that NMIPL and RIPL were subject to the ITC scheme, not the Investment Incentives Scheme. Indeed, Nissan points out, NMIPL and RIPL could not claim Input VAT Incentives under the 2008 MoU because such incentives were only available if their supplier had not claimed Output VAT Incentives.<sup>205</sup> Because RNAIPL was already claiming Output VAT

<sup>199</sup> See Statement of Claim, p. 29, Figure 4.

<sup>200</sup> Counter-Memorial, ¶ 53.

<sup>201</sup> Reply, ¶ 37.

<sup>202</sup> Reply, ¶ 37.

<sup>203</sup> Reply, ¶ 214.

<sup>204</sup> Reply, ¶ 215.

<sup>205</sup> Reply, ¶ 216.



Incentives, NMIPL and RIPL could only claim ITCs under the TN VAT Act.<sup>206</sup> In other words, Nissan stresses, NMIPL and RIPL are not claiming the same tax as RNAIPL.

162. Nissan also contends that prior to implementation of the Amended Business Scheme, the R&N Consortium consulted with the GoTN and sought its approval.<sup>207</sup> This course of action, Nissan insists, was followed “out of abundance of caution” but was “not required under the terms of the 2008 MoU.”<sup>208</sup> In Nissan’s account, after initial consultation as to the possible revision of the Initial Business Scheme, on 14 February 2011 and 7 March 2011 respectively, the R&N Consortium received indication from Mr. Velmurugan, Executive Vice Chairman of the Guidance Bureau, and Mr. Ranjan, the Secretary of the Industries Department, that the Amended Business Scheme could receive approval from the GoTN.<sup>209</sup> Nissan further recalls that at a meeting on 11 April 2011, the R&N Consortium was informed that the operation of the ITC scheme in respect of NMIPL and RIPL would raise no issue under the Amended Business Scheme.<sup>210</sup> Finally, according to Nissan, on 12 September 2011, the R&N Consortium received confirmation from the Joint Secretary to the Industries Department that the Amended Business Scheme was “in line with the 2008 MoU,” and therefore, no approval from the GoTN would be required.<sup>211</sup> On this basis, the R&N Consortium proceeded to the implementation of the new scheme, effective 1 April 2012.<sup>212</sup>

#### 7. The GoTN’s Official Reaction to the Amended Business Scheme

163. On 2 March 2015, almost three years after the R&N Consortium’s implementation of the Amended Business Scheme and allegedly in response to the problems that it created, the GoTN issued Government Order 40 (“GO 40”) as follows:

In order to curtail the members of R&N Consortium from deriving double benefits from the Government due to adoption of New Business Model w.e.f. 1.4.2012, the availment of ITC will be restricted only to the extent of aggregate of Output tax payable on the sale of such goods, inside the State and in the course of Inter State trade or commerce for set off. The excess/balance input tax credit remaining unadjusted on their credit will be made to lapse/forfeit.<sup>213</sup>

164. On 10 March 2015, the GoTN further issued Government Order 53 (“GO 53”), which provides in relevant part:

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<sup>206</sup> Reply, ¶ 216.

<sup>207</sup> Statement of Claim, ¶ 101; Reply, ¶ 35.

<sup>208</sup> Statement of Claim, ¶ 101; Reply, ¶ 35.

<sup>209</sup> Statement of Claim, ¶ 101(b).

<sup>210</sup> Statement of Claim, ¶ 101(c).

<sup>211</sup> Statement of Claim, ¶ 101(d).

<sup>212</sup> Statement of Claim, ¶ 101(e).

<sup>213</sup> Counter-Memorial, ¶ 55 citing R-8, ¶ 8(j)(vi).

Therefore, the marketing companies proposed by R&N Consortium i.e., Nissan Motors India Private Limited and Renault India Private Limited shall be allowed to avail Input Tax Credit only to the extent of aggregate of Output tax payable on the sale of such goods, inside the State and in the course of Inter State trade or commerce for set-off. The excess/balance Input Tax Credit remaining unadjusted at their credit shall lapse/be forfeited.<sup>214</sup>

165. On 3 February 2016, the Legislative Assembly of Tamil Nadu amended the TN VAT Act as follows (the “**TN VAT Act Amendment**”):

2. In section 19 [of the Tamil Nadu Value Added Tax Act, 2006,] after sub-section (20), the [following] sub-section (21) [shall be added, namely:]

(21) Notwithstanding anything contained in sub-section (2), in the case of purchase of goods made within the State from a registered dealer who has availed fiscal incentive in the form of refund of gross or net output tax as Industrial Investment Promotion subsidy or soft loan sanctioned by the Government, input tax credit shall be allowed only to the extent of aggregate of output tax paid on the re-sale of such goods and the sale of goods manufactured out of such goods, within the State or in the course of inter-State trade or commerce.<sup>215</sup>

166. In July 2016, NMIPL and RIPL sought to challenge these legal instruments through several actions before the Madras High Court (Writ Petition No. 23224, Writ Petition No. 23225 and Writ Petition Nos. 26034 to 26037) (collectively the “**Writ Petitions**”).<sup>216</sup> The Writ Petitions allege that issuance of GO 40, GO 53, and the TN VAT Act Amendment violate various provisions of the Indian Constitution because they are unreasonable, arbitrary, *ultra vires*, against principles of law and apply retrospectively. NMIPL and RIPL seek from the Madras High Court, *inter alia*, a declaration that the TN VAT Act Amendment is *ultra vires*, an order quashing GO 53 and GO 40, or an interim stay of their operation.<sup>217</sup> These proceedings are pending and have not been withdrawn.

## **8. Non-Payment of the Claimed Incentives**

167. Meanwhile, according to Nissan, the GoTN became chronically late in paying, and eventually failed to pay at all, a number of the Claimed Incentives to which Nissan and the R&N Consortium were entitled under the 2008 MoU. In its Statement of Claim dated 23 February 2017, Nissan contended that there was then an outstanding amount of INR 2,057.3 crores that had been payable to Nissan for almost two years.<sup>218</sup> As discussed further below, Nissan alludes to the GoTN’s having been late in paying MoU Cell Certificates issued as far back as November 2012, but states that it is not pursuing in these proceedings any claim for accrued interest on those 2012 Certificates, each of which eventually was

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<sup>214</sup> Counter-Memorial, ¶ 56 *citing* **C-014**, Clause 6(ii).

<sup>215</sup> Counter-Memorial, ¶ 57 *citing* **R-9**.

<sup>216</sup> **R-10, R-11, R-12**.

<sup>217</sup> *See* **R-10, R-11, R-12**.

<sup>218</sup> Statement of Claim, ¶ 15.

paid before Nissan commenced this arbitration.<sup>219</sup> Nissan instead pursues relief with respect to non-payment of a series of MOU Cell Certificates arising after February 2014.<sup>220</sup>

168. The Parties dispute whether and to what extent the GoTN's nonpayment of the Claimed Incentives was motivated by the same concerns about the Amended Business Scheme that were said to underlie the various official government acts in 2015 and 2016, including GO 40, GO 53 and the TN VAT Act Amendment. India suggests that the non-payment of the Claimed Incentives was part of the GoTN's broader reaction to concerns about the R&N Consortium obtaining double benefits as a result of its Amended Business Scheme.<sup>221</sup> Nissan disputes any rational linkage, noting *inter alia* that the GoTN had been consulted in advance about the Amended Business Scheme and had not objected to it;<sup>222</sup> that the GoTN continued to make substantial payments in 2012, 2013 and 2014 notwithstanding implementation of the Amended Business Scheme;<sup>223</sup> and that the GoTN also periodically promised, in the course of "key meetings and interactions that have taken place since April 2014," to make payments of outstanding incentives.<sup>224</sup> In Nissan's view, the GoTN's failure to pay the Claimed Incentives was therefore "clearly arbitrary" and without any "cogent or proper reason,"<sup>225</sup> and violated the express commitments the GoTN had made to the R&N Consortium for the specific purpose of inducing its investment.

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169. The background facts identified above provide context to India's four further objections. These objections are addressed below, in an order that appears logical for exposition, without reference to the sequence in which they were presented in the Parties' pleadings.

## VII. INDIA'S OBJECTION ABOUT NISSAN'S FAILURE TO WITHDRAW PROCEEDINGS INITIATED IN INDIA

170. India contends that the Tribunal lacks jurisdiction pursuant to Article 96(6) of the CEPA, because the pending Writ Petition proceedings before the Madras High Court filed by NMIPL and RIPL bar the present claims.

171. Article 96(6) of the CEPA follows Article 96(2), which provides as follows:

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<sup>219</sup> Reply, ¶¶ 131-132.

<sup>220</sup> Tr., 8 November 2018, 183:5-13, 206:11-22.

<sup>221</sup> Counter-Memorial, ¶ 84.

<sup>222</sup> Tr., 8 November 2018, 198:23-24.

<sup>223</sup> Tr., 8 November 2018, 197:13-17.

<sup>224</sup> Statement of Claim, ¶ 113.

<sup>225</sup> Statement of Claim, ¶ 14.

Nothing in this Article shall be construed so as to prevent an investor who is a party to an investment dispute (hereinafter referred to in this Article as “disputing investor”) from seeking settlement by domestic administrative or judicial fora of the Party that is the other party to the investment dispute (hereinafter referred to in this Article as “disputing Party”). However, in the event that the disputing investor has submitted the investment dispute for resolution under one of the international conciliations or arbitrations referred to in paragraph 4, no proceedings may be initiated by the disputing investor for the resolution of the investment dispute before courts of justice or administrative tribunals or agencies.

172. Article 96(6) then provides that “[n]o investment dispute may be submitted to international conciliation or arbitration [...] if the disputing investor has initiated any proceedings for the resolution of the investment dispute before courts of justice or administrative tribunals or agencies. However, in the event that those proceedings are withdrawn within 30 days from the date of filing the case, the disputing investor may submit the investment dispute to such international conciliations or arbitrations.” In other words, in circumstances where “the disputing investor” already has initiated local proceedings for resolution of the “investment dispute,” Article 96(6) of the CEPA permits it to switch to arbitration provided that the investor withdraws the local proceedings within 30 days after filing its CEPA case. India’s case is that by commencing the Writ Petition proceedings in the Madras High Court, but then failing to withdraw those proceedings within 30 days of filing this case, Nissan is barred from proceeding with this arbitration.
173. While both Parties agree that Articles 96(2) and 96(6) of the CEPA constitute fork-in-the-road provisions that prevent investors from initiating multiple proceedings for the resolution of the same investment dispute, they differ with respect to whether the “triple identity” or “fundamental basis” test should be applied to determine whether these provisions are triggered, and whether the requirements under each test have been met. India’s position is that the fundamental basis test should apply, and that in any event, the requirements of both the triple identity test and the fundamental basis test have been met. Nissan, by contrast, argues that the triple identity test should apply, but that in any event, the requirements of neither test have been met.
174. The Parties’ positions are set forth further below, followed by the Tribunal’s analysis.

**A. THE POSITIONS OF THE PARTIES**

**1. The Applicable Test**

*(a) India’s Position*

175. India submits that in order to determine whether the Madras High Court proceedings trigger the fork-in-the-road provision under Article 96(6) of the CEPA, the Tribunal should adopt the fundamental basis test and assess whether the claims brought in this arbitration and before the Madras High Court

“share the same fundamental basis.”<sup>226</sup>

176. First, it contends that the fundamental basis test is in line with recent practice of investment arbitration tribunals,<sup>227</sup> which are “transitioning away from [...] rigid tripartite criteria to the more pragmatic and conceptually sound fundamental basis test that seeks to identify whether the entitlements claimed in parallel proceedings share the same normative source.”<sup>228</sup> India cites *Pantechniki v. Albania*, *H&H Enterprises v. Egypt*, and *Supervision v. Costa Rica*,<sup>229</sup> which discarded the triple identity test to focus on whether the fundamental basis of the claims brought before them is “autonomous of claims to be heard elsewhere.”<sup>230</sup> India says this recent practice is consonant with the International Law Association’s 2006 recommendations on *lis pendens* and *res judicata* and arbitration, proposing that the term “parallel proceedings” be re-defined as proceedings “in which the parties and one or more of the issues are the same or substantially the same.”<sup>231</sup>
177. Second, in India’s view, Nissan has failed to distinguish the authorities India cited,<sup>232</sup> which do not (in India’s view) turn on fork-in-the-road language that meaningfully is different from Article 96(6) of the CEPA.<sup>233</sup> Indeed, the tribunal in *H&H Enterprises* did not focus on the precise language of the US-Egypt BIT “in reaching its conclusions as to the inappropriateness of the triple identity test,”<sup>234</sup> but rather rejected that test because “it would defeat the purpose of Article VII of the US-Egypt BIT” as well as the purpose of the treaty itself.<sup>235</sup> Likewise, the tribunal in *Chevron v. Ecuador* expressed doubts as to whether the triple identity test would be appropriate to “determine if it is the same ‘dispute’ that is being submitted to national courts and to the arbitration tribunal.”<sup>236</sup> In any event, India emphasizes, Nissan has failed to “address the shift in the jurisprudential curve triggered by the

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<sup>226</sup> Counter-Memorial, ¶¶ 173-74 citing *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award (6 May 2014), ¶¶ 367-368 (RLA-22) (“*H&H Enterprises*”); *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009), ¶ 67 (RLA-15) (“*Pantechniki*”); *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, UNCITRAL, Third Interim Award on Jurisdiction and Admissibility (27 February 2012), ¶ 4.75 (RLA-21) (“*Chevron v. Ecuador*”).

<sup>227</sup> Rejoinder, ¶ 164.

<sup>228</sup> Rejoinder, ¶ 163 citing *Pantechniki*, ¶ 62 (RLA-15); *Supervision y Control, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017), ¶ 310 (RLA-19) (“*Supervision*”); *H&H Enterprises*, ¶ 367 (RLA-22); Tr., 9 November 2018, 305:9-23.

<sup>229</sup> Rejoinder, ¶¶ 164-165 citing *Pantechniki*, ¶ 61 (RLA-15); *Supervision*, ¶ 308 (RLA-19); *H&H Enterprises*, ¶ 369 (RLA-22); Tr., 9 November 2018, 305:25-306:11, 307:3-12.

<sup>230</sup> Rejoinder, ¶ 164 citing *Pantechniki*, ¶ 61 (RLA-15).

<sup>231</sup> Rejoinder, ¶ 165 citing F. de Ly & A. Sheppard, “ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration”, 25(1) ARB. INT’L 83 (2009), p. 83 (RLA-64) (“*ILA Recommendations*”).

<sup>232</sup> Rejoinder, ¶¶ 166-167.

<sup>233</sup> Rejoinder, ¶ 170.

<sup>234</sup> Rejoinder, ¶ 168.

<sup>235</sup> Rejoinder, ¶ 168 citing *H&H Enterprises*, ¶ 367 (RLA-22); Tr., 9 November 2018, 305:24-25, 306:1-8.

<sup>236</sup> Rejoinder, ¶ 169 citing *Chevron v. Ecuador*, ¶ 4.77 (RLA-21); Tr., 9 November 2018, 306:20-25, 307:1-2.

awards in *Pantechniki* and *Supervision* or the academic scholarship highlighting the shortcomings of the triple identity test.”<sup>237</sup>

178. Third, India argues that the jurisprudential transition to the fundamental basis test is supported by the general rules of treaty interpretation contained in the VCLT.<sup>238</sup> According to India, Article 31(1)(1) of the VCLT, which requires that a “treaty shall be interpreted in good faith,” places an implicit obligation on the Tribunal not to interpret Article 96(6) of the CEPA in a manner that would “[deprive] it of any practical meaning.”<sup>239</sup> India insists that the triple identity test has precisely this effect because it prioritizes “formal procedural constraints of identity over the overlapping substance of two parallel proceedings.”<sup>240</sup> In a globalized economy, India argues, such “procedural formalities may occasionally protect [...] an abuse of process by one of the parties” and “fail[] to mitigate the risk of parallel proceedings.”<sup>241</sup> This shortcoming of the triple identity test, India points out, was highlighted by the tribunal in *Chevron v. Ecuador*, which noted that “[a] strict application of the triple identity test would deprive the fork-in-the-road provision of all or most of its practical effect.”<sup>242</sup>
179. India rejects Nissan’s claim that Article 96(6) of the CEPA, which provides that it applies only if the “disputing investor has initiated any [local] proceedings for the resolution of the investment dispute,”<sup>243</sup> actually requires that the entities initiating the local and arbitral proceedings, respectively, be identical.<sup>244</sup> India argues that in order to prevent the misuse of the intricacies of corporate legal personality, “international arbitral practice has developed an ‘economic approach’ under which strict legal distinctions – even between legally distinct corporate entities – which do not reflect the underlying economic realities may be disregarded.”<sup>245</sup> This approach requires the Tribunal “to lift the corporate veil and objectively identify if the entities that have initiated parallel proceedings constitute a part of the same economic reality.”<sup>246</sup> India contends that this approach is consistent with the International Court of Justice (the “ICJ”) judgment in the *Barcelona Traction* case, finding that the corporate veil may at times be lifted “to prevent the misuse of the privileges of legal personality [...]

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<sup>237</sup> Rejoinder, ¶ 170.

<sup>238</sup> Rejoinder, ¶¶ 171-172.

<sup>239</sup> Rejoinder, ¶ 172.

<sup>240</sup> Rejoinder, ¶ 172.

<sup>241</sup> Rejoinder, ¶ 173 citing B. Cremades & I. Madalena, “Parallel Proceedings in International Arbitration”, 24 ARB INT’L 507 (December 2008), p. 548 (RLA-62).

<sup>242</sup> Rejoinder, ¶ 173 citing *Chevron v. Ecuador*, ¶ 4.76 (RLA-21).

<sup>243</sup> CEPA, Art. 96(6) (CLA-043) (emphasis added).

<sup>244</sup> Rejoinder, ¶¶ 187-193.

<sup>245</sup> Rejoinder, ¶¶ 188-189 citing A. Reinisch, “The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes”, 17 LAW AND PRAC. OF INT’L CTS. & TRIB. 37 (2014), p. 57 (RLA-54).

<sup>246</sup> Rejoinder, ¶¶ 189-192 citing *Case Concerning The Barcelona Traction, Light and Power Company Limited*, Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3, ¶ 56 (RLA-49) (“*Barcelona Traction*”); *Supervision*, ¶ 326 (RLA-19).

or to prevent evasion of legal requirements or of obligations.”<sup>247</sup> Similarly, India points to *Supervision*, in which the tribunal found that the claimant’s 55%-owned subsidiary was only a corporate vehicle acting on the instructions of the claimant, and thus concluded that all proceedings initiated by the subsidiary were deemed to have been effectively filed by the claimant.<sup>248</sup>

180. Finally, India criticizes Nissan’s reliance on *Khan v. Mongolia* for the proposition that the triple identity test should not be set aside in order to give fork-in-the-road clauses more effect. India finds no support or justification for a principle of treaty interpretation that advocates for “a priori less effect” as opposed to *effet utile* to be given to a treaty clause.<sup>249</sup> Therefore, for India, “the idea that a tribunal should approach a fork-in-the-road clause on the understanding that it should not be too easy to satisfy is [...] ludicrous.”<sup>250</sup>

(b) *Nissan’s Position*

181. Nissan submits that the Tribunal need not reach any determination on the applicable test for fork-in-the-road clauses generally, as can simply rely on the plain language of Article 96(6) of the CEPA to dismiss India’s jurisdictional objection. If the Tribunal sees the need to turn to other international law tests, Nissan argues that the triple identity test should be applied in this case because the fundamental basis test has no basis in case law and ignores the plain language of Article 96(6).<sup>251</sup>

182. In India’s view, the language of the relevant treaty is paramount and should be the starting point for the Tribunal.<sup>252</sup> Other investment tribunals have made the same point. In *Chevron v. Ecuador*, for example, the tribunal found it unnecessary to determine the applicable test “because there is a more fundamental point arising from the wording of the BIT itself.”<sup>253</sup> In *Champion Trading v. Egypt*, the tribunal decided that it had jurisdiction based on the language of the fork-in-the-road provision itself.<sup>254</sup>

183. According to Nissan, “[i]t is obvious from the wording [in the CEPA] that for the ‘fork-in-the-road’ provision to be triggered, the ‘disputing investor’ must have brought the same investment dispute before another forum.”<sup>255</sup> In this case, Nissan notes, that requirement has not been met because the

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<sup>247</sup> Rejoinder, ¶ 190 citing *Barcelona Traction*, ¶ 56 (RLA-49).

<sup>248</sup> Rejoinder, ¶ 192 citing *Supervision*, ¶ 326 (RLA-19).

<sup>249</sup> Tr., 9 November 2018, 355:13-15.

<sup>250</sup> Tr., 9 November 2018, 355:22-25.

<sup>251</sup> Reply, ¶ 224.

<sup>252</sup> Tr., 9 November 2018, 314:8-16.

<sup>253</sup> Tr., 9 November 2018, 319:17-20 citing *Chevron v. Ecuador*, ¶ 4.77 (RLA-21).

<sup>254</sup> Tr., 9 November 2018, 320:20-25, 321:1-16.

<sup>255</sup> Reply, ¶ 226; Tr., 9 November 2018, 316:8-17, 317:10-25, 318:1.

Madras High Court proceedings were commenced by the marketing companies in the R&N Consortium, NMIPL and RIPL, whereas the arbitration was commenced by Nissan.<sup>256</sup> Neither NMIPL nor RIPL could “be a disputing investor” under the CEPA because they are both Indian, and Nissan could not be a party to the Madras proceedings because it is not a registered dealer under the TN VAT Act with “an interest in the validity of the legislative power being challenged [therein].”<sup>257</sup> Similarly, the State of Tamil Nadu could not be a party to the BIT claim and the Union of India could not be a party to the Madras proceedings.<sup>258</sup> Furthermore, the dispute in the Madras proceedings, Nissan asserts, could not be an investment dispute because it does not involve an allegation of a breach of any provision of the CEPA.<sup>259</sup>

184. Nissan also argues that the authorities India cites in support of the fundamental basis test actually support an approach focused on the language of the relevant “fork-in-the-road” provision.<sup>260</sup> In *H&H Enterprises v. Egypt*, the relevant provision allowed a dispute to be submitted to arbitration if it “has not, for any good faith reason, been submitted for resolution in accordance with any applicable dispute settlement procedures previously agreed to by the Parties to the dispute.”<sup>261</sup> The tribunal held that such language does not “require specifically that the parties be the same.”<sup>262</sup> Article 96(6) of the CEPA, by contrast, does specifically require that the disputing investor have made the claim in the parallel proceeding.<sup>263</sup> According to Nissan, the tribunal in *Chevron v. Ecuador*, another case on which India relies, similarly emphasized the language of the relevant provision, which would be triggered only if the parallel proceeding was brought by the “national or company concerned.”<sup>264</sup> According to Nissan, the tribunal determined on the basis of this textual analysis that “insofar as the claimants in the investment treaty arbitration have not themselves submitted the dispute in question to the national courts as claimant or by way of counterclaims, that is a sufficient answer to the fork-in-the-road issue.”<sup>265</sup>
185. Should the Tribunal however see a need to turn to other international law tests, Nissan contends that the language of CEPA supports the application of a triple identity test.<sup>266</sup> This is the test adopted by a

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<sup>256</sup> Reply, ¶ 226.

<sup>257</sup> Tr., 9 November 2018, 322:5-14.

<sup>258</sup> Tr., 9 November 2018, 322:18-25.

<sup>259</sup> Tr., 9 November 2018, 323:15-20.

<sup>260</sup> Reply, ¶¶ 227-230.

<sup>261</sup> Reply, ¶ 228.

<sup>262</sup> Reply, ¶ 228 citing *H&H Enterprises*, ¶ 367 (RLA-22).

<sup>263</sup> Reply, ¶ 228.

<sup>264</sup> Reply, ¶ 229 citing *Chevron v. Ecuador*, ¶ 4.78 (RLA-21).

<sup>265</sup> Reply, ¶ 230.

<sup>266</sup> Reply, ¶¶ 225-226; Tr., 9 November 2018, 314:17-24, 229:25, 330:1-8.



clear majority of tribunals.<sup>267</sup> According to Nissan, the cases India cites adopted the fundamental basis test only because those tribunals considered they could move away from the relevant treaties to avoid application of a test that in their view would be “unjust and inappropriate.”<sup>268</sup>

186. Nissan rejects India’s argument that the triple identity test would deprive the fork-in-the-road provision of any practical meaning because it is unrealistic to expect all three prongs of the test to be satisfied.<sup>269</sup> In response, citing *Khan v. Mongolia*, Nissan insists that “the test for the application of fork-in-the-road provisions should not be too easy to satisfy as this could have a chilling effect on the submission of disputes by investors to domestic fora, even when the issues at stake are clearly within the domain of local law.”<sup>270</sup>
187. Finally, Nissan rejects India’s reliance on *Supervision v. Costa Rica* to show a trend in favor of the fundamental basis test. In its view, “the test applied by the tribunal is unclear.”<sup>271</sup> Despite claiming to apply the fundamental basis test, the tribunal went on to require that the dispute be “submitted before the local tribunals [...] by the claimant.”<sup>272</sup> The tribunal also looked for “a coincidence of compensation claims,” which Nissan emphasizes does not exist in this case.<sup>273</sup>
188. For these reasons, Nissan submits that the Tribunal should dismiss India’s jurisdictional objection based on the plain language of Article 96(6) of the CEPA. Should the Tribunal see the need to apply an international law test, Nissan submits that it should apply the triple identity test because it “still operates as a presumption,” is supported by the language of the CEPA, and the fundamental basis test is only “an exception” applied to certain cases.<sup>274</sup>

## **2. Whether the Fundamental Basis Test has been Satisfied**

### *(a) India’s Position*

189. India maintains that the fundamental basis test has been satisfied so as to trigger the application of Article 96(6) of the CEPA and preclude Nissan from bringing its claims. It explains that the fundamental basis test looks to whether the claims in the local proceedings and the arbitration have “the same normative source,” in the sense that they “share the fundamental cause of the claim and seek

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<sup>267</sup> Reply, ¶ 224; Tr., 9 November 2018, 325:8-14.

<sup>268</sup> Tr., 9 November 2018, 326:13-20.

<sup>269</sup> Tr., 9 November 2018, 325:25, 326:1-4.

<sup>270</sup> Tr., 9 November 2018, 329:4-13 citing *Khan Resources Inc., Khan Resources B.V., CAUC Holding Company Ltd. v. Government of Mongolia*, PCA Case No. 2011-09, ¶ 391 (CLA-82).

<sup>271</sup> Tr., 9 November 2018, 351:5-7.

<sup>272</sup> Tr., 9 November 2018, 350:22-25, 351:1-4.

<sup>273</sup> Tr., 9 November 2018, 351:17-23.

<sup>274</sup> Tr., 9 November 2018, 352:22-25.

for the same effects.”<sup>275</sup> This includes, in India’s view, instances where the allegations in both proceedings “share fundamentally the same factual basis.”<sup>276</sup> Applying this test, India submits that the present claims and the Writ Petitions before the Madras High Court “share the same normative source, have no autonomous existence, and seek the same effect or purpose.”<sup>277</sup>

190. In particular, India rejects Nissan’s position that the Madras High Court proceedings and the present arbitral proceedings seek different relief and have different normative sources—the former involving Section 19 of the TN VAT Act, GO 53 of 2015, and the Notice dated 13 April regarding NMIPL’s ITCs, and the latter involving the incentives promised to Nissan under the 2008 MoU. Rather, India argues, both proceedings in fact share the same normative source, the amendment to Section 19 of the TN VAT Act, and ultimately seek the same relief, the disbursement of incentives under the 2008 MoU.<sup>278</sup>
191. Elaborating on this position, India explains that, the Amended Business Scheme of the R&N Consortium created a “notional sale” between RNAIPL, the sole manufacturing entity, and NMIPL and RIPL, the marketing entities.<sup>279</sup> This notional sale enabled entities within the R&N Consortium, to avail themselves of both the refund of the Output VAT RNAIPL paid under the 2008 MoU, and the ITCs in the same amount that NMIPL and RIPL may claim under the TN VAT Act.<sup>280</sup> In other words, the Amended Business Scheme creates a situation of double tax recovery, thereby “causing immense loss to the State exchequer.”<sup>281</sup>
192. In order to prevent this situation of double recovery, India explains, the GoTN issued GO 53 in 2015 and amended Section 19 of the TN VAT Act in 2016, both of which required NMIPL and RIPL to forfeit all ITCs they accumulated “in excess of their Output VAT/CST liability.”<sup>282</sup> When NMIPL and RIPL did not forfeit their excess ITCs under the TN VAT Act, the GoTN “had to withhold the claims of RNAIPL [for incentives under the 2008 MoU] as the amount claimed is payable either to RNAIPL as [incentives] or to [RIPL and NMIPL] as ITC credit (and subsequent refund) and not both.”<sup>283</sup>
193. These factual circumstances, India argues, demonstrate that the RNAIPL investment incentives for which Nissan claims in this arbitration, and the ITC credit that RIPL and NMIPL seek to defend

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<sup>275</sup> Rejoinder, ¶ 175 citing *Pantechniki*, ¶ 61 (RLA-15); *Supervision*, ¶ 310 (RLA-19); *H&H Enterprises*, ¶¶ 367 (RLA-22).

<sup>276</sup> Rejoinder, ¶ 175 citing *H&H Enterprises*, ¶ 378 (RLA-22).

<sup>277</sup> Rejoinder, ¶ 177. See also Tr., 9 November 2018, 307:22-308:16.

<sup>278</sup> Rejoinder, ¶¶ 176-178.

<sup>279</sup> Rejoinder, ¶ 179.

<sup>280</sup> Rejoinder, ¶¶ 179-181.

<sup>281</sup> Rejoinder, ¶ 181.

<sup>282</sup> Rejoinder, ¶ 182; Counter-Memorial, ¶ 177.

<sup>283</sup> Rejoinder, ¶ 183 citing R-40.

through the Madras High Court proceedings, are in reality “intrinsically linked to the TN VAT Act amendments” and share the same factual basis.<sup>284</sup> Moreover, since this Tribunal is not competent in its view to adjudicate issues of Indian law, “any decision on the disbursement of incentives under the 2008 MoU is contingent on the outcome of the [Madras High Court proceedings].”<sup>285</sup> Accordingly, India submits that the two proceedings share the same fundamental basis.<sup>286</sup>

194. India rejects Nissan’s argument that the Writ Petitions are irrelevant to their claims in these proceedings because “constitutional challenge of the legislative amendments and orders is not an issue before the Tribunal.”<sup>287</sup> India proffers three reasons. First, as explained above, the ITC credit claimed in the Writ Petitions and the RNAIPL investment incentives Nissan claims under the 2008 MoU are closely related. In India’s view, it follows that “the legal framework governing [the ITC credit] as well as the validity of that framework” which is the subject matter of the Writ Petitions must also be relevant for any treaty case concerning the investment incentives.<sup>288</sup> Second, India reiterates, the Writ Petitions were filed to challenge the amendment to the TN VAT Act, which was adopted to address the situation created by the Amended Business Scheme.<sup>289</sup> Likewise, the same Amended Business Scheme, in conjunction with the Consortium’s refusal to relinquish excess ITC, “is precisely what led to the delays in the payment of the [Claimed Incentives] which are being claimed before this Tribunal.”<sup>290</sup> In other words, India argues, the two proceedings stem from the same source or problem. Thirdly, an analysis of the Writ Petitions shows many overlapping legal issues with this arbitration. For example, Writ Petition No. 23224 shares with the current proceedings an issue regarding the competence of Tamil Nadu’s Industries Department under the Indian Constitution to regulate taxation matters.<sup>291</sup> Similarly, both the present case and Writ Petitions Nos. 26034-26037 concern the relationship between the incentives and the taxation regime in Tamil Nadu.<sup>292</sup> Therefore, India contends that overlapping issues bring the Tribunal into “direct competition with the Madras High Court” and that the Writ Petitions are “directly relevant” to issues at the heart of this arbitration.<sup>293</sup> Simultaneously, India claims, these issues also demonstrate that “the fundamental basis of [Nissan’s] claims [...] before this Tribunal is, indeed, not autonomous of the claims that it has

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<sup>284</sup> Rejoinder, ¶¶ 184-185.

<sup>285</sup> Rejoinder, ¶ 185.

<sup>286</sup> Rejoinder, ¶ 185; Counter-Memorial, ¶ 179.

<sup>287</sup> Tr., 9 November 2018, 295:4-12.

<sup>288</sup> Tr., 9 November 2018, 296:6-13.

<sup>289</sup> Tr., 9 November 2018, 296:17-25, 297:1-3.

<sup>290</sup> Tr., 9 November 2018, 296:7-13.

<sup>291</sup> Tr., 9 November 2018, 301:12-18 *citing* **R-10**.

<sup>292</sup> Tr., 9 November 2018, 302:18-25, 303:1-24 *citing* **R-12**.

<sup>293</sup> Tr., 9 November 2018, 304:1-4, 15-17.

presented through its subsidiary and affiliated company in the Madras High Court.”<sup>294</sup> India submits that the combination of overlapping issues of Indian law and the similar practical effect that a successful outcome in both jurisdictions would have render the two proceedings the same “investment dispute” within the meaning of Article 96(6) of the CEPA.<sup>295</sup>

(b) *Nissan’s Position*

195. Nissan maintains that the fundamental basis would not be satisfied even if it were to apply to this case, and therefore Article 96(6) of the CEPA would not be triggered in any event.
196. According to Nissan, the tribunals applying the fundamental basis test have considered (i) whether the claims before the local forum have an ‘autonomous existence’ separate from the treaty claims or whether they share the same normative source;<sup>296</sup> and /or (ii) whether the same purpose/relief was sought.<sup>297</sup> Nissan argues that neither of these factors is present here.<sup>298</sup>
197. First, Nissan insists that the claims in the two proceedings do not share the same the normative source. The normative sources of the Writ Petitions are GO 53 and the TN VAT Act Amendment, which affect NMPL’s entitlement to ITC under the TN VAT Act and which were not adopted solely to address the Amended Business Scheme.<sup>299</sup> Accordingly, these measures have no connection with the 2008 MoU or the CEPA, which provide the normative source of the breaches of obligation at issue in this arbitration.<sup>300</sup> Accordingly, Nissan asserts, the claims before the Madras High Court “exist autonomously” from the treaty claims.<sup>301</sup> Invoking the same authority on which India relies, *H&H Enterprises*, Nissan emphasizes that the tribunal assessed whether the claims “are fundamentally based on the very same facts and, [...] the very same contract.”<sup>302</sup> Nissan submits that India’s case here is “a far cry from the standard,” because at most it involves some factual linkages, which are insufficient to preclude the treaty claims.<sup>303</sup>
198. Second, Nissan argues that the relief sought in the two proceedings is entirely different and therefore were brought for different purposes.<sup>304</sup> In the Madras High Court proceedings, the claims seek relief

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<sup>294</sup> Tr., 9 November 2018, 307:22-25, 308:1-13.

