

**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

STATEMENT OF CLAIM

30 OCTOBER 2020

 **ADDLESHAW
GODDARD**

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I. EXECUTIVE SUMMARY

- 1 This Statement of Claim is submitted on behalf of Patel Engineering Limited (“**PEL**” or “**Claimant**”), pursuant to Annex I of Procedural Order No. 1.
- 2 In 2023, the Republic of Mozambique (“**Mozambique**,” “**Republic**,” “**Government**,” or “**Respondent**”) expects to unveil a brand-new port in Macuse and rail line from Moatize, in the coal-rich province of Tete, to that new port. The port and rail line will open a novel logistics corridor within Mozambique that will transform the prospects of Mozambique to transport and export coal to the world. Currently, coal mined in the Tete province is transported across the country to the only existing ports in Beira and Nacala; those ports are both far away, making transportation expensive, and have limited capacity, meaning that there is always a quota on how much coal can even be transported. As a result, internal logistics mean that the entire coal mining industry in Mozambique is itself constrained. With no way to transport and ship large quantities of coal, there is little need or ability to maximise the extraction of a valuable commodity that would otherwise simply pile up beyond that used for domestic use or the limited international export that is feasible. Now, the new logistics corridor will break that limitation cap and release the coal industry from its previous shackles.
- 3 The idea to create a new port in or around Macuse and a rail line linking the port to a location in Tete was not novel. Mozambique had itself previously considered it and asked the State-owned Directorate of Ports and Railways in Mozambique (“**CFM**”), to investigate whether such a corridor would be feasible. The experts at CFM considered that the siltation and swampland along the Macuse coast made it wholly unsuitable for a port, and Mozambique therefore resigned itself to the fact that its coal industry would continue to be circumscribed by the limits of Mozambican geography, geology, and geoscience. Considering the sheer amount of coal estimated to be under Mozambican soil, and the dire need for coal to satisfy the voracious energy needs around Africa, India, and China, among others, this limitation on Mozambique’s economy, infrastructure, and job creation prospects was beyond unfortunate.

- 4 PEL, an Indian company with years of infrastructure and project expertise, saw the idea that Mozambique had previously considered unfeasible, and industriously turned it into reality.
- 5 Through knowledge gained from pre-existing projects in Mozambique and India, PEL envisioned that this game-changer for the Mozambican coal industry could be unlocked only if a new rail line from the Tete province coal belt area to a new port along the Zambezi coast was built with a larger haulage capacity, as existing haulage capacity of the rail link between Tete and Beira was minimal and insufficient. The new rail line would also be shorter in distance as compared to the existing Beira line, which would result in savings on transportation costs. Mozambique lacked both the port infrastructure and rail transport connections to port infrastructure necessary for the export of significant quantities of coal and other minerals. However, PEL had both the experience and expertise to bring its idea of a rail and port logistics corridor between Macuse and Moatize (the “**Project**”) to fruition.
- 6 In February 2011, Mr Kishan Daga, PEL’s Director of Projects and a witness in this arbitration, met with Mr Paulo Zucula, then the Minister of the Ministry of Transport and Communications (the “**MTC**”), to explore the possibility of investing in Mozambique and, in particular, to present its idea of the Project, which would assist in reducing the infrastructure constraints impeding Mozambique that PEL had identified.
- 7 Despite Minister Zucula’s confirmation that they had already studied such an idea and ruled it out as unfeasible, PEL demonstrated that its concept had real potential, and could substantially benefit Mozambique. In particular, Mr Daga expressed an interest in developing a deep-water port and rail corridor between Tete and Chinde as part of a public-private partnership (“**PPP**”), to facilitate the transport and ultimate export of Mozambican coal and other minerals.
- 8 The Parties agreed that PEL should conduct a preliminary study (the “**Preliminary Study**”) at PEL’s own costs, with assistance from an expert nominated by the MTC. This Preliminary Study assessed 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.¹ It also set out PEL’s recommendations as to the port location and, additionally, detailed specialist studies to be carried out in relation to the proposed port and rail corridor, including detailed engineering, environmental, and economic studies.²

- 9 The Preliminary Study was well received by the MTC, despite Mozambique’s previous assessment that a port in that area of the Zambezia coastline was an impossibility. Minister Zucula agreed that PEL’s concept appeared feasible and viable. Consequently, he agreed that the MTC and PEL should enter into a memorandum of interest (the “**MOI**”) in which PEL would agree – again at its own expense — to compile a prefeasibility study (the “**PFS**”), and in exchange, if the MTC approved the PFS, Mozambique would grant a concession directly to PEL. The PFS would focus on the new port location at Macuse and the connecting railway link from Moatize to Macuse, and form the basic terms and conditions of the concession.
- 10 On 6 May 2011, the Parties entered into the MOI.³ The MOI set out the basis under which PEL would incur millions of dollars to conduct the PFS to implement the Project it had envisaged. In exchange for PEL bringing this concept to the Government, financing it, and completing the PFS to the Government’s full satisfaction, the MTC agreed to grant the Project to PEL, as stated at Clause 2.1 of the MOI through the “*granting of a concession by the [Government] to PEL for the construction and operation of the Project*”⁴ and the offer of “*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*”, which is set out at Clause 2.2.⁵ The MOI likewise provided PEL with exclusivity in relation to the Project (and similar projects that could

¹ **Exhibit C-4**, A Preliminary Study to Assess Potential Port Locations in Zambezia, to Connect the Moatize Coal Mines By Rail, March 2011.

² **Exhibit C-4**, A Preliminary Study to Assess Potential Port Locations in Zambezia, to Connect the Moatize Coal Mines By Rail, March 2011, p. 23.

³ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011.

⁴ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 1.1.

⁵ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 2.2.

compete with PEL's Project concept)⁶ and required confidentiality⁷ to ensure that PEL's idea, which it would spend millions developing, could not be granted to or shared with another contractor.

- 11 Based on the assurances contained in the MOI, PEL proceeded to expend significant investment in terms of money, time, and effort in conducting the PFS and developing the Project concept. PEL was comfortable in doing so because the MOI set out at Clause 6 that if the MTC was satisfied with the studies carried out by PEL and its plans for the Project, PEL's position would be protected in relation to the Project.⁸ 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:

*"MTC also agrees not to give any rights/authorization to any other party for the development/expansion of a port between Chinde and Pebane from imilar objectives, nor for the development/expansion of any rail corridor from Tete to the province of Zambezia within the area referred under objective of the present memorandum."*⁹

- 12 From a commercial perspective, the MOI made sense. PEL had identified the Project that stood to substantially benefit Mozambique, and it was willing to incur significant costs, as well as management time, to determine the feasibility of its concept, with no cost to Mozambique. In exchange for that investment, PEL received, upon approval of the PFS by the MTC, a right to implement the Project through a concession with the Government and the subsequent profits that would flow from that work. It would have flown in the face of commercial reality for PEL to undertake the PFS at its own cost and risk, only then to submit the Project to a public tender, as Mozambique now sustains. Unsurprisingly then, that is not what the Parties agreed in the MOI.
- 13 PEL assembled a team of experts to undertake the necessary research and studies to compile the PFS, who worked fastidiously over the next year so that the PFS would be submitted on schedule to the MTC on 2 May 2012.¹⁰ PEL

⁶ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 6.

⁷ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 11.

⁸ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 6.

⁹ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 6.

¹⁰ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18* dated April 2012 and submitted on 2 May 2012 (the "**Pre-Feasibility Study**").

presented the results of the PFS (the culmination of nearly two years of its investment in the Project) to technical and commercial personnel from at least six of Respondent's organs, including the MTC, CFM (the intended future joint venture partner in the Project), the Ministry of Planning and Development, the Ministry of External Affairs, the Ministry of Mineral Resources and Energy, and the Ministry of Finance. The number of attendees and the representation from a vast group of Ministries evidenced the importance of the Project to the Government, and the fact that the MTC's approval of the PFS would have legal and financial consequences for the Government pursuant to the MOI.

- 14 In the weeks following PEL's presentation of the PFS to the Mozambican delegation, PEL engaged in further detailed technical and commercial discussions with various experts and officials from both the MTC and CFM. It addressed all further queries and provided all additional information requested by Mozambique.¹¹
- 15 After carefully considering the PFS and its implications, the MTC informed PEL on 15 June 2012, "*that the Pre-Feasibility Study submitted by [PEL] was approved.*"¹² The MTC then articulated two requests with a view to granting the concession promised under the MOI. Specifically, MTC asked PEL to: (1) exercise expressly its right of first refusal — in light with the Parties' contractual commitments under the MOI¹³ — and (2) negotiate with the relevant state authority, CFM, to create a project company (the "**Project Company**") to implement the Project.¹⁴ These were the only two requests set out by the MTC to implement the Project at that time (the latter of which was not stated in the MOI).

¹¹ **Exhibit C-8**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 15 May 2012; **Exhibit C-9**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 1 June 2012; **Exhibit C-10**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 11 June 2012.

¹² **Exhibit C-11**, Letter dated 15 June 2012 from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study.

¹³ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 1.1-2.2, MTC granted 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*" and independently, a "*first right of refusal for the implementation of the project.*"

¹⁴ **Exhibit C-11**, Letter dated 15 June 2012 from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study.

- 16 On 18 June 2012, even though it had not seen the terms of the concession yet, PEL expressly exercised its right of first refusal under the MOI,¹⁵ and confirmed it would “*proceed with CFM to incorporate an entity for implementation of the project as directed by you in your letter.*”¹⁶ This now meant that under the MOI, the Government was obligated to grant a concession to PEL, and PEL no longer had any right to refuse it.
- 17 Given that the only two contingencies contained in the MOI for the MTC to award PEL awarded the Project concession (*i.e.*, the Government’s approval of the PFS, and PEL’s waiver of its right of first refusal) had occurred, Mozambique was now obligated to offer the Project concession directly to PEL.
- 18 Rather than honour its end of the bargain, however, the Government began to act in a non-transparent, inconsistent, and disconcerting manner. For example, it refused to comply with PEL’s numerous requests to provide a draft concession agreement. It stalled concession negotiations. Its various Ministries gave PEL inconsistent information or simply ignored PEL’s numerous pleas to move the Project forward altogether.
- 19 From informal sources on the ground, PEL came to understand that the Government might be entertaining the idea of giving PEL’s Project to another company, either through a direct award or a public tender.¹⁷
- 20 Then in January 2013, seven months after the MTC had approved the PFS, the MTC formally revealed its true intentions — to renege on its undertaking to award the concession to PEL as required by the MOI. By letter dated 11 January 2013, the MTC alleged PEL’s “*preferential rights . . . could be materialized through a public tender where [PEL] would benefit from preference if it participated in the tender.*”¹⁸ PEL protested this extraordinary departure from the Parties’ agreement, and beseeched the Government to abide by its commitments in the MOI to award the Project concession to PEL.

¹⁵ **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.

¹⁶ **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.

¹⁷ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 90.

¹⁸ **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.

- 21 The Government ignored PEL’s pleas to comply with the Parties’ bargain. Instead, it distributed a tender notice to interested parties (ostensibly based on PEL’s PFS), inviting them to submit an expression of interest by 8 March 2013 to participate in a public tender for PEL’s Project.¹⁹ The tender requirements seemed designed to exclude PEL from the process. PEL was forced to form a consortium of companies to compete in the public tender process (the “**PGS Consortium**”).
- 22 The PGS Consortium submitted its Expression of Interest for PEL’s own Project to the MTC,²⁰ while stating expressly that its submission was without “*prejudice to the rights Patel is vested in as a result of the MO[I]*.”²¹
- 23 Then unexpectedly, on 18 April 2013, the MTC conducted a *volte face* and informed PEL that the Council of Ministers had decided that it was in the “*national strategic interest*” to grant PEL the Project.²² Beyond complying with the MOI and PEL’s rights to the concession contained therein, this act by the Council of Ministers undeniably constituted an independent act establishing additional rights, which the Government could not subsequently revoke.²³
- 24 Convinced that the Project was back on track as the MOI envisaged, on 23 April 2013 PEL promptly responded in writing to “*formally accept*” Mozambique’s offer to commence negotiations for the concession without holding a public tender.²⁴
- 25 As further indication of its commitment, the MTC requested PEL to provide a bank guarantee for 0.1% of the prospective investment value, to be held until the conclusion of the concession agreement.²⁵ PEL complied with this request on 9 May 2013.²⁶ PEL was reassured that Mozambique now appeared to be committed to comply with its obligations under the MOI. When the MTC

¹⁹ **Exhibit C-24**, Tender Notice entitled “Application of Participants and Fulfillment.”

²⁰ **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.

²¹ **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.

²² **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL, dated 18 April 2013, whereby the MTC invited PEL to commence negotiations for a concession agreement for the Project.

²³ **CER-3**, Expert Legal Opinion of Professor Rui Medeiros, paras 45-46.

²⁴ **Exhibit C-30**, Letter from PEL to the MTC, dated 23 April 2013.

²⁵ **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL, dated 18 April 2013, whereby the MTC invited PEL to commence negotiations for a concession agreement for the Project.

²⁶ **Exhibit C-33**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 9 May 2013, providing a USD 3,115,000 bank guarantee.

promised to provide the draft concession template PEL had been requesting for so long, PEL felt confident that the Project that it had conceived of and financed to date would finally go ahead.²⁷

26 This confidence was not to last. Only four days after PEL provided the guarantee, and a mere one month after the Government decided to abandon the tender in favour of PEL's direct concession, Mozambique once again reversed course. On 13 May 2013, the MTC alleged that, having heard from several unnamed "*stakeholders*" and having reviewed the relevant laws and regulations governing public private partnerships in Mozambique, the Council of Ministers subsequently concluded there was no "*place for direct negotiations with any of the bidders presented in the pre-selection phase*" and that the public tender must proceed.²⁸

27 PEL was astonished. It pleaded with the Government to abide by the distinct rights it had granted PEL under the MOI and Mozambican law.²⁹ This was to no avail.

28 PEL was left with no choice but to continue to participate in the public tender process under protest, even though the MTC was persistently in violation of its obligations. The PGS Consortium submitted its financial and technical proposals as part of the tender process on 27 June 2013.³⁰

29 On 19 July 2013, the MTC announced what PEL had most feared. The Government was going to give away PEL's Project to another contractor. After reviewing the tender results, it became clear to PEL that the tender process was farcical, and aimed to favour a pre-determined winner. The PGS Consortium raised numerous concerns over the MTC's mishandling of the tender process, but the MTC refused to reconsider its position and instead proceeded to confirm its award of the concession for the development of the railway corridor and port to the Italian Thai Development Company ("**ITD**") on 27 August

²⁷ **Exhibit C-32**, Letter from Luis Amândio Chauque of MTC to PEL, dated 24 April 2013, providing a date, time and venue for the meeting to negotiate a concession.

²⁸ **Exhibit C-34**, Letter from Luis Amândio Chauque of MTC to Kishan Daga of PEL, dated 13 May 2013, reversing the MTC's position regarding direct negotiations with PEL.

²⁹ **Exhibit C-35**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 4 June 2013, responding to the MTC's change in position regarding direct negotiations (emphasis in original).

³⁰ **Exhibit C-37**, Letter from Kishan Daga of PEL to the MTC, dated 27 June 2013, attaching the PGS Consortium's Financial and Technical Proposal for the Project.

2013.³¹ The PGS Consortium filed a formal appeal containing numerous grounds for challenging the award to ITD.³² Again, the MTC, refused to change course.

30 Faced with Mozambique's refusal to comply with the terms of the MOI and Mozambican law, PEL sought, at minimum, to be compensated for the considerable expenses it had incurred in carrying out the PFS (which the MTC had accepted and which served to set the parameters for the Project including in the context of the tender). PEL demanded reimbursement for its sunk costs associated with undertaking the PFS and compensation for its identification of the Project, which would result in one of the largest infrastructure projects ever built in Mozambique.³³ Notwithstanding the fact that it had benefitted from the work undertaken by PEL, and that it had unfairly appropriated PEL's concept for itself, the MTC rejected PEL's request for compensation.

31 At the end of the day, therefore, it was PEL and PEL alone that saw the potential for developing the Mozambican coal industry. PEL believed when no one else in Mozambique – not even the experts at CFM or the MTC – did. PEL sunk millions of dollars of its own money, at its own risk, into bringing the idea to fruition. It did so in the legitimate expectation that Mozambique would abide by its contractual commitments and allow PEL to finish what it started. Instead, Respondent appropriated PEL's idea, took advantage of PEL's work, effort, money, and know-how, strung it along for months under the promises it made in the MOI, and undermined its rights at every turn until it finally gave the project to someone else to profit from. By 2025, TML—the project company set up by ITD to develop the Project— expects to make over **\$200 million dollars per year** from the Project.³⁴ Mozambique will have one of the most up to date and modern infrastructure projects in Africa for coal transportation and export, with the prospect of hundreds of millions of dollars of taxes, royalties, and revenues. The coal mining industry in Mozambique will boom. Existing coal miners will increase their production and new coal miners will enter Mozambique bringing additional money, know-how, and

³¹ **Exhibit C-44**, Letter dated 27 August 2013 from the MTC to PEL Consortium confirming its award of the concession to ITD.

³² **Exhibit C-45**, Letter dated 28 August 2013 from Kishan Daga to the MTC contesting the award of the concession to ITD.

³³ **Exhibit C-46**, Letter dated 18 February 2014 from Sal & Caldeira Advogados, LDA on behalf of PEL requesting a response to PEL's request for compensation.

³⁴ This figure is based on the DCF Model adopted by Versant Partners.

jobs. Despite being the inventor and originator of the project, its designer, developer, and financier, PEL on the other hand will be left with absolutely nothing. Not only is that unjust, it is also unlawful, and Mozambique's breaches of the Agreement between the Government of the Republic of India and the Republic of Mozambique for the Reciprocal Promotion and Protection of Investments ("**Treaty**") must result in full compensation to PEL as set out below.

* * * * *

32 This Statement of Claim, together with **Exhibits C-52 to C-195** and Legal Authorities **CLA-11 to CLA-78**, is submitted on behalf of PEL. This Statement of Claim is accompanied by:

- a. the witness statement of Mr Kishan Daga (**CWS-1**) ("**Daga Witness Statement**"), who is Director of Projects at PEL. Mr Daga led PEL's team throughout the Project's initial stages, as well as the negotiations and discussions with the Government concerning the MOI. Mr Daga was also responsible for the completion of the PFS, and he represented the PGS Consortium when PEL was forced to participate under protest in the Government's public tender process;
- b. the witness statement of Mr Ashish Patel (**CWS-2**) ("**Patel Witness Statement**"), currently a fund manager at Novus Capital Partners LLC with expertise in capital markets. Mr Patel undertook a consultancy role for PEL during the relevant time period, focused primarily on the Project's financials. Along with Mr Daga, Mr Patel also signed the MOI on behalf of PEL;
- c. the expert report of Mr Gerald LaPorte (**CER-1**) ("**LaPorte Expert Report**"), a Forensic Chemist and Document Dating Specialist with nearly three decades in the field of forensic science. Mr LaPorte served as the Chief Research Forensic Chemist in the Forensic Services Division of the United States Secret Service, and as the Director in the Office of Investigative and Forensic Science within the United States Department of Justice. Mr LaPorte opines on the authenticity of the English MOI and the Portuguese MOI relied upon by PEL in this arbitration, and raises concerns about the purported English and

Portuguese versions of the MOI put forward by Mozambique in parallel proceedings;

- d. the expert quantum report of Mr Kiran Sequeira and Mr Paul Baez of Versant Partners (**CER-2**) (“**Versant Expert Report**”). The Versant Expert Report assesses the monetary compensation due to PEL as a result of the Government’s breaches of the Treaty on the basis of an *ex-post* DCF assessment. The Versant Report concludes that the damages due to PEL for Mozambique’s breaches of the Treaty equate to USD 115.3 million.
- e. the expert legal opinion of Professor Rui Medeiros (**CER-3**) (“**Medeiros Expert Report**”), a Professor at the Faculty of Law of the Portuguese Catholic University and Partner at the law firm Sérvulo & Associados. The Medeiros Expert Report analyses the legal status of the MOI under Mozambican law, the binding nature of the Parties’ respective commitments in the MOI, and the compatibility of PEL’s right to a direct award of a concession for the Project with the laws governing PPP in Mozambique.

33 This Statement of Claim is structured as follows:

- a. **Section II** sets out the procedural history of this dispute, and exposes Mozambique’s tactical decision to commence ICC arbitration proceedings for purely declaratory relief and in which Mozambique and the MTC seeks a determination from an ICC tribunal as to this Tribunal’s alleged lack of jurisdiction over this dispute;
- b. **Section III** details the key events, documents, and witness testimony relating to the initial studies undertaken by PEL, the Preliminary Study which led to the signing of the MOI, the PFS compiled by PEL in accordance with the MOI, the Government’s failure to comply with its obligations to grant a concession to PEL after approval of the PFS, and the flawed public tender process which the Government undertook in total disregard for its obligations to PEL;
- c. **Section IV** demonstrates that the Tribunal has jurisdiction to determine this dispute;

- d. **Section V** demonstrates Respondent's breaches of the Treaty;
- e. **Section VI** sets out the basis on which the Claimant has assessed and calculated its damages in this arbitration, and the quantum of damages for which the Government must provide compensation; and
- f. **Section VII** contains the Claimant's reservation of rights and relief sought.

II. PROCEDURAL BACKGROUND

34 PEL notified the Republic of an investment dispute between the Parties relating to the Project over two years and four months ago, on 25 June 2018.³⁵ At that time, PEL invited Mozambique to enter into settlement discussions to amicably resolve the dispute, pursuant to Article 9(1) of the Treaty. PEL informed Mozambique that if it failed to engage in good faith, PEL stood ready to “*invoke its right to refer this dispute to international investment arbitration in accordance with Article 9(3) of the Treaty.*”³⁶

35 Protracted negotiations ensued, including after 25 December 2018, when the “cooling-off” period under Article 9 of the Treaty expired. As at that date, PEL was entitled to commence the UNCITRAL Arbitration but the Republic asked for additional time. PEL agreed to this request. But while PEL attempted in good faith to progress the settlement process (often bending over backwards to do so), its efforts were not reciprocated with the same level of commitment. The negotiations accordingly suffered multiple delays at the hands of Mozambique (whether intentionally or otherwise).

36 Critically, not once during the more than two years during which Mozambique had been notified of the existence of an investment dispute under the Treaty, did it suggest that the Parties’ dispute should be resolved pursuant to the ICC arbitration clause in the MOI. Never did Mozambique express that PEL’s lodging of the UNCITRAL Arbitration would be improper.

37 On 20 March 2020, PEL commenced this arbitration, pursuant to Article 9 of the Treaty. In direct retaliation, Mozambique, together with its instrumentality the MTC, commenced an ICC arbitration under the MOI (the “**ICC Arbitration**”).

38 Respondent’s institution of the ICC Arbitration is a procedural tactic aimed at undermining this arbitration. This is obvious from the fact that (1) Respondent’s ICC Request for Arbitration reads as a response to the arguments

³⁵ **Exhibit C-49**, Letter dated 25 June 2018 from Addleshaw Goddard to the Prime Minister of Mozambique, the Ministry of Foreign Affairs and Cooperation and the Investment Promotion Centre.

³⁶ **Exhibit C-49**, Letter dated 25 June 2018 from Addleshaw Goddard to the Prime Minister of Mozambique, the Ministry of Foreign Affairs and Cooperation and the Investment Promotion Centre.

raised by PEL before this Tribunal;³⁷ and (2) Mozambique and the MTC have no genuine claim in the ICC Arbitration,³⁸ but rather seek essentially declaratory relief, including that aimed at depriving *this* Tribunal of jurisdiction over PEL’s investment dispute. For example, Respondent and the MTC request from the ICC tribunal, *inter alia*:

- a. an order “enjoining PEL from proceeding with ... international arbitration initiated by PEL pursuant to the India –MZ BIT. In the alternative, the request [sic] injunction should be granted and remain in place until after this Tribunal finally adjudicates the issues otherwise within its jurisdiction.”;³⁹ and
- b. declarations that:
 - i. “PEL lacks standing and cannot assert any claims under the India –MZ BIT”;
 - ii. “Mozambique and the MTC did not violate the India –MZ BIT in any matter whatsoever”;
 - iii. “PEL is not entitled to any rights, relief or any damages whatsoever, including but not limited to lost profits, consequential and/or incidental damages, under the India-MZ BIT against Mozambique and the MTC.”⁴⁰

39 In an attempt to cover their tracks, Mozambique and the MTC have contended that it was PEL that improperly commenced this arbitration ignoring the arbitration agreement in the MOI,⁴¹ and that the ICC tribunal can also address any Treaty claims.⁴²

40 Respondent is wrong. Clause 10 of the MOI only covers claims arising out of the MOI, not disputes arising out of violations of the Treaty, which contains a separate dispute resolution agreement in its Article 9. The law applicable to the MOI is Mozambique law, not international law. Further, while investment treaty tribunals have routinely held that they have jurisdiction to hear claims

³⁷ **Exhibit C-178**, ICC Request for Arbitration, para 2, which reads “[f]or its part, *PEL contends, inter alia, that on the basis of the six-page MOI...*” Paragraph 3 further provides: “[y]ears after the 2011 MOI, *PEL now contends that Mozambique must pay PEL more than \$100 million in alleged and speculative lost profits...*”

³⁸ **Exhibit C-178**, ICC Request for Arbitration, para. 280.12.

³⁹ **Exhibit C-178**, ICC Request for Arbitration, para 280.7.

⁴⁰ **Exhibit C-178**, ICC Request for Arbitration, para 280.8.

⁴¹ Terms of Appointment, paras. 57-58.

⁴² Terms of Appointment, paras. 57-58.

arising out of breach of contractual obligations where a breach of an umbrella clause was invoked,⁴³ the reverse is not true. Tribunals appointed on the basis of an arbitration agreement contained in a contract have no basis to uphold their jurisdiction under a separate arbitration agreement contained in an investment treaty.

41 However, in light of the real risks of the Parties incurring unnecessary costs and of potentially conflicting awards, just a few days after they had commenced this arbitration, PEL wrote to Mozambique to propose consolidation of the two proceedings. All of PEL's successive reasonable proposals were rejected by Mozambique.

42 For example, on 19 June 2020, and in the spirit of compromise, PEL offered (1) that the two arbitrations be consolidated under either set of arbitration rules (*i.e.*, the ICC Arbitration Rules or the UNCITRAL Arbitration Rules), at Mozambique's election; (2) with this Tribunal presiding over the consolidated arbitration; and (3) that the seat proposed by the Republic in this arbitration, The Hague, The Netherlands, be the seat of the consolidated arbitration.⁴⁴ PEL reiterated its proposal on 14 and then again on 21 July 2020.⁴⁵

43 Mozambique repeatedly rejected this reasonable proposal.⁴⁶ Instead, it sought to push forward an alternative proposal with full knowledge that it would be unacceptable to PEL, namely that all the claims be heard in the ICC Arbitration with a seat in Maputo, Mozambique and that this arbitration be stayed or dismissed.

44 On 22 July 2020, further to the case management conference when the Tribunal encouraged the parties to reach an agreement to consolidate the two proceedings, PEL proposed that the consolidated arbitration be seated in Lisbon, which shares the same language with and has a very similar legal system to that of Mozambique. Mozambique refused this proposal too.

⁴³ See e.g. **CLA-79**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, paras. 46-62.

⁴⁴ **Exhibit C-179**, Letter dated 19 June 2020, from Addleshaw Goddard to Dorsey & Whitney.

⁴⁵ **Exhibit C-180**, Letter dated 14 July 2020 from Addleshaw Goddard to Dorsey & Whitney; **Exhibit C-181**, Letter dated 21 July 2020 from Addleshaw Goddard to Dorsey & Whitney.

⁴⁶ **Exhibit C-182**, Email dated 21 July 2020 from Dorsey & Whitney to Addleshaw Goddard; **Exhibit C-183**, Letter dated 20 July 2020 from Dorsey & Whitney to Addleshaw Goddard; **Exhibit C-184**, Letter dated 21 July 2020 from Dorsey & Whitney to Addleshaw Goddard.

- 45 On 27 July 2020, PEL contacted Respondent again, and offered that the consolidated arbitration be seated in virtually *any* suitable neutral jurisdiction outside Mozambique.⁴⁷ PEL proposed that Respondent suggest *any* such suitable jurisdiction and promised seriously to consider *any* such suggestion.⁴⁸ Mozambique has refused consolidation even on these reasonable grounds.
- 46 Furthermore, despite having exhibited to their Request for Arbitration in the ICC proceedings PEL's Notice of Arbitration in this arbitration⁴⁹ as well as many of PEL's exhibits to its Notice of Arbitration, Mozambique has refused PEL's proposals to agree to any transparency between the two arbitrations.⁵⁰
- 47 Mozambique also made it clear that it expects double standards to be applied in respect of transparency. While Mozambique obviously found it acceptable to disclose PEL's Notice of Arbitration as well as many of its exhibits in the ICC Arbitration, it has complained that PEL, in correspondence in the ICC Arbitration, referred to the fact that this Tribunal encouraged the parties to have constructive discussions on consolidation of the two arbitrations at the case management conference.⁵¹
- 48 At no stage did Mozambique ever explain which confidence it was seeking to protect or for what purpose. With good cause: there is no confidence to protect when PEL and Mozambique are both parties to both sets of proceedings.
- 49 The only conceivable reason why Mozambique is insisting on (a one way only) confidentiality is so that it can present arguments and evidence in the ICC Arbitration that it can withhold from this Tribunal, or vice versa. This type of stratagem has no place in dispute resolution, that requires the disputing parties to act in good faith.

⁴⁷ **Exhibit C-185**, Email dated 27 July 2020 from Addleshaw Goddard to Dorsey & Whitney LLP.

⁴⁸ **Exhibit C-185**, Email dated 27 July 2020 from Addleshaw Goddard to Dorsey & Whitney LLP.

⁴⁹ Notice of Arbitration dated 20 March 2020.

⁵⁰ **Exhibit C-186**, Email dated 20 July 2020 from Addleshaw Goddard to Dorsey & Whitney; **Exhibit C-187**, Exchange of emails dated 3 August 2020 between Addleshaw Goddard and Dorsey & Whitney.

⁵¹ **Exhibit C-188**, Letter dated 7 August 2020 from Dorsey & Whitney to the Secretariat of the ICC Court.

III. FACTUAL BACKGROUND

A. *PEL Conceived of the Project That Mozambique Considered Impossible and Invested in Mozambique to Implement It*

1. PEL Has Significant Experience in Infrastructure Projects in India and Overseas

50 PEL is a highly experienced infrastructure and construction services company with more than 70 years of expertise. It is recognised as a leader in the industry for its strength in traditional construction, cutting-edge technologies, delivery systems, and vast industry experience. PEL has significant experience working for governments and commercial customers, with an emphasis on projects that “grow local economies and improve the quality of life for communities and people around the world.”⁵² In particular, it has developed noteworthy expertise in and a reputation for running large-scale infrastructure projects.

51 PEL has successfully completed more than 250 major projects globally, and has participated in multi-million dollar projects in numerous countries. It has expertise in several different types of infrastructure projects, including in the power, civil construction, and transportation sectors. As PEL described itself in a 2013 proposal to Mozambique:

“Patel Engineering Limited (PEL), the flagship company of Patel Group, is one of the leading private sector companies in the infrastructure industry in India engaged primarily in the business of civil engineering and construction of:

- *Hydro-power projects, including dams, tunnels, power houses, barrages etc;*
- *Irrigation and water supply projects; and*
- *Transportation projects, including roads, railways, bridges and tunnels.”*⁵³

52 In recent years alone, PEL has been responsible for:

⁵² 2014, *Patel Engineering: Company Overview*, Patel Engineering Limited, viewed 30 October 2020, <<https://www.pateleng.com/company-overview.php#.X46eqNVKios>>.

⁵³ **Exhibit C-190**, “Executive Summary” of the Technical Proposal, p. 390.

- a. the completion of a single rail line tunnel at Berdewaai for Konkan Railway in India;
 - b. the construction of a four lane highway project in Varanasi in India; and
 - c. the construction of a submarine assembly workshop in India.
2. PEL Explored and Identified Potential Development Projects in Mozambique

53 Prior to identifying the Project which is the subject-matter of this arbitration, PEL had explored a few other potential projects in Mozambique. In particular, in 2008, PEL had investigated the potential for coal mine concessions in Mozambique to export coal for a thermal power station in India, which was one of PEL's projects at that time. In addition, it had obtained an exploration licence from the Ministry of Mineral Resources and Energy in Mozambique. When carrying out the work pursuant to that licence, PEL had found marble deposits but, unfortunately, these deposits were not commercially viable. Accordingly, PEL returned its exploration licence, but nevertheless remained interested in exploring other opportunities in Mozambique.

54 During the course of its exploration work in relation to tantalite and marble, it became clear to PEL that Mozambique is rich in mineral resources, especially coal, tantalite and marble, and that a significant demand existed for coal externally, especially from China and India. As PEL described in 2013:

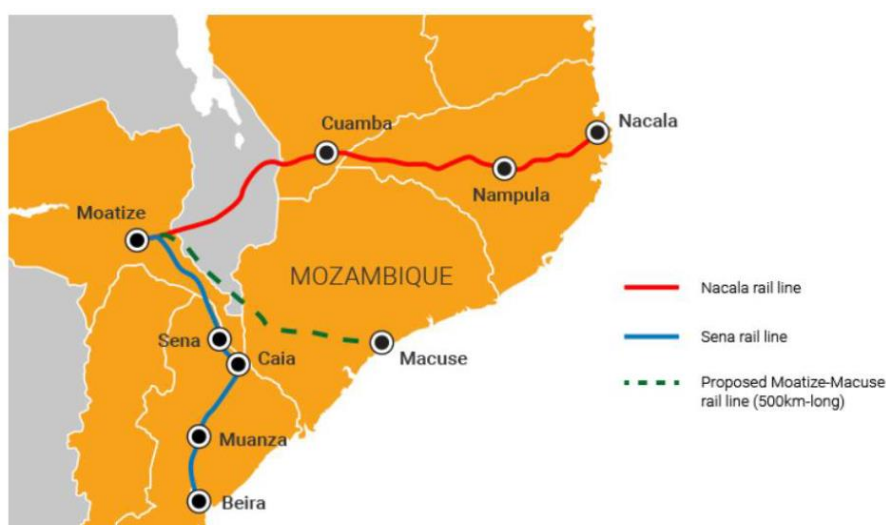
“In terms of geography, Mozambique enjoys a privileged and strategic location as the natural gateway to markets for its landlocked neighbours, in particular Zimbabwe, Zambia, and Malawi. The central and northern regions transport infrastructure extends from the Port of Beira to Zimbabwe, Malawi a [sic], Zambia and marginally to DRC and through the Port of Nacala to Malawi and marginally to Zambia. The southern transport network links the Port of Maputo to the north eastern part of South Africa, Swaziland, Zimbabwe and marginally, Zambia and Botswana. This puts Mozambique in one of the most coveted positions in terms of its strategic location as it is one of the most important gateways for the landlocked countries of South Africa, Swaziland, Zimbabwe, Zambia and Malawi. Zimbabwe, Zambia, and Malawi are also blessed with huge amounts of natural resources, but

collectively share the challenge of the limited availability of transport logistics infrastructure in order to access international markets in order to capitalize on these natural resources. It also helps Mozambique that holds an important position in the geopolitical scenario in the region and the world. This natural heritage augurs well for the economic and geopolitical relations development of the country."⁵⁴

55 It equally became clear that Mozambique lacked both the port infrastructure and the rail transport connections to that port infrastructure that would be necessary for the export of significant quantities of coal and other minerals.

56 As a result, PEL undertook some initial research in relation to the transportation of coal by rail to port for international export. In conducting that research, PEL instructed Dr Satya Pudukollu, a former geology professor at the Eduardo Mondlane University in Maputo. Dr Pudukollu was an expert in geology and had in-depth knowledge of Mozambique's natural resources.⁵⁵ Accordingly, his expert advice greatly assisted PEL.⁵⁶

57 Following that initial research and with Dr Pudukollu's assistance, PEL considered that the export of coal and other minerals could be conducted 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. Building a new port at Macuse and developing a rail corridor would enable the rapid and economical export of large quantities of coal and other minerals that Mozambique was struggling to achieve at that time. While the Project would be the largest PEL had ever



54 **Exhibit C-190**, "Executive Summary" of the Technical Proposal, p. 374.

55 **Exhibit C-54**, Pudukollu, S. Curriculum Vitae.

56 **CWS-1**, Witness Statement of Mr Kishan Daga, para. 11.

undertaken, it had the infrastructure expertise and experience to bring such a concept to fruition, especially in conjunction with suitable partners where needed.⁵⁷

58 Prior to presenting its concept to the Government, PEL met with a number of individuals who were familiar with the issues relating to the exploration and transportation of minerals – in particular, coal – in Mozambique. For example, Mr Daga met with Mr Rui Fonseca, a well-regarded former chairman of CFM. Mr Fonseca initially considered that PEL’s proposal would not be feasible. However, after some discussion, Mr Fonseca agreed with Mr Daga that the concept had potential to be viable and, if it could be done, it would be of significant benefit to the country.⁵⁸

59 Similarly, Mr Daga met with the manager of Maputo Port to discuss PEL’s concept. Again, the initial reaction to PEL’s idea was one of scepticism. Further, the manager believed that, even assuming that such a project would be feasible, it should be run exclusively by the private sector. Accordingly, Mr Daga explained both why the Project would need state participation and the benefits that PEL’s proposal could bring to Mozambique.⁵⁹

60 As soon as PEL’s concept started to take shape, it was clear to PEL that any such project would need to be undertaken on a PPP basis. After all, Mozambique’s participation would be required to ensure that the Project would go as smoothly and as efficiently as possible.⁶⁰

61 PEL anticipated that a new port would contribute significantly to the economic development of the central region of Mozambique in particular, as well as the country as a whole, through the creation of employment and the generation of transport for significant exports. PEL described in 2013 the benefits that the new port and rail corridor was expected to bring to the country:

“- enable the development of coal mining activities in Mozambique to be maximized – 50 million tons per annum of exports and c. 8,000 jobs;

⁵⁷ CWS-1, Witness Statement of Mr Kishan Daga, para. 17. See also, CWS-2, Witness Statement of Mr Ashish Patel, para. 13.

