

**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 LTD.,

Claimant,

-and-

REPUBLIC OF MOZAMBIQUE,

Respondent,

**RESPONDENT REPUBLIC OF MOZAMBIQUE'S JURISDICTIONAL OBJECTIONS
AND STATEMENT OF DEFENSE**

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I. INTRODUCTION

1. On 6 May 2011, Claimant Patel Engineering Ltd. (“PEL”) and the Mozambique Ministry of Transport and Communications (“MTC”) purported to enter into a “Memorandum of Interest” (“MOI”). PEL claims that, on the basis of this six-page MOI and a “prefeasibility study” (the “PFS”), the MTC was required to directly negotiate and award to PEL a thirty-year concession to build and operate a USD\$3 billion port and a 500km railway in Mozambique without any public tender, and without satisfying even the minimum technical and legal requirements for such projects, and that PEL is therefore entitled to a millionaire windfall of over USD\$115 million against Respondent Republic of Mozambique (“Mozambique”). PEL’s assertions are fundamentally flawed, are based on rampant conjecture, and would turn the law and practice of private-public-partnerships on its head.
2. First, PEL fraudulently concealed from the MTC and Mozambique that the Government of India (the country where PEL is headquartered) had blacklisted PEL, precisely in connection with a significant government infrastructure project. PEL also fraudulently concealed that the Supreme Court of India had upheld the blacklisting order rejecting PEL’s defense and, importantly, had adjudicated PEL to be “not commercially reliable and trustworthy.” All dealings by the MTC and Mozambique with PEL would have come to a swift end had PEL disclosed that it had been blacklisted by the Government of India and the Supreme Court of India’s judgment. Although it is a publicly listed company, PEL also concealed this blacklisting and judgment from its annual report. This fraud conclusively bars PEL’s claims, because if PEL had revealed the truth, the MTC and Mozambique would have never dealt with PEL. Tribunals dismiss investment treaty claims where claimants are shown to have unclean hands, and such dismissal sanction is required here.
3. Second, this Tribunal lacks jurisdiction. The MOI contains an ICC arbitration clause and states that a contractual arbitration agreement is not incompatible with the subject BIT. The ICC certainly can, and does, administer investment treaty claims, and the parties’ arbitration agreement is broad enough to encompass treaty claims. There is a current ICC arbitration pending between the parties, initiated pursuant to the MOI’s arbitration agreement. This Tribunal is not called upon to decide which forum is more “neutral.”

Rather, this Tribunal must enforce the parties' arbitration agreement and yield to the ICC arbitration.

4. Even if this Tribunal considered doing otherwise, it cannot because this Tribunal lacks jurisdiction. It is well accepted that instruments like this MOI are not "investments" because they are in the nature of an "option." Here, at best, the MOI provided PEL with an option (as PEL had contended contemporaneously), and therefore there was no investment under the BIT. Without an investment, this Tribunal obviously lacks jurisdiction. Even if the MOI were analyzed under the traditional *Salini* factors, it fails to satisfy any of them. PEL inappropriately asks this Tribunal to expand the scope of BIT dispute resolution to pre-award, pre-investment disputes. This claim is a brazen attempt to ignore and vitiate the Parties' bargained-for choice of law (Mozambican law), the Parties' bargained-for neutral dispute resolution (arbitration in Mozambique under ICC Rules), Mozambique's right to enact and enforce PPP laws that are in accordance with global procurement best practices and the public interest (requiring public tenders for complex PPP procurement), and sensible limitations on bid protest procedures and damages for procurement disputes that are recognized in Mozambique and States across the globe (strict timing requirements to allow for cancellation or redo of tender; no lost profits in bid protests; no expectation damages in disputes over preliminary agreements or memoranda of understanding).
5. Far from "protecting" or "promoting" investment, PEL attempts to have this Tribunal disrupt settled expectations for the law applicable to pre-award, pre-concession activities and public tenders, and create new international standards for procurement disputes, with the purported right to unlimited expectation damages on a project the alleged "investor" was not awarded and did not design, finance, build, operate or maintain. No contractor does, or should, legitimately expect to receive a guaranteed 30-year lost profit stream when a project is awarded to someone else and they never appealed. To break the new ground requested by PEL, this Tribunal would give an enormous advantage to foreign contractors that hail from a country with a BIT: the ability to attract third-party litigation financing and force large settlements with demands premised on rosy 30-year profit forecasts, orders of magnitude larger than the cost of any alleged project pursuit "investment" like the PFS or other technical proposals. Indeed, that is precisely what has occurred here, where PEL

seeks more than USD\$115 million in relief, composed of alleged lost profits, without even bothering to quantify and substantiate the minimal cost of the PFS or other project pursuit costs commonly undertaken in conjunction with proposals for large infrastructure PPP projects.

6. In short, a jurisdictional decision in PEL's favor would open the door to disappointed bidders of all types making BIT claims on the basis of their submittal of technical proposals or other alleged pre-award "investments," to tactically assert liability and quantum positions unmoored from well-developed State contracting and public procurement jurisprudence. It would unfairly *prefer* certain international contractors (allowing them to bypass local and project-specific contract, procurement, and dispute resolution regimes in favor of investment treaty arbitration whenever it is perceived to be advantageous to do so); chill States' appetite for international tenders involving contractors who hail from countries with an active BIT, and lead to more States following India's lead in renegotiating or cancelling their BIT programs. Taxpayers of no State—much less developing countries—should have to fund windfalls to disappointed bidders for projects they did not design or construct. And no State should have their procurement procedures set aside by ad hoc international panels whose charge is limited to *investment* disputes.
7. Third, turning to the merits, PEL fails as well. Based on PEL's fraudulent concealments, it cannot prevail on the merits. The MOI is a void or voidable instrument, PEL is estopped from seeking to enforce it against Mozambique, and PEL also has no rights under the public tender. As noted, the MTC and Mozambique would have had no dealings with PEL.
8. PEL's claims are also completely unfounded on the merits. PEL minimizes, or ignores, the history of this dispute to the extent it is inconvenient to PEL. PEL did that during the negotiations, and repeats that tactic in this arbitration proceeding. PEL's claims are based on the fantastic notion that despite that the MTC and PEL agreed to resolve their dispute over the MOI by PEL being awarded a 15-percentage-point bidding advantage over the other bidders in the public tender for the project, that PEL participated in the public tender as part of a consortium, and that PEL's consortium scored in third place, PEL can simply say – never mind all that – and revert to claiming instead that PEL alone should have been awarded the concession. This Tribunal must reject PEL's flippant approach to conducting

- business (which is also what got PEL blacklisted in India), and reject PEL’s claims based on the fundamental unfairness of PEL’s contradictory actions and positions.
9. As to the MOI, there is a prefatory problem – PEL relies on a suspect English version of the MOI, which contains favorable language to PEL that is not found in the legitimate Portuguese and English versions of the MOI. The language PEL relies on in its suspect Clause 2(1) was not agreed to by the parties, is internally inconsistent, and is inconsistent with the rest of the MOI and Mozambican procurement law. The Tribunal should find, logically, that the correct version of the MOI is the Portuguese version that is controlling under Mozambican law and found in the archives of both parties. The Portuguese version is likewise consistent with the MTC’s English version of the MOI. Only PEL’s suspect English version differs from the rest.
 10. At a minimum, the different versions of the MOI confirm a lack of a meeting of the minds between PEL and the MTC. Likewise, the complete lack of necessary material terms (for instance, regarding the terms of a proposed concession or the meaning and exercise of a right of first refusal)—and the Parties’ factual disagreements about the intent of the MOI, whether it was to be binding, and what was intended regarding key terms—all demonstrate there was no meeting of the minds.
 11. Two illustrations confirm the absence of a binding agreement and meeting of the minds. PEL’s core contention is that the MOI gave it a right to a direct award (in Clause 2(1)) and a right of first refusal (in Clause 2(2)). But as to the alleged right to a USD\$3 billion direct award concession premised only on approval of a *Pre-Feasibility Study*, the language PEL relies on *does not exist in either Party’s controlling Portuguese version of the MOI*, or MTC’s English version of the MOI. It is found only in PEL’s suspect English translation of the MOI. Thus, there can be no meeting of the minds on a right to a direct award.
 12. The Parties’ understanding of the MOI’s undefined “right of first refusal” or “first right of refusal” is even more divergent. PEL’s Statement of Claim exacerbates the confusion. Incredibly, PEL asserts that the purported right of first refusal needed to be “*waived*” by PEL (and was) and needed to be “*exercised*” by PEL (and was). *Contrast* SOC¹ ¶¶ 98,

¹ PEL’s Statement of Claim is referred to herein as “SOC” for purposes of citations.

100, 156, 318, 321, 342, 372 (MOI required that PEL “waive” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession) *with* SOC ¶¶ 16, 153, 157, 183, 184, 197, 324, 326, 334, 337, 360 (MOI required that PEL “exercise” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession). PEL’s assertions are inconsistent and nonsensical: a right of first refusal cannot be both “waived” and “exercised” to commit the government to a blank-check, no-bid concession. PEL cannot harmonize its own diametrically opposed articulations of what was meant by a right of first refusal. This confusion confirms there was no meeting of the minds—even within PEL’s mind—as to what the MOI’s undefined first right of refusal means.

13. Unsurprisingly, neither of PEL’s confused articulations of the “right of first refusal” are consistent with Mozambique’s PPP Law or what MTC intended. The correct interpretation is simple: Clause 2(2) of the MOI provided, at most, a contingent “*direito de preferência*,” as stated in each party’s controlling Portuguese version of the MOI. *Compare Exhibit R-1 with* SOC, Ex. C-5B. The “*direito de preferência*” is expressly defined in Mozambican PPP Law No. 15/2011 (“PPP Law”) that PEL alleges was known to its attorneys at the time of drafting the MOI, especially because its lawyers were involved in *drafting* that law. *See, e.g.,* SOC, CWS-1, Witness Statement of Kishan Daga ¶¶ 35-36. In the PPP Law, *public tenders are required* absent a finding of exceptional, “*last resort*” circumstances (a finding never made in the MOI or PFS), and entities deemed to be the proponent of an unsolicited PPP proposal—what PEL claims to be—are provided a “*direito e margem de preferencia de 15%*” in the public tender. *See RLA-6*, Mozambique Law No. 15-2011, Art. 13(1) & (5). The PPP Law further confirms that the proponent of an unsolicited proposal is *not entitled to compensation for the costs incurred in preparing its proposal*. *Id.* at Art. 13(5).
14. In short, the “*direito de preferência*.” in Clause 2(2) of the MOI is the “*direito de preferência*” in Article 13(5) of Mozambique Law No. 15/2011—which is the 15% public tender scoring advantage that MTC provided to PEL. The MOI was intended to outline the process by which PEL may be able to exercise the “*direito de preferência*” in the PPP Law. The MOI also confirmed that, as reflected in the PPP Law, PEL would be performing the PFS at its own cost, as part of its project pursuit marketing that private proposers commonly undertake in the context of unsolicited PPP proposals.

15. MTC's reasonable, harmonizing interpretation is also the only reading of the MOI that accords with industry practices for PPP Procurement. In the industry, proponents of unsolicited proposals do not legitimately expect to receive a direct concession award on the basis of pre-feasibility studies. The World Bank's PPP Reference Guide and its Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects survey procurement practices across the globe, strongly discourage direct awards for PPP projects, and confirm that PPP project proponents, if entitled to any right of preference at all for their submittal of technical proposals or studies, are provided either (1) automatic shortlisting in a public tender, (2) a scoring advantage in a public tender (typically of a less generous percentage than MTC provided PEL), or, (3) less commonly, a "right to match" competing offers in a public tender. *See Exhibit R-44*, World Bank PPP Reference Guide; *Exhibit R-45*, World Bank Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects. PEL's assertions about the "commercial logic" of its PFS either mislead or are evidence of its inexperience.
16. Thus, MTC's use of a public tender process for this project, with PEL receiving a 15% "direito de preferência" in light of the MOI and PFS, is proper and wholly consistent with the intent and language of the MOI,² Mozambican law,³ Mozambican procurement practices,⁴ and sensible global industry practices for unsolicited proposals on infrastructure PPP projects.⁵
17. The challenges of making sense of PEL's strained interpretations of disputed, terse, and vague provisions of the MOI underscore a core truth: no one sensibly grants (or legitimately expects) a direct award of a USD\$3 billion, 30-year 500km rail and new port concession on the basis of one clause in a six-page document entitled a "Memorandum of Interest." Nor does one create a binding "first right of refusal" for an un-negotiated concession without actually defining what that option means or the terms by which it would

² *See, e.g.*, **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 7, 13-14, 23-24; **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 5-22; SOC, Ex. C-19.

³ *See, e.g.*, **RER-2**, Expert Report of Teresa Muenda ¶ 20-21; **RLA-6**, Mozambican Law No. 15-2011, Art. 13.

⁴ *See, e.g.*, **RER-1**, Expert Report of MZBetar, at 63 (Conclusion F); **RWS-1**, Witness Statement of Luis Amandio Chauque.

⁵ *Infra* § 5; *see also* **RER-1**, Expert Report of MZBetar, at 63 (Conclusion F).

be exercised. The MOI (and the PFS, for that matter) is silent on all necessary and material terms of the concession: the concession fee, the concession duration, social responsibility, the experience and constitution of the concessionaire, and the plethora of other items negotiated and detailed in binding, complex PPP infrastructure concession agreements. Simply stated, the MOI did not (and could not) grant PEL the rights it alleges in this litigation.

18. Regardless of the proper version and disputed terms, however, the MOI is not an enforceable agreement. The MOI is a preliminary document or otherwise unenforceable. PEL also referred to the MOI as a memorandum of understanding. Regardless of the name, it is commonly understood in global commerce that a letter of interest, memorandum of interest, or memorandum of understanding are, at most, non-binding agreements to agree. USD\$3 billion infrastructure concessions are awarded in carefully negotiated concession agreements, with required approvals from the Council of Ministers and the Administrative Court (among other things). They are neither promised nor approved in six-page Memorandums of Interest.
19. The MTC Minister who signed the MOI also was not authorized and acted *ultra vires*. The required authorizations for the MOI were never obtained. The MOI did not comply with Mozambican law and regulations, and, as explained to PEL by the Director of the MTC Legal Department, enactment of Mozambique's Public-Private Partnership Law required a public tender (rather than a direct, no-bid award), which is the proper method for conducting the necessary analysis to award the proposed USD\$3 billion, 30-year concession.
20. Moreover, PEL was never able to satisfy the requirements of the MOI for the award of the concession, including (a) by failing to satisfy conditions precedent (such as reaching a separate agreement with the Ports and Railways Company and establishing project feasibility); (b) the MOI did not comply with even the minimum requirements of Mozambican private-public-partnership law and practice; and (c) PEL's prefeasibility study was amateur and failed to define the basic terms and conditions of any potential concession (it was technically and financially insufficient, made unrealistic and incorrect assumptions, and did not reflect significant development of the Project or establishment of

its feasibility). The flexible standards in investment treaty law are not designed to enable unsuccessful bidders like PEL to avoid rigorous analysis, which squarely defeats PEL's claims on the merits.