<sup>295</sup> Tr., 9 November 2018, 312:14-25, 313:1-2.

<sup>296</sup> Reply, ¶ 234 citing *Pantehnik*, ¶ 67 (RLA-15); *Supervision*, ¶ 315 (RLA-19); *H&H Enterprises*, ¶ 377 (RLA-22).

<sup>297</sup> Reply, ¶ 234 citing *Supervision*, ¶ 315 (RLA-19).

<sup>298</sup> Reply, ¶ 234.

<sup>299</sup> Reply, ¶ 234(a); Tr., 9 November 2018, 343:14-19, 344:7-18.

<sup>300</sup> Reply, ¶ 234(a).

<sup>301</sup> Reply, ¶ 234(a).

<sup>302</sup> Tr., 9 November 2018, 348:7-17 citing *H&H Enterprises*, ¶ 382 (RLA-22).

<sup>303</sup> Tr., 9 November 2018, 348:22-25, 349:1.

<sup>304</sup> Reply, ¶ 234(b).

in the form of “a declaration that the relevant amendments are in violation of the Constitution of India and the principles of promissory estoppel.”<sup>305</sup> In this arbitration, by contrast, the remedy sought is damages equivalent to the unpaid investment incentives under the 2008 MoU.<sup>306</sup>

199. Indeed, Nissan maintains that even if NMIPL and RIPL succeed in the Madras High Court proceedings, there would still be a separate claim for relief in this arbitration because, contrary to India’s characterization of the facts, the ITC scheme under the TN VAT Act is in fact separate and independent from the investment incentives scheme under the 2008 MoU.<sup>307</sup> According to Nissan, while the ITC scheme allows a dealer to set off the input VAT payable on its purchases against its output tax liability and entitles it to a refund of ITCs if the latter is lower than the former, the investment incentives are “calculated by reference to the gross amount of output VAT and input VAT paid.”<sup>308</sup> In addition, Nissan explains, only RNAIPL was entitled to claim Output VAT Incentives under the 2008 MoU’s investment incentive scheme, while NMIPL and RIPL were subject to the ITC scheme.<sup>309</sup> This is because under the Amended Business Scheme, when RNAIPL made notional sales of vehicles to NMIPL and RIPL, it would claim Output VAT Incentives under the 2008 MoU, whereas NMIPL and RIPL were not allowed to claim Input VAT Incentives for the input tax paid to RNAIPL on their purchases.<sup>310</sup> NMIPL and RIPL instead were entitled to claim ITCs under the TN VAT Act when their input tax was higher than their output tax liability. Therefore, Nissan reasons, regardless of whether the NMIPL and RIPL may recover under the ITC scheme, RNAIPL has a separate claim for its Input tax and Output tax refunds under the investment incentives scheme.<sup>311</sup> Hence, Nissan reasons, it necessarily follows that the Writ Petition proceedings and the present arbitration cannot be “multiple proceedings over the same investment dispute.”<sup>312</sup>

### **3. Whether the Triple Identity Test has been Satisfied**

#### *(a) India’s Position*

200. India maintains that even if the triple identity test were to apply to this case, its requirements have been satisfied so as to trigger application of Article 96(6) of the CEPA. India accepts that the triple identity test requires “an identity of the parties, causes of action and object between the two parallel

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<sup>305</sup> Reply, ¶ 234(b).

<sup>306</sup> Reply, ¶ 234(b).

<sup>307</sup> Reply, ¶¶ 213-221, 234.

<sup>308</sup> Reply, ¶¶ 214-215.

<sup>309</sup> Reply, ¶ 216.

<sup>310</sup> Reply, ¶ 216.

<sup>311</sup> Reply, ¶¶ 218-221.

<sup>312</sup> Reply, ¶ 220.

proceedings,”<sup>313</sup> but asserts that every criterion of this test is met in this case.

201. First, with respect to the identity of parties, India posits that NMIPL, the entity that filed the Writ Petitions before the Madras High Court, is “only a corporate vehicle wholly owned and controlled by [Nissan] through its Dutch subsidiary.”<sup>314</sup> Since Nissan indirectly holds a 100% shareholding in NMIPL, India considers that NMIPL and Nissan constitute a part of “the same economic reality” and that the Writ Petitions effectively were filed at the instance of Nissan.<sup>315</sup> In addition, India observes that the GoTN, the party in the domestic proceedings, is a State organ whose action Nissan asserts is attributable to the Government of India in this arbitration.<sup>316</sup> Accordingly, in India’s submission, there exists a common identity of parties in both proceedings.<sup>317</sup>
202. Second, regarding the causes of action, India rejects Nissan’s contention that the domestic proceedings are distinguishable on the basis that they concern issues of Indian constitutional law while this case concerns breaches of treaty obligations.<sup>318</sup> In India’s view, this distinction is “mechanical” and was rejected in *Pantechniki* as “argument by labelling – not analysis.”<sup>319</sup> Instead, India proposes that the Tribunal focus on whether the two causes of action share “the same normative source” and “emanate from the same factual complex.”<sup>320</sup> India contends that both common and civil law traditions assess identical claims on “substance” in terms of their “factual basis” and “legal entitlement.”<sup>321</sup> Applying this approach, India concludes that the claims before this Tribunal and those before the Madras High court share “the same normative source, have no autonomous existence, and derive from the same factual complex.”<sup>322</sup> Therefore, India considers that “there is an identity of cause of action between the two proceedings.”<sup>323</sup>
203. Finally, with respect to the identity of object, India takes the view that the two proceedings have “the same effect and purpose.”<sup>324</sup> For the same reasons proffered in support of its position on the

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<sup>313</sup> Rejoinder, ¶ 195.

<sup>314</sup> Rejoinder, ¶ 196.

<sup>315</sup> Rejoinder, ¶¶ 191, 196; Tr., 9 November 2018, 356:19-23.

<sup>316</sup> Rejoinder, ¶ 197; Tr., 9 November 2018, 356:8-14.

<sup>317</sup> Rejoinder, ¶ 197.

<sup>318</sup> Rejoinder, ¶ 198 *referring to* Reply, ¶ 233(a).

<sup>319</sup> Rejoinder, ¶ 198 *citing Pantechniki*, ¶ 64 (RLA-15).

<sup>320</sup> Rejoinder, ¶¶ 200-201 *citing Pantechniki*, ¶ 61 (RLA-15); *Supervision*, ¶ 316 (RLA-19); G. Wegen & L. Markert, “Chapter V: Investment Arbitration – Food for Thought on Fork-in-the-Road – A Clause Awakens from its Hibernation”, 269 *Austrian Yearbook on International Arbitration* (2010), p.278, PDF p.4 (RLA-66).

<sup>321</sup> Rejoinder, ¶ 201 *citing* M. Swarabowicz, “Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System”, 8 *J. of Int’l Dispute Settlement* 280 (5 June 2016), p. 280 (RLA-72); *ILA Recommendations*, ¶ 1 (RLA-64).

<sup>322</sup> Rejoinder, ¶ 202.

<sup>323</sup> Rejoinder, ¶ 202. *See also* Tr., 9 November 2018, 357:16-25, 358:1-2.

<sup>324</sup> Rejoinder, ¶ 203.

fundamental basis test, India argues that any decision this Tribunal renders on disbursement of incentives under the 2008 MoU would be “inextricably linked to” the outcome of the Writ Petitions in the Madras High Court proceedings.<sup>325</sup> Since the two claims pursue the same end and have the same object, the specific reliefs sought in the two parallel proceedings “do[] not retain any relevance.”<sup>326</sup> Thus, India submits that “there is also an identity of object” between the two proceedings.<sup>327</sup>

*(b) Nissan’s Position*

204. Nissan submits that none of the three requirements of the triple identity test have been satisfied, and accordingly that Article 96(6) of the CEPA does not apply.
205. First, NMIPL and RIPL, the parties that commenced the proceedings in the Madras High Court, are clearly different from Nissan in this present case.<sup>328</sup> Nissan points out that they do not receive any incentives or have anything to do with the MoU.<sup>329</sup> Moreover, Nissan and NMIPL’s status as different entities is convincingly evidenced by the fact that the GoTN could not “seek any shortfall in tax payment by NMIPL [...] from [Nissan].”<sup>330</sup> Nissan urges the Tribunal to recognize that difference, which would also uphold the general principle of corporate separateness recognized by both domestic and international law.<sup>331</sup>
206. Second, Nissan insists that the cause of action in the Madras High Court proceedings is the “constitutional invalidity of the laws and government orders issued by the [GoTN],” which is not an “investment dispute” within the meaning of Article 96 of the CEPA,<sup>332</sup> while this case pleads India’s breach of its treaty obligations under the CEPA by failing to make timely payment of the investment incentives.<sup>333</sup> Nissan notes that tribunals have found that “having recourse to a domestic forum for breaches of contract does not waive the right to the dispute resolution mechanism in the BIT, unless the claim in the domestic forum is based on the breach of the BIT.”<sup>334</sup> In this case, the claims in the Madras High Court do not even involve contract breaches. Nissan also presents two figures, one of the total incentives due under the 2008 MoU and the other the ITC credits denied by GoTN, and

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<sup>325</sup> Rejoinder, ¶ 203. *See also* Tr., 9 November 2018, 358:8-25, 359:1-3.

<sup>326</sup> Rejoinder, ¶ 203.

<sup>327</sup> Rejoinder, ¶ 203.

<sup>328</sup> Reply, ¶ 226.

<sup>329</sup> Tr., 9 November 2018, 335:16-22.

<sup>330</sup> Tr., 9 November 2018, 360:19-21.

<sup>331</sup> Tr., 9 November 2018, 352:9-16.

<sup>332</sup> Reply, ¶ 233(a).

<sup>333</sup> Reply, ¶ 233(a).

<sup>334</sup> Reply, ¶ 233(a) *citing* *M.C.I. Power Group L.G. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶ 186 (CLA-069).

explains that the former is the basis for its cause of action in the treaty claim, while the latter is the basis for the cause of action in the Writ Petitions.<sup>335</sup> These figures are said to be completely different, and compensation of one would not moot the issue of the other.<sup>336</sup> Therefore, Nissan maintains that there is no identity of causes of action.<sup>337</sup>

207. Finally, Nissan contends that the object of the claims before the Madras High Court is “the amendment to the TN VAT Act which affected the input tax credit calculation,” whereas the claim before this Tribunal “relates to the unreasonable delay in paying the Investment Incentives” under the 2008 MoU.<sup>338</sup> Accordingly, Nissan submits, there is no identity of object between the two proceedings.<sup>339</sup>

## **B. THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS**

208. In the Tribunal’s view, the Parties have expended significant energy in a doctrinal debate about fork-in-the-road clauses generally, which is interesting and important academically but ultimately unnecessary to address for purposes of this particular case. That is because the plain text of Article 96(6) of the CEPA is unusually clear, leaving very little to be decided regarding the applicable test.

209. Consistent with the Article 31(1) of the VCLT, the provisions of the CEPA are to be interpreted and applied in accordance with the “ordinary meaning” of their terms, in the “context” in which they occur and in light of the CEPA’s “object and purpose.” The ICJ has explained that under an Article 31(1) analysis, “[i]f the relevant words in their natural and ordinary meaning make sense in their context,” no further inquiry is required.<sup>340</sup> Rather, the Contracting Parties’ use of unambiguous terms should be taken as reflecting their clear intent. The relevant “context” for construing any given passage in a treaty includes the words and sentences found in close proximity to that passage, including definitional terms, as well as other provisions of the same treaty which help illuminate its object and purpose.<sup>341</sup> In accordance with Article 32 of the VCLT, only if the textual approach required by Article 31 leaves a meaning “ambiguous or obscure,” or leads to a result that is “manifestly absurd or

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<sup>335</sup> Tr., 9 November 2018, 335:23-25, 336:1-8.

<sup>336</sup> Tr., 9 November 2018, 336:8-11.

<sup>337</sup> Reply, ¶ 233(a).

<sup>338</sup> Reply, ¶ 233(b); Tr., 9 November 2018, 337:7-14.

<sup>339</sup> Reply, ¶ 233(b).

<sup>340</sup> *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, p. 53, ¶ 48 (citing *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, p. 8).

<sup>341</sup> See generally *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award ¶ 5.2.6 (2 July 2013) (“Treaty terms are obviously not drafted in isolation, and their meaning can only be determined by considering the entire treaty text. The context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty [...].”).



unreasonable,” may recourse be had to supplementary means of interpretation.<sup>342</sup> The ICJ has explained that even in these circumstances, “a decisive reason” (such as unmistakable evidence of the State Parties’ intentions from such supplementary materials) would be required “[t]o warrant an interpretation other than that which ensues from the natural meanings of the words” of a provision.<sup>343</sup>

210. In this case, Article 96(6) employs several terms that are expressly defined in Articles 96(1) and 96(2). There is no basis for presuming that the Contracting Parties intended those terms to have a different meaning for purposes of Article 96(6) than that which they expressly set out in the almost immediately preceding sub-provisions of the same Article.
211. First, Article 96(6) uses the term “*investment dispute*,” which is expressly defined in Article 96(1) as “a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, *an alleged breach of any obligation under this Chapter and other provisions of this Agreement* as applicable with respect to the investor and its investments” (emphasis added). The definition of an investment dispute thus includes, as a predicate element, an allegation that the *substantive obligations of the CEPA* have been violated by a State party, or an individual or entity whose actions are attributable to a State party as a matter of international law. The definition is considerably narrower than in certain other treaties which define an investment dispute not in terms of the legal basis of the claim, but more broadly as any dispute “relating to” a particular investment or investment agreement.<sup>344</sup> Where an investment dispute is so defined, it is entirely possible that a local proceeding involving the same investment or investment agreement may be deemed sufficiently related to the dispute before an arbitral tribunal as to trigger application of a fork-in-the-road clause, depending on the particular analytical test the tribunal adopts to examine the extent of the relationship. By contrast, in order to qualify as an “investment dispute” under Article 96(1), the investor must allege a *treaty breach* that has led to loss or damage. Indeed, India itself emphasizes this requirement, for purposes of another jurisdictional objection discussed in Section VII below.<sup>345</sup>

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<sup>342</sup> Art. 32 of the VCLT (emphasis added).

<sup>343</sup> *Admission of a State to Membership in the United Nations* (Charter, Art.4), Advisory Opinion: I.C.J Reports 1948, p. 57, p. 63.

<sup>344</sup> See, e.g., *Supervision*, ¶¶ 5, 6 (RLA-19) (quoting applicable BIT as providing jurisdiction for “*any investment-related dispute*,” subject to an exclusion triggered by prior submission of “the dispute” to a local court) (emphasis added); *Chevron*, ¶ 2.7 (RLA-21) (quoting applicable BIT as providing jurisdiction for “an investment dispute” defined as including any dispute “*arising out of or relating to [...] an investment agreement*,” whether or not also alleging a “breach of any right conferred or created by this Treaty,” subject to an exclusion triggered by prior submission of “the dispute” to local proceedings) (emphasis added). Neither *Pantechniki* (RLA-15) or *H&H Enterprises* (RLA-22) quotes the applicable treaty definitions, but the tribunal in *H&H Enterprises* did observe that the claimant’s advocacy of a triple identity test “in this case is based on its reading of arbitral jurisprudence as opposed to the specific language of the US-Egypt BIT and/or its interpretation.” *H&H Enterprises*, ¶ 364 (RLA-22).

<sup>345</sup> See Rejoinder, ¶ 123 (citing CEPA Art. 96(1) for the proposition that the Tribunal has jurisdiction to hear only disputes relating to “an alleged breach of any obligation” of the treaty, and not allegations premised solely on breach of contract).

212. Second, Article 96(6) uses the term “*disputing investor*,” which is likewise an expressly defined term. Article 96(2) defines this as “an investor who is *a party to* an investment dispute” (emphasis added). This again is a narrow definition. It would have been possible to define a “disputing investor” more broadly, for example as any entity affiliated with, under common ownership with, or part of the same corporate family as the entity asserting an “investment dispute” (*i.e.*, an allegation of a CEPA breach). Yet Article 96(2) does not adopt this approach. Instead, it defines the “disputing investor” as *the entity which itself* is “a party to,” *i.e.*, a named participant in, the investment dispute.
213. Taking these definitions at face value, then – and according them the same meaning in Article 96(6) that is established in the “context” of surrounding provisions of the same CEPA Article – the scope of Article 96(6) becomes clear. Under its terms, “[n]o *investment dispute*” (as defined in Article 96(1), *i.e.*, a dispute alleging a CEPA breach) “may be submitted to international [...] arbitration [...] if the *disputing investor*” (as defined in Article 96(2), *i.e.*, “a party” to the investment dispute) “has initiated any proceedings for the resolution of the *investment dispute*” (*i.e.*, the alleged CEPA breach) before any “courts of justice or administrative tribunals or agencies,” unless that investor takes prompt action to withdraw the other proceedings within 30 days of filing its international arbitration case. The natural corollary is that if the “disputing investor” (as defined by Article 96(2)) has *not* submitted to another forum any “investment dispute” (as defined by Article 96(1)), then there is no requirement under Article 96(6) to withdraw any such proceedings as a prerequisite for proceeding with international arbitration of that dispute.
214. Once Article 96(6) is so construed, using the terms that the CEPA itself expressly defines, India’s jurisdictional objection cannot be sustained. It is clear that the Writ Proceedings do not present any claim of a CEPA breach, but rather challenge the constitutionality of Tamil Nadu’s amendment of the TN VAT Act. This is not an “investment dispute” as defined by the CEPA. That the Writ Proceedings nonetheless may involve certain *overlapping facts* with the CEPA claim does not change the analysis of Article 96(6)’s clear text. Nor is that text changed by the possibility, which India advances and Nissan apparently disputes, that Tamil Nadu’s non-payment of the Claimed Incentives may have been *motivated by the same underlying policy concerns* (*i.e.*, the perceived risk of “double recovery” at the corporate group level) that led the Tamil Nadu legislature to enact the TN VAT Act Amendment. As noted above, the CEPA does not extend the definition of an “investment dispute” to all disputes arising out of similar facts, or involving measures motivated by the same policy concerns, as those alleged to violate the substantive obligations of the CEPA. The “investment dispute” rather is defined as the dispute with a party alleging loss or damage from a CEPA violation. The Writ Petitions do not so allege.
215. In these circumstances, there is no need for the Tribunal to take any position in the doctrinal debate as to whether a “triple identity” test or a “fundamental basis” test might be more appropriate *in the absence* of expressly defined treaty terms, to achieve what a tribunal otherwise might intuit to have

been the “object and purpose” of the Contracting Parties in including a fork-in-the-road clause (*e.g.*, minimizing parallel proceedings or avoiding possibly inconsistent results). The use of specific defined terms leaves no textual ambiguity for the Tribunal to resolve in this fashion.

216. There is also little to be gained from detailed discussion of the criticism some tribunals and commentators have offered of fork-in-the-road tests like the one incorporated in Article 96(6). It may be true – as some have observed<sup>346</sup> – that because many national systems do not provide a judicial or administrative avenue to pursue alleged treaty breaches, a treaty provision barring international arbitration only where proceedings in those States have alleged a treaty breach would have little practical effect. But even if that is the likely consequence of the text adopted, it is for the States themselves to decide whether they are comfortable with this outcome. States are free to adopt whatever treaty text they prefer, including text that is likely to address common situations as well as text addressing circumstances that are unlikely to arise. States are also free to mutually amend prior treaties, if they conclude that the text to which they had agreed – as interpreted through a VCLT analysis – is proving ill-suited to their common objectives. Alternatively, States may seek to issue joint interpretations with prospective effect, to clarify that they had actually intended a meaning beyond what the ordinary meaning of the treaty text might suggest.
217. However, absent State invocation of such tools to clarify on a mutual basis their intentions for future cases, an arbitral tribunal must proceed on the basis of a VCLT analysis of the *existing* text to which they have agreed. It is not within a tribunal’s remit to override the drafting choices evident in a particular treaty, in order to substitute a different test that does not flow from the ordinary meaning of that text in the context of surrounding provisions. Otherwise stated, the task of a tribunal is not to make policy choices about the preferable design of an investment arbitration system, but rather to respect and enforce the choices already made by the Contracting Parties, to the extent these can be divined through the interpretative tools that the VCLT provides. To the extent Contracting State Parties find themselves disappointed by such interpretations, they retain various tools as noted above to address this situation. But they cannot expect an arbitral tribunal to undertake *sub rosa* what they have not undertaken themselves, namely an effort effectively to amend the treaty by ignoring existing text and instead substituting a different approach that the current text cannot support.
218. For these reasons, the Tribunal rejects India’s jurisdictional objection based on Article 96(6). Moreover, having found jurisdiction to proceed, it also sees no basis for declining to do so, for example by staying its hand until the Writ Proceedings have definitively concluded. While the Tribunal acknowledges India’s concern that the two sets of proceedings may involve certain overlapping factual or legal issues, the consequences for this case of any rulings in the Writ Proceedings are a matter to be dealt with at a later stage. The Parties of course remain free to present

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<sup>346</sup> See, *e.g.*, *Chevron*, ¶ 4.76 (RLA-21).

any arguments *on the merits* resulting from any findings by the Madras High Court, including about the weight that this Tribunal should or should not give to any interpretations of Indian law they believe relevant to the Tribunal's application of the CEPA's substantive treaty obligations on the facts of this case.

### VIII. INDIA'S OBJECTION THAT NISSAN'S CLAIMS ARE FUNDAMENTALLY CONTRACTUAL IN NATURE

219. India also objects to jurisdiction on the grounds that Nissan's arbitration claims are fundamentally contractual in nature. As a primary matter, it argues that Nissan has not alleged facts sufficient to make out an FET claim under the CEPA as opposed to a contractual claim under the 2008 MoU. Even if Nissan had done so, India maintains that the dispute is still subject to the 2008 MoU's dispute resolution clause (Clause 15), which provides in relevant part:

The Parties agree to use their best efforts to negotiate in good faith and settle amicably all disputes that may arise or relate to this MoU or a breach thereof. If such dispute, doubt or question, arising out of or in respect of this MoU or the subject matter thereof, cannot be settled amicably through ordinary negotiations by the Parties, the same will be decided by arbitration in terms of the Indian Arbitration and Conciliation Act, 1996 (Central Act 26 of 1996). The venue of the arbitration will be only in Chennai, India, and the arbitration proceedings will be conducted in the English language. This MoU shall be governed and construed in accordance with the laws of India. The courts located in Chennai alone and only will have jurisdiction on any matter relating to this MoU, to the exclusion of all other courts in any other place.<sup>347</sup>

220. According to India, Clause 15 bars submission of both Nissan's FET claim and its umbrella clause claim, because it is an exclusive jurisdiction clause that requires any disputes relating to the 2008 MoU to be submitted to a domestic arbitral tribunal and excludes all other forums for adjudication of such disputes.<sup>348</sup> In the alternative, India argues that even if the Tribunal accepts jurisdiction over the FET claim, Nissan's umbrella clause claim still would be inadmissible, because Article 87(2) of the CEPA would require importing into the BIT *all* the Parties' obligations under the 2008 MoU, including the obligation to abide by Clause 15. In India's view, Nissan "should not be able to approbate and reprobate in respect of the same contract."<sup>349</sup>

221. Nissan, for its part, submits that it has pleaded sufficient facts to make out an FET claim under the CEPA. Nissan also dismisses India's "misguided attempt" to place undue significance on Clause 15. In Nissan's view, Clause 15 is "nothing more than a forum jurisdiction clause" that is "unclear" and non-exclusive.<sup>350</sup> Moreover, it does not bar the Tribunal's jurisdiction because the parties to this dispute are not the parties to the 2008 MoU; the present cause of action is different from any dispute

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<sup>347</sup> C-005, Clause 15.

<sup>348</sup> Counter-Memorial, ¶¶ 138, 153-154; Rejoinder, ¶ 115.

<sup>349</sup> Counter-Memorial, ¶ 140; Rejoinder, ¶ 115.

<sup>350</sup> Statement of Claim, ¶ 165; Reply, ¶ 186.

that may arise under the 2008 MoU; and Clause 15 does not waive Nissan's treaty rights under the CEPA.<sup>351</sup> Nissan also rejects India's alternative case, insisting that its claim under the umbrella clause in Article 87(2) is admissible.<sup>352</sup>

222. The Parties' respective positions on these various issues are set out further below, followed by the Tribunal's analysis.

#### A. THE POSITIONS OF THE PARTIES

##### 1. Whether Nissan has Alleged Facts Sufficient to Make Out an FET Claim

###### (a) India's Position

223. As its primary submission, India submits that despite Nissan's effort to formulate its claims as treaty breaches under the CEPA, the fundamental basis of the claims remains contractual, based entirely on breaches of the 2008 MoU.<sup>353</sup> Although Nissan purports to allege an FET breach, India contends that the underlying facts and allegations Nissan presents demonstrate that these claims in reality arise solely out of the 2008 MoU.<sup>354</sup> However, pursuant to Article 96(1) of the CEPA, the Tribunal has jurisdiction to hear only disputes relating to "an alleged breach of any obligation" of the treaty.<sup>355</sup> In these circumstances, India argues, Nissan's failure to present facts sufficient to make out an FET claim prevent the Tribunal from exercising subject matter jurisdiction under the CEPA.

224. In analyzing this question, India urges the Tribunal to conduct its own objective assessment of the real subject matter of the claims, independently of Nissan's formulation in its submissions.<sup>356</sup> This approach, India maintains, is strongly supported by "international law jurisprudence [which] clearly indicates that the Tribunal must independently ascertain for itself whether the treaty breaches alleged by Claimant fall within the specific provisions invoked by Claimant."<sup>357</sup> India notes that tribunals

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<sup>351</sup> Reply, ¶ 166.

<sup>352</sup> Reply, ¶ 205.

<sup>353</sup> Counter-Memorial, ¶ 137.

<sup>354</sup> Rejoinder, ¶ 127.

<sup>355</sup> Rejoinder, ¶ 123 citing CEPA, Art. 96(1) (CLA-043); Tr., 9 November 2018, 223:22-25, 224:1.

<sup>356</sup> Rejoinder, ¶¶ 120-122.

<sup>357</sup> Rejoinder, ¶ 122 referring to *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgement of 12 December 1996, I.C.J. Reports 1996, p. 803, ¶ 16 (RLA-50); *Pan American Energy LLC, and BP Argentina Exploration Company Claimants v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006), ¶ 50 (CLA-066); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), ¶ 197 (RLA-57) ("*Bayindir*"); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004), ¶ 26 (RLA-8) ("*SGS v. Philippines*"). See also Counter-Memorial, ¶ 147 citing *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016), ¶ 475 (CLA-51); *Pantechniki*, ¶ 61 (RLA-15); Tr., 9 November 2018, 228:7-17, 229:3-11.

have declined to “confine [themselves] to the formulation” of claims by a party on the basis that “the establishment or otherwise of jurisdiction is not a matter for the parties but for the [tribunal] itself.”<sup>358</sup>

225. Under an objective assessment, India observes that Nissan’s characterization of its own claims “confirms their almost exclusively contractual nature.”<sup>359</sup> For example, Nissan’s allegation of an FET violation “is predicated *only and exclusively* on alleged breaches of the 2008 MoU.”<sup>360</sup> Similarly, in its Statement of Claim, Nissan consistently described its FET claims as concerning “the unpaid Investment Incentives under the 2008 MoU”<sup>361</sup> and revolving around “the GoTN’s failure to honour its commitment to disburse outstanding Investment Incentives under the 2008 MoU.”<sup>362</sup> Moreover, its response to India’s “tax exclusion” objection under Article 10(1) taxation objection described India’s “payment obligations [under the 2008 MoU] as ‘independent contractual obligations’ that exist outside the GoTN’s sovereign power to offer tax refunds to foreign investors.”<sup>363</sup>
226. India contends that “contractual breaches alone cannot violate international law.”<sup>364</sup> India does not dispute that in principle a breach may give rise to claims under both contract and treaty, and that “claims that are rooted in contractual performance are not thereby excluded from [the] treaty sphere.”<sup>365</sup> However, it emphasizes that the conduct alleged to have breached a treaty “must be the result of behavior going beyond that which an ordinary [...] party [to a contract] could adopt,” and that the “threshold to establish that a breach of [a] Contract[] constitutes a breach of [a] Treaty is a high one.”<sup>366</sup> Examples of such conduct could include denial of access to a contractual dispute settlement mechanism (as in *Impreglio v. Pakistan*), denial of access to domestic courts (as in *Parkerings v. Lithuania*), subjecting an investor to spurious investigations (as in *SGS v. Paraguay*), or a conspiracy to interfere or frustrate an investment (as in *Vivendi II*).<sup>367</sup> However, India points out that Nissan has

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<sup>358</sup> Rejoinder, ¶ 121 *citing Fisheries Jurisdiction Case (Spain v. Canada)*, Judgement of 4 December 1998, I.C.J. Reports 1998, p. 432 (RLA-40).

<sup>359</sup> Rejoinder, ¶ 124.

<sup>360</sup> Counter-Memorial, ¶ 148 (emphasis in original) *citing* Statement of Claim, ¶¶ 184-185, 188, 194; Rejoinder, ¶ 127; Tr., 9 November 2018, 228:3-6.

<sup>361</sup> Counter-Memorial, ¶ 148 *citing* Statement of Claim, ¶ 155.

<sup>362</sup> Counter-Memorial, ¶ 148 *citing* Statement of Claim, ¶¶ 184-85, 188, 194, 197; Rejoinder, ¶ 124 *citing* Statement of Claim, ¶ 146.

<sup>363</sup> Rejoinder, ¶ 125 *citing* Reply, ¶ 100; Tr., 9 November 2018, 224:24-25, 225:1-2.

<sup>364</sup> Tr., 9 November 2018, 222:14-15, 227:2-8.

<sup>365</sup> Rejoinder, ¶¶ 126, 130 *citing Impreglio S.p.A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005), ¶¶ 263-285 (RLA-24) (“*Impreglio*”); *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (8 December 2003), ¶ 76 (CLA-062) (“*Azurix*”).

<sup>366</sup> Rejoinder, ¶ 126 *citing Impreglio*, ¶¶ 260, 267 (RLA-24). *See also* Tr., 9 November 2018, 230:2-12.

<sup>367</sup> Rejoinder, ¶ 128 *citing Impreglio* (RLA-24); *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (RLA-59); *SGS Societe Generale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010), ¶ 149 (CLA-038A) (“*SGS v. Paraguay*”); *Compagnia de Aguas Aconquija S.S. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002), ¶¶ 110-112 (CLA-011) (“*Vivendi II*”); Tr., 9 November 2018, 275:24-25, 276:1-5.

made no such allegations.<sup>368</sup>

227. India rejects Nissan's attempt to plead an FET breach under the CEPA by describing GoTN's conduct as arbitrary, a breach of Nissan's legitimate expectation, or a breach of requirements of due process, transparency, and stability, or good faith.<sup>369</sup> For India, such descriptions "do[] not add anything to the fact that the conduct is still just a breach of contract."<sup>370</sup> Likewise, India denies that the alleged breaches of the MoU were "an exercise of sovereign authority" as suggested by Nissan.<sup>371</sup> Citing *BIVAC II*, India argues that a State's failure to pay an outstanding debt under a contract "cannot properly be characterized as an exercise of sovereign authority" even if the failure is persistent or wholly unjustified.<sup>372</sup>
228. India also challenges Nissan's reliance on *Azurix v. Argentina* as a model for the type of analysis the Tribunal should undertake at the jurisdictional stage. It points out that the *Azurix* tribunal acknowledged a duty to consider "whether the dispute, as it has been presented by [Nissan], is *prima facie* a dispute arising under the BIT,"<sup>373</sup> but nonetheless did not actually carry out that objective analysis, for which it has been criticized by Professor Zachary Douglas.<sup>374</sup> In this case, by contrast, an objective assessment would clearly reveal only a contract dispute, not a CEPA dispute.<sup>375</sup> In India's view, Nissan has "not provided the 'something more,' which is so widely considered necessary, in order to view a contract breach as a component of an FET breach."<sup>376</sup> Accordingly, Nissan "has not alleged any facts that *prima facie* establish or constitute a breach of the FET obligation" under the CEPA.<sup>377</sup>

(b) *Nissan's Position*

229. Nissan submits that "the cause of action in the present dispute differs from any dispute which may arise under the 2008 MoU."<sup>378</sup> This is because, Nissan asserts, the dispute before this Tribunal concerns "treaty claims based on [India's] obligations towards [Nissan] as a protected investor under

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<sup>368</sup> Tr., 9 November 2018, 233:5-15.

<sup>369</sup> Tr., 9 November 2018, 230:13-25, 231:1-8.

<sup>370</sup> Tr., 9 November 2018, 231:16-17, 277:3-11.

<sup>371</sup> Tr., 9 November 2018, 231:18-24.

<sup>372</sup> Tr., 9 November 2018, 232:5-20 citing *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction (9 October 2012) (RLA-35) ("*BIVAC II*").

<sup>373</sup> Rejoinder, ¶ 130 citing *Azurix*, ¶ 76 (CLA-062).

<sup>374</sup> Rejoinder, ¶¶ 130-131 citing Z. Douglas, *The International Law of Investment Claims* (2009), ¶ 514C (RLA-14bis).

<sup>375</sup> Counter-Memorial, ¶ 151; Rejoinder, ¶ 132.

<sup>376</sup> Tr., 9 November 2018, 234:9-11.

<sup>377</sup> Tr., 9 November 2018, 234:12-13.