⁵⁸ CWS-1, Witness Statement of Mr Kishan Daga, para. 15.

⁵⁹ CWS-1, Witness Statement of Mr Kishan Daga, para. 14.

⁶⁰ CWS-1, Witness Statement of Mr Kishan Daga, para. 21.

- provide a backbone set of infrastructure through which additional economic growth can take root, both in Mozambique and in Mozambique's its' [sic] landlocked neighbouring countries – not quantified;

- result in the direct creating of employment in the Project during the construction and operation of the Project – c. 2,500 jobs;

- result in the indirect creation of employment in new industries that are able to be developed due to their [sic] being appropriate infrastructure in place to provide a route to market, such as – c. 7.500 jobs;

- agricultural production;

- commerce and industry in support of mining, port and rail activities;

- general economic activity through the creation of a route to market;

- result in significant foreign exchange inflows to Mozambique by unlocking the economic potential in the region – not quantified.”⁶¹

62 In addition, Mozambique stood to gain hundreds of millions of dollars in tax revenue as a result of the Project.⁶²

63 From its growing familiarity with Mozambique, PEL considered that its concept was in line with Mozambique's stated objectives. Mozambique was increasingly focused on revenue generating projects, as there was at the time a “growing perception that the country's mineral resources [could] become a game changer if anchored in the right policies and supported by public and private investments in infrastructure.”⁶³ For example, at a ‘brainstorming event’ in March 2012, held by the World Bank country director for Mozambique, Laurence Clarke, and attended by the Minister for Planning and Development, Aiuba Cuereneia, and the Minister of Transport and Communication, Paulo Zucula, it was agreed that Mozambique needed “to

⁶¹ **Exhibit C-190**, “Executive Summary” of the Technical Proposal, p. 378.

⁶² **CWS-1**, Witness Statement of Mr Kishan Daga, para. 64; **CWS-2**, Witness Statement of Mr Ashish Patel, para. 16; and **Exhibit C-191**, Port Rail Report, Part 1, provided with the Pre-Feasibility Report, p. 108.

⁶³ 8 March 2012, *Tackling the Infrastructure Deficit in Mozambique*, World Bank, viewed 30 October 2020, <<https://www.worldbank.org/en/news/feature/2012/03/08/tackling-the-infrastructure-deficit-in-mozambique>>.

maximise infrastructure investments such as the existing special economic zones, as well as the favourable legal framework for the development of public and private partnerships to tackle infrastructure deficit.”⁶⁴

3. PEL Put Together a Team of Experts to Strengthen Its Idea

64 PEL assembled a team of experts to develop its port and rail concept. PEL’s team was led by Mr Daga, Director of Projects at PEL. Mr Daga’s role includes assessing overseas opportunities and the viability of those opportunities for PEL.⁶⁵ PEL conducted initial research into potential port locations in the Zambezi area and the potential viability of its concept. In doing so, PEL assembled a strong team with geological, local, and financial expertise:

- a. Mr Daga;
- b. Dr Satya N. Pudukollu, a specialist in applied geology who also had extensive experience compiling technical reports;
- c. Mr Ashish Patel, formerly Director and Head of the Financial Institutions Group at Merrill Lynch Australia, who worked on project financials and fundraising on a consultancy basis;
- d. Dr Sudhakar and Dr Malapur, geologists employed by PEL who had been sent to Mozambique in 2009 and were based there until 2015;
- e. Mr Bantwal Subraya Prabhu, from Aries Consulting LDA, who was PEL’s accountant in Mozambique and a Portuguese speaker;
- f. Batchubhai Munim & Co Solicitors, PEL’s Indian counsel;
- g. Sal & Caldeira Advogados, PEL’s legal counsel in Mozambique; and
- h. SPI, a local company that helped to connect PEL to relevant individuals and entities in Mozambique and provided advice on logistics on the ground.

65 PEL conducted some desktop studies into the viability of PEL’s concept before reaching out to the relevant Government authorities in Mozambique. By late

⁶⁴ 8 March 2012, Tackling the Infrastructure Deficit in Mozambique, World Bank, viewed 30 October 2020, <<https://www.worldbank.org/en/news/feature/2012/03/08/tackling-the-infrastructure-deficit-in-mozambique>>.

⁶⁵ CWS-1, Witness Statement of Mr Kishan Daga, para. 8.

2010, PEL was confident that its concept for a port and railway development for the transportation and export of coal and other minerals had real prospects.

66 PEL also met with funding agencies in India and elsewhere, to assess whether potential investors might be interested in PEL's idea. The general response was positive, although it was well understood that investors would be more committed to any project once a detailed project report ("DPR") had been completed.⁶⁶

67 Having established that the concept appeared technically, financially, and commercially viable, and that the Project was of interest to investors, PEL then sought to reach out to the relevant authorities and decision-makers within Mozambique.⁶⁷

4. Mozambique Indicated that It Had Previously Considered Such a Port to Be Impossible But Nevertheless Showed Support for the Project If It Could Be Proven to Work

(a) The MTC Expressed Interest in the Project and Explained It Had Previously Considered It Impossible

68 In February 2011, PEL submitted an expression of interest to the Ministry of Planning and Development ("MPD") and the MTC:

*"[w]e would [like] to take this opportunity to convey you our sincere desire to participate in the development of infrastructure projects in Republic of Mozambique...We would be interested in participation in development of Rail Corridor from Tete to Chinde...We would like to participate in projects on BOO (Build, Own and Operate) model of working on PPP (Public Private Partnership) basis."*⁶⁸

69 PEL's expression of interest led to a meeting between PEL and the Minister for Planning and Development at that time, Mr Aiuba Cuereneia. Minister Cuereneia suggested that MTC, Minister Zucula, would be better placed to

⁶⁶ CWS-1, Witness Statement of Mr Kishan Daga, para. 19.

⁶⁷ CWS-1, Witness Statement of Mr Kishan Daga, para. 21.

⁶⁸ **Exhibit C-55**, Letter dated 17 February 2011 from PEL to Ministry of Planning and Development, regarding "Expression of Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde"; **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."

assess PEL's proposal. Accordingly, Minister Cuereneia called Minister Zucula, who agreed to meet with PEL the next day.⁶⁹

70 The following day, Mr Daga and Mr Prabhu met with Minister Zucula. The purpose of the meeting was to set out PEL's concept, to explore the possibility of PEL investing in Mozambique via this Project and to explain to Mozambique the infrastructure challenges PEL had identified as holding the country back. PEL explained to Minister Zucula the proposal to construct a port along the Quelimane coast in Zambezia province – between Quelimane and Chinde. PEL described how the port in operation at Beira was over 600km from the coal mining area and lacked the capacity to store sufficiently large quantities of coal. A port along the Zambezi coast would be closer and would represent significant savings in terms of transportation costs.⁷⁰

71 During the course of that first meeting with Minister Zucula, he indicated his understanding that, according to CFM, a port in PEL's proposed location would not be feasible because of the geological conditions in the area surrounding the potential port site.⁷¹ In other words, Mozambique already had considered a project such as this, but had determined it to be impossible.

72 However, Mr Daga informed Minister Zucula that PEL's initial studies demonstrated real potential for development, and that a port along the Quelimane coast was feasible and would be of great benefit to Mozambique.⁷² Given that this was PEL's concept – as opposed to PEL responding to a tender process – and given that CFM had previously considered that a port was not possible in the relevant area, PEL suspected that, despite the initial research which it had carried out already, a preliminary study would give Minister Zucula an important level of comfort before proceeding further.⁷³ It was therefore agreed that PEL would put together an initial study to demonstrate the Project's potential.

⁶⁹ CWS-1, Witness Statement of Mr Kishan Daga, para. 21.

⁷⁰ CWS-1, Witness Statement of Mr Kishan Daga, para. 22; and CWS-2, Witness Statement of Mr Ashish Patel, para. 24. This was an estimate on the basis that the proposed route would be 100km shorter than the route from Beira. The transportation rate for coal was 5 cents per metric ton per kilometre.

⁷¹ CWS-1, Witness Statement of Mr Kishan Daga, para. 24; and CWS-2, Witness Statement of Mr Ashish Patel, para. 25.

⁷² CWS-1, Witness Statement of Mr Kishan Daga, para. 33; and CWS-2, Witness Statement of Mr Ashish Patel, para. 26.

⁷³ CWS-1, Witness Statement of Mr Kishan Daga, para. 26; and CWS-2, Witness Statement of Mr Ashish Patel, para. 26.

- 73 Minister Zucula was keen for PEL to undertake a preliminary study, as he considered that this would reduce the likelihood of either PEL or Mozambique wasting time and money. He also made it clear that if PEL was prepared to undertake the Preliminary Study at its own cost, he would assign an expert in oceanography from the MTC to assist. As a result, he asked Dr Isaias Muhate, an expert in oceanography from the MTC, to join the remainder of the meeting.⁷⁴
- 74 Minister Zucula likewise was clear that if the Preliminary Study indicated that PEL's Project was feasible, the MTC would enter into a MOI with PEL, which would provide for PEL to undertake a pre-feasibility study which, if approved by the Government, would result in the Government granting a concession for the Project to PEL. This was very important to PEL, as it provided PEL with the comfort it needed to ensure that it would benefit from the Project's ultimate implementation.⁷⁵
- 75 Minister Zucula appeared very interested in the Project and seemed to appreciate the many benefits it could bring to Mozambique.⁷⁶ He explained, however, that 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.⁷⁷
- 76 PEL immediately produced the written request, which set out PEL's interest in developing the Project as follows:⁷⁸

“We would be interested in participation in development of Rail Corridor from Tete to Chinde. We would like to mention the following in regard to the project.

⁷⁴ CWS-1, Witness Statement of Mr Kishan Daga, para. 28; and CWS-2, Witness Statement of Mr Ashish Patel, para. 29.

⁷⁵ CWS-1, Witness Statement of Mr Kishan Daga, para. 26; and CWS-2, Witness Statement of Mr Ashish Patel, paras. 32 and 35.

⁷⁶ CWS-1, Witness Statement of Mr Kishan Daga, para. 23; and CWS-2, Witness Statement of Mr Ashish Patel, para. 32.

⁷⁷ CWS-1, Witness Statement of Mr Kishan Daga, para. 25.

⁷⁸ 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.*” See also, CWS-1, Witness Statement of Mr Kishan Daga, para 23.

1. *Coal mining work wholly depends upon the efficient evacuation method of coal from mine to port for taking out for export.*
2. *Railway is one of the most efficient modes of bulk transportation for the commodities like coal.*
3. *Along with the rail corridor it has to synchronise with the equivalent capacity of port to optimum evacuation of coal from the country.*
4. *Our objective for the project is to provide a[n] efficient and reliable mode of evacuation system to coal mining industry so that the industry can optimise their mining activity for extraction of coal for export without having any fear in their mind about the non availability of evacuation system.*
5. *This will give a boost to mining industry as well as to country's economy. This will also create job opportunities for the local residents in nearby areas of mine, regional development, and act as an anchor point for the economy.*⁷⁹

77 That evening, Mr. Daga and Ashish Patel met with the oceanography expert Dr Muhate, and with Mr Jafar Ruby, a senior maritime transport specialist from the MTC. In addition to further discussing PEL's concept, the parties agreed on terms such as hourly rates and expected timeframes for the completion of the Preliminary Study.⁸⁰

(b) The MTC Actively Participated in the Preliminary Study

78 Following the Government's positive reaction to PEL's proposal, and as agreed with Minister Zucula, PEL undertook the Preliminary Study in partnership with the MTC. In doing so, PEL pulled together a team of experts to ensure that the Preliminary Study would be considered and comprehensive. The team was comprised of:

- a. Mr Daga;

⁷⁹ **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.*"

⁸⁰ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 28.

- b. Dr Pudukollu;
- c. Dr Sudhakar and Dr Malapur;
- d. Ashish Patel;
- e. Mr Prabhu;
- f. Sal & Caldeira Advogados; and
- g. SPI.

79 Putting together the Preliminary Study involved managing and analysing different work streams, in particular, oceanography analyses, tidal data, and cargo ship navigation routes in the potential port locations. In addition, the Preliminary Study addressed recommended railway routes from the coal mines to the potential port locations.⁸¹

80 The Preliminary Study assessed 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. The March 2011 Preliminary Study stated its purpose as follows:

“This report presents the results of the assessment made both in a desk study and in the field, in March 2011, by Dr. Isaias Muhate and Eng. Jafar Ruby both from the MTC, in the coastal area of the Zambeze Province, aiming to find an adequate site for Port infrastructure development for deep water navigation which could potentially be connected to the Moatize coal mining region via railway.”⁸²

81 Once PEL had completed the Preliminary Study, PEL presented its analysis and conclusions to Minister Zucula and the MTC, along with Dr Muhate and Mr Ruby.⁸³ In light of its findings, the Preliminary Study recommended Macuse as the first preference for the port’s location, with Deia as a secondary option:

⁸¹ **Exhibit C-4**, Muhate. I and Ruby. J, *A Preliminary Study to Assess Potential Port Locations in Zambezia, to Connect the Moatize Coal Mines By Rail*, March 2011, p22.

⁸² **Exhibit C-4**, Muhate. I and Ruby. J, *A Preliminary Study to Assess Potential Port Locations in Zambezia, to Connect the Moatize Coal Mines By Rail*, March 2011, pp1-2.

⁸³ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 32.

*“The Macuse Port as it is at present, seems to be in a better condition to hold a port infrastructure development program for establishing coal transportation and export facilities, provided that the transport modes are: **Rail – Onshore Terminal – Barging – Offshore Terminal.**”⁸⁴*

82 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:

“The study recommends that Terms of Reference for further and detailed investigations be undertaken to cover the following (but not limited) subjects:

- *Detailed hydrographic/bathymetric surveys to the port sites, especially to their bar regions.*
- *Detailed investigation of the bathymetry, sediment dynamics, and physical-environmental studies (tides, currents, winds, wind waves, erosion processes in the coastal areas and along the proposed Rail Routes).*
- *Detailed engineering studies to confirm the proposed Rail Routes and coal terminal area, and determine the technical aspects of its establishment taking into consideration the existing and planned corridors, i.e. Sena/Zambezi and Mutuali corridors.*
- *Detailed studies to determine the best and economically/environmentally feasible transport mode from Moatize to the Oceanic Vessel.*
- *Detailed studies to determine the size and type of vessels adequate to demand the port, as well as those eventually for barging.*
- *Assessment of the impacts of the development of rail way and navigation on the concerned regions.”⁸⁵*

83 PEL proposed the development of a new port at Macuse and a connecting railway link from Moatize to Macuse (*i.e.*, the Project).

⁸⁴ **Exhibit C-4**, Muhate. I and Ruby. J, *A Preliminary Study to Assess Potential Port Locations in Zambezia, to Connect the Moatize Coal Mines By Rail*, March 2011, p22 (emphasis added).

⁸⁵ **Exhibit C-4**, Muhate. I and Ruby. J, *A Preliminary Study to Assess Potential Port Locations in Zambezia, to Connect the Moatize Coal Mines By Rail*, March 2011, p23.

84 PEL's Preliminary Study was well received by the MTC. Minister Zucula asked a number of technical questions about the analysis in the Preliminary Study.

85 In line with the Parties' prior discussions, Minister Zucula confirmed that the next step would be for PEL and the Government to enter into an MOI concerning PEL's undertaking of a pre-feasibility study, which, if approved by the Government, would result in the Government granting a concession to PEL to implement the Project.⁸⁶

86 As set out in witness testimony of Ashish Patel, the Parties agreed that PEL would undertake the PFS at its own costs and if approved, PEL would be granted an exclusive right to implement the Project through a concession granted by the Government:

"After we presented the Preliminary Study, it seemed to me that Minister Zucula was enthusiastic about the Project, and wished to formalize the parties' rights and obligations for carrying it out. He suggested that PEL and the MTC should enter into an agreement to set out parameters for the Project. As I recall, the concept articulated was that PEL would need to undertake a PFS at its own cost, and then, if the MTC approved of the PFS, PEL would get a concession to carry out the Project. This made sense to me, as PEL would not want to spend substantial time and money putting together a PFS without some sort of guarantee that it would then have an exclusive right over the Project. The PEL team viewed this proposal positively and looked forward to undertaking the PFS so that we could start monetizing the Project as soon as possible."⁸⁷

B. The Government and PEL Formalised Their Relationship and Respective Commitments by Entering into the MOI

87 The MTC and PEL started negotiating the MOI, with PEL producing the first draft in late March 2011.

88 PEL had substantial experience working with governments and ministries. That is why the clear commitments of Mozambique as set out in the MOI were

⁸⁶ CWS-1, Witness Statement of Mr Kishan Daga, para. 33; and CWS-2, Witness Statement of Mr Ashish Patel, para. 35.

⁸⁷ CWS-2, Witness Statement of Mr Ashish Patel, para. 32.

so important to PEL. They provided it with the necessary comfort that Mozambique both was committed to the Project, and committed to partnering with PEL as the originator and the instigator of the Project.

89 Mozambique, through the MTC, made key assurances and representations to PEL that 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*”⁸⁸ formed the basis of PEL’s legitimate expectations when investing in Mozambique.⁸⁹

90 The MOI contained numerous key provisions. 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,*” that “*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,*”⁹⁰ and Respondent’s assurance to provide PEL with exclusivity in relation to the Project and any similar projects⁹¹ — were key to inducing PEL’s investment in Mozambique.

1. The Parties Made Significant Commitments in the MOI

91 The MOI recitals record Mozambique’s intention to develop the Project, PEL’s pivotal role in implementing it, and the partnership struck between PEL on the one hand, and Respondent on the other:

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

⁸⁸ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, p6.

⁸⁹ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 40.

⁹⁰ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 2.1-2.2 (emphasis added).

⁹¹ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 6.

- 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 by forming a JV with the Govt. of Mozambique on a Build Operate and Transfer (BOT) basis.*
- e. *PEL shall provide assistance in the successful construction and commissioning of said project to facilitate successful transport system on Public Private Partnership mode.*
- 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.”⁹²*

92 The MOI recitals set the stage for the commitments that follow in the body of the MOI, illustrating that: (1) the Project will be carried out as a joint venture between Mozambique and PEL; (2) PEL will undertake the initial cost and expense of the PFS; and (3) it is PEL who shall construct and commission the Project on the basis of a public private partnership with the MTC.

93 Clause 3 of the MOI — ‘Period to Complete the Study’ — requires that PEL carry out and complete a PFS within 12 months of signing the MOI.⁹³ Pursuant to Clause 4 — ‘Cost to Conduct the Study’ — the Parties agreed that the costs associated with the PFS “*shall be entirely borne by PEL.*”⁹⁴ A PFS for this type of project is always a large undertaking, comprising a lengthy and costly exercise. It is designed to provide detailed analysis of the viability of a project from a technical perspective, as well as an overview of the financial viability of a project.⁹⁵

⁹² **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, recitals a-e (emphasis added).

⁹³ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 3.

⁹⁴ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 4 (emphasis added).

⁹⁵ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 51.

94 In exchange for PEL’s identification of and investment in the Project, Mozambique committed to award PEL a concession for the Project it had envisaged. Thus, Clause 1 of the MOI — ‘Objective’⁹⁶ — explains that the purpose of undertaking the PFS was to define the basic terms and conditions for the project concession that Mozambique would grant to PEL to construct and operate the Project:

*“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 Zambezia 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.”*⁹⁷

95 Clause 2 of the MOI — ‘Pre-Feasibility Study’⁹⁸ — explains that PEL is obligated to carry out the PFS to further assess the port site and rail route. Clause 2.1 provides that once (and if) the PFS is approved by the MTC, the *“Govt. of Mozambique shall issue a concession of the project in favour of PEL.”* The granting of the concession upon approval of the PFS was fundamental to PEL, and the MTC knew and understood this. It would have made little sense for PEL to incur the cost of a PFS for the Project, which it had devised, without any guarantee to be able to develop the Project should it be feasible.

96 Clause 2.2 of the MOI further provides that *“PEL shall have the first right of refusal for the implementation of the project on basis of the concession which will be given by the Government of Mozambique.”*⁹⁹ This right allowed PEL to refuse to implement the Project, for instance, if it turned out that the Project was not technically viable or commercially desirable, or if PEL no longer

⁹⁶ Clause 1 is entitled “Scope” in the Portuguese version of the MOI.

⁹⁷ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; (emphasis added) **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 1.

⁹⁸ Clause 1 is entitled “Scope” in the Portuguese version of the MOI.

⁹⁹ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, dated 6 May 2011, cl. 2.1-2.2 (emphasis added).

wished to invest further in the Project because other projects were more attractive once the concession terms were presented.¹⁰⁰ Only if PEL walked away would the Government be able to offer the concession to a third party. Thus, under the MOI, PEL was awarded a concession for the Project subject only to two contingencies: that the Government approved the PFS, and that PEL waived its right of first refusal. Once those two contingencies were satisfied, Mozambique was absolutely obligated to offer the Project concession directly to PEL.¹⁰¹

97 Further confirming that PEL was the only contender for the development and implementation of the Project, the MOI also contained an exclusivity clause for PEL's benefit. Clause 6 -- 'Exclusivity' -- grants PEL exclusive rights in relation to the Project (and substantially similar projects) both during the time PEL conducted the PFS and thereafter during the term of the concession:

*"During the prefeasibility study and the process of approval for the project, MTC agrees that within the terms of the specific legislation it will not solicit any proposal of study for the objective of the present Memorandum. MTC also agrees not to give any rights/authorization to any other party for the development/expansion of a port between Chinde and Pebane for similar objectives, nor for the development/expansion of any rail corridor from Tete for the province of Zambezia within the area referred to under objective of the present [MOI]."*¹⁰²

98 This further protected PEL's position and underscored Mozambique's commitment to the Project, and to partnering with PEL.

99 Similarly, the parties undertook to *"keep all the data, documents, information, and share between them whether written or otherwise, including this MOI as confidential until the approval of the project."*¹⁰³ As others in the country knew generally that PEL was seeking to develop the Project in some form, it

¹⁰⁰ CWS-1, Witness Statement of Mr Kishan Daga, para. 40.

¹⁰¹ CWS-1, Witness Statement of Mr Kishan Daga, para. 87; See also CER-3, Expert Legal Opinion of Professor Rui Medeiros, paras. 6, 19.1, 19.2, 22.3, 23.4, 25.

¹⁰² Exhibit C-5A, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; Exhibit C-5B, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, at cl. 6.

¹⁰³ Exhibit C-5A, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; Exhibit C-5B, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 11.

was critical that the MOI and the findings and reports PEL shared with the Government were kept strictly confidential.

100 Importantly, there is no mention whatsoever in the MOI of any requirement for a public tender. Indeed, the concept of a public tender would contradict Clauses 1, 2, and 6 of the MOI which collectively demonstrate that Mozambique committed to award PEL the Project concession once the PFS had been approved and PEL had waived its right of first refusal.¹⁰⁴

101 Furthermore, the MOI was reviewed and completed under the supervision of sophisticated lawyers on both sides: SAL & Caldeira Advogados Lda, a prominent Mozambican law firm, for PEL and in-house Government lawyers for Mozambique.

102 Finally, and as a matter of pure commercial logic, PEL only would have committed to complete the PFS at its own costs and invest millions of dollars and dedicated management time to advance the Project if it was assured that the Project and the profits corresponding to it would inure to PEL's benefit in the event the PFS was approved by Mozambique.¹⁰⁵ That was the *quid pro quo* underpinning the MOI.

2. The Memorandum of Interest Was Negotiated, Drafted, and Agreed in English, As The Language Common To Both Parties, and Then Only Translated into Portuguese

103 The first draft of the MOI — which was in English — initially had been put together by PEL. It was then reviewed by PEL's Mozambican legal counsel, Sal & Caldeira, to ensure its conformity with Mozambican law (Sal & Caldeira had recently participated in drafting Law No. 15-2011 (the "**PPP Law**"), which was approved by Parliament on 19 May 2011 and went into force on 10 August

¹⁰⁴ See **CER-3**, Legal Opinion of Professor Rui Medeiros, at para. 12 et seq, especially para. 19 (“*there is nothing to prevent us from considering that, in the MoI, the Parties stipulated an obligation of the MTC to confer direct preference to PEL in the conclusion of the concession contract, if the MTC decided to contract. As we shall see, this is the preferred interpretation.*”) see also Section 4.3 at paras 22.3. (“*if we analyse these contract stipulations, we conclude that once certain conditions have been confirmed — rectius, after approval of the Pre-Feasibility Study carried out by PEL —, the Government of Mozambique shall award the concession of the Project directly to PEL*”) (emphasis in original).

¹⁰⁵ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 40; and **CWS-2**, Witness Statement of Mr Ashish Patel, para. 48.

2011, days after the MOI was executed). The MOI was also reviewed by PEL's accountant, Mr Prabhu.

104 After having consulted with Sal & Caldeira to ensure its draft was in accordance with Mozambican law, PEL proceeded to discuss and negotiate the draft MOI with MTC Minister Zucula. All the drafts were discussed in person and in English, as the only language common between the parties.

105 Once the parties had “reached a common understanding on the English version”,¹⁰⁶ the MOI was translated into Portuguese, as Minister Zucula had indicated that Government entities should sign Portuguese language versions of contracts.¹⁰⁷

106 A first translation of the Portuguese version was prepared, and initial translation issues were ironed out. Then, on 5 May 2011, the day before the MOI was signed, representatives of the parties met to agree on the final Portuguese language in the MTC's office. Specifically, Mr Prabhu and MTC's in-house lawyer, Mr Luis Amândio Chaúque, agreed on certain corrections to be made to the Portuguese translation so that it better reflected the agreed English version. The MTC simply needed to incorporate the corrections to the Portuguese translation and then print both the English version and the Portuguese translation on the MTC's letterhead. Sal & Caldeira then reviewed and signed off on the corrected version of the Portuguese translation. The MOI stated that the English and Portuguese versions were of “equal value.”¹⁰⁸

107 PEL waited all day on 6 May 2011 for Minister Zucula to arrive and sign both the English MOI and the Portuguese version.¹⁰⁹ He was finally ready by early evening, by which time Mr Prabhu – the only Portuguese speaker from PEL's team – had left to attend a different meeting. Mr Chaúque brought both versions of the MOI for signature, printed on the MTC's letterhead. Mr Daga requested confirmation that the execution versions of the English and Portuguese MOI reflected the latest versions of the documents. Minister

¹⁰⁶ CWS-1, Witness Statement of Mr Kishan Daga, para. 38.

¹⁰⁷ CWS-1, Witness Statement of Mr Kishan Daga, para. 38; and CWS-2, Witness Statement of Mr Ashish Patel, para. 34.

¹⁰⁸ Exhibit C-5A, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; Exhibit C-5B, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 12.

¹⁰⁹ CWS-1, Witness Statement of Mr Kishan Daga, paras. 43-44; and CWS-2, Witness Statement of Mr Ashish Patel, para. 38.

Zucula looked to Mr Chaúque to confirm whether the execution versions reflected the latest corrected versions. Mr Chaúque confirmed that this was the case. Comforted by Mr Chaúque's confirmation and by the fact that the MOI stated that the Portuguese version and the English version were of "equal value",¹¹⁰ Mr Daga and Ashish Patel proceeded to sign both versions, as did Minister Zucula.

108 Two originals of the English MOI and two originals of the Portuguese MOI were signed by Mr Daga, Ashish Patel and Minister Zucula, and then franked and stamped.

109 Mr Daga returned to Mumbai with PEL's original copy of the English MOI and the original Portuguese version provided by the Government at the signature meeting, which have remained in his and PEL's custody ever since.

3. The Discrepancies Between the English MOI and the Portuguese Version

110 It has now emerged that the Portuguese translation of the MOI that was presented to Mr Daga and Ashish Patel for signature at the May 6 meeting was not an accurate translation of the agreed English MOI. Consequently, there are certain discrepancies between the English MOI and its Portuguese translation.

111 Clause 2 of the MOI of the English original 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, and the waiver of PEL's right of first refusal, the Government shall issue the Project Concession to PEL:

"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

¹¹⁰ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 12.

*of the project on basis of the concession which will be given by the Government of Mozambique.”*¹¹¹

- 112 The language in bold font in Clause 2.1 is not present in the Portuguese translation of the MOI. Rather, the Portuguese translation of Clause 2.1 states in its entirety: “*A PEL realizará um estudo de pré-viabilidade (EPV), dentro de 12 meses que submeterá ao Governo para a respectiva aprovação.*” Clause 2.1 of the Portuguese translation translates as follows: “*PEL shall conduct a pre-feasibility study (PFS), within 12 months that it will submit to the Government for approval.*”¹¹²
- 113 That the Portuguese version is in error is evident. If Clause 2.1 of the Portuguese translation is correct, it would render redundant Clause 3 in both the original English version and executed Portuguese translation.
- 114 Specifically, Clause 2.1 of the executed Portuguese translation simply states the timeframe in which the PFS should be delivered (*i.e.*, 12 months), and that the PFS should be submitted for approval. However, the timeframe for delivering the PFS is explicitly dealt with in Clause 3, both in the English original and Portuguese translation. This makes them consistent on this point. Moreover, Clause 3 has its own heading “*Period to Complete the Study*”, stating that the PFS is to be delivered within 12 months from the MOI’s execution. To repeat this in Clause 2.1 makes no sense – and unlikely to have been negotiated and agreed in such a form because it renders Clause 3.1 of the Portuguese translation redundant.¹¹³ Parties do not generally intend to state the same thing in two consecutive clauses.

¹¹¹ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, 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.”

¹¹² In contrast, clause 2.2 is identical in both the English original and Portuguese translation. It references, the approval of the PFS, PEL’s right of first refusal, and the implementation of the Project on basis of the concession, which will be given by the Government of Mozambique.

¹¹³ Professor Medeiros opines that these inconsistencies are of no relevance, as the English MOI and its Portuguese translation should be considered as complimentary and part of the contract as a whole. See **CER-3**, Expert Legal Opinion of Professor Rui Medeiros at para. 20.2 (“*there is nothing to prevent the conclusion that either one of the opposing clauses (Clause 2 (1) of the English version and Clause 2 (1) of the Portuguese version) are simultaneously applicable. In fact, since both versions of the MoI ‘have equal value’ (see Clause 12) and taking into account that the clauses in question are not necessarily contradictory in themselves, or unintelligible (or, as we will see, illegal), an interpretation revoking either of them is not justified. On the contrary, the equal value of the English version and the Portuguese version, in a scenario*”).

- 115 Unfortunately, the explanation for this discrepancy is unlikely to be innocent. Ordinarily, this discrepancy could be explained as perhaps lawyers for the Government accidentally using an old version of the Portuguese translation. However, in light of Mozambique’s accusations against PEL of fabrication in the ICC Arbitration and in light of the questionable English MOI relied upon by Mozambique in those proceedings, PEL has serious concerns about the Government’s actions both at the time of signature and currently.¹¹⁴
- 116 PEL would like to give Mozambique the benefit of the doubt, but it is clear that Mozambique now needs to produce its original copies of the English MOI and the Portuguese MOI on which it purports to rely in the ICC Arbitration for examination by PEL’s expert, assuming that Mozambique intends to rely on the same versions of the MOI in this arbitration.¹¹⁵ If, as PEL increasingly suspects based on the initial forensic review of Mr. LaPorte, the Government has now produced a fabricated English MOI to match the incorrect Portuguese MOI, it becomes ever more likely that the Government purposely gave PEL the incorrect Portuguese version in the first place.
- 117 Specifically, Mr LaPorte conducted an expert analysis of the pdf versions of the MOI that Mozambique purports to rely on in the ICC Arbitration, submitted by PEL in this arbitration as Exhibit C-52 (English version) and Exhibit C-53 (Portuguese version). While a more comprehensive analysis could be put forward if Mr LaPorte were able to examine the original version of Exhibit C-52 and Exhibit C-53, his initial findings indicate that there is preliminary evidence that Mozambique’s English version of the MOI (Exhibit C-52) may not be authentic based on the following discrepancies between the English version and the Portuguese translation relied upon by Mozambique in the ICC Arbitration:

where there is no conflict of meaning between the versions, determines that both are in a complementary relationship, and so the clauses that are in one of those versions, but not in the other, are part of the contract considered as a whole”).

¹¹⁴ See **CER-1**, Expert Report of Mr Gerry M. LaPorte, pp. 19-21.

¹¹⁵ This is assumed on the basis that, at the Procedural Hearing on 23 July 2020, counsel for Mozambique indicated that “*there is a question about whether the version of the MOI that was submitted with the RfA [sic] is accurate or not – it is a very strange document, some of the pages are scanned in colour and some of them are scanned in black and white and the pages that are scanned in black and white have different language than the version we have and they fail for the claimant, so we would like, **we think it’s very important to get documents, all the versions of the MOI in their possession to flush that out.***” (Recording of Procedural Hearing, dated 23 July 2020, 01:51:04 – 01:51:40 (emphasis added)). Of course, if Mozambique do not rely on those documents, that in and of itself will also require serious explanation.

- a. firstly, there is a large space following Clause 2 of Exhibit C-52 where additional text could have been added directly thereafter, which indicates that verbiage may have been removed from Clause 2;
- b. secondly, the font size and font type used for the printed text of Exhibit C-52, which seems to be Cambria or a font similar, is different than the font type and font size used on the cover page of Exhibit C-52, which seems to be Arial or a font similar; and
- c. thirdly, the font type and font size used for the printed text on page 1 through 8 of Exhibit C-52 is different than the font type and font size used Exhibit C-53, the Portuguese MOI submitted by Mozambique, Exhibit C-5A, the English MOI submitted by PEL and Exhibit C-5B, the Portuguese MOI submitted by PEL.¹¹⁶

118 Mr LaPorte highlights further discrepancies in relation to Exhibit C-52. These discrepancies are not present in the English MOI or Portuguese translation relied upon by PEL, nor are they present in the Portuguese translation of the MOI relied upon by Mozambique in the ICC Arbitration.¹¹⁷

119 Therefore, if Mozambique maintains its assertion in this Arbitration that the accuracy of Exhibit C-5A and Exhibit C-5B are in doubt, and if Mozambique purports to rely on a separate version of either the English MOI or the Portuguese translation, then PEL puts Mozambique to strict proof to substantiate the provenance of that document, **including through submission of the original signed document for review by Mr LaPorte.**

120 PEL considers that it is important to address and resolve Mozambique's allegations as raised in the ICC Arbitration and as stated by Respondent's counsel in this arbitration because Mozambique's allegations go directly to issues of integrity and honesty.

121 At this stage, PEL only raises its suspicions on the basis of Mr LaPorte's Expert Report, and neither makes any accusations nor requests the Tribunal to make any findings or adverse inferences. However, following Respondent's Statement of Defence, the document production process, and Mr LaPorte's

¹¹⁶ CER-1, Expert Report of Mr Gerry LaPorte, para. 22(b).

¹¹⁷ CER-1, Expert Report of Mr Gerry LaPorte, para. 22.

analysis of Respondent’s original documents, PEL reserves the right to revisit its position.

C. *Mozambique’s Allegations as to the Accuracy of the English MOI as Relied Upon by PEL Are Unsupported*

122 In the ICC Arbitration, Mozambique has alleged that in this arbitration:

- (a) *“PEL relies upon and attaches a purported different, suspect version of the MOI”*;¹¹⁸ and
- (b) *“the English version of the MOI submitted by PEL in the UNCITRAL Arbitration suggests it may have been fabricated. PEL submitted one single PDF of the MOI with the versions in both languages. The first page of the English portion of the MOI is scanned in color and contains initials in blue, including on the page with the Clause 2(1) without the additional language...It is difficult to fathom why PEL would scan portions of the MOI in color and others (the ones with the additional language favouring PEL) in black and white, as part of one single PDF.”*¹¹⁹

123 In the alternative, Mozambique argues that “[a]t the very least, there was not a meeting of minds with respect to the additional language found in the English version submitted by PEL in the UNCITRAL Arbitration and, therefore, the version of the MOI that is proposed by PEL as correct is void ab initio and unenforceable.”¹²⁰

124 While Mozambique has not yet explicitly raised allegations of fabrication in this arbitration, Mozambique has already stated before this Tribunal that:

- a. *“the parties offer different versions of the MOI with conflicting terms, demonstrating a lack of meeting of the minds on material terms. Mozambique’s version is correct”*;¹²¹ and
- b. *“there is a question about whether the version of the MOI that was submitted with the RfA [sic] is accurate or not – it is a very strange*

¹¹⁸ **Exhibit C-178**, ICC Request for Arbitration, para. 46.

¹¹⁹ **Exhibit C-178**, ICC Request for Arbitration, para. 53.

¹²⁰ **Exhibit C-178**, ICC Request for Arbitration, para. 54.