21. PEL makes much of the PFS, contending it was significant work product that shows the Project was its "idea" and "conception," and suggesting PEL would have only undertaken the PFS if guaranteed a direct award. PEL drastically overstates the import of the PFS and either misunderstands—or misrepresents—the project pursuit efforts typically undertaken by sophisticated contractors pursuing large infrastructure PPP projects. As PEL concedes elsewhere in its SOC, the "idea" of the Project was not its conception. Indeed, the idea of this Project predated PEL's involvement, and it was MTC personnel who performed the Preliminary Study and recommended the Macuse port location. The PFS itself was simply a high-level "Pre-feasibility Study" that lifted substantial information from the internet, did not perform the technical investigation necessary to actually establish feasibility, certainly did not design the Project, and did not evince significant labor. In fact, the PFS was far shorter and less detailed than the Technical Proposal submitted by the PGS Consortium. The bidders' Technical Proposals were submitted expressly without any recovery of costs or expectation of award—confirming that it is indeed economically sensible for PEL to conduct a high-level PFS without the promise of a direct award. The PFS, like the more involved Technical and Financial Proposals, are part of the typical pre-investment project pursuit costs incurred by contractors. It would be economically irrational—and far afield from procurement best practices—for PEL to legitimately expect a USD\$3B direct award concession on the basis of a simple PFS.
22. PEL also waived and released any rights under the MOI by participating in the public tender and receiving a scoring advantage and is estopped from relying on the MOI. PEL did not and could not have properly exercised the first right of refusal; the right of refusal was contrary to the public tender process required through the enactment of Mozambique's PPP law. Instead, PEL had, and benefitted from, a "direito de preferência." PEL also did not timely appeal the MTC tender scoring or seek judicial review.
23. Fourth, PEL's damages case is based on the gross assumption that it could perform like the winning bidder (PEL did not and could not match the terms of the winning bidder, which

was found to be superior on both technical and financial metrics), and ignores the economic realities that have plagued this Project (like the massive drop in the worldwide price and demand for coal, the focused product of this concession). The Project as proposed by PEL was infeasible and would have never come to fruition. PEL impermissibly attempts to equate its conceptual “pre-feasibility” work with the Project currently envisioned by the winner bidder. However, the current Project is substantially different from anything specified or “conceptualized” in PEL’s PFS. Among other things, it has a different terminus and alignment, is more than 120 km longer, has a substantially higher tonnage capacity, uses a different rail gauge, and connects with mines never contemplated by PEL. Notwithstanding all the differences in the projects designed to make the Project feasible, it still has not been fully funded or built. PEL also was not financially strong, and was unlikely to bank the Project. Although it is unlikely PEL spent even USD\$4 million in such an amateur prefeasibility study (and PEL never substantiates that amount), PEL wants a return of USD\$115 million, on the basis of a potential concession, the terms of which were never negotiated or consummated by the parties. PEL is entitled to no damages including lost profits, because they are speculative, and PEL actually would have lost money on the Project. PEL is also not entitled to recover costs incurred in connection with the MOI or prefeasibility study, because in the MOI, PEL agreed to bear those costs, as required under the PPP Law. If the Tribunal could find a legal basis to award PEL damages, they should be nominal.

24. Accordingly, Mozambique submits this Statement of Defense, requesting that the Tribunal dismiss PEL’s claims in their entirety, and award Mozambique its fees and costs.

II. FACTUAL BACKGROUND

A. PEL Had No Relevant Experience in Mozambique or With Analogous Rail and Port PPP Projects, and Simply Submitted a Modest “Pre-Feasibility Study” on a Project Idea Already in Existence.

1. PEL has no experience working in Mozambique or conducting projects of this type and magnitude.

25. PEL’s Factual Background leads with misleading assertions that PEL is “highly experienced,” has “vast industry experience,” and is a “leader in the industry.” SOC ¶¶ 50 *et seq.*

26. In actuality, PEL is little known and woefully inexperienced as it relates to the subject geography and Project. The Project PEL (inaccurately) claims it “conceived” through a “pre-feasibility” study would have involved a complex >USD\$3 billion public-private partnership for the design, finance, construction, and operation of a new “516 km standard gauge Rail Corridor from Macuse to Moatize” connecting to a new “25 MTPA [million tonnes per annum] handling capacity Port at Macuse.” *See, e.g.*, SOC, Ex. C-7.
27. PEL had *no experience whatsoever* with infrastructure design, construction, or operations in Mozambique. PEL’s Annual Reports disclose no transportation infrastructure Projects in Mozambique, and demonstrate that any minor subsidiaries PEL had in Mozambique were mining-related and unrelated to transport infrastructure. *See, e.g.*, **Exhibit R-43**, PEL Annual Report 2010-2011. Nor does PEL disclose substantial experience in the rest of Africa—the bulk of its activities are in India. *See id.* PEL’s SOC identifies no existing projects or activities in Mozambique, and simply states PEL had performed “exploration work in relation to tantalite and marble” (that was “not commercially viable”) and “investigated the potential for coal mine concessions.” SOC ¶¶ 53-54.
28. Worse still, PEL has no experience with railway, port, or PPP projects like the Project. When eventually submitting its tender for this Project, PEL did not specify any significant railway corridor or port projects. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 54; SOC, Exs. C-190D & C-190F (noting certain hydropower and road concessions, with no demonstrated PEL experience in constructing or operating railways and ports). PEL’s website confirms its lack of involvement in railway projects. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 59. PEL’s Annual Report suggests its core competencies and focus were in hydropower and irrigation. *See, e.g.*, **Exhibit R-43**, PEL Annual Report 2010-2011.
29. PEL’s SOC is likewise devoid of evidence that PEL had relevant experience to perform this Project. It references (without citation) only three recent PEL projects—a “single rail line tunnel,” “four lane highway project,” and a “submarine assembly workshop”—that are plainly different in kind and scope from the design, finance, construction, and 30-year operation and maintenance of a USD\$3 billion, 516-km new rail corridor and coal port. *See* SOC ¶ 52.

30. Clearly, PEL lacks experience with any ventures of this magnitude. PEL witnesses concede this Project would have been “*larger than any project PEL had run before.*” See SOC, CWS-1, Witness Statement of Kishan Daga ¶ 17.
31. PEL also does not demonstrate it had the wherewithal, credibility, or capacity to secure financing for a PPP rail and port megaproject anywhere—much less in Mozambique, away from its base of operations. In its 2010-2011 Annual Report, for example, PEL acknowledged its financial performance was “particularly challenging.” **Exhibit R-43**, PEL Annual Report 2010-2011, at 33. “Transportation and urban infrastructure” accounted for only 14% of its order backlog, and none of the projects in these categories related to the design, construction, and operation of new rail corridors or ports. *Id.* at 33-34. “Asset ownership” and PPP was something PEL wished to “scal[e] up,” citing a small number of road or generation projects elsewhere. *Id.* at 34-35.
32. In short, PEL reached far outside its proven competencies in pursuing a PPP venture in an African country where it had no engineering, construction, or logistics operations; for infrastructure it had no experience designing, financing, constructing, or operating; on a conceptual Project larger than anything PEL had ever attempted. As will be seen *infra*, PEL’s own actions confirmed its lack of qualifications. To submit an even remotely responsive bid in the public tender, PEL was “forced” to form a consortium and relied primarily on the experience of its new consortium partners. PEL’s lack of necessary experience is further confirmed by its purported belief that a PPP concession of this type was (or should be) directly awarded to PEL, without a competitive tender, definition of technical and financial terms, or further vetting, all on the basis of a six-page “Memorandum of Interest” and a “Pre-Feasibility Study.” See **RER-1**, Expert Report of MZBetar § 5.6 (context on industry standard infrastructure PPP procurement practices); see also **Exhibit R-44** (World Bank PPP Reference Guide). PEL’s purported beliefs are contrary to industry and PPP procurement practices globally. *Id.*

2. The Tete-Macute transport corridor was not PEL’s invention, idea or conception.

33. PEL’s allegations that it conceived the Project are internally inconsistent and inaccurate. On one hand, PEL concedes—as it must—that the “idea to create a new port in and around Macuse and a rail line linking the port to a location in Tete was not novel.” SOC ¶ 3. But

- elsewhere, PEL needs this Tribunal to make an incredible finding: that “[a]t the end of the day . . . it was PEL and PEL alone that saw the potential for developing the Mozambican coal industry,” and that Mozambique somehow “appropriated PEL’s idea.” *See* SOC ¶ 31. In his witness statement, Mr. Daga likewise repeatedly and wrongly contends that the need for a railway link and location of the port was “PEL’s idea.” *See, e.g.*, SOC, CWS-1, Witness Statement of Kishan Daga ¶¶ 14, 40, 145, 162.
34. To be clear, PEL did not conceive (much less own) the “idea” of this Project or the location of the port—or enter into a concession and establish Project feasibility—or finance, design and construct the Project and bring it to realization. *See* **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 3. Prior to PEL’s involvement, the Government had previously developed an integrated strategy for the transportation of coal from Tete. *See* **RWS-2**, Witness Statement of Paulo Zucula ¶ 2. Mozambique, not PEL, originated the idea of that transport corridor. *Id.* Companies other than PEL were interested in the idea. *Id.*
35. The Government also previously proposed Macuse as a location for a port, *id.*, including, for example, as part of a “Strategy for the Integrated Developments of the Transports System” published in the Official Mozambique Republic Gazette on 30 June **2009**, two years before PEL allegedly dreamed up its “novel” idea. **RER-1**, Expert Report of MZBetar § 5.4; **RLA-15**, Resolution n°37/2009 (30 June 2009).
36. Contrary to PEL’s suggestions that PEL “carried out the Preliminary Study,” *e.g.*, SOC, CWS-1, Witness Statement of Kishan Daga ¶ 145, *see* SOC ¶ 257, the record demonstrates that *MTC personnel* performed and authored the “Preliminary Study to Assess Potential Port Locations in Zambezia, To Connect The Moatize Coal Mines by Rail.” SOC, Ex. C-4, Preliminary Study March 2011 (title page showing report was authored “by Isaias Abreu Muhate and Jafar M.C. Ruby” of the MTC). The Preliminary Study states MTC “specialists executed the whole project.” SOC, Ex. C-4, at page iv. MTC’s specialists referenced prior MTC studies and data, identified the recommended options for potential port cites and rail routes, and selected Macuse as the first option. *Id.* at 22-23.
37. The narrative PEL weaves about how PEL—“and PEL alone”—saw the potential and idea of a transport corridor for coal and port in Macuse is bold and baseless. PEL contends that, while exploring for marble, it discovered that “Mozambique is rich in natural resources,

especially coal . . . and that a significant demand existed for coal externally.” SOC ¶ 54. Through Mr. Daga’s witness statement, PEL states it instructed a former geology professor to do research in relation to the transportation of coal by rail to port for international export. SOC ¶ 56. PEL does not cite or exhibit any of that research. Mr. Daga contends that PEL’s “research” showed that Mozambique had coal but did not have required capacity to carry the coal by rail from Tete “to the only port to export coal, in Beira.” SOC, CWS-1, Witness Statement of Kishan Daga ¶ 12. Mr. Daga goes on to assert that in mid-2010, after “collect[ing] data regarding coal production and export planning in Mozambique,” it “became clear to PEL that Mozambique was in pressing need of a new railway link from Tete to a new port location.” *Id.* Mr. Daga concludes that, “PEL took the view that building a new port between Quelimane and Chinde in the Zambezia province, and a rail corridor from Moatize in the Tete Province to that new port (the ‘Project’) would enable the rapid and economic transportation and export of large quantities of coal and other minerals.” SOC, CWS-1, Witness Statement of Kishan Daga ¶ 16.

38. The assertion that “PEL alone” discovered a need and idea of this transport corridor sounds farfetched because it is farfetched. It should be little surprise that those native to Mozambique—including, of course, the Government, say nothing of the international mining conglomerates active in-country—were well aware of the country’s mineral riches, the export market for coal, and potential for development before PEL sent a few people to explore commercially unviable marble deposits or unsuccessfully investigate coal concessions. As noted, it was the Government—not a smattering of PEL individuals working under a surrendered marble exploration license and engaging in a handful of conversations with CFM or port employees—that developed coal export forecasts and an integrated strategy that included a port at Macuse and alternative rail corridors to Nacala and elsewhere. MTC specialists, not PEL, recommended Macuse as the location of the port. *See* **RWS-2**, Witness Statement of Paulo Zucula ¶ 2; **RLA-15**, Resolution no°37/2009 (30 June 2009); *see also* SOC, Ex. C-4, Preliminary Study. In any event, the dozens of paragraphs PEL spends discussing its alleged conception of the Project need, potential, and idea are negated by PEL’s own admission that the “idea to create a new port in and around Macuse and a rail line linking the port to a location in Tete was not novel.” SOC ¶ 3.

39. PEL also inaccurately contends that Mozambique viewed the Tete-Macuse corridor as infeasible or impossible prior to PEL's involvement. As explained by Minister Zucula, this is not the truth. *See* **RWS-2**, Witness Statement of Paulo Zucula ¶ 2.
40. PEL has now disclosed that prior to its submission of the PFS, Rio Tinto, which operates large and efficient integrated mine, rail, and port systems and held key mining operations in Mozambique, had declined PEL's preliminary investigative discussions about potential offtake or other participation in the project concept, choosing instead to present a proposal of its own. SOC, Ex. C-59. This is further confirmation that the "idea" of the Project was not novel or PEL's conception through the PFS.
41. For avoidance of doubt, PEL did not invent, originate, or conceptualize the Project, through its amorphous "research" or the MTC-authored Preliminary Study or the PFS. The winning bidder—not PEL—actually negotiated the terms of a concession; performed bankable feasibility studies; defined and resolved technical and commercial matters; and worked to secure offtake agreements, permits, approvals, and financing. *Infra* § IX(C). As PEL aptly conceded contemporaneously in the parties' dealings, a PFS is just that—a "Pre-Feasibility Study"—and does not establish Project feasibility or constitute a "complete proposal on the technical, quality and price terms." *See, e.g.*, SOC, Ex. C-28 at 3; *see also* **RER-1**, Expert Report of MZBetar § 5.1 ("PEL's PFS did not define the basic terms and conditions of a concession, or reflect a high degree of project development or mobilized resources."). In any event, the current Project envisioned (but still not built) by the winning bidder differs substantially from the corridor suggested by PEL's PFS. *Id.* § 5.5. PEL's attempt to claim conception, ownership, and "appropriation" of an amorphous "idea" of a Project should be rejected.

B. The MOI Does Not Provide PEL An Enforceable Right to a Concession.

42. On 6 May 2011, PEL and the MTC purported to enter into a "Memorandum of Interest Between Ministry of Transport and Communications and Patel Engineering Ltd." (again, the "MOI"). True and correct copies of the Portuguese and English versions of the MOI are attached hereto as **Exhibits R-1 & R-2**, respectively. Both of these copies are accurate translations of each other. *Id.* *See also* *See* **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 4, 11; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 16-17; **RER-5**, Expert

- Report of Mark Lanterman. at 3 ¶ I(b). PEL’s very suspect submission of one purported English version that is significantly different from *both* Parties’ controlling Portuguese-language MOI documents and MTC’s English-language version of the MOI is discussed in more detail in Sections II(D) and V(B)(3).
43. PEL acknowledges that it produced the first draft of the MOI, that the MOI was required to be in Portuguese, and that PEL had Mozambican attorneys and other Portuguese speakers who were capable—and did—review the Portuguese version of the document. *See, e.g.*, SOC ¶ 87; SOC, CWS-1, Witness Statement of Kishan Daga ¶¶ 38, 42-43. Notably, PEL does not explain why its lawyers and Portuguese speakers did not discover or raise concerns about the significant difference between its own Portuguese MOI and English translation until this litigation, nearly a decade after execution of the MOI, long after the Parties had ceased their dealings.
44. As expected for a “Memorandum of Interest,” the MOI was a contingent, non-binding preliminary document, at most an agreement to try to agree, and certainly not a binding contract for a concession. After being introduced to PEL as one of multiple companies interested in exploring the government’s idea of a Tete-Macuse area transportation corridor, Minister Zucula had explained to PEL that MTC did not have sufficient funds for that large of a project, so that the Project required financing through a PPP concession. For that reason, it was stated and mutually understood that “the Project would be put to a transparent public tender process before a decision was made on which company would be awarded the concession for the Project.” *See RWS-2*, Witness Statement of Paulo Zucula ¶¶ 3-6.
45. At the time of negotiation and execution of the MOI, PEL understood—consistent with typical practices for large PPP concessions, the Parties’ discussions, Mozambican law, and forthcoming adoptions of PPP laws and regulations—that if the Project were to proceed it would be put to a public tender. *See RWS-2*, Witness Statement of Paulo Zucula ¶ 3; *RWS-1*, Witness Statement of Luis Amandio Chauque ¶¶ 3, 28.
46. The MOI was not intended to be—and could not be—a binding promise or award of a direct concession of the Project. The MOI was wholly lacking the basic terms and conditions of a concession. A direct award also would have required necessary approvals

that were lacking from the MOI. Minister Zucula and the MTC did not have authority to promise or grant a direct award of a large rail and port project through a MOI, and did not do so. *See* **RWS-2**, Witness Statement of Paulo Zucula ¶ 5; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 2; **RER-2**, Expert Report of Teresa Muenda ¶ 11.