<sup>378</sup> Statement of Claim, ¶ 162; Reply, ¶ 172.

the CEPA,<sup>379</sup> while any dispute that may arise under the 2008 MoU is a contractual dispute between Nissan and the GoTN.<sup>380</sup>

230. Nissan maintains that “[t]he fact that a claim contains issues relating to the performance or termination of a contract does not *per se* mean that the claim is a contractual claim rather than a treaty claim.”<sup>381</sup> In support, it cites Dolzer and Schreuer who opine that “[a] particular course of action by the host state may well constitute a breach of contract and a violation of international law.”<sup>382</sup> Nissan further asserts that “[c]ountless tribunals have supported this view, including, but not limited to” the tribunals in *Impreglio v. Argentina* and *Azurix v. Argentina*, which made clear that while a dispute may involve interpretation or analysis of contractual performance, such issues “cannot *per se* transform the dispute under the BIT into a contractual dispute,”<sup>383</sup> and that “even if the two [disputes] perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.”<sup>384</sup> Accordingly, Nissan argues, even if its claims were merely “about sums due under a contract, which it is not, [...] a failure to pay admitted sums under a contract can give rise to a breach of the FET standard.”<sup>385</sup>
231. Nissan agrees that the Tribunal must carry out an objective assessment to assess whether a claim is a treaty claim. However, it cautions the Tribunal not to “slip into pre-judging or deciding now whether claims are actually made out,”<sup>386</sup> to avoid prematurely expressing a view on the merits of the case. Rather, Nissan suggests that the Tribunal limit itself to determining, on the pleaded basis of the claim, whether it is “arguable” or made out *prima facie*.<sup>387</sup> In making this determination, Nissan asks the Tribunal to recall the approach of the *Vivendi II* tribunal that “the existence of an exclusive jurisdiction clause in a contract [...] cannot operate as a bar to the application of the treaty standard,” and that “whether a particular contract involves a breach of treaty is not determined by asking whether the ‘conduct [...] purportedly involves an exercise of contractual rights’.”<sup>388</sup> Nissan argues that while its entitlements under the 2008 MoU “are part of the context in which the treaty claims arise, the present Tribunal is not asked to determine any contractual claims.”<sup>389</sup>

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<sup>379</sup> Reply, ¶ 172. See also Statement of Claim, ¶ 162.

<sup>380</sup> Statement of Claim, ¶ 162; Reply, ¶ 172.

<sup>381</sup> Reply, ¶ 174.

<sup>382</sup> Reply, ¶ 174 citing R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2012), p. 277 (CLA-074).

<sup>383</sup> Reply, ¶ 175 citing *Azurix*, ¶ 76 (CLA-062).

<sup>384</sup> Reply, ¶ 175 citing *Impreglio*, ¶ 258 (RLA-24).

<sup>385</sup> Tr., 9 November 2018, 259:4-10, 260:10-16 citing *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009), ¶¶ 124-125 (RLA-9) (“BIVAC”).

<sup>386</sup> Tr., 9 November 2018, 254:17-19.

<sup>387</sup> Tr., 9 November 2018, 254:12-13, 256:6-13, 258:5-8, 259:11-19 citing *Vivendi II*, ¶¶ 111-112 (CLA-11); *BIVAC*, ¶¶ 124-125 (RLA-9).

<sup>388</sup> Tr., 9 November 2018, 255:15-18, 255:23-25, 256:1-5 citing *Vivendi II*, ¶¶ 101, 110.

<sup>389</sup> Reply, ¶ 173.



232. Indeed, Nissan maintains, its claims are “much more than” simply about outstanding payments due under a contract.<sup>390</sup> For example, it alleges a violation of its legitimate expectation, as the investment incentives “were expressly offered to induce [its] investment.”<sup>391</sup> Moreover, India “is running fairly and squarely into the arms of a claim of arbitrary behavior” by claiming the Amended Business Scheme as its reason for withholding incentive payments, when the GoTN had approved that very scheme.<sup>392</sup> Accordingly, Nissan insists that under an objective assessment, its claims are grounded in India’s breach of the CETA’s FET clause and thus, are within the Tribunal’s jurisdiction.<sup>393</sup>

## 2. Whether Nissan’s FET Claim is Excluded by Clause 15 of the 2008 MoU

233. Even if the Tribunal finds that Nissan has properly stated an FET claim under the CEPA, India submits that that claim would be excluded by Clause 15 of the 2008 MoU because (i) the parties to the CEPA dispute are substantially similar to the contract parties; and (ii) Clause 15 is exclusive, mandatory, and sufficiently broad to cover Nissan’s treaty claims and constitute a waiver of Nissan’s right to arbitrate under the CEPA.<sup>394</sup> Nissan rejects these points and maintains that the Tribunal has jurisdiction over its claims notwithstanding Clause 15 of the 2008 MoU. These arguments are described further below.

### (a) Whether the parties to this dispute differ from the parties to the 2008 MoU

#### *India’s Position*

234. India claims that the parties in this dispute are “substantially similar” to the parties to the MoU.<sup>395</sup>

235. As a matter of law, India asserts that investment treaty tribunals “have not uniformly applied the identity of the parties rule in enforcing contractual exclusive jurisdiction clauses.”<sup>396</sup> In fact, India points out, the few tribunals which have examined this rule have “made it clear that they will uphold admissibility *only* if the parties to the treaty proceedings are *completely different* from the parties to the underlying contract.”<sup>397</sup> That is the case here, since Nissan is party to both the contract and the treaty dispute.<sup>398</sup> While India is not a signatory to the 2008 MoU, and the GoTN is not a signatory to

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<sup>390</sup> Tr., 9 November 2018, 260:17-262:3.

<sup>391</sup> Tr., 9 November 2018, 260:17-22, 286:15-19.

<sup>392</sup> Tr., 9 November 2018, 261:5-25, 262:1-3.

<sup>393</sup> Reply, ¶ 176.

<sup>394</sup> Counter-Memorial, ¶ 153 *citing* *SGS v. Paraguay*, ¶ 138 (CLA-038A); Rejoinder, ¶ 155.

<sup>395</sup> Counter-Memorial, ¶¶ 143-145; Rejoinder, ¶¶ 134-135.

<sup>396</sup> Rejoinder, ¶ 134.

<sup>397</sup> Rejoinder, ¶ 134 (emphasis added) *referring to Impreglio*, ¶ 289 (RLA-24).

<sup>398</sup> Rejoinder, ¶ 135.

the CEPA, Nissan has claimed the GoTN to be “a state organ” of India and sought to subject India to obligations under the 2008 MoU via the CEPA’s umbrella clause.<sup>399</sup> India objects to Nissan having it both ways, and insists that Nissan must accept either that India is not subject to obligations under the 2008 MoU, or to settle all disputes under that MoU before the forum exclusively designated by Clause 15.<sup>400</sup>

*Nissan’s Position*

236. Nissan insists that the parties to the present dispute differ from those to the 2008 MoU.<sup>401</sup> This arbitration involves “the Republic of India in its capacity as a ‘Party’ under the CEPA,”<sup>402</sup> and Nissan pursuant to its rights as a protected “investor” with a protected “investment” under the CEPA.<sup>403</sup> By contrast, the parties to the 2008 MoU are Nissan, Renault S.A.S., and the GoTN, and any claim that might be brought under that contract accordingly would have to be against the GoTN, not India.<sup>404</sup> Nissan rejects India’s contention that its reliance on the principle of attribution to attribute the GoTN’s acts and omission to India somehow undermines its entitlement to bring a treaty claim under CEPA.<sup>405</sup> To the contrary, the principle of attribution is “a natural corollary” of Article 84(c)(i) of the CEPA and customary international law.<sup>406</sup>

(b) *Whether Clause 15 of the 2008 MoU is exclusive, mandatory, and sufficiently broad to cover Nissan’s treaty claims and waive its treaty rights*

*India’s Position*

237. India submits that Clause 15 is mandatory and exclusive, and that its scope is sufficiently broad to cover Nissan’s treaty claims and constitute a waiver of Nissan’s right to bring treaty claims under the CEPA.<sup>407</sup> In its view, Clause 15 requires any “dispute[s], doubt[s] or question[s], arising out of or in respect of [the 2008 MoU] or the subject matter thereof” to be submitted to “arbitration in terms of the Indian Arbitration and Conciliation Act, 1996.”<sup>408</sup> The clause therefore covers not only disputes concerning the parties’ obligations under the 2008 MoU, but “any other matter that may *relate* to those

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<sup>399</sup> Counter-Memorial, ¶ 144; Rejoinder, ¶ 135 *citing* Reply, ¶ 171.

<sup>400</sup> Counter-Memorial, ¶ 145; Rejoinder, ¶ 135.

<sup>401</sup> Statement of Claim, ¶ 161; Reply, ¶ 167.

<sup>402</sup> Statement of Claim, ¶ 161; Reply, ¶ 168.

<sup>403</sup> Reply, ¶ 168.

<sup>404</sup> Reply, ¶ 169.

<sup>405</sup> Reply, ¶ 170.

<sup>406</sup> Reply, ¶ 171.

<sup>407</sup> Counter-Memorial, ¶ 154; Tr., 9 November 2018, 244:25-250:20.

<sup>408</sup> Counter-Memorial, ¶ 157 *citing* C-005, Clause 15.

obligations.”<sup>409</sup> This would cover Nissan’s claims under the CEPA,<sup>410</sup> since these all arise from or relate to the GoTN’s breaches of the 2008 MoU.<sup>411</sup>

238. India rejects Nissan’s argument that Clause 15 is somehow ambiguous or contradictory by referring to both arbitration in India and the Chennai courts.<sup>412</sup> According to India, the clause provides for Chennai-seated arbitration as the sole and mandatory method of dispute resolution, and establishes the exclusive supervisory jurisdiction of Chennai courts over any matters relating to the arbitration agreement, such as the appointment and challenge of arbitrators, interim measures, enforcement, and/or setting aside of the award.<sup>413</sup> This jurisdiction notably excludes “all other courts in any other place,”<sup>414</sup> but more broadly “lends support to an understanding of the exclusive nature of the forum selection established by Clause 15.”<sup>415</sup>
239. India contends that the Tribunal should treat Clause 15 “as a waiver of the Parties’ right to arbitrate under the CEPA.”<sup>416</sup> It rejects Nissan’s argument that an express waiver would be required to override the Tribunal’s jurisdiction under the CEPA, and maintains that the “breadth of Clause 15 clearly indicates the contractual parties ‘intention to exclude’ the jurisdiction of any forum other than the one specific in the 2008 MoU.”<sup>417</sup> India contends that Clause 15 is broader than the clauses in *Vivendi I*, *SGS v. Paraguay*, and *Aguas v. Bolivia*, which have not been considered to waive resort to treaty arbitration.<sup>418</sup> India analogizes Clause 15 to the contract clause in *SGS v. Philippines*, providing that “[a]ll actions concerning disputes in connection with the obligations of either party to this [contract] shall be filed at the [domestic courts].” The tribunal in that case gave effect to the contractual forum selection because “it was more specific in relation to the parties and the dispute than the BIT,” and the BIT cannot be presumed to have “the effect of overriding specific provisions of particular contracts, freely negotiated between the [parties].”<sup>419</sup> India asserts that the same conclusion

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<sup>409</sup> Counter-Memorial, ¶ 155.

<sup>410</sup> Counter-Memorial, ¶ 155; Rejoinder ¶¶ 140-141; Tr., 9 November 2018, 245:8-15.

<sup>411</sup> Rejoinder, ¶ 141.

<sup>412</sup> Reply, ¶ 187 (emphasis in original). See Counter-Memorial, ¶ 157; Rejoinder, ¶ 137; Tr., 9 November 2018, 245:25, 246:1-9.

<sup>413</sup> Counter-Memorial, ¶ 157; Rejoinder, ¶ 137; Tr., 9 November 2018, 246:9-18.

<sup>414</sup> Rejoinder, ¶ 138 citing *Vivendi II*, ¶ 76 (CLA-011).

<sup>415</sup> Counter-Memorial, ¶ 157, fn. 234; Rejoinder, ¶ 137.

<sup>416</sup> Counter-Memorial, ¶ 155 citing *Vivendi II*, ¶ 76 (CLA-011).

<sup>417</sup> Rejoinder, ¶ 138 citing *Vivendi II*, ¶ 76 (CLA-011); Tr., 9 November 2018, 249:11-25, 250:1-2.

<sup>418</sup> Counter-Memorial, ¶¶ 155, 159 citing *Compagnia de Aguas Aconquija S.S. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 November 2000), Appendix 1, p. 38 (RLA-33) (“*Vivendi I*”); Rejoinder, ¶ 139 citing *SGS v. Paraguay*, ¶ 4 (CLA-038A) and *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶ 112 (RLA-18) (“*Aguas v. Bolivia*”).

<sup>419</sup> Counter-Memorial, ¶ 159 citing *SGS v. Philippines*, ¶ 141 (RLA-8).

must apply to Clause 15 as it is explicitly exclusive in nature and even broader in scope.<sup>420</sup>

240. India clarifies that it does not contend the GoTN could, by contract, derogate from India's treaty obligations. Rather, it simply alleges that the GoTN, "acting in a way that binds the Union of India can displace, together with the beneficiary of the Treaty provision, the alternative provision provided for in the Treaty."<sup>421</sup>
241. India also points out that Article 96(4)(d) of the CEPA allows a disputing investor to submit a dispute to "any arbitration in accordance with other arbitration rules if agreed with the disputing Party."<sup>422</sup> In India's view, this provision envisages the possibility of arbitration agreements like Clause 15, which prescribes arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996.<sup>423</sup> More importantly, India stresses that the Contracting Parties to CEPA accepted that a different tribunal chosen by the parties to a contract (such as a Chennai arbitration tribunal) could be empowered to hear all claims relating to the 2008 MoU, "including any incidental claims under the CEPA itself."<sup>424</sup>

#### *Nissan's Position*

242. Nissan rejects India's contention that Clause 15 could constitute a waiver of Nissan's rights to arbitrate under the CEPA.<sup>425</sup> In its view, Clause 15 is "nothing more than a forum jurisdiction clause" which moreover is "unclear,"<sup>426</sup> as it appears to allow submission of disputes arising under or relating to the MoU to both arbitration seated in Chennai and the Chennai courts.<sup>427</sup> Nissan contrasts Clause 15 with the contractual jurisdiction clause in *SGS v. Philippines*,<sup>428</sup> which it contends to be unambiguous with respect to the exclusive jurisdiction of local courts.<sup>429</sup>
243. More importantly, Nissan submits, even if Clause 15 is an exclusive jurisdiction clause, its mere presence "cannot, without more, constitute a waiver by [Nissan] of its treaty rights."<sup>430</sup> Nissan insists that investment treaty tribunals have consistently found that in order to have the effect India claims, the contract must expressly exclude or vary the jurisdiction of the Tribunal. Nissan relies on three

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<sup>420</sup> Counter-Memorial, ¶ 159.

<sup>421</sup> Tr., 9 November 2018, 247:9-23.

<sup>422</sup> Rejoinder, ¶ 142. *See also* Tr., 9 November 2018, 250:4-14.

<sup>423</sup> Rejoinder, ¶ 142.

<sup>424</sup> Rejoinder, ¶ 142.

<sup>425</sup> Reply, ¶ 185.

<sup>426</sup> Statement of Claim, ¶ 165; Reply, ¶ 186.

<sup>427</sup> Reply, ¶¶ 186-187.

<sup>428</sup> Reply, ¶ 188 *citing* *SGS v. Philippines*, ¶ 22 (RLA-8).

<sup>429</sup> Reply, ¶ 188.

<sup>430</sup> Statement of Claim, ¶ 163.

cases in support of this proposition, namely *SGS v. Paraguay*,<sup>431</sup> *Vivendi I*,<sup>432</sup> and *Aguas v Bolivia*.<sup>433</sup>

244. In this case, Nissan notes, Clause 15 of the 2008 MoU does not refer to the jurisdiction of this Tribunal, “let alone expressly exclude or vary it.”<sup>434</sup> Indeed, since the 2008 MoU entered into force long before the CEPA, it would be impossible for Clause 15 to waive treaty rights which did not even exist at the time.<sup>435</sup>

### 3. Whether Nissan’s Umbrella Clause Claim is Inadmissible Due to Clause 15 of the 2008 MoU

#### (a) India’s Position

245. India submits that Nissan’s umbrella clause claims under Article 87(2) of the CEPA should also be dismissed because (i) Nissan cannot claim under the 2008 MoU without also complying with the exclusive jurisdiction clause in Clause 15;<sup>436</sup> and (ii) in the alternative, should the Tribunal find the parties to the dispute are not substantially the same as those to the 2008 MoU, the umbrella clause claims then fail for lack of privity.

246. India asserts that Nissan may not make claims under the 2008 MoU while simultaneously ignoring its own obligations under the same contract’s exclusive jurisdiction clause. In India’s view, the principle of *pacta sunt servanda* works to preserve “the integrity of the contractual bargain,” in cases where one party seeks to vindicate contractual rights.<sup>437</sup> In this case, Nissan may not rely on the 2008 MoU obligations to raise claims under the CEPA’s umbrella clause while at the same time failing to comply with the obligations imposed by the same legal instrument.<sup>438</sup>

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<sup>431</sup> Statement of Claim, ¶¶ 163-164 *citing* *SGS v. Paraguay*, ¶¶ 138-140 (CLA-038A) (opining that a contractual selection clause cannot “divest it of its jurisdiction to hear claims for breach of the [BIT],” and stating that “given the significance of investors’ rights under the [BIT] [...] they should not lightly be assumed to have been waived”).

<sup>432</sup> Statement of Claim, ¶ 164 (discussing *Vivendi I* as holding that the exclusive jurisdiction clause at issue did not waive the investor’s waiver right to file BIT claims against the State, and noting that the *Vivendi II* annulment committee echoed this by finding it “was not open to the tribunal to dismiss the claim on the ground that it could or should have been dealt with by a national court,” and “the existence of an exclusive jurisdiction clause in a contract could not prevent the characterization of the claim as a treaty claim”), *citing* *Vivendi II*, ¶ 103 (CLA-011).

<sup>433</sup> Reply, ¶ 183 *citing* *Aguas v. Bolivia*, ¶ 115 (RLA-18) (declining to “abstain from exercising its jurisdiction simply because a conflicting forum selection clause exists,” noting that a tribunal “has a duty to exercise its jurisdiction in such instances absent any indication that the parties specifically intended that the conflicting clause act as a waiver or modification of an otherwise existing grant of jurisdiction to [that tribunal],” and concluding that exclusive jurisdiction clause may have that effect “only if it clearly is intended to modify the jurisdiction otherwise granted to [a tribunal]”).

<sup>434</sup> Reply, ¶ 185.

<sup>435</sup> Reply, ¶ 180.

<sup>436</sup> Counter-Memorial, ¶¶ 161-167; Rejoinder, ¶¶ 145-155.

<sup>437</sup> Counter-Memorial, ¶ 162 *citing* Z. Douglas, *The International Law of Investment Claims* (2009), ¶ 682 (RLA-14).

<sup>438</sup> Rejoinder, ¶ 146.

247. India argues that investment tribunals have consistently declared umbrella clause claims inadmissible in light of clauses like Clause 15.<sup>439</sup> It relies in particular on three cases, *SGS v. Philippines*,<sup>440</sup> *BIVAC v. Paraguay*,<sup>441</sup> and *Bosh v. Ukraine*.<sup>442</sup> India disputes Nissan’s reliance instead on *Eureko v. Poland* and *SGS v. Paraguay* as authority for the proposition that “the ability of a tribunal to hear an umbrella clause claim (or any treaty claim) is not affected by an exclusive forum selection clause in the contract.”<sup>443</sup> In particular, India observes that the *Eureko* tribunal did not make any such finding,<sup>444</sup> but rather “endorsed the substantive conclusion in *SGS v. Philippines* on umbrella clause claims” as “cogent and convincing.”<sup>445</sup> As for *SGS v. Paraguay*, India rejects Nissan’s contention that it is “theoretically superior” to the *SGS v. Philippines* line of cases, and accuses Nissan of conflating two clearly different concepts—the jurisdiction and power of a tribunal to hear a claim, and the admissibility of the claim itself, which concerns reasons why a tribunal “should not proceed to an examination of the merits” even if it has jurisdiction.<sup>446</sup> India explains that it is challenging Nissan’s umbrella clause claims as a matter of admissibility because the Parties agreed to submit disputes exclusively to another forum,<sup>447</sup> whereas the tribunal in *SGS v. Paraguay* failed to assess the issue fully, finding simply that because it had jurisdiction to hear the umbrella clause claim, it had to exercise such jurisdiction.<sup>448</sup> Consequently, India notes, neither the *SGS v. Paraguay* tribunal nor Nissan properly considered the separate admissibility issue, and the rationales that justify dismissal of Nissan’s umbrella clause claim to avoid duplication and to respect the contractual autonomy of the

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<sup>439</sup> Rejoinder, ¶ 147; Tr., 9 November 2018, 237:17-24.

<sup>440</sup> Counter-Memorial, ¶ 163; Rejoinder, ¶ 147 citing *SGS v. Philippines*, ¶ 154-155 (**RLA-8**) (finding contractual claims imported via the relevant umbrella clause to be inadmissible on the basis that “a party to a contract cannot claim on that contract without itself complying with it”).

<sup>441</sup> Counter-Memorial, ¶¶ 164-165 citing *BIVAC*, ¶ 148 (**RLA-9**) (finding that “[i]f the parties to a contract have freely entered into commitments, they must respect those commitments, and they are entitled to expect that others, including international courts and tribunals, also respect them”) and *BIVAC II*, ¶ 292 (**RLA-35**) (ultimately staying the arbitration in favor of proceedings in the contractually agreed forum, since “to exercise jurisdiction in relation to a pure contractual dispute, in the circumstances of this case, would plainly amount to an excess of jurisdiction”).

<sup>442</sup> *Bosh International, Inc. and B&P Ltd. Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, ¶¶ 252-253 (**RLA-12**) (“*Bosh*”) (holding that “where a contractual claim is asserted under an umbrella clause, the claimant in question must comply with any dispute settlement provision included in that contract,” and rejecting giving a claimant “an alternative route for the resolution of contractual claims which it was bound to submit” to the forum designated under the contract).

<sup>443</sup> Reply, ¶ 191(b). See Rejoinder, ¶¶ 148-153.

<sup>444</sup> Rejoinder, ¶ 148 citing *Eureko B.V. v Republic of Poland*, UNCITRAL, Partial Award (19 August 2005), ¶ 257 (**CLA-017**) (“*Eureko*”); Tr., 9 November 2018, 243:9-15.

<sup>445</sup> Rejoinder, ¶ 148 citing *Eureko*, ¶ 257 (**CLA-017**).

<sup>446</sup> Rejoinder, ¶ 149 citing *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgement of 6 November 2003, ICJ Reports 2003, p. 161, ¶ 29 (**RLA-53**); Tr., 9 November 2018, 241:17-25, 242:1.

<sup>447</sup> Rejoinder, ¶ 150 citing *SGS v. Philippines*, ¶ 154 (**RLA-8**); *BIVAC II*, ¶ 292 (**RLA-35**); *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 February 2011), ¶ 103(c) (**RLA-11**) (“*Malicorp*”). See also *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim (7 May 2004), ¶¶ 45-57 (**RLA-56**).

<sup>448</sup> Rejoinder, ¶ 151 citing *SGS v. Paraguay*, ¶ 175 (**CLA-038A**); Tr., 9 November 2018, 283:3-13.

parties.<sup>449</sup>

248. India also finds *SGS v. Paraguay* factually and legally distinguishable.<sup>450</sup> For example, unlike Nissan, SGS had advanced an umbrella clause claim for breaches beyond the contract in question, whereas here Nissan bases its claim entirely on the obligations contained in the 2008 MoU.<sup>451</sup> Furthermore, India observes, the clause in question was not considered by the tribunal as an exclusive jurisdiction clause.<sup>452</sup> And most importantly, India notes, the dispute resolution provision in the Swiss-Paraguay BIT covers “disputes with respect to investments” which was deemed by the tribunal to include contract disputes relating to investment. In contrast, Article 96(1) of the CEPA only encompasses disputes “arising out of an alleged breach of any obligation [under the CEPA].”<sup>453</sup>
249. India also rejects any suggestion that its position would undermine the effectiveness of umbrella clauses, since such clauses “are not limited to contractual commitment[s],” and accordingly their *effet utile* “is not disturbed in any significant way by enforcing disputes clauses in contracts.”<sup>454</sup> Here, Nissan must be held to the exclusive jurisdiction provision in Clause 15 of the 2008 MoU, and the Tribunal should reject its effort through Article 87(2) of the CEPA to enforce in this forum instead its rights under the MoU itself.<sup>455</sup>
250. In the alternative, should the Tribunal view the parties to the 2008 MoU as not substantially the same as the parties to the CEPA dispute, India objects to Nissan’s umbrella clause claims on grounds of lack of privity.<sup>456</sup> It notes that Article 87(2) requires the “obligation” in question to have been “entered into” by a Contracting Party to the CEPA,<sup>457</sup> and points out that several tribunals have found that contract breaches by State organs (as opposed to treaty breaches) cannot amount to an umbrella clause violation without privity of the parties. These cases “relied on the separate legal personality of the contracting entity under domestic law,”<sup>458</sup> and are consistent with the terms of Article 87(2) of the CEPA, which binds India only with respect to an “obligation it may have entered into.”<sup>459</sup> In this case, India asserts that it has not entered into any specific obligations with Nissan under the 2008 MoU, and

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<sup>449</sup> Rejoinder, ¶ 151; Tr., 9 November 2018, 282:25, 283:1-3.

<sup>450</sup> Rejoinder, ¶¶ 152-153; Tr., 9 November 2018, 243:16-24.

<sup>451</sup> Rejoinder, ¶ 152.

<sup>452</sup> Rejoinder, ¶ 152.

<sup>453</sup> Rejoinder, ¶ 153 *citing* CEPA, Art. 96(14) (**CLA-043**).

<sup>454</sup> Tr., 9 November 2018, 239:10-17.

<sup>455</sup> Rejoinder, ¶ 155.

<sup>456</sup> Counter-Memorial, fn. 248; Rejoinder, ¶ 156; Tr., 9 November 2018, 250:22-25, 251:1, 284:15-25.

<sup>457</sup> Rejoinder, ¶ 157; Tr., 9 November 2018, 251:5-8.

<sup>458</sup> Rejoinder, ¶ 157. *See also* J. Crawford, “Treaty and Contract in Investment Arbitration”, 24 *Arb Int’l* 351 (2008), p. 363 (**RLA-60**); Tr., 9 November 2018, 251:12-21.

<sup>459</sup> Rejoinder, ¶ 157 *citing* CEPA, Art. 87(2) (**CLA-043**).

under the law that governs that MoU, it is not bound to the GoTN's contractual obligations.<sup>460</sup> The GoTN has "a distinct and separate legal personality" pursuant to the Indian Constitution to enter into contracts.<sup>461</sup>

(b) *Nissan's Position*

251. Nissan rejects India's submission that it cannot raise an umbrella clause claim under the CEPA by relying on a breach of the 2008 MoU without also being subject to that contract's exclusive jurisdiction provision.
252. First, Nissan observes that many tribunals, including those in *SGS v. Paraguay* and *Eureko*, have not accepted the conclusions of the *SGS v. Philippines* tribunal, but rather held that an exclusive jurisdiction clause in a contract does *not* affect a tribunal's ability to hear an umbrella clause claim.<sup>462</sup> It characterizes the majority's reasoning in *SGS v. Philippines* as "an outlier [which] has invoked much criticism by both arbitrators and academics."<sup>463</sup> Nissan cites for example various commentators who criticized the majority's reasoning as rendering the umbrella clause "superfluous,"<sup>464</sup> "depriving the BIT resolution process of any meaning,"<sup>465</sup> and recognizing "the effect of the 'umbrella' clause to bring a contract dispute to the level of international law," while at the same time reversing that effect "by giving full effect to a national court's jurisdiction clause."<sup>466</sup> Nissan emphasizes the *SGS v. Paraguay* tribunal's disagreement with *SGS v. Philippines* on the ground that admissibility of a treaty claim with jurisdiction to hear that claim is not affected by an exclusive forum selection clause.<sup>467</sup>
253. Nissan urges the Tribunal to follow the *SGS v. Paraguay* approach, which it characterizes as "theoretically superior and fits well with other principles of general treaty jurisprudence."<sup>468</sup> In its view, dismissing umbrella clause claims would be equivalent to finding a waiver of jurisdiction over treaty claims where none exists, which would be incompatible with the general principle that

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<sup>460</sup> Rejoinder, ¶ 157.

<sup>461</sup> Rejoinder, ¶ 158 referring to Constitution of India, Arts. 1, 152, First Schedule, Entry 7 (**RLA-45bis**).

<sup>462</sup> Reply, ¶ 191(b) referring to *Eureko*, ¶¶ 112-113, 250 (**CLA-017**); *SGS v. Paraguay*, ¶¶ 167-169 (**CLA-038A**); *Malicorp*, ¶ 103 (**RLA-11**).

<sup>463</sup> Reply, ¶ 199.

<sup>464</sup> Reply, ¶ 201(c) citing J. Wong, "Umbrella Clauses in Bilateral Investment Treaties of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes", 14 *Geo. Mason L. Rev.* 135 (2006), p. 155 (**CLA-067**).

<sup>465</sup> Reply, ¶ 201(a) citing E. Gaillard, "Investment Treaty Arbitration and Jurisdiction over Contractual Claims – the *SGS* Cases Considered" in T. Weiler, *International Investment Law and Arbitration: Leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), p. 334 (**CLA-065**).

<sup>466</sup> Reply, ¶ 201(b) citing T. Wälde, "Energy Charter Treaty-based Investment Arbitration", 3 *Transnational Dispute Management* (2004), p. 33 (**CLA-064**); Tr., 9 November 2018, 271:18-23.

<sup>467</sup> Reply, ¶ 202 citing *SGS v. Paraguay*, ¶¶ 176-177 (**CLA-038A**); Tr., 9 November 2018, 271:8-14.

<sup>468</sup> Reply, ¶ 203.



“jurisdiction of the treaty tribunal may not be lightly waived.”<sup>469</sup> Furthermore, the *SGS v. Paraguay* approach avoids the prospect of parallel proceedings for the FET clause claim and the umbrella clause claim, which could result in conflicting findings.<sup>470</sup> Nissan suggest that admissibility is a controversial notion that does not justify a dismissal.<sup>471</sup>

254. In any event, Nissan views *SGS v. Philippines* as distinguishable in many respects. In particular, that case concerned “a dispute simply about monies owed under a contract” and the expropriation claim “wasn’t made out at all on the pleadings.”<sup>472</sup> By contrast, this case has “additional elements.”<sup>473</sup> The parties to the 2008 MoU also differ from the parties in this arbitration.<sup>474</sup>
255. In response to India’s alternative case that the umbrella clause claims must be dismissed for lack of privity if the Tribunal finds the parties to the 2008 MoU to be substantially different from those here, Nissan contends that India’s argument “runs contrary to the principles of attribution” under the CEPA and international law.<sup>475</sup> Nissan points to other cases upholding umbrella clauses in the context of contracts entered into by State organs.<sup>476</sup> It distinguishes the other cases on which India relies as involving State-owned entities rather than State organs, and relating to commercial contracts rather than an investment agreement like the 2008 MoU.<sup>477</sup>
256. Finally, Nissan argues that India’s position would deprive Article 87(2) of its object and purpose, which is to protect foreign investors “against breach of obligations undertaken by the [S]tate with regard to ‘investment activities.’”<sup>478</sup> Indeed, it would allow a State to avoid its obligation under an umbrella clause by simply “delegating conclusion of any agreements with foreign investors to its regional governments or a domestic legal personality distinct from the state under the local law.”<sup>479</sup> In Nissan’s view, this is clearly incompatible with the intended effect of the CEPA.

## **B. THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS**

### **1. The Jurisdictional Sufficiency of Nissan’s FET Allegations**

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<sup>469</sup> Reply, ¶ 203(b).

<sup>470</sup> Reply, ¶ 203(c).

<sup>471</sup> Tr., 9 November 2018, 288:18-21.

<sup>472</sup> Tr., 9 November 2018, 265:7-20.

<sup>473</sup> Tr., 9 November 2018, 265:23-25.

<sup>474</sup> Reply, ¶ 204(a).

<sup>475</sup> Reply, ¶ 206 (a). *See* Statement of Claim, ¶¶ 126-132.

<sup>476</sup> Tr., 9 November 2018, 273:22-25, 274:1-10.

<sup>477</sup> Reply, ¶ 206(b).

<sup>478</sup> Reply, ¶ 206(c).

<sup>479</sup> Reply, ¶ 206(c).

257. The Tribunal begins with India’s contentions regarding the sufficiency of Nissan’s pleading of an FET claim. The Parties are in agreement about certain core principles. First, they agree that a treaty breach is analytically distinct from a contract breach and requires a different analysis,<sup>480</sup> such that demonstrating a breach of contract would not lead inexorably to a finding of an FET violation. They also agree on the corollary, which is that the fact of a contract breach does not preclude the possibility also of a treaty breach, for example if there are other aggravating factors that satisfy the applicable FET standard.<sup>481</sup> Finally, they agree that a tribunal must make its own objective determination of whether allegations of a treaty violation are sufficient to proceed to the merits, and not simply defer to a claimant’s bald labeling of its claim as one for “treaty” rather than “contract” breach.<sup>482</sup> The Tribunal agrees with each of these propositions.
258. Where the Parties part ways, it appears, is their assessment of the degree to which a claimant at the threshold stage must plead separate and distinct *conduct* by the State, and not just aggravating *context*, to bring an FET claim within a tribunal’s jurisdictional remit. They also appear to differ on the extent to which a tribunal should evaluate the ultimate *sufficiency* of the pleaded allegations as a matter of law, or just their *arguability*, to confirm its jurisdiction to move forward to the merits.
259. Nissan’s view is that it has sufficiently pleaded the elements of an FET breach, and not just a contract breach. Nissan offers several arguments in support of its FET claim: (a) that the 2008 MoU was the culmination and embodiment of specific representations and assurances that Tamil Nadu expressly offered to induce its investment, and Tamil Nadu’s violation of those assurances therefore undermined the “legitimate expectations” on which it had invested;<sup>483</sup> (b) that Tamil Nadu’s conduct violated norms of due process, transparency and stability;<sup>484</sup> (c) that its conduct was arbitrary because it offered no “cogent reasons” for non-payment but rather admitted that payments were due,<sup>485</sup> and to the extent India now relies on the Amended Business Scheme as explanation, it has presented no evidence that this really was the contemporaneous rationale, and in any event Tamil Nadu had previously approved that scheme and made other incentive payments after it was adopted;<sup>486</sup> and finally, (d) Tamil Nadu’s “decision not to pay [...] was not taken in good faith.”<sup>487</sup> Nissan contends that this framing of its FET claim is sufficient for present purposes, because the test at the jurisdictional stage is not whether its case necessarily would succeed on the facts alleged, but rather whether the claims as pleaded “*could*

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<sup>480</sup> See, e.g., Reply, ¶¶ 173-175; Tr., 9 November 2018, 229:22-23 (“treaty and contract breaches are different things, responding to different tests, subject to different rules”) (quoting *Bayindir*, **RLA-57** at ¶ 197).