¹²¹ Terms of Appointment, para. 62. *See also CER-3*, Expert Legal Opinion of Professor Rui Medeiros at paragraph 20.2, where Professor Medeiros opines that the English MOI and its Portuguese translations should be read together as complimentary.

*document, some of the pages are scanned in colour and some of them are scanned in black and white and the pages that are scanned in black and white have different language than the version we have and they fail for the claimant, so we would like, **we think it's very important to get documents, all the versions of the MOI in their possession to flush that out.***"¹²²

- 125 Allegations of fabrication are to be taken extremely seriously, as are Mozambique's allegations of inaccuracy.
- 126 PEL has invited Mozambique to withdraw these allegations in the ICC Arbitration,¹²³ but, to date, Mozambique has refused to do so. In light of these statements — and in light of the fact that Mozambique has not yet withdrawn its allegations in the ICC Arbitration — PEL addresses Mozambique's allegations in this arbitration.
- 127 As indicated by the witness evidence of Mr Daga, once the parties had signed the English MOI and the Portuguese translation, each party took an original signed copy of the English MOI and the Portuguese translation for their own records.¹²⁴ PEL was given one signed English original and one signed Portuguese original, and the MTC kept the other signed English original and the other signed Portuguese original. Mr Daga personally flew with the originals back to India, and filed PEL's original copies in the office for safe-keeping, which is his "*usual practice with original copies of key agreements.*"¹²⁵
- 128 PEL's original copies are still in its possession. Exhibit C-5 – which has now been split into Exhibit C-5A (the English MOI) and Exhibit C-5B (the Portuguese translation) – is a pdf copy of those originals.
- 129 In light of Respondent's allegations of fabrication, PEL instructed Mr Gerald LaPorte, a Forensic Chemist and Document Dating Specialist with Riley Welch LaPorte & Associates Forensic Laboratories.¹²⁶ Mr LaPorte has over 27 years of experience in the field of forensic science and is also the Director of Research Innovation at the Global Forensic and Justice Centre at Florida

¹²² Recording of Procedural Hearing, dated 23 July 2020, 01:51:04 – 01:51:40 (emphasis added).

¹²³ **Exhibit C-178**, Answer to the Request for Arbitration, para. 117.

¹²⁴ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 46.

¹²⁵ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 47.

¹²⁶ **CER-1**, Expert Report of Mr Gerald LaPorte, pp. 2-3.

International University. PEL instructed Mr LaPorte to provide independent and objective expert forensic analysis as to the authenticity of PEL's original copies of the MOI (both the English MOI and its Portuguese translation), including but not limited to:

- a. whether the versions of the MOI held by PEL are authentic originals;
- b. whether the versions of the MOI provided by the Republic of Mozambique are authentic; and
- c. whether there is any further investigation needed to ascertain the authenticity of [PEL's] and Mozambique's versions of the MOI.

130 Gerry LaPorte's expert report is submitted with this Statement of Claim as CER-1, and sets out the following clear findings with regards to the original copies in PEL's possession which have been reproduced in this Arbitration at Exhibit C-5A and Exhibit C-5B. In relation to Exhibit C-5A, the English MOI relied upon by PEL:

- a. the handwritten initials and signatures have been executed with writing inks; both Exhibits bear a hand stamp with 'wet' ink; and are franked with a Government of Mozambique seal that has been physically embossed in the document;
- b. there is no evidence to indicate that PEL's English MOI has been altered, forged, or otherwise manipulated;
- c. the machine printed text has been created with an office machine system using toner, such as a laser printer or photocopier, which is consistent with the same printing process used for Exhibit C-5B, the Portuguese MOI submitted by PEL;
- d. the initials and signatures in the names of Kishan Lal Daga, Ashish Patel, and Paulo F. Zucula have been executed with blue ballpoint ink, black ballpoint ink, and black fountain pen ink, respectively, which is consistent with the colours and types of inks used to execute the same corresponding initials and signatures on Exhibit C-5B, the Portuguese MOI submitted by PEL;

- e. the ‘wet’ ink Patel Engineering LTD. stamp on page 6 is consistent with the ‘wet’ ink Patel Engineering LTD. stamp on page 6 of Exhibit C-5B, the Portuguese MOI submitted by PEL;
- f. the Republic of Mozambique seal embossed on page 6 is consistent with the franking and Republic of Mozambique seal on page 6 of Exhibit C-5B, the Portuguese MOI submitted by PEL;
- g. the font used for the text printing is consistent with the font used in Exhibit C-5B, the Portuguese MOI submitted by PEL and Exhibit C-53, the Portuguese MOI submitted by Mozambique; and
- h. there is no evidence of page substitution, text alteration, text addition, or other irregularities that can be found in forged or fraudulent documents.¹²⁷

131 In relation to Exhibit C-5B, PEL’s Portuguese MOI, Mr LaPorte’s expert report sets out the same findings that apply to Exhibit C-5A, as set out in paragraph 130 (a) – (h) above.

132 Gerry LaPorte’s expert report is therefore clear in its conclusions in relation to the English MOI and its Portuguese translation exhibited and relied upon by PEL in this Arbitration: *“it is my expert opinion that Exhibit C-5A and Exhibit C-5B are authentic original documents.”*¹²⁸

133 The Portuguese version of the MOI on which Mozambique relies upon in the ICC Arbitration, Exhibit C-53, appears to be identical to Exhibit C-5B, as confirmed by Mozambique in the ICC Arbitration: *“[t]he Portuguese version submitted by PEL is consistent with the Portuguese version submitted herein by Mozambique.”*¹²⁹ To date, therefore, Mozambique’s allegations only relate to the English MOI on which PEL relies in this arbitration (Exhibit C-5A).

134 PEL hereby offers, under suitable protocol of chain of custody and safekeeping, the originals of its versions of the MOI to Respondent for forensic examination should Respondent so wish and if Respondent provides its own original documents for examination by Mr LaPorte.

¹²⁷ CER-1, Expert Report of Mr Gerald LaPorte, para. 21.

¹²⁸ CER-1, Expert Report of Mr Gerald LaPorte, para. 21.

¹²⁹ Exhibit C-178, Request for Arbitration, para. 47.

D. *PEL Implemented the MOI with Mozambique's Active Participation*

135 Once the MOI was signed, PEL made an active start on the PFS. 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.¹³⁰

136 PEL's team of experts comprised the following:

- a. Mr Daga;
- b. Dr Pudukollu;
- c. Dr Sudhakar and Dr Malapur;
- d. Mr R K Reddy from Aarvee Associates, an engineering consultancy company which conducted the railway link survey in the PFS;
- e. WAPCOS, a consultancy specialising in water and infrastructure projects, which analysed the proposed port in the PFS and did a "*fatal flaw*" analysis of the Project;
- f. Mr Sunderrajan, a marine consultant who helped collate marine data for the viability of the Macuse Port;
- g. Mr Prabhu;
- h. Mr Joe Veira, a chartered accountant who had previously worked for CFM, and who put together certain costs models for the Project, on the basis of his understanding of the cost involved in the transport of coal;
- i. Batchubhai Munim & Co Solicitors;
- j. Sal & Caldeira Advogados; and
- k. SPI.

137 In compiling the PFS, PEL looked at numerous different aspects of the Project, considering:

¹³⁰ CWS-1, Witness Statement of Mr Kishan Daga, para. 30.

- a. the topography of the land along the proposed route of the 500 km rail corridor;
- b. the Zambezia coastline and oceanographic and meteorological data, which involved the entire Zambezia coastline, and in particular the Macuse basin, as well as conducting a wave modulation study, silting patterns in the Macuse basin, tidal conditions in and around the Macuse basin, and annual rainfall in the area; and
- c. the entirety of the disused railway between Quelimane and Mocuba, to assess whether it could be reinstated. Minister Zucula had requested that PEL include this study in the PFS at PEL's cost, as he was interested to learn whether it would be possible to connect Quelimane and Mocuba to the port, in order to export other materials, such as marble and tantalite.¹³¹

138 The PFS needed to cover a wide scope of analyses, in particular:

- a. the methodology for the selection of the route, which involved, *inter alia*, analysing four separate routes, settling on Alignment II;¹³²
- b. a field survey for the entire alignment from Macuze to Moatize and Quelimane to Macuba. This field survey involved interaction with “*various government officials such as District Governor for Transport & Communication at Quelimane, National Director for Transport & Communications at Maputo, various districts chief executives and other government officials and understood the objectives of the Government of Mozambique and the role of M/s PEL in developing this railway line*”;¹³³
- c. an analysis and overview of the design criteria for the railway;¹³⁴

¹³¹ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*.

¹³² **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, p. 22. Alignment II constitutes the railway alignment which “*commences from Moatize and runs parallel to the existing track, connecting Tete-Beira, show in red colour (Fig. 11) as mentioned in alternative. However, in this option, the alignment is away from existing Moatize – Beira line up to Mutarara town near Zambezi river. The rest of the alignment is same as of Alt I up to Port Macuse. This route is planned with one ROR on Malawi Railway and new crossing station on Macuba Railway Line*”, p. 22.

¹³³ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, p. 27.

¹³⁴ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, Section 6.

- d. an analysis and overview of the road crossings;¹³⁵
- e. an overview of the railway track design, rolling stock specifications and tonnage ramp-up profile in order to develop train operating plans and to identify rail infrastructural requirements;¹³⁶
- f. an overview of rolling stock for locomotives and wagons in Mozambique and in other countries;¹³⁷
- g. a consideration of capital cost estimates;¹³⁸
- h. a consideration of operating cost estimates;¹³⁹
- i. an overview of employment generation;¹⁴⁰ and
- j. an analysis of construction risks, maintenance risks and investment and a return on investment risks.¹⁴¹

139 The PFS contained data collated over the course of 12 months, to ensure that the data was as comprehensive as possible.

140 At the same time, PEL explored further whether coal mining companies would be interested in and receptive to PEL's concept, as had also been advised by Minister Zucula.¹⁴² In November 2011, Mr Daga and Ashish Patel met with Jindal Steel and Power Ltd ("JSPL") to explore the possibility of an eventual offtake contract with JSPL and to gauge JSPL's interest in a potential equity participation. Mr Manoj Gupta, who was JSPL's Head of Operations in Mozambique, was very interested and asked to be kept informed of developments. As Mr Daga recorded in a follow-up letter to Mr Gupta: "[w]e were told during our discussion that you will discuss our proposal with your

¹³⁵ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, Section 6.4 pp. 60-63.

¹³⁶ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, Section 7.3 pp. 73-80.

¹³⁷ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, Section 7.3 pp. 73-80.

¹³⁸ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, Section 9.

¹³⁹ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, Section 9.

¹⁴⁰ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, Section 10.2(C).

¹⁴¹ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, Section 10.

¹⁴² **CWS-1**, Witness Statement of Mr Kishan Daga, para. 56.

*head-quarters and will revert back to us on the proposed association in this project.”*¹⁴³

141 Mr Daga and Ashish Patel also met with Rio Tinto around the same time. Rio Tinto indicated that it too would be interested once the concession was granted to PEL. Mr Daga recorded in a letter to Rio Tinto: “*We draw your attention to the meeting held on 23rd Nov, 2011 at Maputo...When this project was envisaged and discussed with the Government of Mozambique, **both the parties agreed to execute this project on PPP/BOT model. This project will give a major thrust to the mining industry in the region and will enhance the economic growth of the country.***”¹⁴⁴

142 Things appeared to be going well and PEL was buoyed to learn at the end of 2011, that the Prime Minister of Mozambique, during a religious dinner at the Presidential Palace, made it known that he was following the progress of the Project: “[*t]hen interestingly he mentioned about an Indian Company (did not mention the name) which has started the pre feasibility study of a railway line from Tete province to a new port in Macuse in Zambezia province and it would take some time before they can lay the railway line, build the port and the coal starts moving out through this port.*”¹⁴⁵

143 In early 2012, PEL followed up with JSPL and Rio Tinto, after meeting with them in November 2011, to ascertain their potential interest in the Project. In February 2012, PEL wrote to both companies to update them on the Project’s development.¹⁴⁶

144 In response – and to PEL’s surprise – Rio Tinto indicated, in a letter dated 21 February 2012 that it had “*presented a proposal to the Government following the prescribed process for project submissions.*”¹⁴⁷

145 When Kishan Daga raised this with Minister Zucula, he denied categorically that the MTC was in discussions with Rio Tinto and acknowledged that such

¹⁴³ **Exhibit C-58**, Letter dated 15 February 2012 from PEL to JSPL.

¹⁴⁴ **Exhibit C-57**, Letter dated 14 February 2012 from PEL to Rio Tinto (emphasis in original).

¹⁴⁵ **Exhibit C-56**, Email dated 24 December 2011 from S Prabhu to Kishan Daga.

¹⁴⁶ **Exhibit C-57**, Letter dated 14 February 2012 from PEL to Rio Tinto; and **Exhibit C-58**, Letter dated 15 February 2012 from PEL to JSPL.

¹⁴⁷ **Exhibit C-59**, Letter dated 21 February 2012 from Rio Tinto to PEL. Please also see **CWS-1**, Witness Statement of Mr Kishan Daga, para. 59.

discussions would constitute a violation of the exclusivity provisions in the MOI.¹⁴⁸

- 146 PEL submitted the PFS on schedule to the MTC on 2 May 2012, almost a year after signing the MOI,¹⁴⁹ in accordance with clause 3 of the MOI.¹⁵⁰ The PFS identified Macuse as the best port location for the Project. The PFS also put forward four possible railway routes, preferring Alignment II.¹⁵¹ The PFS also set out a cost estimate for the construction of the port and the railway corridor.¹⁵²
- 147 On 9 May 2012, PEL presented the results of the PFS (the culmination of nearly two years of its investment in this Project) to a group of approximately 25-30 people. The sheer number of participants at the meeting, and the origins of those participating (from at least six different Government organs), evidence the importance of the Project to the Government, and the fact that the MTC's approval of the PFS would have wide-ranging legal and financial consequences pursuant to the MOI. Minister Zucula, as well as technical and commercial representatives from the MTC and the CFM (the intended future joint venture partner in the Project) attended. In addition, there were representatives from the MPD, the Ministry of External Affairs, and the Ministry of Mineral Resources and Energy, and the Ministry of Finance.¹⁵³
- 148 PEL's presentation to the Mozambican delegation set out the findings of PEL's work, detailing the proposed railway line and port location. The presentation explained the objectives of the Project as follows:

“- To provide reliable and economical logistic support for export of coal from Tete

- To avoid use of Zambezi river as a means of transportation of heavily polluting minerals

¹⁴⁸ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 60.

¹⁴⁹ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*.

¹⁵⁰ **Exhibit C-193**, Letter dated 2 May 2012 from PEL to the MTC; and **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, cl. 3.

¹⁵¹ **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, Section 4.

¹⁵² **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*, Section 9, p. 106.

¹⁵³ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 65.

- *Development of Efficient Rail Transport Corridor and matching Port Facility; [and]*

- *To attract cargo from neighbouring countries.*”¹⁵⁴

149 Given that a number of attendees from the Government delegation did not speak fluent English, the presentation was conducted in Portuguese, and presented by Portuguese speakers, Mr Prabhu and Mr José Caldeira, name partner at Sal & Caldeira. After the presentation, questions were translated from Portuguese to English for Mr Daga, who answered all the questions in English, and his answers were translated into Portuguese.¹⁵⁵

150 After the meeting, the entire PEL team felt confident about the presentation.¹⁵⁶ Minister Zucula praised the technical aspect of the report and PEL’s presentation, but requested further information in respect of the Project’s economic data: “*During the discussion it was pointed out by Excellency that the required parameter on Technical side is well represented in the report while he wanted some more information on the economic datas.*”¹⁵⁷ PEL met this request promptly, by providing Mozambique with additional economic information including a statement of fund utilisation, and projected cash flows.¹⁵⁸

E. Mozambique Approves the PFS and Requests PEL to Waiver Its Right of First Refusal

151 In the weeks following PEL’s presentation of the PFS to the Mozambican delegation, as Mozambique further studied and considered the contents of the PFS, PEL engaged in further detailed technical and commercial discussions with various experts and officials from both the MTC and CFM.¹⁵⁹ PEL addressed all queries from the MTC and CFM (usually by way of letter to the MTC to record the information requested) to the satisfaction of Mozambique,

¹⁵⁴ **Exhibit C-7**, Patel Engineering Limited, *Pre-feasibility study for Development of 25 MTPA Handling Capacity Port at Macuse and Approximately 516km Standard Gauge Rail Corridor from Macuse to Moatize Power Point Presentation*, dated 9 May 2012.

¹⁵⁵ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 67.

¹⁵⁶ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 69.

¹⁵⁷ **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.*”

¹⁵⁸ **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.*”

¹⁵⁹ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 70.

and ensured all additional information requested by Mozambique was provided, this included, inter alia, “*the source information used for preparation of the [PFS]*” and a compliance report, which amongst other things, provided PEL’s “*reasons for proposing the Standard Gauge [railway line] instead of a Meter Gauge.*”¹⁶⁰

152 On 15 June 2012, after having considered PEL’s PFS in detail and having been satisfied of all further points of inquiry, the MTC informed PEL “*that the Pre-Feasibility Study submitted by [PEL] was approved.*”¹⁶¹ Having approved the PFS, Mozambique acknowledged its satisfaction of the work completed by PEL, and committed itself to award the Project concession pursuant to the MOI.¹⁶²

153 MTC requested that PEL:

- a. “Expressly exercise its right of first refusal;
- b. Negotiate with the CFM the creation of a company to implement the project.”¹⁶³

154 Importantly, the MTC made no mention of a public tender (which would, in any event, make no sense in light of its request to create the project company with CFM to implement the Project).¹⁶⁴ The first requirement (the right of first refusal) was set out in Clause 2.2 of the MOI. The second requirement was not. However, the norm is that when Mozambique enters into PPPs, it does so through State-owned companies. CFM is precisely the State-owned company supervised by the MTC, and through which Mozambique typically carries out its activities relating to the national rail and port system. As such, it came as no surprise that the public partner in the JV to be implemented with Mozambique would be CFM.

¹⁶⁰ **Exhibit C-8**, Letter dated 15 May 2012 from Kishan Daga of PEL to Minister Zucula of MTC; **Exhibit C-9**, Letter dated 1 June 2012 from Kishan Daga of PEL to Minister Zucula of MTC; **Exhibit C-10**, Letter dated 11 June 2012 from Kishan Daga of PEL to Minister Zucula of MTC.

¹⁶¹ **Exhibit C-11**, Letter dated 15 June 2012 from Minister Zucula of MTC to Kishan Daga of PEL, accepting the Pre-Feasibility Study.

¹⁶² See also **CER-3**, Expert Legal Opinion of Professor Rui Medeiros, at para 22.3. (“*if we analyse these contract stipulations, we conclude that once certain conditions have been confirmed — rectius, after approval of the Pre-Feasibility Study carried out by PEL —, the Government of Mozambique shall award the concession of the Project directly to PEL*”) (emphasis in original).

¹⁶³ **Exhibit C-11**, Letter dated 15 June 2012 from Minister Zucula of MTC to Kishan Daga of PEL, accepting the Pre-Feasibility Study.

¹⁶⁴ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 78.

155 As such, the MTC’s instructions that PEL should negotiate the incorporation of a Project Company with 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 entity, to execute the Project.¹⁶⁵

156 On 18 June 2012, PEL expressly waived its right of first refusal,¹⁶⁶ and confirmed that it would “*proceed with CFM to incorporate an entity for implementation of the project as directed by you in your letter.*”¹⁶⁷ Having done so, even before seeing the concession terms, PEL was thereafter obligated to carry out the Project. Importantly, the MTC never objected to the fact of, or manner in which, PEL expressly waived its right of first refusal. Nor did the MTC indicate that there were any other potential candidates to implement the Project at that time (which would, in any event, have been a breach of the MOI).

157 As Professor Medeiros explains, the Parties’ behaviour confirms that they both assumed PEL would be awarded the concession directly:

*“This behaviour of the Parties confirms that, at that time, immediately after the approval of the Pre-Feasibility Study, the MTC and PEL assumed that the contract granted PEL the right of direct award of the concession contract. In fact, if the MTC offered PEL the possibility of exercising its right of preference before considering any bids of third parties and before launching a tender procedure, it is obvious that it never considered the right of preference set out in Clause 2 (2) of the MoI to be a right to be exercised in a public tender procedure ...”*¹⁶⁸

158 On 22 June 2012 and in response to the MTC’s letter dated 15 June 2012, PEL enquired as to whom in CFM it should liaise with 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 CFM as the Government’s partner for the Project:

“we would like to request you to kindly let us know...a communication to authorize us for discussion for formation of

¹⁶⁵ CWS-1, Witness Statement of Mr Kishan Daga, para. 75.

¹⁶⁶ 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.

¹⁶⁷ 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.

¹⁶⁸ CER-3, Expert Legal Opinion of Professor Rui Medeiros, at para. 23.4.

*SPV with CFM and CFM being nominated by the Govt. of Mozambique as designated partner for this project on PPP model structure.*¹⁶⁹

159 PEL received no reply. Receiving no assistance from the MTC, PEL proceeded to arrange an in-person meeting with CFM's President and Chairman of the Board, Mr Rosario Mualeia, with the assistance of SPI's then Executive Director, Ms Safura de Conceição.¹⁷⁰

F. Mozambique Adopted an Inconsistent and Contradictory Approach Towards the Project With PEL

160 PEL met with CFM in August 2012. During the course of that meeting, and much to PEL's surprise, PEL learned that the CFM Chairman claimed to have no information about the Project and claimed to know nothing about the PFS or its approval.¹⁷¹

161 This was especially surprising given that CFM representatives had attended the presentation of the PFS. Furthermore, CFM representatives had asked follow up questions after the presentation, which PEL had answered promptly.¹⁷²

162 Chairman Mualeia informed Mr Daga that CFM had not been directed by the MTC to commence negotiations with PEL in relation to the Project, and that he did not have a copy of the PFS or know anything about it.¹⁷³ This was alarming for PEL, and not in line with the MTC's commitments, or with the fact that CFM representatives had been at the PFS presentation.¹⁷⁴

163 Shortly thereafter, PEL sent Chairman Mualeia a copy of the PFS, a copy of the PFS approval letter, and a copy of PEL's letter of acceptance. PEL also followed up with the CFM head 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*

¹⁶⁹ **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. Please also see **CWS-1**, Witness Statement of Mr Kishan Daga, para. 79.

¹⁷⁰ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 79.

¹⁷¹ **CWS-1**, Witness Statement of Mr Kishan Daga, paras. 80-81 (emphasis added).

¹⁷² See **Exhibit C-8**, Letter dated 15 May 2012 from Kishan Daga of PEL to Minister Zucula of MTC; **Exhibit C-9**, Letter dated 1 June 2012 from Kishan Daga of PEL to Minister Zucula of MTC; **Exhibit C-10**, Letter dated 11 June 2012 from Kishan Daga of PEL to Minister Zucula of MTC. See also, **CWS-1**, Witness Statement of Mr Kishan Daga, para. 81.

¹⁷³ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 81.

¹⁷⁴ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 81.

of the Project for discussion and signing of [the] concession agreement as per [the] MOI without losing any more time.”¹⁷⁵

164 At a meeting between PEL and Minister Zucula the next day, Mr Daga informed Minister Zucula that Chairman Mualeia purported to be entirely unaware of the Project, and CFM’s role in relation to it. Minister Zucula telephoned Chairman Mualeia during that meeting (in the presence of Mr Daga), and proceeded to engage in what seemed to be an agitated conversation with the CFM Chairman.¹⁷⁶

165 Once the conversation was finished, Minister Zucula explained to Mr Daga that he had instructed CFM to commence negotiations with PEL to form the Project Company. Mr Daga therefore left his meeting with Minister Zucula reassured that progress would continue to be made in line with Mozambique’s obligations. Minister Zucula’s actions and approach were in line with Mozambique’s stated commitments in the MOI and subsequent approval of the PFS and follow up requests.¹⁷⁷

166 As a result of Minister Zucula’s telephone call with Chairman Mualeia, PEL met with CFM for a further meeting later that same month.

167 Mr Daga, Ms de Conceição, and Mr Prabhu attended that meeting. During that meeting, Chairman Mualeia 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 in the Project. Chairman 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. In short, CFM informed PEL in no uncertain terms that it simply did not have the funds to take on an equity interest in the Project and on that basis alone, CFM would not participate in the Project.¹⁷⁸

168 PEL was surprised by CFM Chairman Mualeia’s response. However, it anticipated that the MTC would indicate a different Government ministry with which PEL would be expected to cooperate with for equity participation in the

¹⁷⁵ **Exhibit C-14**, Letter dated 7 August 2012 from Kishan Daga of PEL to President and Rosario Mualeia President and Chairman of the Board of CFM, seeking guidance on how PEL should proceed with the Project. See also, **CWS-1**, Witness Statement of Mr Kishan Daga, paras. 82-83.

¹⁷⁶ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 84.

¹⁷⁷ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 84.

¹⁷⁸ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 85.

Project.¹⁷⁹ After all, PEL had been ready, willing, and able to partner with CFM; it was CFM that was not willing to participate.

169 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 MTC provide PEL with access to the concession agreement template which Minister Zucula had previously undertaken to provide “*in order to help expedite*”¹⁸⁰ the Project’s execution:

“in line with your communication we initiated talks with CFM to set up a SPV to develop the Project.

*Having complied with all the requirements of the MOU [sic] and recognizing the urgency of providing viable alternatives for the logistic needs of the Tete Province, we would like to request the good offices of Your Excellency to have an access to a template Concession Agreement for Ports and Railways in order to help expediting the process and potential implementation of the project.”*¹⁸¹

170 Thereafter, on 27 August 2012, the MTC replied to PEL’s letter of 22 June 2012 (*i.e.*, its letter before last, in which PEL asked who at CFM it should liaise with to establish the Project Company). Curiously, the MTC merely stated that such information had already been provided, adding that negotiations with CFM were “*not prohibited*”: “[*n*]egotiation with CFM is not prohibited, and to my knowledge has already begun.”¹⁸² The MTC further indicated that the institutional body of the MTC to be dealt with was the Office of Studies and Projects for the purpose of negotiating the concession.¹⁸³

171 During the course of trying to get CFM (or anyone else the Government might indicate) to partner with it in mid to late 2012, PEL continuously requested that

¹⁷⁹ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 86. As far as PEL was aware, there were a number of government entities involved in infrastructure projects, and therefore, it would not have been difficult for the MTC to nominate a different entity.

¹⁸⁰ **Exhibit C-15**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 15 August 2012 requesting access to the concession agreement template for CFM in order to expedite the process of implementing the Project.

¹⁸¹ **Exhibit C-15**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 15 August 2012, requesting access to the concession agreement template for CFM in order to expedite the process of implementing the Project.

¹⁸² **Exhibit C-16**, Letter from Ema Chicoco of MTC to Kishan Daga of PEL, dated 27 August 2012, regarding CFM negotiations not being prohibited and providing contact details for the purpose of negotiating the concession.

¹⁸³ **Exhibit C-16**, Letter from Ema Chicoco of MTC to Kishan Daga of PEL, dated 27 August 2012, regarding CFM negotiations not being prohibited and providing contact details for the purpose of negotiating the concession.

the MTC comply with its obligation under the MOI to award the Project concession to PEL.¹⁸⁴ Despite numerous requests from PEL, however, the MTC failed to provide PEL with even the concession template, and CFM ignored all requests from PEL in relation to the Project.

- 172 By October 2012, nearly six months after the MTC had approved the PFS and 18 months after signing the MOI, the MTC had still not complied with its obligations under the MOI, despite PEL having complied with its contractual commitments and having made serious and significant headway with the Project, as envisaged under the MOI. The MTC continued to fail to provide a draft concession agreement. PEL repeatedly sought action and compliance from Mozambique and the MTC, and confirmed its undertaking “*that up to 20% of equity will be allotted to Govt. of Mozambique or its nominated partner*”¹⁸⁵ in accordance with Article 33(1)(a) of the PPP law, which states that “*the participation reserved for sale...in the share capital of the undertaking or in the joint venture equity, whether or not foreign investment is involved, [be] guaranteed by the State or other public entity appointed thereby, in a percentage not less than %5 nor greater than 20% of the referred capital.*”¹⁸⁶
- 173 It was around this time that Mr Daga “*came to understand that the Government may be entertaining the idea of giving our Project to someone else, either through a direct award or a public tender.*”¹⁸⁷
- 174 By the end of November 2012, PEL was becoming increasingly concerned. The MTC was ignoring PEL’s repeated requests for a draft concession agreement, even though PEL had complied with its obligations under the MOI. In addition, the MTC was not engaging with PEL. As Mr Daga testifies, he “*was becoming seriously worried and confused*” about the Government’s failure to engage with PEL.¹⁸⁸

¹⁸⁴ **Exhibit C-15**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 15 August 2012, requesting access to the concession agreement template for CFM in order to expedite the process; **Exhibit C-17**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 5 October 2012, regarding PEL’s request for a copy of the template Concession Agreement for CFM; **Exhibit C-18**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 28 November 2012, citing real examples of authorisations for direct awards.

¹⁸⁵ **Exhibit C-17**, Letter from PEL to MTC, dated 5 October 2012, regarding “*Implementation of Rail Corridor from Moatize to Macuse and Port at Macuse.*”

¹⁸⁶ **CLA-2**, Law No. 15-2011 of 10 August 2011, article 33(1), para (a)(i).

¹⁸⁷ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 90.

¹⁸⁸ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 91.

175 PEL wrote to the MTC to repeat its request for a draft concession agreement and to explain why PEL should be awarded a direct concession in line with the PPP Law, namely:

- a. *“PEL has identified the location of Port in the coast of Zambezia between Chinde and Pebane and a railway line which is approximately 500 Km Long from Tete to the location of Port as referred and conceived the idea at the cost and initiative of PEL.”*
- b. *“PEL had proceeded with the execution of a Memorandum of Understanding [sic] with MTC, dated 6 May 2011, which aims to regulate the implementation of the pre-feasibility study for the Macuse project and additionally, define the basic terms and conditions so that a concession for the development and **implementation of the Project could be directly awarded by the Mozambic [sic] Government to PEL.**”*
- c. *“PEL carried out Initial study at their own cost based on the understanding that if project is found viable than [sic] Ministry of transport shall sign an MOU with PEL for carrying of prefeasibility study and to give exclusive rights to PEL for development of the said project. Prefeasibility study of the Project was also carried out at their own cost by PEL and report was submitted to Ministry of Transport and communication.”*
- d. *“PEL communicated to Your Excellency the exercising of its preferential right and its intention to initiate negotiations with CFM for the incorporation of the joint company for the development of the Project.”*
- e. *“The implementation of the project referred to is estimated at a value of USD 3.115.000.000 (three billion, one hundred and fifteen million United States Dollars). This value was indicated in the Pre-feasibility report submitted to ministry of transport.”*
- f. *“the legislator provided for and established the possibility of an exception to the public tender rule, whenever there are weighty and justified situations related to the implementation of each specific project, the Government may authorize the direct award for the hiring*

of the PPP – Article 13, paragraph 3 of the Law 15/2011 and Article 17 of Decree 16/2012.”

- g. *“Decree 16/2012 states in its Article 2, paragraph 2 that, the PPP undertakings can be elevated to large scale projects (‘LSP’) whenever the value of the investment exceeds 12.500.000.000,00 MT (twelve and a half billion Meticais), reported on 1 January 2009, this being the case for the Macuse Project. Its elevation to a LSP also means a contracting regime that is more flexible, seeing as the law expressly permits that ‘the entity responsible for sector tutelage’, in this case Your Excellency the Minister of Transport and Communication.”¹⁸⁹*

176 PEL also set out numerous other direct concessions that the Government had granted under the PPP Law regime, including in relation to railway and port infrastructure projects.¹⁹⁰

177 PEL still did not have a draft concession agreement even though it had complied with all of its obligations under the MOI and was consistently pleading with the Government to progress the Project. Even though almost six months had passed since the MTC had approved the PFS, Mozambique still had not complied with its obligations under the MOI to award a concession, even though PEL had spent a considerable amount of time and money to develop and progress the Project, in particular through the PFS. The MTC was just silent.

178 PEL continued to repeat its request that the Project proceed to concession, in accordance with the MOI:

“PEL has demonstrated a great interest in the development of the Project by proposing the incorporation of a joint venture with the Mozambican Government/companies/or institutions. PEL has proceeded with the execution of a Memorandum of Understanding with MTC, dated 6 May 2011, which aims to regulate the implementation of the pre-feasibility study for the Macuse Project and additionally, define the basic terms and conditions to that a concession for the development and

¹⁸⁹ **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 (emphasis added).

¹⁹⁰ **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.

implementation of the Project could be directly awarded by the Mozambic [sic] Government to PEL.”¹⁹¹

179 Still, the MTC was not forthcoming. This was a growing source of concern to PEL.¹⁹²

G. Mozambique Reneged on Its Promise to Award the Concession to PEL and Proceeded with a Public Tender in Violation of Its Commitment in the MOI

180 Having stonewalled PEL for months, over time, it became increasingly clear to PEL that Mozambique wanted to shut PEL out of the very Project of which PEL had conceived, and in relation to which PEL had undertaken expensive, time-consuming, and detailed analysis, on the understanding that, if the Project was deemed viable on the basis of the PFS, Mozambique would grant the relevant Project concession to PEL.¹⁹³

181 On 11 January 2013, the MTC wrote a letter to PEL, in which it announced the forthcoming public tender for the Project.¹⁹⁴

182 The MTC’s letter alleged that the MTC had informed PEL during meetings in June and October 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.

183 The MTC’s explanation made no sense at all. If the MTC was correct, PEL would not have exercised its right of first refusal — which it did at a time when there had been no discussion of a public tender — **and** entered into discussions with CFM. By the MTC’s new logic, these two options were mutually exclusive. Besides CFM had no interest in participating in the Project anyway for which PEL bore no responsibility.

184 Similarly, if the MTC’s new logic was correct, it would have made no sense for Minister Zucula to speak to Chairman Mualeia instructing him to enter into negotiations with PEL¹⁹⁵ or for the MTC to tell PEL that negotiations with

¹⁹¹ **Exhibit C-18**, Letter from PEL to Minister Zucula of MTC, dated 28 November 2012 (emphasis added).

¹⁹² **CWS-1**, Witness Statement of Mr Kishan Daga, para. 92.

¹⁹³ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 100.

¹⁹⁴ **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL, dated 11 January 2013, informing PEL of Government’s decision to conduct a public tender.

¹⁹⁵ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 84.

CFM had already begun,¹⁹⁶ when PEL had already exercised its right of first refusal directly with the MTC.¹⁹⁷ The MTC noted that if PEL were to “participate in [the public tender] it would have the right of preference, as per the Memorandum and the Law.”¹⁹⁸ This was also a nonsensical position for, had that been the case, none of the other participants in the public tender process had been informed and likely none would have been willing to participate. In reality, under the newly-enacted PPP Law, PEL would benefit from a 15% preference in any event, as the party that had originated the Project concept.¹⁹⁹ Logically, this is not mentioned in the MOI because no public tender was ever envisaged or expected. Had it been, PEL would have clearly stipulated in the MOI that there would be no public tender of the Project, at least until such time as PEL had walked away from the Project, if it chose to do so.

185 As Professor Medeiros explains, the Government’s position was inconsistent with both the provisions of the MOI and the Parties behaviour:

“Clause 8 of the MoI does not imply that PEL’s consideration for carrying out and submitting the Pre-Feasibility Study is merely the possibility of having a quantitative increase in the assessment of the technical and financial conditions of its bid”²⁰⁰”it would be difficult to understand the rationale behind PEL’s decision to enter into a MoI in which it agrees to carry out a Pre-Feasibility Study, assuming that ‘the direct costs necessary to conduct the feasibility study shall be entirely borne by PEL’ (see Clause 4), without having a guarantee that it would have the right, if the Pre-Feasibility Study is approved by the Government, to implement the project.”

Would it be credible, in such a scenario, for PEL – acting with economic rationality – to agree to make the investment knowing that there was a serious risk of losing the tender?”²⁰¹

¹⁹⁶ **Exhibit C-16**, Letter from Ema Chicoco of MTC to Kishan Daga of PEL, dated 27 August 2012, regarding CFM negotiations not being prohibited and providing contact details for the purpose of negotiating the concession.

¹⁹⁷ **Exhibit C-12**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 18 June 2012, exercising PEL’s right of first refusal to implement of the Project.

¹⁹⁸ **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL, dated 11 January 2013, informing PEL of Government’s decision to conduct a public tender.

¹⁹⁹ **CLA-2**, Law No. 15-2011 of 10 August 2011, article 13(5).

²⁰⁰ **CER-3**, Expert Legal Opinion of Professor Rui Medeiros, at para. 29.

²⁰¹ **CER-3**, Expert Legal Opinion of Professor Rui Medeiros, at paras. 30.2-30.3.

- 186 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 company or Joint Venture and indication of a plan to reinforce CFM’s capacity.*”²⁰² This had never been discussed, in large part because CFM refused to enter into negotiations with PEL. Simply stated, this was Mozambique opportunistically attempting to rewrite history in an attempt to avoid its legal commitments to PEL.
- 187 What was more, the MTC also informed PEL that a 20% equity offer made subsequently by PEL to CFM, which PEL had been advised by Sal & Caldeira – who actively contributed to drafting the PPP Law – to be the *maximum equity share permitted under relevant legislation*,²⁰³ was “*by no means indicative of a strategic partnership.*”²⁰⁴ The MTC suggested PEL should be “*more generous to ensure a greater participation of CFM.*”²⁰⁵ The MTC went on to claim 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.*”²⁰⁶ This statement was particularly suspect given that the legal position – as known to all – was that a 20% equity stake was the maximum stake legally permissible.²⁰⁷
- 188 It was also devoid of any logic or substance since CFM had persistently refused to enter into any negotiations with PEL.²⁰⁸ PEL was left perplexed and shocked to learn that Mozambique was proposing to issue a public tender, in clear violation of the MOI and its undertakings towards PEL.²⁰⁹

²⁰² **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL, dated 11 January 2013, informing PEL of Government’s decision to conduct a public tender.

