

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

AND

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

Between

PATEL ENGINEERING LIMITED

Claimant

and

THE REPUBLIC OF MOZAMBIQUE

Respondent

NOTICE OF ARBITRATION

20 March 2020

 **ADDLESHAW
GODDARD**

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I INTRODUCTION AND REFERENCE TO ARBITRATION

- 1 Patel Engineering Limited ("**PEL**" or the "**Claimant**") hereby demands that the dispute which is described in this Notice of Arbitration ("**NoA**") against the Republic of Mozambique ("**Mozambique**", the "**Government**", or the "**Respondent**") be referred to arbitration pursuant to Article 9(3)(c) of the Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment (the "**Treaty**" or the "**BIT**"),¹ and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (the "**UNCITRAL Rules**").
- 2 The Treaty was signed on 19 February 2009 in New Delhi, India, and entered into force on 23 September 2009.
- 3 This dispute arises out of Mozambique's failure to fulfil fundamental legal obligations and assurances that formed the basis of PEL's decision to invest in developing and operating a rail corridor spanning approximately 500 km that was to link Moatize in the mineral-rich Tete province to Macuse, where PEL planned to construct a new port along the Zambezia coast (the "**Project**"). The Project was valued at USD 3.115 billion.
- 4 This NoA is accompanied by 51 factual exhibits (marked "**Exhibit C-**") and 10 legal authorities (marked "**CLA-**").

¹ Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, **CLA-1**, available at <https://dea.gov.in/bipa?page=6> on the Department of Economic Affairs website, of the Ministry of Finance of the Government of India.

II THE PARTIES

A THE CLAIMANT

5 PEL is an Indian-incorporated infrastructure and construction service company founded in 1949.² It is a public company whose stock is traded on both the Mumbai Stock Exchange and the National Stock Exchange of India. PEL's business encompasses all sectors of the infrastructure industry from dams, tunnels, hydroelectric projects, irrigation projects, highways, roads, bridges, railways and refineries, to real estate and township development. PEL's contact details are as follows:

Patel Engineering Limited

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6 In this Arbitration, PEL is represented by Addleshaw Goddard LLP, whose contact details are as follows:

(a) Addleshaw Goddard LLP

Attention: Sarah Vasani, Partner, Head of Investor State Dispute
 Resolution
 Nathalie Allen, Legal Director
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² **Exhibit C-1**, Certificate of Incorporation No. 7089 dated 2 April 1949, certifying the incorporation of Patel Engineering Company Limited pursuant to the Indian Companies' Act, VII of 1913. See also **Exhibit C-2**, Certificate of Incorporation Consequent on Change of Name in the Office of the Registrar of Companies, Maharashtra, Mumbai, changing PEL's company name from Patel Engineering Company Limited to Patel Engineering Limited.

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Francesca.Seber@addleshawgoddard.com

(b) **Miranda & Associados**

Attention: Sofia Martins, Partner
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7 All hard copies of communications and correspondence intended for PEL in
respect of this arbitration should be sent to Addleshaw Goddard LLP at the
address cited above. All electronic correspondence should be copied to all
foregoing email addresses.

B THE RESPONDENT

8 Mozambique is a sovereign state located in southeast Africa.

9 In this Arbitration, Mozambique is represented by Dorsey & Whitney LLP,
whose contact details are as follows:

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(b) **Republic of Mozambique**

(i) **Ministry of Transport & Communications**

Dr Janfar Abdulai, Minister, Ministry of Transport & Communications

Mr Afonso Cipriano Jamisse, Head of the Minister's Office

Mr Fortunato Albrinho, National Director of International Relations

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III GENERAL NATURE OF THE CLAIM AND AMOUNTS INVOLVED

A PEL BRINGS ITS EXPERTISE AND EXPERIENCE TO BEAR ON AN ESSENTIAL INFRASTRUCTURE PROJECT IN MOZAMBIQUE

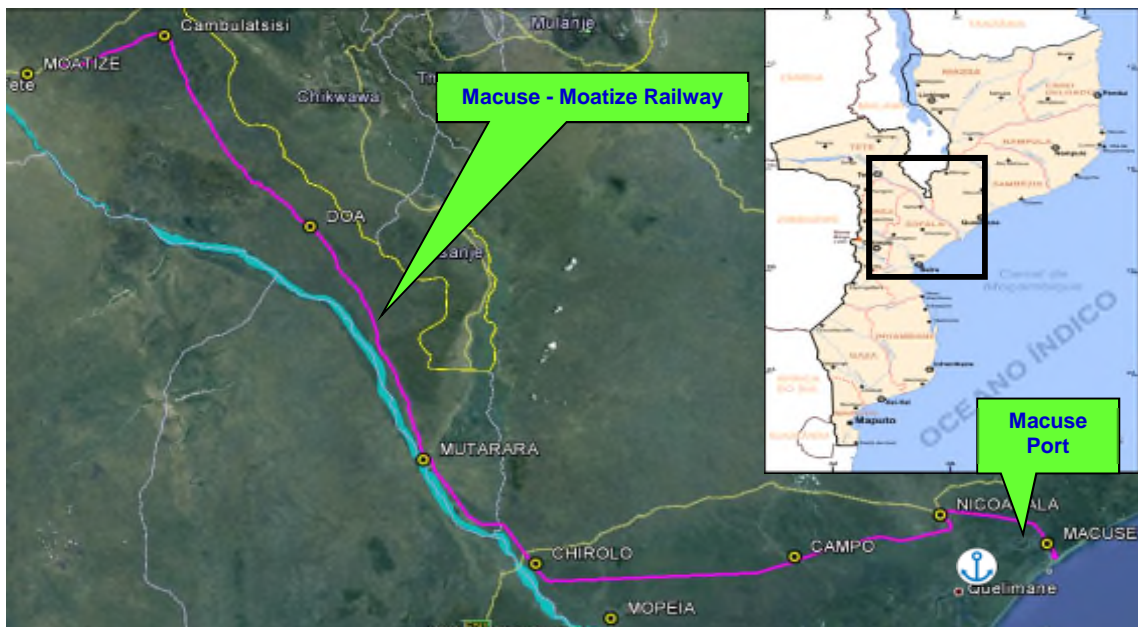
10 The Claimant is an integrated infrastructure and construction services conglomerate with more than 70 years of experience. PEL has broad expertise encompassing all sectors of the infrastructure industry, and provides its clients with reliable solutions to complex construction challenges. PEL is recognised *"as a leader in the industry for their strength in traditional construction methods and for their creative, fresh approach to cutting-edge technologies and delivery systems."*³ PEL's clients comprise governments and commercial customers alike, and its *"projects have helped grow local economies and improve the quality of life for communities and people around the world."*⁴ From its inception in 1949, PEL *"has grown from strength to strength, having successfully completed over 250 projects."*⁵

11 In relation to the Project at the heart of the Parties' dispute, PEL identified that Mozambique is rich in mineral resources, especially coal and other minerals, for which there was demand from other countries including China and India. Notwithstanding this natural wealth, however, Mozambique lacked both the port infrastructure, and rail transport connections to port infrastructure, that were needed to export large quantities of coal and other minerals which could be extracted. To enable Mozambique to overcome these hurdles, PEL identified that by building a new port at Macuse in the Zambezia province (the closest area of coastline to the vast coal reserves in the Tete province) and a rail corridor from Moatize in the Tete province to the new port, the rapid and economical export of large quantities of coal and other minerals would be possible.

³ **Exhibit C-50**, Devex Companies Overview, Patel Engineering Ltd, *available at*: <https://www.devex.com/organizations/patel-engineering-ltd-24848> (last visited 19 March 2020).

⁴ *Id.*

⁵ *Id.*



- 12 PEL anticipated that the proposed development would: (i) contribute to the economic development of the central region of Mozambique in particular, as well as the country as a whole; (ii) promote development in the Zambezia Valley; (iii) provide a feasible export route for coal from the Tete province in north-western Mozambique; and (iv) create employment opportunities. In addition, Mozambique stood to gain hundreds of millions of dollars in tax revenue as a result of the Project.
- 13 In early February 2011, Mr Kishan Daga, Special Director-Projects at PEL at that time, met with Mr Paulo Zucula, the then Minister of Mozambique's Ministry of Transport and Communication ("**MTC**"), to explore the possibility of investing in Mozambique and in particular, to address the infrastructure challenges PEL had identified. Mr Daga explained to Minister Zucula PEL's proposal to construct a port along the Quelimane coast in Zambezia province, which comprises the shortest transport route from the mineral-rich Tete Province. Mr Zucula indicated his understanding that according to the Government's state authority, Mozambique Ports and Railways ("**CFM**"), a port in that location would not be feasible. PEL informed Minister Zucula that its initial studies demonstrated the contrary — a port along the Quelimane coast was indeed possible and would be of great benefit to Mozambique. Accordingly, PEL expressed its desire to conduct a prefeasibility study to develop the Project. To take the matter further, Minister Zucula indicated PEL would need to write to the MTC to formalise its request, and to cover the costs of an initial study to be conducted by an expert to be nominated by the MTC, who would first need to confirm that a port in PEL's proposed location would indeed be feasible.

14 Further to PEL's meeting with Minister Zucula, on 17 February 2011, Mr Daga formally wrote to the MTC to reiterate PEL's interest in developing infrastructure projects within the country.⁶ In particular, Mr Daga set out PEL's credentials and expressed an interest in developing a deep-water port and rail corridor between Tete and Chinde, on a Build-Own-Operate ("**BOO**") basis as part of a public-private partnership ("**PPP**"), to facilitate the transport and ultimate export of Mozambican coal and other minerals.⁷

15 Given Mozambique's need for such infrastructure, and in light of PEL's substantial expertise and experience in this area, the MTC reacted positively to PEL's proposal. Accordingly, and as advised by the MTC, PEL subsequently commissioned a preliminary study (the "**Preliminary Study**") in partnership with the MTC (including various MTC specialists), for assessing potential locations for a deep-water port in the eastern Zambezi Province, which could be connected by rail to coal mines located in the Moatize District in western Mozambique.⁸ The Preliminary Study recommended Macuse as the first preference for the port's location, with Deia as a secondary option.⁹ The Preliminary Study further advised that additional, detailed specialist studies be carried out in relation to the proposed port and rail corridor, including detailed engineering, environmental, and economic studies.¹⁰

16 PEL's Preliminary Study was well received by the MTC, whose actions and specific assurances led PEL to undertake further activities and commit further resources to the Project.