47. Minister Zucula, who was involved in the negotiations and execution of the MOI, summarized his intent for the document and the Parties’ contemporaneously understood approach during this Project investigation and pursuit phase:

Rather, the contemplated approach under the MOI was, as follows: After PEL satisfied various conditions (for example, PEL had to submit a pre-feasibility study (“PFS”) subject to approval by the MTC, and reach a joint-venture agreement with an entity called CFM), the MOI provided PEL with a preferential position (through a points scoring advantage) in the public tender contest for the Project, and the right of first refusal in the event that PEL prevailed in the public tender contest for the Project. The MOI is a contingent document, or gentlemen’s agreement to try to agree, and not a binding contract for a concession.

A right of first refusal is a right that PEL could have decided not to exercise, and thus there was no binding commitment by both parties to enter into a concession. The MOI also did not contain the necessary terms for a PPP concession and did not go through the necessary approvals for PPP concessions, because it was not intended to award the concession to PEL. PEL would later request a direct award, which confirms it was not given by the MOI.

RWS-2, Witness Statement of Paulo Zucula ¶¶ 6-7.

48. Mr. Chauque, a MTC attorney also involved in the development of the MOI, further explains that the MOI was intended as a memorandum of understanding regarding one entity—PEL’s—desire to conduct a pre-feasibility study and potentially work toward a joint venture or PPP. *See* **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 3. It was never approved by the Administrative Tribunal, and neither the MOI nor the later PFS specified the material terms for a concession. The MOI was never intended to make or promise a direct award. Such a promise could not be made under Mozambican law and procurement practices. *See id.*
49. The MOI, brief as it may be, is consistent with Minister Zucula’s and the MTC’s understanding. In its Recitals, the MOI indicates that PEL was interested in a potential public private partnership infrastructure project in Mozambique: “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).” See **Exhibits R-1 & R-2**, MOI, Recital (a). The MOI further notes that: “PEL has shown keen interest in the development of said Project by forming a JV with the Gov’t of Mozambique on a Built Operate and Transfer (BOT) basis.” *Id.* at Recital (d).

50. PEL agreed to undertake a prefeasibility study at its own cost: “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 MTC.” See **Exhibits R-1 & R-2**, MOI, Recital (f).
51. In the MOI, the parties made clear that “[t]he 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 and a railway line ... defining the basic terms and conditions for the granting of a concession by the Gov’t of Mozambique to PEL for the construction and operation of the project.” See **Exhibits R-1 & R-2**, MOI, Clause 1.
52. Later, the MOI reiterates that: “The direct costs necessary to conduct the feasibility study shall be entirely borne by PEL.” See **Exhibits R-1 & R-2**, MOI, Clause 4.
53. Although Mozambican law requires a public tender contest for such infrastructure projects, PEL purports that the MOI gives it a first right of refusal for implementation of the Project, a project that had not yet even been defined or approved: “PEL shall carry out a prefeasibility study (PFS) within 12 months and will submit to the government for the respective approval.” See **Exhibits R-1 & R-2**, MOI, Clause 2(1). “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.” See **Exhibit R-6B** (PEL English Version), Clause 2(2).
54. The intent of the undefined “right of first refusal,” or more accurately “a direito de preferência,” in the controlling Portuguese, was to grant a right of preference in the tender that both Parties understood would occur should the potential process progress past the Pre-feasibility stage. Mr. Zucula explains:

As stated in Portuguese, PEL was given a preferential position – *a direito de preferência*. This preference entitled PEL to a scoring advantage in the public tender, which PEL was indeed provided when PEL participated in the public tender for this Project through a consortium. There would be no need for a right of first refusal if the concession had been awarded by the mere PFS approval. The MOI also envisions that a concession would need to be negotiated and entered into (Clauses 1 and 2), because the MOI does not comply with the requirements, under Mozambican law, regulations and practice, for negotiation and award of the Project or its concession.

RWS-2, Witness Statement of Paulo Zucula ¶ 10.

55. Accordingly, the brief MOI was intended to memorialize that PEL would undertake the PFS at its own cost, and if the PFS was deemed acceptable by MTC, PEL would benefit from a right of preference through the scoring advantage provided to entities deemed to have suggested an unsolicited proposal for a PPP Project. No contractor legitimately expects to receive a full award of a concession based on a MOI or a PFS. *See RER-1*, Expert Report of MZBetar, at 61 (“neither the MOI nor the PFS would be viewed as sufficient or prudent basis to grant a concession for a Project of this size, type, and complexity”); **RER-2**, Expert Report of Teresa Muenda ¶ 11(d); **Exhibit R-44**, World Bank PPP Reference Guide (confirming that direct negotiations are strongly disfavored and that scoring advantages are utilized for those submitting unsolicited proposals).
56. In short, the “direito de preferência.” in Clause 2(2) of the MOI is the “direito de preferência” in Article 13(5) of Mozambique Law No. 15/2011—which is the 15% public tender scoring advantage that MTC provided to PEL. *See RWS-1*, Witness Statement of Luis Amandio Chauque ¶¶ 13-14. The MOI was intended to outline the process by which PEL may be able to exercise the “*direito de preferência*” in the PPP Law. The MOI also confirmed that, as reflected in the PPP Law, PEL would be performing the PFS at its own cost, as part of its project pursuit marketing that private proposers commonly undertake in the context of unsolicited PPP proposals. *Id.*
57. Notably, PEL’s legal expert appears to suggest that the “direito de preferência” is a “right of preference,” and that commonly this means that the entity with this right is simply allowed to match competing proposals in a tender. PEL’s legal opinion also reflects that that the time the MOI was entered into, a direct award to PEL would not have been authorized, as the MOI “does not fit within any of the sub-paragraphs in Article 113(2)” of

- Decree no. 15/2010, of 24 May 2010. *See* SOC, CER-3 at 33-34. The contention that the later promulgation of the PPP law, which allowed for direct negotiation in “exceptional” or “last resort” circumstances, corrected the “problem” if the illegality of a direct award at the time of the MOI, or meant that the parties intended to proceed through the MOI with a promised direct award of an undefined concession, is baseless and contrary to the Parties’ intent as described.
58. Confirming the preliminary and contingent nature of the MOI, it acknowledges that the project may not be technologically or commercially viable: “In 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.” *See Exhibits R-1 & R-2*, MOI, Clause 7.
59. The MOI contains a purported exclusivity clause: “During the feasibility 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 current 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 areas referred under objective of the present memorandum.” *See Exhibits R-1 & R-2*, MOI, Clause 6 (emphasis added).
60. As noted therein, the “exclusivity” is contemplated during the process of the development and approval of the PFS, and is expressly conditioned upon Mozambican legislation. **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 16-18. At most, this was intended to mean that MTC would not grant similar preferential rights to others while PEL’s PFS was underway and in the process of approval. *Id.* Indeed, Minister Zucula confirms that the “exclusivity” in Clause 6 “simply meant that PEL would be exclusively provided the preferential position at the public tender, other bidders would not be provided a preferential position, and PEL could exercise its right of first refusal if PEL prevailed at the tender.” *See RWS-2*, Witness Statement of Paulo Zucula ¶ 17.
61. The MOI and the arbitration agreement (discussed in detail below) are governed by Mozambican law, or at least it was the intention of the parties to the MOI. *See Exhibits R-*

- 1 & R-2**, MOI, Clauses 8 (“The implementation of a project shall be done within the laws approved by the Gov’t of Mozambique”), 9 (applying Mozambican Law No. 6/2004 of June 17) & 10 (“The arbitration will be governed by Mozambique law ...”).
62. The MOI required the parties to maintain confidentiality: “The parties have agreed to keep all the data, documents, information, and share [sic] between them whether written or otherwise, including this MOI as confidential until the approval of the project.” *See Exhibits R-1 & R-2*, MOI, Clause 11.
63. The MOI was purportedly signed “[o]n Behalf of Government of Mozambique for Ministry of Transport and Communication” by Paulo F. Zucula (the former Minister of Transport and Communications), and on behalf of PEL by Kishan Daga (Special Director-Projects) and Ashish Patel (Executive Director). *See Exhibits R-1 & R-2*, MOI, at 8.
64. PEL’s attempt to turn the six-page MOI into a “commit[ment] to award PEL a concession for the Project it had envisaged” is wholly inaccurate. As a threshold issue, PEL did not “envisage” the Project. As discussed above, MTC did not, would not, and could not commit the Government to a binding concession, based only on a *Pre-Feasibility* study, as a complete blank check with no definition as to the technical and commercial terms of the concession. Such a process is contrary to Mozambican law—and PPP procurement practices—before, during, and after the MOI. Indeed, the PFS is silent on the concession fee and numerous other basic and material terms of a concession. PEL itself admits that the PFS does not even constitute a complete technical, quality, or price proposal—much less a negotiated agreement on any of those basic terms and conditions of a concession.
65. The incoherence of PEL’s position is further illustrated by its widely divergent positions on what the purported “right of first refusal” meant. PEL cannot decide itself whether the first right of refusal is a something to be “waived,” that “allowed PEL to refuse to implement the Project,” *see, e.g.*, SOC ¶ 96, or something which upon its “exercise” committed MTC to award the Project to PEL, *see, e.g.*, SOC ¶ 324. PEL’s legal opinion concedes the term is undefined in the MOI and has different meanings in practice—including the meaning ascribed by the MTC. In PEL’s view, the right of first refusal changes meaning on a whim to suit its claim positions: it inconsistently asserts the purported right of first refusal needed to be “*waived*” by PEL (and was) and needed to be

- “exercised” by PEL (and was). Contrast SOC ¶¶ 98, 100, 156, 318, 321, 342, 372 (MOI required that PEL “waive” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession) with SOC ¶¶ 16, 153, 157, 183, 184, 197, 324, 326, 334, 337, 360 (MOI required that PEL “exercise” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession).
66. As noted, PEL’s assertions are nonsensical: a right of first refusal cannot be both “waived” and “exercised” to commit the government to a blank-check, no-bid concession. PEL cannot harmonize its own diametrically opposed articulations of what was meant by a right of first refusal. Neither articulation is consistent with Mozambique’s PPP Law or what MTC intended. See C-19; **RWS-2**, Witness Statement of Paulo Zucula ¶ 10; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 13-14; **RER-2**, Expert Report of Teresa Muenda ¶¶ 20-21 (right of first refusal to be exercised in context of a public tender with scoring advantage). This confusion confirms there was no meeting of the minds—even within PEL’s mind—as to what the MOI’s undefined first right of refusal means.
67. PEL seeks to mislead the Tribunal about the “commercial logic” of the MOI and PFS. Without providing any technical expert opinions, PEL contends that the PFS is a “large undertaking” that 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,” and is something PEL never would have undertaken absent the promise that the Project and its profits would insure to PEL’s benefit immediately upon approval of the PFS. See SOC ¶¶ 93, 102. PEL is, quite simply, wrong. A PFS is just that—a brief *Pre-Feasibility* study that does not actually perform the detailed analyses necessary to establish technical or commercial feasibility—and is *less complete* requiring *less effort* than the technical, quality, and price proposals submitted by the PGS Consortium and others in the public tender. Sophisticated contractors pursuing PPP megaprojects commonly submit proposals evincing as much or more effort than the PFS, at their cost, without any promise or expectation of receiving the award, much less constructing the project and successfully realizing 30-year profits. See **RER-1**, Expert Report of MZBetar at 61 (“it is not uncommon for entities pursuing PPP projects to provide proposals that are more comprehensive and demonstrate a higher degree of mobilized resources than the PFS, without any expectation of winning the tender or receiving the award”). In this tender, for

instance, the bidders expressly submitted their technical and financial proposals without expectation of payment or award. *See* SOC, Ex. C-27 ¶ 9. The preferential right contemplated in the MOI—a scoring advantage in the tender—is the value PEL received in exchange for developing the PFS, was more than sufficient to make it logical for PEL to put forth the very modest project pursuit effort in preparing a PFS (which PEL and its quantum experts fail to quantify or substantiate), and is a greater advantage than other bidders received for submitting more complete technical and financial proposals for the Project.

C. PEL Fraudulently Concealed from the MTC and Mozambique that PEL was Blacklisted by the Indian Government, and That the Indian Supreme Court Ruled PEL Is “Not Commercially Reliable and Trustworthy.”

68. As discussed below in detail, after this arbitration proceeding was commenced, the MTC and Mozambique first learned that PEL had intentionally and fraudulently concealed from them that PEL had been “blacklisted” by the Government of India in connection with a highway infrastructure project located in India, and also that the Supreme Court of India had actually adjudicated that PEL “is not (commercially) reliable and trustworthy.”
69. On 11 May 2012, the Supreme Court of India entered a Judgment in the case of *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059 (2011). *See* **RLA-21**. The National Highways Authority of India (“NHAI”) had conducted a tender process for the development of a highway in West Bengal and Orissa “on [a] design, build, finance, operate and transfer” “toll basis project through [a] public private partnership.” *Id.* at ¶¶ 1-2. The NHAI informed PEL “that its bid had been accepted and [PEL] was called upon to confirm its acceptance within 7 days.” *Id.* However, PEL reneged on its bid and, instead, “expressed its *inability to confirm its acceptance on the ground that its bid was found not commercially viable on a second look.*” *Id.* (emphasis added).
70. After the NHAI blacklisted PEL and PEL challenged the blacklisting in court, the Supreme Court of India rejected PEL’s arguments and agreed with the NHA, finding PEL “was not commercially reliable and trustworthy”:

We do not find any illegality or irrationality in the conclusion reached by [the NHAI] that [*PEL*] is not (commercially) reliable and trustworthy in the light of its conduct in the context of the transaction in question. We cannot find fault with [the NHAI’s] conclusion because [*PEL*] chose to go back on

its offer of paying a premium of Rs.190.53 crores per annum, after realizing that the next bidder quoted a much lower amount.

Id. at ¶ 24 (emphasis added).

71. In stern language, the Supreme Court of India further held that PEL must be punished and suffer the consequences of being blacklisted:

The dereliction, such as the one indulged in by [PEL], if not handled firmly, is likely to result in recurrence of such activity not only on the part of [PEL], but others also, who deal with public bodies, such as [the NHAI] giving scope for unwholesome practices. No doubt, the fact that [PEL] is blacklisted (for some period) by [the NHAI] is likely to have some adverse effect on its business prospects

Id. at ¶ 25 (emphasis added).

72. PEL's concealment of its blacklisting in India was material because PEL is incorporated and has its principal place of business in India, PEL was blacklisted by the India National Highways Authority, PEL's blacklisting related to a public tender bidding process for the construction and operation of a highway in India on a PPP basis, and the Supreme Court of India specifically held that PEL "was not commercially reliable and trustworthy."