²⁰³ **CLA-2**, Law No. 15-2011 of 10 August 2011, article 33(1), para (a)(i), (“*1. 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;***”). The inclusion of such financial benefit is deemed a mandatory provision pursuant to **CLA-3**, Decree No. 16-2012, of 4 July 2012, article 37(2), para (a) (emphasis added). See also **CWS-1**, Witness Statement of Mr Kishan Daga, para. 85.

²⁰⁴ **CLA-2**, Law No. 15-2011 of 10 August 2011, article 33(1), para (a)(i).

²⁰⁵ **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL, dated 11 January 2013, reneging on its commitment to award the concession to PEL (emphasis added).

²⁰⁶ **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL, dated 11 January 2013, reneging on its commitment to award the concession to PEL (emphasis added).

²⁰⁷ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 105.

²⁰⁸ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 105.

²⁰⁹ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 96.

189 Contrary to the MTC’s assertions that CFM desired *more* than a 20% equity share in the Project, Chairman Mualeia 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 to Mozambican law, but was also at odds with Chairman Mualeia’s statements to Mr Daga that CFM lacked sufficient funds to contribute *any* equity to the Project.²¹⁰

190 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.²¹¹

H. PEL Was Forced to Participate in a Public Tender for the Project Under Protest

191 By this stage, PEL was increasingly concerned that, for reasons unknown to PEL, Mozambique was attempting to commandeer the Project PEL had spent the last two years developing and give it to someone else. It was becoming clear to PEL that Mozambique seemed intent on cutting PEL out of the Project that it had devised, developed, and presented to Mozambique and that the Government itself had always considered impossible.²¹² Accordingly, PEL wrote to the MTC, with copy to Prime Minister Vaquina, CFM and the High Commissioner of India, to dispute Mozambique’s decision to conduct a public tender, and the inaccuracies contained in the MTC’s letter dated 11 January 2013. PEL explained the situation recorded its objections – in writing – to the public tender. In that letter, PEL stressed that the MTC had recognised “*that this project has been conceived at the sole initiative of Patel Engineering that undertook all the development work at a substantial cost*” and that, in accordance with the Parties’ agreement as embodied in the MOI, PEL

²¹⁰ See **Exhibit C-20**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 22 January 2013, disputing the Government’s decision to conduct a public tender.

²¹¹ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 98.

²¹² **CWS-1**, Witness Statement of Mr Kishan Daga, para. 100.

“undertook all the development work at [] substantial costs” and exercised its right of first refusal once the PFS had been approved by the MTC.²¹³

192 PEL set the record straight regarding its numerous fruitless attempts to negotiate with an utterly unresponsive CFM. Specifically, PEL had at all times been ready, willing, and able to negotiate the terms of its offer with CFM, but CFM showed no interest whatsoever in engaging with PEL:

“[w]e were and are always interested and willing to enter into a partnership with CFM to develop this project but unfortunately have not received any formal position from neither from CFM nor from your Excellency.”²¹⁴

193 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.

194 Accordingly, PEL pleaded with Mozambique to discuss with PEL: (i) the Project and CFM’s participation; (ii) delaying the tender process; and (iii) commencing parallel negotiations on the concession agreement:

“a. We understand that our offer is well in line with the relevant legislation. As a matter of fact, the PPP act (Law No. 15/2011 of 10th August) and its regulation (Decree No. 16/2012 of 4th June) establishes that the participation of local Mozambique interests is established up to 20% of the share capital. Reference is made to articles and the Law and respective regulations both.

b. Our offer of equity participation was in line with the share participation offered to CFM by VALE in CLIN project which is an established fact and agreed by all parties concerned.

c. At no point of time our offer to CFM was non-negotiable. As a matter of fact, we indicated our intention to negotiate but unfortunately we never received any reaction/response whatsoever from CFM till date whether they are willing to participate and, if so, at what level of share participation.”²¹⁵

²¹³ **Exhibit C-20**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 22 January 2013, disputing the Government’s decision to conduct a public tender.

²¹⁴ **Exhibit C-20**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 22 January 2013, disputing the Government’s decision to conduct a public tender, p. 3.

²¹⁵ **Exhibit C-20**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 22 January 2013, disputing the Government’s decision to conduct a public tender, pp. 3-4 (emphasis added).

- 195 Totally disregarding PEL’s valid and founded objections, the MTC published a Request for Proposal (“**RFP**”) for the Project in the *Noticias* newspaper just one week later - on 29 January 2013.²¹⁶
- 196 PEL met with 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 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. The Prime Minister undertook to look further into the situation.²¹⁷
- 197 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.²¹⁸ 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: “[t]he tender follows and Patel may compete with a right of first refusal.***²¹⁹ This made no sense at all. Six months earlier, the MTC had asked PEL to exercise its right of first refusal, which PEL promptly did. During the six months after PEL’s exercise of its right of first refusal, and despite the multiple letters sent by PEL regarding the Project during that time, the MTC never once indicated that PEL had not exercised such right properly. The MTC’s new assertion that PEL’s right of first refusal should be exercised in the context of a public tender (in effect, re-exercised in a totally different way) was thus nothing more than a self-serving afterthought aimed at justifying a decision which it knew constituted a breach of the commitments it had made to PEL in the MOI.²²⁰

²¹⁶ **Exhibit C-21**, Request for Proposal (“**RFP**”) published by the MTC in *Noticias* newspaper on 29 January 2013, p. 40.

²¹⁷ **CWS-1**, Witness Statement of Mr Kishan Daga, paras. 111-113.

²¹⁸ **Exhibit C-22**, Letter from Minister Zucula to PEL, dated 14 February 2013, regarding the decision of Mozambique to hold a public tender.

²¹⁹ **Exhibit C-22**, Letter from Minister Zucula to PEL, dated 14 February 2013, regarding the decision of Mozambique to hold a public tender.

²²⁰ **CER-3**, Expert Legal Opinion of Professor Rui Medeiros, at paras. 23.4 and 27.

198 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:

*“[h]ere I must mention that, in some cases, the participation of Mozambique Ports and Railways [CFM] is minimal. In this case, for example, it will not participate because the values are large and we have already participated in the project with Vale, in the Nacaia Corridor, in the Technobanine project we are part of Bela Vista Holding.”*²²¹

199 PEL brought this statement to the Prime Minister’s attention in a letter dated 4 March 2013:

*“[v]ery much to the confirmation of our position, the Chairman of CFM came public to announce that CFM do not intend to participate in this project due to its involvement in other projects, the development of a port and railway in and to Nacala with Vale.”*²²²

200 This confirmed what Chairman Mualeia had shared with Mr Daga and what the MTC had ignored in its letter dated 27 August 2012 in which it, incorrectly, asserted that *“[n]egotiation with CFM is not prohibited, and to my knowledge has already begun.”*²²³

201 PEL 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 never interested in the Project, and now had publicly stated so, PEL requested the MTC to give effect to the MOI as signed, and permit PEL to develop the Project:

“[t]he single reason for altering the course of the MOU [sic] signed was, expressly, the lack of agreement with CFM on the shareholding. Being however clear that CFM do not intend participating in the project, being the project conceived and developed by PATEL, we believe it is only fair and just to

²²¹ **Exhibit C-23**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 4 March 2013, enclosing **Exhibit C-194** “Chairman of CFM Board of Directors Puts His Finger in the Wound “The Sena Line is Not Adapted to Transport Coal”, published in *O Pais Economico*, dated 1 March 2013, where CFM stated publicly that it would not participate in the Project.

²²² **Exhibit C-23**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 4 March 2013, enclosing **Exhibit C-194** “Chairman of CFM Board of Directors Puts His Finger in the Wound “The Sena Line is Not Adapted to Transport Coal”, published in *O Pais Economico*, dated 1 March 2013, where CFM stated publicly that it would not participate in the Project.

²²³ **Exhibit C-16**, Letter from Ema Chicoco of MTC to Kishan Daga of PEL, dated 27 August 2012, regarding CFM negotiations not being prohibited and providing contact details for the purpose of negotiating the concession.

*implement the MOU [sic] as signed with GOM and allow Patel to proceed with the development of this project.”*²²⁴

202 Respondent ignored PEL’s pleas to reconsider the public tender. Instead, Mozambique 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.²²⁵ The tender notice set out that the tender was for the acquisition of “*the concession rights to develop, design, build, maintain, finance, operate, manage, exploit and transfer to the Government of Mozambique a new Railway Line from Moatize to Macuse and the New Port Terminal in Macuze.*”²²⁶ In other words, the precise Project which it had devised, developed, and presented to the MTC was now being put up for grabs to any and all third parties, contrary to Clauses 1, 2, and 6 of the MOI.²²⁷

203 Twenty-one companies ultimately expressed an interest in the Project.²²⁸

204 In line with the tender requirements, PEL formed the PGS Consortium, a consortium of companies to compete in the public tender process.²²⁹ While PEL had always intended to bring in additional partners into the Project post concession, it would have been under PEL’s terms and within a timeframe that suited it depending on the Project’s progression and needs. Here, the PGS Consortium was pulled together quickly, with PEL having to give away more of the equity than it otherwise might.

205 The PGS Consortium was comprised of different companies with significant and relevant expertise. The members of the consortium were:

- a. PEL, with its extensive and long-standing expertise in running large-scale infrastructure projects;

²²⁴ **Exhibit C-23**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 4 March 2013, enclosing **Exhibit C-194** “Chairman of CFM Board of Directors Puts His Finger in the Wound “The Sena Line is Not Adapted to Transport Coal”, published in O Pais Economico, dated 1 March 2013, where CFM stated publicly that it would not participate in the Project.

²²⁵ **Exhibit C-24**, Tender Notice entitled “*Application of Participants and Fulfillment*”, undated. See also, **CWS-1**, Witness Statement of Mr Kishan Daga, para. 119.

²²⁶ **Exhibit C-24**, Tender Notice entitled “*Application of Participants and Fulfillment*”, undated.

²²⁷ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 121.

²²⁸ **Exhibit C-25**, Semião. O, “Tender for the Acquisition of Concession Rights to Conceive, Design, Finance, Build, Operate and Transfer the Railway Line and the Port of Macuse”, undated.

²²⁹ The PGS 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).

- b. Grindrod, a South African company with over 100 years of experience in manufacturing rail wagons and the operation and maintenance of railway lines and ports with significant experience in Mozambique. Grindrod’s business relates to projects for “*movement of cargo by road, rail, sea and air, through integrated logistics services utilising specialised assets and infrastructure, including vehicles, locomotives, ships, ports, terminals, warehouses and depots*”;²³⁰ and
- c. SPI, a well-connected local company that would be able to assist the PGS Consortium with local knowledge and by connecting the PGS Consortium with local individuals and entities.²³¹

206 The PGS Consortium submitted an Expression of Interest (“EOI”) in March 2013, in accordance with Mozambique’s deadline.²³²

207 The PGS Consortium’s tender was thorough, considered, and deeply impressive. It revealed a true understanding of Mozambique’s natural resources and the infrastructure which could be implemented to develop Mozambique’s potential. It offered a number of well thought out options, assessing both the advantages and disadvantages of each, so to provide the MTC with as detailed an analysis of the Project as possible and to properly showcase PEL’s confidence that the Project would:

*“leverage the economic development of [the] central Mozambique region by means of transportation of mineral resources commodities, but...also compliment the Mozambican Government’s effort of promoting [the] economic development of the Zambezia valley through integration of the rail corridor with regional agricultural production systems.”*²³³

208 In the EOI, PEL did not waive or release any of its rights under the MOI or otherwise by participating in the public tender as part of a consortium: “[t]he submission of this EOI is made with no prejudice to the rights Patel is vested in as a result of the MOA [sic] signed between the Government of Mozambique

²³⁰ **Exhibit C-190**, “Audited Balance Sheets of Last 3 Years”, *Technical Proposal*, dated 27 June 2013, pp. 91.

²³¹ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 54(i).

²³² **Exhibit C-26**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 8 March 2013, submitting an Expression of Interest for the Project.

²³³ **Exhibit C-190**, “Interpretation and Understanding of the Project”, *Technical Proposal*, dated 27 June 2013, p430.

*represented by the Minister of Transport and Communications and Patel Engineering.”*²³⁴

209 Soon after, the MTC issued tender documents to six pre-qualified companies on 12 April 2013:

- a. ITD;
- b. Sumitomo Corporation;
- c. Moto Engil, Codiza, Edvisa and Manica Consortium;
- d. the CLZ Consortium;
- e. Rio Tinto; and
- f. the PGS Consortium.²³⁵

210 The tender documents requested the recipients to submit technical and financial proposals for the Project by 29 May 2013.²³⁶

I. Mozambique Reversed Course and Offered to Award the Concession Directly to PEL as Required by the MOI

211 On 18 April 2013, PEL thought its numerous petitions to Mozambique 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*” – a situation that, under the PPP law,²³⁷ justified recourse to direct award – to permit PEL to begin negotiating towards the execution of the Project.²³⁸ This turnaround by the MTC was welcomed by PEL. Finally, the Government had decided to honour the commitments it had made under the MOI.

²³⁴ **Exhibit C-26**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 8 March 2013, submitting an Expression of Interest for the Project.

²³⁵ **Exhibit C-27**, MTC, Bidding Documents, Tender No. MTC-15/13/UGEA/SDP/SC, dated 12 April 2013.

²³⁶ **Exhibit C-27**, MTC, Bidding Documents, Tender No. MTC-15/13/UGEA/SDP/SC, dated 12 April 2013.

²³⁷ **CLA-65**, Law No. 15-2011 of 10 August 2011, Article 13(3) (“*In ponderous and duly substantiated situations, and as a measure of last resort subject to the prior express authorization of the Government, PPP enterprises may, on an exceptional basis, be contracted through negotiation and direct award*”).

²³⁸ **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL, dated 18 April 2013, whereby the MTC invited PEL to commence negotiations for a concession agreement for the Project.

212 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.*”²³⁹

213 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.*”²⁴⁰ Reassured, PEL promptly responded in writing to “*formally accept*” Mozambique’s offer to commence negotiations for the concession without holding a public tender on 23 April 2013: “[p]lease do accept this letter as formal acceptance by Patel Engineering to start the negotiation process as per the terms of your notification letter.”²⁴¹

214 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.²⁴² PEL submitted a bank guarantee to the MTC on 9 May 2013 for US \$3,115,000, as requested by the MTC and representing 0.1% of the value of the Project.²⁴³

215 Finally, things seemed to be going in the right direction. The MTC promised to provide the draft concession template PEL had been requesting for so long, and the parties scheduled their first direct negotiation meeting for 10 May 2013 in Maputo.²⁴⁴

J. Mozambique Reversed Course Once More and Proceeded with a Public Tender for PEL’s Project

216 Unfortunately, the rollercoaster of Respondent’s flip flops had not ended. Only four days after PEL provided the requested guarantee, and a mere one month after the Government decided to abandon the tender in favour of PEL’s direct

²³⁹ **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL, dated 18 April 2013, whereby the MTC invited PEL to commence negotiations for a concession agreement for the Project.

²⁴⁰ **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL, dated 18 April 2013, whereby the MTC invited PEL to commence negotiations for a concession agreement for the Project.

²⁴¹ **Exhibit C-30**, Letter from PEL to the MTC, dated 23 April 2013.

²⁴² **Exhibit C-33**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 9 May 2013, providing a USD 3,115,000 bank guarantee.

²⁴³ **Exhibit C-33**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 9 May 2013, providing a USD 3,115,000 bank guarantee. **CWS-1**, Witness Statement of Mr Kishan Daga, para. 129.

²⁴⁴ **Exhibit C-32**, Letter from Luis Amândio Chauque of MTC to PEL, dated 24 April 2013, providing a date, time and venue for the meeting to negotiate a concession.

concession, the MTC informed PEL that Mozambique had once again changed its position. On 13 May 2013, the MTC alleged that, having heard from several unnamed “*stakeholders*” and having reviewed the relevant laws and regulations governing public private partnerships in Mozambique, the Council of Ministers subsequently concluded there was no “*place for direct negotiations with any of the bidders presented in the pre-selection phase*” and that the public tender must proceed.²⁴⁵

217 This was an astonishing and unlawful reversal of a decision that had been made only weeks earlier, in which the very same governmental body authorised direct negotiations between PEL and the MTC as a matter of “*national strategic interest.*”²⁴⁶ As explained by Professor Medeiros, “[t]he revocation of the act performed by the Council of Ministers on 18 April 2013 is, therefore, an unlawful revocation of an act establishing rights, such revocation being vitiated by illegality.”²⁴⁷

218 PEL was not sure how to address yet another arbitrary *volte face* by Mozambique. In response, PEL reiterated its understanding of the distinct rights it had been granted under the MOI and Mozambican law:

*“1. Once the pre feasibility study is submitted by PATEL and approved by MTC, in that case **MTC will sign a concession agreement with PATEL.** Refer clause no. 2.1.*

*2. It was also agreed that **once prefeasibility study will be approved then PATEL shall have first right of refusal.** Kindly refer clause. 2.2.”²⁴⁸*

219 Further, PEL explained that Article 13(3) of the PPP Law specifically permitted that the “*contracting of a PPP undertaking*” could “*take the form of negotiation and direct award*” in special circumstances, all of which were present in the case of the Project.²⁴⁹

²⁴⁵ **Exhibit C-34**, Letter from Luis Amândio Chauque of MTC to Kishan Daga of PEL, dated 13 May 2013, reversing the MTC’s position regarding direct negotiations with PEL.

²⁴⁶ **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL, dated 18 April 2013, whereby the MTC invited PEL to commence negotiations for a concession agreement for the Project.

²⁴⁷ **CER-3**, Legal Opinion of Professor Rui Medeiros, at para. 49. *See also id.* at paras. 47- 48.

²⁴⁸ **Exhibit C-35**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 4 June 2013, responding to the MTC’s change in position regarding direct negotiations (emphasis in original).

²⁴⁹ **Exhibit C-35**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 4 June 2013, responding to the MTC’s change in position regarding direct negotiations. *See also, CLA-2*, Law No. 15-2011 of 10 August 2011, article 13(3).

220 The MTC never objected to PEL’s description of the obligations and commitments in the MOI or rebutted PEL’s position.

221 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.²⁵⁰

222 PEL was left with no choice but to continue to participate in the public tender process under protest, even though the MTC was persistently in violation of its obligations. The PGS Consortium submitted its financial and technical proposals as part of the tender process on 27 June 2013.²⁵¹

K. Mozambique’s Public Tender Was Replete With Serious Irregularities

223 On 19 July 2013, representatives of the MTC and various bidders convened at the MTC’s offices in Maputo.²⁵² During this meeting, the MTC announced the scores it had allocated to each tenderer which purportedly had been calculated by reference to a specific formula which had been published during the tender process.

224 As a result of this alleged formula:

- a. ITD was awarded 95 points;
- b. CLZ Consortium was awarded 80 points; and
- c. PGS Consortium garnered a mere 72.5 points.²⁵³

²⁵⁰ **Exhibit C-36**, Letter from the MTC to Italian Thai Development Company, Sumitomo Corporation, Moto Engil, Codiza, Edvisa and Manica Consortium, CLZ Consortium, Rio Tinto, and PEL, Grindrod and SPI Consortium, dated 10 June 2013.

²⁵¹ **Exhibit C-37**, Letter from Kishan Daga of PEL to the MTC, dated 27 June 2013, attaching the PGS Consortium’s Financial and Technical Proposal for the Project.

²⁵² **Exhibit C-38**, MTC, “Minutes of the Opening Session of Economic Proposals”, Tender No. MTC-15/13/UGEA/SDP/SC, dated 19 July 2013. See also, **CWS-1**, Witness Statement of Mr Kishan Daga, para. 143.

²⁵³ **Exhibit C-38**, MTC, “Minutes of the Opening Session of Economic Proposals”, Tender No. MTC-15/13/UGEA/SDP/SC, dated 19 July 2013. 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 Semião. O, “Tender for the Acquisition of Concession Rights to Conceive, Design, Finance, Build, Operate and Transfer the Railway Line and the Port of Macuse”, dated 29 July 2013, p. 3.

225 Accordingly, the MTC announced ITD as the winning bidder. On 26 July 2013, the MTC formally notified the PGS Consortium of its decision to award the concession to ITD.²⁵⁴

226 PEL was surprised and dismayed by the outcome of the tender process. The results of this supposed formula were suspect for numerous reasons. On 29 July 2013, the MTC provided further information purportedly explaining how the proposals had been evaluated.²⁵⁵

227 In response, the PGS Consortium immediately sent a letter to the MTC expressing its concern over the MTC's handling of the tender. In particular, the PGS 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.*"²⁵⁶ 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*";²⁵⁷
- (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 spirit of an international competitive bid process and contrary to the public procurement policy of the country.*"²⁵⁸

²⁵⁴ **Exhibit C-39**, Letter from Pedro Augusto Ingles to PGS Consortium, dated 26 July 2013, regarding proposal evaluation.

²⁵⁵ **Exhibit C-25**, Translation of Semião. O, "Tender for the Acquisition of Concession Rights to Conceive, Design, Finance, Build, Operate and Transfer the Railway Line and the Port of Macuse", dated 29 July 2013.

²⁵⁶ **Exhibit C-40**, Letter from Kishan Daga to Minister Zucula, dated 29 July 2013, expressing concern over the MTC's handling of the tender.

²⁵⁷ **Exhibit C-40**, Letter from Kishan Daga to Minister Zucula, dated 29 July 2013, expressing concern over the MTC's handling of the tender.

²⁵⁸ **Exhibit C-40**, Letter from Kishan Daga to Minister Zucula, dated 29 July 2013, expressing concern over the MTC's handling of the tender.

- 228 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.*”²⁵⁹
- 229 The PGS Consortium lodged a complaint for the MTC’s award of the concession to ITD, asking the MTC “*to kindly put on hold the decision conveyed by the MTC.*”²⁶⁰ The MTC responded to the PGS Consortium’s complaint about the irregularities of the tender process on 12 August 2013,²⁶¹ maintaining that the tender evaluation criteria had remained unchanged, and that the PGS Consortium’s 15% right of preference had been applied correctly.
- 230 Given the serious irregularities surrounding the evaluation of the tenders, on 19 August 2013, 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.²⁶²
- 231 The MTC refused to reconsider its position and instead proceeded to confirm its award of the concession for the development of the railway corridor and port to ITD on 27 August 2013.²⁶³
- 232 Consequently, on 28 August 2013, the PGS Consortium submitted to the MTC its formal appeal (the “**Formal Appeal**”) in which the PGS Consortium set out the numerous grounds for challenging the award to ITD.²⁶⁴
- 233 In particular, the PGS Consortium set out a number of examples where, in the PGS Consortium’s view, “*there has been a mis-interpretation, mis-*

²⁵⁹ **Exhibit C-40**, Letter from Kishan Daga to Minister Zucula, dated 29 July 2013, expressing concern over the MTC’s handing of the tender.

²⁶⁰ **Exhibit C-41**, Letter from Kishan Daga of PEL to the MTC to Ms Odete, President of Jury, dated 1 August 2013.

²⁶¹ **Exhibit C-42**, Letter from the MTC to PGS Consortium, dated 12 August 2013, responding to PEL’s complaint about the tender process.

²⁶² **Exhibit C-43**, Letter from the PGS Consortium to the Mr Pedro Augusto Ingles of MTC, dated 19 August 2013.

²⁶³ **Exhibit C-44**, Letter from the MTC to PGS Consortium, dated 27 August 2013, confirming its award of the concession to ITD.

²⁶⁴ **Exhibit C-45**, Letter from Kishan Daga of PEL to the MTC, dated 28 August 2013, contesting the award of the concession to ITD.

*application, or entirely incorrect application of the scoring provisions of the Project” as stipulated in the RFP and the amendments thereto.*²⁶⁵

- 234 By way of example only, the PGS Consortium only received a remarkably low score of 3.5 (out of 10) in the category of “*Organic Composition of the Bidder*”,²⁶⁶ even though PEL had over 60 years of experience in the heavy construction industry and has completed national and international projects all over the world. Furthermore, one of the PGS Consortium members, Grindrod, had designed and constructed numerous port and terminal projects in Mozambique itself and across Africa, had over 100 years’ track record in operating port and rail infrastructure. In 2007, it had invested in the Maputo Port Development Company, running the operation and management of Maputo Port.²⁶⁷
- 235 Mozambique’s assessment of the PGS Consortium’s capabilities under the ‘Interpretation and Understanding of the Project’ category was equally flawed. The PGS Consortium only received an inexplicably low score of 10.5 (out of 15) in the category of “*Interpretation and Understanding of the Project*” notwithstanding that PEL originated the Project and had “*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 approve the PFS and for the Council of Ministers to decide that it was in the nation’s strategic interest to proceed with the Project with PEL forthwith.²⁶⁸
- 236 In light of the many inconsistencies and errors plaguing the tender process, the PGS 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*

²⁶⁵ **Exhibit C-45**, Letter from Kishan Daga of PEL to the MTC, dated 28 August 2013, contesting the award of the concession to ITD.

²⁶⁶ **Exhibit C-45**, Letter from Kishan Daga of PEL to the MTC, dated 28 August 2013, contesting the award of the concession to ITD, p. 4.

²⁶⁷ **Exhibit C-190**, “Executive Summary” of the *Technical Proposal*, dated 27 June 2013, pp. 385-389. Please also see, 2018, “The Grindrod Story”, Grindrod Ltd, viewed 30 October 2020, <<http://www.grindrod.co.za/Pages/History>>, for confirmation that in 2007 Grindrod invested in the Maputo Port Development Company.

²⁶⁸ **Exhibit C-45**, Letter from Kishan Daga of PEL to the MTC, dated 28 August 2013, contesting the award of the concession to ITD, p. 5.

amendments thereto”,²⁶⁹ and to hold the award in abeyance until these grave errors could be addressed.

237 Intent, it seemed, to award the project to ITD (for reasons as yet unexplained), the MTC refused to change its position. It also rejected PEL’s modest claims for compensation which, at that time, included reimbursement of the costs it had incurred for the PFS, plus USD 4 million, as well as royalties of 0.5% of the value of the investment (being 0.5% of the USD 3,115,000,000 value of the Project identified in the PFS, *i.e.*, USD 15,575,000) for its identification and development of the Project and its conceptualisation.²⁷⁰

L. *The Project Today*

238 Mozambique has been very guarded about any information in relation to the Project today in the hands of ITD.

239 Public information suggests that ITD formed a consortium comprised of:

- a. ITD, with a 60% interest;
- b. Zambezia Development Corridor, with a 20% interest; and
- c. CFM, with a 20% interest.

(together, the Thai Mocambique Logistica Consortium, or “**TML Consortium**”).²⁷¹

240 PEL is particularly surprised to learn that CFM has partnered with the TML Consortium, and that CFM has agreed to a 20% equity participation.²⁷² This is in stark contrast to the messages delivered by CFM to PEL and what CFM declared publicly thereafter.²⁷³

241 The TML Consortium signed a concession agreement in December 2013.²⁷⁴ The concession is for 30 years, as measured from the start of construction, with

²⁶⁹ **Exhibit C-45**, Letter from Kishan Daga of PEL to the MTC, dated 28 August 2013, contesting the award of the concession to ITD, p. 2.

²⁷⁰ **Exhibit C-46**, Letter from Sal & Caldeira Advogados, LDA on behalf of PEL to Gabriel Muthisse of MTC, dated 18 February 2014, rejecting PEL’s claims for compensation.

²⁷¹ **Exhibit C-125**, Annual Report - Italian-Thai Development Public Company, dated 2016, p. 145.

²⁷² **Exhibit C-130**, CL Brief, “Chinese-funded Moatize-Macuse Logistics Corridor scheduled to launch in 2019”, *China-Lusophone Brief*, dated 10 July 2018.

²⁷³ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 85.

²⁷⁴ **Exhibit C-126**, “Concession Signed for Construction of 525 km Coal Railway”, *Railway Gazette*, dated 19 December 2013.

an option to extend for an additional 10 years.²⁷⁵ Furthermore, Mozambique has agreed to a concession premium of USD 5 million to be paid upon signature of the concession agreement for the Project, with a further USD 5 million to be deployed in relation to human development initiatives for the duration of the concession.²⁷⁶

242 The TML Consortium completed a bankable feasibility study in 2016 (the “**TML Bankable Feasibility Study**”).²⁷⁷

243 The TML Consortium secured financing for the Project from a number of Chinese lenders in 2018, after completion of the TML Bankable Feasibility Study.²⁷⁸ The TML Consortium appears to have secured offtake agreements from mining companies, including JSPL and Eurasian Resources Group.²⁷⁹ PEL understands that securing these offtake commitments has resulted in an extension of 120 km to the railway line. PEL understands that the concession was amended to reflect this change.²⁸⁰

244 Financial close for the Project appears to have occurred in 2019 and construction commenced thereafter.²⁸¹

245 As it stands, therefore, the Government has appropriated PEL’s idea that will transform Mozambique that the Government previously considered impossible, benefited from its work, money, and effort in the Preliminary Study and PFS, trampled on PEL’s rights under the MOI, and manipulated the tender system with a view to have it and a third party benefit. That is the archetypal paradigm of why the investor-State system was created, and as the next section lays out, forms the basis of a series of breaches of the Treaty for which compensation to PEL is due.²⁸²

²⁷⁵ **Exhibit C-125**, Annual Report - Italian-Thai Development Public Company, dated 2016, p. 145.

²⁷⁶ **Exhibit C-125**, Annual Report - Italian-Thai Development Public Company, dated 2016, p. 145.

²⁷⁷ **Exhibit C-125**, Annual Report - Italian-Thai Development Public Company, dated 2016, p. 145. The feasibility study has been relied upon by lenders/investors when making investment decisions regarding the project.

²⁷⁸ **Exhibit C-130**, CL Brief, “Chinese-funded Moatize-Macuse Logistics Corridor scheduled to launch in 2019”, *China-Lusophone Brief*, dated 10 July 2018.

²⁷⁹ **Exhibit C-131**, “Tete province, Mozambique, Will have Four Railways”, *Macauhub*, dated 11 September 2017.

²⁸⁰ **Exhibit C-132**, “Government of Mozambique Signs Port and Railway Contracts with Mota-Engil”, *Club of Mozambique*, dated 24 November 2017.

²⁸¹ **Exhibit C-121**, “The Project”, *Thai Mozambique Logistica Website*.

²⁸² The concession contract is not publically available. Despite PEL’s efforts to obtain a copy of the concession under the available legal means in Mozambique, the Respondent has failed to produce it.

IV. THE TRIBUNAL HAS JURISDICTION OVER PEL'S CLAIM

246 This Tribunal has jurisdiction over PEL's claim given that (1) both Parties to this dispute consented to arbitration; and (2) Claimant fulfils all the jurisdictional and procedural requirements provided for in the Treaty.²⁸³

A. *Both Parties Consented to Arbitration*

247 The Treaty was signed on 19 February 2009²⁸⁴ and entered into force on 23 September 2009.²⁸⁵

248 The Treaty contains Respondent's open offer to arbitrate, pursuant to the UNCITRAL Rules, at Article 9 which reads as follows:

“(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

²⁸³ See also Notice of Arbitration, paras 77-86.

²⁸⁴ **CLA-1**, The Treaty, p. 8.

²⁸⁵ *Bilateral Investment Treaties*, Department of Economic Affairs, viewed 30 October 2020 <<https://dea.gov.in/bipa?page=6>>.

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, [. . .]²⁸⁶

249 It is well established that by filing for arbitration in accordance with the terms of a bilateral investment treaty, a claimant accepts the relevant state’s open offer to arbitrate, thereby giving rise to “*an agreement in writing*” for the purposes of Article II of the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²⁸⁷

250 In the present case, PEL accepted Mozambique’s open offer to arbitrate by filing the Notice for Arbitration on 20 March 2020 (the “**Notice**”). Accordingly, both Parties consented to arbitration.

B. The Treaty’s Jurisdictional and Procedural Requirements Are Satisfied

251 Article 9 provides that the disputes which may be submitted to arbitration under the Treaty are “*any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former.*” It also requires that the parties attempt to settle such dispute amicably before it is submitted to arbitration. As already explained in paragraphs 77 to 86 of the Notice and further developed below, Claimant meets all these requirements.

1. The Tribunal has Jurisdiction Ratione Personae

252 The term “investor” is defined as “*any national or company of a Contracting Party*”, pursuant to Article 1(c) of the Treaty. The term “Companies” is defined

²⁸⁶ CLA-1, The Treaty, pp. 5-6. (emphasis added)

²⁸⁷ See e.g. CLA-66, C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles*, OUP, 2017, paras. 3.48-3.49.

as “Corporations firms and associations incorporated or constituted or established under the laws in force in any part of either of the Contracting Party”, in accordance with 1(a) of the Treaty.

253 In the present case, India is a Contracting Party to the Treaty and PEL is a public company incorporated in India.²⁸⁸ Accordingly, PEL is an “investor of one Contracting Party” for the purposes of the Treaty. Respondent is Mozambique, which is “the other Contracting Party” to the Treaty. The Tribunal therefore has jurisdiction *ratione personae*.

2. The Tribunal Has Jurisdiction Ratione Materiae

(a) PEL Made a Qualifying Investment

254 Article 1(b) of the Treaty expansively defines the term “investment” under a broad chapeau as “*every kind of asset established or acquired, including changes in the form of such investment in accordance with the national laws of the Contracting Party in whose territory the investment is made.*”²⁸⁹ It then sets out a non-exhaustive list of assets that fall within the definition of investment, including “(v) *business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals*” (Article 1(b)(v)), “*rights to money or to any performance under contract having a financial value*” (Article 1(b)(iii)), and “*intellectual property rights, in accordance with the relevant laws of the respective Contracting Party*” (Article 1(b)(iv)).

255 It is widely accepted that when considering whether an investment is a qualifying investment under the relevant treaty, tribunals ought to adopt a holistic approach, and to consider the economic operation of the investment as a whole.²⁹⁰

²⁸⁸ **Exhibit C-1**, Certificate of Incorporation No. 7089, certifying the incorporation of Patel Engineering Company Limited pursuant to the Indian Companies’ Act, VII of 1913; and **Exhibit C-2**, Certificate of Incorporation No. 7039 Consequent on Change of Name in the Office of the Registrar of Companies, Maharashtra, Mumbai, dated 9 December 1999.

²⁸⁹ **CLA-1**, The Treaty, Article 1(b) (emphasis added).

²⁹⁰ **CLA-80**, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, paras. 72 and 74; **CLA-81**, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 92; **CLA-82**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 428, 453; **CLA-83**, *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 27 September 2006, para. 331; **CLA-84**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on

256 Furthermore, it is well established that a broadly worded chapeau, such as the one in the Treaty referring to “*every kind of asset*” embraces “*everything of economic value, virtually without limitation.*”²⁹¹ The form of the “thing” of economic value or contribution matters not²⁹² and typically includes know-how, which falls within the scope of such definition.²⁹³

257 In the instant case, in 2011, PEL invested in the Project, an economic transaction aimed at developing and operating a rail corridor and port in Mozambique, which was valued at USD 3.115 billion. PEL alone devised the Project, and its investment in it includes, *inter alia*:

- a. The direct award of a concession to implement the Project, as well as all of the rights under the MOI associated with the Project, including (i) PEL’s right that “*the Govt. of Mozambique shall issue a concession of the project in favour of PEL*”²⁹⁴ for the USD 3.115 billion Project, (ii) PEL’s exclusive right to develop the Project through Respondent’s commitment “*not to give any rights/authorization to any other party for the development/expansion of a port between Chinde and Pebane for similar objectives, nor for the development/expansion of any rail corridor from Tete for the province of Zambezia within the area referred to under objective of the present [MOI]*”²⁹⁵, and (iii) PEL’s “*first right of refusal for the implementation of the project on the basis*

Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.44; **CLA-85**, *Chevron Corp. (USA) v. Republic of Ecuador*, UNCITRAL, Final Award, 31 August 2011, para. 19; **CLA-86**, *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, para. 6.58.

²⁹¹ **CLA-87**, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, 8 September 2006, para. 106. See also **CLA-88**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 113.

²⁹² See e.g. **CLA-89**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 297. See also **CLA-90**, *Société Civile Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award, 21 December 2015, para. 216; **CLA-91**, *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award, 22 June 2017, para. 424.

²⁹³ See e.g. **CLA-88**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras. 113-114. See also **CLA-89**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 297; **CLA-92**, *RSM Production Corporation v. Grenada I*, ICSID Case No. ARB/05/14, Award, 13 March 2009, para. 249.

²⁹⁴ **Exhibit C-5A**, English Version of the Memorandum of Interest Between The Ministry of Transport and Communications & Patel Engineering Ltd, Clause 2.1.

²⁹⁵ **Exhibit C-5A**, English Version of the Memorandum of Interest Between The Ministry of Transport and Communications & Patel Engineering Ltd, Clause 6.

of the concession which will be given by the Government of Mozambique”²⁹⁶.