B THE GOVERNMENT MAKES SPECIFIC ASSURANCES TO PEL, EMBODIED IN A MEMORANDUM OF INTEREST, WHICH INDUCE PEL TO INVEST SIGNIFICANT FURTHER RESOURCES IN THE PROJECT

17 Following the submission of the Preliminary Study, PEL met with the MTC to discuss its findings, and to determine more precisely how to proceed with the Project. At that meeting, Minister Zucula expressed his satisfaction with the

⁶ **Exhibit C-3**, Letter dated 17 February 2011 from Kishan Daga of PEL to Minister Zucula of MTC regarding "*Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde*".

⁷ *Id.*

⁸ **Exhibit C-4**, A Preliminary Study to Assess Potential Port Locations in Zambezia, to Connect the Moatize Coal Mines By Rail, March 2011 (the "**Preliminary Study**").

⁹ *Id.* at p. 22.

¹⁰ *Id.* at p. 23.

Preliminary Study, and agreed to enter into a memorandum of interest to set parameters for PEL to implement the Project.

18 Thereafter, on 6 May 2011, the Parties signed a *Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd.* (the “**MOI**”) in relation to the Project.¹¹ The MOI requires PEL to undertake a prefeasibility study (the “**PFS**”) for the Project at “*its own cost and expense*”.¹² In exchange for PEL's investment, and only in the event the MTC ultimately approved the PFS, Clause 2(1) requires the Government of Mozambique to “*issue a concession of the project in favour of PEL.*”¹³ As described in more detail below, the Respondent, through the MTC, made key assurances and representations to PEL which PEL relied upon when it decided to execute the MOI and undertake the PFS at its own cost and risk. Accordingly, the MOI, which Minister Zucula signed “*on behalf of the Government of Mozambique*”¹⁴ formed the basis of PEL's legitimate expectations when investing in Mozambique.

19 The key provisions of the MOI are set out in brief below. In short, pursuant to the MOI, PEL agreed to carry out the activities required to complete the PFS at its own cost and risk within one year of the signing of the MOI. In exchange for PEL's investment, the MTC agreed to grant PEL preferential rights in respect of the Project's implementation, including the “*granting of a concession by the [Government] to PEL for the construction and operation of the Project*”¹⁵ and a “*first right of refusal for the implementation of the project.*”¹⁶

20 The MOI recitals highlight both the Government's desire to develop the Project and PEL's vital role in implementing it, including PEL's anticipated “*construction and commissioning of the said project*”:

"a. MTC is interested in developing a Port in and around the Zambezia coast line with a corresponding railway line of 500 (five hundred) kilometers from the corridor

¹¹ **Exhibit C-5**, Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd. (the “**MOI**”).

¹² *Id.* at Recital (f) (“PEL agrees to undertake at its own cost and expense an initial prefeasibility study for the Project to identify a probable area for the port and the railway line with the assistance of the MTC.”).

¹³ *Id.* at cl. 2.1. As discussed further below, the English and Portuguese versions of the MOI differ in important respects, including in relation to Clause 2.1.

¹⁴ *Id.* at p. 6.

¹⁵ *Id.* at cl. 1.

¹⁶ *Id.* at cl.1.1-2.2.

of Tete to the proposed port through a Public Private Partnership (PPP).

- b. This is required to provide transport of material, goods, coal and other commodities from the mineral rich region of Tete and other neighbouring provinces.*
- c. Such project will enhance the economic prosperity in the entire region.*
- d. PEL has shown keen interest in the development of the said Project. . . .*
- e. **PEL shall provide assistance in the successful construction and commissioning of said project to facilitate successful transport system on Public Private Partnership Mode**".¹⁷*

21 In exchange for certain guarantees from the Government, Clause 1 — "*Objective*"¹⁸— provides that PEL will undertake the PFS at its own expense and risk to develop the Project to better define the "*terms and conditions for the granting of a concession by the [Government] to PEL for the construction and operation of the Project*".¹⁹

22 Clause 2 of the MOI provides that in exchange for completing the PFS **at PEL's expense** within the allotted time period, and upon the approval of the PFS by the MTC, the MTC would then grant PEL a right of first refusal to implement the Project through a concession granted to PEL by the Government:

"1. PEL shall carry out a prefeasibility study (PFS) on the basis of the report of the working group for assessing the appropriate site of the port and to finalize the rail route thus ensuring that once the terms under Clause 7 of this memorandum are approved, the Govt. of Mozambique shall issue a concession of the project in favour of PEL.

*2. After the approval of the prefeasibility study **PEL shall have the first right of refusal for the implementation of the project***

¹⁷ **Exhibit C-5**, MOI, at Recitals a-e (emphasis added).

¹⁸ Clause 1 is entitled "Scope" in the Portuguese version of the MOI.

¹⁹ **Exhibit C-5**, MOI, at cl. 1.1 (emphasis added). The English version of Clause 1 provides in full: "*The objective of the present memorandum is to undertake the prefeasibility study the expense of which will be borne by PEL, for the development of a port infrastructure on the coast of Zambesia province and a railway line of approximately 500 (five hundred) kilometres from the Tete region to the said port under a Public Private Partnership (PPP) ("The Project") defining the basic terms and conditions for the granting of a concession by the [Government] to PEL for the construction and operation of the project.*" (emphasis added).

on basis of the concession which will be given by the Government of Mozambique."²⁰

- 23 The language in bold font in Clause 2.1 is not present in the Portuguese version of the MOI,²¹ but the reference to PEL's mandatory right of first refusal is consistent in both the English and Portuguese versions of Clause 2.2 of the MOI, which are of "*equal value*" pursuant to Clause 12.
- 24 It is important to note that the PEL representatives who signed the MOI on 6 May 2011 — Mr Kishan Daga (Special Director-Projects) and Mr Ashish Patel (Executive Director) — do not speak Portuguese, and that this was well known and understood by Mozambique's government negotiators. Mr Daga and Mr Patel therefore relied upon assurances from the government negotiators that the Portuguese version of the MOI reflected the language contained in the English version of that same agreement. In fact, Mr Daga specifically requested confirmation that the English version of the MOI was identical to the Portuguese version, and the government negotiators, including Minister Zucula himself, confirmed that this indeed was the case. Furthermore, the oral negotiations of the MOI between Minister Zucula and Mr Daga likewise were conducted entirely in English, precisely because Mr Daga does not speak Portuguese. It was only once the terms of the MOI had been finalised that the MOI was translated into Portuguese. It was Mr Daga's understanding that Mozambican law required government contracts to be translated into Portuguese, and that this was the reason for translating the MOI. Although both the Mozambican negotiating team and Minister Zucula himself assured Mr Daga that the Portuguese and English versions were identical, this was not the case.
- 25 The specific and express assurances contained in the MOI — that "*the Govt. of Mozambique shall issue a concession of the project in favour of PEL*" and "*PEL shall have the first right of refusal for the implementation of the project on the basis of the concession which will be given by the Government of Mozambique*"²² — were key to inducing PEL's investment in Mozambique. After all, the PFS required significant investment in terms of money, time and

²⁰ **Exhibit C-5**, MOI, at cl. 2.1-2.2 (emphasis added). Clause 7 is entitled "New Memorandum" and provides that "[i]n the event that the above mentioned corridor is found techno commercially unviable for any reason whatsoever, both parties agree to sign a new memorandum to undertake another study of a similar project."

²¹ Specifically, the Portuguese version of Clause 2.1 provides that "*PEL shall carry out a prefeasibility study (PFS), within 12 months, that it will submit to the Government for approval.*"

²² **Exhibit C-5**, MOI, at cl. 2.1-2.2 (emphasis added).

efforts by PEL, and it was to be undertaken at its sole expense and risk, and at the cost of other projects that PEL could be developing. PEL therefore sought assurances that, if the Government was satisfied with the studies carried out by PEL and its plans for the Project, PEL would then benefit from the work it had conducted and the investment it had made, by having a right of first refusal to implement the Project on the basis of a concession with the Government. In further recognition of the investment PEL would be required to make, and to protect PEL's position while it carried out the PFS, Clause 6 of the MOI granted PEL exclusive rights in relation to the Project. In particular, the MTC agreed not to solicit any third-party proposal or study for the Project throughout the process of the PFS's development and approval.

C PEL INVESTS IN THE PROJECT ON THE BASIS OF MOZAMBIQUE'S ASSURANCES, COMPLETES THE PFS SUCCESSFULLY, AND THE GOVERNMENT APPROVES THE PFS

26 On the basis of the Government's express assurances embodied in the MOI, PEL proceeded to expend substantial sums in undertaking the PFS. For the purposes of producing the PFS, PEL *inter alia*: (i) analysed the topography of the land along the proposed route of the 500 km rail corridor; (ii) surveyed the Zambezia coastline; (iii) examined oceanographic and meteorological data; (iv) proposed a port location and rail route; (v) produced a cost estimate for the construction of the port and rail corridor; and, at the Government's request, (vi) surveyed the entirety of the disused railway between Quelimane and Macuba to assess whether it could be reinstated. To complete the PFS successfully and in a timely manner, PEL dedicated considerable management and implementation time to the Project, with members of PEL's project and management teams making frequent visits to, and spending considerable time in, Mozambique.

27 PEL's hard work and extensive efforts paid off. PEL submitted the PFS on schedule to the MTC on 2 May 2012.²³ On 9 May 2012, PEL presented the results of the PFS to technical and commercial personnel from the MTC and CFM, as well as representatives from the Ministry of Planning and the Ministry of Finance.²⁴

²³ Exhibit C-6, Pre-Feasibility Study and Annexures 1 – 18 (the "Prefeasibility Study").

²⁴ Exhibit C-7, Power Point Presentation dated 9 May 2012.