73. During all relevant times, PEL concealed the Indian Government blacklisting and the Indian Supreme Court ruling from the MTC and Mozambique, and PEL misrepresented that it was an Indian company in good standing and compliant with industry practices, in order to fraudulently induce, and did so fraudulently induce, the MTC and Mozambique, to have dealings with PEL, execute the MOI, purportedly approve PEL's prefeasibility study, prequalify PEL and/or the PGS Consortium for the public tender bidding process, allow PEL or the PGS Consortium to participate in the public tender bidding process, and not immediately void the MOI or cease to have dealings with PEL and PGS Consortium. **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 26.

74. If the MTC had known that PEL was making said concealments and misrepresentations, the MTC would have never dealt with PEL or signed the MOI, would have never provided any purported approval of any study (including any prefeasibility or feasibility study) or other proposal submitted by PEL, would have never prequalified PEL or the PGS Consortium for the public tender and would have immediately disqualified them, and would have not allowed PEL or the GS Consortium to participate in the public tender.

Similarly, the Mozambique Council of Ministers would have rejected any requests by PEL and would have instructed the MTC to have no further dealings with PEL. *Id.* at ¶ 27.

75. Additionally, deeply troubling evidence of PEL's commercially untrustworthy behavior has now come to light, further confirming PEL's unsuitability and ineligibility for the Project. PEL attempted to offer former MTC Minister Zucula a bribe in relation to the Project, as is also discussed in detail below. *See RWS-2*, Witness Statement of Paulo Zucula ¶¶ 25-27.
76. Further, the tender documents and Mozambican law precluded PEL from participating given the blacklisting and questions about its professional integrity. *See, e.g., RER-2*, Expert Report of Teresa Muenda ¶ 10. Likewise, the prequalification and tender documents confirm that blacklisted entities are not qualified and cannot participate in the tender. SOC, Ex. C-24 at 2; SOC, Ex. C-27 at 7-8.

D. PEL's English Version of the MOI is Incorrect.

77. In its Notice of Arbitration, PEL attaches a purported different, suspect version of the MOI. A copy of the PEL Notice of Arbitration is attached hereto as Exhibit R-5, and a copy of the purported version of the MOI submitted by PEL is attached as **Exhibits R-6A** and **R-6B**. The version of the MOI originally submitted by PEL has inconsistent English and Portuguese versions scanned into one PDF. In its Statement of Claim, PEL divided the single, combined PDF into two separate exhibits. *See Exhibits R-6A & R-6B*. In both submissions from PEL, the Portuguese version of the MOI is consistent with the Portuguese version submitted by MTC. *Compare Exhibit R-6A with Exhibit R-1*. However, the English version of the MOI submitted by PEL differs from all other versions of the MOI in the record. Specifically, the English version of the MOI submitted by PEL has language added to Clause 2(1) purporting to obligate the MTC to automatically grant a concession to PEL. *Compare Exhibit R-6B with Exhibits R-1, R-2 & R-6A*. This language is inconsistent with all other versions of the MOI and the intent of the parties.
- Clause 2(1) of the MOI, in both the Portuguese and English versions, submitted by Mozambique provides: "PEL shall carry out a prefeasibility study (PFS) within 12 months and will submit to the government for the respective approval." *See Exhibits R-1 & R-2*.

- Clause 2(1) of the MOI in the Portuguese version of the MOI submitted by PEL in the UNCITRAL Arbitration has identical language. “A PEL realizará um estudo de pré-viabilidade (EPV), dentro de 12 meses que submeterá ao Governo para a respectiva aprovação.” See **Exhibit R-6A**.
 - However, the English version submitted by PEL has the highlighted language added to Clause 2(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 Gov’t of Mozambique shall issue a concession of the project to PEL.*” See **Exhibit R-6B** (emphasis added). PEL’s English version therefore deletes the following language, as found in the Portuguese versions and MTC’s English version: “within 12 months and will submit to the government for the respective approval.” Compare **Exhibit R-6B** with **Exhibits R-1, R-2 & R-6A**.
78. Without waiving its position that the MOI is void and unenforceable, Mozambique contends that the correct Portuguese and English signed versions of the MOI are those submitted herein as **Exhibits R-1** and **R-2**, which are consistent with the Portuguese version of the MOI submitted by PEL in this UNCITRAL Arbitration. Initial review by document authenticity experts confirm that PEL’s English version of the MOI “exhibit suspect features,” and there “is no factual basis to conclude that Mozambique’s versions of the MOI are inauthentic.” **RER-5**, Expert Report of Mark Lanterman, at 3.
79. In its Notice of Arbitration, dated 20 March 2020, PEL argues that: “Mr Kishan Daga (Special Director-Projects) and Mr Ashish Patel (Executive Director)—do not speak Portuguese” and “relied upon assurances from the government negotiators that the Portuguese version of the MOI reflected the language contained in the English version of that same agreement.” See **Exhibit R-5** ¶ 24. PEL’s attempt to blame the MTC is implausible because these two gentlemen also signed *the English version* submitted by Mozambique that *does not contain the additional language*, see **Exhibit R-2**, and which is consistent with the Portuguese version submitted by PEL and the MTC, see **Exhibits R-2 & R-6A**. In any event, under Mozambican law, the Portuguese version governs.
80. PEL’s English version of the MOI is also internally inconsistent. The additional language in Clause 2(1) of PEL’s English version is inconsistent with the language in Clause 2(2) of that document. If under Clause 2(1) “the Gov’t of Mozambique *shall issue* a concession of the project to PEL,” see **Exhibit R-6B** (emphasis added), then it would be inconsistent

- to grant PEL a “first right of refusal” under Clause 2(2) and the unilateral ability to walk away from the concession, *id.*, because the concession supposedly “shall issue” to PEL.
81. Clause 2(1) of PEL’s English version has additional language that “*once the terms under Clause 7 of this memorandum are approved*, the Gov’t of Mozambique shall issue a concession of the project to PEL.” See **Exhibit R-6B** (emphasis added). Clause 7 states: “[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.” *Id.* (emphasis added). Therefore, if the project is not viable, a concession *shall not* issue to PEL, and not the other way around.
82. Moreover, Clause 2(1) of PEL’s English version, see **Exhibit R-6B**, deletes the language that the PFS will be “submit[ted] to the government for the respective approval,” compare **Exhibits R-1 & R-2** (Mozambique’s versions) with **Exhibit R-6A** (PEL Portuguese version). If that language is deleted, nothing in the MOI discusses the effect of an approval or lack thereof of the PFS by the MTC.
83. Finally, the English version of the MOI submitted by PEL suggests it is inauthentic. 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, whereas the rest of the pages (including those with the additional language that favors PEL) are scanned in black and white and do not contain the initials in blue. See Exhibit R-6B. In contrast, the Portuguese portion submitted by PEL is scanned in color with initials in blue, including on the page with the Clause 2(1) without the additional language. See **Exhibit R-6A**. In any event, it is difficult to ascribe controlling weight to a version of the MOI that is different from every other version submitted by the parties, and from the parties’ intent as described.
84. At the very least, there was not a meeting of the minds with respect to the additional language found in the English version submitted by PEL and, therefore, the version of the MOI that is proposed by PEL as correct is void *ab initio* and unenforceable.

E. PEL's Prefeasibility Study was Inadequate.

85. PEL first provided the MTC with "A Preliminary Study to Assess Potential Port Locations in Zambezia, to Connect the Moatize Coal Mines by Rail" ("PEL Preliminary Study"). The Preliminary Study is dated March 2011, just two weeks after PEL submitted its initial letter of interest to MTC on 17 February 2011. PEL asserts that on the basis of that Preliminary Study, the MTC agreed to enter into the MOI. If the MOI obligates the MTC as PEL claims, the PEL Preliminary Study was an insufficient basis to sign the MOI under Mozambican law.
86. After the MOI was signed, PEL submitted a purported prefeasibility study to the MTC. A copy of PEL's Pre-Feasibility Report, dated April 2012 ("PFS"), is attached hereto as **Exhibit R-7**. The various purported copies of the PFS that PEL has referenced or submitted to the Tribunal since its Statement of Claim (SOC, Ex. C-6, amended to SOC, Ex. C-6A and C-6B) are incorrect. PEL's latest purported version of the PFS (to be SOC, Ex. C-6B) omits a PEL's signature and stamp on the cover page, and improperly includes at the end of the pdf several unexplained cost spreadsheets that are not referenced in the table of contents for the PFS or included in the copy of the PFS submitted to MTC. **Exhibit R-7** is the correct and complete PFS.
87. PEL asserts that, "[o]n 9 May 2012, PEL presented [via a PowerPoint] the results of the PFS to technical and commercial personnel from the MTC and CFM, as well as representatives from the Ministry of Planning and the Ministry of Finance." *See Exhibit R-5* ¶ 27. However, PEL's PowerPoint contained various disclaimers:
- "This presentation is for information purposes only ... and no part of it shall form the basis of or relied upon *in connection with any contract or commitment whatsoever*."
 - "*Any person placing reliance on the information contained in this presentation or any other communication by the company* does so at this or her own risk and the Company *shall not be liable* for any loss or damage caused pursuant to any act or omission based on or in reliance upon the information contained herein."
 - "*No presentation or warranty (express or implied) of any nature is made* nor is any responsibility or liability of any kind accepted with respect to the *truthfulness, completeness or accuracy of any information, projection,*

representation or warranty (expressed or implied) or omissions in this presentation.”

- “The Company accepts no liability whatsoever for any loss, however, arising from any use of reliance on this presentation or its contents or otherwise arising in connection therewith.”

See **Exhibit R-8**, attaching a copy of PEL’s Power Point Presentation, dated 9 May 2012 (emphasis added).

88. On 15 May 2012, PEL sent a letter to the MTC asserting further qualifications to the PFS, including regarding the project’s commercial/financial viability, and requesting approval by the PFS. See **Exhibit R-9**.
89. Although PEL’s letter is dated 15 May 2012, PEL’s letter concealed that four days before, the Supreme Court of India had entered the aforementioned Judgment upholding India NHA’s blacklisting of PEL and adjudging PEL to be “not commercially reliable and trustworthy.” See Exhibit R-3. PEL concealed these material facts from the MTC in order to fraudulently induce, and did so fraudulently induce, the MTC to purportedly accept PEL’s PFS. As a result, on 15 June 2012, the MTC sent a letter to PEL purportedly accepting PEL’s PFS. See **Exhibit R-10**. Had MTC known the concealed facts, it would have never purportedly accepted PEL’s PFS, and would have ended all dealings with PEL. See **RWS-2**, Witness Statement of Paulo Zucula ¶ 24; **RWS-1**, Witness Statement of Luis Amandio Chauque § IV.
90. Although MTC (lacking knowledge of the blacklisting) elected to continue discussions with PEL after submittal of the PFS, the PFS was not, as PEL now suggests, some type of robust, resource-intensive analysis that established the Project’s viability or would have formed the basis for a direct concession. Minister Zucula recalls:

The PFS that PEL submitted was conceptual, discussed ideas the MTC already had, and was not a study of the quality the MTC expected. It also did not define the basic terms and conditions of a concession. In good faith, the MTC continued discussions and gave PEL the benefit of the scoring advantage for the public tender contest, if PEL wished to proceed and could form the planned partnership with CFM. PEL struggled to provide required information about its PFS and failed to reach agreement with CFM. PEL’s position then changed and PEL asserted, instead, that it should be provided a direct award. However, PEL was again informed that the required public

tender process would be employed and that – consistent with the MOI – PEL could compete with a bidding advantage and be awarded a right of first refusal if it prevailed in the tender.

RWS-2, Witness Statement of Paulo Zucula ¶ 18.

91. Independent technical evaluation of the PFS establishes that PEL’s PFS is simply a “preliminary stage” study, consisting of general concepts with limited technical detail, and was submitted with no meaningful analysis of economic, commercial, and environmental feasibility. The PFS “did not reflect a high degree of design development or either a high degree of resources mobilized.” The PFS did not define the “basic terms and conditions” of a PPP concession for the Project and did not address the significant unresolved technical and commercial questions. **RER-1**, Expert Report of MZBetar, at 61-62 (Conclusion A).
92. Indeed, far from involving costly and time-consuming investigation and study, the PFS used publicly available input data, often vaguely referencing “internet” sources, with minimal site work. *Id.* Its inputs are unclear, and assumptions about design and other facts neither deeply discussed nor justified. The PFS simply provided a single summary table, with 15 rows, to show a cost estimate for a Project anticipated to exceed USD\$3 billion. The highly summary information in the PFS is not enough to understand the rationale for its estimations or conclusions, much less demonstrate feasibility or establish the basic terms and conditions of a concession.
93. Further, the PFS certainly did not “finalize the rail route” for the Project, as would have been required under the disputed Clause 2(1) that PEL relies upon from its suspect English version of the MOI. In the PFS, PEL had not even finalized the location of the port at Macuse—it offered two locations 75 km apart—and thus could not have finalized the alignment of the rail route. *See RER-1*, Expert Report of MZBetar ¶ 38.
94. The MOI could not and did not give PEL the right to a direct concession upon approval of the PFS. *Supra* § V. Yet if it the MOI was mistakenly interpreted to do so, MTC’s purported acceptance of PEL’s PFS, and any alleged resulting commitment to award a PPP, infrastructure or concession project to PEL on the basis of the PFS, also was void, voidable or unenforceable, because the Minister of Transport and Communications lacked actual authority to grant such approval to PEL, and any such purported approval did not comply with the requirements of Mozambican law and regulations, as detailed below. *See RWS-*

1, Witness Statement of Luis Amandio Chauque § IV. In any event, the PFS did not meet the requirements of the MOI and the concession/project, as noted herein. A concession cannot be granted without a complete and approved Feasibility Study (as opposed to a pre-feasibility study); was not authorized or approved by the Mozambican Minister of Finance; was not authorized or approved by the Mozambican Administrative Tribunal; was not authorized or approved as a PPP, infrastructure or concession project in Mozambique; was not awarded pursuant to a duly conducted, authorized or approved public tender bidding process; was not entered into with or awarded to a prequalified party; was not awarded pursuant to a duly conducted, authorized or approved direct negotiating process; was not entered into or awarded pursuant to a duly authorized and accepted prefeasibility and feasibility study; and was not authorized, approved or registered as a foreign investment. Said deficiencies continued during all relevant times and they are grounds why any PPP, infrastructure or concession agreement would have been void, voidable or unenforceable. *See RWS-1*, Witness Statement of Luis Amandio Chauque § IX.

F. PEL Failed to Reach Agreement With CFM, Rendering the MOI Moot.

95. In its 15 June 2012 letter to PEL, the MTC stated that “in order to pursue the project,” PEL “must,” *inter alia*, “negotiate with the CFMs the creation of a company to implement the project.” *See Exhibit R-10*. This condition precedent is consistent with the MOI, which envisioned the creation of a joint venture. *See Exhibits R-1 & R-2*, Recitals.
96. On 18 June 2012, PEL sent a letter to the MTC purporting to “exercise” its first right of refusal, and acknowledging that it was required to “proceed with CFM to incorporate an entity for implementation of the project as directed in your letter.” A copy of said letter is attached hereto as Exhibit R-11. In its June 18 letter, PEL continued to conceal from the MTC that, just one month before on 11 May 2012, the Supreme Court of India had entered the Judgment upholding India NHA’s blacklisting of PEL and adjudging PEL to be “not commercially reliable and trustworthy.” *Id.* Had these material facts been disclosed to the MTC, the MTC would have had no further dealings with PEL and would have voided, assuming it was not void, the MOI.
97. Notably, PEL did not contend contemporaneously that it had no obligation to partner with CFM. *See Exhibit R-11*. PEL also did not contend contemporaneously that there was an

English-version Clause 2(1) of the MOI that already obligated MTC to directly award the Project to PEL simply upon approval of the PFS. *Id.* Presumably seeking to preserve in litigation an argument that such incongruous right exists, PEL’s SOC misstates the plain language of its Ex. C-12 (R-11), saying in paragraph 156 that PEL “expressly waived its right of first refusal.” SOC, Ex. C-12 actually states “we expressly exercise our right of preference.” As noted, PEL’s confused and inconsistent articulation of the right of preference are not in accord with the facts: the right of preference was intended to provide for a scoring advantage or bonus in the eventual public tender.