- b. PEL transferred information and data to the MTC and the CFM, including PEL’s know-how regarding its conception and development of the Project, previously deemed impossible by Respondent. This know-how was explicitly protected by the MOI through the exclusivity clause²⁹⁷ as well as through the confidentiality clause, whereby the parties “*agreed to keep all the data, documents, information, and share between them whether written or otherwise, including this MOI as confidential until the approval of the project*”²⁹⁸;
- c. the Preliminary Study PEL conducted in early 2011; and
- d. the detailed PFS PEL carried out during the course of 2011 and 2012.

258 Claimant’s investment comes comfortably within the ambit of Article 1(b)(v) because the MOI amounts to the direct award of a “(v) *business concession[] conferred . . . under contract,*” while PEL’s rights under the MOI fall squarely within Article 1(b)(iii), as they comprise “*rights . . . to performance under [a] contract having a financial value.*”

259 Furthermore, the know-how PEL transferred to Mozambique regarding the conception and development of the Project falls within the scope of the broadly worded chapeau of Article 1(b). The inclusion of intellectual property rights in Article 1(b) as examples of “investment” reinforces the fact that know-how was contemplated as an investment under the Treaty.

260 Claimant’s investment therefore falls within the scope of the broadly worded chapeau of Article 1(b) as well as within the specific examples of qualifying investment listed at Articles 1(b)(iii).

261 Moreover, Claimant’s investment was made in Mozambique’s territory. There is no doubt that the Project was to be developed on Mozambique’s territory,

²⁹⁶ **Exhibit C-5A**, English Version of the Memorandum of Interest Between The Ministry of Transport and Communications & Patel Engineering Ltd, Clause 2.2.

²⁹⁷ **Exhibit C-5A**, English Version of the Memorandum of Interest Between The Ministry of Transport and Communications & Patel Engineering Ltd, Clause 6.

²⁹⁸ **Exhibit C-5A**, English Version of the Memorandum of Interest Between The Ministry of Transport and Communications & Patel Engineering Ltd, Clause 11.

and that the Preliminary Study, the MOI, and the PFS were all developed with the Mozambican territory in mind.

262 The MOI also independently constitutes an investment in the territory of Mozambique. Case law is unequivocal that a contractual relationship with a state or a state entity creating value in the State, constitutes an investment in the territory of such State. For instance, the Tribunal in *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela* held that contractual rights constitute an investment (even where no physical in-country activities exists) for the purposes of the relevant treaty:

“The Tribunal finds that the contractual rights to coal under the Confirmation Letters are properly characterized as an intangible asset. The coal to be purchased was located in Venezuela, but NSPI carried out no physical in-country activities in connection with this and had no established, physical, in-country presence. By the Claimant’s own account, what is at issue here are contractual rights. A contractual right by its very nature has no fixed abode in the physical sense, for it is intangible. However, a lack of physical presence is not per se fatal to meeting the territoriality requirement; intangible assets, with no accompanying physical in-country activities, have been accepted as investments for the purposes of bilateral investment treaties by many tribunals. The awards of those tribunals are therefore apposite and instructive. Further, the Tribunal agrees with the approach taken in several such cases, whereby tribunals have looked to whether the host State received a benefit. However, this “benefit” does not necessarily have to be economic development, a highly subjective element. As has been noted in connection with economic development as an inherent economic feature of “investment,” incorporating this criterion may run the risk of using hindsight improperly; it is the alleged investment at the time of its inception that should be considered, not the impact that the investment has ultimately had.”²⁹⁹

²⁹⁹ **CLA-93**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela II*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award, 30 April 2014, para. 130. See also **CLA-81**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 124: “Claimants’ expenditures in connection with the Kherstones created value in Ukraine, on the basis of contractual relationships with a Ukrainian State entity. Accordingly, the Tribunal has little difficulty in concluding that the Claimants’ investments are investments in the territory of Ukraine.”

263 In this case, the MOI was entered into directly with the MTC on behalf of Respondent, who unquestionably benefitted from PEL's conception of, and investment in, the Project. Respondent *inter alia* benefitted from the 185 page long PFS, which included the methodology for the selection of the route;³⁰⁰ a field survey for the entire alignment from Macuze to Moatize and Quelimani to Macuba;³⁰¹ an analysis and overview of the design criteria for the railway;³⁰² an analysis and overview of the road crossings;³⁰³ an overview of the railway track design, rolling stock specifications and tonnage ramp-up profile in order to develop train operating plans and to identify rail infrastructural requirements;³⁰⁴ an overview of rolling stock for locomotives and wagons in Mozambique and in other countries;³⁰⁵ a consideration of capital cost estimates;³⁰⁶ a consideration of operating cost estimates;³⁰⁷ an overview of employment generation;³⁰⁸ and an analysis of construction risks, maintenance risks and investment and a return on investment risks.³⁰⁹ Respondent also benefitted from further studies and reports it explicitly required from PEL such as an estimated and projected commercial model and a statement on utilisation of funds for the Project.³¹⁰ It is on the very basis of the data carefully prepared and gathered by PEL that Respondent, in breach of the Treaty, organised the public tender for the Project that it once had considered to be unfeasible in Mozambique.³¹¹ This allowed others to usurp the Project and reap the benefits of PEL's investment in relation to it, in the context of an infrastructure Project which is one of the most important in Mozambican history.

264 Claimant's investment was also a lawful investment made with the direct support and involvement of Respondent. From the very beginning, the Project was discussed directly with and supported by Respondent itself, especially the MTC. This conclusion is not affected by Respondent's allegation in the ICC

300 **Exhibit C-6**, Pre-Feasibility Study and Annexures 1 –18, Section 4.

301 **Exhibit C-6**, Pre-Feasibility Study and Annexures 1 –18, Section 4.4, pp. 27-28.

302 **Exhibit C-6**, Pre-Feasibility Study and Annexures 1 –18, Section 5.

303 **Exhibit C-6**, Pre-Feasibility Study and Annexures 1 –18, Section 6.

304 **Exhibit C-6**, Pre-Feasibility Study and Annexures 1 –18, Section 7.

305 **Exhibit C-6**, Pre-Feasibility Study and Annexures 1 –18, Section 7.

306 **Exhibit C-6**, Pre-Feasibility Study and Annexures 1 –18, Section 9.

307 **Exhibit C-6**, Pre-Feasibility Study and Annexures 1 –18, Section 9.

308 **Exhibit C-6**, Pre-Feasibility Study and Annexures 1 –18, Section 10.

309 **Exhibit C-6**, Pre-Feasibility Study and Annexures 1 –18, Section 10.

310 **Exhibit C-8**, Letter from PEL to MTC, dated 15 May 2012; **Exhibit C-10**, Letter from PEL to MTC, dated 11 June 2012; **Exhibit C-10**, Letter from PEL to MTC, dated 11 June 2012.

311 **CWS-1**, Witness statement of Mr Kishan Daga, para. 24.

Arbitration,³¹² that PEL fraudulently concealed a purported “blacklisting” by the Indian government.³¹³ In particular, Mozambique contends that without the alleged fraudulent misrepresentation by PEL concerning such blacklisting, the MTC would never have entered into the MOI or had any dealing with PEL whatsoever.³¹⁴

265 Specifically, Mozambique argues that PEL’s purported concealment of a decision by the National Highways Authority of India (“**NHAI**”) to preclude PEL from submitting bids for future projects to be undertaken by the NHAI for a period of 12 months, induced the MTC: (1) to enter into and execute the MOI; and (2) to allow PEL to participate in the public tender process, as part of the PGS Consortium.³¹⁵ Mozambique further contends that this constitutes fraudulent inducement under Mozambique law and accordingly, *inter alia*, that the MOI is void, non-binding³¹⁶ or unenforceable.³¹⁷

266 Mozambique’s argument does not hold water. The relevant facts are as follows:

- a. on 20 May 2011 — i.e. after the MOI was executed — the NHAI communicated a decision barring PEL “*from prequalification, participating or bidding for future projects to be undertaken by [the NHAI] for a period of one year from the date of issue of the letter*” (the “**NHAI decision**”),³¹⁸
- b. the factual underpinning of the NHAI decision was PEL’s decision not to accept a Letter of Award from the NHAI notwithstanding the fact that it had been declared the successful bidder by the NHAI.³¹⁹ It was the NHAI’s position that PEL’s failure to accept the Letter of Award

³¹² Mozambique has already indicated its intention to put forward similar arguments before this Tribunal in the Terms of Appointment

³¹³ **Exhibit C-178**, ICC Request for Arbitration, paras. 34-44.

³¹⁴ **Exhibit C-178**, ICC Request for Arbitration, paras. 45-54.

³¹⁵ **Exhibit C-178**, ICC Request for Arbitration, paras. 6; 40 and 44.

³¹⁶ **Exhibit C-178**, ICC Request for Arbitration, paras. 130-133.

³¹⁷ **Exhibit C-178**, ICC Request for Arbitration, para. 134.

³¹⁸ **Exhibit C-195**, Judgment of the Supreme Court of India in the case of Patel Engineering Ltd. v. Union of India & Anr., No. 23059 of 2011, dated 11 May 2012.

³¹⁹ **Exhibit C-195**, Judgment of the Supreme Court of India in the case of Patel Engineering Ltd. v. Union of India & Anr., No. 23059 of 2011, dated 11 May 2012.

deprived NHAI of a financial premium, given that PEL had been the most competitive bidder;³²⁰

- c. PEL challenged this decision through an (apparently non-suspensive) judicial review *inter alia* on the basis that barring PEL from bidding on future NHAI projects for a one-year period was a disproportionate sanction and instead should have been sanctioned by an award in damages.³²¹ Ultimately, PEL’s challenge was rejected by the Indian Supreme Court on 11 May 2012;³²²
- d. the NHAI’s decision, which was in place for one year only, expired a few days after the Indian Supreme Court Judgment, on 19 May 2012.³²³

267 As such, at the time the MOI was executed, there was no decision from the NHAI “blacklisting” PEL, and therefore, there was no — and could have been no — fraudulent action to conceal this decision. Obviously, PEL could not have concealed what did not exist.

268 In the ICC Arbitration, Mozambique alleges that without PEL’s purported fraudulent misrepresentation concerning the NHAI decision, PEL would not have been allowed to participate in the 2013 tender. Again, Mozambique’s argument misses the mark entirely.

269 The PGS Consortium’s formal decision to proceed with the tender is set out in its Request for Proposals document dated 12 April 2013, which the PGS Consortium submitted on 29 May 2013, *i.e.*, ***more than a year after the NHAI’s decision had expired***. Therefore, at the time the PGS Consortium submitted its proposal, there was plainly no decision in force – either in Mozambique or in India – “blacklisting” or debarring PEL.

270 It is abundantly clear from the Indian Supreme Court Judgment that the NHAI decision does not relate to dealings with any governments but only to PEL’s

³²⁰ **Exhibit C-195**, Judgment of the Supreme Court of India in the case of Patel Engineering Ltd. v. Union of India & Anr., No. 23059 of 2011, dated 11 May 2012, p. 261, para. g.

³²¹ **Exhibit C-195**, Judgment of the Supreme Court of India in the case of Patel Engineering Ltd. v. Union of India & Anr., No. 23059 of 2011, dated 11 May 2012, p. 261, paras. d-h.

³²² **Exhibit C-195**, Judgment of the Supreme Court of India in the case of Patel Engineering Ltd. v. Union of India & Anr., No. 23059 of 2011, dated 11 May 2012.

³²³ **Exhibit C-195**, Judgment of the Supreme Court of India in the case of Patel Engineering Ltd. v. Union of India & Anr., No. 23059 of 2011, dated 11 May 2012.

specific dealings with the NHAI.³²⁴ Even if the NHAI decision had been in force at the relevant time (which it was not), this would not have affected PEL's standing to participate in the Project – either through the direct award of the concession or through a public tender process - with Mozambique.

271 In addition, the Mozambican law governing a company's participation in public procurement procedures, at the time the MOI was executed, was Decree No. 15/2010 of 24 May 2010 (the "**Public Works Decree**"). The Public Works Decree, in turn, only prohibits the participation in procurement procedures of entities that have been sanctioned by a *Mozambican*³²⁵ State body or institution for limited reasons,³²⁶ none of which is applicable to PEL or this case.

272 PEL was, therefore, not barred from entering into contractual relationships at the relevant times in either India or Mozambique, and, in any event, was not subjected to any kind of debarring procedure by Mozambique at any time.

273 In light of the foregoing, PEL unquestionably has a qualifying investment in Mozambique (including a "*business concession[] conferred . . . under contract,*" under Article 1(b)(v), PEL's "*rights . . . to performance under [a] contract having a financial value*" pursuant to Article 1(b)(iii), and the MOI itself. Nothing further is required by the Treaty and as a result, the Tribunal has jurisdiction *ratione materiae*.

³²⁴ **Exhibit C-195**, Judgment of the Supreme Court of India in the case of Patel Engineering Ltd. v. Union of India & Anr., No. 23059 of 2011, dated 11 May 2012, p. 261, para. a "*the order that barred the petitioner from prequalification, participating or bidding for future projects to be undertaken by R-2 i.e. the NHAI for a period of one year from date of issue of the letter.*"

³²⁵ **CLA-67**, Article 21 of Decree No. 15/2010 of 24 May 2010 (the "Public Works Decree") refers to sanctions by any "*body or institution of the State.*" This necessarily must be a reference to the State of Mozambique, as opposed to foreign bodies or institutions. There is no reference in the Public Work Decree to decisions rendered abroad. The scope of application of the Public Work Decree cannot be extended to situations that are not explicitly provided for within that decree. This derives from the principle of legality, i.e. only what is expressly set forth in the law can limit the rights of private entities when relating to the State. As noted, the Public Works Decree does not reference the decisions of foreign States and even if did (which is denied), the fact remains that there was no decision in force debarring PEL from participating in public tenders at that time.

³²⁶ **CLA-67**, Article 21 of Decree No. 15/2010 of 24 May 2010 (the "Public Works Decree") sets out three situations whereby legal persons can be blacklisted from public procurement procedures, namely (1) Article 21.1(c) debars legal persons who have been sanctioned by any State body or institution prohibiting the participation in procurement procedures due to an unlawful act in the procurement process, during the term of the sanction; (2) Article 21.1(g) debars legal persons who have defrauded the State or have been involved in fraudulent company bankruptcies or who have been declared bankrupt; and (3) Article 21.1(h) debars legal persons whose share capital originates from an unlawful activity. None of these categories are relevant to the present dispute.

- 274 Some investment tribunals (particularly in the ICSID context), have gone beyond the definition of investment stipulated in the relevant treaty, to consider whether a qualifying investment possesses “hallmarks” commonly attributed to investments — a contribution that extends over a certain period of time that involves some risk and, according to some tribunals, contributes to the host state’s development (the so-called *Salini* factors).³²⁷
- 275 There has been considerable debate as to whether these so-called hallmarks are compulsory requirements or mere indicators of the possible existence of an investment.³²⁸ There is further controversy as to their very relevance, particularly outside the ICSID context.³²⁹
- 276 Assuming *arguendo* that this Tribunal considers such factors relevant, Claimant’s investment also possesses the hallmarks commonly attributed to an investment:
- a. In respect of contribution, the estimated cost of the Project was USD 3.115 billion with PEL expecting hundreds of millions of dollars in profits associated with it.³³⁰ PEL expended several million dollars to fund the preliminary study and the PFS.³³¹

³²⁷ See e.g. **CLA-94**, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, para. 207.

³²⁸ See e.g. **CLA-95**, *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, paras. 57-74; see also **CLA-96**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008, paras. 311-318.

³²⁹ For instance, the tribunal in **CLA-87**, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia* referred to the established practice of ICSID tribunals to assess whether a specific transaction qualified as an investment, independently of the definition in the relevant investment treaty, in order to fulfil the *ratione materiae* prerequisite of Article 25 of the ICSID Convention. It concluded that such concerns were irrelevant outside the ICSID context: “*However, this latter ratione materiae test for the existence of an investment in the sense of Article of the (sic) 25 ICSID Convention is one specific to the ICSID Convention and does not apply in the context of ad hoc arbitration provided for in BITs as an alternative to ICSID. In the present ad hoc arbitration under the UNCITRAL Rules one would therefore have to conclude that the only requirements that have to be fulfilled in order to confer ratione materiae jurisdiction on this Tribunal are those under the BIT.*” (**CLA-87**, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, paras. 117-118). See also **CLA-97**, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, para. 388 where the tribunal merely decided whether the investment fell within the scope of the definition of investment in the relevant BIT.

³³⁰ **Exhibit C-18**, Letter from PEL to MTC, 28 November 2012. See also, **Exhibit C-7**, Patel Presentation to MTC.

³³¹ **Exhibit C-46**, Letter from Sal & Caldeira Advogados, LDA on behalf of PEL to Gabriel Muthisse of MTC, dated 18 February 2014, rejecting PEL’s claims for compensation.

- b. As to duration, it was estimated that the construction of the Project would take place over 3 years,³³² and the concession was set to last over the course of 30 years of operation and maintenance.³³³ It took PEL approximately one year to organise the Project with the Government, oversee the Preliminary Study in conjunction with the MTC, and negotiate the MOI. PEL then spent the next twelve months completing the PFS (to Respondent’s satisfaction).³³⁴
- c. There is no doubt that there were risks associated with the Project, for instance, that the MTC would reject the PFS, or that the PFS would deem the Project to be unfeasible, as Respondent had once believed.
- d. Finally, the Project contributed to Mozambique’s development. The development of a railway and a port is a quintessential example of a project that contributes to the development of a country. As the MOI notes in its opening recitals, “[s]uch project will enhance the economic prosperity in the entire region.”³³⁵ The website of the very company to which Mozambique wrongfully granted PEL’s concession unequivocally supports this statement. It explains that the Project “is of vital importance for the logistics of the mining sector, since it assures the opening of the Moatize basin to the international market, ensuring a more competitive logistics cost compared to the more direct competitors, namely Australia and Indonesia”³³⁶ as well as “of vital importance network effect for communities and the economy.”³³⁷

(b) A Dispute Has Arisen in Relation to PEL’s Investment

277 While the Treaty does not contain a definition of the term “dispute”, such term has been defined by the Permanent Court of International Justice (the “**PCIJ**”) and its successor, the International Court of Justice (the “**ICJ**”) as “a disagreement on a point of law or fact, a conflict of legal views or interests

³³² **Exhibit C-6**, Patel Engineering Limited, *Pre-Feasibility Study and Annexures 1 –18*.

³³³ **Notice of Arbitration** dated 20 March 2020, para. 82.

³³⁴ **Exhibit C-20**, Letter from PEL to MTC, dated 22 January 2013.

³³⁵ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Recital C.

³³⁶ <https://tml.co.mz/mission-vision-values/> (accessed on 30 October 2020).

³³⁷ <https://tml.co.mz/mission-vision-values/> (accessed on 30 October 2020).

between the parties.”³³⁸ Investment treaty tribunals routinely rely on this definition.³³⁹

278 In the present case, PEL submits that Respondent’s conduct towards Claimant and its investment was in breach of the Treaty as developed in Section V below. Respondent denies the entirety of Claimant’s claim and of the relief sought.³⁴⁰ Therefore, a dispute exists concerning PEL’s investment for the purposes of Article 9 of the Treaty.

279 It follows that this Tribunal has jurisdiction *ratione materiae* over PEL’s claim.

(c) The Tribunal has Jurisdiction *Ratione Temporis*

280 As noted above, the Parties signed the Treaty on 19 February 2009³⁴¹ and it entered into force on 23 September 2009.³⁴²

281 India purported to terminate the Treaty on 22 March 2019 with effect from 21 March 2020,³⁴³ pursuant to Article 15(1) of the Treaty. Article 15(1) provides, to the extent relevant, that the Treaty stands terminated one year from receipt of a written notice of intention to terminate it.

282 However, Article 15(2) of the Treaty contains a “sunset clause” which extends the Treaty’s protections for 15 years from the date of termination in respect of investments made prior to such termination. Article 15(2) provides as follows:

*“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.”*³⁴⁴

³³⁸ **CLA-98**, *Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, Objection to the Jurisdiction of the Court, 30 August 1924, p. 11; **CLA-99**, *Case Concerning East Timor (Portugal v. Australia)*, *International Court of Justice (ICJ)*, 30 June 1995, I.C.J. Reports 1995, p.99 (para. 22).

³³⁹ See e.g. **CLA-100**, *Achmea B.V. v. Slovak Republic II*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, para. 167.

³⁴⁰ Terms of Appointment, paras. 61-67.

³⁴¹ **CLA-1**, The Treaty, p. 8.

³⁴² *Bilateral Investment Treaties*, Department of Economic Affairs, viewed 30 October 2020 <<https://dea.gov.in/bipa?page=6>>.

³⁴³ **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 termination the Treaty in accordance with Article 15.

³⁴⁴ **CLA-1**, The Treaty, Article 15(2).

283 PEL's investment was made in 2011, almost a decade prior to March 2020. The Treaty thus continues to be effective in relation to the current dispute before this Tribunal. Accordingly, this Tribunal has jurisdiction *ratione temporis* over this dispute.

(d) Claimant Complied with the Relevant Procedural Requirement to Commence this Arbitration

284 Article 9(1) of the Treaty provides that the Parties must attempt to settle their dispute amicably, as far as possible, through negotiations. Articles 9(2)-(3) provide that any such dispute which has not been settled within a period of six months, may, if both Parties agree, be submitted to the mechanisms specified in Article 9(2), or where they fail to agree on such mechanism, referred to arbitration under Article 9(3).

285 In the present case, on 25 June 2018, PEL sent a letter to Respondent formally notifying it of the existence of a dispute under the Treaty (the "Cooling-Off Letter").³⁴⁵ The Cooling-Off Letter, which was over 15 pages long, sets out in some detail PEL's claim. It clearly stated that failing Respondent's prompt engagement in settlement negotiations, PEL would commence arbitration proceedings, pursuant to Article 9(3) of the Treaty.³⁴⁶ The Cooling-Off Letter therefore triggered the six months negotiations period.

286 Settlement negotiations ensued for over a year and a half. They included an in-person meeting in Maputo, Mozambique between representatives of both Parties as well as the exchange of confidential, without prejudice communications, regarding the Parties' respective positions. Ultimately, the Parties failed to achieve an amicable solution to their dispute.

287 On 20 March 2020, well after the six-month cooling-off period had expired, Claimant filed its Notice in these proceedings. PEL accordingly complied with the procedural requirements of Article 9 when it commenced this arbitration.

³⁴⁵ **Exhibit C-49**, Letter dated 25 June 2018 from Addleshaw Goddard to Mozambique notifying Respondent of a dispute under the Treaty.

³⁴⁶ **Exhibit C-49**, Letter dated 25 June 2018 from Addleshaw Goddard to Mozambique notifying Respondent of a dispute under the Treaty, at para. 67.

C. *The Arbitration Clause in the MOI Does Not Affect the Jurisdiction of this Tribunal*

288 In the Terms of Appointment,³⁴⁷ Respondent wrongly contends that this Tribunal has no jurisdiction, on the basis that the MOI contains the following arbitration clause providing for ICC arbitration with a venue in Mozambique:

“The present document constitutes a memorandum of interest between the parties. Any dispute arising out of this memorandum between the parties shall be referred to arbitration. The arbitration will be governed by Mozambique law and the rules of the International Chamber of Commerce shall be followed. Each party will appoint one arbitrator and both of these appointed arbitrators will in turn appoint the presiding arbitrator. The venue of the arbitration shall be at the Republic of Mozambique.”

289 Respondent’s contention directly contradicts the well-established principle of investment treaty law that an arbitration clause in a contract does not prevent an investor from commencing a treaty claim, as the causes of action are different. This key principle was set out by the *Ad Hoc* Committee in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine*. In that case, the Committee set aside the portion of the tribunal’s award holding that a jurisdiction clause in a contract precluded any claim under the treaty unless and until an action in the local courts had been pursued.³⁴⁸

“In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract....

At the same time, the exclusive jurisdiction clause did not and could not preclude a claim by his government in the event that the treatment accorded him amounted to a breach of international law...

the Committee does not understand how, if there had been a breach of the BIT in the present case (a question of international law), the existence of Article 16(4) of the Concession Contract could have prevented its characterisation as such. A state cannot rely on an exclusive

³⁴⁷ Terms of Appointment, paras. 57-58.

³⁴⁸ **CLA-102**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 86-116.

jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.”³⁴⁹

- 290 The Committee’s decision was then widely adopted and followed by other tribunals, including in very recent awards.³⁵⁰
- 291 In the present case, as is clear from Section V below, PEL’s claim in this arbitration is a claim against Respondent for breach of the Treaty. In contrast, the arbitration clause in the MOI covers only contractual breaches.
- 292 It follows that contrary to the Republic’s contention, the arbitration clause in the MOI does not affect the jurisdiction of this Tribunal.

³⁴⁹ **CLA-102**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 98-99 and 103. (emphasis added)

³⁵⁰ **CLA-103**, *SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic*, SCC Case No. V2016/32, Final Award, 25 March 2020, para. 573; **CLA-104**, *Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, para. 163; **CLA-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 479-482; **CLA-106**, *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, paras. 141-142.

V. MOZAMBIQUE BREACHED THE TREATY THROUGH ITS WRONGFUL CONDUCT

293 Mozambique breached the Treaty by failing to accord at all times fair and equitable treatment to PEL’s investment, by failing to observe the obligations it had entered into with regard to PEL and its investment, and by indirectly expropriating PEL’s investment without adequate compensation.

A. *Mozambique Breached the Treaty’s Fair and Equitable Treatment Standard*

1. The Applicable Legal Standard

294 Article 3(2) of the Treaty mandates that Mozambique accord fair and equitable treatment (“FET”) to PEL’s investments as follows:

“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.”

295 The FET obligation is a “broad requirement”³⁵¹ that is flexible in its protection of foreign investors.

296 While the obligation to afford investments FET “*must be appreciated in concreto taking into account the specific circumstances of each case*”,³⁵² investment treaty case law has repeatedly established that the standard contains a number of core obligations for the host state.

297 Of particular relevance to the present case, the FET standard includes the obligations to refrain from frustrating the investor’s legitimate expectations,³⁵³

³⁵¹ **CLA-107**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 450.

³⁵² **CLA-108**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 185. See also **CLA-109**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2021, para. 221.

³⁵³ See e.g. **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*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 519. See also **CLA-8**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 178, (“*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 [CLA-116, Metalclad v. Mexico], to refrain from taking arbitrary or discriminatory measures [CLA-110, Waste Management v. Mexico II, CLA-111, Lauder v. Czech Republic], from exercising coercion [CLA-112, Saluka v. Czech Republic] or from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment [CLA-113, Duke Energy v. Ecuador.*”); **CLA-109**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 221; **CLA-114**, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No.

to act transparently³⁵⁴ and consistently,³⁵⁵ to act in good faith³⁵⁶ as well as to refrain from taking arbitrary or discriminatory measures and from exercising coercion.³⁵⁷

(a) Obligation Not to Frustrate an Investor's Legitimate Expectations

298 The FET standard protects legitimate expectations at the inception of the investment and requires predictability and stability.³⁵⁸ Legitimate expectations

2014-01, Award, 2 May 2018, para. 360; **CLA-115**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, para. 461.

³⁵⁴ See e.g. **CLA-116**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 76; **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 54; **CLA-118**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 277; **CLA-119**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, paras 183-185; **CLA-120**, *Murphy Exploration and Production Company International v. Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, para. 206.

³⁵⁵ **CLA-119**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, paras 183-185; **CLA-121**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras.166-167; **CLA-120**, *Murphy Exploration and Production Company International v. Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, para. 206.

³⁵⁶ See e.g. **CLA-122**, *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award, 12 November 2010, para. 297: “Good faith is a broad principle that is one of the foundations of international law and has been confirmed as being inherent in fair and equitable treatment.” See also], **CLA-123**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 308; **CLA-124**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 242; **CLA-125**, *Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 367; **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 153.

³⁵⁷ **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*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 519. See also **CLA-8**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 178; **CLA-109**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 221; **CLA-114**, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360; **CLA-115**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, para. 461.

³⁵⁸ See, e.g., **CLA-112**, *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 Mar. 2006 para 302 (describing legitimate expectations as the “dominant element”); **CLA-113**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 Aug. 2008 paras 339-40 (explaining that legitimate expectations are an “essential element”); **CLA-126**, *PSEG Global Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 Jan. 2007, para 240 (describing legitimate expectations as the “most significant[]” element of the FET standard); see also **CLA-127**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, para 627 (“[B]reach [of the minimum standard of treatment] may be exhibited by . . . the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations.” (emphasis removed)); **CLA-110**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 Apr. 2004, para 98 (“In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant”); **CLA-128**, *Eureko B.V. v. Republic*

materialise when a state conducts itself in such a way that an investor may reasonably rely on that conduct.³⁵⁹ This facet of FET is designed to protect an investor’s “*basic expectations that were taken into account . . . to make the investment, as long as these expectations are reasonable and legitimate . . .*”³⁶⁰ So for example, where the state approves an investor’s joint venture with a local company, but later retracts its approval, the government will have “*breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest.*”³⁶¹

299 It is generally accepted that a host state’s duty not to frustrate an investor’s legitimate expectations is engaged where (i) the host State made a promise;³⁶² (ii) the investor relied upon that promise when making its investment;³⁶³ and (iii) such reliance was reasonable,³⁶⁴ that is to say that it must be determined objectively and not by reference to the investor’s subjective expectations.³⁶⁵

of Poland, Partial Award, 19 August 2005, paras 232, 234 (stating that a breach of Claimant’s “basic expectations” gave the tribunal “no hesitation in concluding that the ‘fair and equitable’ provisions of the Treaty ha[d] clearly been violated”).

359 See, e.g., **CLA-129**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 Jan. 2006 para 147 (“[T]he concept of ‘legitimate expectations’ relates . . . to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages”).

360 **CLA-96**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008, para 602.

361 **CLA-130**, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, paras 460-574, 611

362 **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*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 668-672. See also **CLA-131**, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, para. 435; **CLA-132**, *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019, para. 496.

363 **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*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 668-672. See also **CLA-131**, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, para. 435; **CLA-132**, *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019, para. 496.

364 **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*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 668-672. See also **CLA-131**, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, para. 435; **CLA-132**, *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019, para. 496.

365 **CLA-112**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 304. See also **CLA-133**, *National Grid plc v. Argentina*, IIC 361, UNCITRAL, 2008, Award, 3 November 2008, para. 175.

- 300 Tribunals have been particularly inclined to find that an investor’s legitimate expectations have been breached where the host state’s promise relied upon by the investor was contained in a contract. This is unsurprising given that the existence of the promise³⁶⁶ and the reasonableness of the investor’s reliance upon it³⁶⁷ are more readily verifiable when contained in a contract. It also follows that, as an evidentiary matter, “specific assurances” contained in “*decrees, licences, and similar executive statements, as well as contractual undertakings . . . are the strongest basis for legitimate expectations . . .*”³⁶⁸
- 301 For instance, in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, the tribunal held that the investor’s investment contract with Chile’s foreign investment commission for the construction of an urban development project gave rise to the expectation that the project could be carried out successfully. The necessary permits were then denied by the Chilean authorities because granting them would have been in breach of zoning regulations. The tribunal found that the host state, by entering into the investment contract and later denying the relevant permits, frustrated the investor’s legitimate expectations and accordingly breached the FET standard.³⁶⁹
- 302 Similarly, the *Tethyan Copper Company Pty Limited v. Pakistan*³⁷⁰ case concerned a claimant which had done extensive exploration and feasibility work concerning the potential development of a gold and copper mine in Balochistan. The tribunal found that Pakistan frustrated the claimant’s legitimate expectations and thus violated the FET standard by failing to abide by its promise to grant a mining lease to the claimant contained *inter alia* in a joint venture contract between the investor and Balochistan for development of the mine,³⁷¹ a promise which had been reinforced by state conduct.³⁷² The

³⁶⁶ **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*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 669. See also **CLA-66**, C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles*, OUP, 2017, paras. 7.184-7.185.

³⁶⁷ **CLA-66**, C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles*, OUP, 2017, paras. 7.184-7.185.

³⁶⁸ **CLA-69**, R Dolzer and C Schreuer, *Principles of International Investment Law*, OUP, 2012, at 145, 149, 152.

³⁶⁹ **CLA-121**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras.166-167.

³⁷⁰ **CLA-134**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017.

³⁷¹ **CLA-134**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, paras. 899.

³⁷² **CLA-134**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, paras. 899-905.

tribunal reached this conclusion notwithstanding the fact that the joint venture contract had been declared null and void *ab initio* by the Supreme Court of Pakistan.³⁷³

303 This being said, not every breach of a contractual promise is a breach of the investor's legitimate expectations for the purposes of the FET standard. Tribunals generally consider that for a contractual breach to rise to the level of a treaty breach, the host State must have acted in its sovereign capacity³⁷⁴ or the breach must constitute an outright and unjustified repudiation of the transaction.³⁷⁵

(b) Obligations to Act Consistently and Transparently

304 The obligations to act consistently and transparently are closely linked.³⁷⁶ The content of these obligation as part of the FET standard have been articulated by the tribunal in *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, which summarised the existing jurisprudence as follows:

“The notion of transparency as an element of fair and equitable treatment has been expounded upon in a number of investment treaty arbitration decisions. Interpreting transparency in the context of the NAFTA treaty, the tribunal in Metalclad v. Mexico considered it ‘to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another

³⁷³ **CLA-134**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, para. 905: “While the Tribunal is aware that the Supreme Court has declared that the CHEJVA and its related agreements are null and void *ab initio*, the Tribunal considers that this is not relevant to the question as to whether the conclusion and performance of the CHEJVA gave rise to legitimate expectations under Article 3(2) of the Treaty. Respondent acknowledges that acts or representations ‘may’ give rise to liability under international law ‘even if the acts or representations are considered legally non-existent or null and void or susceptible to invalidation as a matter of domestic law.’ In light of the fact that, up to early 2011, all parties involved in the conclusion and performance of the CHEJVA acted on the assumption that it was valid and there was no indication that the GOB thought otherwise, the Tribunal is of the view that the declaration of the Supreme Court in 2013 cannot have any effect on Claimant’s legitimate expectations in 2006.”

³⁷⁴ **CLA-135**, *UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, para. 838; **CLA-8**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 180.

³⁷⁵ **CLA-136**, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012, para. 272.

³⁷⁶ **CLA-66**, C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles*, OUP, 2017, paras. 7.201.

Party. There should be no room for doubt or uncertainty on such matters.’

The notion of consistency as an element of fair and equitable treatment has been found to stand for the proposition that the foreign investor should be entitled to expect the host State to act ‘without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.’ See Tecmed v. Mexico.

Neither of these criteria is intended however to go so far as to require the State to freeze its legal framework, but rather to act in an open manner and consistent with commitments it has undertaken. As noted by the Tribunal in *CMS v Argentina*: ‘It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made’.³⁷⁷

305 Tribunals have held that two arms of the same government acting inconsistently *vis à vis* the same investor can amount to a breach of the FET standard.³⁷⁸

306 Likewise, a state’s contradictory statements made *vis à vis* an investor can also amount to a FET violation. For example, the *Saluka v Czech Republic* tribunal found that the Czech Republic breached its duty to act consistently by (i) making contradictory statements as to whether or not it was Saluka’s own responsibility to rescue the company in which it had invested without any state aid and to what extent the state was prepared to assist; and (ii) communicating inconsistently with Saluka by keeping the communication channel between

³⁷⁷ **CLA-119**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, paras 183-185 quoting **CLA-116**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 76; **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154; **CLA-118**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 277. See also **CLA-137**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020, para. 489.

³⁷⁸ **CLA-121**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 166-67 endorsed in **CLA-138**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, para 381.

Saluka and the Ministry of Finance formally open but refusing to meet Saluka’s representatives.³⁷⁹

307 The decision in *Nordzucker v. Poland* is also apt. There, a “lack of information” and “lack of open and frank communication by the Ministry . . . about what was [holding up] the [transaction]” evinced a denial of FET where “a prospective investor . . . had completed the entire sales procedure and . . . was [merely] waiting for the other party to agree or at least tell him clearly what he had to do . . . ”³⁸⁰

308 Similarly, in *Gold Reserve v. Venezuela*, the claimant could not proceed with mining operations without the state signing an “Initiation Act.” The claimant had satisfied all necessary conditions to signature, but heard nothing from the State for nearly a year (when its permit was revoked). In the view of the tribunal, “Respondent’s failure to sign the Initiation Act despite Claimant’s repeated requests without explaining the reasons for such inaction, [but] rather reinforcing Claimant’s expectation that such signature would be forthcoming . . . amount[s] to conduct evidencing . . . a lack of transparency, consistency and good faith in dealing with an investor.”³⁸¹

309 As to the duty of transparency, tribunals have found that a host state’s failure to disclose its decision to not renew a permit while simultaneously engaging in lengthy discussions with the investor on the possible relocation of the landfill resulting in the claimant’s inability to know upon which condition it could renew the permit violated the FET standard in the Mexico Spain BIT.³⁸²

310 Similarly, a tribunal found a breach of the host state’s duty to ensure transparency where the state had not implemented any clear rules as to the requirement or not of a municipal construction permit and there existed no established practice or procedure as to the manner of handling applications for such permits.³⁸³

³⁷⁹ **CLA-112**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 417-419.

³⁸⁰ **CLA-139**, *Nordzucker AG v. The Republic of Poland*, Ad Hoc, Second Partial Award, 28 Jan. 2009, para. 84.

³⁸¹ **CLA-140**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, paras. 583-91.