28 During May and June 2012, PEL engaged in further detailed technical and commercial discussions with various experts and officials from the MTC and the CFM. As part of these discussions, PEL submitted further information concerning the PFS and the envisaged Project, as requested by the Government, to ensure its satisfaction with PEL's plans. These discussions led to PEL producing and sending to the MTC, among other information, an estimated and projected commercial model, a statement on utilisation of funds for the Project, and information on the publications and other resources used to compile the PFS.²⁵ Having provided this additional information, and having addressed the MTC's queries, PEL requested the MTC's approval of the PFS so that the Parties could "*enter into the second phase of the project for [the] signing of [a] concession agreement.*"²⁶

29 In light of PEL's investment and efforts, on 15 June 2012, the MTC informed PEL "*that the Pre-Feasibility Study submitted by [PEL] was approved.*"²⁷ In the same letter, the MTC stated that in order for PEL to pursue the Project, it was required to do two things: (i) expressly exercise its right of first refusal; and (ii) negotiate with the relevant state authority, CFM, to create a project company (the "**Project Company**") to implement the Project.²⁸ Importantly, these were the only two requirements set out by the MTC to implement the Project at that time. In particular, the MTC made no mention of a public tender. Rather, the MTC's instructions that PEL negotiate directly with the CFM confirmed PEL's understanding that it would be directly awarded the concession once the Project Company was established in conjunction with the relevant state company, to execute the Project on a PPP basis.

²⁵ **Exhibit C-8**, Letter dated 15 May 2012 from Kishan Daga of PEL to Minister Zucula of MTC regarding "*Additional information to the Prefeasibility Report for Development of Rail Corridor from Moatize to Macuse and Port at Macuse, Statement of fund utilisation and projected/estimated cash flow for the entire project*"; **Exhibit C-9**, Letter dated 1 June 2012 from Kishan Daga of PEL to Minister Zucula of MTC regarding "*The source of information used for preparation of this report*"; **Exhibit C-10**, Letter dated 11 June 2012 from Kishan Daga of PEL to Minister Zucula of MTC regarding "*The discussion held on 11.05.2012 in regards to Rail corridor at CFM office*".

²⁶ **Exhibit C-8**, Letter dated 15 May 2012 from Kishan Daga of PEL to Minister Zucula of MTC regarding "*Additional information to the Prefeasibility Report for Development of Rail Corridor from Moatize to macuse and Port at Macuse, Statement of fund utilisation and projected/estimated cash flow for the entire project*"; **Exhibit C-9**, Letter dated 1 June 2012 from Kishan Daga of PEL to Minister Zucula of MTC regarding "*The source of information used for preparation of this report*"; **Exhibit C-10**, Letter dated 11 June 2012 from Kishan Daga of PEL to Minister Zucula of MTC regarding "*The discussion held on 11.05.2012 in regards to Rail corridor at CFM office*".

²⁷ **Exhibit C-11**, Letter dated 15 June 2012 from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study.

²⁸ *Id.*

- 30 On 18 June 2012, PEL expressly exercised its right of first refusal,²⁹ and confirmed that it would "*proceed with CFM to incorporate an entity for implementation of the project as directed by you in your letter.*"³⁰
- 31 On 22 June 2012, PEL again wrote to Minister Zucula. In that letter, PEL inquired about with whom in the CFM it should liaise to establish the Project Company, requested official authorisation from the MTC for the formation of the Project Company with CFM, and asked the MTC to designate the CFM as the Government's partner for the Project.³¹
- 32 Having received no response to the queries raised in its letter of 22 June 2012, and anxious to implement the Project it had envisioned, PEL proceeded to arrange a meeting with the CFM's President and Chairman of the Board, Mr Rosario Mualeia. During the course of that meeting, and much to PEL's surprise, PEL learned that the CFM Chairman had no information about the Project and knew nothing about the PFS or its approval. This was especially surprising to Mr Daga given that CFM representatives had been involved in the technical and commercial discussions that had ensued between early May and June 2012, when PEL submitted the PFS, and the time when the Government approved the PFS in mid-June. Notwithstanding the MTC's directives to PEL, Mr Mualeia assured Mr Daga that the CFM had not been directed by the MTC to commence negotiations with PEL in relation to the Project.
- 33 On 7 August 2012, PEL followed up with Mr Mualeia, seeking guidance on "*how we can proceed further in regard to the formation of [the] SPV between PATEL and CFM for the above-mentioned project*" so that PEL could "*enter into the second phase of the Project for discussion and signing of [the] concession agreement as per [the] MOI without losing any more time.*"³²
- 34 At a meeting between PEL and MTC Minister Zucula on that same day, Mr Daga informed the Minister that Mr Mualeia was entirely unaware of the Project, and CFM's role in relation to it. Minister Zucula telephoned Mr

²⁹ **Exhibit C-12**, Letter dated 18 June 2012 from Kishan Daga of PEL to Minister Zucula of MTC exercising PEL's right of first refusal to implement of the Project.

³⁰ *Id.*

³¹ **Exhibit C-13**, Letter dated 22 June 2012 from Kishan Daga of PEL to Minister Zucula of MTC requesting authorisation to form a Project Company with CFM to implement the Project.

³² **Exhibit C-14**, Letter dated 7 August 2012 from Kishan Daga of PEL to President and Mr Rosario Mualeia, President and Chairman of the Board of CFM, seeking guidance on how PEL should proceed with the Project.

Mualeia during that meeting (in the presence of Mr Daga), and proceeded to engage in what seemed to be an extremely harsh conversation with the CFM Chairman. While that conversation took place in Portuguese (which Mr Daga could not comprehend), Minister Zucula informed Mr Daga — after he terminated the call with Mr Mualeia — that he had instructed the CFM to commence negotiations with PEL to form the Project Company. PEL was hopeful that such instructions would result in the CFM's cooperation with PEL to progress the Project without further delay.

- 35 Regrettably, this was not the case. During a meeting between Mr Daga and CFM Chairman of the Board Mr Mualeia, the latter explained to Mr Daga that CFM was unable to partner in the Project because it lacked sufficient funds to invest in a 20% equity stake as per the PPP law. Mr Mualeia further commented that, if CFM had access to that level of funding, it would have completed its existing projects first rather than investing in a large new project.
- 36 Anxious to implement the Project, and having received no further response from the Government, PEL again wrote to Minister Zucula on 15 August 2012, to request that the Minister provide PEL with access to the concession agreement template "*in order to help expedite[] the process*"³³ of the Project's execution.
- 37 Thereafter, on 27 August 2012, the MTC replied to PEL's letter of 22 June 2012. The MTC stated that negotiations with CFM were not prohibited (curiously, the CFM alleged negotiations already had started), and provided the name of an MTC office to contact for the purpose of negotiating the concession, the Office of Studies and Projects.³⁴
- 38 During the course of these negotiations with the CFM in mid to late 2012, PEL continuously requested the MTC to comply with its obligation under the MOI to award the concession for the Project to PEL.³⁵ For example, in October

³³ **Exhibit C-15**, Letter dated 15 August 2012 from Kishan Daga of PEL to Minister Zucula of MTC requesting access to the concession agreement template for CFM in order to expedite the process of implementing the Project.

³⁴ **Exhibit C-16**, Letter dated 27 August 2012 from Minister Zucula of MTC to Kishan Daga of PEL regarding CFM negotiations not being prohibited and providing contact details for the purpose of negotiating the concession.

³⁵ See, e.g. **Exhibit C-14**, Letter dated 7 August 2012 from Kishan Daga of PEL to Rosario Mualeia, President and Chairman of the Board regarding how PEL should proceed with the project; **Exhibit C-15**, Letter dated 15 August 2012 from Kishan Daga of PEL to Minister Zucula of MTC requesting access to the concession agreement template for CFM in order to expedite the process; **Exhibit C-17**, Letter dated 5 October 2012 from Kishan Daga of PEL to Minister Zucula of MTC regarding PEL's request for a copy of the template Concession Agreement for CFM; **Exhibit C-18**, Letter dated 28 November 2012 from Kishan Daga of PEL to Minister Zucula of MTC citing real examples of authorisations for direct awards.

2012, PEL again requested a copy of the template Concession Agreement for Ports and Railways, and urged the MTC "*that the process of signing [] the concession agreement starts at the earliest,*" especially given the "*project is of national importance and will benefit the Government of Mozambique in many ways.*"³⁶

39 In November 2012, nearly six months after the MTC had approved the PFS, PEL continued to implore the MTC to comply with its obligations under the MOI to award PEL the concession. In support of its request, PEL cited numerous "*real examples of authorizations for direct awards [of concessions], including for projects in the port and railway infrastructure areas.*"³⁷ Notwithstanding PEL's pleas, and its undertaking that 20% of the equity in the Project Company would be allotted to the Government or its nominated partner (which was the maximum equity share permitted under the PPP law), the Government refused to award PEL the concession and instead, it proceeded with a public tender process which would be fraught with irregularities.

D MOZAMBIQUE HOLDS A PUBLIC TENDER FOR THE PROJECT IN AN EFFORT TO DEPRIVE PEL OF ITS RIGHTS AND THE VALUE OF ITS INVESTMENT

40 On 11 January 2013, more than six months after it approved the PFS and directed PEL to negotiate with CFM directly to create the Project Company to implement the Project, the MTC, in a remarkable *volte face*, reneged on its promise to award the concession to PEL.³⁸ The letter states in relevant part:

(a) The MTC alleged it had informed PEL during a meeting in June 2012 that PEL's "*preferential rights . . . could be materialized through a public tender where [PEL] would benefit from preference if it participated in the tender*" **or** "*through a direct negotiation*" if PEL entered into a "*strategic partnership*" with CFM. In addition, the MTC explained that the "*indicative factors of the strategic partnership should be construed so as to bestow upon CFM a relevant role in the*

³⁶ **Exhibit C-17**, Letter dated 5 October 2012 from Kishan Daga of PEL to Minister Zucula of MTC regarding PEL's requests to form the Project Company and execute a concession agreement to implement the Project.

³⁷ **Exhibit C-18**, Letter dated 28 November 2012 from Kishan Daga of PEL to Minister Zucula of MTC reiterating PEL's request for a direct award of the concession.

³⁸ **Exhibit C-19**, Letter dated 11 January 2013 from Minister Zucula of MTC to Kishan Daga of PEL reneging on MTC's commitment to award the concession to PEL.

company or Joint Venture and indication of a plan to reinforce CFM's capacity”.