<sup>481</sup> See, e.g., Reply, ¶¶ 173-175; Rejoinder, ¶¶ 126, 130; Tr., 9 November 2018, 233:18-21.

<sup>482</sup> See, e.g., Reply, ¶ 176; Rejoinder, ¶¶ 120-122.

<sup>483</sup> Statement of Claim, ¶ 184; Tr., 9 November 2018, 260:19-22.

<sup>484</sup> Statement of Claim, ¶¶ 185-187.

<sup>485</sup> Statement of Claim, ¶¶ 188, 191; Tr., 9 November 2018, 268:14-269:24.

<sup>486</sup> Statement of Claim, ¶ 189; Tr., 9 November 2018, 261:5-262:3.

<sup>487</sup> Statement of Claim, ¶ 193.

[...] be a breach as argued for,” in the sense of “first-level arguability.”<sup>488</sup> Nissan urges the Tribunal not to prejudge the merits at this stage.<sup>489</sup>

260. In India’s view, by contrast, Nissan is simply cloaking a breach of contract case in treaty garb, in a manner that is conclusively insufficient to establish the “something more” required for an FET claim.<sup>490</sup> It contends that “labeling such breaches as arbitrary or as violating *pacta sunt servanda* or as frustrating expectations or as being inconsistent with due process, transparency or stability, does not add anything to the fact that the conduct is still a breach of contract.”<sup>491</sup> According to India, the key question is what the challenged State action is, not whether the same action may be characterized in different ways.<sup>492</sup> For these reasons, India contends that the Tribunal should decide now that the facts Nissan alleges would be insufficient to prevail on an FET claim. In its view, the proper test at the jurisdictional stage is whether the alleged facts if proven would establish an FET violation. If not, then their mere allegation cannot provide a jurisdictional basis for continuing to the merits.
261. Having evaluated these arguments, the Tribunal concludes that Nissan has alleged sufficient facts to vest the Tribunal with jurisdiction to *consider* the merits, *i.e.*, to evaluate whether Tamil Nadu’s conduct as ultimately demonstrated is sufficient to meet the CEPA standard for an FET violation. The Tribunal does not accept that it is obligated to *resolve* that question at the threshold jurisdictional stage, before the Parties even have completed briefing on the contours of the FET standard or the underlying facts. India remains free to argue on the merits that Nissan has demonstrated nothing more than a simple breach of contract, and if the Tribunal ultimately agrees, the consequences presumably would be a failure of the FET claim. But it would be premature for the Tribunal now to evaluate the strength or weakness of Nissan’s case for an FET violation. In other words, the jurisdictional question is not whether the facts as pleaded would *definitively prevail* on the merits, but rather whether the facts as pleaded *present a treaty question* for the Tribunal to decide.
262. In the Tribunal’s view, this framing of the jurisdictional question is consistent with the approach to preliminary jurisdictional questions articulated by Judge Higgins in her seminal separate opinion in the *Oil Platforms* case.<sup>493</sup> Judge Higgins explained that the Court should “accept *pro tem* the facts as alleged by Iran to be true and [...] see if on the basis of Iran’s claims of fact there *could* occur a

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<sup>488</sup> Tr., 9 November 2018, 254:12-21 (emphasis added); *see also id.*, 259:16-19.

<sup>489</sup> Tr., 9 November 2018, 254:17-19, 257:18-20.

<sup>490</sup> Tr., 9 November 2018, 233:9-10.

<sup>491</sup> Tr., 9 November 2018, 231:13-17.

<sup>492</sup> Tr., 9 November 2018, 276:21-277:10 (“[e]very contract dispute party can claim [such] things about the simple non-payment of money. It’s unfair, it’s non-transparent. You haven’t told me why you haven’t paid. These do not change the character of the claim as a simple claim for monies due under a contract. What’s lacking is any allegation of any action in addition to non-payment of money.”).

<sup>493</sup> *See Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Separate Opinion of Judge Higgins of 12 December 1996, I.C.J. Reports 1996 (“*Oil Platforms, Separate Opinion of Judge Higgins*”).

violation” of its substantive obligations.<sup>494</sup> She further clarified that this approach would not require determining that the claims as pleaded necessarily “*would*” involve a breach of the provisions,” explaining that “[t]his would seem to go too far. Only at the merits, after deployment of evidence, and possible defences, *may ‘could’ be converted to ‘would’*. The Court should thus see if, on the facts as alleged by Iran, the United States actions complained of *might* violate the Treaty articles.”<sup>495</sup> This approach leaves for the merits not only “to determine what exactly the facts are,” but also to evaluate “whether as finally determined they do sustain a violation of [the applicable obligations]; and if so, whether there is a defence to that violation.”<sup>496</sup> Investment treaty tribunals have articulated similar standards.<sup>497</sup>

263. For the reasons set forth above, the Tribunal concludes that Nissan has met this lower hurdle.

## 2. The Implications of Clause 15 of the 2008 MoU

264. India contends that the broad scope of the 2008 MoU’s forum selection clause bars Nissan from submitting any of its treaty claims to UNCITRAL arbitration, including its FET claims, because those claims as pleaded are subsumed within the universe of matters that Clause 15 of the 2008 MoU directs exclusively to local arbitration. “At the very least,” however, India argues that Clause 15 “command[s] the dismissal” of Nissan’s umbrella clause claim,<sup>498</sup> because an umbrella clause imports into a treaty all provisions of the relevant contract, including the obligation to comply with agreed procedures for resolution of contract-based claims. The Tribunal addresses these arguments in sequence below.

### (a) *The Implications for Treaty Claims in General (Including FET Claims)*

265. As a threshold matter, the Tribunal accepts that Article 96(4)(d) of the CEPA allows parties to an

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<sup>494</sup> *Oil Platforms*, Separate Opinion of Judge Higgins, p. 856, ¶ 32 (emphasis added).

<sup>495</sup> *Oil Platforms*, Separate Opinion of Judge Higgins, p. 856, ¶ 33 (emphasis added).

<sup>496</sup> *Oil Platforms*, Separate Opinion of Judge Higgins, p. 857, ¶ 35 (emphasis added).

<sup>497</sup> See, e.g., *BIVAC*, ¶¶ 120, 125-126 (**RLA-9**) (first explaining that “at this preliminary stage we are not in a position to [...] express conclusions on the arguments of law” but are “limited to an assessment of whether BIVAC has pleaded a [...] case which [...] *would be capable* of giving rise” to a treaty violation,” and then equating this question with arguability, as follows: “our finding as to jurisdiction should not be taken to reflect any view [...] as to whether a persistent failure to make payment on an outstanding debt [...] could of itself ever amount to a violation of the [FET] obligation [...]. We express no view as to whether it could meet [the required] standard. At this preliminary stage our conclusion is simply that BIVAC’s claim [...] is *arguable*”) (emphasis added); *SGS v. Paraguay*, ¶¶ 134-136 (**CLA-038A**) (explaining that under a test accepting that “the threshold at the jurisdictional stage is whether the facts alleged by Claimant *could, if proven, make out* a claim under the Treaty,” it would not be appropriate yet to resolve the respondent’s argument that a treaty breach could not be shown because “Claimant has alleged no more than non-performance of contractual obligations (principally, the obligation to make payment)”; rather, “[r]esolution of that dispute is properly reserved to such time as both Parties have fully presented their evidence and arguments”) (emphasis added).

<sup>498</sup> Rejoinder, ¶ 115.

“investment dispute” to agree to submit that dispute to “any arbitration in accordance with other arbitral rules,” beyond the three expressly offered in Articles 96(4)(a)-(c) (*i.e.*, the ICSID Arbitration Rules, ICSID Additional Facility Rules and the UNCITRAL Rules). As noted above, an “investment dispute” is defined in Article 96(1) as a dispute with an investor that has “incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation” under CEPA Chapter 8, *i.e.*, as a claim for treaty breach. There is nothing in Article 96(4)(d) that limits the parties’ discretion to agree only to certain *types* of “other arbitral rules,” such as international rules like those of the ICC, LCIA, or SCC. To the contrary, Article 96(4)(d)’s use of the word “any” in the phrase “any arbitration in accordance with other arbitral rules” encompasses the full universe of available arbitral options. *A fortiori*, this includes the possibility of an agreement by the parties to submit treaty claims to a local arbitration seated within the host State. However, as with all other issues of party agreement under the CEPA, the Tribunal should be satisfied that such an agreement actually was reached. This requires close scrutiny of the instrument that is said to manifest the agreement to an alternative arbitral forum within the meaning of Article 96(4)(d).

266. The instrument here is a contract between Nissan and Tamil Nadu, not Nissan and the State of India. However, the Tribunal assumes *arguendo* – for purposes of this discussion only – that the distinction between an investor’s agreement with a State organ, and the same investor’s agreement with the State itself, may not be determinative. If the evidence were to demonstrate that Nissan had clearly agreed with Tamil Nadu to submit investment treaty claims to a particular arbitral forum, the Tribunal accepts that such an agreement might well bind Nissan in pursuing a CEPA breach claim arising out of Tamil Nadu’s conduct, notwithstanding that the State of India would be the proper respondent to defend Tamil Nadu’s actions under international law. The Tribunal therefore focuses on the *content* of the relevant arbitral agreement, rather than the formalism of its conclusion with Tamil Nadu rather than the State of India.

267. Clause 15 of the 2008 MoU provides as follows:

The Parties agree to use their best efforts to negotiate in good faith and settle amicably all disputes that may arise or relate to this MoU or a breach thereof. If such dispute, doubt or question, arising out of in respect of this MoU or the subject matter thereof, cannot be settled amicably through ordinary negotiations by the Parties, the same will be decided by arbitration in terms of the Indian Arbitration and Conciliation Act, 1996 (Central Act 26 of 1996). The venue of the arbitration will be only in Chennai, India, and the arbitration proceedings will be conducted in the English language. This MoU shall be governed and construed in accordance with the laws of India. The courts located in Chennai alone and only will have jurisdiction on any matter relating to this MoU, to the exclusion of all other courts in any other place.<sup>499</sup>

268. Contrary to Nissan’s arguments, the Tribunal accepts that Clause 15 constitutes an exclusive forum selection clause in favor of Chennai-based arbitration, for the particular categories of disputes that it

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<sup>499</sup> C-005, Clause 15.

covers. The Tribunal does not find the references to Chennai arbitration in the second and third sentences to be either non-exclusive or fatally ambiguous as Nissan suggests,<sup>500</sup> simply because the last sentence of the Clause also references a role for the Chennai courts. Rather, the second sentence specifies that covered disputes “*will be* decided by arbitration in terms of the Indian Arbitration and Conciliation Act,” and the third sentence confirms that such arbitration may “*only*” be venued in Chennai. The combination of the two sentences is an exclusive choice of Chennai-based arbitration for the covered categories of disputes. While the last sentence of the Clause contains a similar exclusive choice of forum (“[t]he courts located in Chennai *alone and only* [...]”), the sentence in its full context makes clear that this is in relation to other courts (“to the exclusion of all other courts in any other place”), and not to the exclusion of the very arbitration agreed in the preceding sentences. The logical reading is neither that the last sentence overrides the prior ones (to mandate judicial rather than arbitral resolution), nor that it eliminates the exclusive import of the “only in Chennai” language, enabling the substitution of alternative arbitral venues outside of Chennai. Rather, the harmonious reading of Clause 15 is the one India suggests, namely that with respect to the categories of disputes that the Clause covers, it mandates arbitration in Chennai, while conferring exclusive *supervisory* authority on the Chennai courts to address any matters arising in connection with the arbitration or a resulting award.<sup>501</sup>

269. However, this analysis does not resolve the critical question of the *scope* of disputes that are covered by Clause 15, and in particular whether that scope includes potential investment disputes against India alleging a breach of the substantive provisions of the CEPA. On that issue, India focuses on the textual breadth of the second sentence of Article 15, namely its reference to the submission to arbitration of “such dispute, doubt or question, arising out of in respect of this MoU or the subject matter thereof.” The words “such dispute, doubt or question” relate back to the first sentence, which address negotiation and amicable settlement efforts for “all disputes that may arise or relate to this MoU or a breach thereof.”
270. The Tribunal accepts that this is broad language, and that in many domestic legal systems, such language frequently is interpreted as encompassing not only domestic law claims for breach of contract, but also other types of domestic law claims related to the contract, such as (for example) claims for fraud in the inducement. However, the Tribunal is unable to accept India’s leap from the proposition that “it’s universal [...] as a matter of municipal law, that an arbitration agreement brings about a waiver of a right to go to court,” to its conclusion – stated as a matter of inference – that the parties to the 2008 MoU *also* intended to waive international arbitration of any treaty claims.<sup>502</sup> The fact remains that international treaty obligations, and the right to enforce them by procedures specified

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<sup>500</sup> Statement of Claim, ¶ 165; Reply, ¶ 187.

<sup>501</sup> Rejoinder, ¶ 137; Tr., 9 November 2018, 245:16-246:23.

<sup>502</sup> Tr., 9 November 2018, 249:17-250:2 (“there’s no reason why a clear indication of waiver could not be inferred from the very breadth of Clause 15”).

in such treaties, exist on a different level of the international legal order than domestic law rights.<sup>503</sup>

In the investment treaty context, sovereign States agree to create procedural rights for the benefit of their respective investors, allowing them to enforce in particular fora the substantive obligations that these States undertake to one another. These procedural rights are different in kind from procedural rights created by private law contracts or other private law relationships.

271. In the Tribunal's view, an agreement by an investor to submit such international law claims to a forum *other* than the particular fora offered in the treaty therefore must be clearly manifested, and not simply inferred. While the Tribunal does not exclude the possibility that parties might by clear contract agree to opt-out of international arbitration of treaty claims,<sup>504</sup> there must be persuasive evidence of any such opt-out, including that the parties had in mind the possibility of future treaty claims and knowingly waived the right to arbitrate such claims in a neutral international forum. The Tribunal thus agrees with prior tribunals that the right to access a particular dispute resolution forum offered in a treaty "should not lightly be assumed to have been waived."<sup>505</sup> Rather, there would have to be direct and convincing evidence that a party intended to do so, for example through an express waiver rather than one merely by inference or implication.<sup>506</sup>
272. Clause 15 of the 2008 MoU does not evince any such intent, either expressly or by clear implication, regarding potential future investment disputes. Nor has India presented any extrinsic evidence to suggest that at the time of the 2008 MoU, Nissan and the GoTN ever discussed the possibility of a potential treaty dispute, much less mutually agreed to substitute local arbitration for international arbitration of such a dispute. Indeed, given that the CEPA was not even signed by India and Japan until 2011, it could not have been within Nissan and the GoTN's contemplation during the negotiation

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<sup>503</sup> See *SGS v. Paraguay*, ¶ 178 (**CLA-038A**) (describing the "international law 'safety net' of protections that [BITs] are meant to provide separate from and supplementary to domestic law regimes").

<sup>504</sup> See generally *SGS v. Philippines*, ¶ 154 (**RLA-8**) (considering it "doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to [...] treaties under international law," and therefore analyzing the impact of a contractual forum selection clause on umbrella clause claims as a matter of admissibility rather than jurisdiction); *Aguas v. Bolivia*, ¶ 118 (**RLA-18**) (stating that to the contrary, "[a]ssuming that parties agreed to a clear waiver of ICSID jurisdiction, the Tribunal is of the view that such a waiver would be effective"); *SGS v. Paraguay*, ¶ 178 & fn. 108 (**CLA-038A**) (noting a "serious question whether individuals are capable of waiving rights conferred upon them by a treaty between two States," and simply finding that "[a]ssuming *arguendo* that the parties [...] could have expressly excluded the right to resort to arbitration under the [...] BIT, [...] they did not do so").

<sup>505</sup> *SGS v. Paraguay*, ¶ 178 (**CLA-038A**).

<sup>506</sup> *Vivendi II*, ¶ 76 (**CLA-011**) (noting that the concession contract "did not in terms purport to exclude the jurisdiction of an international tribunal arising under [...] the BIT; at the very least, a clear indication of an intention to exclude that jurisdiction would be required"); *Aguas v. Bolivia*, ¶¶ 115, 117, 119 (**RLA-18**) (stating that "the question of whether a conflicting mandatory obligation in a separate document can affect the jurisdiction of an ICSID tribunal is a question of the intent of the Parties in concluding the separate document"; distinguishing between "direct" evidence of "specific intent" by an "explicit waiver" reflecting "specific language," and a scenario where any such intent "must be implied"; and declining to "imply a waiver or modification of ICSID jurisdiction without specific indications of the common intention of the Parties"); *SGS v. Paraguay*, ¶ 180 (**CLA-038A**) (concluding that "at least in the absence of an express waiver, a contractual forum selection clause should not be permitted to override the jurisdiction to hear Treaty claims").

of the 2008 MoU that Clause 15 would foreclose resort to the default fora provided in CEPA for resolution of investment disputes.<sup>507</sup> In these circumstances, the Tribunal is unable to accept India's argument that the particular wording of Clause 15, however broad it may be for domestic law disputes, reflects an agreement to submit investment treaty disputes to Chennai-based arbitration.

273. For these reasons, the Tribunal rejects India's objection that Clause 15 requires dismissal of all CEPA claims, including Nissan's claims under the CEPA's FET clause. The Tribunal finds no waiver in Clause 15 of Nissan's right to avail itself of a later-agreed BIT, even if Nissan's claims under that BIT are closely connected to facts involving its 2008 MoU. The Tribunal turns below to India's separate argument that as a matter of *admissibility*, Clause 15 nonetheless requires dismissal of Nissan's umbrella clause claim, because umbrella clauses themselves mandate observance of contractual undertakings, of which a contractual dispute resolution clause is one important part.

(b) *The Implications for Nissan's Umbrella Clause Claim*

274. The Tribunal accepts that there is a broad jurisprudential debate about the meaning, scope and consequences of umbrella clauses. The Tribunal sees no need to address all strands of this debate. Rather, at this juncture it confines itself to the particular issue at hand, namely whether it should decline to hear Nissan's umbrella clause claim as a matter of admissibility. India's argument is that Nissan should not be able to pursue an umbrella clause claim that is predicated on the State's failure to observe obligations in the 2008 MoU without itself complying with another MoU obligation, namely the obligation under Clause 15 to pursue MoU complaints exclusively through local arbitration.
275. At the outset, the Tribunal expresses discomfort with the dividing line, in this particular context, between jurisdiction and admissibility. The ICJ has described objections to admissibility as "an assertion that, even if the Court has jurisdiction and the facts stated by the applicant [...] are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."<sup>508</sup> While doctrines of admissibility may well have important applications in investment arbitration – for example, in considering whether tribunals should entertain claims about investments procured through illegal acts, or whether they should countenance re-litigation of treaty claims that already were litigated in a prior treaty case – in this particular context, there is significant overlap with the jurisdictional analysis conducted above. In essence, India asks the Tribunal to find that even if Clause 15 *did not waive* Nissan's right to pursue international law claims under a treaty that later came

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<sup>507</sup> Cf. *BIVAC*, ¶¶ 145-146 (**RLA-9**) (considering it significant that the contract postdated a BIT but did not allude to potential BIT claims as an exception to a contractual forum selection clause); *SGS v. Paraguay*, ¶¶ 171, 178 (**CLA-038A**) (rejecting the *BIVAC* notion that silence in a contract may waive BIT rights, but discussing a theoretical scenario in which "the parties to [a] later-in-time Contract could have expressly excluded the right to resort to arbitration under [an] BIT") (emphasis added).

<sup>508</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgement of 6 November 2003, ICJ Reports 2003, p. 161, ¶ 29 (**RLA-53**).



into force, and therefore *does not deprive us of jurisdiction* to hear such claims in general, the Tribunal nonetheless should *decline to hear* one such treaty claim. Implicit in India's invocation of admissibility is a notion of impropriety, namely that the very act of complaining under CEPA about a failure to honor MoU commitments would be an abrogation of Nissan's own commitments in the 2008 MoU.<sup>509</sup> India asks the Tribunal not to countenance this posited end-run around Nissan's contractual commitments, even if the Tribunal formally has jurisdiction to allow it.

276. The Tribunal performs its role pursuant to the powers vested in it by the CEPA. Accordingly, the Tribunal again considers it appropriate to start with the language of the CEPA, interpreted in good faith and in accordance with the ordinary meaning of its terms "in their context and in the light of its object and purpose," pursuant to Article 31 of the VCLT.
277. First, Article 87(2) (the umbrella clause) provides that "[e]ach Party shall observe any obligation it may have entered into with regard to investment activities in its Area of investors of the other Party." The word "Party" is defined by the CEPA as the two Contracting Parties, India and Japan.<sup>510</sup> "[A]ny obligation [...] entered into with regard to investment activities" is not a defined term,<sup>511</sup> but the Tribunal accepts that the ordinary meaning of "any" is all-encompassing. The phrasing draws no distinctions based on the mechanism through which the commitment is conveyed, and certainly does not suggest that State contracts were meant to be excluded or covered only in certain circumstances.<sup>512</sup> Indeed, the words "entered into" seem to envision contracts as at least one primary means by which the Contracting States might undertake obligations to each other's investors. This would be consistent with the provenance generally of umbrella clauses, which indicates they were intended originally as providing international treaty protection to investors entering into contracts with States.<sup>513</sup> The Contracting Parties must have understood, at the time of the CEPA, that many State contracts have their own forum selection clauses, but gave no indication in the text of Article 87(2) that the wording

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<sup>509</sup> See Counter-Memorial, ¶ 162 (accusing Nissan of trying to use "the principle of *pacta sunt servanda* [...] [as] a one-way street"); Rejoinder, ¶¶ 146, 155 (accusing Nissan of "ignoring its own obligations").

<sup>510</sup> CEPA, Art. 3(q).

<sup>511</sup> The Tribunal addresses separately in Section VIII.B.3 below the potential implications of the word "it," which raises different issues (regarding privity between Tamil Nadu and India) than those addressed here (regarding the scope of matters covered by Clause 15).

<sup>512</sup> See generally *SGS v. Philippines*, ¶¶ 115, 118 (**RLA-8**) (noting that "the term 'any obligation' is capable of applying to obligations arising under national law, e.g. those arising from a contract," and that if States had intended to limit the umbrella clause to obligations outside of contracts, "such a limitation could readily have been expressed"); *BIVAC*, ¶ 141 (**RLA-9**) ("[t]he words 'any obligation' are all encompassing. They are not limited to international obligations, or non-contractual obligations, so that they appear without apparent limitation with respect to commitments that impose legal obligations."); *SGS v. Paraguay*, ¶ 167 (**CLA-038A**) ("The obligation has no limitations on its face – it apparently applies to all such commitments [...]. [E]ven as to the [...] claims that are predicated directly on Paraguay's alleged breach of the Contract, we have no hesitation in treating the Contract's obligations as 'commitments' within the meaning of [the umbrella clause]").

<sup>513</sup> See *Eureko*, ¶ 251 (**CLA-017**). Indeed, the first umbrella clause was included in the very first bilateral investment treaty, between Germany and Pakistan in 1959, and it was explained in the German Parliament at the time that the clause was meant to cover any contract entered into between the investor and the State. See *Alenfeld*, *Die Investitionsförderungsverträge der Bundesrepublik Deutschland* (1971), p. 97, fn. 180.

of such clauses could be relevant to the scope or reach of the umbrella clause itself.

278. Equally important, and as previously discussed, Article 96(4) of the CEPA authorizes a qualified investor to submit to international arbitration any “investment disputes,” defined in Article 96(1) as involving claims for loss or damage incurred by an alleged breach of “any obligation” under CEPA Chapter 8. There is no carve-out from the submission clause for claims alleging breach of Article 87(2) in circumstances where the underlying obligation that the State allegedly did not observe derived from a contract with an exclusive forum selection clause.
279. However, India’s admissibility objection would require the Tribunal to read either Article 87(2) or Article 96(4) as if it contained such an exception. The proposition would limit arbitrability of umbrella clause claims to circumstances where the investor complains about non-observance of commitments made outside a contractual setting, or in a contract with no mandatory designation of a dispute resolution forum. This would be a significant limitation on the reach of the umbrella clause, and one for which the Contracting Parties have not indicated any such intent, either in surrounding provisions of the CEPA or in instruments appropriate to signal their contemporaneous expectations of the clause’s object and purpose. Effectively, India would have the Tribunal read into the CEPA something that it does not say, while ignoring a significant element of what it *does* say (that claims for failure to observe “any obligation” may be submitted to treaty arbitration). India suggests that this reading is important to “respect [...] the contractual autonomy and understanding of the parties before it,”<sup>514</sup> but at the same time it would disregard the equally important respect for the autonomy of the Contracting Parties to the CEPA, in negotiating and agreeing on particular treaty text.
280. The Tribunal accepts that some tribunals have been uncomfortable with the potential consequences of permitting investors to prosecute umbrella clause claims without first pursuing resolution of complaints through domestic law remedies provided in the underlying contract. Postulating that the Contracting States could not have intended such a result, some tribunals have tried to limit the consequences through application of the doctrine of admissibility. This has led some tribunals to stay international proceedings to allow local remedies to be pursued first, while others have dismissed treaty claims outright as prematurely filed,<sup>515</sup> while leaving open the possibility of an investor reverting to international arbitration following domestic proceedings. However, this Tribunal does not see it as its role as delineating a proper sequence for proceedings in two potential venues,<sup>516</sup> each of

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<sup>514</sup> Rejoinder, ¶ 151.

<sup>515</sup> See, e.g., *SGS v. Philippines*, ¶¶ 155, 162-163, 173-175 (RLA-8) (staying treaty claims based on a finding that “a decision by this Tribunal [...] would be premature” until the Philippines courts first resolved certain underlying contractual issues); *BIVAC*, ¶¶ 154, 160-161 (RLA-9) (criticizing *SGS v. Philippines* for using a stay, but ultimately deferring decision as between a stay and a dismissal).

<sup>516</sup> The Tribunal accepts that different “ripeness” considerations may arise in the context of specific procedural prerequisites to arbitration imposed by treaty text, and that these are sometimes analyzed as matters of admissibility although they alternately could be viewed as preconditions for jurisdiction. See Tr., 9 November 2018, 241:20-

which has a legitimately designated basis of jurisdiction over a type of dispute (*i.e.*, local arbitration of contract claims under the 2008 MoU, international arbitration of umbrella clause claims under the CEPA). While it is possible that these two overlapping sources of jurisdiction could result in parallel proceedings interpreting contractual obligations, nothing in the CEPA forbids this possibility. It certainly does not require arbitral tribunals with jurisdiction over treaty claims to stay their hand in circumstances where there is no parallel proceeding on the horizon, in order to force an investor to pursue potential contract remedies rather than treaty ones.

281. This does not mean that States themselves cannot take appropriate measures to require the sequencing of proceedings, if they are concerned about investors pursuing umbrella clause remedies offered by treaty rather than local remedies provided by contract. As noted above, it is the clear prerogative of States to take any measures they feel appropriate to address any unintended or reconsidered consequences of the prior treaty text to which they have agreed. Some States have done so already, including in new treaties that eliminate umbrella clauses entirely or modify their contents significantly. The Tribunal expresses no views on the policy benefits or drawbacks of these recent treaty changes. That is because its role is not to opine in the abstract on the proper role or scope of umbrella clauses, or to seek to shape that role through malleable notions of admissibility or otherwise, but rather to interpret and apply faithfully the particular clauses contained in the treaty under which it is empaneled. Where Contracting Parties to a particular treaty have not signaled any basis to reject umbrella clause claims based on the language of underlying State contracts, it is not for a tribunal to substitute its judgment for theirs. The Tribunal's duty is to exercise the jurisdiction with which it has been vested.

### 3. India's Privity Arguments Regarding the Umbrella Clause Claim

282. India's final argument is that "in the event" the Tribunal concludes that the GoTN and India are not "substantially the same" for purposes of Clause 15 of the 2008 MoU, then Nissan's umbrella Clause claim must be dismissed for lack of privity.<sup>517</sup> India presents this objection as an "alternative argument,"<sup>518</sup> with its primary position remaining that the Parties to this dispute *are* "substantially similar" to the parties to the MoU.<sup>519</sup> As explained in Section VIII.B.2(a) above, however, the Tribunal does not rest its conclusion about Clause 15 on the fact that the 2008 MoU was signed by the GoTN rather than by India.<sup>520</sup> Rather, it viewed Clause 15 as insufficient *in any event* to waive

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242:1 (India referring to admissibility in the context of exhaustion of remedies), 263:16-264:10 (Nissan referring to admissibility in the context of negotiation periods required before initiating a treaty arbitration).

<sup>517</sup> Counter-Memorial, fn. 248; Rejoinder, ¶¶ 118, 156.

<sup>518</sup> Rejoinder, ¶ 118.

<sup>519</sup> See Counter-Memorial, Section VI.B.1 ("The Parties To This Dispute Are Substantially Similar To The Parties To The 2008 MoU"); Rejoinder, Section IV.C.1 ("The Parties To the 2008 MoU And This Dispute Are Substantially The Same").

<sup>520</sup> To the contrary, the Tribunal noted that "[i]f the evidence were to demonstrate that Nissan had clearly agreed with Tamil Nadu to submit investment treaty claims to a particular arbitral forum, the Tribunal accepts that such an

international arbitration of potential treaty claims, particularly for a treaty that was not even in existence when the 2008 MoU was concluded. Since the Tribunal did not make the finding about separate identities on which India expressly conditioned its “alternative argument,” there is arguably no need to address the privity point further.

283. Nonetheless, the Tribunal accepts that there is a relevant textual issue under Article 87(2) of the CEPA. Article 87(2) provides that “[e]ach Party shall observe any obligation *it* may have entered into with regard to investment activities in its Area of investors of the other Party.” India’s “privity” argument is that the word “it” in this provision refers back to the word “Party,” which is defined in CEPA Article 3(q) as meaning the Contracting States, India and Japan. Since the 2008 MoU was not signed by India but rather by the GoTN, India contends that it does not constitute “any obligation” that India itself has “entered into,” and therefore the umbrella clause does not bind to “observe” it or create a cause of action against India for failure to do so.
284. In the Tribunal’s view, the implication of the word “it” for purposes of Article 87(2) is one that goes to the merits, rather than to jurisdiction. As explained in Section VIII.B.1 above, for purposes of jurisdiction the question is not whether the facts as pleaded would definitively prevail on the merits, but rather whether the facts as pleaded could be *capable* of giving rise to a treaty violation, in the sense of presenting an arguable treaty question that the Tribunal would have jurisdiction to decide. Here, India certainly has an arguable case that the word “it” in Article 87(2) limits its substantive duty to observing only such obligations as the State itself entered into, bearing in mind “the separate legal personality of the contracting entity under domestic law.”<sup>521</sup> But Nissan correspondingly has an arguable case that as an instrument of international law, the CEPA should be read in light of public international law principles of attribution, under which a State is considered responsible for the actions of State organs.<sup>522</sup> The Parties have not yet briefed these issues in any depth: India initially offered its position in a single footnote of its Counter-Memorial, Nissan responded in a single paragraph of its Reply, and India reiterated its position in a few paragraphs of its Rejoinder.<sup>523</sup> The Tribunal considers the interpretative issue too important to decide on the basis of such scant briefing. More fundamentally, there is no question that this is a substantive treaty question that falls within the Tribunal’s jurisdiction to decide, rather than a strictly jurisdictional question which goes to the Tribunal’s authority over the dispute in the first place. The Tribunal therefore declines India’s

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agreement might well bind Nissan in pursuing a CEPA breach claim arising out of Tamil Nadu’s conduct, notwithstanding that the State of India would be the proper respondent to defend Tamil Nadu’s actions under international law.” See *supra* ¶ 266.

<sup>521</sup> Rejoinder, ¶ 157.

<sup>522</sup> Reply, ¶ 206 (citing ILC Art. 4 and CEPA Arts. 83, 84(c)(i), providing that CEPA Chapter 8 “shall apply to measures adopted or maintained by a Party,” defined to include measures of its “central, regional or local governments or authorities”).

<sup>523</sup> Counter-Memorial, fn. 248; Reply, ¶ 206; Rejoinder, ¶¶ 118, 156-158.

invitation to resolve this issue as a preliminary point on very limited briefing,<sup>524</sup> and defers the substantive issue of the scope of India's obligations under Article 87(2) for examination as a merits defense, rather than as a putative barrier to jurisdiction.

#### IX. INDIA'S OBJECTION THAT NISSAN'S CLAIMS ARE TIME-BARRED

285. India maintains that the Tribunal lacks jurisdiction because Nissan failed to bring its claims before the expiry of the three-year limitation period imposed by Article 96(9) of the CEPA. In particular, India argues that three years before the commencement of this arbitration on 23 February 2014,<sup>525</sup> Nissan had already “acquired or should have [already] first acquired [...] the knowledge that [it] had incurred loss or damage”<sup>526</sup> arising out of India's alleged breaches of the FET and umbrella clause provisions in Articles 87(1) and 87(2) of the CEPA, respectively, and therefore, should have raised its claims earlier. Additionally, India considers that no action or measure by either Party could result in tolling the limitation period after it was triggered by Nissan's first knowledge.<sup>527</sup>
286. Nissan agrees that under the terms of Article 96(9) of the CEPA, its claims would be time-barred if it had either actual or constructive knowledge of India's alleged breaches, and of any damage or loss arising out of those breaches, before 23 February 2014.<sup>528</sup> However, it disagrees with India's approach to applying the time bar, contending that India fails to differentiate among multiple claims, the multiple points in time when relevant losses and damages occur, and therefore the multiple points in time during which Nissan had knowledge of those losses or damages.<sup>529</sup> In Nissan's view, the question of whether the time bar applies to its FET claims under Article 87(1) of the CEPA, must be analyzed separately from its umbrella claims under Article 87(2) of the CEPA, and that when this is done, it becomes clear that none of its claims are time-barred.<sup>530</sup> Nissan considers it irrelevant whether any tolling occurred, because no cause of action even arose prior to the critical date.<sup>531</sup>
287. The Parties' positions are summarized below with respect to the three issues that emerged in their submissions, namely (i) interpretation of Article 96(9) of the CEPA; (ii) whether Nissan's claim under

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<sup>524</sup> See, e.g., *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, ¶¶ 197-198 (CLA-072) (“*Burlington*”) (joining to the merits a jurisdictional objection regarding privity for purposes of an umbrella clause claim, because the issue had been briefed insufficiently at the jurisdictional stage).

<sup>525</sup> Tr., 8 November 2018, 141:11-21.

<sup>526</sup> CEPA, Article 96(9) (CLA-043).

<sup>527</sup> Tr., 8 November 2018, 203:10-18.

<sup>528</sup> Reply, ¶ 115; Tr., 8 November 2018, 179:23-180:2.