³⁸² **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras 164-166.

³⁸³ **CLA-116**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 88.

(c) Obligation to Refrain From Acting in an Arbitrary Manner

311 The FET standard prohibits states from treating investors in a manner that is unreasonable, disproportionate, or arbitrary.³⁸⁴ These are, as one tribunal has said, “*basic obligations of international law*” and underscore the fundamental requirement that governments operate “*within the confines of reasonableness.*”³⁸⁵ Thus, state actions that “*depend [] on individual discretion . . . founded on prejudice or preference rather than on reason or fact,*”³⁸⁶ or behaviour that is “*done capriciously or at pleasure*” and “*without cause based upon the law,*”³⁸⁷ violate this standard.

312 Like courts, administrative authorities can act arbitrarily. For instance, in *Lemire v. Ukraine*, the tribunal found that the executive branch of the government acted arbitrarily by facilitating the secret awarding of licences without transparency, with total disregard of the process and law and no possibility of judicial review.³⁸⁸

(d) Obligations to Act in Good Faith

³⁸⁴ **CLA-141**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/5, Award, 31 Oct. 2011 para. 373 (“[F]air and equitable treatment is a standard entailing reasonableness and proportionality. It ensures basically that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances. FET is a means to guarantee justice to foreign investors.”); **CLA-142**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 Jan. 2003, para. 188 (noting that a state violates the FET standard with “*idiosyncratic or aberrant and arbitrary*” conduct.); **CLA-110**, *Waste Management*, para. 98 (holding that FET “*is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.*”); **CLA-96**, *Biwater Gauff*, para. 602 (“[T]he conduct of the State must be . . . consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary.”); **CLA-111**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award dated 3 September 2001, paras. 292-293; **CLA-96**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008, para. 602; **CLA-143**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008, para. 609; **CLA-66**, C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles*, OUP, 2017, pp. 322-323.

³⁸⁵ **CLA-144**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, Award, 31 Mar. 2010, 187, 213.

³⁸⁶ **CLA-111**, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 Sept. 2001, 221 (quoting Black’s Law Dictionary 100 (7th ed., 1999)).

³⁸⁷ **CLA-123**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 318 (internal quotation marks omitted).

³⁸⁸ **CLA-145**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010.

- 313 There is broad consensus that the principle of good faith underlies fair and equitable treatment.³⁸⁹
- 314 Tribunals have found breaches of this principle where host states made commitments to the investor and then invoked their internal structure to avoid these commitments. For instance, in *Siemens v Argentina*, the tribunal held that Argentina was in violation of “*the principle of good faith underlying fair and equitable treatment*” for the government to award a contract to an investor, including a core obligation of the government to conclude agreements with its provinces, and then argue that the structure of the state did not permit it to fulfil such obligation.³⁹⁰
- 315 Furthermore, a host state’s failure to negotiate with an investor in good faith in order to resolve issues relating to its investment have also be found in breach of the fair equitable treatment. In *Saluka v Czech Republic*, the tribunal found that the Czech Republic’s failure to consider seriously, transparently and in an unbiased and even-hand way proposals made by the investor to solve the financial situation of the bank in which it had invested constituted a breach of its obligation to act in good faith.³⁹¹

2. Mozambique Breached the Treaty’s FET Standard

- 316 Respondent’s conduct as set out above breached the Treaty’s FET provision.
- (a) Mozambique’s Conduct Frustrated Claimant’s Legitimate Expectations by Reneging on the Specific Assurances Contained in the MOI and Mozambican Law

³⁸⁹ See e.g. **CLA-122**, *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award, 12 November 2010, para. 297: “*Good faith is a broad principle that is one of the foundations of international law and has been confirmed as being inherent in fair and equitable treatment.*” See also **CLA-123**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 308; **CLA-124**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 242; **CLA-125**, *Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 367; **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 153.

³⁹⁰ **CLA-123**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 308. See also **CLA-122**, *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award, 12 November 2010, para. 300: “*Reliance by a government on its internal structures to excuse non-compliance with contractual obligations would also be contrary to good faith.*”

³⁹¹ **CLA-112**, *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 363; 407-456.

- 317 As explained above, a host state frustrates an investor's legitimate expectations where it reneges on a promise that the investor reasonably relied upon it to make its investment. All these conditions are met in the present case.
- 318 Under the MOI, PEL was awarded a concession for the Project subject only to two contingencies: that the Government approved the PFS and PEL waived its right of first refusal upon presentation of the concession document. Once those two contingencies were satisfied, Respondent was obliged to finalise the concession. Mozambique reneged on its promise to finalise PEL's Project concession after the MTC approved the PFS and after PEL had exercised its right of first refusal. It took PEL on a rollercoaster of contradictory and irrational decisions culminating in a final *volte face* whereby less than 10 days after it confirmed it would directly award the concession to PEL, Mozambique unlawfully decided again that it would organise a public tender instead.³⁹² This final blow to PEL's legitimate expectations also flew in the face of Mozambique's commitment to refrain from granting a similar project or concession to any other actor.³⁹³
- 319 Mozambique made its specific promises to PEL through the MOI. As explained above, if the touchstone of fair and equitable treatment is the protection of legitimate expectations, then expectations derived from government contracts leave the clearest mark.
- 320 The MOI was undoubtedly a government contract. The MTC executed the MOI "*on behalf of the Government.*"
- 321 Mozambique made specific promises to PEL in the MOI which formed the basis of its legitimate expectations:
- a. Clause 1 of the MOI (OBJECTIVE) set out the Parties' overall intentions in relation to the Project, highlighting that the purpose of the PFS was to set the terms and conditions on which the Government's grant of the concession would be based and emphasising the Parties' end-goal of PEL constructing and operating the Project on a public private partnership through the grant of a concession by Respondent:

³⁹² CER-3, Legal Opinion of Professor Rui Medeiros, at para. 49 ("*The revocation of the act performed by the Council of Ministers on 18 April 2013 is, therefore, an unlawful revocation of an act establishing rights, such revocation being vitiated by illegality.*")

³⁹³ Exhibit C-5A, MOI, Clause 6.

“The objective of the present memorandum is to undertake the prefeasibility study the expense of which will be entirely borne by PEL, for the development of a port infrastructure... under a Public Private Partnership (PPP) (“The Project”) defining the basic terms and conditions for the granting of a concession by the Govt. of Mozambique to PEL for the construction and operation of the project.”

- b. In Clause 2.1, Respondent promised PEL that if the MTC approved the PFS and if PEL waived its right of first refusal, *“the Govt. of Mozambique shall issue a concession of the project in favour of PEL.”*³⁹⁴
- c. The Respondent further guaranteed to PEL *“the first right of refusal for the implementation of the project on basis of the concession which will be given by the Government of Mozambique”*,³⁹⁵ which allowed PEL to refuse to implement the Project, for instance, if it turned out that the Project was not technically viable or commercially desirable, or if PEL no longer wished to invest further in the Project because other projects were more attractive.³⁹⁶ Only if PEL walked away would the Government be able to offer the concession to a third party.
- d. As a logical flip-side to its commitment directly to award the concession to PEL, Respondent also granted PEL exclusivity in relation to the Project (and substantially similar projects) in Clause 6 (EXCLUSIVITY), including by assuring PEL that it would refrain from granting a concession to any other party for any similar project:

“ . . . MTC also agrees not to give any rights/authorization to any other party for the development/expansion of a port between Chinde and Pebane for similar objectives, nor for the development/expansion of any rail corridor from Tete

³⁹⁴ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 2(1).

³⁹⁵ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 2(1) and 2(2).

³⁹⁶ **CWS-1**, Witness Statement of Mr Kishan Daga, paras. 40-41.

for the province of Zambezia within the area referred to under objective of the present [MOI].”³⁹⁷

e. The Respondent also committed to keep the data, document and information shared in writing or otherwise between itself and PEL confidential, pursuant to Clause 11 of the MOI. This was particularly important in the context of the Project which was conceived and developed by PEL.

322 Equally important to PEL’s legitimate expectations is what is not in the MOI. Most importantly, there is no mention of any requirement for a public tender which in any event would contradict Clauses 2 and 6 of the MOI.

323 All of the foregoing was completed under the supervision of lawyers on both sides: Sal and Caldeira for PEL and in-house Government lawyers for Respondent.³⁹⁸

324 Mozambique thus committed to award PEL the Project concession once the PFS had been approved and PEL had exercised its right of first refusal. This was the fundamental basis upon which PEL invested in Mozambique. As a matter of pure commercial logic, PEL only would have committed to complete the PFS at its own costs and invest millions of dollars and dedicated management time to advance the Project if it was assured that the Project and the profits corresponding to it would inure to PEL’s benefit in the event the PFS was approved by Respondent.³⁹⁹

325 PEL’s reliance on Mozambique’s promise was reasonable. As explained above, tribunals routinely consider that reliance upon representations made in a contract is reasonable. This is precisely what PEL did.

326 The reasonableness of PEL’s reliance is further confirmed by the MTC’s conduct, with the MTC initially appearing to abide by the commitments it had made in the MOI, and thereafter reneging on them in an abrupt and arbitrary manner. Mozambique first took an active interest in the Project. The PFS was presented before 20 to 30 persons from at least six ministries, including representatives from the MTC, CFM, the MPD, the Ministry of External

³⁹⁷ **Exhibit C-5A**, English Version of the Memorandum of Interest between The Ministry of Transport and Communications & Patel Engineering Ltd, dated 6 May 2011, Clause 6.

³⁹⁸ **CWS-1**, Witness Statement of Kishan Daga, paras. 35-36.

³⁹⁹ **CWS-1**, Witness Statement of Mr Kishan Daga, paras. 40-41.

Affairs, the Ministry of Mining and the Ministry of Finance.⁴⁰⁰ The MTC also asked for further information.⁴⁰¹ It approved the PFS in writing, and asked PEL to “*expressly exercise its right of first refusal*”⁴⁰² (which PEL did a few days later, on 18 June 2012).⁴⁰³ It also asked PEL to set up the Project Company with CFM, which would only make sense in the context of a direct award. In other words, Respondent reaffirmed the negotiated steps in the MOI as the contract that governed the Parties’ relationship and upon which Claimant relied when investing in the Project.

327 However, Mozambique then reneged on its promises to execute the concession documents with PEL, not to grant the concession to another, and to keep the data and information shared by PEL confidential, blowing hot and cold by taking conflicting and incoherent decisions before it ultimately decided to grant the concession to ITD.

328 First, the MTC required PEL to negotiate the creation of company to implement the Project with the CFM,⁴⁰⁴ an entity that was purportedly not interested in implementing the Project⁴⁰⁵ which had not been directed by the MTC to negotiate with PEL⁴⁰⁶ and allegedly lacked sufficient funds for the investment.⁴⁰⁷ Yet, the CFM now appears to have suddenly found the required funds as it has entered into a partnership with ITD’s consortium in respect of the Project.

329 The MTC then explicitly refused to execute the concession documents with PEL. Instead, it declared that a public tender would be organised,⁴⁰⁸ based on several demonstrably false justifications.

330 On 11 January 2013, the MTC contended that CFM wanted more than 20% equity in the company implementing the Project.⁴⁰⁹ This is not only belied by Mozambican law (which provides for a maximum of 20% equity in such

⁴⁰⁰ CWS-1, Witness Statement of Kishan Daga, para. 65.

⁴⁰¹ Exhibit C-9, Letter from Kishan Daga of PEL to Minister Zucula of MTC, 1 June 2012. Exhibit C-10, Letter from Kishan Daga of PEL to Minister Zucula of MTC, 11 June 2012.

⁴⁰² Exhibit C-11, Letter from Minister Zucula of MTC to Kishan Daga of PEL, 15 June 2012.

⁴⁰³ Exhibit C-12, Letter from Kishan Daga of PEL to Minister Zucula of MTC, 18 June 2012.

⁴⁰⁴ Exhibit C-11, Letter dated 15 June 2012, from Minister Zucula of MTC to Kishan Daga of PEL.

⁴⁰⁵ Exhibit C-23, Letter from PEL to MTC, dated 4 March 2013.

⁴⁰⁶ CWS-1, Witness Statement of Kishan Daga, paras. 80-81.

⁴⁰⁷ CWS-1, Witness Statement of Kishan Daga, para. 85.

⁴⁰⁸ Exhibit C-19, Letter dated 11 January 2013 from Minister Zucula of MTC to Kishan Daga of PEL.

⁴⁰⁹ Exhibit C-19, Letter dated 11 January 2013 from Minister Zucula of MTC to Kishan Daga of PEL.

ventures)⁴¹⁰ but also by the CFM's later decision to enter into a joint venture for the implementation of the Project with an equity of exactly 20% with the ITD consortium.⁴¹¹

331 The MTC further alleged that PEL's right of first refusal was in fact to be exercised in the context of a tender, as per the MOI and "the Law" (which was apparently a reference to Law 15/2011, *i.e.* the PPP Law.)⁴¹² This is a *non sequitur*. Six months earlier, the MTC had asked PEL to exercise its right of first refusal, which PEL promptly did. During these six months, and despite the multiple letters sent by PEL regarding the Project during that time, the MTC never once indicated that PEL had not exercised such right properly. The MTC's assertion that PEL's right of first refusal should be exercised in the context of a public tender was thus nothing more than a self-serving argument aimed at justifying a decision which it knew constituted a breach of the commitments it had made to PEL.

332 As for the MTC's purported reliance on "the Law", it did not suggest that it would be in breach of such "Law" if it were to execute the concession directly with PEL as required by the MOI. Nor would this have been the case.⁴¹³ To the contrary, it was compatible with the PPP Law.⁴¹⁴

333 Mozambique's second U-turn was even more incomprehensible than the first one. Within less than 10 days, the MTC issued contradictory decisions based on purported justifications which were concocted in haste to camouflage the fact that Mozambique was ruling by caprice.

334 On 18 April 2013, the MTC informed PEL that the Council of Ministers had decided to award the Project directly to PEL, as it was in the "*national interest*" to accelerate the Project. The MTC also asked that PEL provide a bank

⁴¹⁰ **Exhibit C-51**, Legal Opinion of Sal & Caldeira dated 9 March 2013, p3. **CLA-2**, Law No. 15-2011 of 10 August 2011, article 33(1), para (a)(i), ("*1. 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).

⁴¹¹ **Exhibit C-125**, Annual Report - Italian-Thai Development Public Company, dated 2016, p. 145.

⁴¹² **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL, dated 11 January 2013, informing PEL of Government's decision to conduct a public tender.

⁴¹³ **CER-3**, Expert Report of Rui Medeiros, paras. 14-19.

⁴¹⁴ **CER-3**, Expert Report of Rui Medeiros, paras. 37-49.

guarantee “*corresponding to ... (0.1%) of the volume of the investment foreseen*”,⁴¹⁵ which PEL did a few days later.⁴¹⁶ Officials of the MTC then met with representatives of PEL in person confirming that that the concession would be issued by 24 April 2013,⁴¹⁷ and the MTC invited PEL in writing to in person negotiations on 10 May 2013.⁴¹⁸ This confirmed the Parties’ mutual understanding that the MOI plainly awarded PEL a direct concession if and when the PFS was approved and PEL exercised its right of refusal. Under Mozambican law, this also translated into an administrative act by which the Government, pursuant to the applicable law, acknowledged that it was in a situation which justified, in light of the public interest, recourse to a direct award of the concession,⁴¹⁹ thus giving effect to PEL’s right to a direct award.⁴²⁰ It was in fact “*an act establishing rights*”⁴²¹ which could as such not be freely revoked.⁴²²

335 However, just a few days after committing to abide by its MOI obligations, on 3 May 2013, the MTC contradicted its commitment by writing to the tender participants to extend the deadline to participate in the tender for the Project.⁴²³ The *coup de grâce* to the assurances which formed the basis of PEL’s investment, came in the form of a letter sent by the MTC to PEL on 13 May 2013 where it finally reneged on its promises.⁴²⁴ The MTC indicated that the Council of Minister had decided, after having heard from various unnamed “*stakeholders*” and having reviewed the “*legal and regulatory framework of Public-Private Partnership*”, that a public tender was the “*correct option*” and that there was “*no place for direct negotiations with Patel.*”⁴²⁵ The reasons provided by the Government in this letter are suspect. It suggests that the Government somehow did not review the “*legal and regulatory framework*”

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

416 **Exhibit C-33**, Letter dated 9 May 2013 from Kishan Daga of PEL to Minister Zucula of MTC regarding the bank guarantee.

417 **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.

418 **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.

419 **CER-3**, Expert Report of Rui Medeiros, para. 43.

420 **CER-3**, Expert Report of Rui Medeiros, para. 44.3.

421 **CER-3**, Expert Report of Rui Medeiros, para. 45.

422 **CER-3**, Expert Report of Rui Medeiros, para. 46.

423 **Exhibit C-61**, Letter from MTC to tender participants, dated 3 May 2013.

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

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

before the Council of Ministers instructed the Project to be awarded directly to PEL in the “*national interest*”; in other words, that it somehow went back to check the law *after* the Council of Minister’s decision and only then realized that there was “*no place for direct negotiations.*” In terms of such an important national and strategic decision as this, where other tenderers would be disappointed by the decision and the Government would have to justify its actions to award the Project directly to PEL after having already announced a public tender, the likelihood that the Council of Ministers acted without consulting the law and Government lawyers is impossible. It suggests, therefore, that the unnamed “stakeholders” pressured the Government into a U-turn; who those stakeholders were, and what pressure they brought to bear, can only be guessed at.

336 But what is clear is that the MTC did not point to any specific requirement establishing that the Project ought to be awarded by public tender. With good cause: no such requirement existed.⁴²⁶ Consistent with what PEL had been advised prior to making its investment in Mozambique, the direct award of a concession was permissible in the context of the Project,⁴²⁷ a fact which was confirmed by Respondent’s prior conduct.⁴²⁸ In doing so, Respondent unlawfully revoked a prior valid administrative act that had established rights in favour of PEL, such revocation being null and void.⁴²⁹

337 The MTC then requested PEL to compete in the public tender promising a mere preference right of 15 percentage points,⁴³⁰ which was futile in comparison with what it had been promised. The 15-percentage point preference was not reflective of the commitments made by Respondent pursuant to the MOI.⁴³¹ Rather, it was an entirely distinct right stemming directly from the PPP Law due to the fact that PEL had submitted an unsolicited bid for the Project.⁴³² In

⁴²⁶ CER-3, Expert report, of Rui Medeiros, paras. 37-49.

⁴²⁷ See e.g. **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.

⁴²⁸ **Exhibit C-11**, Letter dated 15 June 2012 from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study.

⁴²⁹ CER-3, Expert Report of Rui Medeiros, para. 47, 48 and 49.

⁴³⁰ **Exhibit C-34**, Letter dated 13 May 2013 from Luis Amandio Chauque of MTC to Kishan Daga of PEL.

⁴³¹ CER-3, Expert Report of Rui Medeiros, paras 26 to 30.

⁴³² **CLA-2**, Law No. 15-2011 of 10 August 2011, article 13(5). (Proposals for PPP enterprises submitted by private initiative are subject to public bidding procedures aimed at assessing or adjusting the terms in matters of technical issues and quality, price and other conditions offered by the proponent, who shall benefit from a 15% right and margin of preference in the evaluation of technical and financial proposals resulting from the bidding procedure, without the right to compensation for the costs incurred preparing the bid)

other words, PEL would have been granted the 15-percentage point preference in any event, even if the parties had never entered into the MOI at all. The entire reason for the MOI was for PEL to be granted a concession directly for the Project of which it had conceived, financed, and developed – once MTC had approved the PFS and PEL had exercised its right of first refusal.

338 Once the tender, which was pervaded by irregularities, was won by ITD, all the know-how invested by PEL, including data and information that the MTC had committed to keep confidential, were no doubt transmitted to ITD so that it could develop PEL's Project. Of course, considering the shenanigans surrounding the tender and PEL's prior treatment by MTC and CFM, PEL has no confidence that the PFS was not provided to ITD and/or other tenderers before the tender process was completed.

339 Respondent's repudiation of the promises made to PEL by the MTC and the Council of Ministers were not pure contractual breaches. Just as in the cases mentioned above, the MTC and the Council of Ministers undoubtedly acted in their sovereign capacity when refusing to issue the concession agreement and instead pushing a public tender. Alternatively, their breach of the MOI was an outright and unjustified repudiation of the transaction, which annihilated PEL's core right to the concession under the MOI.

340 If the denial of the relevant permits was a breach of the claimants' respective legitimate expectations contained in the investment contracts in *Tethyan Copper Company Pty Limited v. Pakistan*, it is *a fortiori* the case in the present circumstances.

341 In *Tethyan* the investor had a legitimate expectation that it would be granted the mining concession in respect of a gold and copper mine, PEL had a similar legitimate expectation that it had been granted a concession in respect of the Project that had been its own invention and that it had sunk millions into developing and years cultivating. PEL never would have committed the time, resources, and capital to complete the PFS if it knew the Project would then be subject to a public tender. Furthermore, just as the claimant in *Tethyan* conducted extensive exploration and feasibility work in respect of the potential development of the mine, PEL committed to conduct and conducted the PFS. Similarly, both the claimant in *Tethyan* and PEL were ousted of the project in which they had invested.

342 However, PEL's argument is even more compelling in this case than that of the claimant in *Tethyan*. Unlike in *Tethyan* where the Pakistan Supreme Court had found that the joint venture contract was null and void *ab initio*, in this case, there is no such court decision, nor could there be as the MOI was concluded in accordance with Mozambique law.⁴³³ Moreover, here the Government also approved the PFS and PEL waived its right of refusal, as expressly requested to do so, meaning that any contingent elements to the concession award were removed. There was from that moment on no contractual or other barrier to the Government's obligation to award the concession to PEL, as the decision of the Council of Ministers of 18 April 2013 confirmed.

343 Accordingly, if the tribunal in *Tethyan* found that Pakistan breached the claimant's legitimate expectations, it is *a fortiori* the case of Mozambique in the present circumstances.

344 Similarly, in *MTD v Chile*, even though the issuance of the construction permit was contrary to zoning regulations, the tribunal found that Chile had breached the claimant's legitimate expectations by failing to grant such permit. The Tribunal should thus *a fortiori* make such findings in the present case, as the issuance of the concession would not have been contrary to *any* regulation.⁴³⁴

345 It follows from the above that by failing to grant PEL a concession agreement in respect of the Project subsequent to approving the PFS and PEL exercising its right of first refusal and by communicating to other parties the information and data developed thanks to PEL's know-how, Mozambique breached PEL's legitimate expectations and accordingly the FET standard contained in Article 3(2) of the Treaty.

(b) Mozambique Failed to Act Consistently and Transparently in Respect of PEL's Investment

346 Mozambique's conduct in this case is characterised by a complete lack of consistency and transparency. As explained above, for a government to make contradictory statements to an investor in respect of its investment and to communicate inconsistently has been found to be a breach of FET standard.

⁴³³ CER-3, Expert Report of Rui Medeiros, para. 6.

⁴³⁴ CER-3, Expert Report of Rui Medeiros, paras. 37, 43 and 48.

- 347 In the present case, the conduct of the MTC, the Council of Ministers and the CFM in respect of Claimant's investment is characterised by several *volte face* and a complete failure to communicate consistently with PEL.
- 348 First, the conduct of the MTC, the Council of Minister and the CFM in respect of the direct award of the concession to PEL was erratic and unreasonable.
- 349 The MTC initially took steps to implement the MOI and appeared to have the intention to issue a concession directly to PEL. It approved the PFS and asked that PEL exercised its right of first refusal.
- 350 Yet, only a few months later, the MTC made it clear that it would not grant the concession to PEL directly. On 11 January 2013, the MTC wrote to PEL explaining that, notwithstanding the express commitments contained in the MOI, the Council of Ministers reversed course, deciding to organise a public tender in respect of the Project.⁴³⁵
- 351 Three months later, on 18 April 2013, the MTC changed tack again. It indicated that the Council of Ministers had decided to award the Project directly to PEL,⁴³⁶ confirmed during a meeting in person meeting that the concession would be issued by 24 April 2013⁴³⁷ and invited PEL to in-person negotiations on 10 May 2013 (which the Government later cancelled).⁴³⁸
- 352 However, just three days after the negotiations were due to take place, on 13 May 2013, the MTC declared that the Council of Ministers had yet another change of heart and that the concession would be awarded through public tender in contravention of the MOI.⁴³⁹
- 353 As for the CFM, its conduct was just as erratic. It purportedly could not create a joint venture with PEL because it wanted more than 20% equity in such venture and had no funds to implement the Project. Yet, it ended up entering into a joint venture with ITD holding a 20% equity.⁴⁴⁰

⁴³⁵ **Exhibit C-19**, Letter dated 11 January 2013, from Minister Zucula of MTC to Kishan Daga of PEL.

⁴³⁶ **Exhibit C-29**, Letter dated 18 April 2013, from Minister Zucula of MTC to Kishan Daga of PEL.

⁴³⁷ **Exhibit C-31**, Letter dated 24 April 2013, from Kishan Daga of PEL to Luis Amandio Chauque of MTC.

⁴³⁸ **Exhibit C-32**, Letter dated 24 April 2013 from Luis Amandio Chauque of MTC to PEL.

⁴³⁹ **Exhibit C-34**, Letter dated 13 May 2013 from Luis Amandio Chauque of MTC to Kishan Daga of PEL reversing the MTC's decision regarding direct negotiations with PEL.

⁴⁴⁰ **Exhibit C-125**, Annual Report - Italian-Thai Development Public Company, dated 2016, p. 145.

- 354 Secondly, the conduct of the MTC and the Council of Minister in respect of PEL’s first right of refusal was inconsistent and irrational.
- 355 On 15 June 2012, in writing, the MTC asked that PEL “*expressly exercise its right of first refusal.*”⁴⁴¹ PEL did so promptly, on 18 June 2012.⁴⁴² Once PEL did so, any contingent elements to the concession award were removed.
- 356 There were multiple exchanges during that summer between the MTC and PEL during which time the MTC never took any issue with the fact that or the manner in which PEL had exercised its right.
- 357 Yet, a mere six months later, on 11 January 2013, when the MTC wrote to PEL relaying the Government’s decision to impose a public tender in respect of the Project, it sought for the first time to put forward a new purported interpretation of PEL’s right of first refusal as a “preferential right” in the public tender. This was completely inconsistent with its previous conduct, with the MOI and with the law.
- 358 Thirdly, the MTC’s communication with PEL was inconsistent. After it had told PEL to negotiate with the CFM, the MTC failed to assist PEL in such negotiations.
- 359 According to Chairman Mualeia, the MTC initially had not even directed the CFM to negotiate at all. It then clearly decided not to help PEL.⁴⁴³ The MTC ignored the majority of PEL’s multiple requests for assistance in its negotiations with the CFM and PEL’s requests to proceed in the meantime with the issuance of the concession agreement.⁴⁴⁴ The MTC only responded to one of the three letters sent to the MTC between June and August 2012⁴⁴⁵ merely stating that “[n]egotiations with the CFM is not prohibited and...has already begun” and Minister Zucula’s Chief of Staff even made it clear that PEL should

⁴⁴¹ See e.g. **Exhibit C-11**, Letter dated 15 June 2012, from Minister Zucula of MTC to Kishan Daga of PEL.

⁴⁴² **Exhibit C-12**, Letter dated 18 June 2012, from Kishan Daga of PEL to Minister Zucula of MTC.

⁴⁴³ **CWS-1**, Witness Statement of Mr Kishan Daga, para. 85.

⁴⁴⁴ See e.g. **Exhibit C-17**, Letter dated 5 October 2012 from Kishan Daga of PEL to Minister Zucula of MTC.

⁴⁴⁵ **Exhibit C-13**, Letter dated 22 June 2012 from Kishan Daga of PEL to Minister Zucula of MTC; **Exhibit C-14**, Letter dated 7 August 2012 from Kishan Daga of PEL to Rosario Mualeia, President and Chairman of the Board; **Exhibit C-15**, Letter dated 15 August 2012, from Kishan Daga of PEL to Minister Zucula of MTC.

liaise with a subaltern department at the Ministry⁴⁴⁶ but no longer with the MTC Minister.⁴⁴⁷ The MTC ignored all of PEL's subsequent correspondence.⁴⁴⁸

360 The MTC eventually wrote to PEL in January 2013, six months after it had approved the PFS, informing PEL that the concession would be awarded by public tender.⁴⁴⁹ This was despite the fact that the MOI calls for the direct award of the concession to PEL (assuming the PFS was approved and PEL's right of first refusal exercised), without requirement for a public tender.⁴⁵⁰ The Republic's flip-flop on the issue of whether to award the concession directly to PEL as envisaged by the MOI was the epitome of inconsistency.

361 Furthermore, as explained above, in *Tecmed*, refusal to renew a permit while engaging in lengthy discussions with the investor on the possible relocation of the landfill resulting in the claimant's inability to know in which condition it could renew the permit, was found to breach the host state duty to act transparently.

362 If the conduct of the authorities lacked transparency in *Tecmed*, it is *a fortiori* the case in the present circumstances where not only did Mozambique leave PEL in a state of uncertainty for months as to what it ought to do to finalise the concession agreement but also attempted to justify its decision to hold a public tender on the basis of demonstrably untrue statements.

363 Once it had instructed PEL to negotiate with the CFM, the MTC failed to assist PEL in such negotiations and instead, indicated that PEL should liaise with a subaltern department at the Ministry but no longer with the MTC Minister⁴⁵¹ and then ignored PEL's letters. At that stage, PEL simply no longer understood

⁴⁴⁶ **Exhibit C-16**, Letter from Ema Chicoco of MTC to Kishan Daga of PEL, dated 27 August 2012, regarding CFM negotiations not being prohibited and providing contact details for the purpose of negotiating the concession.

⁴⁴⁷ **Exhibit C-16**, Letter dated 27 August 2012, from Minister Zucula of MTC to Kishan Daga of PEL.

⁴⁴⁸ **Exhibit C-17**, Letter dated 5 October 2012, from Kishan Daga of PEL to Minister Zucula of MTC; **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.

⁴⁴⁹ **Exhibit C-19**, Letter dated 11 January 2013, from Minister Zucula of MTW to Kishan Daga of PEL.

⁴⁵⁰ **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, cl. 1, 2.1, 2.2 and 6; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, cl. 1, 2.1, 2.2 and 6.

⁴⁵¹ **Exhibit C-16**, Letter dated 27 August 2012, from Minister Zucula of MTC to Kishan Daga of PEL.

what it had to do to obtain the concession agreement. As Mr Daga testifies he “*really did not understand what was going on.*”⁴⁵²

364 Mozambique traversed its obligation to award the concession directly to PEL twice based on demonstrably false justifications, including misrepresentations and even breaches of its own laws.

365 It follows from the above that by failing to act consistently and transparently, Mozambique breached the FET standard contained in Article 3(2) of the Treaty.

(c) The Conduct of the MTC and the Council of Minister breached Mozambique’s Obligation to Refrain From Acting in an Arbitrary Manner

366 The conduct of the MTC and the Council of Minister as described immediately above was inconsistent, irrational, lacked transparency, and was characterised by a misrepresentation of Mozambique’s own law.

367 U-turns such as the ones performed by Mozambique are by definition arbitrary.

368 This is all the truer when these are not justified in fact or in law. Mozambique failed to give any reasonable justifications for the U-turns of January and May 2013, through which it decided to award the concession by way of public tender in breach of its commitments to PEL.

369 Instead, Mozambique sought to rely on demonstrably false facts and misrepresentation of its own law. In respect of the January 2013 U-turn, these include Mozambique’s allegations (i) that the CFM wished to obtain more than 20% equity in the company implementing the Project when this was contrary to Mozambique’s own law and the CFM is now content to own this precise percentage in its current venture with the ITD consortium; and (ii) that PEL’s right of first refusal was in fact to be exercised in the context of a tender, as per the MOI and “the Law” when it had itself asked PEL to exercise it months earlier without any mention of a public tender or any “Law” to the contrary. With good cause: the MOI clearly provides that PEL’s right of first was to be

⁴⁵² CWS-1, Witness statement of Mr Kishan Daga, para. 91.

exercised prior to the granting of the concession, it was not a preference right in the context of a tender and there was no law to the contrary.⁴⁵³

370 In respect of the May 2013 U-turn, these include Mozambique's purported justification founded on the "*legal and regulatory framework of Public-Private Partnership.*"⁴⁵⁴ Such appears to have been Mozambique's haste to concoct this justification that it did not even attempt to point to a specific requirement of the relevant law, nor did it seek to reconcile this purported justification with the position it took just a few weeks earlier that a direct award of the Project to PEL was in the "*national interest.*" What is more, Mozambique and its lawyers had already come to the conclusion that there was no requirement that the Project be established through public tender; there is no mention of any public tender requirement in the MOI.⁴⁵⁵ Had a public tender been a mandatory and key step in the award of the concession as Respondent expediently claimed then it would have been provided for in the MOI that governed the concession award.

371 Furthermore, and perhaps unsurprisingly in this context, the tender itself was pervaded by major irregularities. As explained by Mr Daga contemporaneously in a letter dated 29 July 2013, the way points were awarded to different bidders was absurd.⁴⁵⁶ To take only one example, the PEL Consortium was only granted 10.5 points out of 15 points in respect of its understanding of the Project whereas two other bidders were granted 15 points.⁴⁵⁷ Yet, it was PEL that had conceived of the Project, and spent over a year developing the details in relation to it.

372 As a result, in addition to breaching its obligation to act consistently and transparently, Mozambique's conduct was capricious and unreasonable such that Respondent violated its obligation to refrain from acting in an arbitrary manner.

⁴⁵³ CER-3, Expert report, of Rui Medeiros, para 24.

⁴⁵⁴ Exhibit C-34, Letter dated 13 May 2013 from Luis Amandio Chauque of MTC to Kishan Daga of PEL.

⁴⁵⁵ CER-3, Expert report, of Rui Medeiros, paras. 37, 38 and 42 to 45.

⁴⁵⁶ Exhibit C-40, Letter dated 29 July 2013 from Kishan Daga to Minister Zucula expressing concern over the MTC's handling of the tender.

⁴⁵⁷ Exhibit C-40, Letter dated 29 July 2013 from Kishan Daga to Minister Zucula expressing concern over the MTC's handling of the tender.

373 It follows that Mozambique breached the FET standard under Article 3(2) the Treaty by acting in an arbitrary manner.

(d) Mozambique's Conduct Breached its Obligation to Act in Good Faith

374 Once Mozambique had approved the PFS and PEL had waived its right of first refusal, Mozambique was bound to issue the concession. Yet, all the steps Mozambique took to avoid compliance with the very commitment it had made were in breach of its obligation to act in good faith.

375 The MTC required PEL to negotiate with the CFM, which it knew it had not instructed to do so. It then openly refused to assist PEL in these negotiations and, in its January 2013 U-turn, used their purported failure as an excuse to circumvent its obligation to grant the concession to PEL. Yet, the MTC's very description of the alleged reasons for such failure lay bare that this was a mere excuse made in contravention of the principle of good faith. The MTC complained that PEL refused to give more than 20% in the joint venture that would implement the concession when Mozambican law provides for a maximum of 20% equity in such ventures.⁴⁵⁸

376 The MTC also sought to camouflage its failure to abide by its commitment to issue the concession in favour of PEL by recasting PEL's right of first refusal as a preferential right to 15 percentage points in a public tender. This cannot have been in good faith when just a few months earlier, it had asked PEL to exercise its right of first refusal, which PEL had done promptly, without receiving any comments from the MTC.

377 In its May 2013 further U-Turn, the MTC did not even bother to mask its own failure to grant the concession by recasting PEL's right of first refusal as a preference right. It no longer referred to the MOI. Instead, it sought to rely on some undefined provisions of its own law, which purportedly required it to organise a public tender. Not only did this contradict the relevant Mozambique law at the relevant time allow for a direct award,⁴⁵⁹ but this contradicted (unlawfully revoking) the position it had taken just days earlier that it was in

⁴⁵⁸ **Exhibit C-51**, Legal Opinion of Sal & Caldeira dated 9 March 2013, p3. **CLA-65**, Law No. 15-2011 of 10 August 2011, Article 13(3) ("In ponderous and duly substantiated situations, and as a measure of last resort subject to the prior express authorization of the Government, PPP enterprises may, on an exceptional basis, be contracted through negotiation and direct award")

⁴⁵⁹ **CER-3**, Expert Report of Rui Medeiros, paras. 37-49.

the national interest to grant the concession to PEL directly and that had legally established rights in favour of PEL.

378 The CFM also breached its obligation to act in good faith. Specifically, it failed to negotiate in good faith with PEL stating that it was not interested in the Project and had no funds to invest in the Project only to enter a few months later into a joint venture for the implementation of the Project with an equity of 20% with the ITD consortium.⁴⁶⁰

379 It follows that Mozambique's conduct breached its obligation to act in good faith.

B. Mozambique Breached the Treaty's Most-Favoured Nation Clause, which Entitles PEL to Protections from other Mozambican Treaties

1. The applicable legal standard

(a) The Treaty's MFN Clause Incorporates Umbrella Clause Protection from the Mozambique-Netherlands BIT

380 The Treaty contains a most-favoured nation or "MFN" clause requiring Mozambique to accord to Indian investors and their investments in Mozambique treatment no less favourable than that which it accords to investors of any third state and their investments. Article 4 (1) and (2) of the Treaty provide that:

"(1) Each Contracting Party shall accord to investment of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investment of its own or investor of investments of investors of any third State."⁴⁶¹

(2) In 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."