- (b) The MTC informed PEL that a 20% equity offer made subsequently by PEL to CFM, which PEL understood to be the **maximum equity share permitted under relevant legislation**,³⁹ was “*by no means indicative of a strategic partnership*”. The MTC suggested PEL should be “*more generous to ensure a greater participation of CFM*”.
- (c) The MTC claimed that CFM and PEL “*had not been able to reach an agreement leading to the development of a strategic partnership because no offer beyond 20% was made*”.⁴⁰
- (d) Accordingly, the Mozambican Cabinet of Ministers purportedly decided “*to look in the market for a partner who was willing to accept more participation of [CFM]*”, notwithstanding the fact that PEL had offered the maximum equity share legally permitted. Indeed, it had been explained to the Minister that one of PEL's Consortium partners, SPI – Gestão e Investimento, S.A.R.L. (“**SPI**”), was a Mozambican company and held a 5% equity interest in the Project. Accordingly, PEL's proposal would have resulted in Mozambican entities owning significant equity in the Project. Notwithstanding this fact, however, the Government decided to find another partner through a public tender. No doubt in an attempt to placate PEL, the MTC noted that if PEL were to participate in the public tender, it nevertheless would still benefit from the right of first refusal contained in the MOI.

41 PEL was both deeply troubled and surprised by the Government's letter of 11 January 2013. Much of its contents was contrary to PEL's understanding of the Parties' agreement at the time PEL decided to invest in Mozambique's infrastructure sector. It was also contrary to the information that both the MTC

³⁹ **CLA-2**, Art 33(1) paragraph (a)(i) of PPP Law (Law No. 15-2011 of 10 August 2011) (“*I. The financial benefits for the Country from each PPP, LSP and BC undertaking shall be expressly provided in the contract to be concluded between the contracting party and the contracted party, namely: a) the participation reserved for sale, via the stock market in favor of the economic inclusion on commercial market terms, preferably of Mozambican natural persons, in the share capital of the undertaking or in the joint venture equity, whether or not foreign investment is involved, guaranteed by: (i) the State or other public entity appointed thereby, in a percentage not less than 5% **nor greater than 20% of the referred capital**;*”) (emphasis added). The inclusion of such financial benefit is deemed a mandatory provision pursuant to Article 37(2) paragraph (a) of the Regulations of the PPP Law (Decree No. 16/2012, of 4 July 2012), which is attached as **CLA-3**.

⁴⁰ **Exhibit C-19**, Letter dated 11 January 2013 from Minister Zucula of MTC to Kishan Daga of PEL reneging on its commitment to award the concession to PEL (emphasis added).

and the CFM had provided PEL with previously. For example, contrary to the MTC's assertions that CFM desired *more* than a 20% equity share in the Project, the CFM Chairman had communicated to Mr Daga that CFM had insufficient funds to purchase an equity stake in the USD 3.115 billion Project. Thus, the MTC's justification for refusing to "*issue a concession of the project in favour of PEL*" as required by Clause 2.1 of the MOI — PEL's purported failure to provide *more* than a 20% equity stake in the Project to CFM — was not only contrary Mozambican law, but was also at odds with the CFM Chairman of the Board's statements to Mr Daga that CFM lacked sufficient funds to contribute **any** equity to the Project. Thus, rather than being a legitimate concern, the MTC's focus on the 20% equity participation appeared to be an after-the-fact excuse that was concocted to deny PEL the direct award of the concession that had been assured to PEL in the MOI, and that formed the basis of its legitimate expectations when it decided to invest in Mozambique.

42 It appeared to PEL that after making a substantial investment in the PFS, and defining the contours of the Project, the Government was now failing to uphold its end of the Parties' agreement. In short, it was attempting to cut PEL out of the Project that had been PEL's very own invention.

43 Accordingly, by letter dated 22 January 2013 (which PEL copied to the Prime Minister of Mozambique and the CFM Chairman of the Board given the importance of the matter), PEL disputed the Government's decision to conduct a public tender, and the inaccuracies contained in the MTC's letter of 11 January.⁴¹ PEL relayed its serious concern that the Government appeared to be renegeing on the specific assurances of the MOI notwithstanding the fact that the Project was "*conceived at [PEL's] sole initiative*" and that, in accordance with the Parties' agreement as embodied in the MOI, PEL "*undertook all the development work at [] substantial costs*" and exercised its right of first refusal once the PFS had been approved by the MTC.⁴²

44 PEL likewise set the record straight regarding its numerous fruitless attempts to negotiate with an utterly unresponsive CFM. Specifically, while PEL had at all times been willing to negotiate the terms of its offer with CFM, PEL

⁴¹ **Exhibit C-20**, Letter dated 22 January 2013 from Kishan Daga of PEL to Minister Zucula of MTC disputing the Government's decision to conduct a public tender.

⁴² *Id.* at pp. 1-2.

simply "never received any reaction / response whatsoever from CFM till date [regarding] whether they are willing to participate and, if so, at what level of share participation."⁴³ PEL likewise restated its understanding that 20% was the maximum equity share in the Project Company that it was permitted to offer CFM under Mozambican law and that regardless, its offer had never been non-negotiable. Accordingly, PEL pleaded with the Government to "not be penalised" for CFM's non-responsiveness, and requested a meeting to discuss: (i) the Project and CFM's participation; (ii) delaying the tender process; and (iii) commencing parallel negotiations on the concession agreement.⁴⁴

45 Notwithstanding PEL's objections, the MTC published a Request for Proposal ("RFP") for the Project in the *Noticias* newspaper on 29 January 2013.⁴⁵

46 PEL met the then-Mozambican Prime Minister Alberto Vaquina on 6 February 2013. During that meeting, Mr Daga explained the background to the Project, the work PEL had carried out to date, PEL's fruitless attempts to negotiate with the CFM, and the rights that had been granted to PEL in the MOI, including PEL's right of first refusal and its right to a direct award of a concession. Prime Minister Vaquina seemed surprised by Mr Daga's account of the events, and indicated that he had been informed of contrary facts during a Cabinet Meeting in which the Project had been discussed.

47 On 14 February 2013, the MTC wrote to PEL stating that it could not "reverse the decision already taken by the Council of Ministers" of Mozambique to hold a public tender.⁴⁶ The MTC submitted, however, that PEL would nonetheless benefit from the right of first refusal it guaranteed to PEL in the MOI, but in the context of the public tender.⁴⁷ This was yet another promise the Government ultimately would flout in the subsequent months.

48 Around this time, in an article published by the newspaper *O Pais Economico* on 1 March 2013, CFM stated publicly that it would not participate in the Project because it already had taken stakes in other ventures.⁴⁸ PEL brought

⁴³ **Exhibit C-20**, Letter dated 22 January 2013 from Kishan Daga of PEL to Minister Zucula of MTC disputing the Government's decision to conduct a public tender, at p. 3.

⁴⁴ *Id.* at pp. 4-5.

⁴⁵ **Exhibit C-21**, Request for Proposal ("RFP") published by the MTC in *Noticias* newspaper on 29 January 2013, at p. 40.

⁴⁶ **Exhibit C-22**, Letter dated 14 February 2013 from Minister Zucula to PEL regarding the decision of Mozambique to hold a public tender.

⁴⁷ *Id.*

⁴⁸ **Exhibit C-23**, Letter dated 4 March 2013 from Kishan Daga of PEL to Minister Zucula of MTC enclosing published newspaper article on 1 March 2013 where CFM stated publicly that it would not participate in the Project.

this statement to the Prime Minister's attention in a letter dated 4 March 2013.⁴⁹ It explained that the sole purported reason given by the MTC for holding the tender had been PEL's inability to reach an agreement with CFM. Since CFM was no longer interested in the Project, PEL requested the MTC to give effect to the MOI as signed, and permit PEL to develop the Project.⁵⁰ At this stage PEL also gave assurances to the Prime Minister that PEL would follow the guidelines of the PPP law and would allocate 20% equity to any company nominated by the Government. Once again, the Government ignored PEL's request.

49 Rather than abiding by its obligations under the MOI, the Government instead subsequently distributed a tender notice to interested parties, inviting them to submit an expression of interest by 8 March 2013, to participate in a public tender for the Project.⁵¹ Twenty-one companies ultimately expressed an interest in the Project.⁵²

50 Given the considerable investment PEL already had made in Mozambique, and while expressly reserving its rights under the MOI, PEL was forced to form a consortium of companies to compete in the public tender process (the "**PEL Consortium**"). The PEL Consortium was comprised of PEL, Grindrod Limited (a leading South African freight logistics and shipping services provider with considerable experience in port and rail corridor management) and SPI (a privately-held Mozambican investment and consulting company).

51 The PEL Consortium submitted an Expression of Interest ("**EOI**") for the Project to the MTC by the 8 March 2013 deadline.⁵³ In doing so, PEL was careful to note that its EOI was without "*prejudice to the rights Patel is vested in as a result of the MO[I]*" and that nothing in the PEL Consortium's letter or package shall be construed as "*a waiver or a variation of any of the rights Patel has in terms of the MO[I]*".⁵⁴

⁴⁹ **Exhibit C-23**, Letter dated 4 March 2013 from Kishan Daga of PEL to Minister Zucula of MTC enclosing published newspaper article on 1 March 2013 where CFM stated publicly that it would not participate in the Project.

⁵⁰ *Id.*

⁵¹ **Exhibit C-24**, Tender Notice entitled "*Application of Participants and Fulfillment*".

⁵² **Exhibit C-25**, MTC Document entitled "*Contest to Acquiring of Rights of Concession to Conceive, Design, Finance, Build, Operate and Transfer the Railway and Macuse Port*".

⁵³ **Exhibit C-26**, Letter dated 8 March 2013 from Kishan Daga of PEL to Minister Zucula of MTC submitting an Expression of Interest for the Project.