98. Interestingly, PEL contends in its factual background that because PEL “waived” its right of preference “even before seeing the concession terms, PEL was thereafter obligated to carry out the Project.” SOC ¶ 156. In essence, PEL’s position is that PEL would have had to perform the decades-long project on whatever terms MTC proposed in a concession. Whatever the merits of this confounding position, it confirms that PEL’s damages calculations—premised on a plethora of assumptions about what the Project would look like and what would be agreed upon—are wholly speculative. *See infra* (damages section § IX).
99. In a letter dated 22 June 2012 to the MTC, PEL specifically undertook to have direct negotiations with CFM. PEL confirmed that it would “dialogue with CFM and keep [the MTC] apprised about the developments on a regular basis.” *See Exhibit R-12*.
100. On 7 August 2012, PEL wrote to CFM, and admitted that the creation of a company together with CFM to implement the project was a condition of the concession being awarded: “We would like to request you [CFM] to kindly let us know how we can proceed further in regard to the formation of SVP between PATEL and CFM for the above-mentioned project. We shall be highly obliged to receive your advice letter *for formation of SVP so that we can enter into the second phase of the project for discussion and signing of concession agreement per the MOI*” *See Exhibit R-13* (emphasis added).
101. On 15 August 2012, PEL wrote to the MTC that it had “initiated talks with CFM to set up a SPV to develop the PROJECT” and claiming to have “complied with all the requirements of the MOU [sic].” *See Exhibit R-14*. However, PEL’s representation that it had

“complied with all the requirements” of the MOI was false because its negotiations with CFM had not resulted in the formation of a company.

102. On October 5, 2012, PEL sent another letter to the MTC now arguing for the first time that “the concession agreement always comes first” and demanding that the MTC sign the concession agreement, although PEL had not yet formed the company with CFM, PEL had acknowledged that in order to sign a concession agreement it must first form that company, and PEL had acknowledged that “per law” “the pre-requisites for signing of a concession agreement is that an SPV is formed with a nation[a]l entity” See **Exhibit R-15**.
103. Ultimately, PEL was unable to reach an agreement with CFM on the creation of a company to implement the subject project. PEL did not satisfy this condition precedent of the MOI, rendering the MOI moot.
104. Even if the MOI was valid, and the PFS was properly accepted, PEL’s inability to satisfy this condition mooted the MOI and released the MTC of further obligations thereunder.

G. PEL Admitted the MOI Violated Mozambican Law, Acknowledged That PPP Concessions are to be Submitted to Public Tender, Abandoned the MOI, and then Changed Course now Requesting an Extraordinary Direct Award.

105. On 28 November 2012, PEL wrote to the MTC admitting that the MOI violated Mozambican law, and seeking to rewrite the MOI. See **Exhibit R-16**. PEL acknowledged that the Mozambican law “*regime [for] the contracting of the public-private partnerships provided by Law No. 15/2011 of 10 August, which establishes the guiding principles for the process of contracting, implementing and monitoring undertakings of public-private partnerships, large scale projects and business concession[s] ... and its regulation[s], approved by Decree No. 16/2012 of 4 June, we understand that ... The standard regime for the contracting of the PPP is public tender, as stated in Article 13 of Law 15/2011.*” *Id.* (emphasis added). PEL has therefore expressly admitted that the MOI indeed violated Mozambican law because PPP contracting must be through public tender.
106. Faced with the foregoing, in its November 28 letter, PEL abandoned the MOI and the argument that “the concession agreement always comes first.” PEL again changed course and requested, for the first time, that it be granted “a direct award” under an extraordinary “last resort” exception to public tender in Mozambican law, although the MOI had made

no finding of extraordinary circumstances. PEL argued that: “The vast experience that PEL has accumulated in the development of Infrastructure projects in Roads, Highways, port and railway infrastructure and other undertaking of large dimensions and responsibility, *we believe that makes PEL a candidate that deserves the trust of a direct award.*” See **Exhibit R-15** (emphasis added). On this new ground, PEL requested that the MTC enter into “direct negotiations for the contracting of PEL” on a “direct award basis.” *Id.*

107. PEL’s letter of 28 November reflects a scattered and unpersuasive position: that it should receive a direct award even though (1) Mozambican law at the time of the MOI would not have considered this project to be appropriate for direct negotiations and award, *see RER-2*, Expert Report of Teresa Muenda ¶ 11(d)-(e); (2) the MOI itself, consistent with Mozambican law, merely suggested a contingent “right of preference” and not a direct award; (3) it was believed to be mutually understood by both parties that a public tender would occur, perhaps with a scoring bonus or advantage to PEL if the PFS was approved; (4) neither the MOI nor the PFS constituted a complete proposal on technical, quality, and price matters, much less specify the basic terms and conditions of a concession; and (5) the PPP law enacted after the MOI specified, in accordance with procurement best practices globally, that public tenders are required for PPP contracts in all but the most exceptional “last resort” circumstances. An exception allowing for direct negotiation of PPP projects in instances where certain extraordinary findings are made, that arose in legislation *after* execution of the MOI, does not support PEL’s attempt to avoid even a modicum of competition and be awarded a concession on a USD\$3 billion project for which the parties never even proposed, much less agreed upon, the most basic of commercial terms. In each of the other PPP concessions that PEL alleged had been awarded with some element of direct negotiation, the government had made authorizations through certain Resolutions, the entities in question (Vale, etc.) had joined joint ventures with CFM, and the circumstances were not shown to be analogous to the USD\$3B, pre-feasibility, 500km greenfield rail corridor and new port being discussed by an inexperienced contractor like PEL. *See Exhibit R-16.*
108. Minister Zucula continued to confirm in discussions with PEL that “the required public tender process would be employed and that—consistent with the MOI—PEL could

complete with a bidding advantage and be awarded a right of first refusal if it prevailed in the tender.” See **RWS-2**, Witness Statement of Paulo Zucula ¶ 18; see also **Exhibit R-17** (Minister Zucula had told PEL in June 2012 meeting PEL would “benefit from preference (if it participated in the tender) with an advantage in the score right at the start”).

109. Again, although PEL stated that it is a “candidate that deserves *the trust* of a direct award,” see **Exhibit R-16**, PEL continued to conceal that the Supreme Court of India had entered a Judgment upholding India NHA’s “blacklisting” of PEL and adjudging PEL to be “*not* commercially reliable and *trustworthy*.” See **Exhibit R-3** (emphasis added).

H. The MTC Accommodated PEL by Giving it a Bidding Scoring Advantage.

110. On 11 January 2013, the MTC wrote to PEL noting that PEL’s November 28 letter “omits some facts” and “misrepresents what happens.” See **Exhibit R-17**. MTC rejected the notion of a direct tender.
111. Instead, and despite the invalidity of the MOI, the MTC was accommodating to PEL and noted that PEL’s “preferential rights” stated in the MOI “could be materialized through a public tender where [PEL] would benefit from preference (if it participated in the tender) with an advantage in the score right at the start, or through direct negotiation in case [PEL] entered into a strategic partnership with ... CFM.” *Id.*
112. MTC noted that PEL and CFM “had not been able to reach an agreement leading to the development of a strategic partnership” *Id.* The MTC reiterated that if PEL participated in the public tender, it would receive a scoring preference as indicated in the letter. *Id.*
113. On 22 January 2013, PEL wrote to MTC, reiterating its old arguments, and again changing course now stating that “we also have SPI a local Mozambican company as our potential partner who are in this project right from the beginning and actively participating.” See **Exhibit R-18**. PEL asked the MTC “to stall the tender process” and “start negotiation on [a] concession agreement in parallel” *Id.*
114. At this point, PEL was grasping at straws, asking the MTC to violate Mozambican law and “stall” the required public tender process so it can negotiate a concession only with PEL.

Nothing in the MOI allowed, much less required, the MTC to find exceptional and weighty circumstances, to apply an exception to the public tender requirement in the PPP law.

115. On 14 February 2013, the MTC wrote to PEL explaining that the public tender would go forward, that the MTC could not reverse the Council of Ministers' decision, and that PEL may compete and participate in the public tender with the advantage scoring. *See Exhibit R-19*. The Council of Ministers' decision was entirely consistent with applicable Mozambican law and the MOI.

I. The MTC Conducted a Tender Process, and PEL Participated Through a Consortium, Waiving any Rights Under the MOI.

116. On or about 30 January 2013, the MTC published a request for manifestations of interest for the project.⁶ Twenty-five companies submitted expressions of interest, and the MTC then invited six to participate, including the PGS Consortium. *See Exhibit R-22*, "Contest to Acquiring of Rights of Concession to Conceive, Design, Finance, Build, Operate and Transfer the Railway and Macuse Port"; *Exhibit R-23*, the MTC tender documents issued to the six pre-qualified companies on 12 April 2013.

117. Indeed, on 8 March 2013, a consortium consisting of PEL, Grindrod and SPI sent a written expression of interest to the MTC, *see Exhibit R-24*. The letterhead lists PEL, Grindrod and SPI and states that these group of companies ("we") submit the expression of interest "in the form of a consortium." *Id.* The letter, however, is only signed by PEL. *Id.* In this letter, PEL states that it is participating in the tender "with no prejudice to the rights Patel is vested in as a result of the MOA [MOI?]" *Id.*

118. PEL's purported reservation of rights under the MOI is meaningless and has no legal significance. By submitting the expression of interest, and thereafter actively participating in the public tender, as part of this three-company consortium, PEL waived any rights (even

⁶ On 4 March 2013, PEL wrote to the MTC admitting the MOI required PEL's "agreement with CFM on the terms of a potential JV," that PEL had failed to satisfy that condition and CFM would not be participating in the project, and that the project had been submitted to tender because of PEL's "inability to reach an agreement with CFM on the terms of the partnership." *See Exhibit R-21*. Nonetheless, PEL now requests that the MTC allow PEL to "proceed with the development of the project" without CFM, regardless of the MOI's requirements. *Id.* At the same time, PEL stated it had been having negotiations with two other companies, Rio Tinto and Jindals, which had not been previously disclosed to the MTC. *Id.*

- assuming it had any) under the MOI, abandoned the MOI, became subject to an estoppel which precluded PEL from relying any further on the MOI, and/or entered into an accord and satisfaction with the MTC that superseded the MOI. PEL's assertion of rights under the MOI would be inconsistent with its membership in the consortium and its decision to participate in the public tender. It would lead to an absurd result if PEL were to participate in the public tender, not be the winning bidder, and then be able to unilaterally veto and undo the public tender results by relying on the MOI to the prejudice of the winning bidder.
119. Just four days after sending the written expression of interest to the MTC *on behalf of the PGS Consortium*, PEL changes course again and sent another letter, dated 12 March 2013, to the MTC, now again arguing that PEL alone is entitled to the concession under the MOI. *See Exhibit R-25*. In its March 12 letter, PEL demands that it is "entitled to proceed with the project as per the terms of the [MOI]" *Id.*
120. Notably, PEL's letter of 12 March 2013, like others, never mentions the MOI Clause 2(1) in PEL's purported English version of the MOI, that PEL now claims granted it a direct award. Rather, PEL repeats flawed arguments about the "first right of refusal" mentioned in Clause 2(2) of the MOI. *See Exhibit R-25*.
121. Of additional import, PEL concedes in Exhibit R-25 that the purpose of the public tender requirement in the PPP Law is "to determine and ensure the technical and quality terms, the price and further conditions offered by the proponent." *Exhibit R-25* at 4. Instead of claiming that it had already specified such appropriate terms in either the MOI or the PFS, thereby arguably making direct negotiations a colorable option, PEL stated that it "has still not submitted its complete proposal on the technical, quality and price terms. Till date, Patel has only submitted the pre-feasibility study and exercised [sic] its first right of refusal to implement the project." *Id.*
122. This is a startling, albeit factually appropriate, admission by PEL. Although PEL strives mightily in this litigation to accuse Mozambique of "illogical" positions, the unsound argument PEL submitted to the Prime Minister of Mozambique was that (A) the PPP law should not apply to require a tender, because (B) a tender under the PPP Law is intended to ensure that the proposer submitted appropriate technical, quality, and price terms (while benefiting from a "right and preference [sic] margin of 15% . . . and without [sic] any right

to compensation for costs incurred in the preparation of the proposal”), and (C) in the present case PEL *had not submitted its technical, quality, or price terms as part of the MOI or the PFS*. *Id.* Needless to say, this dispels PEL’s efforts in this claim to exaggerate the import and value of both the MOI and the PFS. This much is true: PEL’s failure to conceptualize its own proposal, much less the Project, by early 2013 is *not* a coherent reason for why the Government should find exceptional circumstances to forgo the prudent best practice (and legislative requirement) of a public tender.

123. PEL also asserts that through its contacts with the Mozambican Government, *see Exhibit R-5* ¶ 54, PEL was able to obtain a letter, dated 18 April 2013, from the MTC to PEL stating that the Council of Ministers decided to “invite [PEL] to start the process with a view of carrying out these projects.” The letter reflected that the negotiation process and tentative project was subject to, *inter alia*, “a statement, agreement or *take or pay* memorandum with mining companies, in order to make the project in question feasible.” *Id.* *See Exhibit R-26*. However, PEL again intentionally concealed from the MTC, and this time also from the Mozambique Council of Ministers, that the Supreme Court of India had entered a Judgment upholding India NHA’s “blacklisting” of PEL and adjudging PEL to be “not commercially reliable and trustworthy.” *See Exhibit R-3*. If PEL had disclosed such material facts to the Council of Ministers, the Council would have instead instructed the MTC to cease having any dealings with PEL. PEL did not provide a sufficient and satisfactory statement, agreement, or take or pay memorandum with mining companies making the project in question feasible.
124. As Minister Zucula notes, in light of PEL’s requests, the Council of Ministers had suggested further discussions with PEL—but did not directly award the concession to PEL. There were also other potential bidders that were interested in the project, and Mozambican law and regulations required that the Project be put to a transparent public tender contest. Therefore, in order to treat all potential bidders in a fair and equitable manner, and comply with Mozambican PPP law and regulations, it was confirmed by the MTC legal counsel and the Council of Ministers that a public tender was the appropriate process, and that PEL would be provided a bidding scoring advantage consistent with the MOI to account for its preferential position under the MOI, in the tender contest for this Project. *See RWS-2*, Witness Statement of Paulo Zucula ¶¶ 19-20.

125. Indeed, several stakeholders objected to the Council of Minister’s decision to allow negotiations with PEL, and the matter was referred to the MTC’s Legal Department. The MTC’s Legal Department concluded that the PPP legal and regulatory framework in Mozambique required that all potential bidders for the project be treated fairly in accordance with applicable law and that the public tender process therefore be followed. Thus, on 13 May 2013, Mr. Luis Amandio Chauque, Director of the MTC Legal Department, wrote to PEL, and indicated:

The Council of Ministers, after hearing various stakeholders of the above-mentioned Projects and after reviewing the legal and regulatory framework of Public-Private Partnerships, on its 12th Ordinary Session held on 30 April 2013, has come to a conclusion that the current Public Tender represents the correct option, there not being, therefore, space for direct negotiations with any of the bidders presented in the pre-selection phase.

Thus, and based on this decision, there shall be no place for direct negotiation with Patel Engineering, Limitada, and this company is encouraged to continue in the bidding, enjoying from the start ... [the] preference right [of] the 15 percentage points stipulated by Law.