⁴⁶⁰ **Exhibit C-125**, Annual Report - Italian-Thai Development Public Company, dated 2016, p. 145.
⁴⁶¹ **CLA-1**, The Treaty, Articles 4(1) and 4(2).

- 381 Traditionally, states have inserted MFN clauses into investment treaties “to ensure that they obtain any advantages, privileges and concessions that the granting state has accorded or accords in the future to third states.”⁴⁶²
- 382 An MFN clause will be triggered “where any third state investment or investor is entitled to more favorable treaty protections” from the respondent state.⁴⁶³ It is well established, as a matter of general public international law, that a treaty obligation towards a third state constitutes “treatment” for the purposes of the MFN clause.⁴⁶⁴
- 383 Although there has been some disagreement among arbitral tribunals about whether MFN clauses allow investors to import more favourable procedural rights from third-party treaties, it is widely accepted that MFN clauses allow investors to import substantive rights from other BITs.⁴⁶⁵
- 384 One such substantive right is the obligation for the host state to fulfil commitment vis-à-vis investors (“**umbrella clause**”) provided for in many treaties.
- 385 MFN clauses phrased in an essentially identical manner as Clause 4 of the Treaty have been found to allow the importation of a more favourable treatment contained in another treaty.⁴⁶⁶ For instance, in *MTD v Chile*, the tribunal considered that by virtue of the MFN Clause in the Malaysia-Chile BIT, the FET standard in such treaty had to encompass the obligation for the host state to fulfil contractual obligation contained in the Denmark-Chile BIT.⁴⁶⁷

⁴⁶² **CLA-70**, A Newcombe & L Paradel, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International B.V. 2009), para. 5.5.

⁴⁶³ **CLA-70**, A Newcombe & L Paradel, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International B.V. 2009), para. 5.20.

⁴⁶⁴ **CLA-77**, ILC, “Draft Articles on most-favoured-nations clauses with commentaries”, in Yearbook of the International Law Commission, 1978, Vol. II, Part Two, p. 23: “...the fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State.”

⁴⁶⁵ See e.g. **CLA-146**, *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, paras. 11.2.1-11.2.9; **CLA-121**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras.103-104; **CLA-8**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 157-160; **CLA-147**, *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, paras. 541-555.

⁴⁶⁶ See e.g. **CLA-8**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 156-160.

⁴⁶⁷ **CLA-121**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras.100-104.

386 Similarly, in *EDF International v. Argentina*, the applicable treaty (the Argentina-France BIT) contained an MFN clause and there were umbrella clauses in third-party treaties (the Argentina-Luxembourg BIT and the Argentina-Germany BIT).⁴⁶⁸ The tribunal found that the MFN clause “permit[ted] recourse to the ‘umbrella clauses’ of third-country treaties,”⁴⁶⁹ and explained that to “ignore the MFN clause in this case would permit more favourable treatment to investors protected under third countr[y] [BITs], which is exactly what the MFN Clause is intended to prevent.”⁴⁷⁰ The tribunal noted the “divergence of opinion” with respect to whether MFN clauses can result in the importation of procedural and/or jurisdictional provisions from third-party treaties,⁴⁷¹ but concluded that it “need take no position on this debate,” as umbrella clauses are “clearly substantive provisions requiring respect for explicit host state undertakings such as concession agreements.”⁴⁷²

387 An MFN clause was also used to import an umbrella clause in *Arif v. Moldova*.⁴⁷³ In that case, the MFN clause in the France-Moldova BIT was at issue, and there were umbrella clauses in Moldova’s BITs with the U.K. and the U.S. The tribunal found that the MFN clause was “broadly drafted” and did “not restrict its application to any particular kind of substantive obligation under the BIT.”⁴⁷⁴ Accordingly, the MFN clause could be used to “import an ‘umbrella clause (which is substantive in nature), . . . thereby extending the

⁴⁶⁸ **CLA-148**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, 11 June 2012, para 921-23.

⁴⁶⁹ **CLA-148**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, 11 June 2012, at para 929.

⁴⁷⁰ **CLA-148**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, 11 June 2012, at para 932.

⁴⁷¹ **CLA-148**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, 11 June 2012, at para 935.

⁴⁷² **CLA-148**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, 11 June 2012, at para 936.

⁴⁷³ See **CLA-149**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 Apr. 2013.

⁴⁷⁴ See **CLA-149**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 Apr. 2013, para 396. To be sure, if the applicable treaty explicitly limits the scope of the MFN clause, the MFN clause can be used to import substantive protections only within that scope. For example, in **CLA-150**, *Paushok v. Mongolia*, the applicable treaty guaranteed fair and equitable treatment not less favorable than treatment accorded to investments or investors of third states; in other words, the MFN clause was limited in scope to FET. Based on that explicitly limited scope, the tribunal declined to incorporate an umbrella clause from a third-party treaty. **CLA-150**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 Apr. 2011, paras 562-73. Importantly, there is no such limitation on the scope of the MFN clause in the Treaty.

more favourable standard of protection granted by the ‘umbrella’ clause in [the third-party BITs] into the BIT at hand.”⁴⁷⁵

388 Article 3(4) of the Mozambique-Netherlands BIT contains an umbrella clause, which reads as follows:

“Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.”⁴⁷⁶

389 This constitutes a treatment more favourable than that accorded to Indian investors and their investment, under the Treaty. By virtue of the MFN clause, Mozambique must accordingly accord the benefit of the umbrella clause in the Mozambique-Netherlands BIT to PEL.

(b) Umbrella Clauses Impose an International Law Requirement that States Comply with Obligations Entered into with Regard to Investments

390 Umbrella clauses require *“host states [to] observe any obligations . . . undertaken towards investments.*”⁴⁷⁷ They are called “umbrella clauses” because they bring such obligations within the umbrella of treaty protection.⁴⁷⁸ These clauses *“enshrine[] the principle of ‘pacta sunt servanda,’ a cornerstone of the legal security of economic transactions and the basis for contract law in national and international law.*”⁴⁷⁹ By ensuring the “effective

⁴⁷⁵ **CLA-149**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para 396. The tribunal explicitly rejected “Respondent’s arguments that ‘umbrella’ clauses are procedural in nature and cannot be imported through an MFN clause because they give a means of protection for contractual and other undertakings, rather than a unique standard of behaviour.” *Id.*, para 395; see also **CLA-121**, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras 100-04, 179-89 (using treaty’s MFN clause to import third-party treaty’s umbrella clause).

⁴⁷⁶ **CLA-9**, Mozambique-Netherlands BIT.

⁴⁷⁷ **CLA-70**, A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International B.V. 2009, para 9.1.

⁴⁷⁸ **CLA-70**, A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International B.V. 2009, para 9.1; see also **CLA-71** C Schreuer, “Travelling the BIT Route—Of Waiting Periods, Umbrella Clauses and Forks in the Road” in *The Journal of World Investment and Trade*, Vol. 5, 2004, at 250 (“They are often referred to as umbrella clauses because they put contractual commitments under the BIT’s protective umbrella.”).

⁴⁷⁹ **CLA-70**, A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International B.V. 2009, para 9.2; see also **CLA-128**, *Eureko*, para 251 (quoting the commentary to the umbrella clause located in the 1967 Draft OECD Convention on the Protection of Foreign Property: “Article 2 [the umbrella clause] represents an application of the general principle of pacta sunt servanda – the maintenance of the pledged word’ which ‘also applies to agreements between States and foreign nationals.’”).

international protection of contracts,” they promote stability in international trade and investment.⁴⁸⁰

391 The umbrella clause in Article 3(4) of the Mozambique-Netherlands BIT is broad, and *identical* to the umbrella clause contained in Article 3(5) the Netherlands-Poland BIT which was at issue in the *Eureko v. Poland* case.⁴⁸¹

392 The *Eureko* tribunal explained that the effect of this specific clause was is that failure by the host state to abide by a contractual obligation it entered into with investors in respect of their investment constitutes a breach of the relevant investment treaty. Considering Article 3(5) of the Netherlands-Poland BIT, by majority, the tribunal in *Eureko v Poland* held:

“Article 3.5 of the Treaty provides that each Contracting Party “shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party”. (A clause of such substance is often called “the umbrella clause”. Thus, insofar as the Government of Poland has entered into obligations vis-a-vis Eureko with regard to the latter’s investments, and insofar as the Tribunal has found that the Respondent has acted in breach of those obligations, it stands, prima facie, in violation of Article 3.5 of the Treaty.

...

*The immediate, operative effects of Article 3.5 are two. The first is that Eureko’s contractual arrangements with the Government of Poland are subject to the jurisdiction of the Tribunal, a conclusion that reinforces the jurisdictional conclusions earlier reached in this Award. The second is that breaches by Poland of its obligations under the SPA and its First Addendum, as read together, that are not breaches of Articles 3.1 and 5 of the Treaty nevertheless may be breaches of Article 3.5 of the Treaty, since they transgress Poland’s Treaty commitment to “observe any obligations it may have entered into” with regard to Eureko’s investments.*⁴⁸²

⁴⁸⁰ See **CLA-70**, A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International B.V. 2009, para. 9.2.

⁴⁸¹ **CLA-175**, Netherlands-Poland BIT, Article 3(5) of which reads as follows: “Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.”

⁴⁸² **CLA-128**, *Eureko B.V. v. Republic of Poland, Partial Award*, 19 August 2005, paras. 244 and 250 (emphasis added).

393 The tribunal’s analysis was founded on an interpretation of Article 3(5) of the Netherlands-Poland BIT in accordance with Article 31(1) VCLT.⁴⁸³ In particular, the tribunal analysed the ordinary meaning of the Article and noted the capacious nature of the use of the expression “any” obligations and the principle of *effet utile* (that the umbrella clause must be interpreted as to render it effective rather than ineffective):

“The plain meaning - the “ordinary meaning” -- of a provision prescribing that a State “shall observe any obligations it may have entered into” with regard to certain foreign investments is not obscure. The phrase, “shall observe” is imperative and categorical. “Any” obligations is capacious; it means not only obligations of a certain type, but “any” - that is to say, all - obligations entered into with regard to investments of investors of the other Contracting Party.

...

It follows that the effect of Article 3.5 in this proceeding cannot be overlooked, or equated with the Treaty’s provisions for fair and equitable treatment, national treatment, most-favored-nation treatment, deprivation of investments, and full protection and security. On the contrary, Article 3.5 must be interpreted to mean something in itself.”⁴⁸⁴

394 It was further supported by a thorough scholarly analysis of the historic provenance of umbrella clause. The tribunal highlighted that from the legal advice given by Elihu Lauterpacht in respect of the Iranian Consortium Agreement in 1954, through to Article II of the Abs-Shawcross Convention on Investment of 1959 and Article 2 of the OECD draft Convention on the Protection of Foreign Property of 1967, the umbrella clause was always intended to transform contractual obligations into international obligations.⁴⁸⁵

395 The reasoning of the majority in *Eureko* was later endorsed by a number of tribunals in respect of umbrella clauses worded in an identical,⁴⁸⁶ or essentially identical manner.⁴⁸⁷

⁴⁸³ **CLA-128**, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, paras. 247-250.

⁴⁸⁴ **CLA-128**, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, paras. 246 and 249.

⁴⁸⁵ **CLA-128**, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, para. 251.

⁴⁸⁶ See e.g. **CLA-138**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, paras. 328-330.

⁴⁸⁷ See e.g. Cases decided under Article 10(1) of the **CLA-176**, Energy Charter Treaty which reads as follows: “Each Contracting Party shall observe any obligations it has entered into with an

396 Considering an umbrella clause that was worded more narrowly than that in Article 3(4) of the Mozambique-Netherlands BIT (in contrast with Article 3(4), the clause did not refer to “*any obligations [the host State] may have entered into*”), the tribunals in *SGS v Pakistan*⁴⁸⁸ and *SGS v Paraguay*⁴⁸⁹ reached opposite conclusions as to the effect of the relevant umbrella clause. In essence, the tribunal in *SGS v Pakistan* considered that a party’s breach of its contractual obligations could only breach the relevant umbrella clause where the parties to the contract had expressed an intent that a breach thereof would also be a breach of the treaty obligation whereas the tribunal in *SGS v Paraguay* regarded a failure to observe an obligation that the host state assumed in a contract with the investor as a breach of the umbrella clause.

397 To the extent these cases are relevant to the interpretation of Article 3(4) of the Mozambique-Netherlands BIT, it is clear that:

- a. A significantly greater number of cases have adopted the approach of the tribunal in *SGS v Paraguay*⁴⁹⁰ rather than the one in *SGS v Pakistan*, which has been heavily criticised, including by Switzerland which was party to the relevant BIT.⁴⁹¹
- b. Furthermore, any hesitation to treat contract breaches as treaty breaches appears to arise out of a concern to avoid an indefinite extension of the umbrella clause to any contractual breaches.⁴⁹² However, tribunals

Investor or an Investment of an Investor of any other Contracting Party” (ECT), including **CLA-151**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 185-186; **CLA-152**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 110; **CLA-119**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Final Award, 8 June 2010, paras. 256-257.

⁴⁸⁸ **CLA-106**, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of Tribunal on Objections to Jurisdiction, 6 August 2003.

⁴⁸⁹ **CLA-106**, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010.

⁴⁹⁰ See e.g. **CLA-123**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, paras. 204-206; **CLA-113**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, paras. 317-325; **CLA-153**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paras. 98-102; **CLA-154**, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, paras. 355-359.

⁴⁹¹ **CLA-72**, Note on the Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in **CLA-106**, Case No. ARB/01/13 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy Secretary-General dated 1 October, 2003, published in 19, *Mealey’s: Int’l Arb. Rep. E*, 3, February 2004.

⁴⁹² See e.g. **CLA-155**, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 310.

have held that this pitfall can largely be averted where the obligation is entered into directly with the state⁴⁹³ and/or is breached by the exercise of sovereign powers.⁴⁹⁴

(c) Mozambique Breached Its Umbrella Clause Obligations to PEL on Numerous Occasions

398 Respondent's conduct breached the obligations it had entered into in respect of PEL's investment in Mozambique.

399 First, the obligations that Respondent had entered into in respect of PEL's investment in the Project are clear on the very face of the MOI.

400 Respondent's core obligation, under Clause 2 of the MOI, was to issue the concession in respect of the Project in favour of PEL, subject to the MTC's approval of the PFS and PEL's exercise of its right of first refusal. The obligation is absolute and clear on the face of the Clause, which reads as follows:

"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 on the basis of the concession which will be given by the Government of Mozambique."*⁴⁹⁵

401 The importance of this core obligation is also confirmed by Clause 1 which deals with objective of the MOI as follows:

"The objective of the present memorandum is to undertake the prefeasibility study the expense of which will be entirely borne by PEL, for the development of a port infrastructure on the coast of Zambezia province and a railway line of approximately 500 (five hundred) kilometres from the Tete

⁴⁹³ See e.g. **CLA-156**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, Award, 18 June 2010, paras. 342-350.

⁴⁹⁴ See e.g. **CLA-155**, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 310.

⁴⁹⁵ **Exhibit C-5A**, English Version of the Memorandum of Interest between The Ministry of Transport and Communications & Patel Engineering Ltd, dated 6 May 2011. Clause 2 (emphasis added).

*region of the said power under a Public Private Partnership (PPP) (“The Project”) defining the basic terms and conditions for the grating of a concession by the Govt. of Mozambique to PEL for the construction and operation of the project.*⁴⁹⁶

402 As a logical flip-side to its obligation to issue the Project concession to PEL, Respondent owed PEL a connected obligation of exclusivity, to refrain from granting a concession for a similar project to any other party. Clause 6 of the MOI, entitled EXCLUSIVITY, provides:

*“During the prefeasibility study and the process of approval for the project, the MTC agrees that within the terms of the specific legislation it will not solicit any proposal of study for the objective of the present memorandum. MTC also agrees not to give any rights/authorization to any other party for the development/expansion of a port between Chinde and Pebane for similar objectives, nor for the development/expansion of any rail corridor from Tete to the province of Zambezia within the area referred under objective of the present memorandum.*⁴⁹⁷

403 Also consistent with Mozambique’s obligation to issue the concession in favour of PEL, the MOI contained an obligation for the parties to keep the data documents and information exchanged between them confidential. This was further protection for PEL’s know-how. This protection was until approval of the Project, that is to say when Mozambique became obliged to issue in PEL’s favour. Clause 11 entitled Confidentiality provides:

“the parties have agreed to keep all the data, documents, information, and share between them whether written or otherwise, including this MOI as confidential until the approval of the project.”

404 Furthermore, to the extent the Tribunal deems such consideration relevant, the obligations under the MOI were entered into *directly* by Respondent and PEL. The MOI stipulates that it was made between “*Ministry of Transport and Communications, Govt. of Mozambique, (hereinafter singly and/or collectively referred to as ‘MTC’)*” and Claimant as well as its associates and/or

⁴⁹⁶ **Exhibit C-5A**, English Version of the Memorandum of Interest between The Ministry of Transport and Communications & Patel Engineering Ltd, dated 6 May 2011, cl. 1.1 (emphasis added).

⁴⁹⁷ **Exhibit C-5A**, English Version of the Memorandum of Interest between The Ministry of Transport and Communications & Patel Engineering Ltd, dated 6 May 2011, cl. 6 (emphasis added).

subsidiaries. It was signed by the MTC Minister “*on behalf of the Government of Mozambique.*”

405 Secondly, there is no doubt that Respondent breached its obligations under Clauses 1, 2, 6 and 11 of the MOI.

406 Moreover, to the extent the Tribunal deems such consideration relevant, Mozambique breached these obligations through the exercise of its sovereign powers. It is by virtue of such powers that Mozambique was entitled to issue a concession in respect of the Project and made the decision to organise a public tender, instead.

407 It follows that, by virtue of the operation of the MFN clause in the Treaty, Respondent has an obligation to observe any obligation it may have entered into with regard to PEL’s investments in Mozambique, which it breached.

C. *Mozambique Indirectly Expropriated PEL’s Investment*

1. The Applicable Legal Standard

408 Article 5 of the Treaty deals with expropriation, and provides in relevant part:

“Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose in accordance with law on a non- discriminatory basis and against fair and equitable compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a fair and equitable rate until the date of payment, shall be made without unreasonable delay, be effectively realizable and be freely transferable....”⁴⁹⁸

409 Consistent with the well-established interpretation of the wording of Article 5, which refers to “*measures having effect equivalent to nationalization or*

⁴⁹⁸ CLA-1, The Treaty, Article 5

*expropriation,”*⁴⁹⁹ Article 5 protects against both direct and indirect expropriation.

410 Indirect expropriation occurs where a state’s action or series of actions result in the investor being substantially deprived of the enjoyment, use or benefit of its investment, although title to the property or the rights remains with the original owner.⁵⁰⁰

411 That such indirect expropriation is covered by the Treaty is unequivocally confirmed by the Annexure to the Treaty entitled “Interpretation of ‘Expropriation’ in Article 5 (Expropriation) (the “**Annexure**”), which provides to the extent relevant that:

*“A measure of expropriation includes, apart from direct expropriation or nationalization through formal transfer of title or outright seizure, a measure or series of measures taken intentionally by a Party to create a situation whereby the investment of an investor may be rendered substantially unproductive and incapable of yielding a return without a formal transfer of title or outright seizure.”*⁵⁰¹

412 The Annexure further provides that the determination of whether an indirect expropriation has occurred requires a case specific inquiry based *inter alia* on the following factors:

“(i) the economic impact of the measure or a series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that expropriation or nationalization, has occurred.

⁴⁹⁹ See e.g. **CLA-157**, *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award, 29 March 2005, paragraph VIII.8.23 commenting on **CLA-176**, Article 13(1) of the Energy Charter Treaty which refers to measures having effect equivalent to nationalization or expropriation. See also **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para. 114; **CLA-158**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 101; **CLA-159**, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, para. 6. 122; **CLA-73**, J M Cox, *Expropriation in Investment Treaty Arbitration*, OUP, 2019, p. 43.

⁵⁰⁰ **CLA-116**, *Metalclad Corporation v The United Mexican States*, Award, 30 August 2000, ICSID Case No ARB(AF)/97/1, para. 103. See also **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, Award, 29 May 2003, ICSID Case No ARB(AF)/00/2, para. 114.

⁵⁰¹ **CLA-1**, The Treaty, Annexure

(ii) *the extent to which the measures are discriminatory either in scope or in application with respect to a Party or an investor or an enterprise;*

(iii) *the extent to which the measures or series of measures interfere with distinct, reasonable, investment-backed expectations;*

(iv) *the character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate.”*

413 A consistent body of jurisprudence confirms that contractual rights are susceptible to expropriation. This principle harkens back to the *Chorzow Factory Case*⁵⁰² and has been applied in vast number of investment treaty cases. For instance, in *Vivendi v Argentina* (No. 2), the tribunal unequivocally confirmed that contractual rights can be expropriated:

*“There can be no doubt that contractual rights are capable of being expropriated, and a number of treaty cases have arisen out of contractual disputes. The same act that may violate a treaty may also violate a contract, or both the treaty and the contract.”*⁵⁰³

414 It went on to find that the wrongful regulatory action, which culminated in the unilateral amendments to an agreement revising the terms of a concession agreement to such extent that the claimant was forced to terminate it, constituted an indirect expropriation.⁵⁰⁴

415 Similarly, in *Eureko v Poland*, the tribunal held that Eureko’s investment, which consisted *inter alia* of contractual rights to an IPO under a share

⁵⁰² **CLA-160**, *Case concerning Certain German Interests in Polish Upper Silesia (The Merits)*, Judgment of 25 May 1926, p. 44 in which the Permanent Court of International Justice held that by taking possession of the Chorzow nitrate factory on 3 July 1926 and by operating it and making use of the experiments, patents, and licences, Poland had unlawfully expropriated the contract rights of the Bayerische, a German company which had concluded a contract on 5 March 1915 with the German Reich to manage the exploitation of the factory on its behalf.

⁵⁰³ **CLA-161**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.5.4.

⁵⁰⁴ **CLA-161**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras. 7.5.22-7.6.2.

purchase agreement,⁵⁰⁵ had been indirectly expropriated by virtue of Poland's refusal to hold the IPO.⁵⁰⁶

416 Measures amounting to indirect expropriation have been found to include the refusal by the host state to grant construction permits to the investors.⁵⁰⁷

417 Expropriation, whether direct or indirect is not in and of itself an illegitimate act.⁵⁰⁸

418 However, for a host state to establish that an expropriation is lawful, it must demonstrate that it has complied with the conditions set out in the relevant treaty, that is to say in Article 5 of the Mozambique-India BIT. Consistent with international standards, Article 5 provides that any expropriation must be carried out for a public purpose, which is understood as there being some genuine interest of the public which the State is able to prove;⁵⁰⁹ in accordance with the law; on a non-discriminatory basis, which means that the expropriatory measures must apply to all investments of all investors equally, rather than singling out a particular investor;⁵¹⁰ and against fair and equitable compensation to be paid without unreasonable delay, be effectively realizable and be freely transferable.

2. Mozambique Breached the Applicable Standard

419 Mozambique indirectly expropriated PEL's contractual rights to a concession and to exclusivity in respect of the Project.

⁵⁰⁵ **CLA-128**, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, paras. 147-160.

⁵⁰⁶ **CLA-128**, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, paras. 238-243.

⁵⁰⁷ **CLA-116**, *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras 104-108 (finding the non-issuance of a permit to be a measure tantamount to expropriation in violation of NAFTA Article 1110(1)); **CLA-117**, *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 117 (holding the Mexican government's failure to renew the hazardous waste landfill permit held by the investor's subsidiary to be expropriatory).

⁵⁰⁸ **CLA-66**, C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles*, OUP, 2017, p. 388; **CLA-107**, *Waguih Elie George Siag & Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, para. 428.

⁵⁰⁹ **CLA-83**, *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary* (Award, 2 October 2006) ICSID Case No ARB/03/16, para. 432. See also, **CLA-162**, *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, paras. 90-91; **CLA-107**, *Waguih Elie George Siag & Clorinda Vecchi v The Arab Republic of Egypt* (Award, 1 June 2009) ICSID Case No ARB/05/15, para. 432.

⁵¹⁰ **CLA-83**, *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary* (Award, 2 October 2006) ICSID Case No ARB/03/16, para. 442.

- 420 PEL's investment consisted *inter alia* of its right to a direct concession in respect of the Project, its rights under the MOI (including to exclusivity and to confidentiality) as well as the know-how it invested in the Project.
- 421 Yet, Mozambique's conduct deprived PEL of any substantial benefits it could derive from such investment. As already explained above, the CFM refused to negotiate the implementation of the Project based on a false pretence. The MTC/the Council of Ministers then refused to issue a concession in favour of PEL based on similarly false and changing purported justifications. The MTC then organised a public tender, which was riddled by serious irregularities, and resulted in the concession being granted to ITD. As for the knowhow PEL transferred to Mozambique, it is now most certainly being used by ITD and unjustly enriching the Government.
- 422 Evidently, PEL's concession and its rights to exclusivity and confidentiality under the MOI, and the very idea that PEL conceived, no longer have any value and PEL cannot derive any substantive benefits from them now that Mozambique has granted to concession to another company. Respondent provided no due process, singled PEL out for discriminatory treatment, demonstrated no public purpose, and provided no compensation.
- 423 It follows that Mozambique has breached Article 5 of the Treaty by indirectly expropriating PEL's rights to a concession, to exclusivity under the MOI, and its idea and know-how in coming up with and developing the Project before it was appropriated by the Government for ITD and the Government's benefit.

VI. RESPONDENT'S TREATY BREACHES CAUSED SUBSTANTIAL DAMAGE FOR WHICH CLAIMANT IS ENTITLED TO FULL REPARATION

424 Respondent's acts and omissions resulted in the wholesale loss of Claimant's investment in Mozambique.⁵¹¹ Given Respondent's actions did not comprise a lawful expropriation, full reparation is required. This includes damages associated with PEL's lost profits. The only remedy that would wipe out the consequences of Respondent's illegal acts and provide Claimant with the reparation to which it is entitled under customary international law is payment of compensation, in an amount no less than **USD 115.3 million**.

A. *Claimant Is Entitled to Full Reparation As A Matter Of International Law*

1. Breaches of the Treaty Should Be Compensated with Full Reparation as at the Date of the Award

425 The Treaty not does set out the standard of compensation payable by a Contracting Party in the event that it commits a non-expropriatory breach of its treaty obligations. Also, while Article 5 of the Treaty addresses the measure of compensation payable for *lawful* expropriation, the Treaty does not state the compensation method applicable in the event of an *unlawful* expropriation.

426 In these circumstances, the amount of compensation which Mozambique is obliged to pay in respect of breaches of the Treaty is to be established by reference to customary international law, as established by the Permanent Court of International Justice ("PCIJ") in the seminal *Chorzów Factory* case and subsequently reflected in the ILC Articles.

427 In the *Chorzów Factory* case, the PCIJ stated that the essential principle 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*

⁵¹¹ The standard of proof for establishing the amount of damages suffered must be treated like any other fact in the case—it must be demonstrated as being more probable than not. *See CLA-140, Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 685; **CLA-163**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 para. 371; **CLA-164**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 Apr. 2015, paras. 30-31. The burden to prove the existence of damages is on Claimant. However, the burden shifts to Respondent if Claimant submits evidence that *prima facie* supports its allegations, and "any difficulty in determining the compensation does not prevent the assessment of such compensation where the existence of damage is certain."

existed if that act had not been committed.”⁵¹² This principle was later endorsed by the ILC Articles.⁵¹³ In this respect:

- a. Article 31(1) provides that “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”
- b. Article 36(1) provides that “The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as damage is not made good by restitution.”
- c. Article 36(2) provides that “The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”

428 Thus, the “full reparation” standard requires reparation that restores the injured party to the situation that would have existed if the wrongful act had not been committed. This principle of international law has been affirmed and applied in hundreds of cases since its formulation by the PCIJ.⁵¹⁴ As the *ADC v. Hungary* tribunal observed, “*there can be no doubt about the present vitality of the Chorzów Factory principle, its full current vigor having been repeatedly attested to by the International Court of Justice.*”⁵¹⁵

2. Full Reparation Requires Compensation for the Value of the Investment as well as Any Other Financially Assessable Damage

429 As explained, Article 36(2) of the ILC Articles requires compensation of “*any financially assessable damage including loss of profits insofar as it is*

⁵¹² **CLA-174**, *The Factory (Claim for Indemnity) (The Merits) Germany v Poland*, Judgment, 13 September 1928 (emphasis added).

⁵¹³ **CLA-177**, ILC, “*Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*”, in Yearbook of the International Law Commission, 2001, Vol. II, Part Two (emphasis added).

⁵¹⁴ See, e.g. **CLA-140**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 681; **CLA-165**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 Nov. 2007, para. 275; **CLA-166**, *OKO Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank PLC v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 Nov. 2007, para. 330; **CLA-133**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 Nov. 2008, paras. 269-70; **CLA-146**, *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 Nov. 2011, para. 14.3.3; **CLA-100**, *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 Dec. 2012, para. 322; **CLA-173**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014, paras. 1767-1768.

⁵¹⁵ **CLA-83**, *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 27 September 2006, paras. 486-95.

established.”⁵¹⁶ This is usually assessed by reference to specific heads of damage relating to: (i) compensation for capital value, (ii) compensation for loss of profits, and (iii) incidental expenses.⁵¹⁷

430 Regarding the first prong - the value of an investment - it is generally accepted that “[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act” is to be “assessed on the basis of the ‘fair market value’ of the property lost.”⁵¹⁸ Fair market value (“**Fair Market Value**” or “**FMV**”) is frequently defined as “the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.”⁵¹⁹

431 FMV of the lost investment is a common measure of the loss in both expropriation cases and in cases involving other treaty breaches.⁵²⁰ This is particularly the case where the non-expropriatory measure has resulted in the total loss of the investment.⁵²¹ Furthermore, when both unlawful expropriation and other treaty violations have been found, tribunals have frequently favoured this valuation approach to damages.⁵²²

⁵¹⁶ **CLA-177**, ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries”, in Yearbook of the International Law Commission, 2001, Vol. II, Part Two (emphasis added).

⁵¹⁷ **CLA-177**, ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries”, in Yearbook of the International Law Commission, 2001, Vol. II, Part Two, art. 36, Comment 21.

⁵¹⁸ **CLA-177**, ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries”, in Yearbook of the International Law Commission, 2001, Vol. II, Part Two, art. 36, Comment 22; see also **CLA-76**, C N. Brower & M Ottolenghi, “Damages in Investor-State Arbitration”, in Compensation and Damages in International Investment Arbitration, at 183.
⁵¹⁹ **Exhibit C-134**, American Society of Appraisers, Business Valuation Standards, 2008, p. 27; **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, at 183-85.

⁵²⁰ See, e.g., **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, at 92.

⁵²¹ See, e.g., **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, at 98 (“Importantly, the ‘value’ approach, even though explicitly named in treaty expropriation clauses, is not reserved for expropriation cases only. Full loss of, or diminution in, the fair market value of investment can be a measure of compensation regardless of the type of conduct that inflicted the loss.”).

⁵²² **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, at 99 (“In the event of multiple treaty violations, wherein one of the violations is expropriation, the measure of compensation applied in expropriation cases (ie, the ‘value approach’) has been preferred by tribunals.”).

432 For example, in *Vivendi v. Argentina*, the tribunal found that “*the same state measures*” amounted to both an unlawful expropriation and an FET violation, “*caus[ing] more or less equivalent harm*”⁵²³ and “*emasculat[ing] the Concession Agreement*” such that it was rendered “*valueless.*”⁵²⁴ As a result, the tribunal concluded that it was appropriate to accord compensation based on the FMV of the concession.⁵²⁵ Even where no expropriation has been found, tribunals have awarded compensation on the basis of FMV for breaches of obligations such as FET, full protection and security, and umbrella clauses.⁵²⁶ Thus, in *Azurix v. Argentina*, there was no finding of expropriation, but the tribunal was “*of the view that a compensation based on the fair market value of the Concession [was] appropriate, particularly since the Province ha[d] taken it over.*”⁵²⁷

433 Within the value of the investment head of damages, there are three main approaches to the calculus—an income-based approach, a market-based

⁵²³ **CLA-164**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 Apr. 2015, para. 8.2.8.

⁵²⁴ **CLA-164**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 Apr. 2015, para. 8.2.8.

⁵²⁵ **CLA-164**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 Apr. 2015, 8.2.9-10; see also, e.g., **CLA-143**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008 (para. 793 (“*In the present case, the loss which Claimants maintain that they have suffered is in fact the expropriation of their shares in Kar-Tel, whether or not this is characterised as an expropriation calling for compensation under the BIT, or merely as the consequence of some other internationally wrongful act, such as a breach of the obligation of fair and equitable treatment. In either case, the Tribunal considers that the correct approach is to award such compensation as will give back to Claimants the value to them of their shares at the time when the expropriation took place.*”)).

⁵²⁶ **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, 92 (“*In a number of cases, a non-expropriatory violation has produced effects similar to those of an expropriation, ie the total loss of the investment, for example due to the destruction of property or termination of a concession. In these circumstances, arbitrators have logically chosen to measure the loss, and therefore compensation, by focusing on the market value of the investment lost.*” (emphasis omitted).

⁵²⁷ **CLA-167**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, 14 July 2006, para 424; see also, e.g., **CLA-118**, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 410 (the tribunal was “*persuaded that the cumulative nature of the breaches discussed here [was] best dealt with by resorting to the standard of fair market value,*” explaining that “[w]hile this standard figures prominently in respect of expropriation,” it is also “*appropriate for breaches different from expropriation if their effect results in important long-term losses*”); **CLA-168**, *Enron*, para 363 (“*On occasions, the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and in those circumstances the standard of compensation can also be similar on one or the other side of the line. Given the cumulative nature of the breaches that have resulted in a finding of liability, the Tribunal believes that in this case it is appropriate to apply the fair market value to the determination of compensation.*”). **CLA-120**, *Murphy Exploration and Production Company International v. Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, para. 482. **CLA-141**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 702.

approach, and an asset-based approach.⁵²⁸ Selecting an approach “*requires careful analysis specific to the circumstances of the case*” and “*considerations may relate to the specificities of the asset, industry or the economy in question.*”
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434 Under the income approach, the most common method is the discounted cash flow (“**DCF**”) method, in which “*the sum of future cash flows projected for a certain period of time is discounted back to present value by using a discount rate.*”⁵³⁰ The DCF method is firmly grounded in both financial theory and business reality—it is a common means by which potential purchasers value assets and entities, by identifying the present worth of future cash flows those assets and entities will generate.⁵³¹

⁵²⁸ **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, at 193 (“1. *Income-based approach* calculates the present value of a business’s anticipated cash flows. 2. *Market-based approach* determines the value of a business by comparing it to similar businesses, business ownership interests, or securities that are sold on the open market. 3. *Asset-based approach* values tangible and intangible assets comprising a business and aggregates these separate values to arrive at the value of the business.”); see, e.g., **CLA-133**, *National Grid*, para. 275 (“*The first task of the Tribunal in determining the quantum of compensation is to select among the many valuation methodologies available including ‘book value,’ ‘asset value or replacement cost,’ ‘comparable transaction value,’ ‘option valuation,’ ‘discounted cash flow,’ and variations on all of the above.*”).

⁵²⁹ **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, at 194; see also ILC, “*Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*”, in Yearbook of the International Law Commission, 2001, Vol. II, Part Two, art. 36, Comment 22 (method ultimately selected should “depend [...] on the nature of the asset concerned.”).

⁵³⁰ **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, at 195; see also, e.g., **CLA-118**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 403 (“*the valuation of the assets is arrived at by determining the present value of future predicted cash flows, discounted at a rate which reflects various categories of risk and uncertainty*”). “*The DCF method is thus conceptually similar to an award of lost profits, provided that the cash flows are expected to result in profits.*” **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, at 289.

⁵³¹ **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008 at 195.

435 Dozens of tribunals have relied on the DCF method of valuation;⁵³² it has “been constantly used by tribunals in establishing the fair market value of assets to determine compensation of breaches of international law.”⁵³³

436 The DCF method requires means by which to predict those future cash flows, such as a business plan⁵³⁴ or historical information regarding the company’s operations.⁵³⁵ Commentators have observed that the DCF method is regularly used for valuing “an ongoing enterprise or a long term contractual right, for example to exploit a natural resource [.]” even in the absence of a past history of profitability.⁵³⁶ As emphasised by the tribunal in *East Mediterranean Gas S.A.E. v. Egyptian General Petroleum Corporation* in the context of an ICC arbitration brought under several contracts for the purchase, sale, and supply of gas, the key question is not whether there is evidence of profitability in the past but whether it is reasonable to presume that but for the other party’s wrongdoing, the injured party would have obtained a foreseeable stream of income in the future.⁵³⁷

⁵³² See, e.g., **CLA-83**, *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 27 September 2006, para. 502 (“Like many other tribunals in cases such as the present one, the Tribunal prefers to apply the DCF method”); **CLA-118**, *CMS – Award*, paras 411 (“The Tribunal has concluded that the discounted cash flow method i[s] the one that should be retained in the present instance.”), 416 (“DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets.”); **CLA-133**, *National Grid*, para. 275 (“[T]he Tribunal finds that there is a broad consensus that where, as here, the problem presented is not to fix the value of a fixed asset, but instead to determine the loss, if any, of fair market value of an operating business entity, there is considerable merit in using the Discounted Cash Flow (DCF) method.”); **CLA-169**, *Sistem Mühendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 Sept. 2009, para. 164.