⁵⁴ *Id.*

- 52 Soon after, the MTC issued tender documents to six pre-qualified companies on 12 April 2013: (1) the Italian Thai Development Company ("ITD"); (2) Sumitomo Corporation; (3) Moto Engil, Codiza, Edvisa and Manica Consortium; (4) the CLZ Consortium; (5) Rio Tinto; and (6) the PEL Consortium.⁵⁵ The tender documents requested the recipients to submit technical and financial proposals for the Project by 29 May 2013.⁵⁶
- 53 In parallel with its preparation for the public tender, PEL continued to petition the Government to suspend the public tender, and to honour the commitments it made to PEL in the MOI, which had induced PEL to invest in Mozambique in the first place. This included imploring Prime Minister Vaquina to abide by the commitments undertaken by the Government in the MOI, and providing the Government with a legal opinion from a prominent Mozambican law firm confirming PEL's interpretation of Mozambican law and the MOI.⁵⁷
- 54 On 18 April 2013, PEL thought its numerous petitions to the Government to honour its MOI commitments finally had been successful, when the MTC informed PEL that the Council of Ministers had decided it was in the "*national strategic interest*" to permit PEL to begin negotiating towards the execution of the Project. The MTC explained that this decision had been taken "*considering the urgency of these infrastructures, the national strategic interest, the time available and the fact that the tenderer has carried out all the feasibility and engineering studies, and that it is in the national interest that the project be accelerated.*"⁵⁸ On this basis, the Council of Ministers "*decided to invite [PEL] to start the [negotiation] process with a view of carrying out those projects*" and invited "*the representatives of [PEL] . . . to contact the [MTC], to begin this process, within seven days.*"⁵⁹ The MTC further requested PEL to provide a bank guarantee for 0.1% of the prospective investment value, to be held until the conclusion of the agreement.⁶⁰

⁵⁵ **Exhibit C-27**, Tender Documents issued to six pre-qualified companied on 12 April 2013.

⁵⁶ *Id.*

⁵⁷ **Exhibit C-28**, Letter dated 12 March 2013 from Kishan Daga of PEL to Minister Zucula of MTC setting out rationale for a direct award of the concession pursuant to the MOI. **Exhibit C-51**, Legal Memorandum from Sal & Caldeira Avogados Lda. dated 9 March 2013 regarding Award of a Concession for the Macuse Project.

⁵⁸ **Exhibit C-29**, Letter dated 18 April 2013 from Minister Zucula of MTC to PEL whereby the MTC invited PEL to commence negotiations for a concession agreement for the Project.

⁵⁹ *Id.*

⁶⁰ *Id.*

- 55 PEL promptly responded in writing to "formally accept" the Government's offer to commence negotiations for the concession without holding a public tender.⁶¹
- 56 Over the next few days, further seemingly positive steps were taken with the MTC promising to hand over a draft concession agreement and the parties scheduling their first direct negotiation meeting for 10 May 2013 in Maputo.⁶² In reliance on these steps, PEL provided the MTC with a bank guarantee for the equivalent of USD 3,115,000.⁶³
- 57 Then, on 13 May 2013, the MTC informed PEL that Mozambique had once again changed its position.⁶⁴ The Government alleged that, having heard from several unnamed "*stakeholders*" and having reviewed the relevant laws and regulations governing public private partnerships in Mozambique (the "**PPP Law**"), the Council of Ministers subsequently concluded there was no "*space for direct negotiations with any of the bidders presented in the pre-selection phase*" and that the public tender must proceed. Consequently, the MTC declared that "*there shall be no place for direct negotiation with [PEL]*".⁶⁵ Rather, it instructed PEL to continue with the public tender in which it would benefit "*from the start of pre-emption right from 15 percentage points as stipulated by Law*".⁶⁶ This was an astonishing reversal of a decision that had been made just 14 days earlier, in which the same governmental body authorised direct negotiations between PEL and the MTC as a matter of "*national strategic interest*".
- 58 PEL responded to the MTC on 4 June 2013.⁶⁷ In its letter, PEL reiterated its understanding of the distinct rights it had been granted under the MOI and Mozambican law. Namely,

⁶¹ **Exhibit C-30**, Letter dated 23 April 2013 from Kishan Daga of PEL to MTC Minister Zucula concerning PEL's acceptance of the MTC's offer to commence negotiations for a concession agreement for the Project.

⁶² **Exhibit C-31**, Letter dated 24 April 2013 from Kishan Daga of PEL to Luis Amandio Chauque of MTC regarding draft concession agreement and negotiation meetings; **Exhibit C-[32]**, Letter dated 24 April 2013 from Luis Amandio Chauque of MTC to PEL providing a date, time and venue for the meeting to negotiate a concession.

⁶³ **Exhibit C-33**, Letter dated 9 May 2013 from Kishan Daga of PEL to Minister Zucula of MTC providing a USD 3,115,000 bank guarantee.

⁶⁴ **Exhibit C-34**, Letter dated 13 May 2013 from Luis Amandio Chauque of MTC to Kishan Daga of PEL reversing the MTC's position regarding direct negotiations with PEL.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ **Exhibit C-35**, Letter dated 4 June 2013 from Kishan Daga of PEL to Minister Zucula of MTC responding to the MTC's change in position regarding direct negotiations.

- (a) Clause 2.1 guaranteed that, following the Government's approval of the PFS, "*the Govt. of Mozambique shall issue a concession of the project in favour of PEL*";
- (b) Clause 2.2 conferred upon PEL a right of first refusal to implement the Project; and
- (c) the PPP law provided for a 15% right of preference to which PEL was entitled for providing an unsolicited proposal for the Project. This 15% right of preference was *entirely distinct from and in addition to* the right of first refusal granted to PEL in the MOI.

59 Further, PEL explained its view that the PPP Law specifically permitted the direct award of concessions in special circumstances, all of which were present in the case of the Project. Accordingly, PEL requested that the Government "*abide by the agreed condition[s] in [the] MO[I]*" and the Council of Minister's approval of direct negotiations on 16 April 2013, and "*start the negotiation of [the] concession agreement on the basis of [a] direct award.*"⁶⁸

60 Despite PEL's plea to the Government to comply with its past assurances and its obligations under the MOI, PPP Law, and Resolution of the Council of Ministers, the plea again fell on deaf ears, with the MTC failing to reply directly to PEL's letter. Instead, on 10 June 2013, the MTC provided clarifications to queries from the tender bidders to the six companies comprising the "Short List phase" of the tender process, including PEL, and thereby impliedly rejected PEL's request to negotiate a concession agreement for the Project.⁶⁹

61 In light of the above events, and having invested considerable time and costs into the Project to date on the basis of the Government's previous assurances, PEL was left with no choice but to continue to participate in the public tender process. Accordingly, on 27 June 2013, the PEL Consortium submitted its financial and technical proposals as part of the tender process.⁷⁰ In doing so,

⁶⁸ **Exhibit C-35**, Letter dated 4 June 2013 from Kishan Daga of PEL to Minister Zucula of MTC responding to the MTC's change in position regarding direct negotiations.

⁶⁹ **Exhibit C-36**, Letter dated 10 June 2013 from the MTC to PEL and the other five tender bidders regarding tender query clarifications.

⁷⁰ **Exhibit C-37**, Letter dated 27 June 2013 from Kishan Daga of PEL to the MTC attaching the PEL Consortium's Financial and Technical Proposal for the Project.

PEL once again clearly and explicitly reserved its rights to rely on the terms of the MOI.⁷¹

62 On 19 July 2013, representatives of the MTC and various bidders convened at MTC's offices in Maputo.⁷² During this meeting, the MTC announced the scores it had allocated to each tender (which *purportedly* had been calculated by reference to a specific formula which had been published during the tender process): ITD was awarded 95 points, the CLZ Consortium was awarded 80 points and the PEL Consortium garnered 72.5 points.⁷³ Accordingly, the MTC announced ITD as the winning bidder.

63 PEL was surprised and dismayed by the outcome of the tender process because, *inter alia*:

- (a) PEL's indicative cost estimate for the Project was USD 3115 million whereas the cost estimate of the winning bidder was higher at USD 3993 million.
- (b) The PEL Consortium was awarded zero points for construction expertise in ports and railways notwithstanding its substantial experience in such sectors.
- (c) The PEL Consortium was awarded only 10 out of a possible 15 points for its interpretation and understanding of the Project, while the other bidders were each awarded 15 points. This was notwithstanding that:
 - (i) it was PEL, and not the other bidders, who was the Project's originator;
 - (ii) it was PEL that had carried out the Preliminary Study and the PFS for the Project;
 - (iii) it was PEL who possessed the detailed knowledge of the Project on the basis of its prior substantial investment and work; and

⁷¹ **Exhibit C-26**, Letter dated 8 March 2013 from Kishan Daga of PEL to Minister Zucula of MTC submitting an expression of Interest for the Project.

⁷² **Exhibit C-38**, Minutes of the Opening Session of Economic Proposals dated 19 July 2013.

⁷³ *Id.* According to the MTC, only ITD, the CLZ Consortium, and the PEL Consortium successfully made it through the technical proposal round through to the economic proposal round. See **Exhibit C-25**, Translation of MTC Document entitled "Contest to Acquiring of Rights of Concession to Conceive, Design, Finance, Build, Operate and Transfer the Railway and Macuse Port" dated 29 July 2013, at p. 3.

(iv) much of the tender process was based on the PFS, which had been prepared by PEL. In fact, the other bidders relied on the PFS prepared by PEL to compile their own bids.

(d) Some of the other bidders were awarded higher scores than PEL in the "manager's profile" category notwithstanding the fact that these operators had little or no experience operating railways or ports in Mozambique. In contrast, Grindrod, a member of the PEL Consortium, had significant experience in this field. In fact, Grindrod was already operating and managing Maputo port at the relevant time.

64 On 26 July 2013, the MTC formally notified PEL of its decision to award the concession to ITD.⁷⁴

65 Separately, on 29 July 2013, the MTC provided further information explaining how the proposals had been evaluated.⁷⁵

66 The PEL Consortium sent a letter to the MTC on 29 July 2013 expressing its concern over the MTC's handling of the tender. In particular, the Consortium raised serious concerns that the "*proper process has not been followed in the evaluation and scoring of the technical and financial proposals submitted by the Consortium in terms of the rules of the RFP and in terms of Mozambique law.*"⁷⁶ Amongst other concerns, PEL underscored the fact that:

(a) "*the criteria communicated as being used by the MTC for the evaluation of the technical proposals differs materially from the criteria communicated to the bidders in the RFP for the tender*";⁷⁷

(b) the financial proposal scores did not appear to be calculated in accordance with the formula specified in the RFP and amended by MTC correspondence; and

(c) ITD's selection as the winning bidder evidently was "*not based on the criteria and formula given in the project RFP documentation, including amendments thereto*" and therefore the tender was "*contrary to the*

⁷⁴ **Exhibit C-39**, Letter dated 26 July 2013 from Pedro Augusto Ingles to PEL Consortium regarding proposal evaluation.