- See Exhibit R-27*, the MTC Legal Department’s letter, dated 13 May 2013 (emphasis added); *see also RWS-1*, Witness Statement of Luis Amandio Chauque ¶ 66. MTC also returned the guarantee earlier submitted by PEL. **Exhibit R-27**.
126. On 4 June 2013, PEL again sent a letter to the MTC requesting that it be awarded the concession, *see Exhibit R-28*, although at the same time PEL was requesting that the PGS Consortium be awarded the concession in the public tender. PEL was therefore also acting in a conflict of interests, and demonstrating that it was ill-equipped to be directly awarded the concession without a broader consortium legally distinct from the entity executing the MOI.
127. In fact, PEL’s efforts to disrupt standard PPP procurement practices and receive a direct award constituted a violation of its commitments and duties to its other consortium members. PEL promised its more experienced PGS Consortium partners—Grindrod and SPI—that it would not “directly or indirectly, submit an EOI or participate in the Project other than through the Consortium and/or the SPV.” SOC, Ex. C-60, Memorandum of Understanding between PEL, Grindrod, and SPI, Clause 6 (“Exclusivity”). Yet, at the time the PGS Consortium was participating in the public tender, PEL was seeking to invalidate

- that tender and receive a direct award, allegedly pursuant to the MOI (where Grindrod and SPI are neither mentioned nor parties).
128. Thus, PEL was precluded by the PGS Consortium MOU from seeking a direct award outside the PGS Consortium. *Id.* MTC had no obligation in the MOI to deal with, and much less directly award a concession to, the heretofore unmentioned and unformed PGS Consortium. **Exhibits R-1 & R-2.** By forming the PGS Consortium to participate in the public tender, and then agreeing to only pursue the Project as part of the PGS Consortium, PEL both (1) confirmed through its actions that it lacked the expertise to itself be awarded and successfully execute the concession and (2) foreclosed its ability to seek a direct award in good faith to its other Consortium members or the public tender process.
 129. On 10 June 2013, the MTC sent clarifications regarding the tender to all bidders, including the PGS Consortium. *See Exhibit R-29*, the MTC letter with clarifications.
 130. On 27 June 2013, the PGS Consortium submitted to the MTC to the Consortium's Financial and Technical Proposal for the Project ("PGS Consortium's Proposal"). *See Exhibit R-30.* Had the MTC known that PEL was blacklisted, it would have disqualified the PGS Consortium from participation in the public tender. The Consortium's Proposal explicitly accepted that the PGS Consortium will be provided a bidding scoring advantage in light of the MOI, and therefore PEL waived any claims pursuant to the MOI and became estopped from relying upon the MOI by accepting said bidding scoring advantage. The PGS Consortium also accepted that the Consortium's Financial and Technical Proposal is subject to applicable Mozambican laws and regulations. PEL chose to present a consortium and respond the public tender, recognizing that a public tender was the standard process under Mozambique's PPP law of August 2011. Notably (and commonsensically), at no time did PEL bring an action under the dispute provisions of the MOI, alleging that the MOI had been breached by MTC issuing a public tender in accordance with the provisions of Mozambique's PPP law. *See RWS-1*, Witness Statement of Luis Amandio Chauque § XII; **RER-2**, Expert Report of Teresa Muenda ¶ 24.
 131. The bid process demonstrates that PEL's fact witness and legal expert misunderstand PPP procurement when they suggest it would be commercially illogical to conduct a PFS without a promise of a direct award. Under the tender for this Project, each of the bidders

were to submit detailed Technical and Financial Proposals *at their sole cost*. SOC, Ex. C-27, Tender Documents, Item 12 (“Cost of Preparing Proposal”). As demonstrated by the PGS Consortium’s own proposal (see C-190A through C-190I), which was approximately 900 pages in length and included a Technical Proposal longer and more substantial than the PFS, sophisticated PPP bidders commonly submit proposals for PPP projects that reflect substantially more effort and cost than the PEL PFS—and do so as a project pursuit business development cost. That PEL received a 15% right of preference by submitting its modest PFS is more value than all the other disappointed bidders received from their Technical and Financial Proposals.

J. The MTC Properly Scored the Public Tender, The Winner was ITD, and the PGS Consortium Failed to Submit a Timely Appeal.

132. On 19 July 2013, the MTC met with the bidders’ representatives, opened all proposals in their presence, scored the various proposals submitted by the bidders, and announced the public tender’s scoring results: ITD (the Italian-Thai Development Public Company Limited) was awarded 95 points, the CLZ Consortium was awarded 80 points and the PGS Consortium was awarded 72.5 points. Accordingly, the winner was ITD. Each of the bidder representatives signed the MTC minutes, including PEL, accepting the scoring results by their signatures. *See Exhibit R-31*, a copy of the Minutes of the Opening Session of Economic Proposals, dated 19 July 2013.
133. Independent technical evaluation, by engineers experienced in Mozambique and elsewhere, dispels PEL’s unsubstantiated contentions that the tender suffered from “serious irregularities” or reached an “absurd” result. The Public Tender followed the applicable rules and procedures. The assertions PEL makes about how the tender should have been scored are speculative, technically incorrect, and inconsistent with common procurement practices. The formula PEL claims should have been utilized would lead to nonsensical results. Moreover, even if one were to assume, at the present moment, that PEL was correct that the 15% right of preference was applied to only the Technical (rather than both the Technical and Financial, scores), it would not have changed the outcome. PEL simply struggles to come to terms that a large percentage of the score was based on the Technical Proposal, and its inexperience as an EPC (engineer-procure-construct) contractor and failure to articulate a substantiated broader strategic vision for the transportation corridor

- are valid reasons for lower scores in those significantly weighted categories. The Financial Proposal, which was scored only 30%, was weighted most heavily toward both the process and type of social responsibility payments, and PEL cannot expect its claimed payments at the end of the concession (30 years in the future) to be treated as favorably as other financial structures. **RER-1**, Expert Report of MZBetar § 5.3
134. On 26 July 2013, the MTC formally notified the PGS Consortium of its decision to award the concession to ITD. *See Exhibit R-32*. The MTC letter specifically notified the bidders of the three-day deadline to file claims (that is, the deadline to formally appeal the MTC's award decision).
135. The PGS Consortium failed to file a formal appeal by the deadline or using the process specified in SOC, Ex. C-25. Instead, on 29 July 2013, the consortium sent a letter to the MTC seeking clarifications and requesting that the tender remain open. *See Exhibit R-33*.
136. On 1 August 2013, the PGS Consortium sent another letter to the MTC now asking that the public tender be suspended. *See Exhibit R-34*. Said belated letter was sent after the three-day appeal deadline and has no legal force or effect – the PGS Consortium waived any appeal.
137. Nonetheless, as a courtesy, the MTC sent a letter, dated 12 August 2013, to the PGS Consortium addressing the issues raised by said consortium. The MTC explained, in detail and attaching also a chart, that the tender evaluation criteria had remained unchanged, and that the 15% right of preference (that is, the bidding scoring advantage) had been applied correctly to the PGS Consortium. *See Exhibit R-35*.
138. Refusing to accept that they were not the winning bidder, on 19 August 2013, the PGS Consortium sent another letter to the MTC now requesting reevaluation of the three bids. *See Exhibit R-36*. However, said belated letter also was sent after the three-day claims deadline and has no legal force or effect – the PGS Consortium waived any appeal.
139. On 27 August 2013, the MTC sent a letter to the PGS Consortium stating that, “in the absence of pending appeals,” the MTC was giving final confirmation of the award of the concession to ITD, a copy of which is attached as Exhibit R-37.

140. Finally recognizing that they had not submitted a formal appeal, on 28 August 2013, the PGS Consortium sent a letter to the MTC purporting to be their “Formal appeal. *See Exhibit R-38*. Said letter also was sent after the deadline expired and has no legal force. The consortium waived any administrative appeal and failed to file a judicial appeal. The MTC provided an explanation of its bidding calculations and had no further obligation to respond to this belated appeal.
141. For avoidance of a doubt, PEL *admits* in this litigation that the PGS Consortium did not pursue the required process to protest or appeal the bid. *See, e.g., SOC, CWS-1, Witness Statement of Kishan Daga ¶ 161* (“we thought that it would be pointless to lodge a court appeal”). Expert analysis confirms that PEL failed to satisfy the appeal requirements in this fashion and others. **RER-1**, Expert Report of MZBetar § 5.3.5; **RER-2**, Expert Report of Teresa Muenda ¶ 24. Importantly, the recourse (and legitimate expectation) in the event of a successful bid protest—in Mozambique and globally—is *not* lost profits of a construction project or concession. Instead, the proper remedy would be to cancel or redo the tender. *Id.*; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 81. Had the PGS Consortium timely and appropriately appealed and been successful with any objections to the tender, MTC could have had the opportunity to correct any errors found through the judicial process. *See RWS-1, Witness Statement of Luis Amandio Chauque ¶ 82*.

K. The Project as Proposed by PEL Would not Have Been Viable. The Present Project, which Still has not been Constructed, has a Different Terminus and Differs Substantially from PEL’s Proposal.

142. The project as proposed by PEL or the PGS Consortium would not have been techno, commercially, and/or financially viable or feasible. *See RER-1, Expert Report of MZBetar, at 61-65 (Conclusions); infra § IX(B)-(C)* (value of PEL’s project proposal is zero).
143. For example, even though the successful bidder, ITD, made a superior proposal, its agreement with CFM and concession agreement with MTC have been subject to further revisions. Even with project alterations to improve feasibility, financial closure has not yet been achieved and the project has not yet come to fruition. Among other things, stakeholders have been unable to secure take or pay or other contracts for a sufficient volume of coal. Further, market dynamics have resulted in underutilization of existing rail

and port infrastructure for coal in Mozambique. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶¶ 86-104.

144. PEL’s efforts to equate the current Project envisioned (but still not built by) ITD [or TML], with what was outlined in any way in the PFS, are entirely inappropriate. *See* SOC ¶ 2. The PFS contemplated the “development of 25 MTPA handling capacity Port at Macuse” and a “516km standard gauge rail corridor from Macuse to Moatize.” *Every fundamental term is different in the TML Project*. TML proposes a 33 MTPA handling capacity port, located on the other side of the river in Macuse, connecting to a cape gauge railway, that is 639 km long—terminating not in Macuse, but rather at in Chitima, to secure offtake from mines never contemplated in the PFS. *See RER-1*, Expert Report of MZBetar § 5.5. Numerous other significant differences exist. *Id.* (discussing differing axle loads, train formations, port parameters, port capacities, vessel sizes, length and layout of terminal berths and port, alignment of the rail route, and so forth).
145. In short, PEL greedily seeks to collect the forecasted lost profits of a still-unbuilt project, designed and studied by a different entity, that is different in every key metric from what PEL simply reviewed in a modest Pre-Feasibility Project.
146. Because, among other things, the Project has not been built, has not generated revenue or expenses, and (at least as proposed by PEL) would not have been viable, PEL’s claim for lost profits and damages under the MOI fails and is futile PEL’s purported damages are speculative, illusory, and unfounded.

L. PEL Violated the Confidentiality Clause in the MOI.

147. Clause of the MOI contains a confidentiality clause: “The parties have agreed to keep all the data, documents, information, and share [sic] between them whether written or otherwise, including this MOI as confidential until the approval of the project.” *See Exhibits R-1 & R-2*, MOI, Clause 11.
148. Based on information and belief, PEL violated the confidentiality clause by disclosing information regarding the existence and terms of the MOI with various third parties, including but not limited to Grindrod, SPI, Rio Tinto, and Jindals.

149. Further, PEL also violated the confidentiality clause by publicly disclosing information regarding the MOI to the press. PEL made such disclosures to *The Economic Times*, an Indian newspaper in Mumbai. See **Exhibit R-39**, attaching a copy of an article, dated 15 August 2013, entitled “Patel Engg Seeks Clarity from Mozambique on 46-bn Project.” The article quotes “a spokesperson at Patel Engineering” and reports that “Patel Engineering had earlier entered into a Memorandum of Understanding (MoU) with the Mozambique government for a pre-feasibility study of the project. At that time, it was agreed that if the project is found to be feasible, then the same would be awarded to the company, sources said.”
150. PEL’s violation of the confidentiality clause constitutes a breach and anticipatory repudiation of the MOI.

M. PEL Made False and Defamatory Public Statements About Mozambique and the MTC, Causing Injury to Mozambique and the MTC.

151. As discussed, on 15 August 2013, a PEL spokesperson made statements to *The Economic Times*, reported by that newspaper. See *id.* The article quotes “a spokesperson at Patel Engineering” and reports that: “While Indian infrastructure firm had earlier emerged as a successful bidder, the Mozambique government later decided to call for global tenders for the project.” *Id.* “When contacted, a spokesperson for Patel Engineering said the change in Mozambique government’s stance came despite the company ‘emerging as the most successful bidder for the project purely on its merits and in-depth knowledge of the project.’” *Id.*
152. The following statements, made intentionally and publicly by the PEL spokesperson directly to *The Economic Times*, were false and defamatory: that PEL “had earlier emerged as a successful bidder” and a “change in Mozambique government’s stance came despite the company ‘emerging as the most successful bidder for the project purely on its merits and in-depth knowledge of the project.’”
153. PEL never “emerged as a successful bidder” and never “emerg[ed] as the most successful bidder for the project purely on its merits and in-depth knowledge of the project.” The winning bidder was ITD. PEL was not even a bidder in the public tender – the bidder was the PGS Consortium, and said consortium was not the successful bidder. PEL’s statement

that there was a “change in Mozambique government’s stance” “despite the company emerging as the most successful bidder” also is false. There was no such change because PEL never emerged as the most successful bidder.

154. PEL’s false and defamatory statements, made in connection with commercial activity of Mozambique and the MTC, constitute defamation *per se*, and should have been reasonably anticipated by PEL to cause, and did cause, injury and damage to the goodwill and reputation of Mozambique and the MTC.

N. PEL Refused to Accept ITD as the Winner and Retaliated in Bad Faith.

155. In addition to not filing a timely administrative appeal, PEL also fails to seek any judicial review of the MTC’s bid tender decision in the Mozambican courts.
156. Instead, six months later, on 18 February 2014, the Mozambican law firm of Sal & Caldeira Advogados, Lda. sent a letter to the MTC, which letter does not even state that they are acting for PEL. *See Exhibit R-40*. Although these lawyers refer to the public tender and bid submitted by the PGS Consortium, the lawyers demand that USD\$4 million in compensation be paid only to PEL pursuant to the MOI. This letter was submitted several months after the deadline to appeal expired.
157. Almost four years later, on 25 June 2018, the English law firm of Addleshaw Goddard sent another letter to the MTC, as counsel for PEL, a copy of which is attached hereto as Exhibit R-41. They now threatened a claim against the Republic of Mozambique pursuant to bilateral investment treaty between India and Mozambique (“MZ-India BIT”), *see RLA-1*, seeking a millionaire windfall of USD\$100-200 million. The letter makes a frivolous claim because, *inter alia*, there was no investment by PEL or violation of the MZ-India BIT by Mozambique.
158. The parties engaged in efforts to try to resolve the subject claims, and were going to meet in Portugal in March, 2020. However, based on the coronavirus pandemic and the prohibitions against travel instituted both by the Governments of Mozambique and the United States (counsel for the MTC and Mozambique is based in the United States), the MTC and Mozambique proposed to PEL that the parties should enter into a standstill agreement without prejudice (that also would suspend the statutes of limitation) for a

reasonable amount of time until they could restart their discussions. However, PEL unreasonably rejected the standstill proposal.