<sup>529</sup> Reply, ¶¶ 111-114 referring to Counter-Memorial, ¶¶ 122, 128-129, 130-131, 132; *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016), ¶¶ 237-240 (CLA-080) (“*Rusoro*”).

<sup>530</sup> Reply, ¶ 115.

<sup>531</sup> Tr., 8 November 2018, 210:7-19.

the FET clause in Article 87(1) of the CEPA is time-barred; and (iii) whether Nissan's claim under the umbrella clause in Article 87(2) of the CEPA is time-barred. The Tribunal's analysis follows.

**A. THE POSITIONS OF THE PARTIES**

**1. Interpretation of Article 96(9) of the CEPA**

*(a) India's Position*

288. India considers that provisions such as Article 96(9) of the CEPA constitute “categorical limitations on Contracting States’ offer of consent to arbitration of investments disputes,” which “limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties they bring.”<sup>532</sup> Consistent with this purpose, India points out that tribunals analyzing similar clauses have emphasized that they introduce a “clear and rigid limitation defense which, as such, is not subject to any suspension, prolongation or other qualification.”<sup>533</sup>
289. Accordingly, India argues, “when similar and related actions by a respondent State are at issue,” an investor may not rely on the most recent allegation of wrongful conduct to circumvent any applicable limitations provision.<sup>534</sup> Otherwise, India alleges, “the limitations provision would be without *effet utile*.”<sup>535</sup> Therefore, in India's submission, the correct approach is the one described in *Spence v. Costa Rica*, where the tribunal found that, “[w]hile it may be that a continuing course of conduct constitutes a continuing breach [...] such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims.”<sup>536</sup>
290. Addressing the particular requirements of Article 96(9) of the CEPA, India contends that both “actual or constructive knowledge” can serve to trigger the running of the time period, and that the latter is assessed by an objective standard, namely, “what a prudent claimant should have known or must reasonably be deemed to have known [...] [if it had] ‘exercise[d] [...] a reasonable care or

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<sup>532</sup> Counter-Memorial, ¶ 120 citing *Spence International Investments et al. v. Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 208 (RLA-46) (“*Spence*”); Tr., 8 November 2018, 142:10-15.

<sup>533</sup> Counter-Memorial, ¶ 120 citing *Spence*, ¶ 208 (RLA-46); *Feldman*, Award, ¶ 63 (RLA-3); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006), ¶ 29 (RLA-4) (“*Grand River*”); *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 June 2013), ¶ 304 (RLA-5); *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA (31 May 2016), ¶ 192 (RLA-6) (“*Corona*”).

<sup>534</sup> Counter-Memorial, ¶ 121 referring to *Grand River*, ¶ 81 (RLA-4).

<sup>535</sup> Counter-Memorial, ¶ 121 referring to *Grand River*, ¶ 81 (RLA-4).

<sup>536</sup> Counter-Memorial, ¶ 121 citing *Spence*, ¶ 208 (RLA-46) and referring to *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award (9 Mar. 2017), ¶ 113 (RLA-7) (“*Ansung*”); Rejoinder, ¶ 88 referring to Reply ¶ 115, 124; Counter-Memorial, ¶ 121; Tr., 8 November 2018, 168:10-18.

diligence.”<sup>537</sup> India acknowledges that the relevant knowledge must relate to the fact of “loss or damage,” but notes that such knowledge does not have to be full or precise, and that a “first appreciation” would suffice.<sup>538</sup>

(b) *Nissan’s Position*

291. Nissan emphasizes that Article 96(9)’s knowledge requirement must be fulfilled with respect to the relevant loss or damage resulting from alleged CEPA breaches, and not merely the breach itself.<sup>539</sup> It notes that knowledge of a breach does not necessarily equate to knowledge of the relevant loss or damage.<sup>540</sup>
292. Nissan argues that India’s approach to applying the time bar is erroneous.<sup>541</sup> In particular, it disputes India’s suggestion that a time bar for its claims to investment incentives can be determined globally, without distinguishing among different individual claims.<sup>542</sup> In its view, India “fail[s] to consider the different points in time when the relevant losses and damages from the different CEPA breaches occur, let alone when the Claimant had or must have had the relevant knowledge.”<sup>543</sup> Nissan further contends that India’s approach is “not supported by logic or treaty jurisprudence,” which recognizes that different treaty breaches may crystallize at different times.<sup>544</sup> In *Rusoro v. Venezuela*, for example, the tribunal recognized that in a case involving multiple claims, the claims that are not time-barred cannot be deemed affected by those which are.<sup>545</sup>
293. Thus, Nissan submits, the mere fact that certain events relating to its claims occurred before 23 February 2014 is not sufficient to constitute actual or constructive knowledge of the resulting loss or damage arising from the alleged breaches of the CEPA for which it seeks redress.<sup>546</sup> Rather, application of the time bar under Article 96(9) must be assessed separately for each individual claim, distinguishing between those invoking the FET Clause in CEPA Article 87(1) and those invoking the umbrella clause in CEPA Article 87(2).<sup>547</sup>

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<sup>537</sup> Counter-Memorial, ¶ 123 citing *Spence*, ¶ 208 (RLA-46); referring to *Ansung*, ¶¶ 110-111 (RLA-7); Tr., 8 November 2018, 142:25, 143:1-8 citing *Grand* (RLA-5).

<sup>538</sup> Counter-Memorial, ¶ 124 citing C-043; *Spence*, ¶ 213 (RLA-46).

<sup>539</sup> Reply, ¶ 110.

<sup>540</sup> Reply, ¶ 110 referring to *Spence*, ¶ 211 (RLA-46).

<sup>541</sup> Reply, ¶¶ 111-115.

<sup>542</sup> Reply, ¶¶ 112, 114.

<sup>543</sup> Reply, ¶ 114.

<sup>544</sup> Reply, ¶ 113.

<sup>545</sup> Reply, ¶ 113 referring to *Rusoro*, ¶¶ 237-240 (CLA-080).

<sup>546</sup> Reply, ¶¶ 114-15.

<sup>547</sup> Reply, ¶ 115.

2. Whether Nissan's FET Claim is Time-Barred

(a) India's Position

294. India contends that Nissan's FET claim is time-barred because more than three years have elapsed since it acquired or should have acquired knowledge of its alleged losses and damages from an alleged breach of Article 87(1).<sup>548</sup>
295. As a preliminary matter, India contends that Nissan has "acknowledged that its FET claims are premised upon an alleged continuing breach and could, in principle, be subject to the analysis adopted by the tribunal in [*Spence*]," namely that the continuing conduct causing the breach cannot without more renew the limitation period.<sup>549</sup> However, the Parties disagree on the date the alleged breaches crystallized, thereby giving rise to Nissan's knowledge of the relevant loss or damage it suffered. India states that the alleged breaches crystallized before the critical date of 23 February 2014 for two reasons.
296. First, before that date, Nissan knew or should have known all the factual predicates of its FET claim, namely that India allegedly had "failed to make timely payments to Nissan under the 2008 MoU"<sup>550</sup> in an arbitrary manner and in spite of various assurances.<sup>551</sup> According to India, these predicates form the "bedrock of Claimant's FET claim," including alleged payment delays, alleged "assurances given to [Nissan] by the GoTN," and "non-cogent reasons" provided by the GoTN for non-payment of the Claimed Incentives.<sup>552</sup> To demonstrate Nissan's knowledge of these factual predicates before 23 February 2014, India refers to various facts from Nissan's own evidence. For example, with respect to Nissan's knowledge regarding failure to make timely payment, India refers to Annex 1 of the statement of Nissan's witness Mr. Kochhar, showing that from 29 December 2012 onwards, there were substantial amounts of Output VAT Incentives that remained outstanding under the 2008 MoU.<sup>553</sup> In India's view, this demonstrates that "Nissan was fully aware that the Government of Tamil Nadu was failing in its obligations under the MoU to timely disburse incentives" before 23 February 2014.<sup>554</sup>
297. With respect to Nissan's knowledge regarding the GoTN's repeated assurances, India refers to

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<sup>548</sup> Rejoinder, ¶¶ 89, 91-107.

<sup>549</sup> Rejoinder, ¶ 89 referring to Reply, ¶¶ 142, 146.

<sup>550</sup> Rejoinder, ¶ 91.

<sup>551</sup> See Counter-Memorial, ¶¶ 125-127; Rejoinder, ¶¶ 91-102.

<sup>552</sup> Counter-Memorial, ¶ 125 citing Statement of Claim, ¶¶ 11, 14, 111; referring to Statement of Claim, ¶ 112; Rejoinder, ¶¶ 91-92 citing Ramakrishnaiah Statement ¶ 6.1; referring to Reply, ¶¶ 111, 142, 146; C-038; Tr., 8 November 2018, 145:21-25.

<sup>553</sup> Counter-Memorial, ¶¶ 128-129 referring Kochhar Statement, Annex 1, Column C-9, Rows R9-R14; C-128; C-129; Tr., 8 November 2018, 146:7-17, 147:6-23.

<sup>554</sup> Tr., 8 November 2018, 148:7-14.



Nissan's Statement of Claim, which states that promises were given in the context of "key meetings and interactions that have taken place since April 2014."<sup>555</sup> According to India, Nissan's internal documents record assurances "as early as 29 November 2012, and that is approximately 15 months before the critical date," and these assurances were no "less key than assurances being made after April 2014."<sup>556</sup> India points to the statement of Nissan's witness Mr. Ramakrishnaiah, and a contemporaneous e-mail from him to his colleagues, both of which reference assurances by the GoTN Minister of Heavy Industries to RNAIPL between November 2012 and July 2013 that outstanding VAT incentives would be paid within the month.<sup>557</sup> India points out that Mr. Ramakrishnaiah's witness statement records Nissan's disappointment and frustration towards the end of 2013 as the GoTN defaulted on its payment obligations despite these assurances.<sup>558</sup>

298. With respect to Nissan's knowledge regarding the alleged "non-cogent"<sup>559</sup> reasons for delays in payment, India likewise refers to Mr. Ramakrishnaiah's statement that by November 2012, "the issue of the nature of the Amended Business Scheme arose again, in the context of the GoTN addressing non-payment of the then-outstanding incentives."<sup>560</sup> Similarly, minutes of a meeting between the GoTN and the R&N Consortium dated 21 June 2013 record the GoTN's statement that it does not accept the R&N Consortium's collection of investment incentives and ITC credits "on account of the double benefit accruing to them."<sup>561</sup> India also points to an internal presentation circulated on the eve of the critical date, 22 February 2014, communicating the R&N Consortium's "clear understanding that the recovery of tax refunds 'is mainly delayed due to the uniqueness of R&N Consortium's business model'."<sup>562</sup>
299. India dismisses Nissan's argument that these pre-23 February 2014 events do not reveal the crystallization of the alleged breach.<sup>563</sup> According to India, in order to sustain this contention, Nissan has reinvented its FET claims from one concerning the "GoTN's failure to make timely payment of all the fiscal incentives" to one involving "the GoTN's continued failure" to pay the fiscal incentives.<sup>564</sup> India maintains that in doing so, Nissan has failed to account for why the GoTN's alleged failure to

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<sup>555</sup> Counter-Memorial, ¶ 130 *citing* Statement of Claim, ¶ 113.

<sup>556</sup> Tr., 8 November 2018, 151:16-23.

<sup>557</sup> Counter-Memorial, ¶ 131 *citing* Ramakrishnaiah Statement, ¶ 6.2; Rejoinder, ¶ 93 *citing* **R-32**; Ramakrishnaiah Statement, Annex 1, Rows R13-R14; Tr., 8 November 2018, 151:24-25, 152:1-5.

<sup>558</sup> Tr., 8 November 2018, 152:10-21, 152:25, 153:1-6 *citing* **C-125**; Ramakrishnaiah Statement, ¶ 6.10.

<sup>559</sup> Rejoinder, ¶ 92 *citing* Ramakrishnaiah Statement, ¶ 6.1.

<sup>560</sup> Counter-Memorial, ¶ 132 *citing* Ramakrishnaiah Statement, ¶¶ 6.1-6.2; Tr., 8 November 2018, 149:1-20.

<sup>561</sup> Rejoinder, ¶ 94 *referring to* **R-33**; E-mail from Mr. Kumar to Mr. Kobayashi and Mr. Rekhi, titled "RE: VAT Incentive attaching PowerPoint slides" (22 February 2014), slide 2; Tr., 8 November 2018, 149:21-25, 150:1-3.

<sup>562</sup> Tr., 8 November 2018, 150:7-15 *citing* **R-36**.

<sup>563</sup> Rejoinder, ¶ 95-97 *citing* Reply, ¶¶ 143, 148.

<sup>564</sup> Rejoinder, ¶ 96 *citing* Statement of Claim, ¶ 11; Reply, ¶ 142.

meet prior assurances and delay in payments is “more definitive after the critical date than before.”<sup>565</sup> In India’s view, Nissan is inappropriately attempting to “base its claims on those actions from a series of similar and related actions that postdate the critical date in order to bypass the limitation clause of an investment treaty.” Such attempts, according to India, have been rejected by several tribunals.<sup>566</sup>

300. India rejects Nissan’s contention that the four key events in relation to its FET claim occurred after 23 February 2014, and that as a result the alleged breach only crystallized then.<sup>567</sup> India dismisses Nissan’s first alleged key event—Mr. Kochhar’s assumption of a mandate in April 2014 to resolve the outstanding incentives issue—on the grounds that it does not indicate when the issue first arose, that the issue must have pre-existed to justify the creation of his mandate, and that documents show he was already supervising the issue prior to the critical date.<sup>568</sup> Moreover, India reasons that Mr. Kochhar’s seniority shows “how serious the matter was to [Nissan’s] management by April 2014.”<sup>569</sup> For India, “it is reasonable to assume that it didn’t suddenly become serious after the critical date,” but that “it was already serious a month before April 2014.”<sup>570</sup> This assumption, India argues, is corroborated by meeting minutes from 29 November 2012, which record “the great concern of all the Executives of the company global and local over the issue of outstanding bad incentives.”<sup>571</sup> India further observes that by March 2013 the Consortium had warned the GoTN “that any attempt to cancel or neutralize or nullify or withdraw the double benefit would ‘nullify the entire MoU’.”<sup>572</sup>
301. With respect to Nissan’s second category of key events—assurances about the incentive payments made after 23 February 2014—India notes that Nissan does not explain why these assurances were “key” while earlier ones were not, when they were given by the same officials and “appear to have been made in no different terms.”<sup>573</sup> Finally, with respect to Nissan’s third and fourth events—Nissan’s escalation of the issue to the Government of India and the Prime Minister of India in December 2014 and March 2016, respectively—India notes that Nissan does not explain why this should matter for crystallization of the FET breach.<sup>574</sup> India stresses that the test for crystallization is objective in nature, and therefore Nissan’s late escalation of the matter only demonstrates its lack of prudence and diligence, not the date of its first actual or constructive knowledge under Article

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<sup>565</sup> Rejoinder, ¶ 97.

<sup>566</sup> Rejoinder, ¶ 97 referring to *Grand River*, ¶ 81 (RLA-4); *Spence*, ¶ 208 (RLA-46); *Corona*, ¶ 215 (RLA-6).

<sup>567</sup> Rejoinder, ¶¶ 98-101.

<sup>568</sup> Rejoinder, ¶ 99 referring to **R-35**; Tr., 8 November 2018, 155:15-25.

<sup>569</sup> Tr., 8 November 2018, 156:1-8.

<sup>570</sup> Tr., 8 November 2018, 156:8-12.

<sup>571</sup> Tr., 8 November 2018, 159:25, 160:1-6 referring to **R-31**.

<sup>572</sup> Tr., 8 November 2018, 160:9-14 citing **C-130**.

<sup>573</sup> Rejoinder, ¶ 100; Tr., 8 November 2018, 160:3-10.

<sup>574</sup> Rejoinder, ¶ 101.

96(9).<sup>575</sup>

302. India also argues that before the critical date, Nissan knew or should have known of the loss and damage caused by India's alleged breach of the FET clause.<sup>576</sup> According to India, Annex 1 of Mr. Kochhar's witness statement, Mr. Ramakrishnaiah's witness statement, and relevant documents all reveal Nissan's knowledge of losses from delayed payment of incentives before 23 February 2014.<sup>577</sup> In particular, India points out that Nissan had recorded "heavy losses, [...] approximately [...] \$134 million," by the end of 2013.<sup>578</sup>
303. Further, India disputes Nissan's insistence that it is only claiming in this arbitration for outstanding incentives arising after 23 February 2014, and that therefore it could not have known earlier about the relevant loss and damage.<sup>579</sup> In particular, India points out that in its Statement of Claim, Nissan in fact seeks damages in the form of interest on all belatedly paid incentives, including those from before the critical date.<sup>580</sup> India also rejects Nissan's contention that it could not have known of loss or damage arising out of a 4 June 2013 Tax Payment Certificate before the critical date because it was superseded by a subsequent certificate.<sup>581</sup> In India's view, the fact that the certificate was subsequently superseded does not affect Nissan's knowledge of the unpaid status of the relevant amounts.<sup>582</sup>
304. As a matter of principle, India invites the Tribunal to view the post-critical date loss "as being caused by the same pattern of conduct," because whether or not the breaches are separate, they are related.<sup>583</sup> In India's submission, it would naturally follow that any settlement of pre-critical date losses after that date could not negate Nissan's first knowledge of loss and damage before that date.<sup>584</sup> Otherwise, India contends that, "investors could avoid the effect of the time bar simply by waiving claims of loss incurred prior to the critical date," an implication which would "effectively denude the Limitation Clause of its essential purpose."<sup>585</sup>

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<sup>575</sup> Tr., 8 November 2018, 164:24-25, 165:1-12.

<sup>576</sup> Counter-Memorial, ¶¶ 133-135; Rejoinder, ¶¶ 103-107.

<sup>577</sup> Counter-Memorial, ¶¶ 133-135; Rejoinder, ¶ 105 referring to Kochhar Statement, Annex 1; Ramakrishnaiah Statement, ¶¶ 6.1, 6.10; C-130, ¶ 12.

<sup>578</sup> Tr., 8 November 2018, 147:24-25, 148:1-4.

<sup>579</sup> Rejoinder, ¶¶ 103-104.

<sup>580</sup> Rejoinder, ¶ 104 citing Statement of Claim, ¶¶ 219; Tr., 8 November 2018, 176:2-19, 205:19-25, 206:1.

<sup>581</sup> Rejoinder, ¶ 106 referring to Reply, ¶ 133.

<sup>582</sup> Rejoinder, ¶ 106 referring to C-038; Kochhar Statement, Annex 1, Rows R12, R15, R19-R24.

<sup>583</sup> Tr., 8 November 2018, 173:25, 174:1.

<sup>584</sup> Tr., 8 November 2018, 173:15-18, 174:2-6.

<sup>585</sup> Tr., 8 November 2018, 174:7-12, 175:3-12 referring to *Ansung*, ¶¶ 113 (RLA-7).

(b) Nissan's Position

305. Nissan submits it could not have acquired the actual or constructive knowledge required to bar its FET claim because India's alleged breach crystallized, and the loss and damage claimed in this arbitration arose, only after the critical date of 23 February 2014.<sup>586</sup>
306. As an initial matter, Nissan contends that India's FET breach did not occur upon the GoTN's first single failure to provide Nissan with incentives due under the 2008 MoU, but instead resulted from "the GoTN's continued failure to provide the [Claimed Incentives] in an arbitrary manner, without cogent reasons and in spite of various assurances of the GoTN."<sup>587</sup> This is because, Nissan reasons, a single failure to make payment "is unlikely to be characterized as a breach of [Nissan]'s reasonable and legitimate expectations; a lack of due process; an act which is arbitrary or grossly unfair or unjust; or a failure to act in good faith," namely, the four ways in which Nissan claims India breached the FET clause.<sup>588</sup> On the basis of this framework, Nissan argues that its claim under the FET clause is not time barred for two reasons.
307. Nissan acknowledges that in cases of continuous breach, tribunals have taken different approaches to determining when the limitation period starts to run. If the Tribunal were to adopt the approach in *UPS v. Canada*, where the tribunal found that the limitation period does not start to run until the continuing conduct had ended, Nissan notes that there would be no time bar issue because the continued failure by India to afford Nissan fair and equitable treatment would continuously renew the limitation period.<sup>589</sup> If the Tribunal instead were to adopt the approach in *Spence v. Costa Rica*, Nissan maintains that its claim is still not time-barred because the events that occurred prior to the critical date, while relevant, do not "give[] rise to a self-standing cause of action" that may trigger application of the time bar.<sup>590</sup>
308. Elaborating on this point, Nissan argues that the events that occurred before 23 February 2014 merely provide relevant context to "determin[e] whether breaches occurred during the [limitation period]," including ascertaining the "legitimate expectations of an investor."<sup>591</sup> This is supported, Nissan notes, by the tribunal in *Feldman v. Mexico*, which relied on events occurring prior to the limitation period to

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<sup>586</sup> Reply, ¶ 152.

<sup>587</sup> Reply, ¶¶ 141-142.

<sup>588</sup> Reply, ¶¶ 140-141 referring to Statement of Claim, ¶ 169.

<sup>589</sup> Reply, ¶ 145 referring to *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007), ¶ 28 (CLA-068) ("UPS").

<sup>590</sup> Reply, ¶ 146 citing *Spence*, ¶ 210 (RLA-46).

<sup>591</sup> Reply, ¶¶ 147-148 citing *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015), ¶ 282 (CLA-076) ("Clayton").

assess whether Mexico had discriminated against the claimant.<sup>592</sup>

309. In this case, Nissan contends, the earlier events do not give rise to a self-standing cause of action because the key events relating to Nissan's FET clause claim only arose after the critical date.<sup>593</sup> Specifically, Nissan points to the following: (i) payments in 2012, 2013 and 2014 were relatively frequent, and even continued into 2015;<sup>594</sup> (ii) Mr. Kochhar was mandated to resolve the issue of outstanding investment incentives only in April 2014;<sup>595</sup> (iii) the GoTN's key assurances regarding payments were given only after April 2014, and no cause of action accrued given the positive result of several meetings in 2014;<sup>596</sup> (iv) the R&N Consortium saw the necessity to escalate matters to the Government of India only in December 2014; and (v) the R&N Consortium escalated the matters to the Prime Minister of India only in March 2016.<sup>597</sup> Nissan rejects India's reliance on the Amended Business Scheme as the source of problem which "traced back" to 2012.<sup>598</sup> First, according to Nissan, the Amended Business Scheme was discussed with and approved by the GoTN.<sup>599</sup> Second, in Nissan's submission, India's position is not compatible with the fact that the GoTN continued to make substantial payments in 2012, 2013 and 2014.<sup>600</sup>

310. Moreover, Nissan notes, unlike the situation in *Spence*, where the tribunal was able to identify a "distinct and legally significant event that is capable of founding a claim in its own right,"<sup>601</sup> here there was no singular event prior to 23 February 2014 that could give rise to an FET claim in its own right. For example, Nissan points out that following discussions at a meeting on 29 November 2012, the Industries Department did take steps to address the Consortium's concern.<sup>602</sup> In consequence, it is not correct to conclude that "there was a serious problem" in late 2012.<sup>603</sup> To the contrary, Nissan suggests that the earliest date on which an FET claim could have crystallized was March 2016.<sup>604</sup>

311. In any event, Nissan emphasizes, the relevant loss and damage that is claimed in this arbitration arose after 23 February 2014, thereby making it impossible for Nissan previously to have had actual or

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<sup>592</sup> Reply, ¶ 147 citing *Feldman v. Mexico*, ¶ 167 (RLA-3).

<sup>593</sup> Reply, ¶ 149.

<sup>594</sup> Tr., 8 November 2018, 193:2-18, 196:7-197:1 referring to C-174.

<sup>595</sup> Tr., 8 November 2018, 194:21-195:23.

<sup>596</sup> Tr., 8 November 2018, 193:19-194:16 referring to R-36, at 4, 195:24-196:2.

<sup>597</sup> Reply, ¶ 149 referring to Kochhar Statement, ¶¶ 2.9, 5.13-5.19, 5.44-5.55; Statement of Claim, ¶ 113; Tr., 8 November 2018, 193:9-16, 195:12-19.

<sup>598</sup> Tr., 8 November 2018, 197:2-17.

<sup>599</sup> Tr., 8 November 2018, 198:23-24.

<sup>600</sup> Tr., 8 November 2018, 197:13-17.

<sup>601</sup> Reply ¶ 150 citing *Spence*, ¶ 276 (RLA-46).

<sup>602</sup> Tr., 8 November 2018, 198:4-7.

<sup>603</sup> Tr., 8 November 2018, 198:9-10, 198:25, 199:1-3.

<sup>604</sup> Reply, ¶ 151.

constructive knowledge of that loss.<sup>605</sup> According to Nissan, all the outstanding incentives claimed before the critical date were paid before its initiation of this arbitration and do not form part of the loss and damages that Nissan seeks to recover.<sup>606</sup>

### 3. Whether Nissan's Umbrella Clause Claim is Time-Barred

#### (a) India's Position

312. India submits that Nissan's umbrella clause claim is similarly time-barred under the approach in *Spence*.<sup>607</sup> It also suggests that Nissan has reformulated its umbrella clause claim since the Statement of Claim, to suggest that there were multiple different breaches,<sup>608</sup> in "a thinly veiled attempt to bypass the effect of Article 96(9)."<sup>609</sup>
313. India contends that the *Spence* ruling is not limited to continuing breaches.<sup>610</sup> Instead, the *Spence* tribunal addressed "a continuing course of conduct" which may, but not necessarily, constitute a continuing breach. Similarly, the tribunal in *Corona* considered that in the event of sufficiently similar and related actions, the claim may be time-barred even if the breaches are separate.<sup>611</sup> This approach should be followed here, it argues, since this case involves "a series of similar and related actions."<sup>612</sup> The actions in question are similar, because they all involve "failure[s] to make timely payment of [...] fiscal incentives," and they are related, because they all stem from the GoTN's concerns over the R&N Consortium's Amended Business Scheme.<sup>613</sup>
314. India points to several facts in support of its view that Nissan possessed actual or constructive knowledge before 23 February 2014 of damage arising out of the alleged breaches. First, the annex to Mr. Kochhar's witness statement shows that Nissan made its first application for disbursement of investment incentives on 16 August 2012,<sup>614</sup> and it received the MoU Cell Certificates on 29 November 2012.<sup>615</sup> On 18 January 2013, the incentives relating to those Certificates were disbursed

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<sup>605</sup> Reply, ¶¶ 153-156.

<sup>606</sup> Reply, ¶¶ 154, 156 *citing* Kochhar Statement, Annex 1, row R-14, Annex II, and Annex III.

<sup>607</sup> Rejoinder, ¶ 109.

<sup>608</sup> Rejoinder, ¶¶ 90, 109; Tr., 8 November 2018, 166:23-25, 167:1-15.

<sup>609</sup> Tr., 8 November 2018, 167:15-17.

<sup>610</sup> Rejoinder, ¶ 110 *referring to Spence*, ¶ 124; Tr., 8 November 2018, 168:19-25, 169:1-6.

<sup>611</sup> Tr., 8 November 2018, 170:12-14, 170:25, 171:1-14 *referring to Corona*, ¶¶ 143, 147, 202, 204, 205, 210, 212 (RLA-6).

<sup>612</sup> Rejoinder, ¶ 111.

<sup>613</sup> Rejoinder, ¶ 111 *citing* Statement of Claim, ¶¶ 11, 212; Tr., 8 November 2018, 167:17-24.

<sup>614</sup> Counter-Memorial, ¶ 128 *referring to* Kochhar Statement, Annex 1.

<sup>615</sup> Counter-Memorial, ¶ 128 *referring to* Kochhar Statement, Annex 1, Rows R5-R8; C-034; C-035.

only in part.<sup>616</sup> The witness statements of Mr. Kochhar and Mr. Ramakrishnaiah both record that payments for certain incentives were outstanding throughout 2013.<sup>617</sup> On 4 June 2014, the R&N Consortium’s CEO, Mr. Sunil Rekhi, recognized that there existed a “huge amount due from GoTN for nearly a year.”<sup>618</sup>

315. India observes that Nissan was aware of both the alleged wrongful conduct and the loss arising therefrom prior to the critical date.<sup>619</sup> Citing Mr. Kochhar’s witness statement, India states that the extent of loss that Nissan is seeking to recover certainly encompasses losses allegedly occurring before 23 February 2014.<sup>620</sup> These losses are quantified to be “an amount of INR 933.57 crores in relation to Output VAT and/or CST Incentives from 1 April 2012 to 31 March 2013 [which] remained outstanding at the end of 2013.”<sup>621</sup>

*(b) Nissan’s Position*

316. Nissan submits that its umbrella clause claims do not involve a single continuing breach, but rather “the payment obligations in relation to each MoU Cell Certificate must be assessed on an individual basis.”<sup>622</sup> Under this approach, Nissan asserts, none of its claims arise out of MoU Cell Certificates that pre-date 23 February 2014. As a result, it could not have known of any loss and damage resulting from these Certificates before the critical date.

317. Nissan frames its umbrella clause claims as breaches of the GoTN’s obligation under the 2008 MoU to pay the investment incentives “on best effort basis within one month” from the R&N Consortium’s application [...] for refund.”<sup>623</sup> The GoTN’s payment obligations are therefore “separate,” “self-standing,” and independent of each other, as they “arose at different points of time, were breached at different times, and pertained to different amounts.”<sup>624</sup> Each obligation was “extinguished to the extent [it was] paid by the GoTN.”<sup>625</sup> And as such, would not affect the validity of later obligations. In this respect, Nissan sees “no legal basis under the MoU, public international law or otherwise” for India’s argument that knowledge of a previous breach could trigger the running of a time bar for a

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<sup>616</sup> Counter-Memorial, ¶ 128 referring to Kochhar Statement, Annex 1, Rows R9-R10; **C-128**; **C-129**.

<sup>617</sup> Counter-Memorial, ¶ 129 referring to Kochhar Statement, Annex 1, Column C-9, Rows R9-R14; Ramakrishnaiah Statement, ¶ 6.10.

<sup>618</sup> Counter-Memorial, ¶ 129 citing **C-137**.

<sup>619</sup> Counter-Memorial, ¶ 127; Reply, ¶ 122.

<sup>620</sup> Counter-Memorial, ¶ 133 referring to Kochhar Statement, Annex 1, ¶ 6.1.

<sup>621</sup> Counter-Memorial, ¶ 133 citing Ramakrishnaiah Statement, ¶ 6.10; Tr., 8 November 2018, 172:9-15.

<sup>622</sup> Reply, ¶¶ 115(a), 122; Tr., 8 November 2018, 181:5-16, 182:12-17.

<sup>623</sup> Reply, ¶¶ 116-17, 128 citing the Schedule of the 2008 MoU, Clause M.12(a).

<sup>624</sup> Reply, ¶ 120; Tr., 8 November 2018, 181:5-8.

<sup>625</sup> Reply, ¶ 120.

cause of action in respect of all subsequent breaches.<sup>626</sup>

318. Nissan contends that the investment treaty jurisprudence supports its position, by “consistently recogniz[ing] that, when multiple related actions are in question, the fact that some of the actions occurred prior to the critical date does not render the whole series of actions non-justiciable,”<sup>627</sup> and that in some cases, it is even possible “to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits.”<sup>628</sup>
319. Nissan argues that its umbrella clause claim under Article 87(2) is distinguishable from a claim involving a “continuing breach” of the same obligation or a breach of “multiple separate obligations” as would be the case if the GoTN had refused to pay the investment incentives on a blanket basis.<sup>629</sup> Thus, in Nissan’s view, it would be inappropriate to apply the approaches adopted by the tribunals in both *UPS v. Canada* and *Spence v. Costa Rica*.<sup>630</sup> Moreover, *Spence* presents “a very different case” with “deeply historical losses” that could not possibly come within the limitation period,<sup>631</sup> whereas here it is possible to identify breaches arising after the critical date.<sup>632</sup> Nissan also challenges India’s reliance on *Corona Materials v. Dominican Republic* on the basis that the alleged breaches in that case “related to one central measure adopted by the respondent, the Environment Ministry’s refusal to grant the environmental license,” which clearly arose before the cut-off date.<sup>633</sup> This case involves no equivalent facts.
320. Rather, Nissan contends, the three-year limitation period under CEPA Article 96(6) should run from the dates on which Nissan acquired (or should have acquired) knowledge of loss or damage arising out of the GoTN’s failure to meet its payment obligations in respect of each individual MoU Cell Certificate.<sup>634</sup> It follows that “the time bar doesn’t operate, cannot possibly operate, in respect of MoU cell certificates that fell due after 23 February 2014.”<sup>635</sup>
321. Nissan clarifies that its claims under CEPA Article 87(2) include late payments of both certified and uncertified Claimed Incentives. As explained earlier, following the payment of taxes, the R&N

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<sup>626</sup> Tr., 8 November 2018, 181:9-16.

<sup>627</sup> Reply, ¶ 122 referring to *Grand River*, ¶ 86 (RLA-4); *Spence*, ¶ 210 (RLA-46); *Clayton*, ¶ 266 (CLA-076); *Feldman*, ¶ 203 (RLA-3); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), ¶ 87 (CLA-012).

<sup>628</sup> Reply, ¶ 122 citing *Clayton*, ¶ 266 (CLA-076).

<sup>629</sup> Reply, ¶¶ 124-125; Tr., 8 November 2018, 181:17-182:4, 15-17.

<sup>630</sup> Reply, ¶¶ 124-125 citing *UPS*, ¶ 28 (CLA-068); *Spence*, ¶ 208 (RLA-46).

<sup>631</sup> Tr., 8 November 2018, 189:1-7, 15-16.

<sup>632</sup> Tr., 8 November 2018, 190:7-10.

<sup>633</sup> Tr., 8 November 2018, 191:21-25, 192:1-3.

<sup>634</sup> Reply, ¶ 126.

<sup>635</sup> Tr., 8 November 2018, 182:12-25; Reply, ¶ 127.