⁷⁵ **Exhibit C-25**, MTC Document entitled "*Contest to Acquiring of Rights of Concession to Conceive, Design, Finance, Build, Operate and Transfer the Railway and Macuse Port*" dated 29 July 2013.

⁷⁶ **Exhibit C-40**, Letter dated 29 July 2013 from Kishan Daga to Minister Zucula expressing concern over the MTC's handling of the tender.

⁷⁷ *Id.*

spirit of an international competitive bid process and contrary to the public procurement policy of the country."⁷⁸

67 In light of the serious irregularities surrounding the public tender, PEL requested that the MTC clarify the way in which the bids had been scored, and suspend its decision to award the concession to ITD until the "*correct determination of the highest bidder is adjudicated on the criteria specified in the technical proposal and the formulas for the calculation of the final scores specified in the RFP read in conjunction with the amendments thereto.*"⁷⁹

68 Pursuant to Article 140.1 of the Procurement of Public Works Legislation on administrative complaints and appeals, an application for review may be brought against decisions relating to the selection of applicants and the award of contracts taken by the Contracting Authority in the course of public procurement procedures, which may impair the rights and interests of the parties concerned. Once a complaint is submitted, the corresponding public procurement procedure is suspended, as per Article 140.6 of the Procurement of Public Works Legislation, and the Contracting Authority is prevented from: (i) deciding definitively on the final selection of bidders; (ii) starting the negotiation phase; (iii) deciding on the award; or (iv) concluding the contract. Pursuant to Article 141 of the Procurement of Public Works Legislation, on 1 August 2013, PEL lodged a guarantee with the MTC in the amount of MZN 125,000 to officially contest MTC's award of the concession to ITD, expressly stating it was submitting the "GUARANTEE AMOUNT FOR RIGHT TO APPEAL TO AWARD".⁸⁰

69 The MTC responded to the PEL Consortium's complaint about the irregularities of the tender process on 12 August 2013.⁸¹ In effect, the MTC maintained that the tender evaluation criteria had remained unchanged, and that the PEL Consortium's 15% right of preference had been applied correctly. Further, the MTC failed to provide detailed responses to the queries raised by the PEL Consortium in its letters of 19 and 29 July and 1 August, as it was

⁷⁸ **Exhibit C-40**, Letter dated 29 July 2013 from Kishan Daga to Minister Zucula expressing concern over the MTC's handing of the tender.

⁷⁹ *Id.*

⁸⁰ **Exhibit C-41**, Letter dated 1 August 2013 from Kishan Daga of PEL to the MTC and Ms Odete, President of Jury (emphasis in original).

⁸¹ **Exhibit C-42**, Letter dated 12 August 2013 from the MTC to PEL Consortium responding to PEL's complaint about the tender process.

required to do under Mozambican law.⁸² In particular, Article 253 of the Constitution sets out a duty to stipulate grounds on all acts and decisions from the Administration which may affect the rights and legitimate interests of interested parties, a duty which is further replicated and detailed in the legal statutes governing the actions of the Mozambican authorities.

70 After reviewing the MTC's explanations, it became clear that the tender evaluation had not been conducted in accordance with the tender documents provided to PEL and the other bidders. To the contrary, it appears to have been a sham tender conducted with the aim of reaching a pre-determined outcome. For example, both the criteria and formulae articulated by the MTC in its letter of 12 August 2013 were "*entirely different to the criteria and formulas specified in the RFP and subsequent clarifications through amendment notices.*"⁸³ This was a clear violation of Article 8 of the Public Procurement Act, which mandates that "*The evaluation of bids must be based solely on the criteria established in the tender documents.*"⁸⁴ Given the serious irregularities surrounding the evaluation of the tenders, PEL reiterated its request that the award of the concession be placed on hold until the bid committee re-evaluated the bids in accordance with the criteria stipulated in the RFP as clarified by amendment notices.⁸⁵

71 Following the confirmation of the award on 27 August 2013, PEL issued an appeal to the Minister of the MTC. This confirms that PEL satisfied all legal requirements in terms of challenging the award decision from an administrative law standpoint. Although PEL decided not to lodge a court appeal, this does not mean that it waived any of its rights. Even more so, the court appeal would not have suspended the award decision.

72 The Government disregarded PEL's serious concerns about the tender process, and the award of the Project to ITD. In particular, the MTC refused to reconsider its position and instead proceeded to confirm its award of the

⁸² **Exhibit C-43**, Letter dated 19 August 2013 from Kishan Daga of PEL to the MTC regarding the failure of the MTC to carry out the tender in accordance with Mozambican Law.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

concession for the development of the railway corridor and port to ITD on 27 August 2013.⁸⁶

73 Faced with this injustice, the PEL Consortium took immediate action. On 28 August 2013, the PEL Consortium reiterated in a 10-page letter captioned “FORMAL APPEAL” the numerous grounds for challenging the award to ITD.⁸⁷ In particular, the PEL Consortium set out a number of examples where, in the PEL Consortium's view, *"there has been a mis-interpretation, mis-application, or entirely incorrect application of the scoring provisions of the Project"* as stipulated in the RFP and the amendments thereto. These examples included, *inter alia*:

- (a) The PEL Consortium only received a score of 3.5 (out of 10) in the category of "*Organic Composition of the Bidder*" notwithstanding that:
 - (1) PEL had over 60 years of experience in the heavy construction industry and had completed national and international projects in India and abroad;
 - (2) PEL Consortium member Grinrod has a strategic relationship with (and was in the final stages of acquiring) RACEC, the preeminent railway construction company in Africa with a track record dating back to the 1960s;
 - (3) Grinrod had designed and constructed numerous port and terminal projects in Mozambique and across Africa, had over 100 years' track record in operating port and rail infrastructure, and had experience operating and managing Maputo Port.⁸⁸

- (b) The PEL Consortium only received a score of 10.5 (out of 15) in the category of "*Interpretation and Understanding of the Project*" **notwithstanding that PEL and SPI conceived of the Project themselves** and "*spent the best part of two years on various feasibility and technical studies, resulting in the generation of a number of detailed reports*" which ultimately led the MTC to determine it was both feasible and in the nation's strategic interest to proceed with the Project. Given the PEL Consortium's "*deep and fundamental understanding of this Project and the significant number of site visits*

⁸⁶ **Exhibit C-44**, Letter dated 27 August 2013 from the MTC to PEL Consortium confirming its award of the concession to ITD.

⁸⁷ **Exhibit C-45**, Letter dated 28 August 2013 from Kishan Daga to the MTC contesting the award of the concession to ITD.

⁸⁸ *Id.* at pp. 3-4.

and technical studies conducted over the past two years" it was highly suspect that all of the other bidders – who had only 45 days to acquaint themselves with the Project prior to the tender – received the maximum score of 15 points.⁸⁹

- (c) In the category "*Strategic Vision of the Business Model*", the PEL Consortium scored zero in the subcategory of "*Strategic Partnership*" notwithstanding that: (1) 30% of the Project was to be awarded to Mozambican entities with (i) 20% being allocated to the relevant Mozambican government entity (the maximum percentage allowed under the PPP law); (ii) 5% equity participation being granted to the Mozambican company SPI, which was part of the PEL Consortium; and (iii) 5% equity to be offered to other local Mozambican entities yet to be identified; and (2) none of the other bidders offered equity to Mozambican entities on a fully funded and free carry basis. Further, the PEL Consortium's Financial Proposal was superior to all other bidders in the subcategories of "*Human Resources Development*" and "*Social Projects*" with the PEL Consortium "*offering the largest value financial package in terms of social programmes.*"⁹⁰
- (d) Competing bidders with either no or minimal experience of operating ports and railways, and no experience of operating in Mozambique, outscored the PEL Consortium in the category of "*Manager's Profile of the Bidder*" notwithstanding that PEL Consortium member Grindrod "*is a well respected operator of ports and railways in the region and has an excellent track record, with significant experience of operating in Mozambique, which respectfully, none of the other bidding consortiums can match.*"⁹¹
- (e) The MTC "*unilaterally altered the scoring formula or applied the incorrect formula in error for both the calculation of the Financial Proposal scores and the consolidated Final Technical and Financial Proposal score*"⁹² thereby deviating from the RFP and amendments

⁸⁹ **Exhibit C-45**, Letter dated 28 August 2013 from Kishan Daga to the MTC contesting the award of the concession to ITD, at p.5.

⁹⁰ *Id.* at pp. 5-6.

⁹¹ *Id.* at p. 6.

⁹² *Id.* at p. 8, pp. 6-10.

thereto, in contravention of the PPP Law stipulating that "*the criteria established for the evaluation of tenders as set out in the relevant tender documents . . . cannot be altered after the submission and opening of the tender bids.*"⁹³

- (f) According to the PEL Consortium's calculations, the winning bidder, ITD, would contribute only approximately 20% of the value (i.e, USD 195.8 million, by way of a concession premium and corporate social investment) as compared to the PEL Consortium (which would have contributed USD 977 million by way of a concession premium and corporate social investment). Notwithstanding this large discrepancy, which would have inured to the benefit of Mozambique and its people, ITD was nevertheless awarded 70 points (5 points more than the PEL Consortium's score of 65 points) for its Financial Proposal.⁹⁴

74 In light of these inconsistencies and errors, the PEL Consortium again petitioned the MTC to "*re-evaluate the Technical and Financial Proposals of each of the three bidders for the Project in accordance with the tender scoring provisions as stipulated in the RFP, including amendments thereto*",⁹⁵ and to hold the award in abeyance until these grave errors could be addressed.

75 The MTC, however, refused to change its position and rejected PEL's claims for compensation which, at that time, included reimbursement of the costs it had incurred for the PFS (estimated at USD 4 million), as well as royalties of 0.5% of the value of the investment (being .5% of the USD 3,115,000,000 value of the Project identified in the PFS, *i.e.* USD 15,575,000) for its identification of the Project.⁹⁶

76 In the course of 2013 through to 2015, PEL made several attempts to try to resolve its dispute with the Respondent. All such attempts failed.

⁹³ **Exhibit C-45**, Letter dated 28 August 2013 from Kishan Daga to the MTC contesting the award of the concession to ITD, at p. 8.

⁹⁴ *Id.* at p. 9.

⁹⁵ *Id.* at p.2.