159. Instead, PEL aggravated the dispute and, unfortunately, sought to take advantage of the coronavirus pandemic. On 20 March 2020, and in an act of bad faith because PEL had been advised that the MTC and Mozambique were unable to meet with their recently retained counsel due to coronavirus travel restrictions, PEL's English lawyers served a Notice of Arbitration against the Republic of Mozambique pursuant to the MZ-India BIT. A copy of said Notice of Arbitration is attached hereto as Exhibit R-5. PEL's millionaire international arbitration claim is brought in wrongful retaliation to the MTC's selection of the ITD as the winning bidder, and continues to conceal PEL's blacklisting.
160. In addition, PEL's Notice of Arbitration improperly seeks to institute arbitration under UNCITRAL Rules in London, ignoring that the MOI's arbitration clause mandates ICC arbitration to be located in Mozambique. The MOI's arbitration agreement is severable and enforceable, and encompasses any and all purported claims under Mozambican law and international law, including any claims under the MZ-India BIT. PEL cannot pursue arbitration in alternative forums or under alternative arbitration rules. PEL's actions constitute an abuse of process, that has caused damages to the MTC and Mozambique.

O. MTC and Mozambique Properly Commenced an ICC Arbitration against PEL, which is Pending.

161. Accordingly, to protect their rights, the Republic of Mozambique and MTC initiated an ICC arbitration in Mozambique against PEL pursuant to the MOI's arbitration agreement. Mozambique and the MTC duly filed the ICC arbitration pursuant to the arbitration agreement in the MOI, which is severable from the MOI and requires arbitration under ICC Rules 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.

Exhibit R-2, MOI, Clause 10 (emphasis added).

162. Both the arbitration agreement and the MOI are governed by Mozambican law. *See id.* at Clauses 8 (“The implementation of a project shall be done within the laws approved by the Gov’t of Mozambique”), 9 (applying Mozambican Law No. 6/2004 of June 17) & 10 (“The arbitration will be governed by Mozambique law ...”).
163. The ICC Arbitration Rules are sufficiently broad to permit arbitration of investment treaty claims, and the ICC regularly does so, as this Tribunal is aware.
164. In the ICC arbitration, Mozambique and the MTC have placed at issue both the contractual and the investment treaty disputes. This UNCITRAL proceeding is subsumed within the ICC arbitration. Mozambique and the MTC seek the relief specified in **Exhibit R-46**, ICC Request for Arbitration at ¶ 280, which includes determination of rights regarding the Treaty claims. PEL has appeared in that ICC arbitration, is participating, has filed an answer and has requested affirmative relief.
165. The MOI’s arbitration agreement is not a local judicial forum selection clause or a local arbitration clause limited to contractual disputes. It provides for arbitration under the ICC Rules, and it mandates ICC arbitration for “any disputes arising out of” the MOI. ICC arbitration is broad enough to permit the assertion of investment treaty claims. There is nothing in the ICC Rules that bars consideration of investment treaty claims, and investment treaty disputes have been resolved through ICC arbitration. Therefore, the arbitration agreement in Clause 10 of the MOI required PEL to bring its investment treaty claims in an ICC arbitration in Mozambique.

III. PEL’S CLAIMS ARE INADMISSIBLE OR THE TRIBUNAL MUST DECLINE JURISDICTION BASED ON PEL’S FRAUDULENT CONCEALMENT OF ITS BLACKLISTING BY THE GOVERNMENT OF INDIA, PEL’S CONVICTION BY THE SUPREME COURT OF INDIA, PEL’S SUBSEQUENT DEBARMENT IN INDIA, AND PEL’S ATTEMPTED BRIBERY OF THE MTC MINISTER.

166. “[A]dmissibility’ and ‘jurisdiction’ are two distinct legal concepts under international law, which governs the judicial function of international courts and tribunals.” **RLA-112**, *Achmea B.V. v. Slovak Republic II*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014) ¶ 114. “The key element to determine the jurisdictional character of an objection is assessing whether it addresses the Parties’ consent to the relevant dispute settlement mechanism, and the scope of such consent.” *Id.* at ¶ 116. “The

jurisdiction of a tribunal goes to the power to decide a specific dispute, *whereas admissibility relates to the ability to exercise that power and speaks to the characteristics of a particular claim and whether it is fit to be heard by a tribunal.*” *Id.* at ¶ 115 (emphasis added).

A. PEL’s Claims Are Inadmissible or the Tribunal Must Decline Jurisdiction, Based on PEL’s Fraudulent Concealment of its Blacklisting, PEL’s Conviction by the Supreme Court of India, and PEL’s Subsequent Debarment.

167. PEL’s claims are rendered inadmissible (or, in the alternative, the Tribunal must decline jurisdiction) because PEL fraudulently concealed from the MTC and Mozambique that, contemporaneously with its dealings with the MTC and Mozambique, PEL had been blacklisted by the Indian Government in connection with a public infrastructure project, and had been adjudicated by the Indian Supreme Court to be “not commercially reliable and trustworthy.” PEL concealed these material facts in order to fraudulently induce, and so fraudulently induced, the MTC and Mozambique to have dealings with PEL. Had the MTC and Mozambique known these material facts, they would have revoked the MOI, any approvals and any authorization for PEL to participate in the public tender, and would have ceased all dealings with PEL. PEL’s nondisclosure also violates the duties of good faith and transparency that are imposed by both national and international law.

168. Serious misconduct by a purported investor in connection with the making of an investment is a basis to decline jurisdiction:

[T]he investor’s conduct ... can be an integral part of a tribunal’s evaluation of jurisdiction, merits, and damages. This is especially true with respect to allegations of serious illegality and misconduct by the investor. While investor illegality or misconduct during the life of an investment may give rise to a merits defense (e.g., as justification for the State’s conduct), *fundamental illegality or misconduct in the making of an investment in certain circumstances may defeat jurisdiction entirely. The underlying theory is that treaty protection does not attach to, and investor-State arbitration is unavailable for, investments that: (1) are inherently illegal as a matter of host State law or international public policy; or (2) were procured only as a result of illegality or misconduct.*

See **RLA-127**, J. Kalici, D. Evseev & M. Silberman, *Building International Investment Law: The First 50 Years of ICSID*, WOLTERS KLUWER (2016) at 127.

169. Fraudulent concealment and conduct, in violation of national or international principles of good faith, constitute such serious misconduct that will render a claim inadmissible:

An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. These are general principles that exist independently of specific language to this effect in the Treaty.

See RLA-29, Gustav FW Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (18 June 2010) ¶¶ 123-124 (emphasis added).

170. It is an internationally recognized legal principle that a party may avoid a contract where it has been led to enter into the contract on the basis of a material fraudulent non-disclosure or concealment by the other party under circumstances where the concealed or non-disclosed fact should have been disclosed.

171. For example, in *Inceysa*, the tribunal held that the claimant's fraudulent conduct – involving misrepresentation of its financial status and industry expertise during the public bidding process – violated these principles of international law: (1) the principle of good faith, (2) the principle that no one should be permitted to profit from their own fraud, (3) international public policy, and (4) the prohibition against unlawful enrichment, and therefore the tribunal dismissed the investor's claim. *See RLA-30, Inceysa Vallisoletana, S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (2 August 2006) ¶¶ 230-258. "Good faith is a supreme principle, which governs legal relations in all of their aspects and content." Id. at 230. "In the contractual field, good faith means absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties." Id. at ¶ 231. "Any legal relation starts from an indispensable basic premise, namely the confidence each party has in the other. If this confidence did not exist, the parties would have never entered into the legal relation in question, because the breach of the commitments assumed would become a certainty, whose only undetermined aspect would be the question of time." Id. at ¶ 232 (emphasis added). "This implicit confidence that should exist in any legal relation is based on the good faith with which the parties must act when entering into the legal relation, and which*

is imposed as a generally accepted rule or standard. Asserting the contrary would imply supposing that the commitment was assumed to be breached, which is an assertion obviously contrary to the maxim *Pacta Sunt Servanda*, unanimously accepted in legal systems.” *Id.* at ¶ 233.

172. The *Inceysa* tribunal emphasized the following violations of good faith by Inceysa:

(i) Inceysa’s presentation of false financial information as part of the tender made by it to participate in the bid; (ii) false representations during the bidding process, in connection with the experience and capacity necessary to comply with the terms of the Contract, particularly concerning its alleged strategic partner; (iii) falsity of the documents by which Inceysa sought to prove the professionalism of Mr. Antonio Felipe Martinez Lavado, on whose career in large measure it based its alleged aptness to perform the functions entrusted to it when winning the bid; and (iv) the fact that it had hidden the existing relationship between Inceysa and ICASUR, in clear violation of one of the fundamental pillars of the bidding rules.

Id. at ¶ 236.

173. Therefore, the *Inceysa* tribunal held:

In light of the foregoing, and considering the violations of Salvadoran law committed by Inceysa when making its investment, as described in the previous pages, this Tribunal decides that Inceysa cannot benefit from the rights granted by the Investment Law because its ‘investment’ does not meet the condition of legality necessary to fall within the scope and protection of that law. *Consequently, this Arbitral Tribunal denies the jurisdiction of the Centre and its competence to decide the claim arising from Inceysa’s investment.*

Id. at ¶ 264 (emphasis added).⁷

1. Under Indian Law, the Legal and Business Effects of Blacklisting are Substantial and Devastating.

174. Respondent has submitted herewith the Expert Report of Gourab Banerji (“Banerji Expert Report”). *See RER-4.* Mr. Banerji is barrister admitted to practice law in India, a former

⁷ Stated differently, such violations constitute “unclean hands,” barring admissibility of a claim. The “clean hands” doctrine has been defined as “an important principle of international law that has to be taken into account whenever there is evidence that an investor has not acted in good faith and that it has come to court with unclean hands.” This precludes claims made by an investor with unclean hands in relation to that investment. **RLA-129**, Rahim Moloo, *A Comment on the Clean Hands Doctrine in International Law* (2010) ¶ 1.

Additional Solicitor General of the Government of India, and now a Senior Advocate and an Overseas Associate with Essex Court Chambers, London. *Id.* at ¶ 1.

175. PEL is an entity formed and existing under Indian law, and headquartered in India. Mr. Banerji explains that, under Indian law, the legal effects of blacklisting are fairly well-settled. Back in 1975, the Supreme Court of India, in *Erusian Equipment*, highlighted that a blacklisting must have a valid and solid rationale behind it because of the serious negative effects it has on the person blacklisted. See **RLA-16**, *Erusian Equipment & Chemicals Ltd. v. State of West Bengal*, 1 SCC 70 (1975). Blacklisting has been described as “civil death” of the person or entity foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person or entity from participating in government tenders which means precluding the person or entity from the award of government contracts. See **RER-3**, Expert Report of Gourab Banerji ¶ 3.

176. The Supreme Court of India has held, as follows:

12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. *The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting.* A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

[...]

20. *Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned*

should be given an opportunity to represent his case before he is put on the blacklist.

See **RER-3**, Expert Report of Gourab Banerji ¶ 4 (citing India Supreme Court judgment *Erusian Equipment & Chemicals Ltd. v. State of West Bengal*, 1 SCC 70 (1975) ¶¶ 12, 20 (emphasis added)).

177. This stand was reiterated by the Supreme Court of India in *Raghunath Thakur*. **RLA-17**, *Raghunath Thakur v. State of Bihar*, 1 SCC 229 (1989). The relevant paragraph from the judgment is quoted below:

4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. *It has to be realized that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event.* Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the blacklist in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order will, however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is so entitled to do in accordance with law i.e. after giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefor. We, however, make it quite clear that we are not expressing any opinion on the correctness or otherwise of the allegations made against the appellant. The appeal is thus disposed of.

See **RER-3**, Expert Report of Gourab Banerji ¶ 5 (citing India Supreme Court judgment in **RLA-17**, *Raghunath Thakur v. State of Bihar*, 1 SCC 229 (1989) ¶ 4 (emphasis added)).

178. In a recent judgment of the Supreme Court of India in *Gorkha Security*, after elucidating the legal position, the Supreme Court gave its verdict as to the form and content of the show cause notice that is required to be served before deciding as to whether the noticee is

to be blacklisted or not. See **RER-3**, Expert Report of Gourab Banerji ¶ 6; **RLA-18**, *Gorkha Security Services v. Govt. NCT of Delhi*, 9 SCC 105 (2014).

179. On this question, the Supreme Court of India observed:

21) The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of Show Cause Notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22) However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz: i) The material/ grounds to be stated on which according to the Department necessitates an action; ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

See **RER-3**, Expert Report of Gourab Banerji ¶ 7 (citing India Supreme Court judgment in **RLA-18**, *Gorkha Security Services v. Govt. NCT of Delhi*, 9 SCC 105 (2014) ¶¶ 21-22).

180. In that case, as the appropriate procedure had not been followed, the order of blacklisting was set aside but leave was given to take action after complying with the procedural formalities delineated above. See **RER-3**, Expert Report of Gourab Banerji ¶ 8.

181. This judgment has been recently followed by Supreme Court of India in the case of *UMC Technologies* (where Mr. Banerji had the privilege of appearing on behalf of the Petitioner). See **RER-3**, Expert Report of Gourab Banerji ¶ 9; **RLA-19**, *UMC Technologies v Food Corporation of India*, SCC Online SC 934 (2020).

182. The Supreme Court of India observed that:

... Here, it may be gainful to describe the concept of blacklisting and the graveness of the consequences occasioned by it. *Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into*

government contracts. This privilege arises because it is the State who is the counterparty in government contracts and as such, every eligible person is to be afforded an equal opportunity to participate in such contracts, without arbitrariness and discrimination. Not only does blacklisting takes away this privilege, it also tarnishes the blacklisted person’s reputation and brings the person’s character into question. *Blacklisting also has long-lasting civil consequences for the future business prospects of the blacklisted person.*

See **RER-3**, Expert Report of Gourab Banerji ¶ 10 (citing India Supreme Court judgment in **RLA-19**, *UMC Techs. v Food Corp. of India*, SCC Online SC 934 (2020) ¶ 14 (emphasis added)).

183. Accordingly, Mr. Banerji concludes that “the legal effect of blacklisting under Indian law is that many negative consequences follow. It is described as “civil death” of the person or entity who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person or entity from participating in government tenders which means precluding the person or entity from the award of government contracts.” See **RER-3**, Expert Report of Gourab Banerji ¶ 11.

2. PEL Was Blacklisted by the Government of India in Connection with an Infrastructure Project and the Supreme Court of India Adjudicated that PEL “Was Not Commercially Reliable and Trustworthy.”

184. PEL was blacklisted by the Indian government in connection with an infrastructure project, and the Supreme Court of India rejected PEL’s legal challenge to that blacklisting and adjudicated that PEL “was not commercially reliable and trustworthy.”
185. Based on Mr. Banerji’s research, the facts and circumstances of PEL’s blacklisting in India were, as follows:
- The National Highways Authority of India (‘NHAI’) had invited bids for development and operation/maintenance of National highway 6 (NH 6) in West Bengal and Odisha. PEL was the successful bidder. NHAI accepted the bid by its letter dated 17 January 2011. See Delhi High Court’s judgment in *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011). See **RLA-20** ¶ 1.
 - However, on 24 January 2011, PEL expressed its inability to confirm its acceptance on the ground that its bid was found not commercially viable, on a second look. NHAI, after issuing a Show Cause Notice to PEL, debarred/blacklisted it from participating/bidding from future projects to be undertaken by NHAI for a period of one year from the date of issue of the letter

dated 20 May 2011. PEL challenged the blacklisting before the Delhi High Court which upheld NHAI's blacklisting order. *Id.* at ¶ 2.

- PEL *inter alia* submitted that it was aggrieved by the website display of NHAI where the name of the Petitioner is shown with the remark “*the applicant has been debarred by NHAI.*” PEL argued that this may have an effect on the other tenders issued by third parties, in which it may want to participate. *Id.* at ¶ 16.

Id. at ¶ 13.