Consortium would apply for a MoU Cell Certificate to certify eligible incentives and the amount to be paid, which should be issued within 10 working days.<sup>636</sup> After the Certificate is issued, the GoTN is obliged to pay the incentives within one month.<sup>637</sup> According to Nissan, the GoTN has failed to meet its payment obligations with respect to incentives for which MoU Cell Certificates have issued, and also for those where they have not. Nissan considers the payment obligations to have been breached when no payment was made within one month of the MoU Cell Certificate for certified incentives, or within six weeks from the date of the R&N Consortium's application for the Certificate with respect to uncertified incentives.<sup>638</sup>

322. According to these deadlines, Nissan identifies five MoU Cell Certificates which were dated before 23 February 2014 and for which a time bar issue might have existed,<sup>639</sup> but that four certificates of them (each dated 29 November 2012) were paid before this arbitration commenced and thus no claims are pursued about them in this case.<sup>640</sup> The fifth certificate was dated 4 June 2013, but was superseded by a subsequent certificate dated 5 November 2014, after the critical date;<sup>641</sup> in any event, the GoTN also satisfied its obligations regarding that certificate before this arbitration.<sup>642</sup> Nissan rejects India's suggestion that its claim includes interest on these certificates, and insists that its claim "extends only in respect of the MOU Cell Certificates which arose after 23 February 2014."<sup>643</sup> As for the uncertified incentives, Nissan points out that its claims relate only to applications for MoU Cell Certificates that were made after 23 February 2014,<sup>644</sup> and therefore that any breach of payment obligations concerning these incentives and any knowledge by Nissan of resulting loss or damage from the breach must be after 23 February 2014.<sup>645</sup>

## **B. THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS**

323. The Tribunal accepts that Article 96(9) of the CEPA<sup>646</sup> acts as a limitation on Contracting Parties' consent to arbitration, and not simply as a potential merits defense to any particular claim. Article

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<sup>636</sup> Reply, ¶ 136.

<sup>637</sup> Reply, ¶ 129.

<sup>638</sup> See Reply, ¶¶ 129, 136.

<sup>639</sup> Reply, ¶ 131 *referring to C-034, C-035, C-038, C-041*; Kochhar Statement, Annex 1, Rows R5-R8, R-12.

<sup>640</sup> Reply, ¶ 132.

<sup>641</sup> Reply, ¶ 133.

<sup>642</sup> Reply, ¶ 133.

<sup>643</sup> Tr., 8 November 2018, 183:5-13, 206:11-22.

<sup>644</sup> Reply, ¶ 137.

<sup>645</sup> Reply, ¶ 137.

<sup>646</sup> In its full text, Art. 96(9) provides as follows: "Notwithstanding paragraph 8, no investment dispute may be submitted to conciliation or arbitration set forth in paragraph 4, if more than three years have elapsed since the date on which the disputing investor acquired or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred loss or damage referred to in paragraph 1."

96(9) begins with the words, “[n]otwithstanding paragraph 8,” and the cross-referenced Article 96(8) is the provision that expressly sets out the requisite consent (“Each Party hereby consents to the submission of investment disputes [...] to arbitration”).<sup>647</sup> Moreover, Article 96(9) is itself framed as about the “submission” to arbitration (“[...] no investment dispute may be submitted to [...] arbitration [...], if [...]”), and not simply about the outcome of any particular claim. There is thus no question that the conditions set forth in this Article constitute outer limits to the Tribunal’s jurisdiction.<sup>648</sup>

324. To apply those conditions, however, it is important to follow closely the applicable treaty text. Article 96(9) addresses the submission of an “investment dispute,” which is defined in Article 96(1) as “a dispute between a Party and an investor [...] that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of this Chapter and other provisions of this Agreement as applicable with respect to the investor and its investments.” A particular “investment dispute” is therefore defined by three characteristics: (a) the CEPA obligation at issue, (b) the “alleged breach” of that obligation, and (c) the “loss or damage” allegedly “incurred [...] by reason of” that alleged breach. Article 96(9) however confirms the paramount importance of the last element, by tying accrual of the time period for initiating arbitration not solely to the date of the State’s conduct, or solely to the investor’s knowledge of the breach of obligation that conduct is said to represent, but specifically to its knowledge that it “*had incurred loss or damage* referred to in paragraph 1” (*i.e.*, in Article 96(1)).<sup>649</sup> The requisite knowledge can be actual or imputed (“acquired or should have first acquired [...] the knowledge”), but the triggering information is *knowledge of harm*. The investor may not submit any “investment dispute” to arbitration “if more than three years have elapsed” since the date on which it “acquired” the requisite actual or imputed knowledge of that harm.<sup>650</sup> There is no provision in Article 96(9) for tolling the limitations period for subsequent acts by the State relating to the same underlying harm.<sup>651</sup>

325. Bearing these provisions in mind, the Tribunal agrees with India on a threshold proposition: that once an investor has knowledge that it has been harmed by a particular State act alleged to breach a CEPA obligation, additional conduct relating to the *same underlying harm* “cannot without more renew the limitation period” for the filing a claim seeking redress.<sup>652</sup> If the three years have elapsed from first

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<sup>647</sup> CEPA Art. 96(8)(a).

<sup>648</sup> See *similarly Corona*, ¶ 191 (**RLA-6**) (under a similar treaty provision, “the DR-CAFTA Parties have plainly conditioned their consents to arbitration”).

<sup>649</sup> CEPA Art. 96(9) (emphasis added); see *similarly Corona*, ¶ 194 (**RLA-6**) (finding under a similar treaty provision that “knowledge of the breach in and of itself is insufficient to trigger the limitation period’s running; [the provision] requires knowledge of breach *and* knowledge of loss or damage”) (emphasis in original); *Spence*, ¶ 211 (**RLA-46**) (determining that under a similar treaty provision, “the relevant date is when the claimant first acquired knowledge not simply of the breach but also that they incurred *loss or damage* as a result thereof”) (emphasis in original).

<sup>650</sup> CEPA Art. 96(9).

<sup>651</sup> See *similarly Corona*, ¶ 192 (**RLA-6**).

<sup>652</sup> Counter-Memorial, ¶ 121 (quoting *Spence*, ¶ 208 (**RLA-46**)).

knowledge, then that particular investment dispute cannot be revived. Putting this conclusion into the context of the present case, Nissan could not pursue a CEPA claim – whether framed as a violation of FET or the umbrella clause – regarding the harm it suffered from non-payment of incentives that were due prior to 23 February 2014 (three years before its Request for Arbitration), since there is no question that Nissan was aware of the status of payments, and therefore knew before the critical date that it had incurred “loss or damage.” The fact that it may not yet have conceived of this damage as caused by a CEPA breach is not determinative, when both the relevant State conduct (non-payment) and the relevant loss (non-receipt of payment) predated the critical date. Nissan could not point to an additional GoTN act after 23 February 2014 with regard to the same basic harm (for example, a further denial of liability with respect to the same Cell Certificates) as somehow triggering a new supervening CEPA breach for purposes of the limitations period, because the requisite “loss or damage” would be the same as it already had incurred.<sup>653</sup> The Tribunal accepts that this would be the case even if the precise *quantum* of harm continued to increase after the critical date, because the triggering event for the running of the limitations period is knowledge that the investor has been harmed (*i.e.*, qualitatively has incurred “loss or damage”), not knowledge of the precise calculation of that harm.<sup>654</sup>

326. India is also correct that as Nissan originally framed its case in the Statement of Claim, it did appear to be pursuing relief at least in part with respect to certain older MoU Cell Certificates for which it contended that payment had been due prior to 23 February 2014. The Statement of Claim complained that “[e]ven in respect of the Investment Incentives which have been paid prior to the date of this Statement of Claim, these were also paid well beyond the one-month period in which payment should have been made,” referring to a witness statement Annex that listed a number of Certificates dated in 2012 and 2013, well before the critical date.<sup>655</sup> Nissan asserted an entitlement to damages not only for the “outstanding Investment Incentives,” but also for “interest on late and unpaid sums,”<sup>656</sup> and reiterated at the end of the Statement of Claim that it “seeks interest [...] in respect of sums which

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<sup>653</sup> See *similarly Corona*, ¶¶ 202, 204, 210-211 (**RLA-6**) (where “Claimant’s case on the merits [...] is built on the premise that one measure [a denial of an environmental license] frustrated [its] efforts to build and operate a construction aggregate mine,” the limitations period was not restarted by the State’s later failure to respond to a request for reconsideration; the “failure to reconsider the refusal to grant the license is nothing but an implicit confirmation of its previous decision,” and not a “stand-alone ‘measure’” imposing distinct harm); *Ansung*, ¶¶ 51-52, 107, 109-110 (**RLA-7**) (where State actions prior to the critical date allegedly forced claimant to dispose of its entire investment in a planned golf course, the claimant had knowledge then that it had incurred loss or damage, and neither the State’s subsequent “continued inaction” or the claimant’s final liquidation of its damages restarted the limitations period); *Spence*, ¶¶ 66, 165, 171, 204 (**RLA-46**) (where claimants should have known prior to the critical date of a court decision requiring expropriation of their properties as falling within national park boundaries, they could not avoid a time-bar by invoking a “continuing delay in the payment of compensation and continuing denial of fair and equitable treatment” regarding the same properties).

<sup>654</sup> See *Grand River*, ¶ 77 (**RLA-4**) (“damage or injury may be incurred even though the amount or extent may not become known until some future time”); *Spence*, ¶ 213 (**RLA-46**) (“knowledge is triggered by the first appreciation that loss or damage will be (or has been incurred). It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result”); *Corona*, ¶ 194 (**RLA-6**); *Ansung*, ¶ 111 (**RLA-7**).

<sup>655</sup> Statement of Claim, ¶ 108, citing Kochhar Statement, Annex 1.

<sup>656</sup> Statement of Claim, ¶ 219.

have been paid late,” referring again to “the belated payment of Investment Incentives” referenced previously in connection with the Annex.<sup>657</sup> If Nissan in fact were pursuing claims regarding pre-23 February 2014 MoU Cell Certificates, the Tribunal might well find them to be barred by the three-year limitations period in Article 96(9).

327. However, Nissan subsequently confirmed that it was *not* pursuing any claim with respect to these older MoU Cell Certificates which the GoTN eventually paid, disclaiming in particular any claim for interest accruing during the window before late payment was received. Nissan states categorically that “[t]here are no ‘historic claims’ for Investment Incentives pre-dating 23 February 2014 that are being submitted to this arbitration.”<sup>658</sup> Rather, it is *only* pursuing claims for Claimed Incentives based on MoU Cell Certificates issued after the 23 February 2014 critical date, or that Nissan requested after such date but which were never issued at all.<sup>659</sup>
328. With respect to those post-23 February 2014 Certificates, the Tribunal agrees with Nissan that its claims are not barred by Article 96(9). On Nissan’s pleadings, the GoTN had not categorically *repudiated* its payment obligations under the 2008 MoU, which arguably would have crystallized the event of harm as of the date of repudiation, both for then-current payment obligations and for any future demands for payment that Nissan nonetheless might try to present.<sup>660</sup> Notably, Nissan itself conceded during oral arguments that “[i]t would be a different case” if the GoTN had clearly stated prior to the critical date that “we will not pay any further incentives under the MoU.”<sup>661</sup> But Nissan alleges the contrary, namely that the GoTN provided various assurances of forthcoming payment (and indeed made certain payments) up through and after the critical date, based on which Nissan could not have known before that date that future incentive claims would not be honored.<sup>662</sup> Stated simply, Nissan’s case is that “it was not clear that the GoTN were going to refuse to pay on a blanket basis.”<sup>663</sup> In these circumstances, and based at least on the pleaded facts (which the Tribunal accepts *arguendo* for present purposes only), the Tribunal concludes that Nissan was not on actual or constructive notice before 23 February 2014 that it would incur “loss or damage” with regard to claims presented after that date.

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<sup>657</sup> Statement of Claim, ¶¶ 226, 231.

<sup>658</sup> Reply, ¶ 153; Tr., 8 November 2018, 183:5-11, 206:18-22.

<sup>659</sup> Reply, ¶¶ 114, 132-134, 137, 153-156; Tr., 8 November 2018, 183:11-13, 189:24-25.

<sup>660</sup> Cf. *Grand River*, ¶¶ 71, 81-82 (RLA-4) (finding under a similar treaty provision that because claimants should have known before the critical date of both a Master Settlement Agreement (MSA) between major tobacco producers and various state attorneys general, and of various state actions to implement that MSA pursuant to a “clear [...] statutory obligation to place funds in [...] escrow,” the limitations period would not be revived each time a state took an additional escrow step to implement the same MSA obligations); “the claims were directed against the adoption and enforcement of the escrow statutes and other measures in a generic manner”).

<sup>661</sup> Tr., 8 November 2018, 181:17-182:4, 183:20-25, 210:20-211:9.

<sup>662</sup> See, Tr., 8 November 2018, 182:5-7, 193:19-194:16, 195:24-196:2.

<sup>663</sup> Tr. 8 November 2018, 182:15-17.

329. Finally, the Tribunal cannot accept India’s argument that this reading of Article 96(9) would “effectively denude [the Article] of its essential purpose,” by enabling investors to “avoid the effect of the time bar simply by waiving claims of loss incurred prior to the critical date.”<sup>664</sup> The limitations period still serves an important purpose, by limiting any claims – and therefore any damages exposure to the respondent State – to only such instances where the investor can demonstrate it incurred a qualitatively new instance of “loss or damage” after the critical date, because of a new State act that it alleges constituted a treaty breach. Article 96(9) bars the assertion of any claims in the alternate scenario where the investor knew or should have known that it already had suffered a harm from State conduct, but sat on its rights for more than three years without initiating a claim regarding that harm. This function of Article 96(9) remains fully intact, consistent with the ordinary meaning of the relevant treaty text.

330. For these reasons, India’s objection under Article 96(9) is dismissed.

**X. INDIA’S OBJECTION THAT NISSAN’S CLAIMS RELATE TO “TAXATION MEASURES”**

331. India’s final Objection is that Nissan’s claims in this arbitration relate to “taxation measures” that are excluded from the Tribunal’s jurisdiction pursuant to Article 10(1) of the CEPA, which states that “[u]nless otherwise provided for in this Agreement, the provisions of this Agreement shall not apply to any taxation measures.” India contends that the Claimed Incentives under the MoU 2008 are tax refunds, and accordingly that under well-established case law addressing tax refunds, they constitute “taxation measures” beyond the scope of the CEPA.<sup>665</sup> Alternatively, India contends that even if the Claimed Incentives are not considered to be tax refunds, the Claimed Incentives still independently qualify as “taxation measures” under Article 10(1) of the CEPA.<sup>666</sup>

332. By contrast, Nissan argues that regardless of how they are labelled, the Claimed Incentives are not by their nature tax refunds,<sup>667</sup> because they are not provided pursuant to any taxation law or through the exercise of powers to regulate taxation matters, and they are assessed and paid in a manner different from that provided under Indian taxation laws. Moreover, Nissan contends, even if the Claimed Incentives could be described as tax refunds, they are not excluded by virtue of Article 10(1) of the CEPA because they are not part of the regime for the imposition of tax, the present dispute does not impugn any tax law, and the relevant jurisprudence establishes that claims that relate to contractual entitlements do not trigger taxation carve-outs such as the one reflected in Article 10(1) of the

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<sup>664</sup> Tr., 8 November 2018, 174:7-12.

<sup>665</sup> Counter-Memorial, ¶¶ 68-70.

<sup>666</sup> Rejoinder, ¶ 14.

<sup>667</sup> Reply, ¶ 62(a).

CEPA.<sup>668</sup>

333. The Parties' positions are described further below, with respect to four issues that crystallized in their submissions: (i) whether the Claimed Incentives under the 2008 MoU are tax refunds; and for that reason are "tax measures" for purposes of CEPA Article 10(1); (ii) whether the Claimed Incentives in any event are part of India's "taxation regime," and for that reason qualify as "taxation measures"; (iii) whether Article 10(1)'s exclusion for "taxation measures" applies only to claims impugning tax laws or decisions applying those laws; and (iv) whether the contractual nature of the 2008 MoU renders the "taxation measures" exclusion inapplicable to Nissan's claims. The Tribunal's analysis follows the summary of the Parties' positions.

**A. THE POSITIONS OF THE PARTIES**

**1. Whether the Claimed Incentives are "Tax Refunds" and Therefore Taxation Measures**

*(a) India's Position*

334. India asserts that the Tribunal lacks jurisdiction because the Claimed Incentives under the 2008 MoU are in essence tax refunds, which in its view necessarily constitute "taxation measures" falling outside the CEPA's scope by virtue of its Article 10(1).<sup>669</sup>

335. First, India cites to several legal documents which "make clear that the incentives are tax refunds."<sup>670</sup> This includes (i) the 2008 MoU, which expressly describes the incentives at issue as tax refunds, and specifies that "refund amount [...] would be paid by GoTN to individual members of the R&N Consortium who have paid the tax;"<sup>671</sup> (ii) the relevant government orders, including GO 52, GO 124, and GO 5, which describe the incentives as "refund[s]" of the taxes;<sup>672</sup> and (iii) the Tax Payment Certificates issued by the MoU Cell of the Commercial Taxes Department, which also consistently refer to the incentives as "tax refunds."<sup>673</sup>

336. In response to Nissan's contention that the Claimed Incentives were all denominated as either "Investment Promotion Subsidies" or "Fiscal Incentives," with the term "refund" used only as a shorthand to describe how the Claimed Incentives should be quantified,<sup>674</sup> India points out that "there

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<sup>668</sup> Reply, ¶ 62(b).

<sup>669</sup> Counter-Memorial, ¶ 70.

<sup>670</sup> Rejoinder, ¶ 62.

<sup>671</sup> Counter-Memorial, ¶ 74 *citing* C-005, Schedule, Clause M.12; Rejoinder, ¶ 63 *citing* C-005, Schedule, Clauses M.4.1(a), M.5(iii), M.6(a), M.6(b), M.12; Tr., 8 November 2018, 66:22-69:16.

<sup>672</sup> Rejoinder, ¶ 64 *referring to* C-010, ¶3(2)(v); C-012, ¶ 5.9; C-013, ¶ 2; Tr., 8 November 2018, 70:19-71:1.

<sup>673</sup> Rejoinder, ¶ 64 *referring to* C-050, ¶¶ 1,2; C-051, ¶¶ 1,3; C-053, ¶¶ 1,3; Tr., 8 November 2018, 71:2-9.

<sup>674</sup> Reply, ¶ 64.

is no reason why a name should have more weight than a description.”<sup>675</sup> Indeed, India notes, the latter may at times provide a more accurate portrayal of the subject at issue.<sup>676</sup> Moreover, even if a name were an important consideration, India argues, all the cited documents do in fact use the word “refund” to name the Claimed Incentives, and the terms “Investment Promotion Subsidy” and “Fiscal Incentives” were used only to refer to a broader set of applicable incentives, including but not limited to the tax refunds.<sup>677</sup> In any event, India accepts that the Claimed Incentives “are simultaneously [i]nvestment [i]ncentives and [t]ax [r]efunds” as “[t]hese two labels are not mutually exclusive.”<sup>678</sup> What really matters, India emphasizes, is that under the mechanism for disbursing the investment incentives established under GO 5, “an R&N Consortium member claims the incentives as refunds of taxes it has already paid.”<sup>679</sup> Therefore, according to India, the Claimed Incentives are “refund of taxes paid.”<sup>680</sup>

337. Second, India cites to Nissan’s own documents, submissions, and witness testimony, all of which it says “have considered the [Claimed I]ncentives to be tax refunds.”<sup>681</sup> This includes (i) the witness statement of Nissan’s Senior Vice President Mr. Kochhar, in which he “confirms the nature of the [Claimed Incentives]” as “refunds” of Output VAT, Input VAT, and Capital Goods VAT<sup>682</sup> (ii) communications between Nissan’s tax consultant, Ernst & Young, and Mr. Ramakrishnaiah, the Deputy General Manager (Tax) of RNAIPL and one of Nissan’s witnesses, which consistently refer to the incentives as “tax refunds;”<sup>683</sup> (iii) the witness statement of Mr. Ramakrishnaiah, in which he describes his role as being “responsible for overseeing all tax-related matters of RNAIPL and [NMIPL],” including liaising with external advisors on tax matters and overseeing the process of securing the incentives at issue;<sup>684</sup> (iv) the applications to SIPCOT and the MoU Cell, in which RNAIPL and NMIPL consistently called the Claimed Incentives “tax refunds;”<sup>685</sup> and (v) Nissan’s Statement of Claim, in which Nissan describes the Claimed Incentives as “refund[s].”<sup>686</sup>

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<sup>675</sup> Rejoinder, ¶ 66.

<sup>676</sup> Rejoinder, ¶ 66.

<sup>677</sup> Rejoinder, ¶¶ 67-69 referring to **C-005**, Clause 4.1(b), Clause 4.2 (a); **C-010**, ¶3(2)(v); **C-012**, ¶ 5(9)(c)-(h); **C-013**, ¶ (B)(i)(b).

<sup>678</sup> Tr., 8 November 2018, 66:2-4.

<sup>679</sup> Tr., 8 November 2018, 66:13-14.

<sup>680</sup> Tr., 8 November 2018, 66:8-9.

<sup>681</sup> Counter-Memorial, ¶¶ 75-76; Rejoinder, ¶ 71.

<sup>682</sup> Counter-Memorial, ¶ 75; Rejoinder, ¶ 75 citing Kochhar Statement, ¶ 3.1; Tr., 8 November 2018, 72:3-5.

<sup>683</sup> Rejoinder, ¶ 72 referring to **R-24**, pp. 12-13; **R-25**, pp. 1-3; **R26**, pp. 6-7; **R-27**, pp. 6-7; **R-28**, pp. 2,4,5,8,9,12; Tr., 8 November 2018, 71:20-72:2 referring to **R-23**.

<sup>684</sup> Rejoinder, ¶ 73 citing Ramakrishnaiah Statement, ¶ 2.3.

<sup>685</sup> Rejoinder, ¶ 74 referring to **C-017**, **C-018**, **C-019**, **C-046**, **C-047**, **C-048**, **C-049**; Tr., 8 November 2018, 72:6-15.

<sup>686</sup> Counter-Memorial, ¶ 76; Rejoinder ¶ 75 citing Statement of Claim, ¶ 71; referring to ¶¶ 69, 77, 83, 86, 189(b)(iii), 221; Tr., 8 November 2018, 71:12-19.

338. Finally, India rejects Nissan’s argument that “the characterization of the [Claimed] Incentives as ‘tax refunds’ is contradictory to a number of provisions of the 2008 MoU.”<sup>687</sup> To the contrary, India observes, the provisions on which Nissan relies actually reveal the nature of the Claimed Incentives as tax refunds. In particular, India maintains that Clause M.13, which provides that in the event of future changes in the tax regime, a suitable mechanism will be put in place to ensure that the “fiscal benefits offered” will not be affected,<sup>688</sup> “shows that – without it – the assumption would have been that the incentives would change with future changes in the tax regime, thereby revealing that the incentives are indeed part of the tax regime, and are thus tax refunds.”<sup>689</sup> India likewise rejects Nissan’s contention that the 2008 MoU’s option for the R&N Consortium to convert its entitlement to the Claimed Incentives into a soft loan under Clause M.4.6, and the existence of a cap on the amount of Output VAT and/or CST Incentives under Clause M.4.1(d), are inconsistent with a characterization of the Claimed Incentives as tax refunds.<sup>690</sup> In fact, India emphasizes, all three contractual provisions Nissan invokes expressly refer to the Claimed Incentives as “tax refunds.”<sup>691</sup>
339. Because the Claimed Incentives qualify as tax refunds, India argues, they necessarily constitute “taxation measures” within the meaning of Article 10(1) of the CEPA.<sup>692</sup> India contends that investment tribunals have consistently found tax refunds to constitute “taxation measures” and involve “matters of taxation.”<sup>693</sup> It relies in particular on three cases:
340. The first case, *Feldman v. Mexico*, concerned the Mexican government’s alleged non-payment of refunds of taxes on the export of cigarettes.<sup>694</sup> This case was brought under the North American Free Trade Agreement (“NAFTA”), Article 2103(1) of which provides that with the exception of certain specific provisions (or “claw-backs”), NAFTA provisions do not apply to “taxation measures.”<sup>695</sup> According to India, the tribunal in *Feldman* declined jurisdiction on the grounds that the protection available under Article 1105 of NAFTA, which was not among the “claw-back” provisions under Article 2103(1), was “not available in tax cases.”<sup>696</sup> This finding, India claims, demonstrates that “there was no doubt in the mind of the tribunal” that the term “taxation measures” in Article 2103(1)

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<sup>687</sup> Rejoinder, ¶ 76 citing Reply, ¶ 67.

<sup>688</sup> C-005, Schedule, Clause M.13.

<sup>689</sup> Rejoinder, ¶ 80; Tr., 8 November 2018, 73:2-6.

<sup>690</sup> Rejoinder, ¶¶ 81-85; Tr., 8 November 2018, 73:7-17, 131:5-10.

<sup>691</sup> Rejoinder, ¶¶ 76, 78, 82.

<sup>692</sup> Counter-Memorial, ¶ 79; Rejoinder, ¶ 11.

<sup>693</sup> Counter-Memorial, ¶ 80; Tr., 8 November 2018, 74:5-10.

<sup>694</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (RLA-3) (“*Feldman*”).

<sup>695</sup> Counter-Memorial, ¶ 82 citing NAFTA, Article 2103(1).

<sup>696</sup> Counter-Memorial, ¶¶ 81-83 citing *Feldman*, ¶ 141 (RLA-3).



included “tax rebates.”<sup>697</sup>

341. The second case, *OEPC v. Ecuador*,<sup>698</sup> concerned Ecuador’s alleged non-payment of refunds of VAT paid in “local acquisitions or importation of goods employed in the manufacture of exported products.”<sup>699</sup> This case was brought under the Ecuador-United States BIT which contains both an exclusion for “matters of taxation” and a “claw-back” (or exception) from that exclusion relating to investment agreements.<sup>700</sup> According to India, the tribunal found it had jurisdiction because while the dispute did relate to a “matter of taxation,” it involved the observance and enforcement of an investment agreement and thus fell within the “claw-back” provision.<sup>701</sup> India disputes Nissan’s assertion that the tribunal found the dispute did not relate to matters of taxation, and cites also to subsequent findings about the case in set-aside proceedings in English courts.<sup>702</sup>
342. The third case, *EnCana v. Ecuador*,<sup>703</sup> concerned Ecuador’s non-payment of tax refunds to which the claimant’s indirect subsidiaries allegedly were entitled under Ecuadorian tax law.<sup>704</sup> This case was brought under the Canada-Ecuador BIT which excludes “taxation measures,” subject to a “claw-back” for expropriation claims.<sup>705</sup> India contends that the tribunal found “taxation measures” encompassed “a law entitling the supplier to offset VAT paid to those from whom it has purchased goods and services.”<sup>706</sup> India claims that the tribunal’s conclusion that the “entitlement of the subsidiaries to VAT refunds” qualified as “taxation measures” directly supports its position that tax refunds likewise are “taxation measures” under the CEPA.<sup>707</sup>

(b) *Nissan’s Position*

343. Nissan submits that the Claimed Incentives are not tax refunds but incentives offered by India to

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<sup>697</sup> Counter-Memorial, ¶ 83.

<sup>698</sup> *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award (1 July 2004) (**CLA-015**) (“*OEPC*”).

<sup>699</sup> Counter-Memorial, ¶ 84 *citing OEPC*, ¶ 31 (**CLA-015**).

<sup>700</sup> Counter-Memorial, ¶ 85 *citing* Ecuador-United States BIT, Article X(2) (**RLA-26**).

<sup>701</sup> Counter-Memorial, ¶ 86.

<sup>702</sup> Counter-Memorial, ¶¶ 87-92 *citing* *Republic of Ecuador v. Occidental Exploration & Petroleum Company*, England and Wales, High Court of Justice, Judgement, ¶ 44 (**RLA-25**); *Ecuador v. OEPC*, England and Wales, Supreme Court of Judicature, Court of Appeal (Civil Division), Judgement, Case No. A3/2006/1116, [2007] EWCA Civ 656 (4 July 2007), ¶¶ 19, 40 (**RLA-27**); Tr., 8 November 2018, 74:24-75:8, 77:10-14.

<sup>703</sup> *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award (3 February 2006) (**CLA-019**) (“*EnCana*”).

<sup>704</sup> Counter-Memorial, ¶ 93.

<sup>705</sup> Counter-Memorial, ¶ 94 *citing* Canada-Ecuador BIT, Articles XII(1), XII(4) (**RLA-28**).

<sup>706</sup> Counter-Memorial, ¶ 95 *citing EnCana*, ¶¶ 141-143 (**CLA-019**).

<sup>707</sup> Counter-Memorial, ¶¶ 93, 96 *citing EnCana*, ¶ 149.

induce its investment, even though such incentives were “quantified by reference to certain taxes.”<sup>708</sup> According to Nissan, although the word “refund” has been used as shorthand to describe how the Claimed Incentives work, the MoU and relevant government orders “ultimately use the terms ‘Investment Promotion Subsidy’ and/or ‘Fiscal Incentives’ to name the incentives.”<sup>709</sup> Moreover, the use of “refunds” in the descriptions merely reflects that the Claimed Incentives “may only be provided in respect of the tax payments already made by the R&N Consortium, and are quantified based on those sums.”<sup>710</sup>

344. In Nissan’s view, regardless of the labelling, the Claimed Incentives are not tax refunds by their nature and substance.<sup>711</sup> First, they “are not provided pursuant to any taxation law, nor is it an exercise of powers to regulate taxation matters.”<sup>712</sup> Second, the characterization of the Claimed Incentives as tax refunds “does not reconcile with how the [Claimed] Incentives are assessed and paid, which is different from the tax exemption mechanism under Indian taxation laws in every way.”<sup>713</sup> In particular, Nissan points out, (i) it is not the Commercial Taxes Department but SIPCOT, “an agency under the Industries Department in charge of administration of structured packages of assistance,” that determines the R&N Consortium’s entitlement to the Claimed Incentives, including issuing eligibility certificates and executing deeds of agreement;<sup>714</sup> (ii) the R&N Consortium does not receive any exemption of CST or VAT from the Commercial Taxes Department, nor is there any reduction in its taxable turnover;<sup>715</sup> (iii) the R&N Consortium receives the Claimed Incentives as payments from SIPCOT, and not as a reimbursement of taxes from the Commercial Taxes Department;<sup>716</sup> and (iv) the disbursement by SIPCOT is made from a separate budgetary allocation under the Industries Department’s Head of Account, as opposed to the budget of the Commercial Taxes Department.<sup>717</sup>
345. Nissan also emphasizes the uncertainty in the payment of the investment incentives which does not result in “a pari passu payment or repayment of every rupee of tax paid.”<sup>718</sup> In particular, it observes that (i) investment incentives are paid under the 2008 MoU only up to a cap of 115 percent of Eligible Investment; and (ii) the Government has claimed cash flow difficulties as a potential reason for non-

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<sup>708</sup> Statement of Claim, ¶¶ 155, 157; Reply, ¶ 99.

<sup>709</sup> Reply, ¶ 64 *referring to* Counter-Memorial, ¶ 72.

<sup>710</sup> Reply, ¶ 64.

<sup>711</sup> Reply, ¶ 65.

<sup>712</sup> Reply, ¶ 65.

<sup>713</sup> Reply, ¶ 66.

<sup>714</sup> Reply, ¶ 66(a) *referring to* Statement of Claim, ¶¶ 61(d), 95; Tr., 8 November 2018, 135:23-25, 136:1-6, 137:6-12.

<sup>715</sup> Reply, ¶ 66(b).

<sup>716</sup> Reply, ¶ 66(c).

<sup>717</sup> Reply, ¶ 66(d) *referring to* **C-013**, ¶ (vii); **R-4**; **C-198**.

<sup>718</sup> Tr., 8 November 2018, 113:23-25, 114:1-4.

payment of the incentives.<sup>719</sup> In Nissan's submission, such uncertainty indicates that the incentive payments cannot be refund of taxes paid because if they were, the Government "would simply receive one rupee in tax, hold it for 30 days and pay it back."<sup>720</sup>

346. Finally, Nissan asserts that the characterization of the Claimed Incentives as "tax refunds" is contradictory to a number of provisions in the 2008 MoU.<sup>721</sup> This includes, for example, Clause M.13, which provides that a suitable mechanism would be renegotiated and put in place in the event of a future change in the tax regime to ensure that the benefits of the MoU are protected and unaffected.<sup>722</sup> Nissan considers that this Clause reinforces its position that the Claimed Incentives "are not tax refunds within the regime but a separate arrangement albeit with overlapping economic effects."<sup>723</sup> Nissan also cites Clause M.4.6, which gives the R&N Consortium the option to convert the Claimed Incentives into a "soft loan,"<sup>724</sup> and explains that a similar "soft loan" has been held by the High Court of Gujarat to not be a "refund of tax."<sup>725</sup> In Nissan's submission, the "soft loan" and the Claimed Incentives are alternatives and "essentially amount to the same thing," namely, incentives "to encourage the establishment of the automobile industries in the State," albeit measured by reference to taxes.<sup>726</sup> Nissan further invokes Clause M.4.1(d), which caps the amount of Output VAT and/or CST Incentives by reference to the amount of investment made by the R&N Consortium, and makes it possible that the "amount of [Claimed I]ncentives [paid is] lower than the amount of taxes paid."<sup>727</sup> Both Clauses, according to Nissan, run contrary to the characterization of the Claimed Incentives as tax refunds.

## **2. Whether the Claimed Incentives Are Part of the "Tax Regime" and Therefore "Taxation Measures"**

### *(a) India's Position*

347. India asserts that even if the Claimed Incentives could not be considered tax refunds, the dispute still pertains to "taxation measures" outside the Tribunal's jurisdiction, because it involves matters within the framework of the applicable tax regime.<sup>728</sup>

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<sup>719</sup> Tr., 8 November 2018, 114:5-19.

<sup>720</sup> Tr., 8 November 2018, 114:19-22.

<sup>721</sup> Reply, ¶ 67.

<sup>722</sup> Tr., 8 November 2018, 115:21-25, 116:1-5.

<sup>723</sup> Reply, ¶¶ 67(a), 99.

<sup>724</sup> Reply, ¶ 67(b).

<sup>725</sup> Tr., 8 November 2018, 109:14-21, 111:10-16 *citing* Writ Petition (Pil) No. 96 of 2013, *Himanshu V. Patel v. State of Gujarat & 2 Ors* (24 April 2014) (CLA-83).

<sup>726</sup> Tr., 8 November 2018, 111:4-9, 112:9-11, 116:23-25, 117:1-2.

<sup>727</sup> Reply, ¶ 67(c).

<sup>728</sup> Rejoinder, ¶¶ 13-14, 22.