⁹⁶ **Exhibit C-46**, Letter dated 18 February 2014 from Sal & Caldeira Advogados, LDA on behalf of PEL rejecting PEL's claims for compensation.

**E THE TREATY PROTECTS PEL FROM MOZAMBIQUE'S
WRONGFUL CONDUCT**

1 PEL meets the jurisdictional requirements of the Treaty

77 The Treaty protects PEL and its investment from the above-mentioned actions and omissions of Mozambique, as PEL satisfies the Treaty's *ratione personae*, *ratione materiae*, and *ratione temporis* requirements. In particular, PEL qualifies as a protected investor, has made a qualifying investment in Mozambique, and its claim satisfies the temporal requirements of the Treaty.

(a) PEL qualifies as an investor under Article 1(c) of the Treaty

78 With respect to jurisdiction *ratione personae*, the Treaty's scope extends to protect investors, which Article 1(c) defines as "*any national or company of a Contracting Party*". Article 1(a) further defines the term "*Companies*" as "*Corporations, firms and associations incorporated or constituted or established under the law in force in any part of either of the Contracting Party*". **PEL unequivocally satisfies this condition given that it is a public corporation established in India,⁹⁷ a Contracting Party to the Treaty.**

(b) PEL's investment in Mozambique's infrastructure sector qualifies as an investment under Article 1(b) of the Treaty

79 With respect to jurisdiction *ratione materiae*, Article 1(b) of the Treaty contains a broad and non-exhaustive definition of the term "*investment*" which unquestionably encompasses PEL's investment in Mozambique:

"(b) The term "investment" means every kind of asset established or acquired, including changes in the form of such investments in accordance with the national law of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:

(i) Movable and immovable property as well as other[] rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other similar forms of participation in a company;

⁹⁷ **Exhibit C-1**, Certificate of Incorporation No. 7089 dated 2 April 1949, certifying the incorporation of Patel Engineering Company Limited pursuant to the Indian Companies' Act, VII of 1913. See also **Exhibit C-2**, Certificate of Incorporation Consequent on Change of Name in the Office of the Registrar of Companies, Maharashtra, Mumbai, changing PEL's company name from Patel Engineering Company Limited to Patel Engineering Limited.

(iii) *rights to money or to any performance under contract having a financial value;*

(iv) *intellectual property rights....; and*

(v) *business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals.*⁹⁸

80 The Treaty's definition of investment follows a traditional international investment agreement formulation — it broadly defines "*investment*" to include "*every kind of asset*", and includes an illustrative and non-exhaustive list of specific categories of covered assets.

81 It is clear that PEL's investment in Mozambique meets the requirements of Article (1)(b). In particular, PEL's investment includes valuable rights under the MOI, which explicitly fall within Article (1)(b)(iii) — "*rights to money or to any performance under contract having financial value*". In particular, PEL's investment includes its rights under the MOI, including its valuable right to be awarded a concession for the USD 3.115 billion Project that PEL had itself conceived of, and its right of first refusal, both of which were abrogated by the MTC.

82 In addition to expressly falling within Article (1)(b)'s broad and inclusive definition of investment, the Claimant's investment in Mozambique demonstrates the hallmarks commonly attributed to investments – a financial commitment on the part of the investor; a certain duration; and the assumption of risk. In this case, PEL expended approximately USD 4 million to fund the Preliminary Study and the PFS. The PFS alone took twelve months to perform, for a Project that would have taken six years to build and was set to last over the course of 30 years of operation and maintenance and was estimated to cost USD 3.115 billion. Undertaking the PFS entailed an element of risk – both the risk that the development of a Port along the Zambezia coast with a corresponding 500 km rail corridor would not be feasible (as the MTC had initially indicated), and the risk that, notwithstanding the assurances provided by the Government in the MOI, the Government would renege on its commitments to PEL notwithstanding the time, effort and resources PEL had dedicated to the Project (as actually occurred in this case).

⁹⁸ CLA-1, Article 1(b), the Treaty (emphasis added).

83 In light of the above, PEL's investment in Mozambique unquestionably qualifies as an "investment" for the purposes of Article 1(b) of the Treaty.

(c) **This Tribunal has jurisdiction *ratione temporis***

84 With respect to jurisdiction *ratione temporis*, Article 14 —Entry into Force— and Article 15 —Duration and Termination— provide:

***"Article 14
Entry into Force***

This Agreement shall enter into force on the day when both Contracting Parties have notified each other in writing that they have complied with their internal legal requirements for the entry into force of this Agreement.

***Article 15
Duration and Termination***

(1) This Agreement shall remain in force for a period of ten (10) years and thereafter it shall be deemed to have been automatically extended unless either Contracting Party gives to the other Contracting Party a written notice of its intention to terminate the Agreement. The Agreement shall stand terminated one year from the date on receipt of such written notice.

*(2) **Notwithstanding termination** of this Agreement pursuant to paragraph (1) of this Article, **the Agreement shall continue to be effective for a further period of fifteen (15) years from the date of its termination in respect of investment made or acquired before the date of termination of this Agreement.**"⁹⁹*

85 The Treaty was signed in New Delhi on 19 February 2009, and entered into force on 23 September 2009.¹⁰⁰ On 22 March 2019, the Ministry of External Affairs of the Government of India, as part of a government mandate to terminate all existing BITs and renegotiate investment treaties to conform with India's revised 2015 Model BIT, notified the High Commission of the Republic of Mozambique of its intention to terminate the Treaty in accordance with

⁹⁹ CLA-1, Articles 14 and 15, the Treaty (emphasis added).

¹⁰⁰ According to the Department of Economic Affairs of the Ministry of Finance of the Government of India, the Treaty was signed on 19 February 2009, and entered into force on 23 September 2009. In Mozambique, the Treaty was approved and ratified by the Council of Ministers Ministers on 11 August 2009, and published in the official gazette on 23 September 2009. See CLA-4, Resolução n.º 54/2009, Boletim da República PUBLICAÇÃO OFICIAL DA REPÚBLICA DE MOÇAMBIQUE. The Ministry of Foreign Affairs and Cooperation of the Republic of Mozambique confirmed to the High Commission of the Republic of India in Maputo that the Treaty entered into force in Mozambique from 23 September 2013. See Exhibit C-47, Undated letter from the Mozambican Ministry of Foreign Affairs and Cooperation to the Indian High Commission in Maputo confirming that the Treaty entered into force in Mozambique from 23 September 2013.

Article 15.¹⁰¹ According to Article 15(1), the Treaty shall terminate one year from the date of Mozambique's receipt of that notice (*i.e.* on Saturday, 21 March 2020). The Treaty contains a sunset provision which requires that the Treaty "*shall continue to be effective for a further period of fifteen (15) years from the date of its termination in respect of investment made or acquired before the date of termination of this Agreement.*"¹⁰²

86 Given that PEL's investment was unquestionably made before the date of the Treaty's termination, jurisdiction *ratione temporis* is established in this case by virtue of the Treaty's 15-year sunset provision, which guarantees the Treaty's continued effectiveness until 21 March 2035, for investments made prior to its termination.

2 The Treaty's Substantive Protections Safeguard PEL from Mozambique's Internationally Wrongful Conduct

87 Given that PEL meets all jurisdictional requirements under the Treaty, it is entitled to the substantive protections contained therein.

88 The Treaty requires, in summary, that Mozambique shall:

- (a) Promote and protect investments, in particular encourage and create favourable conditions for investors to make investments in its territory and accord such investments fair and equitable treatment ("**FET**") (see further Article 3).
- (b) Accord to investments treatment which is no less favourable than that accorded either to investments of its own or investments of investors of any third State (commonly known as national treatment and most-favoured nation treatment) (see further Article 4).
- (c) Not nationalise or expropriate (or take measures which are similar in effect to nationalisation or expropriation of) investments except where this is done for a public purpose, in accordance with the law, on a non-discriminatory basis and the investor receives fair and equitable compensation (see further Article 5).

¹⁰¹ **Exhibit C-48**, Letter dated 22 March 2019 from India's Ministry of External Affairs to Mozambique's High Commission notifying the latter of India's intention to terminate the Treaty in accordance with Article 15.

¹⁰² **CLA-1**, the Treaty, Article 15(2).

(d) Permit all funds of an investor related to an investment in its territory to be freely transferred, without unreasonable delay and on a non-discriminatory basis (see further Article 7).

89 In light of the foregoing facts and circumstances described in this NoA, it is clear that Mozambique's conduct contravened the Treaty's substantive requirements.

90 For example, Mozambique violated its obligation to accord PEL's investment FET in accordance with Article 3(2) of the Treaty, which provides:

"Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party".

91 The FET obligation must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of the object and purpose of the Treaty.¹⁰³ The Treaty's preamble describes the protections set out therein (which include the FET obligation) as being *"conducive to the stimulation of individual business initiative and will increase prosperity in both States"*.

92 Given the breadth of the terms *"fair"* and *"equitable"*, as well as their context in the Treaty and the object and purpose of the Treaty, the FET standard prohibits a wide array of governmental misconduct (including both acts and omissions), including the various acts of misconduct and wrongful omissions at issue in this case. As articulated by the *Micula v. Romania* tribunal, *"tribunal practice shows that the concepts of transparency, stability and the protection of the investor's legitimate expectations play a central role in defining the FET standard, and so does compliance with contractual obligations, procedural propriety and due process, action in good faith and freedom from coercion or harassment."*¹⁰⁴

¹⁰³ **CLA-5**, Vienna Convention on the Law of Treaties, Art. 31.

¹⁰⁴ **CLA-6**, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, Award, 11 December 2013, para. 519, ICSID Case No. ARB/05/20. See also **CLA-7**, R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2008, p. 133. See also **CLA-8**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, 27 August 2009, para. 178, ICSID Case No. ARB/03/29 ("The Tribunal agrees with Bayindir when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the FET standard. These comprise the obligation to act transparently and grant due process [*Metalclad v. Mexico*], to refrain from taking arbitrary or discriminatory measures [*Waste Management v. Mexico II*, *Lauder v. Czech Republic*], from exercising coercion [*Saluka v. Czech Republic*] or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment [*Duke Energy v. Ecuador*].")