⁵³³ **CLA-168**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, 22 May 2007, para. 385.

⁵³⁴ See, e.g., **CLA-83**, *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 27 September 2006, para. 507 (“The 2002 Business Plan . . . constitutes the best evidence before the Tribunal of the expectations of the parties at the time of expropriation for the expected stream of cash flows.”).

⁵³⁵ **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, at 211; see also id. at 234 (“the DCF method needs data to support projection of future earnings”).

⁵³⁶ See, e.g., **CLA-76**, C N. Brower & M Ottolenghi, “Damages in Investor-State Arbitration”, in *Compensation and Damages in International Investment Arbitration*, TDM, 2007.

⁵³⁷ **CLA-170**, *East Mediterranean Gas S.A.E. v. Egyptian General Petroleum Corporation, Egyptian Natural Gas Holding Company and Israel Electric Corporation Ltd.* ICC Case No. 18215/GZ/MHM, Final Award, 4 December 2015, para. 1344: “JWC has, additionally, raised an objection as to the accuracy of a DCF model, given the lack of record of EMG’s profitability. The Tribunal sees no reason for concern. The important fact is not whether EMG can prove its profitability in the past, but rather whether it is reasonable to presume that, were it not for EGAS’ wrongdoing, it would have obtained a foreseeable stream of income in the future. In the case of a 15 year-long gas supply deal, secured by an interlocking mesh of contracts (the MoU, the GSPA, the Tripartite Agreement and the On-Sale Agreement) the Tribunal entirely satisfied of the reasonableness of such presumption.”

437 Investment tribunals have thus regularly relied on the DCF valuation method, notwithstanding the fact that claimants did not have a proven track record of profitability. This approach is particularly appropriate in cases pertaining to the deprivation of an investor’s long-term future rights under licenses or concessions. As noted by the tribunal in *Vivendi II*:

*“in an appropriate case, a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of a genuine going concern. For example, a claimant might be able to establish clearly that an investment, such as a concession, would have been profitable by presenting sufficient evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.”*⁵³⁸

438 The tribunal in *Tethyan* thus decided to apply the DCF method, in spite of the facts that a concession agreement had not been granted and that the claimant had never commenced the exploitation of the mine. The tribunal put significant weight on the feasibility study produced by the claimant and its owners as well as their experience in the relevant industry, which it saw as very strong indications that they believed that the project would become operational and profitable:

“In particular, the Tribunal cannot follow Respondent’s allegation that the Feasibility Study was a blueprint for another Mega Project failure. In the Tribunal’s view, the fact that the Feasibility Study was produced at a time when Claimant and its owners were determined to proceed with the project and the fact that its owners combined their impressive experience in operating copper mines and in operating gold mines across the globe, had been sponsoring and overseeing the project during its exploration stage, and were willing to contribute large further amounts of equity into the project, are very strong indications that they believed that this project would become operational and profitable. The Feasibility Study itself was the result of several years of intensive work on the ground, which was overseen by both of Claimant’s owners and in which numerous outside consultants and companies participated. To suggest that the team conducting the exploration work and compiling the Feasibility Study had no idea what they were doing is not credible, in

⁵³⁸ **CLA-164**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 Apr. 2015, para. 8.3.4.

particular considering that Antofagasta and Barrick were investing large amounts of equity as well as seconding their own personnel for the project.”⁵³⁹

439 Similarly, in *Crystallex v Venezuela*, the tribunal adopted the DCF method when assessing quantum, in spite of the fact that the investor did not have a proven track record of profitability. It placed particular emphasis on the exploration activities and feasibility studies produced by the claimant and approved by the respondent as evidence that the investment would have been profitable.⁵⁴⁰

440 Likewise, *Rumeli v. Kazakhstan* involved the valuation of licensing rights relating to the provision of mobile telecommunication services through an enterprise that “*had not been in existence for long enough to have generated the data required for the calculation of future income.*”⁵⁴¹ The tribunal concluded that “[s]ince the value of that asset [a license to operate a mobile telecommunication network] was directly linked to its potential to produce future income, there is no realistic alternative to using the DCF method to ascribe a value to it.”⁵⁴²

441 As for *ADC v. Hungary*, it involved the expropriation of a 12-year concession agreement to operate two airport terminals. In assessing damages, the tribunal did not rely on the company’s operating history but instead based its assessment of the value of the concession rights on a DCF analysis derived from the project company’s business plan, which had been subject to approval by the relevant State authority.⁵⁴³ The tribunal concluded that the business plan constituted “*the best evidence*” of the parties’ expectations regarding the profitability of the enterprise.⁵⁴⁴

⁵³⁹ **CLA-134**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, para. 327 (emphasis added).

⁵⁴⁰ **CLA-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 878.

⁵⁴¹ **CLA-143**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008, para. 811.

⁵⁴² **CLA-143**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008, para. 811.

⁵⁴³ **CLA-83**, *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 27 September 2006, para. 507.

⁵⁴⁴ **CLA-83**, *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 27 September 2006, para 507; see also **CLA-171**, *Walter Bau AG (In Liquidation) v. The Kingdom of Thailand, UNCITRAL*, Award, 1 July 2009, para. 14.12 (“Value at any one time is a forward-looking concept and does not depend on how many (past) periods have elapsed; it depends on what remains ahead. . . . The only method which can accurately track value through time is the Discounted Cash Flow (DCF) method.”).

442 In this case, as in the foregoing cases, a DCF valuation is the most appropriate measure of Claimant’s loss of the right to the Concession to carry out the Project given to a third party (TML) instead of PEL, in breach of Treaty protections.

B. Full Reparation Justifies an Award of At Least USD 115.3 Million, As Amply Proven By The Evidence And Claimant’s Expert

1. The General Approach of Claimant’s Experts to Calculating Damages

443 As noted above, Claimant is entitled to be placed in the same position it would have been in “but for” Respondent’s breaches of the Treaty. Having set out Mozambique’s treaty breaches, the causal link is self-evident: Respondent’s actions wrongfully deprived PEL of all of its contractual rights under the MOI. As a direct result of Respondent’s unlawful conduct, Claimant lost its right to implement the Project through a Concession with the Government.

444 The Versant Expert Report describes the situation in which Claimant would have found itself, as at 30 September 2020 (a proxy for the current date), “but for” Respondent’s breaches (the “**But For Scenario**”). It is Claimant’s case that, but for Respondent’s breaches of the Treaty, PEL would have been awarded the concession on economic and commercial terms that were no less favourable than the concession awarded to TML.

445 To calculate Claimant’s economic position in the But For Scenario, the Versant Expert Report calculates the value of Claimant’s investment in Mozambique based on the Fair Market Value of the Project.⁵⁴⁵

446 As set out above, Fair Market Value represents “*the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of*

⁵⁴⁵ CER-2, Versant Expert Report, para 132.

the relevant facts,”⁵⁴⁶ and it is arguably the most well-known valuation standard, being commonly applied in judicial and regulatory matters.⁵⁴⁷

447 Echoing international arbitral decisions and commentary, the Versant Expert Report affirms that there are two “*generally accepted valuation approaches*”: (1) the Income Approach, and (2) the Market Approach.⁵⁴⁸

448 First, with respect to the income approach’s DCF method, the Versant Expert Report has described it as a “*commonly implemented valuation approach.*”⁵⁴⁹ It adds that the DCF method is “*universally adopted by valuation practitioners to value assets such as the Concession, that are expected to generate income over a finite operating period.*”⁵⁵⁰ Concessions are regularly valued using an income-based approach since there is usually sufficient evidence to capture relevant dynamics (*i.e.*, magnitude, timing, growth and uncertainty in cash flows) effectively. Here, as discussed below, there is sufficient evidence of what actually happened with respect to the Project in question after Respondent's breach to justify valuing the concession on the basis of the DCF method.

449 There is also ample evidence showing that, had PEL been awarded the concession as was envisaged under the terms of the MOI, the Project would have generated substantial income. PEL is a highly experienced infrastructure and construction services company which has successfully completed more than 250 major projects globally.⁵⁵¹ It put substantive time, capital, and effort into conducting a highly detailed PFS demonstrating the Project’s feasibility.⁵⁵² PEL’s confidence in the Project and its potential was so clear that it did not hesitate to provide a large bank guarantee to the MTC on 9 May 2013, of USD 3,115,000.⁵⁵³

⁵⁴⁶ **Exhibit C-134**, American Society of Appraisers, Business Valuation Standards, 2008, p. 27; see also, e.g., **CLA-167**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, 14 July 2006, para. 424 (quoting this definition); see also **CER-2**, Versant Expert Report, para. 112.

⁵⁴⁷ See, e.g., **CLA-118**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 402 (“[T]he general concept upon which commercial valuation of assets is based is that of ‘fair market value.’”).

⁵⁴⁸ **CER-2**, Versant Expert Report, para 132.

⁵⁴⁹ **CER-2**, Versant Expert Report, para 133.

⁵⁵⁰ **CER-2**, Versant Expert Report, para 133.

⁵⁵¹ See paras. 51-52 above.

⁵⁵² **CWS-1**, Witness Statement of Mr Kishan Daga paras. 49-55.

⁵⁵³ **CWS-1** Witness Statement of Mr Kishan Daga, para. 129.

450 Second, as for the Market Approach, the Versant Expert Report explains that this approach relies on analysing the market prices of similar companies or projects to determine the value of the investment. The Versant Expert Report states that it is usually difficult to implement the Market Approach to value investments such as the concession, because “*the value of the Concession is directly influenced by the specific terms of the Concession, which could differ substantially (e.g., with respect to timeline/duration and economics) from publicly traded companies (or acquisitions of companies) that build/operate ports and railways.*”⁵⁵⁴ However, the Versant Expert Report was able to identify a suitably comparable transaction in order to conduct a reasonableness check on its valuation.

451 The Versant Expert Report also briefly considers the “Cost Approach”, a variation of the Market Approach, which calculates the “replacement” or “reproduction” cost of an investment, using as a starting point the amount of money that was spent over time obtaining and developing that investment. The Report concludes that this approach is not appropriate in a damages analysis context, which seeks (following the international law principles detailed above) to accord full reparation to a claimant.⁵⁵⁵

2. The Approach Taken by Claimant’s Expert in this Case

452 The income-based, DCF valuation approach should be the primary method for determining Claimant’s damages in this case. As Mr Sequeira and Mr Baez explain, this analysis requires “*the valuation practitioner to project the future cash flows that the business would have generated, determine an appropriate discount rate that reflects the level of risk or uncertainty associated with those cash flows, and then discount the expected future cash flows to present value as of the relevant date.*”⁵⁵⁶ A number of inputs are important for this analysis (as is explained further below).

(a) Valuation Date

453 The Versant Expert Report also considers the appropriate Valuation Date (*i.e.*, the date as of which the investment is to be valued). If a damages analysis is conducted as of the date of the alleged breach, it is considered an *ex-ante*

⁵⁵⁴ CER-2, Versant Expert Report, para. 139.

⁵⁵⁵ CER-2, Versant Expert Report, paras 140-141.

⁵⁵⁶ CER-2, Versant Expert Report, para. 133.

analysis; whereas, if a damages analysis is conducted as at a current date, it is considered an *ex-post* analysis.⁵⁵⁷ *Ex-post* assessments of a claimant's damages are appropriate for cases of illegal expropriation. An *ex-ante* assessment is also appropriate, but in order to conduct this, it would be relevant and material to consider and review,⁵⁵⁸ at a minimum, the actual terms of the concession awarded to TML, as well as the Bankable Feasibility Study for the concession that was completed by TML.⁵⁵⁹ Respondent has refused to provide such documentation to PEL despite numerous requests.⁵⁶⁰ In any event, Claimant is entitled to claim the higher of the damages calculated under the *ex-ante* and *ex-post* approaches. For the purpose of the below *ex-post* assessment, a Valuation Date of 30 September 2020 is adopted, as a proxy for the current date.⁵⁶¹

454 As to the approach this entails, the Versant Expert Report explains that “[a]n *ex-post* analysis entails a current valuation of the subject investment but-for the alleged breaches of Respondent – it therefore requires a valuation

⁵⁵⁷ CER-2, Versant Expert Report, para. 115.

⁵⁵⁸ CER-2, Versant Expert Report, paras. 122-123.

⁵⁵⁹ To ensure that the Tribunal can benefit from the most accurate *ex-ante* analysis possible, it will also be instructive to review the following documents, in order to further elucidate the value of the Concession: copy of the EPC contract for the Project that was awarded to the joint-venture comprised of Mota-Engil and China National Complete Engineering Corporation (a subsidiary of CMEC) in mid-2016, together with any modifications or amendments to this EPC contract; copy of offtake agreements, Take-or-Pay agreements, Letters of Intent, or other arrangements executed by or between the TML consortium and the coal mining companies or other offtakers in the Tete region for the offtake of product via the railway; information or data pertaining to the tariffs (e.g., US dollar per ton or US dollar per ton-kilometre) that TML will charge for the transport of coal (or other product) via the railway and the handling of coal (or other product) at the port; copy of political risk guarantee for the project that was secured from Multilateral Investment Guarantee Agency (MIGA) in 2018; copy of documentation related to the debt financing (including Term Sheet and/or other documents detailing the terms of the debt financing) secured for the project by the TML consortium; copy of the agreements executed with third party rail operator and/or port operator for operation and maintenance (“O&M”) of the railway and port; and information on the current status of the project and the expected timeline for completion of the Project.

⁵⁶⁰ Claimant requested documents from Respondent on 7 September 2019, 13 November 2019, 3 and 28 March 2020, and 20 May 2020. In addition, Pimenta & Associados made a formal request for these documents to the MTC on 23 September 2020, on the statutory basis of the Mozambican Law No. 34/2014, of 31 December (the "Access to Information Act") and Decree No. 35/2015, of 31 December (the "Regulations on the Access to Information Act"). Such a request was rejected by the MTC on 2 October 2020.

⁵⁶¹ Meaning that the *ex-post* valuation will need to be updated in Versant's second report in order to account for the passage of time and the progress of the Project over the intervening period: CER-2, Versant Expert Report, para. 12. Versant has also reserved the right (and Claimant reserves the right) to undertake an *ex-ante* assessment of damages in Versant's second report, pending the production of relevant documents by Respondent, in particular the Concession Agreement executed with TML and the Bankable Feasibility Study: CER-2, Versant Expert Report, para. 123. Claimant also reserves the right, following document production, to quantify its claim as one for unjust enrichment. As unjust enrichment requires the damages to be valued in the hands of the Government, rather than as a damage to Claimant, it necessarily depends on evidence that the Government currently has in order for that valuation to be undertaken. For that reason, it is appropriate for such a valuation to be conducted post document production. Nevertheless, to ensure that Respondent is given fair notice of Claimant's reservation of rights to provide such a valuation, Claimant mentions it now.

practitioner to model how the Project would have progressed between the date of breach and the current date in a counterfactual scenario where the alleged breach did not occur.”⁵⁶² As noted by the witness testimony of Mr Kishan Daga and Mr Ashish Patel,⁵⁶³ even though Claimant would have been entitled to implement the Project independently, it most likely would have sought partners to both raise finance and implement the Project, similar to what it did to compete in the public tender process in or around March 2013. Per the terms Memorandum of Understanding dated 8 March 2013⁵⁶⁴ agreed between members of the PGS Consortium during the public tender process, PEL would have retained an ownership interest of at least 47.22% in the consortium and the Project. The Versant Expert Report therefore adopts, for the purpose of its DCF analysis, Claimant’s 47.22% ownership interest in the Project.⁵⁶⁵ This is done as per the instructions of PEL’s counsel, to ensure a conservative approach.

456 Because Claimant’s equity value in the investment is being calculated, the appropriate measure of cash flow is “free cash flow to equity” (FCFE), *i.e.* the cash flow available for equity investors after all the costs of doing business have been paid and all debts are paid.⁵⁶⁶

(b) DCF Projections

457 Versant's DCF projections are guided by a projection of the upfront capital costs, revenues from commercial operation of the railway and port (*i.e.*, freight volumes and tariffs), operating and maintenance costs for the railway and port, capital expenditures, depreciation and amortisation, changes in net working capital, taxes, and the discount rate for the Project.⁵⁶⁷ Importantly, such projections also consider the actual developments pertaining to the TML concession. This is because the Bankable Feasibility Study undertaken by TML confirmed the economics and positive value of the Project, and the TML consortium achieved financial close for the Project in 2019. It is therefore reasonable and appropriate to assume that the Bankable Feasibility Study that

⁵⁶² CER-2, Versant Expert Report, para 124.

⁵⁶³ CWS-1, Witness Statement of Mr Kishan Daga, para. 163; CWS-2, Witness Statement of Mr Ashish Patel, para. 46.

⁵⁶⁴ Exhibit C-60, Memorandum of Understanding between PEL, Grindrod and SPI, dated 8 March 2013.

⁵⁶⁵ CER-2, Versant Expert Report, para 128.

⁵⁶⁶ CER-2, Versant Expert Report, para. 134.

⁵⁶⁷ CER-2, Versant Expert Report, section VI.

would have been undertaken by Claimant would have yielded similar results, and the Project would have progressed along a similar path in the But-For Scenario.⁵⁶⁸ Therefore, for the purposes of its DCF analysis, Versant assumes that the Project would have progressed along a timeline similar to the actual progression of the Project (as operated by TML).⁵⁶⁹ On that basis, Versant estimates FCFE over the duration of the Project: during the pre-construction period (prior to 2019), the four-year construction period (2019-2022), and the operational period (2023-2048). The principal inputs in the Versant Expert Report's analysis are summarised below.

458 **Revenue (during the operational period) – Throughput:** The Versant Expert Report assumes that the Project would have had the capacity to transport 33 million tonnes of product per year (the same capacity adopted by TML).⁵⁷⁰ It also assumes that the Project would achieve a throughput of 17.5 million tonnes in its first operational year (2023), or 53% of capacity. It then assumes that this throughput would increase by 5 million tonnes each year until it reaches 30 million tonnes in its fourth operational year (2026), or 91% of capacity.⁵⁷¹ After 2026, it maintains the annual throughput constant at 30 million tonnes.⁵⁷² These assumptions are reasonable as informed by a review of the supply capacity of coal mines and resources in the Tete region.⁵⁷³ They also take account of a ramp-up period to full capacity, assumed to occur over a period of 3-5 years. In addition, the conservative nature of this assessment is highlighted by the fact that it does not take account of a potential for expanded capacity claimed by TML, from 33 million tonnes to up to 100 million tonnes. As the Versant Expert Report explains, “*We note that based on information disclosed by ITD/TML, the Concession/Project capacity can be expanded from 33 million tonnes to up to 100 million tonnes. It is therefore reasonable to assume that the PGS Consortium would also have the potential to expand the capacity over time. However, we have chosen not to model such additional expansions, which would be accretive to the value of the Project.*”⁵⁷⁴

⁵⁶⁸ CER-2, Versant Expert Report, para. 32.

⁵⁶⁹ CER-2, Versant Expert Report, para. 149.

⁵⁷⁰ CER-2, Versant Expert Report, para. 151.

⁵⁷¹ CER-2, Versant Expert Report, para. 151.

⁵⁷² CER-2, Versant Expert Report, para. 151.

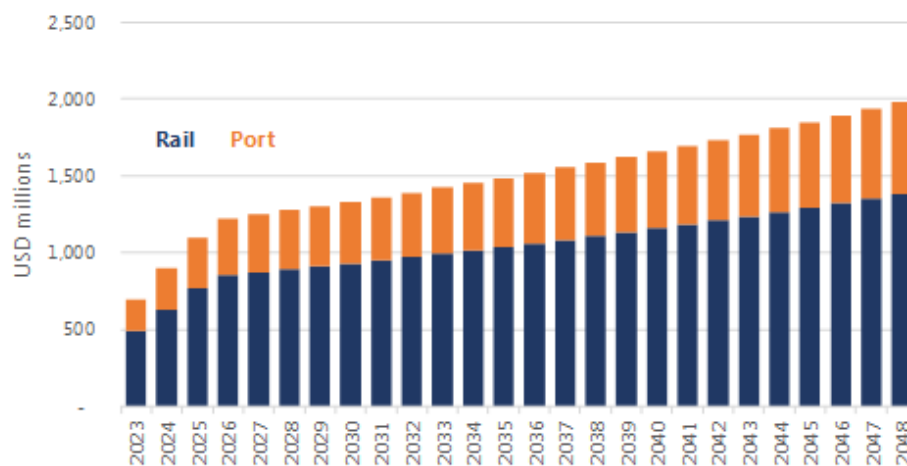
⁵⁷³ CER-2, Versant Expert Report, para. 152.

⁵⁷⁴ CER-2, Versant Expert Report, para 154.

459 **Revenue (during the operational period) – Tariffs:** As regards tariffs for transporting coal from Moatize to Macuse, the Versant Expert Report assumes a base tariff of USD 0.050 per tonne-km (which is equivalent to a tariff of USD 26 – 32 per tonne based on route lengths of 520 km from Moatize and 639 km from Chitima respectively) for rail transport starting in 2023. This is consistent with the tariff PEL intended to adopt and also similar to the tariff adopted by TML. This tariff also appears to be lower than actual rail tariffs for the neighbouring Nacala corridor as well as the Beira rail corridor, on both a per tonne-km and per tonne basis.⁵⁷⁵ Regarding tariffs for coal/product handling at the port and related port services, the Versant Expert Report has based its assumption on estimates published for the neighbouring Beira and Nacala ports, and assumed a conservative estimate of USD 12 per tonne for Macuse starting in 2023, which is at the low end of these ranges.⁵⁷⁶

460 Based on the foregoing volumes and prices, Mr Sequeira and Mr Baez forecast the but-for revenues for the concession from 2023 to 2048, shown in each year of income in the following table:

Figure 13 – Annual Revenues from Rail and Port¹⁶³



461 The above chart demonstrates that after a brief ramp-up period at the start of operations, the concession is reasonably expected to generate revenues in the range of USD 1-2bn per annum.

462 **Operating and Maintenance Costs:** A further input in the DCF analysis is the Project’s rail operating costs, which are assumed to equal 54% throughout the

⁵⁷⁵ CER-2, Versant Expert Report, paras 156-157.

⁵⁷⁶ CER-2, Versant Expert Report, para 158.

life of the concession.⁵⁷⁷ This assumption is drawn from a review of the operating margins of major freight services companies in Africa and elsewhere, which were found to average 54% between 2015 and 2019, as shown in Table 5 below. The Versant Expert Report notes⁵⁷⁸ that this is likely to be a conservative assumption, since the other companies considered typically operate more complex and older rail systems than that envisaged by the Project, which is a new single-track rail with limited stops. On that basis, it is reasonable to expect that the Project would have materially lower operating and maintenance costs (as a percent of revenue, or on a per kilometre basis) than these other companies. In addition, Mr Sequeira and Mr Baez observe that the modelling adopted in the Versant Expert Report may also lead to an overstatement of this cost: maintenance costs (such as corporate overheads, and certain labour costs) are fixed and therefore may be lower over the long term.⁵⁷⁹

Table 5 – Operating and Maintenance Costs as a Percent of Revenues for Rail Operators¹⁶⁶

Operating and Maintenance Costs % of Revenues	2015	2016	2017	2018	2019	Avg. 2015-2019
Transnet	57 %	58%	56%	53 %	55%	
CSX Corp	60 %	59%	54%	51 %	48%	
Union Pacific Corp	54 %	54%	52%	53 %	49%	
Canadian Pacific Railway Ltd	53 %	50%	51%	50 %	51%	
Aurizon Holdings Ltd	60 %	60%	60%	50 %	52%	
Average	57%	56%	55%	51%	51%	54%
Min	53 %	50%	51%	50 %	48%	50%
Max	60 %	60%	60%	53 %	55%	58%

463 With regard to the operating and maintenance costs of the port operations, the Versant Expert Report estimates these at 50% of port revenues, following a review of the operating margins of other port operators, between 2015-2019 (per Table 6 included below).⁵⁸⁰ The Versant Expert Report observes that this assumption is also likely to be conservative because (i) the cost of operating and maintaining new port infrastructure and equipment/machinery at Macuse is likely to be lower (as a percentage of revenue or per-tonne of throughput) than the operating and maintenance costs for the older port systems considered,

⁵⁷⁷ CER-2, Versant Expert Report, para 164.
⁵⁷⁸ CER-2, Versant Expert Report, para. 163.
⁵⁷⁹ CER-2, Versant Expert Report, para. 165.
⁵⁸⁰ CER-2, Versant Expert Report, paras. 166-167.

and (ii) their modelling of port costs , as entirely variable, may overstate Port operating and maintenance costs over the long-term.⁵⁸¹

Table 6 – Operating and Maintenance Costs as a Percent of Revenues for Port Operators¹⁹⁰

Operating and Maintenance Costs % of Revenues	2015	2016	2017	2018	2019	Avg. 2015-2019
Transnet	69%	70%	66%	66%	65%	
DP World	55%	51%	51%	54%	59%	
Hutchison Port	44%	40%	43%	43%	42%	
Adani	33%	35%	36%	37%	35%	
Average	50%	49%	49%	50%	50%	50%
Min	33%	35%	36%	37%	35%	35%
Max	69%	70%	66%	66%	65%	67%

464 The Versant Expert Report’s DCF analysis also accounts for the likely concession fee and CRS reserve applicable to the concession.⁵⁸² Versant considers it reasonable to assume that the same fees that are applicable to TML’s concession agreement, would be applied to PEL’s concession, in the But-For Scenario. Accordingly, the Versant Expert Report assumes (a) a USD 5 million concession premium paid between 2014 and 2018, and USD 0.17 million paid annually between 2019 and 2048 (which amounts to USD 5 million over the concession period), and (b) a CSR Reserve of 0.5% of capital expenditures *plus* 0.5% of revenues between 2019 and 2048.

465 **Taxes:** The concession would be subject to income taxes, understood to be 32% of pre-tax income.⁵⁸³ The Versant Expert Report also takes account of the application of certain investment tax credits, based on prevailing tax incentives in Mozambique.

466 **Capital expenditure:** Based the assumption that it would be reasonable, in the But-For Scenario, to assume that the PGS Consortium would have arrived at a similar estimate for the total Project costs as that published by TML, after a Bankable Feasibility Study, the Versant Expert Report has adopted TML’s capital cost of USD 3.2 billion for the Project, to be incurred throughout the construction period, which would start around 2019 and conclude by the end of 2022 (consistent with the Project timeline indicated by TML).⁵⁸⁴ The Versant Expert Report includes an estimate of replacement capital expenditures for rolling stock and port machinery/equipment which, taking

⁵⁸¹ CER-2, Versant Expert Report, paras. 167.

⁵⁸² CER-2, Versant Expert Report, paras. 168-169.

⁵⁸³ CER-2, Versant Expert Report, para. 172.

⁵⁸⁴ CER-2, Versant Expert Report, paras. 173-176.

account of inflation, comes to USD 680 million and USD 628 million respectively.

467 For the pre-construction period (2014-2018), the Versant Expert Report assumes total capital expenditures of USD 64 million, based on TML's development costs up to 2018.⁵⁸⁵ This is likely a conservative assumption as it is reasonable to expect that PEL would have spent less since PEL had completed the PFS and was familiar with the Project.

468 ***Debt Financing:*** As explained by the witness testimony of Mr Kishan Daga and Mr Ashish Patel,⁵⁸⁶ PEL anticipated using a mixture of debt and equity to finance the Project. The Versant Expert Report has accordingly assumed that the Project would be financed with a combination of debt and equity financing (i.e., 75% debt and 25% equity), which is in accordance with PEL's financing plan, and also representative of the capital structure typically adopted for infrastructure projects in Africa.⁵⁸⁷ Versant determined, based on external sources, that debt financing for infrastructure/mining projects in Africa is commonly provided by Chinese lenders, and has conservatively adopted a cost of debt of 6% based on a review of information on loans made by Chinese banks to other comparable projects.⁵⁸⁸

469 ***Discount Rate:*** a further important input into any DCF analysis is the discount rate used to discount future cash flows to net present value. Having calculated the future cash flows that the PGS Consortium concession would have generated but-for Respondent's unlawful actions, the Versant Expert Report then discounts those cash flows to a net present value, as of the Valuation Date (of 30 September 2020), by applying an appropriate discount rate.⁵⁸⁹ The Versant Expert Report explains that "[t]he discount rate represents the rate of return that investors would require from the subject investment, based on the time value of money and the risks associated with future cash flows."⁵⁹⁰

470 To determine the appropriate discount rate, the Versant Expert Report calculates PEL's cost of equity (COE). This reflects "*the rate of return*

⁵⁸⁵ CER-2, Versant Expert Report, para. 176.

⁵⁸⁶ CWS-1, Witness Statement of Mr Kishan Daga, para. 163; CWS-2, Witness Statement of Mr Ashish Patel, paras. 45-47.

⁵⁸⁷ CER-2, Versant Expert Report, para. 182.

⁵⁸⁸ CER-2, Versant Expert Report, paras. 181-182.

⁵⁸⁹ CER-2, Versant Expert Report, para. 185.

⁵⁹⁰ CER-2, Versant Expert Report, para. 186.

investors require to invest in the share capital of a company”⁵⁹¹ and is calculated looking at the risk free rate of return, adjusted to reflect equity risk (ERP), market risk (the “*beta*”), and country-specific risk (CRP). For the risk free rate of return, the Versant Expert Report takes the average daily rate for the 10-year USD Treasury bond over the last 5 years (2.09%).

471 As to the ERP, the Versant Expert Report applies the average premium recommended to investors in 2020 by market analysts (5.42%). As for the market-risk premium (also called the “*beta*”), this is a measure of the “*volatility of a single security relative to the overall market.*”⁵⁹² The Versant Expert Report determines the beta based on “*unlevered betas for publicly traded railroad and port companies*”⁵⁹³ which is then adjusted to reflect the changes in the debt-to-equity ratio over the life of the concession, to arrive at a dynamic re-levered beta (the calculations for which are shown in their Appendix C8⁵⁹⁴).

472 To determine the CRP, the Versant Expert Report adopts an average of Professor Damodaran’s calculation of Mozambique’s country risk premium, and the average country risk premium according to a survey of perceived investment risk published by Professor Pablo Fernandez. Using the average of those sources, the Versant Expert Report calculates an average baseline country risk premium of 11.12% for equity investments in Mozambique. It then adjusts that figure to reflect the risk that is already protected against under the Treaty, reducing Mozambique’s total country risk to 9.01%.⁵⁹⁵

473 Based on the risk-free rate, beta, ERP, and CRP described above, the Versant Expert Report calculates an appropriate and conservative COE of 19.6% as at the Valuation Date.⁵⁹⁶ Then, since the capital structure of the Project changes as the debt is repaid over time, (meaning the cost of equity of the Project also changes over the life of the Project), the Versant Expert Report finds that the COE will reduce from 19.6% in 2020 to 13.9% when the debt has been fully repaid.⁵⁹⁷

⁵⁹¹ CER-2, Versant Expert Report, para 135.

⁵⁹² CER-2, Versant Expert Report, para 189.

⁵⁹³ CER-2, Versant Expert Report, para 189.

⁵⁹⁴ CER-2, Versant Expert Report, Appendix C8.

⁵⁹⁵ CER-2, Versant Expert Report, para. 195.

⁵⁹⁶ CER-2, Versant Expert Report para 196.

⁵⁹⁷ CER-2, Versant Expert Report, para. 36 and Table 8.

474 **Conclusions.** Using these discount rates, the Versant Expert Report calculates the present value of the Project’s future cash flows to equity investors as of the Valuation date to be USD 575 million. It also estimates that equity investors would have invested USD 207 million in the construction of the Project up to the Valuation Date. This yields a net equity value for the Project of USD 367 million.⁵⁹⁸

475 On the conservative basis that PEL would have had only a 47.22% ownership interest in the Project, the Versant Expert Report then estimates the share of the Project’s equity cash flows that would accrue to Claimant (net of withholding taxes that would be paid by Claimant). It calculates that Claimant would have invested USD 103.8 million up to the Valuation Date,⁵⁹⁹ and the Project would have generated a fully discounted FCFE of USD 219.1 million for Claimant as at the Valuation Date. The resulting value for Claimant’s equity interest in the Project as of the ex-post Valuation Date is **USD 115.3 million**.⁶⁰⁰ This amount, which represents Claimant's ex-post damages due to Respondent's breach, is reflected in Table 1 below.

Table 1 – PEL’s Equity Value as of 30 September 2020

Component	USD millions
PV of PEL's Historical Cash Flows	(103.8)
PV of PEL's Future Cash Flows	219.1
PEL's Equity Value as of the Valuation Date	115.3

(c) The Versant Expert Report’s DCF Analysis Is Conservative and reasonable, as Confirmed by Cross-Checks

476 The Versant Expert Report’s DCF valuation is reasonable and conservative, as it has adopted assumptions that have been benchmarked against market data and actual developments pertaining to the Project.

477 Not only that, in order to test the reasonableness of its assumptions, the Versant Expert Report considers a transaction involving the neighbouring Nacala Logistics Corridor project.⁶⁰¹ This involves the construction (and

⁵⁹⁸ CER-2, Versant Expert Report, paras. 36 and 198.

⁵⁹⁹ CER-2, Versant Expert Report, paras. 37 and 212.

⁶⁰⁰ CER-2, Versant Expert Report, paras. 37 and 212.

⁶⁰¹ CER-2, Versant Expert Report, para. 202.

rehabilitation) of a 912 km railway linking Moatize to the deep-water port of Nacala. It was recently developed by the mining company Vale, that previously owned a 70% stake in the Nacala Corridor project.⁶⁰² The subject transaction involved a sale of a 35% equity stake in the project from Vale to Mitsui for USD 348 million in March 2017. While the Nacala Corridor was further advanced in its construction timeline at the time of the transaction, the Project offers a shorter and more cost-efficient route to transport the coal from Tete Province to the coast for export.⁶⁰³

478 As stated in the Versant Expert Report, the Nacala Corridor and the Project perform “*essentially the same business activity in the very same geography. The value of the two projects should therefore be broadly comparable.*”⁶⁰⁴ The Versant Expert Report finds that the Nacala Corridor transaction implies an equity value for the Nacala project (i.e., the value of the rights to the Nacala concession) of USD 994 million.⁶⁰⁵

479 This shows that the Versant Expert Report's valuation of the Project of USD 575 million (or USD 367 million, net of the equity capital that would have been invested in the Project as of the Valuation Date) is reasonable.⁶⁰⁶

C. FULL REPARATION ALSO REQUIRES PAYMENT OF INTEREST

480 Under the ILC Articles, interest—which “runs from the date on which the principal sum should have been paid until the date the obligation to pay is fulfilled”—is also part of the “full reparation” to which Claimant is entitled.⁶⁰⁷

⁶⁰² CER-2, Versant Expert Report, para. 203.

⁶⁰³ CER-2, Versant Expert Report, para. 39.

⁶⁰⁴ CER-2, Versant Expert Report, para. 207.

⁶⁰⁵ CER-2, Versant Expert Report, para. 206.

⁶⁰⁶ CER-2, Versant Expert Report, para. 208.

⁶⁰⁷ CLA-177, ILC, “*Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*”, in Yearbook of the International Law Commission, 2001, Vol. II, Part Two, art. 36, Comment 21, art. 38; CLA-172, LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 55;8; CLA-173, Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, 30 November 2009, para. 1677 (“*In the view of the Tribunal, there can be no doubt that, a fortiori, in the case of an unlawful expropriation . . . Claimants are entitled to interest from Respondent in order to ensure full reparation for the injury they suffered as a result of those of Respondent’s measures that the Tribunal has found to be internationally wrongful.*”); CLA-105, Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 932 (“*[A]n award of interest is an integral component of the full reparation principle under international law, because, in addition to losing its property and other rights, an investor loses the opportunity to invest funds or to pay debts using the money to which that investor was rightfully entitled.*”).

481 The Tribunal, therefore, has wide discretion to award interest, including compound interest, up to the date of the award (pre-award interest) and up to the date of payment (post-award interest). Claimant reserves its right to claim interest in these proceedings. Such interest has not been included in the Versant Expert Report so far, because the Valuation Date used as part of its *ex-post* assessment is the current date, meaning no pre-award interest has accrued in the scenario it considers.

VII. RESERVATION OF RIGHTS AND RELIEF REQUESTED

482 PEL reserves its right to introduce, *inter alia*, further claims, arguments, evidence, fact witnesses, experts and damages valuations.

483 For the reasons set out in PEL's Statement of Case, PEL requests that the Tribunal:

- a. FIND that this Tribunal has jurisdiction over PEL's claims;
- b. FIND that Respondent has breached its obligations towards PEL under the Treaty;
- c. ORDER Respondent to compensate PEL for the loss of its investment arising from Respondent's violations of the Treaty, with such reparation being in the form of monetary compensation in an amount to be determined by the Tribunal, but in any event, no less than USD 115.3 million;
- d. ORDER Respondent to pay all costs incurred by PEL in connection with these arbitration proceedings, including the costs of the arbitrators and of the Permanent Court of Arbitration, as well as legal costs and other expenses incurred by PEL (including, *inter alia*, the fees of their legal counsel, experts, and consultants, and fees associated with third party funding);
- e. ORDER Respondent to pay interest at a rate to be determined by the Tribunal on any compensation and/or arbitration and/or legal costs and expenses awarded to PEL by the Tribunal in its Final Award or any other award issued in the course of this arbitration; and
- f. ORDER such further or alternative relief as the Tribunal shall consider just and appropriate.

Respectfully submitted on 30 October 2020 by

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