348. As a preliminary matter, India points out that the Parties agree that “taxation measures” include “matters of taxation” and “exclude from the Tribunal’s jurisdiction ‘claims relating to taxation measures’.”<sup>729</sup> Therefore, in India’s view, there is no distinction between a measure involving a government act with respect to tax and an issue relating to tax – they are both “taxation measures.”<sup>730</sup> In the absence of a definition of “taxation measures” in the CEPA, India relies on the following definition in *EnCana* which, it notes, both Parties consider authoritative:<sup>731</sup>

All those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of “taxation measures.” Thus, tax deductions, allowances or rebates are caught by the term.<sup>732</sup>

349. In accordance with this definition, India argues, whether the Claimed Incentives in the present case are “taxation measures” depends on two conditions. They must be “aspects of the tax regime,” and they must “go to determine how much tax is payable or refundable.”<sup>733</sup> According to India, “there is no question that the latter condition is satisfied, [and t]he only remaining question is thus whether the [Claimed Incentives] are ‘aspects of the tax regime.’”<sup>734</sup>

350. India rejects Nissan’s position that the relevant inquiry is limited to whether particular measures were directly *imposed by* the “taxation law”; in its view, it is sufficient that they were granted *within the framework* of the taxation regime.<sup>735</sup> According to India, Nissan’s interpretation is premised upon an inaccurate and incomplete reading of the *EnCana* award which, in actuality, stands for the opposite proposition.<sup>736</sup> The relevant extract of the *EnCana v. Ecuador* provides in full:<sup>737</sup>

142. In the Tribunal's view, the term “taxation measures” should be given its normal meaning in the context of the Treaty. In particular, the Tribunal would make the following observations as to the meaning of the term.

It is in the nature of a tax that it is imposed by law. Tax authorities are not robber barons writ large, and an arbitrary demand unsupported by any provision of the law of the host State would not qualify for exemption under Article XII. On the other hand, as the Respondent stressed, the Tribunal is not a court of appeal in Ecuadorian tax matters, and provided a matter is sufficiently clearly connected to a taxation law or regulation (or to a procedure, requirement or practice of the taxation authorities in apparent reliance on such a law or regulation), then its legality is a matter for the courts of the host State.

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<sup>729</sup> Tr., 8 November 2018, 64:20-24.

<sup>730</sup> Tr., 8 November 2018, 76:21-25, 77:1-6.

<sup>731</sup> Counter-Memorial, ¶ 97.

<sup>732</sup> *EnCana*, ¶ 142 (CLA-019).

<sup>733</sup> Counter-Memorial, ¶ 98.

<sup>734</sup> Counter-Memorial, ¶ 98; Tr., 8 November 2018, 77:23-25, 78:1-11.

<sup>735</sup> Counter-Memorial, ¶ 99; Rejoinder, ¶¶ 37-50; Tr., 8 November 2018, 78:18-19.

<sup>736</sup> Counter-Memorial, ¶¶ 108-109; Rejoinder, ¶ 42.

<sup>737</sup> *EnCana*, ¶ 142 (CLA-019).

There is no reason to limit the term "taxation" to direct taxation, nor did the Claimant suggest it should be so limited. Thus indirect taxes such as VAT are included.

Having regard to the breadth of the defined term "measure", there is no reason to limit Article XII(1) to the actual provisions of the law which impose a tax. All those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of "taxation measures". Thus tax deductions, allowances or rebates are caught by the term.

The question whether something is a tax measure is primarily a question of its legal operation, not its economic effect. A taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes. The economic impacts or effects of tax measures may be unclear and debatable; nonetheless a measure is a taxation measure if it is part of the regime for the imposition of a tax. A measure providing relief from taxation is a taxation measure just as much as a measure imposing the tax in the first place. In the case of VAT, the Tribunal does not accept that the system of collection and recovery of VAT, even if it may be revenue-neutral for the intermediate manufacturer or producer, is any less a taxation measure at each stage of the process. A law imposing an obligation on a supplier to charge VAT is a taxation measure; likewise a law imposing an obligation to account for VAT received, a law entitling the supplier to offset VAT paid to those from whom it has purchased goods and services, as well as a law regulating the availability of refunds of VAT resulting from an imbalance between an individual's input and output VAT.

351. Instead of imposing a requirement that "taxation measures" be part of the taxation law, India claims that the *EnCana v. Ecuador* award only requires that the measures in question be "sufficiently clearly connected to a taxation law or regulation" and that "there is no reason to limit [taxation measures] to the actual provisions of the law which impose a tax."<sup>738</sup> Moreover, while India acknowledges that the "taxation measures" in the three cases Nissan cites—*EnCana*, *Feldman*, and *Duke Energy v. Mexico*<sup>739</sup>—were actual laws, it sees no reason why such findings would mean that "taxation measures" may not encompass a broader range of measures, as recognized by the *EnCana* tribunal.<sup>740</sup>
352. Applying the law to the facts, therefore, India submits that the dispute over the Claimed Incentives "in the present case undoubtedly meet the test of 'sufficiently clearly connected'," because the incentive scheme was created pursuant to various government orders and constitutes an exercise of executive powers to regulate taxation matters, provided to State Governments under Article 162 of the Constitution of India.<sup>741</sup> Article 162 of the Constitution states that State Governments, in exercise of their executive powers, can undertake taxation measures which have the effect of law.<sup>742</sup> The Legislature of Tamil Nadu did not intend to occupy the entire field of refunds of VAT with the TN VAT Act,<sup>743</sup> but left room for the issuance of Government Orders, pursuant to the principle that "the

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<sup>738</sup> Rejoinder, ¶¶ 43-44 citing *EnCana*, ¶¶ 142(1), 142(3) (CLA-019) (emphasis added).

<sup>739</sup> *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (CLA-071) ("*Duke Energy*").

<sup>740</sup> Rejoinder, ¶ 46.

<sup>741</sup> Rejoinder, ¶¶ 43, 49.

<sup>742</sup> Rejoinder, ¶ 23.

<sup>743</sup> Tr., 8 November 2018, 128:7-15.

State Executive has the power to make any regulation or order which shall have the effect of law so long as it does not contravene any legislation by the State Legislature already covering the field.”<sup>744</sup> This is “precisely what the GoTN did in issuing the [particular Government Orders] authorizing the incentives” at issue in this case,<sup>745</sup> and those Government Orders “have the effect of law because they don’t contravene any legislation covering the field of these rebates for incentivizing investment.”<sup>746</sup> In other words, India emphasizes, the Claimed Incentives – which are expressly described in the 2008 MoU as refunds of taxes collected under the CST Act and the TN VAT Act – could not have been granted by the GoTN if not for the fact that both Acts expressly empower the GoTN to grant tax exemptions.<sup>747</sup> This is confirmed, India argues, by the Preamble of the 2008 MoU, which provides:<sup>748</sup>

GoTN is sufficiently entitled and empowered under the relevant statutes, regulations and applicable laws to offer the incentives to the Consortium and its members.

353. Moreover, India argues, the Claimed Incentives are “aspects of the tax regime” because they are implemented by measures that form part of the tax regime.<sup>749</sup> Indeed, India elaborates, although the Claimed Incentives are contractual promises under the 2008 MoU, such promises could only be made because of the “existing legal framework” on taxation and implemented by government orders issued under the “executive authority over taxation matters.”<sup>750</sup> Without first putting in place GO 52, GO 80, GO 124, and GO 5, the GoTN could not, in India’s view, have implemented the Claimed Incentives.<sup>751</sup> This is confirmed, India argues, by Clause 6 of the 2008 MoU, which provides:<sup>752</sup>

The GoTN undertakes to ensure putting in place adequate statutory and regulatory framework and appropriate machinery provisions so that each of the R&N Consortium members qualifies or becomes eligible for fiscal incentives within the framework and overall ceiling envisaged in the MoU.

354. First, GO 80 by its own terms “established a cell under the control of the Commissioner of Commercial Taxes that is responsible for issuing the Tax Payment Certificates,”<sup>753</sup> and “a mechanism to operate the Tax incentive package in the VAT regime.”<sup>754</sup> In turn, GO 5 established a procedure for tax refunds, including the issuance of a Tax Payment Certificate to demonstrate eligibility for

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<sup>744</sup> Tr., 8 November 2018, 127:3-9, 128:24-25, 129:1-4.

<sup>745</sup> Rejoinder, ¶ 23.

<sup>746</sup> Tr., 8 November 2018, 129:5-8.

<sup>747</sup> Counter-Memorial, ¶ 103. *See also* Counter-Memorial, ¶¶ 20-21, 99.

<sup>748</sup> Counter-Memorial, ¶¶ 99-100 *citing* C-005, Preamble, Recital M; Tr., 8 November 2018, 78:20-24.

<sup>749</sup> Rejoinder, ¶¶ 23; Tr., 8 November 2018, 79:25-80:4.

<sup>750</sup> Counter-Memorial, ¶ 103 *referring to* P.H. Paul Manoj Pandian v. Mr. P. Veldurai, Supreme Court of India, Judgment, AIR 2011 SC 1660 (13 March 2011), ¶ 19 (RLA-43).

<sup>751</sup> Counter-Memorial, ¶¶ 39, 103.

<sup>752</sup> Counter-Memorial, ¶ 68; C-005, Clause 6.

<sup>753</sup> Tr., 8 November 2018, 80:22-25.

<sup>754</sup> Counter-Memorial, ¶ 101 *citing* R-4, Clause 1.

refunds.<sup>755</sup> Finally, GO 124, which India describes as the “legally authoritative instrument,” “enact[s] and give[s] legal force to the MoU.”<sup>756</sup> India emphasizes that all the Interim ECs were issued by SIPCOT to RNAIPL under GO 124, not under the 2008 MoU, and that Nissan itself has accepted against its interest that GO 124 prevails in cases of inconsistency with the 2008 MoU.<sup>757</sup>

355. India points out that in accordance with GO 5 and GO 80, before claiming an incentive, the relevant entity from the R&N Consortium must first receive an MoU Cell Certificate from the MoU Cell of the Commercial Taxes Department, which “should not simply state the tax remitted but should indicate the amount eligible as incentive after deducting the ineligible amounts.”<sup>758</sup> Moreover, under Government Order No. 64 (“GO 64”), the officials of the MoU Cell “would be working under the control of Commissioner of Commercial Taxes.”<sup>759</sup> Indeed, India observes that the incentive mechanism was “largely developed by the Commercial Taxes Department,”<sup>760</sup> with the Industries Department relying heavily on the Commercial Taxes Department’s suggestions, including the establishment of the MoU Cell Certificate process.<sup>761</sup> Indeed, “the 2008 MoU and the relevant GOs *could not* and *would* not have been passed without the inputs of the Commercial Taxes Department with respect to any tax incentives, including tax refunds.”<sup>762</sup> India also points out that the MoU Cell Certificates are issued under the signature of the Joint Commissioner of Tax of the GoTN, which further demonstrates the Commercial Taxes Department’s prominent role in processing the Claimed Incentives.<sup>763</sup>
356. By contrast, India describes SIPCOT, an agency under the authority of the Industries Department, as merely acting as a conduit for the disbursement of the Claimed Incentives, while the Commercial Taxes Department has “the final say in the amount to be refunded.”<sup>764</sup> India rejects Nissan’s claim that India “exaggerates the role played by the Commercial Taxes Department.”<sup>765</sup> According to India, Nissan’s description of SIPCOT’s role demonstrates “how minimal SIPCOT’s role is in comparison to that of the Commercial Taxes Department,” particularly because “SIPCOT actually does very little deciding.”<sup>766</sup> This is because, India argues, it is the MoU Cell Certificate issued by the MoU Cell of

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<sup>755</sup> Tr., 8 November 2018, 80:25-81:2.

<sup>756</sup> Tr., 8 November 2018, 80:11-16.

<sup>757</sup> Counter-Memorial, ¶ 104 referring to **C-020**, **C-021**, **C-028**; Statement of Claim, ¶¶ 53, 80, 89.

<sup>758</sup> Counter-Memorial, ¶ 102 citing **C-013**, Clause B(1)(b); Tr., 8 November 2018, 81:3-11.

<sup>759</sup> Counter-Memorial, ¶ 102 citing **R-5**, Clause 1.

<sup>760</sup> Rejoinder, ¶ 30; Tr., 8 November 2018, 81:22-24.

<sup>761</sup> Rejoinder, ¶ 30 referring to **R-20**, **R-21**, **R-22**.

<sup>762</sup> Rejoinder, ¶ 30 (emphasis in original).

<sup>763</sup> Rejoinder, ¶ 28 referring to **C-040**; **C-050**; **C-051**.

<sup>764</sup> Counter-Memorial, ¶ 102; Tr., 8 November 2018, 81:16-18.

<sup>765</sup> Rejoinder, ¶ 29 citing Reply, ¶ 102.

<sup>766</sup> Rejoinder, ¶ 29.

the Commercial Taxes Department that stipulates the final amount of refunds to be paid by SIPCOT, and any disagreement with respect to the content of the MoU Cell Certificates is to be clarified and finally determined by the Commercial Taxes Department, not SIPCOT.<sup>767</sup> Moreover, India points out, SIPCOT itself recognized in its response to the Industries Department's request to review the VAT refund mechanism that any such mechanism "has to be analysed by the Commercial Taxes Department [...] [because it] is the operating and implementing agency of VAT."<sup>768</sup> In any event, India maintains, the particular mechanism is insignificant because the funds regardless "always come out of the same tax-funded general budget of the [GoTN] as would any tax refund."<sup>769</sup> For India, "the choice of agency" to refund taxes "is quite irrelevant" to the characterization of a government's obligation to make such refunds as "tax measure."<sup>770</sup>

357. India rejects Nissan's argument that the Claimed Incentives are not implemented by measures that form part of the tax regime because they are assessed and paid differently from the tax exemption mechanism under Indian taxation laws.<sup>771</sup> In India's view, the differences are explained by the fact that the Claimed Incentives are refunds, while the tax exemptions are exemptions.<sup>772</sup>
358. Finally, India contends that the TN VAT Act Amendment reveals that the Claimed Incentives are aspects of the tax regime.<sup>773</sup> According to India, the fact that the TN VAT Act Amendment was enacted statutorily to "disallow excess unutilized ITC accumulated by dealers such as NMIPL and RIPL, such that they could not reap a double benefit from the incentives," demonstrates that the Claimed Incentives were integral to the tax regime.<sup>774</sup>

(b) *Nissan's Position*

359. As noted above, Nissan maintains that the Claimed Incentives are not tax refunds. However, even if the Claimed Incentives "could somehow be described as 'tax refunds,'" Nissan claims that they are still not "taxation measures" within the meaning of Article 10(1) of the CEPA.<sup>775</sup> In particular, Nissan rejects India's attempt to "describe the contractual obligations under the 2008 MoU as part of a 'tax regime' [...] [and] recast the GoTN's promise to pay the [Claimed] Incentives [...] 'as an exercise of

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<sup>767</sup> Rejoinder, ¶ 29 referring to C-050, C-051, C-053.

<sup>768</sup> Rejoinder, ¶ 29 citing R-19, ¶ 3.

<sup>769</sup> Rejoinder, ¶ 27 referring to R-29; R-30; R-34; R-37-R-39.

<sup>770</sup> Tr., 8 November 2018, 126:4-11.

<sup>771</sup> Rejoinder, ¶ 24.

<sup>772</sup> Rejoinder, ¶ 25 referring to R-20.

<sup>773</sup> Rejoinder, ¶¶ 34-35.

<sup>774</sup> Rejoinder, ¶ 35.

<sup>775</sup> Reply, ¶ 68.



its delegated executive authority over taxation matters” for several reasons.<sup>776</sup>

360. Nissan disputes India’s characterization of certain government orders relating to the Claimed Incentives as an exercise of the GoTN’s delegated authority over taxation measures.<sup>777</sup> Nissan emphasizes that the legal source of the Claimed Incentives is “not based on, nor implemented by any taxation law or any taxation regulation.”<sup>778</sup> Although they may be implemented by various government orders, these orders by themselves “have no legal effect whatever, having no statutory authority,” because “[o]nce a law occupies the field, it will not be open to the State Government in exercise of its executive power under Article 162 of the Constitution to prescribe in the same field by an Executive Order.”<sup>779</sup> In Nissan’s submission, because the State of Tamil Nadu has legislated in respect of VAT and CST, “[t]here is no room for a so-called ‘order’ or ‘circular’ to have effect as part of the VAT or CST taxing regime.”<sup>780</sup> Rather, refund of VAT has essentially been covered by the TN VAT Act, and “if the Legislature wished to provide an additional situation in which there might be a refund, it would have to change the law, amend the law in some way, shape or form.”<sup>781</sup>
361. Moreover, in Nissan’s view, the Claimed Incentives were not tax exemptions and were not granted pursuant to either the CST Act or the TN VAT Act.<sup>782</sup> While acknowledging that Section 8(5) of the CST Act and Sections 30(1)(a) and 33(3) of the TN VAT Act empower the GoTN to grant tax exemptions, Nissan points out that the 2008 MoU makes no reference to these provisions, and that India has failed to provide any evidence that the Claimed Incentives were actually granted under such powers.<sup>783</sup> In fact, Nissan observes, the Claimed Incentives were granted in a different manner than that in which tax exemptions are typically granted under these laws.<sup>784</sup> While the latter entails official notification and publication on the Government Gazette, as well as a government order with “the notification annexed to it,”<sup>785</sup> these procedures were absent in the 2008 MoU.<sup>786</sup> Additionally, while tax exemptions are assessed by the Commercial Taxes Department, the Claimed Incentives are assessed and paid by the SIPCOT, an agency under the Industries Department.<sup>787</sup> In this context, Nissan distinguishes between the Claimed Incentives and other investment incentives granted under

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<sup>776</sup> Reply, ¶ 16.

<sup>777</sup> Reply, ¶¶ 25-28.

<sup>778</sup> Tr., 8 November 2018, 100:8-10.

<sup>779</sup> Tr., 8 November 2018, 102:12-15, 102:23-25, 103:1.

<sup>780</sup> Tr., 8 November 2018, 103:2-8.

<sup>781</sup> Tr., 8 November 2018, 135:8-15.

<sup>782</sup> Reply, ¶¶ 20, 101.

<sup>783</sup> Reply, ¶ 21.

<sup>784</sup> Reply, ¶¶ 22-23; Tr., 8 November 2018, 118:22-25, 119:1-4.

<sup>785</sup> Reply, ¶¶ 22, 26; Tr., 8 November 2018, 105:4-8.

<sup>786</sup> Reply, ¶¶ 22-24.

<sup>787</sup> Reply, ¶¶ 27, 66(a)-(d); 102; Tr., 8 November 2018, 105:22-25, 106:1-2.

the 2008 MoU such as exemption from stamp duty under Section B, or exemption from payments of electricity tax under Section G.<sup>788</sup> According to Nissan, those other incentives required an order under the relevant legislation to be given effect, which is “quite a contrast to the indirect mechanism by which the [Claimed Incentives] are to be paid through SIPCOT.”<sup>789</sup> Therefore, Nissan contends that while other investment incentives under the 2008 MoU may ultimately give rise to tax measures implemented by the recognized tax authorities, the Claimed Incentives do not.<sup>790</sup> Similarly, the R&N Consortium never receives any reduction in its taxable turnover for which a tax exemption would normally provide.<sup>791</sup>

362. In Nissan’s submission, the various Government Orders relating to the Claimed Incentives were not an exercise of the GoTN’s designated authority over taxation matters, pursuant to “statutory powers derived from the TN VAT Act or the CST Act,” but rather were only “administrative orders” made in accordance with Tamil Nadu’s industrial policy to attract investments.<sup>792</sup> With respect to GO 80, Nissan takes the view that India’s characterization of the Investment Incentives Scheme under the 2008 MoU as a “[t]ax incentive package in the VAT regime” is “out of context.”<sup>793</sup> Rather, Nissan considers that GO 80 affirms the necessity for the Investment Incentives Scheme to work alongside the VAT regime, demonstrating their separate and independent existence.<sup>794</sup>
363. Nissan also denies that the Claimed Incentives, as contractual obligations of the GoTN under the 2008 MoU, are contingent upon the issuance of government orders implementing them.<sup>795</sup> Nissan views the incentives as independent obligations which “unconditionally come into effect on 22 February 2008” under the terms of the 2008 MoU, and which must be fulfilled by GoTN “irrespective of the existence of any preceding and ensuing government orders.”<sup>796</sup>
364. Nissan further objects to India’s description of the role of the Commercial Taxes Department in developing the investment incentive mechanism under the 2008 MoU.<sup>797</sup> Nissan insists this Department merely commented upon request on the incentive mechanism’s compatibility with the TN VAT Act or the CST Act, but did not “design the process.”<sup>798</sup>

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<sup>788</sup> Tr., 8 November 2018, 106:24-25, 107:1-14.

<sup>789</sup> Tr., 8 November 2018, 106:24-25, 107:1-14.

<sup>790</sup> Tr., 8 November 2018, 107:22-25.

<sup>791</sup> Reply, ¶¶ 22(d)(i); 66(b).

<sup>792</sup> Reply, ¶¶ 25-28.

<sup>793</sup> Reply, ¶ 28 *citing* Counter-Memorial, ¶ 101.

<sup>794</sup> Reply, ¶ 28.

<sup>795</sup> Reply, ¶¶ 29-30.

<sup>796</sup> Reply, ¶¶ 32-33; 100.

<sup>797</sup> Tr., 8 November 2018, 138:2-8.

<sup>798</sup> Tr., 8 November 2018, 138:13-19.

365. In addition to these factual allegations, Nissan disputes India’s legal submissions on this issue in three respects. First, in Nissan’s view, the term “taxation measures” does not extend to all “tax matters” or “tax-related matters,”<sup>799</sup> but must be interpreted to denote measures that form “part of the taxation law,” as assessed through their legal operation.<sup>800</sup> Based on its interpretation of *EnCana*, Nissan considers that while taxation measures may not necessarily have to be “the actual provisions of the law which impose a tax,’ their legal operation nevertheless must be part of the regime for the imposition of a tax.”<sup>801</sup> Nissan insists that this interpretation is supported by *EnCana* as well as *Feldman* and *Duke Energy*, in which the measures found to be “taxation measures” were those “instituted,” “based on” or made “in purported compliance” with the relevant tax laws.<sup>802</sup>
366. Applying this interpretation, Nissan submits that “there can be no question that the [Claimed] Incentives are *not* taxation measures and are not part of the regime for the imposition of tax.”<sup>803</sup> That is because, Nissan asserts, they neither impose nor provide relief from any tax or “liability [...] to pay money to the State for public purposes.”<sup>804</sup> If the Claimed Incentives were indeed tax exemptions, Nissan points out, the R&N Consortium would not have had first to pay all CST and VAT as required by law, and only subsequently apply for disbursement of the Claimed Incentives under a “separate contractually-agreed mechanism.”<sup>805</sup> In addition, Nissan reiterates, the Claimed Incentives legally operate as contractual entitlements to induce investment, and are not “instituted by or in purported compliance with any taxation law.”<sup>806</sup> Likewise, the GoTN’s delay or failure to pay the Claimed Incentives was “not an executive act taken to implement any taxation law.”<sup>807</sup> Moreover, even if the Claimed Incentives were implemented by the various government orders, Nissan maintains that they are not as India claims an exercise of the GoTN’s delegated authority over taxation matters.<sup>808</sup>

### 3. Whether the “Taxation Measures” Exclusion is Limited to Claims Challenging Tax Laws or Decisions Applying Those Laws

#### (a) India’s Position

367. India disputes Nissan’s position that the term “taxation measures” requires that the dispute itself

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<sup>799</sup> Tr., 8 November 2018, 91:25, 92:1-2.

<sup>800</sup> Reply, ¶ 73.

<sup>801</sup> Reply, ¶¶ 74-75 citing *EnCana*, ¶ 142(4) (CLA-019).

<sup>802</sup> Reply, ¶ 76 citing *EnCana*, ¶ 146 (CLA-019); *Feldman*, ¶¶ 7-22 (RLA-3); *Duke Energy*, ¶¶ 175-176 (CLA-071).

<sup>803</sup> Reply, ¶ 77 (emphasis in original).

<sup>804</sup> Reply, ¶ 77(a) citing *EnCana*, ¶ 142(4) (CLA-019).

<sup>805</sup> Reply, ¶ 77(a).

<sup>806</sup> Reply, ¶ 77(b).

<sup>807</sup> Reply, ¶ 77(d).

<sup>808</sup> Reply, ¶ 77(c) referring to Reply, ¶¶ 25-28.

“concern the validity of a tax law of India (or of the State of Tamil Nadu), an application of any tax law or a change to any tax assessment or law, or a challenge to any decision taken by any taxation authority.”<sup>809</sup> In its view, a dispute does not need to impugn any tax law or decision to fall within the scope of Article 10(1) of the CEPA; it says Nissan’s narrow interpretation is baseless and contradicts the case law in *EnCana* and *Feldman*, in which, according to India, the tribunals defined the term more broadly.<sup>810</sup> The correct interpretation stemming from these cases, India insists, is that “provided a matter is sufficiently clearly connected to a taxation law or regulation,” it is a “taxation measure” whose legality should fall to the determination of the court of the host State.<sup>811</sup>

368. India also rejects Nissan’s reliance on the fact that prior “taxation measure” cases involved challenges to tax laws. While this may be true, India contends that this is not a necessary requirement, pointing out that the *EnCana* tribunal “made clear that a ‘taxation measure’ does not need to concern the application of a tax law.”<sup>812</sup>

(b) *Nissan’s Position*

369. Nissan maintains that this case does not concern “taxation measures” because it does not relate to “the validity of a tax law of India (or the State of Tamil Nadu), an application of any tax law or a change to any tax assessment or law, or a challenge to any decision taken by any taxation authority.”<sup>813</sup> This formulation, according to Nissan, is consistent with the object and purpose of the taxation carve-out in Article 10(1) of the CEPA, which it claims was to “preserve a State’s sovereignty in relation to its power to determine its tax policies and impose taxes in its territory.”<sup>814</sup> Viewed in this light, Nissan argues that its claims do not intrude on India’s sovereignty but rather are premised on the validity of the relevant tax laws, because the Claimed Incentives are calculated by reference thereto.<sup>815</sup> Nissan considers that *Feldman* and *EnCana* in fact support its position because those cases both involved claims that impugned a tax law.<sup>816</sup>

370. In particular, Nissan stresses the tribunal’s ruling in *EnCana* that “to impose a tax or to deny a refund by reference to a term contained in a taxation law is itself a Taxation Measure,” and insists that the present case “is not this situation.”<sup>817</sup> Nissan further cites *Burlington*, a case in which a claim not

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<sup>809</sup> Counter-Memorial, ¶¶ 106-107 citing Statement of Claim, ¶ 156.

<sup>810</sup> Counter-Memorial, ¶¶ 108-110; Rejoinder, ¶¶ 51-53; Tr., 8 November 2018, 86:8-13, 86:20-87:14, 89:19-90:2.

<sup>811</sup> Tr., 8 November 2018, 86:13-19.

<sup>812</sup> Rejoinder, ¶ 53 citing Reply, ¶ 80.

<sup>813</sup> Statement of Claim, ¶ 156.

<sup>814</sup> Reply, ¶ 81.

<sup>815</sup> Reply, ¶ 82.

<sup>816</sup> Reply, ¶¶ 84-85 citing *Feldman*, ¶¶ 7-22 (RLA-3); *EnCana*, ¶ 23 (CLA-019).

<sup>817</sup> Tr., 8 November 2018, 93:22-25, 94:1.

challenging the lawfulness of the tax law in question was held not to raise “matter of taxation,” but only revolve “around a contract matter.”<sup>818</sup> For Nissan, this dispute is of the same nature as it arises out of the GoTN’s failure to “make timely payment” of investment incentives under the 2008 MoU, and therefore assumes (rather than challenges) the validity of the relevant tax law.<sup>819</sup>

#### 4. Whether the Contractual Context Bars Application of the “Taxation Measures” Exclusion

##### (a) India’s Position

371. Finally, India argues, the fact that Nissan formulated its claims as arising under the 2008 MoU does not inherently bar the applicability of CEPA Article 10(1), particularly in the absence of a “claw-back” provision in the CEPA.<sup>820</sup> In fact, India argues, the fact that such “claw-back” provisions are common and yet were not included in the CEPA reinforces the conclusion that Japan and India intended the Article 10(1) exclusion to allow all claims relating to “taxation measures,” even if they are predicated on provisions of an investment agreement.<sup>821</sup>
372. India disputes Nissan’s submission that the case law establishes that claims relating to contractual entitlements fall outside the scope of taxation exclusions.<sup>822</sup> In its view, neither *OEPC* nor *Burlington* stand for that broad proposition. With respect to *OEPC*, India contends that the tribunal accepted that the dispute related to a “matter of taxation,” but found jurisdiction because it fell under an express “claw-back” provision which does not exist in this case.<sup>823</sup> With respect to *Burlington*, India submits that the tribunal rejected jurisdiction over certain claims relating to contractual entitlements precisely because of the taxation exclusion.<sup>824</sup>
373. India also disputes Nissan’s reliance on *Murphy v. Ecuador*, in which the tribunal found that the measure at issue was not a “matter of taxation” on the grounds that the measure’s stated purpose was to amend certain oil contracts, the obligation to pay stemmed from contractual obligations, and the revenue earned by the State was classified as non-revenue.<sup>825</sup> Notwithstanding the fact that the *Burlington* tribunal found the same measure to constitute a tax for the purposes of the same BIT,<sup>826</sup> India considers *Murphy* to be “clearly distinguishable” from the present case. In particular, India

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<sup>818</sup> Reply, ¶ 95; Tr., 8 November 2018, 96:3-10, 96:19-25, 97:1-6.

<sup>819</sup> Reply, ¶ 96.

<sup>820</sup> Counter-Memorial, ¶¶ 111-112; Tr., 8 November 2018, 84:15-24.

<sup>821</sup> Counter-Memorial, ¶ 112.

<sup>822</sup> Rejoinder, ¶¶ 54-59.

<sup>823</sup> Rejoinder, ¶ 55 referring to Counter-Memorial, ¶¶ 84-90.

<sup>824</sup> Rejoinder, ¶ 58 referring to *Burlington*, ¶ 206 (CLA-072).

<sup>825</sup> Rejoinder, ¶ 48 citing *Murphy Exploration & Production Company – International v. the Republic of Ecuador*, UNCITRAL Rules, Partial Final Award, 6 May 2016, ¶ 190 (CLA-079) (“*Murphy*”).

<sup>826</sup> Rejoinder, ¶ 48 referring to *Burlington*, ¶ 167 (CLA-072).

argues, the purpose of the Claimed Incentives is not to amend any contracts, the obligation to pay the Claimed Incentives stem from relevant government orders implementing them; and the Claimed Incentives are, in effect, assessed by and paid from the taxes of the Commercial Taxes Department, the recognized tax authority in Tamil Nadu.<sup>827</sup>

*(b) Nissan's Position*

374. By contrast, Nissan submits that the “case law confirms that a dispute relating to a contractual entitlement, not tax law, is not excluded by the taxation carve-out clause even if the relevant entitlement is quantified by reference to tax law.”<sup>828</sup> Contrary to India’s analysis of the *OEPC* ruling, Nissan’s reading does not support the conclusion that this dispute is one concerning a “matter of taxation.”<sup>829</sup> According to Nissan, while the tribunal may have found jurisdiction because the “claw-back” provision for an investment agreement was triggered, this does not mean the tribunal necessarily first concluded that the dispute related to a “matter of taxation.”<sup>830</sup> Rather, the tribunal simply reasoned that if the dispute involves a “claw-back” provision, it “will in any event fall within [...] the settlement of disputes.”<sup>831</sup> As such, the tribunal was not required to make any predicate finding as to whether a “matter of taxation” had been involved.<sup>832</sup> Notably, Nissan points out that the tribunal also recognized jurisdiction on a basis other than the “claw-back” provision, because “the parties do not dispute the existence of the tax or its percentage.”<sup>833</sup>
375. As additional support, Nissan cites *Murphy*, in which the tribunal concluded that Ecuador’s Law 42 was not a “matter of taxation” because its purpose was to amend certain oil contracts, the source of Ecuador’s obligation to pay was contractual, and “the nature of the revenue in relation to the measure was non-tax revenue.”<sup>834</sup> Nissan argues that similarly in this case, the purpose of the Claimed Incentives was to induce investment, that they are contractual promises by the GoTN under the 2008 MoU, and that they are paid by SIPCOT, which is not a taxation authority.<sup>835</sup>

**B. THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS**

376. The Tribunal again starts with the placement and language of the relevant CEPA provision. Article 10

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<sup>827</sup> Rejoinder, ¶ 48; Tr., 8 November 2018, 87:24-25, 88:1-25, 89:1-5.

<sup>828</sup> Reply, ¶ 86.

<sup>829</sup> Reply, ¶¶ 88-94.

<sup>830</sup> Reply, ¶ 90.

<sup>831</sup> Reply, ¶ 90 *citing OEPC*, ¶ 71 (CLA-015).

<sup>832</sup> Reply, ¶ 91.

<sup>833</sup> Reply, ¶¶ 92-93 *citing OEPC*, ¶ 74 (CLA-015).

<sup>834</sup> Reply, ¶ 78 *referring to Murphy*, ¶ 190 (CLA-079).

<sup>835</sup> Reply, ¶ 79 *referring to C-005*, ¶¶ 51-52; Statement of Claim, ¶ 96(d).

appears in Chapter 1 of the CEPA, entitled “General Provisions,” and thus is not specific to Chapter 8 on “Investment.” Article 10(1) provides that “[u]nless otherwise provided for in this Agreement, the provisions of this Agreement shall not apply to any taxation measures.”