93 The Treaty further provides PEL with national treatment and most-favoured nation protection as follows:

*"Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which **shall not be less favourable** than that accorded either to investments of its own or investments of investors of any third State" (Article 4(1)) and "[i]n addition, each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which **shall not be less favourable** than that accorded to investors of any third State."¹⁰⁵*

94 As a general rule, the effect of a most favoured nation obligation such as that in Article 4 is that standards of treatment available to investors under the host state's investment treaties with third party states will generally also be made available to investors under the treaty containing the most favoured nation obligation.

95 In this regard, we note that the Netherlands-Mozambique investment treaty contains a so-called "umbrella clause" at Article 3(4) which provides that *"[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party."*¹⁰⁶ PEL reserves its right to rely on this provision, and any other relevant provisions incorporated through the Treaty's most-favoured nation provision, in these arbitral proceeding against Mozambique.

F MOZAMBIQUE CONTRAVENED THE TREATY'S SUBSTANTIVE PROTECTIONS AND PEL IS ENTITLED TO DAMAGES AS A RESULT

96 Mozambique violated its obligations under the Treaty. By way of example only, Mozambique violated the Treaty's FET obligation by, *inter alia*:

- (a) acting contrary to the specific assurances it provided to PEL in the MOI (including its assurance in Clause 2.1 that, in the event the PFS was

¹⁰⁵ CLA-1, Articles 4(1) and 4(2), the Treaty (emphasis added).

¹⁰⁶ CLA-9, Article 3(4), Agreement between the Government of the Republic of Mozambique and the Government of the Kingdom of the Netherlands Concerning the Encouragement and the Reciprocal Protection of Investments.

approved by the MTC (which it was), the "*Govt. of Mozambique shall issue a concession of the project in favour of PEL*" and its guarantee in Clause 2.2 that once the PFS was approved, PEL "*shall have the first right of refusal for the implementation of the project on the basis of the concession which will be given by the Government of Mozambique*".¹⁰⁷ These assurances formed the basis of PEL's legitimate expectations when it invested in Mozambique;

- (b) initially representing to PEL that it could exercise its right of first refusal on condition that it set up a Project Company with CFM, leading PEL to incur time and costs pursuing negotiations with CFM, only for Mozambique later to renege on this position and insist on a public tender process for the award of the concession for the Project;
- (c) acting without good faith by indicating that the public tender was to take place only because PEL allegedly failed to offer a "*strategic partnership*" exceeding a 20% equity shareholding to CFM, when in reality this was the maximum amount permitted under Mozambican law and, in any event, CFM did not have sufficient funds to obtain a 20% equity share in the Project let alone something higher.
- (d) acting without transparency and inconsistently by subsequently leading PEL to believe that it was willing to forego a public tender process only to change its position once again;
- (e) requiring PEL to provide a substantial bank guarantee (which it did) on the premise (which turned out to be false) that Mozambique was once again willing to enter into negotiations with PEL for a direct award of the concession;
- (f) failing to conduct the tender in a transparent manner as demonstrated by the fact that the MTC appears to have failed to adhere to its published processes, and specifically its formula for evaluating the tender participants' bids;

¹⁰⁷ **Exhibit C-5**, MOI, at cl. 2.1-2.2 (emphasis added). Clause 7 is entitled "New Memorandum" and provides that "[i]n the event that the above mentioned corridor is found techno commercially unviable for any reason whatsoever, both parties agree to sign a new memorandum to undertake another study of a similar project."

- (g) failing to apply accurately the 15% right of preference which PEL had been expressly promised if it participated in the tender and which, regardless, it was entitled to be awarded under PPP Law; and
- (h) failing to honour PEL's first right of refusal by affording PEL the opportunity to match ITD's winning bid.

97 As a result of Mozambique's breaches of international law, PEL has suffered substantial losses and is entitled to full reparations.

98 The principles of customary international law require PEL to be restored to the position it would have been in but for Mozambique's internationally wrongful conduct, in accordance with the customary international law principle of *restitutio in integrum*. The Permanent Court of International Justice articulated this principle in its seminal *Chorzów Factory* decision as follows:

*"The essential principle contained in the actual notion of an illegal act [...] is that **reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.** Restitution in kind, or, if this is not possible, **payment of a sum corresponding to the value which a restitution in kind would bear;** the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law".¹⁰⁸*

99 Based on the initial calculations and analysis of an independent quantum expert, PEL estimates that it has suffered damages of at least USD 100 million, and likely substantially more. These preliminary estimates will be further developed, particularised and validated with expert evidence during the course of these arbitral proceeding.

¹⁰⁸ CLA-10, *Factory at Chorzów*, Judgment No. 13, 13 September 1928, Series A, No. 17, p. 47 (emphasis added).

IV THE TREATY'S DISPUTE RESOLUTION PROVISION

100 The agreement to arbitrate is contained in Article 9 of the Treaty, which provides as follows:

"Article 9

Settlement of Disputes Between an Investor and a Contracting Party

- (1) *Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.*
- (2) *Any such dispute which has not been amicably settled within a period of six months may, if both Parties agree, be submitted:*
 - (a) *for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial, arbitral or administrative bodies; or*
 - (b) *To international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.*
- (3) *Should the Parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:*
 - (a) *If the Contracting Party of the investor and the other Contracting Party are both parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965 and the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes, such a dispute shall be referred to the Centre; or*

- (b) *If both parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings; or*
- (c) *to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:*
- (i) *The appointing authority under Article 7 of the Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party.*
- (ii) *The parties shall appoint their respective arbitrators within two months.*
- (iii) *The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding for the parties in dispute.*
- (iv) *The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.*
- (4) *Any dispute arising out of action taken under Article 12 (Applicable Laws) and all pre-establishment disputes shall be excluded from the purview of international arbitration."*

101 The Claimant notified the Respondent of the existence of an investment dispute under the Treaty by a letter from Addleshaw Goddard LLP to the Respondent dated 25 June 2018 (the "**Cooling off Letter**").¹⁰⁹ In the Cooling off Letter, the Claimant expressed that notwithstanding various failed efforts since 2013 to

¹⁰⁹ **Exhibit C-49**, Letter dated 25 June 2018 from PEL to Mozambique regarding "Notice of Dispute under the Agreement between the Government of the Republic of Mozambique and the Government of the Republic of India for the Reciprocal Promotion and Protection of Investments."

resolve the dispute, PEL remained "*open to good faith negotiations with the Government to attempt to settle this dispute amicably*".¹¹⁰

102 Thereafter, the Parties engaged in settlement negotiations pursuant to Article 9(1). These negotiations included, *inter alia*, a delegation of the Claimant's representatives meeting with Government representatives in Maputo in May 2019, and the provision by both Parties of confidential, without prejudice information concerning their respective positions associated with the dispute. Regrettably, notwithstanding the Parties' good faith efforts to resolve their dispute amicably, no such resolution has been achieved to date.

103 Accordingly, and having complied with the six month negotiation period prescribed by Article 9(1) of the Treaty, the Claimant hereby invokes its right to commence arbitration pursuant to Article 9(3)(c) of the BIT.¹¹¹

V PROPOSALS AS TO THE NUMBER OF ARBITRATORS, LANGUAGE AND PLACE OF ARBITRATION

104 The Claimant proposes that three arbitrators be appointed, consistent with Article 9(c) of the Treaty. Pursuant to Article 9(3)(c)(ii) of the Treaty, the Parties "*shall appoint their respective arbitrators within two months*" of the Claimant's reference to arbitration, i.e. by **20 May 2020**.

105 Pursuant to Article 16 of the UNCITRAL Rules, the Claimant proposes that the place of arbitration be London, England.

106 Pursuant to Article 17 of the UNCITRAL Rules, the Claimant proposes that the Arbitration be conducted in the English language, the only common language amongst the Parties.¹¹²

107 Finally, the Claimant propose that the arbitral proceedings be administered by the Permanent Court of Arbitration (the "**PCA**"), and invites the Respondent

¹¹⁰ **Exhibit C-49**, Letter dated 25 June 2018 from PEL to Mozambique regarding "Notice of Dispute under the Agreement between the Government of the Republic of Mozambique and the Government of the Republic of India for the Reciprocal Promotion and Protection of Investments," at para 66.

¹¹¹ The invocation of Article 9(2) of the Treaty, as contrasted from Article 9(3), requires the agreement of "both Parties." For the avoidance of doubt, the Claimant does not agree to submit this present dispute under Article (9)(2) of the Treaty either: (a) to the judicial, arbitral or administrative bodies of Mozambique; or (b) to international conciliation under the UNCITRAL Conciliation Rules. Furthermore, India is not a Contracting Party to the ICSID Convention, and PEL does not consent to resolve this dispute under the ICSID Additional Facility Rules. Accordingly, Articles 9(3)(a) - (b) are not applicable, and this dispute is therefore submitted pursuant to Article 9(3)(c).

¹¹² Claimant notes that English is the common language between all Parties. The Treaty was concluded in Hindi, Portuguese, and English, and "*the English text shall prevail*" in the event of divergence between the various versions.

to agree to the same when communicating its party-appointed arbitrator to the Claimant.

VI RELIEF SOUGHT

108 In the event that the Tribunal finds that the Respondent has acted in violation of its treaty obligations and/or customary international law, the Claimant seeks damages and compensation for all costs, losses and liabilities suffered by the Claimant.

109 A detailed damages report will be submitted at a later stage of these proceedings.

110 For the purpose of Article 3(f) of the UNCITRAL Rules, the Claimant seeks the following relief:

- (a) a declaration that the Respondent has violated its obligations under Article 3 and/or Article 4 and/or Article 5 of the Treaty and/or to its obligations under customary international law;
- (b) an order that the Respondent make full reparation to the Claimant for the loss of its investment arising from the Respondent's violations of the Treaty and/or its obligations under customary international law, such reparation being in the form of monetary compensation in an amount to be determined by the Tribunal;
- (c) an order that the Respondent pay the costs of this arbitration, including the costs of the Tribunal and the legal costs and expenses of the Claimant including, without limitation, the fees of legal counsel, experts, and fees associated with third party funding;
- (d) an order that the Respondent pay interest on any compensation awarded and/or on any legal costs and expenses awarded, in each case at such rate and for such period or periods as the Tribunal shall consider just and appropriate; and
- (e) such further or alternative relief as the Tribunal shall consider just and appropriate.

Respectfully submitted on 20 March 2020 by

A handwritten signature in cursive script, appearing to read "Sarah Vasani".

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