377. It is axiomatic that this provision is an exclusionary clause, intended to carve out certain matters from the scope of the CEPA. States are free to limit the scope of their treaties in any way they wish, and when they unmistakably have done so, such exclusions must be given meaning. What that meaning *is*, however – and therefore the scope and reach of any particular exclusion – is a matter of treaty interpretation that is subject to the general principles of interpretation provided by the VCLT.
378. Beginning then with the first part of Article 10(1) – “[u]nless otherwise provided for in this Agreement” – a review of the CEPA as a whole indicates two other provisions referring to “taxation measures” to which the CEPA *was* intended to apply. First and most proximately, Article 10(3) provides that “Articles 4, 6 and 9 shall apply to taxation measures, to the extent that the provisions of this Agreement are applicable to such taxation measures.” The three referenced articles impose general obligations on the Contracting Parties, including (a) obligations of transparency regarding legal instruments and competent authorities (Article 4), (b) obligations to maintain impartial and independent judicial procedures for review of government actions (Article 6), and (c) obligations to maintain the confidentiality of information provided in confidence by the other Contracting Party (Article 9). Second, Article 58(d), which defines the word “measure” for purposes of Chapter 6 of the CEPA regarding “Trade in Services,” notes that “[t]he term ‘measure’ shall include taxation measures to the extent covered by the GATS.”
379. Subject to these exceptions, however, Article 10(1) commands that “the provisions of this Agreement shall not apply to any taxation measures.” The reference to “*the provisions of this Agreement*” is all encompassing, and therefore excludes application of *all* of Chapter 8 on “Investment,” meaning equally the provisions that *define the scope* of protected investors and investments (Article 83), the provisions that impose *substantive obligations* on the Contracting Parties with respect to those investors and investments (Articles 85-95), and the provisions that provide investors a *mechanism for redress* of alleged violations (Article 96).<sup>836</sup>
380. Accordingly, the question of whether something involves a “taxation measure” excluded from the CEPA may arise in the context either of (a) determining the source of an alleged right that the investor seeks to protect, or (b) determining the nature of the challenged government act that the investor alleges interfered with its rights. Under the former inquiry, if the rights in question were created by a “taxation measure,” then the State has no CEPA-based obligations to protect them, even though it may

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<sup>836</sup> See *EnCana*, ¶¶ 109-110 (noting that to the extent the tax exclusion applied, “it is not open to EnCana to complain of breaches of other provisions of the BIT,” and “in that event the jurisdictional provision of the BIT lacks application also, since subject to the enumerated exceptions, *nothing* in the BIT applies to taxation measures, and this includes Article XIII” providing for submission to arbitration) (**CLA-019**) (emphasis in original).

have relevant duties under its domestic laws. Under the latter inquiry, if the harm to the investor was caused by a “taxation measure,” then that measure cannot be challenged through CEPA-based arbitration, even though it may be challenged through domestic law mechanisms. The Parties in this case have discussed both of these inquiries, debating (a) whether the *rights* that Nissan *seeks to preserve* had their origin in “taxation measures” or simply in a contractual instrument, and (b) whether the GoTN’s *conduct* that Nissan *seeks to challenge* involves “taxation measures” connected for example to the TN VAT Act Amendment, or simply non-payment of contractual obligations.<sup>837</sup> The Tribunal considers both inquiries to be relevant for purposes of Article 10(1).

381. Returning to the language of Article 10(1), the provision is notable also for what it does *not* contain, namely any exceptions or carve-outs from the exclusion of “any taxation measures.” This is different from the treaty text at issue in all the prior tax exclusion cases cited by the Parties. Those BITs contained explicit carve-outs for certain sources of investor rights (*i.e.*, “investment agreements”),<sup>838</sup> for certain types of treaty claims (*i.e.*, expropriation),<sup>839</sup> or both. These distinctions must be given meaning. The natural conclusion is that to the extent a particular case under the CEPA is found to involve a “taxation measure” within the meaning of Article 10(1), the fact that it may *also* involve an investment agreement or an expropriation claim would not automatically salvage it from the broad exclusion, as might be the case under a treaty that includes these exceptions.
382. These threshold observations regarding Article 10(1) bring the Tribunal to the central question, namely how the phrase “*any taxation measures*” should be interpreted. The phrase itself is not defined in the CEPA. However, one component of this phrase – the word “*measure*” – is defined in Section

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<sup>837</sup> Specifically, as discussed further below, Nissan insists that it is not impugning any general taxation measures such as the TN VAT Act Amendment, but simply seeking to enforce rights that in its view emanate only from contract. By contrast, India contends that the rights in question are tax refunds that the GoTN granted by contract only pursuant to Government Orders that constitute taxation measures, and that the challenged State conduct (denial of the Claimed Incentives) was part of a coordinated tax policy decision to prevent double tax benefits from corporate restructuring, and therefore an implementation of a taxation measure for purposes of Article 10(1).

<sup>838</sup> *See, e.g., OEPC*, ¶¶ 64, 73, 77 (CLA-015) (finding jurisdiction because even if the dispute involved a “matter of taxation,” it was clearly one “associated with an investment agreement,” bringing it within the express carve-out in the United States-Ecuador BIT for “matters of taxation [...] with respect to [...] the observance and enforcement of terms of an investment agreement or authorization”); *EnCana*, ¶¶ 166-167 (CLA-019) (noting that under the Canada-Ecuador BIT, “a claim concerning a taxation measure” would fall within the tribunal’s jurisdiction if it were “in breach of an agreement between the central government authorities [of Ecuador] and [EnCana] concerning an investment,” but no such agreement was alleged in the case); *Burlington*, ¶¶ 124, 231 (CLA-072) (explaining that if non-expropriation claims raised “matters of taxation,” the question would be whether they fell within the carve-out for observance and enforcement of an investment agreement); *Murphy*, ¶ 156 (CLA-079) (quoting applicable BIT language including carve-out for investment agreements).

<sup>839</sup> *See, e.g., OEPC*, ¶¶ 64 (CLA-015) (quoting United States-Ecuador BIT as applying *inter alia* to “matters of taxation [...] with respect to [...] expropriation, pursuant to Article III”); *EnCana*, ¶ 109 (CLA-019) (explaining that under the Canada-Ecuador BIT, “even if the measures complained of are taxation measures [...] it is open to EnCana to challenge them as an expropriation under Article VIII”); *Burlington*, ¶¶ 112-121 (CLA-072) (finding jurisdiction over an expropriation claim under the relevant carve-out); *Murphy*, ¶ 126 (CLA-079) (noting that Ecuador did not challenge jurisdiction over an expropriation claims in light of the BIT’s expropriation exception to the tax exclusion); *see also Feldman*, fn. 9, ¶¶ 141, 188 (RLA-3) (noting that NAFTA carves out from its tax exclusion any claims for violation of national treatment and expropriation, but not claims related to the minimum standard of treatment).



58(d) of the CEPA as meaning “any measure, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form.”<sup>840</sup> The Tribunal recognizes that the definition in Article 58(d) is stated to be “[f]or the purposes of this Chapter” (namely Chapter 6 on “Trade in Services”), but there is no suggestion in Article 10(1) on “Taxation” that the word “measure” was intended there to have any different scope. Operating from the principle that words recurring in a given treaty should be interpreted similarly unless the context or object and purpose of different parts of the treaty suggest otherwise, the Tribunal adopts the same definition of “measure” for purposes of Article 10(1) as provided expressly in Article 58(d). The Tribunal also adopts for this purpose the explanation in Article 84(c)(i) that a measure should be considered to be *by* a State Party if it was adopted or maintained by the “central, regional or local governments or authorities of a Party,” which would include the GoTN and its various constituent departments.

383. The one critical word that is not defined anywhere in the CEPA is “taxation.” The Tribunal agrees with prior investment arbitration tribunals that this leaves the term to be “given its normal meaning in the context of the Treaty,” using the interpretative tools available as a matter of international law.<sup>841</sup> However, the Tribunal also agrees with the assessment in *Murphy* that in applying an international law definition to the circumstances of a particular case, significant importance must be paid *as a matter of fact* to the domestic law system at issue, including how and through whom the State customarily regulates issues of taxation.<sup>842</sup>
384. Beginning with the international law meaning of the word “taxation,” the Tribunal has no quarrel with the general definition set out in *EnCana* and subsequently adopted by other tribunals, namely that “[a] taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes.”<sup>843</sup> Applying this definition, it is self-evident that measures regulating the obligation to pay taxes to a central, regional or local government would constitute “taxation measures,” including executive branch actions implementing tax laws to the same degree as legislative branch actions issuing those laws in the first place.<sup>844</sup> The Tribunal also accepts that measures granting exemptions, rebates and refunds of taxes would also be “taxation measures,” to the same extent as those imposing

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<sup>840</sup> Cf. *EnCana*, ¶ 141 (CLA-019) (observing that the Canada-Ecuador BIT at issue in that case defined the term “measure” to include “any law, regulation, procedure, requirement or practice”).

<sup>841</sup> *EnCana*, ¶ 142 (CLA-019); *Burlington*, ¶ 162 (CLA-072); *Murphy*, ¶ 158 (CLA-079).

<sup>842</sup> *Murphy*, ¶¶ 161, 185 (CLA-079) (“When the Tribunal interprets the term “matters of taxation” [...], it should therefore take into account the domestic tax regime that is the legislative and regulatory manifestation of [the State’s] tax policies. Even though the domestic characterisation of a law is not decisive in the treaty context, it is a strong indication as to how the law should be characterized.”).

<sup>843</sup> *EnCana*, ¶ 142(4) (CLA-019); *Duke Energy*, ¶ 174 (CLA-071); *Burlington*, ¶¶ 164-165 (CLA-072); *Murphy*, ¶ 159 (CLA-079).

<sup>844</sup> See *EnCana*, ¶ 142(3), (4) (CLA-019) (finding that “[a]ll those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of ‘taxation measures,’” with the result that “tax deductions, allowances or rebates are caught by the term”; a “measure providing relief from taxation is a taxation measure just as much as a measure imposing the tax in the first place”).

tax obligations in the first place.<sup>845</sup> Finally, it also follows that Article 10(1) excludes not only challenges *to* such taxation measures themselves, but also challenges predicated on an alleged failure to honor rights emanating *from* such measures” (*i.e.*, denials of claimed exemptions, rebates or refunds of taxes). As noted above, the exclusion in Article 10(1) does not distinguish between taxation measures that are the *source* of an investor’s claimed rights and those that are the cause of alleged *abrogation* of those rights.

385. However, this does not mean that *every* instance of a governmental authority imposing monetary obligations, relieving a party of such obligations, or returning moneys to a party necessarily is assessing, exempting, rebating or refunding a “tax.” In many if not all systems of government, for example, it may be necessary to pay fees to obtain certain licenses, permits or authorizations, and certain entities may be exempt as a matter of domestic law from otherwise applicable license fees, or entitled to a full or partial rebate or refund of such fees. This does not mean that any government ministry or department that takes measures in connection with such fees is thereby engaging in a “taxation measure.” The Tribunal thus agrees with the observation in *Murphy* that the definition should include “an additional element,” namely that the mandatory levy imposed for public purposes should be “without any direct benefit to the taxpayer.”<sup>846</sup> Equally, and as the *Murphy* tribunal also observed, the fact that a government ministry or department may impose fines or penalties as punishment for proscribed conduct, or alternatively forgive or refund such fines or penalties, does not make these actions necessarily “taxation measures” either.<sup>847</sup> In order to distinguish in any given case between measures that involve “taxation” and those which do not, it may therefore be necessary (particularly in close cases) to move beyond a mere generalization about imposing liability to pay money to the State.

386. A more nuanced inquiry may involve considerations of “*who*,” “*what*” and “*why*,” within the domestic law framework of the measures in question. The “*who*” question seeks to determine *which entities* are empowered under domestic law to regulate, administer, collect or refund taxes, and whether the case at hand involves the conduct of these entities, either as the source of the rights the investor seeks to protect or as the source of harm the investor alleges violated its underlying rights. The “*what*” question in turn seeks to assess the *qualitative nature* of the acts in question, namely whether they were of the type customarily used in the State (or in States more generally) to deal with matters of taxation. Finally, the “*why*” question examines the *purpose* of the relevant acts, including whether they were motivated principally by tax objectives.

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<sup>845</sup> *EnCana*, ¶ 142(3), (4) (CLA-019) (finding that “[a]ll those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of ‘taxation measures,’” with the result that “tax deductions, allowances or rebates are caught by the term”; a “measure providing relief from taxation is a taxation measure just as much as a measure imposing the tax in the first place”); *Duke Energy*, ¶ 180 (CLA-071).

<sup>846</sup> *Murphy*, ¶ 159 (CLA-079).

<sup>847</sup> *See Murphy*, ¶ 191 (CLA-079) (observing that “certain types of fines, fees, or special contributions may be required payments to the government but not constitute a tax”).

387. In the Tribunal’s view, these questions collectively are better suited to resolving a “taxation measure” objection than the test India proposed here, namely that “provided a matter is sufficiently clearly connected to a taxation law or regulation,” it is a “taxation measure.”<sup>848</sup> The “connection” element as thus framed is too broad, and conceivably could shield from treaty review even actions taken by State authorities acting completely outside the recognized domestic law structure for taxation decisions, simply because of some factual cross-reference to events of taxation. To take an extreme example for purposes of illustration only, if one State ministry not charged with taxation authority took actions purporting to expropriate all tax refund checks that were issued by the recognized tax authority, these actions would not themselves qualify as “taxation measures,” even though they might be factually “connected to” qualifying taxation measures (the issuance of the tax refunds in the first place). In another example, if a ministry outside the usual taxation channels purported to impose its own fines on an investor calculated by reference to the amount of taxes due through the recognized channels (*i.e.*, “for each dollar in taxes you owe, you shall also pay our ministry an equivalent dollar”), that could not be shielded from review as a “taxation measure,” despite the “connection” evident as a matter of fact. A “who,” “what,” and “why” analysis by contrast would easily tease out the difference, by distinguishing among the relevant State actors and focusing on the nature and rationale of the conduct in question.
388. In some of the prior tax exclusion cases, there was little debate about the “who” question. The *OEPC* and *EnCana* cases involved decisions by Ecuador’s central tax authority (the Internal Revenue Service) regarding VAT refunds,<sup>849</sup> and these tribunals therefore had little difficulty concluding that the disputes involved “matters of taxation” or “taxation measures,” which were the relevant treaty tests.<sup>850</sup> In other cases, such as *Duke Energy*, *Burlington* and *Murphy*, the measures in question were taken by the central legislature, which by definition had power over both taxation and many other non-taxation areas. The tribunals in those cases therefore were required to grapple also with “*what*” and “*why*” questions, namely whether the measures were *qualitatively* in the nature of a tax or tax exemption, and whether they were enacted principally for *reasons motivated* by tax policy factors. In *Duke Energy*, this too was treated as straightforward, since the laws in question involved customs duties, and particularly an “exemption from duties on goods imported for the needs of an industry that is considered to be a national priority.” The tribunal concluded that “[f]rom their title and even more from their purpose,” the laws “must be deemed to constitute taxation legislation,” and “[i]t is therefore

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<sup>848</sup> Tr., 8 November 2018, 86:13-19; Rejoinder, ¶ 44.

<sup>849</sup> *OEPC*, ¶ 3 (CLA-015); *EnCana*, ¶¶ 1, 146 (CLA-019) (noting that “[t]he demands were made by authorised tax officials” and “were subject to review by the tax courts and eventually by the Taxation Chamber of the Supreme Court”).

<sup>850</sup> *OEPC*, ¶ 73 (CLA-015); *EnCana*, ¶ 149 (CLA-019); *see also Murphy*, ¶ 175 (CLA-079) (noting that “[t]here was no dispute [in *EnCana*] that the measures were enacted within the tax regime; demands were made on the claimant by tax officials”).

clear that the claim for customs duties relates to matters of taxation,”<sup>851</sup> leaving open only the question whether the claims nonetheless could proceed under any relevant carve-outs in the applicable BIT.<sup>852</sup> By contrast, in *Burlington* and *Murphy*, the legislation involved an amendment to Ecuador’s Hydrocarbons Law, which was not a tax law under Ecuadorian law;<sup>853</sup> the tribunals therefore delved more deeply into the “what” and “why” issues, to determine whether it nonetheless could be treated in essence as imposing a tax on the investor. While the *Burlington* and *Murphy* tribunals ultimately differed in their conclusions, they both wrestled with these fundamental inquiries.<sup>854</sup>

389. Notably, however, most of the tribunals that ultimately resolved contested tax exclusion issues did so only after considering a full evidentiary record. In *Duke Energy*, Ecuador did not seek bifurcation of its jurisdictional objections; in *OEPC*, *EnCana* and *Murphy*, the respondents did seek preliminary resolution, but each tribunal declined to decide the tax exclusion objection as a preliminary matter, instead joining it to the merits.<sup>855</sup> The *EnCana* tribunal explained in its Partial Award on Jurisdiction that the claimant had presented the case as “[a] dispute as to the content and meaning of the oil contracts,” whereas Ecuador described it as “depend[ing] on nothing but the interpretation of the tax laws” of Ecuador.<sup>856</sup> Yet “[a]t the stage of jurisdiction,” the tribunal explained, it “would have to be clear that the characterisation offered by the Respondent is plainly correct” in order to dismiss the case on the basis of a BIT tax exclusion.<sup>857</sup> The tribunal concluded that it was “not satisfied that it has sufficient material before it to enable it to definitively decide the disputed issue of characterisation on which its jurisdiction depends,” and therefore “decide[d] to proceed with the arbitration and to rule on the Respondent’s jurisdictional plea in its final award.”<sup>858</sup> Similarly, in *Murphy*, the presiding arbitrator (determining the bifurcation request on his own by party agreement), concluded that whether the challenged measure was a “matter of taxation” was “so intertwined with the merits of the case [...] that it is prudent to defer [...] determination to the merits phase.”<sup>859</sup>

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<sup>851</sup> *Duke Energy*, ¶ 175 (CLA-071).

<sup>852</sup> *Duke Energy*, ¶¶ 178-179 (CLA-071).

<sup>853</sup> *Burlington*, ¶¶ 133, 147 (CLA-072); *Murphy*, ¶ 167 (CLA-079).

<sup>854</sup> See, e.g., *Murphy*, ¶¶ 186-190 (CLA-079) (examining whether Law 42 “carried [...] the conceptual characteristics of a tax” as Ecuador contended, including by reference to its “legal operation” and purpose); *Burlington*, ¶ 176 (CLA-072).

<sup>855</sup> *Duke Energy*, ¶¶ 82, 118 (CLA-071); *OEPC*, ¶ 16 (CLA-015); *EnCana*, ¶ 8 (CLA-019); *Murphy*, ¶ 18 (CLA-079).

<sup>856</sup> *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Partial Award on Jurisdiction, 27 February 2004, ¶¶ 34-35 (“*EnCana Partial Award*”).

<sup>857</sup> *EnCana* Partial Award, ¶ 36 (reasoning further that “a claimant is entitled to a decision on the merits of its claim if its characterisation of the dispute—being a characterisation relevant to jurisdiction—is reasonably arguable, whether or not it is the preferable characterisation and whether or not the tribunal (if it had to make an immediate decision on the point) would be inclined to accept it”).

<sup>858</sup> *EnCana* Partial Award, ¶¶ 38, 40.

<sup>859</sup> *Murphy Exploration & Production Company – International v. the Republic of Ecuador*, UNCITRAL Rules, Decision on Respondent’s Request for Bifurcation, ¶¶ 60, 68 (19 December 2012).

390. Here, the Tribunal considers there to be even greater ambiguity than in the prior cases, which makes India’s Article 10(1) objection ultimately inappropriate for resolution prior to development of a full factual record. The ambiguities arise because more than one government authority apparently was involved both in the *creation of the rights* that Nissan seeks to protect, and in the *alleged interference* with those rights. Specifically, the Parties’ evidence and arguments reflect roles played both by the Commercial Taxes Department of the GoTN and by the Industries Department. Yet neither the relative legal remits of these two Departments within the GoTN structure, nor the relative roles they played with regard to the facts of this case, are clearly established on the present record.
391. For example, Nissan sources its right to the Claimed Incentives to the 2008 MoU, which was signed by the Industries Department. The Parties do not dispute that the 2008 MoU was an implementation of an overall GoTN policy scheme reflected in a series of prior Government Orders, each issued “by order of the Governor” at the initiative of the Industries Department. These Government Orders contain potentially relevant characterizations of the rights to be granted investors through MoUs, but the characterizations differ from each Order to the next. For example, GO 52 – issued on 26 February 2007 and authorizing the issuance of specified “concessions” to “Ultra Mega Integrated Automobile Projects” through MoUs – describes a plan to offer both a “Refund of Gross output Value Added Tax (VAT) and Central Sales Tax (CST)” and an “Input tax refund [to] run parallel with Gross output VAT and CST refund,” and then explains that “[t]he *nomenclature of VAT / CST / Input tax refund* will be Investment Promotion Subsidy.”<sup>860</sup> This description could suggest that the “concessions” at issue were viewed as “tax refunds,” even though they might be provided a special “nomenclature” to describe their purpose (investment promotion) and effect (a subsidy). However, GO 80 – issued on 26 March 2008 “to formulate a mechanism to operate the Tax incentive package in the VAT regime,” in response to requests by “[c]ertain companies who have executed MoUs” – described the exercise as paying “an investment promotion subsidy *equivalent to* the amount of VAT paid,” and from “the budget of the Industries Department.”<sup>861</sup> This could be interpreted as implying that the exercise was not a tax refund as such, but rather a special arrangement for payments by a government authority other than the one principally charged with tax collections and refunds, although measured *by reference to* the taxes paid to the recognized tax authority. A third description appears in GO 124, issued on 2 June 2008 and authorizing “the following structured package of assistance” specifically to implement the 2008 MoU. That document uses the phrase “tax refunds” in several places, and states that “[t]he refunds [...] will be given *in the form of* Investment Promotion Subsidy out of Industries Department Budget based on certificate of payment of tax issued by the Commercial Taxes Department.”<sup>862</sup> Like GO 52 referring to a tax refund given the “nomenclature” of a subsidy – and unlike GO 80 referring to a subsidy simply “equivalent to” taxes paid – the formulation in GO 124

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<sup>860</sup> C-10, ¶¶ 3(2)(v), (vi), (vii) (emphasis added).

<sup>861</sup> R-4, ¶¶ 1, 3(a) (emphasis added).

<sup>862</sup> C-12, ¶¶ 5.II(9)(c), (e), (j)(4), (k) (emphasis added).

suggests the concessions are tax refunds, albeit provided “in the form” of a subsidy. And yet, a fourth Government Order issued on the initiative of the Industries Department – GO 5 dated 1 December 2009, to “prescribe the [...] guidelines for implementation of structured package of assistance” for MoU projects – again referred to an “Investment Promotion Subsidy (equivalent to taxes paid and to be refunded),” and further referenced the “disbursal of VAT and CST *based* [...] refund.”<sup>863</sup> Arguably, a tax-based refund is not the same as a tax refund itself. In other words, the descriptions in these four Government Orders are inconsistent, making it difficult to rely on any one formulation as reflecting the precise understanding of the Industries Department in formulating this text, much less the understanding of the Governor in adopting it.

392. Meanwhile, the Commercial Taxes Department was copied on each of these Government Orders prepared by the Industries Department,<sup>864</sup> and there is no question that it agreed to cooperate with the Industries Department in the administration of the scheme. Among other things, GO 80 provided for the “[f]ormation of a cell especially for the purpose of collecting the taxes and issuing necessary certificates for refund [...] for MOU companies,” which was to be staffed by Commercial Taxes officers “under the control of Commissioner of Commercial Taxes,” although physically “operat[ing] in SIPCOT” in order “to quicken the process,” and on the understanding that “[t]he refund [...] will be made by SIPCOT,” with “[n]ecessary Budgetary provision [...] made under Industries Head of Account.”<sup>865</sup> But the record does not clearly reflect the understanding of the Commercial Taxes Department as to how this scheme would fit within the framework of *its* official functions, nor how the payments back to the R&N Consortium regularly were recorded for purposes of official tax records presumably maintained by that Department.

393. Nor is there evidence yet in the record to explain the relevant powers of the two Departments within the overall structure of the GoTN, including whether the Industries Department had the authority to undertake or implement “taxation measures.” India emphasizes that within its constitutional structure, State Governments such as the GoTN may exercise taxation powers through executive acts such as Government Orders,<sup>866</sup> but this begs the question of *which* executive departments or officers with the GoTN were authorized to do so. For example, the fact that the Tamil Nadu legislature might have delegated power to the Commercial Taxes Department with respect to “taxation measures” does not necessarily establish that the Industries Department also could do so, or that these particular Government Orders adopted at its initiative were themselves taxation measures, even though they evidently had the concurrence of the Commercial Taxes Department. For these reasons, the

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<sup>863</sup> **C-13**, ¶¶ 3(B), 3(B)(i).

<sup>864</sup> *See, e.g.*, GO 52 (**C-10**); GO 220 (**R-3**); GO 80 (**R-4**); GO 124 (**C-12**); GO 5 (**C-13**).

<sup>865</sup> **R-4**, ¶¶ 3(b), (d), (e), (h), (i); *see also* **C-12** (GO 124, issued on 25 June 2008 by the Commercial Taxes Department, approving a proposal by the Commissioner of Commercial Taxes for the additional personnel required to staff the cell described in GO 80).

<sup>866</sup> *See, e.g.*, Counter-Memorial, ¶¶ 22-23.

characterization of the incentive scheme either as a “taxation measure,” or alternatively as an investment promotion concession simply measured by taxes paid, is thus one that requires further factual development. The issue is far more ambiguous than in prior tax exclusion cases where the rights that the claimants invoked either clearly were, or clearly were not, ones established by the recognized taxation authorities through the channels customarily used to enact taxation measures.

394. The factual record is even less developed with respect to the government conduct that Nissan challenges as interfering with its rights. In prior tax exclusion cases, the State acts that investors sought to impugn either clearly involved the exercise of taxation powers, or (as in *Murphy*) were ultimately found (on a full factual record) not even to have been *considered* contemporaneously as taxation measures by any of the relevant parties.<sup>867</sup> In the Tribunal’s view, understanding the parameters of the *challenged government conduct* is critically important in this case to determining whether it involves “taxation measures” within the meaning of CEPA Article 10(1). While the origin of Nissan’s *claimed rights* (discussed above) may also be relevant, it will not necessarily be determinative of the issue on its own. That is because, at a hypothetical level, it is entirely possible to imagine scenarios in which a State might use official “taxation measures” (*e.g.*, tax legislation, tax assessments or other acts by recognized tax authorities) in ways that are inconsistent with commitments made in forms that were not themselves “taxation measures.” In such circumstances, the infringing acts still remain “taxation measures” by their nature, even if they might also breach the prior commitments.<sup>868</sup> As previously discussed, some treaties (including the ones at issue in *OEPC*, *EnCana*, *Burlington*, and *Murphy*) provide for jurisdiction in these circumstances, by expressly carving out a breach of investment agreements from the scope of a tax exclusion.<sup>869</sup> Others, such as the CEPA, do not. Indeed, Nissan itself concedes that if its challenge under the CEPA had been to a qualifying tax measure – such as the “the validity of a tax law [...], an application of any tax law or a change to any tax assessment or law, or a challenge to any decision taken by any taxation authority” – then the Tribunal might not have had jurisdiction to proceed.<sup>870</sup>

395. The problem here is that the nature and origins of the challenged government conduct is far murkier at

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<sup>867</sup> *Cf. Murphy*, ¶¶ 168, 184 (CLA-079) (noting that “[a]t the time of Law 42’s enactment, high-ranking government officials said that it was not a tax,” and that “[n]either *Murphy*, *Murphy Ecuador*, nor the other Consortium members contemporaneously characterized Law 42 as a tax”).

<sup>868</sup> For example, a hypothetical factual scenario might involve an official tax assessment issued on an investor, based on rates higher than promised in a qualified investment agreement. This conduct might well constitute a breach of that agreement, but a treaty claim challenging the official tax assessment nonetheless would remain a challenge to a “taxation measure.” Under treaties that carve out investment agreements from the tax exclusion, the treaty claim might well be able to proceed, while under treaties that provide no such exception the result might be different, with the different outcomes necessary to give effect to the different treaty language.

<sup>869</sup> *See, e.g.*, the treaties at issue in *OEPC* (CLA-015), *EnCana* (CLA-019), *Burlington* (CLA-072), and *Murphy* (CLA-079).

<sup>870</sup> Statement of Claim, ¶ 156 (contending that “the dispute does not concern” a challenge to any of these measures); *see also* Reply, ¶ 105 (“The Respondent is free to change its tax regime [...] and the tax authorities retain their discretion in implementing such tax measures. The Claimant’s rights do not in any way impinge this discretion”).

present than in prior tax exclusion cases. In Nissan’s characterization, the relevant conduct is simply that the Industries Department did not pay the Claimed Incentives under the 2008 MoU, and Nissan suggests this may have been motivated contemporaneously by factors largely independent of the tax policy rationales India later invoked, including by straightforward budgetary constraints.<sup>871</sup> In Nissan’s framing, non-payment on such grounds could not qualify as “taxation measures” within the meaning of Article 10(1), among other reasons because the Industries Department is not the recognized taxation authority in the GoTN.<sup>872</sup> However, in India’s competing characterization of events, the non-payment of the Claimed Incentives was integrally linked to a concerted and coordinated GoTN tax policy, driven by the recognized taxation authorities, that investors not be allowed to use corporate restructuring to obtain unanticipated double benefits to the detriment of the public fisc. Although India has not yet presented its case on the merits, its suggestion appears to be that an overall tax policy disallowing such outcomes was implemented *both* by a general legislative amendment (the TN Tax Act Amendment), *and* by directions regarding the proper handling of specific incentive claims that would be inconsistent with the overall tax policy.<sup>873</sup> In this alternative framing of the narrative, Nissan’s claims are said to involve “taxation measures” because they would have the effect of circumventing official policy decisions and directives by the recognized taxation authorities, even though Nissan ostensibly takes aim not at the policies or directives themselves, but only at the resulting implementation by the Industries Department.

396. The Tribunal simply is not in a position to evaluate these competing narratives at this stage of the proceedings and on the current record. For example, Nissan points to certain documents in which the Industries Department alludes to budgetary constraints,<sup>874</sup> but it is not clear if these issues are relevant to non-payment of the Claimed Incentives or only to the late payment of prior incentives preceding the 23 February 2014 critical date, which Nissan insists it is not challenging under the CEPA.<sup>875</sup> Moreover, it is not clear whether the Industries Department was the authority within the GoTN that actually took the decision regarding non-payment of the Claimed Incentives. At least one document in the record – an internal Nissan presentation dated 24 February 2014 – suggests that different GoTN

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<sup>871</sup> See, e.g., Statement of Claim, ¶ 109; Tr., 8 Nov. 2018, 114:9-17 (claiming that “the Government have repeatedly said to my clients, ‘Well, in effect, you can’t rely [...] on these incentives being paid because we may have cash flow difficulties,’ [...] [and made] repeated references to the Government excusing late payment on the basis of a so-called ‘financial crunch’”) (citing Kochhar Statement, ¶ 5.6(b)).

<sup>872</sup> See, e.g., Statement of Claim, ¶ 155; Reply, ¶ 27.

<sup>873</sup> See, e.g., Counter-Memorial, ¶¶ 3 (“In order to prevent the R&N Consortium from receiving double tax refunds, the GoTN adopted [GO 40 and GO 53], and the Legislative Assembly of Tamil Nadu enacted [the TN VAT Act Amendment]”), 58 (“GO 40, GO 53, and the TN VAT Act were thus intended to eliminate the double benefit the R&N Consortium accrue from its unilateral change to its business scheme”); Tr., 8 Nov. 2018, 58:14-16 (claiming that “the State has made it clear in the court proceedings that it challenges the entitlement to refunds as long as the accumulated ITC is not resolved”).

<sup>874</sup> See, e.g., Statement of Claim, ¶ 113(c) (citing **C-138**, which in turn reports that the Industries Department is “in the process of seeking higher allocation from the Finance Department”).

<sup>875</sup> See Section IX *supra*.



authorities may have had different views about the R&N Consortium's outstanding incentive claims, stating that "Industrial dept. is very helpful and keen to pay, but it has to be agreed by Other dept's."<sup>876</sup> But again, it is not clear to what this document refers, and even if relevant to the Claimed Incentives, it is not clear how (and by whom, in what form and for what reasons) any such debate was resolved.

397. Similarly, with regard to India's suggestion that this case effectively impugns official tax policy directives provided in response to the Amended Business Scheme, the Tribunal takes note of two Government Orders from March 2015 which refer to a "direction" to SIPCOT on 2 April 2014, that it should "issue common Eligibility Certificate [...] to the extent of the amount R&N Consortium normally becomes eligible had the new business model not been introduced [...] and the amount over and above the permitted amount accruing [...] due to the introduction of this new business model *will not be sanctioned till the issue is settled.*"<sup>877</sup> Yet the Tribunal has insufficient evidence regarding any ultimate "settling" of "the issue" within the GoTN, which might allow it to evaluate any connection between the recognized taxation authorities and any decision not to pay any portion of the Claimed Incentives.

398. More generally, the Tribunal has virtually no evidence, and has received no briefing as of yet, regarding any dialogue, deliberations or decisions among or between various GoTN authorities. It cannot determine at this juncture, *inter alia*, (a) which government agencies were involved in consideration of the Claimed Incentives; (b) whether a clear decision was taken at some point not to pay the Claimed Incentives; or (c) if so, who took that decision, in what form, and on what basis. Absent such information, the Tribunal is unable at this preliminary stage to make a finding, either way, about whether the government conduct that underlies the challenged result (*i.e.*, non-payment of those incentives) did or did not involve qualified "taxation measures" within the meaning of CEPA Article 10(1).

## **XI. DISPOSITIF**

399. For the reasons set out above, the Tribunal unanimously:

- (a) *Denies* India's objections to jurisdiction on the basis that:
  - (i) the Tribunal was improperly constituted;
  - (ii) Nissan failed to withdraw proceedings initiated in India;
  - (iii) Nissan's claims are fundamentally contractual in nature, and/or excluded or inadmissible under Clause 15 of the 2008 MoU or for lack of privity; and

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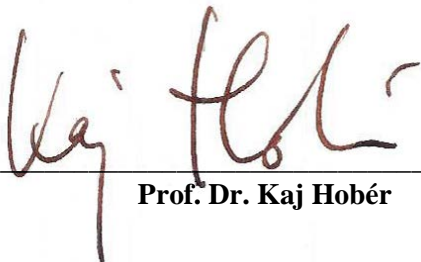
<sup>876</sup> **R-36**, Attachment, p. 4.

<sup>877</sup> **R-8**, ¶ 6 (GO 40 dated 2 March 2015) (emphasis added); **C-14**, ¶ 5 (GO 53 dated 10 March 2015) (emphasis added).

- (iv) Nissan's claims are time-barred;
- (b) *Defers* for further consideration India's objection to jurisdiction on the basis that its claims involve "taxation measures" within the meaning of Article 10(1) of the CEPA;
- (c) *Determines* that this case shall proceed to the merits in accordance with the general time intervals set forth in Annex A, page 10, of Procedural Order No. 1, but with the merits hearing to be held on the provisionally reserved alternate dates of 3-11 February 2020 rather than the originally targeted dates of 5-13 November 2019;
- (d) *Directs* the Parties to consult promptly on specific deadlines for the pre-hearing steps leading to the hearing in February 2020, and report back to the Tribunal on their agreement or disagreement regarding such deadlines, no later than 10 days from the date hereof; and
- (e) *Defers* consideration of costs until a later phase of these proceedings.


**SEAT OF ARBITRATION: Singapore**

**DATED: 29 April 2019**



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Prof. Dr. Kaj Hobér



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Justice Jagdish Singh Khehar



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Ms. Jean E. Kalicki  
(Presiding Arbitrator)