186. Further, Mr. Banerji explains that, in its judgment, dated 2 August 2011, in *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011), see **RLA-20**, the Division Bench [of the Delhi High Court], speaking through Sanjay Kishan Kaul, J., (presently a judge of the Supreme Court) discussed the matter threadbare and held that the action of NHAI was

...completely justified and in accordance with law. The Petitioner, a corporate entity, knew the nature of bid it was making. It made a bid for RS 190.57 crores. On having found out that the next highest bid of H-2 was for Rs. 126.06 crores (as revised), though the original bid was even lower, it had a second thought and under the garb of ostensibly re-visiting a business decision withdrew from the tender. It naturally bore the financial consequences of the bid security amount being forfeited without any demur or protest. What the Petitioner seeks by way of the present writ petition is a right to continue to participate in the tenders to be issued of Respondent No. 2 in the near future despite the aforesaid conduct. We cannot lose sight of the fact that Respondent No. 2 is dealing with highway projects all over the country which are of *critical national importance both in terms of their economics and logistical relevance.* Expeditious construction of road links is an important part of infrastructure development of the country. Any delay in such infrastructure projects is a national waste. In such a situation for the Petitioner to have withdrawn at the last minute, ostensibly on the ground of prudent commercial decision can certainly invite the consequences of the tendered declining to deal with such an entity for a specified period of time...

In our considered view, such an action by Respondent No. 2, in the given facts and circumstances of the case, is a decision which any prudent businessman placed in a similar situation would naturally have taken to deter such like entities from conducting themselves in *a manner, to say the least, which is unbusinessman like.* In such circumstances, it would be both unfair and unreasonable for the court to issue a direction requiring Respondent No. 2 to deal with a person (i.e., the Petitioner) who had no qualms in *ditching the project at the nth hour.*

- See RER-3*, Expert Report of Gourab Banerji ¶ 14 (citing Delhi High Court judgment, Exhibit 6 to the Report ¶¶ 20-21 (emphasis added)).
187. Mr. Banerji notes that the emphasized portion in the passage set out above shows that in an infrastructure project of critical national importance, both in terms of economic and logistical sense, PEL acted in an “unbusinessman” like manner by ditching the project at the nth hour. *See RER-3*, Expert Report of Gourab Banerji ¶ 15.
188. Another grievance of PEL was that it was aggrieved by the website display of the NHAI where its name was shown with the remark “*the applicant has been debarred by NHAI.*” PEL argued that this may have an effect on the other tenders issued by third parties, in which PEL may want to participate. *See RER-3*, Expert Report of Gourab Banerji ¶ 16.
189. As Mr. Banerji cites, this was repelled by Delhi High Court, by holding as follows:
- Insofar as the display on website is concerned, the same is only stating a fact that Respondent No. 2 has taken a decision to debar the Petitioner from further dealing for a period of one year. It is not a debarment qua any third party. *It is for the third parties to take an informed decision whether they would like to deal with the Petitioner keeping in mind the conduct of the Petitioner qua Respondent No. 2. We can only sum up by noting that the consequences which flowed in this case pursuant to the conduct of the Petitioner are those, which are of, the Petitioner’s own making; it has no one else to blame but itself.*
- See RER-3*, Expert Report of Gourab Banerji ¶ 17 (citing Delhi High Court judgment, Exhibit 6 to the Report ¶ 24 (emphasis added)).
190. Accordingly, PEL’s Writ Petition was dismissed with heavy costs of INR 1,000,000 imposed on PEL. *See RER-3*, Expert Report of Gourab Banerji ¶ 18 (citing Delhi High Court judgment, Exhibit 6 to the Report ¶ 25).
191. Moreover, Mr. Banerji then discusses what took place in this case after it reached the highest court of India. Subsequently, on 11 May 2012, the Supreme Court of India entered a Judgment in this same case of *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059 (2011). *See RER-3*, Expert Report of Gourab Banerji ¶ 19 (citing to **RLA-21**).
192. As noted, the NHAI had decided to undertake development and operation of a highway in the States of West Bengal and Orissa “on [a] design, build, finance, operate and transfer” “toll basis project through [a] public private partnership.” *See RER-3*, Expert Report of

Gourab Banerji ¶ 20 (citing India Supreme Court judgment, Exhibit 7 thereto at ¶ 1). A public tender bidding process was conducted by the NHAI. *Id.* at ¶ 2. PEL was one of fourteen bidders in the public tender. *Id.* at ¶ 3. The NHAI informed PEL “that its bid had been accepted and [PEL] was called upon to confirm its acceptance within 7 days.” *Id.* However, in response, on 24 January 2011, PEL “expressed its *inability to confirm its acceptance on the ground that its bid was found not commercially viable on a second look.*” *Id.* (emphasis added).

[The NHAI] issued a show-cause notice on 24-02-2011 calling upon [PEL] to explain as to why action debarring (blacklisting) the company for a period of 5 years from participating or bidding for future projects to be undertaken by [the NHAI] should not be taken. On 01-03-2011, [PEL] replied to the show cause notice. Two months later, [the NHAI] through its letter dated 20-05-2011 communicated the order that barred [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.

See **RER-3**, Expert Report of Gourab Banerji ¶ 20 (citing India Supreme Court judgment, Exhibit 7 thereto at ¶ 4 (emphasis added)).

193. Counsel for PEL argued, before the Supreme Court of India, that the NHAI’s decision to “blacklist” PEL was “without any authority of law” because “refusal to enter into a contract can never be classified as an act of fraud or a corrupt practice warranting the blacklisting of such defaulting bidder.” See **RER-3**, Expert Report of Gourab Banerji ¶ 21 (citing India Supreme Court judgment, Exhibit 7 thereto at ¶ 6).
194. Counsel for the NHAI argued, before the Supreme Court of India, that the NHAI was legally justified in blacklisting PEL. NHAI counsel cited a prior Supreme Court of India precedent holding that: “*Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains.*” See **RER-3**, Expert Report of Gourab Banerji ¶ 22 (citing India Supreme Court judgment, Exhibit 7 thereto at ¶ 11 (emphasis added)).
195. Mr. Banerji notes that the Supreme Court of India rejected PEL’s arguments and agreed with the NHAI, concluding that PEL “was not commercially reliable and trustworthy.” Specifically, the Supreme Court of India held:

We do not find any illegality or irrationality in the conclusion reached by [the NHAI] that ***[PEL] is not (commercially) reliable and trustworthy*** in the light of its conduct in the context of the transaction in question. We cannot find fault with [the NHAI's] conclusion because ***[PEL] chose to go back on its offer*** of paying a premium of Rs.190.53 crores per annum, ***after realizing that the next bidder quoted a much lower amount.***

See **RER-3**, Expert Report of Gourab Banerji ¶ 23 (citing India Supreme Court judgment, Exhibit 7 thereto at ¶ 24 (emphasis added)).

196. In stern language, the Supreme Court of India further held that PEL must be punished and suffer the consequences of being blacklisted:

The dereliction, such as the one indulged in by [PEL], if not handled firmly, is likely to result in recurrence of such activity not only on the part of [PEL], but others also, who deal with public bodies, such as [the NHAI] giving scope for unwholesome practices. No doubt, the fact that [PEL] is blacklisted (for some period) by [the NHAI] is likely to have some adverse effect on its business prospects...

See **RER-3**, Expert Report of Gourab Banerji ¶ 24 (citing India Supreme Court judgment, Exhibit 7 thereto at ¶ 25 (emphasis added)).

197. Therefore, the Supreme Court of India upheld the blacklisting of PEL, holding that PEL ***“is not (commercially) reliable and trustworthy.”*** See **RER-3**, Expert Report of Gourab Banerji ¶ 25.

3. PEL Also Was Subsequently Debarred from Another Indian Project.

198. PEL also was subsequently debarred in another Indian government project, and these facts also were never disclosed to the MTC or Mozambique government.
199. PEL has been subject to subsequent adverse legal action arising out of the earlier blacklisting. In 2015, PEL had participated in a tender issued by the Water Resources Department of the State of Jharkhand. The tender had been floated for Construction of Canal Tunnel from 12.22 to 13.95 Km. of Kharkai Right Main Canal on Turnkey Basis for an estimated cost of INR. 137 Crores. See **RER-3**, Expert Report of Gourab Banerji ¶ 27 (**RLA-22**, *M/s Patel Engineering Limited v. The State of Jharkhand and Others*, SCC Online Jhar 974 (2016) (“PEL v. Jharkhand”) ¶ 2).
200. When the Tender Committee sat to consider the financial bids of the two bidders, it came to their notice that PEL had been debarred by NHAI, and its bid was disqualified for not

confirming to condition no. 20 of the Notice Inviting Tender [NIT] which required that the interested bidder should not have been blacklisted for the last five years. Interestingly, during this bid, PEL had only disclosed that it was not debarred or blacklisted by Jharkhand state. A fresh tender was floated and this time the Tender Committee found that PEL was ineligible to participate on account of the debarment order of the NHAI, which incidentally was disclosed. See **RER-3**, Expert Report of Gourab Banerji ¶ 28 (**RLA-22**, *PEL v. Jharkhand*, SCC Online Jhar 974 at ¶ 2).

201. PEL argued that the condition at Clause 21 of the NIT could not operate across all orders of blacklisting passed by any other State or instrumentality, but had to be confined only to such debarment/blacklisting order of the State of Jharkhand. See **RER-3**, Expert Report of Gourab Banerji ¶ 29 (citing **RLA-22**, *PEL v. Jharkhand*, SCC Online Jhar 974 at ¶ 4).
202. PEL's argument was squarely rejected by the Jharkhand High Court. Following the observations of the Supreme Court in *Kulja Industries*, the Jharkhand High Court repelled the contention of PEL that incorporation of condition at Clause 21 of NIT should be read to be confined to debarment/blacklisting only by the State of Jharkhand. See **RER-3**, Expert Report of Gourab Banerji ¶ 30; **RLA-23**, *Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited*, 14 SCC 731 (2014).
203. In these circumstances, PEL's challenge to the decision of Water Resources Department, State of Jharkhand failed and consequently, the Writ Petition was dismissed. Thus, PEL was required to generally disclose its blacklisting when dealing with government entities, not only the particular one that issued the blacklisting. See **RER-3**, Expert Report of Gourab Banerji ¶ 31.
204. It may be noted that this decision is by a Learned Single Judge of the Jharkhand High Court and there does not appear to be any publicly available record of whether PEL appealed against this order or not and if so, the result. See **RER-3**, Expert Report of Gourab Banerji ¶ 32.

4. PEL's Blacklisting Was Substantial and PEL Should Have Disclosed its Blacklisting and the Adjudication of the Indian Supreme Court.

205. Mr. Banerji opines that, under Indian law which governs PEL because it is an entity formed and existing under the laws of India, PEL had an obligation to disclose its blacklisting by

the Indian government and the Supreme Court of India’s adjudication that PEL is “not commercially reliable or trustworthy.”

In my opinion, *PEL had an obligation to disclose the fact of its blacklisting when seeking to participate in other government projects.* This is implicit in the decision cited above which discuss the negative effects of a blacklisting on future business prospects. Government procurement laws, concepts of transparency and good faith, legal duties not to engage in fraudulent concealment of material facts, and general contract principles *require that blacklisted entities, like PEL, disclose their blacklisting to governments with whom they are dealing.*

See **RER-3**, Expert Report of Gourab Banerji ¶ 26 (emphasis added).

5. PEL Fraudulently Concealed in Its Annual Reports that It Had Been Blacklisted and Debarred.

206. PEL also did not disclose, in its Annual Reports for 2011 to 2013, or anytime thereafter, that it had been blacklisted by the Indian government and that the Supreme Court of India had adjudicated PEL to be “not commercially reliable or trustworthy.” See, e.g., **Exhibit R-43**.

207. PEL’s failure to disclose these material facts to its own investors further demonstrates that PEL’s fraudulent concealment was intentional, wrongful and in bad faith.

6. First, PEL’s Claims are Inadmissible because PEL Engaged in Fraudulent Concealment.

208. First, PEL’s instant claims are inadmissible, or this Tribunal lacks or should decline to exercise jurisdiction, because PEL engaged in fraudulent concealment. During all relevant times, PEL fraudulently concealed from the MTC and the Republic of Mozambique that PEL had been blacklisted by the Indian Government and that the Supreme Court of India had adjudicated PEL to be “not commercially reliable and trustworthy.” Had the MTC and Mozambique known these material facts, they would have had no dealings with PEL.

209. The *Inceysa* tribunal, *supra*, concluded that claimant Inceysa could not benefit from its fraud and violation of the bidding rules, rendering its claims inadmissible:

Applying the ... principle indicated [*Ex dolo malo non oritur actio (an action does not arise from fraud)*] to the case at hand, we can affirm that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that *its act had a fraudulent origin*

and, as provided by the legal maxim, ‘nobody can benefit from his own fraud.’

See **RLA-30**, *Inceysa*, ICSID Case No. ARB/03/26 at ¶¶ 240, 242 (emphasis added).

In the dispute brought to this Arbitral Tribunal, there are clear facts and reasons that match the aforementioned supposition, since *Inceysa acted improperly in order to be awarded the bid that made its investment possible and, therefore, it cannot be given the protection granted by the BIT.*

Id. at 243.

The clear and obvious evidence of the violations committed by Inceysa during the bidding process lead this Tribunal to decide that Inceysa’s investment cannot, under any circumstances, enjoy the protection of the BIT. *Allowing Inceysa to benefit from an investment made clearly in violation of the rules of the bid in which it originated would be a serious failure of the justice that this Tribunal is obligated to render.* No legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them.

Id. at 244 (emphasis added).

210. In addition, while the *Inceysa* case dealt with fraudulent misrepresentations, these same principles have been applied to render an investor’s claims inadmissible where the claimant engaged in *the fraudulent concealment of facts*. For example, in *Plama*, the tribunal dismissed the claim, on the basis that the investment *was obtained through fraudulent concealment*, in breach of the principle of good faith and international public policy, and contrary to Bulgarian and international law.

The investment . . . was, therefore, the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery [T]his behavior is contrary to other provisions of Bulgarian law and to international law and . . . it, therefore, precludes the application of the protections of the ECT.

RLA-31, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) ¶ 135 (emphasis added).

211. Indeed, the claimant’s fraudulent concealment can render a claim inadmissible because, just as the government has transparency obligations, so does the investor. See **RLA-32**, *Fraport AG Frankfurt Airports Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007) ¶ 402 (“As for policy, BITs oblige

- governments to conduct their relations with foreign investors *in a transparent fashion. Some reciprocal if not identical obligations lie on the foreign investor.*”) (emphasis added).
212. PEL was obligated to disclose to the MTC and Mozambique that the Indian Government had blacklisted it and that the Supreme Court of India had held it “was not commercially reliable and trustworthy.” This obligation of disclosure is implicit in internationally recognized principles of good faith, because “[a]n investment will not be protected if it has been created in violation of national or international principles of good faith; by ... fraud or deceitful conduct These are general principles that exist independently of specific language to this effect in the Treaty.” See **RLA-29**, *Hamester*, ICSID Case No. ARB/07/24 at ¶¶ 123-124.
213. Under international law principles of good faith, PEL had this obligation of disclosure from the beginning of its interactions with the MTC and Mozambique, and its obligation continued thereafter during the entirety of PEL’s negotiations and dealings with the MTC and Mozambique. “*Any legal relation starts from an indispensable basic premise, namely the confidence each party has in the other. If this confidence did not exist, the parties would have never entered into the legal relation in question...*” See **RLA-30**, *Inceysa*, ICSID Case No. ARB/03/26 at ¶ 232 (emphasis added). “In the contractual field, *good faith means absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment*, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties.” *Id.* at ¶ 231 (emphasis added).⁸
214. Nonetheless, despite the foregoing disclosure obligations, PEL intentionally and fraudulently concealed from the MTC and Mozambique that PEL had been blacklisted by the Indian Government and that the Supreme Court of India had adjudicated PEL to be “not commercially reliable and trustworthy.”
215. In this regard, Minister Paulo Zucula, who was the MTC Minister who engaged in the subject negotiations with PEL, confirms in his witness statement that PEL’s representatives never disclosed these material facts to him or the MTC:

⁸ PEL also had an obligation of disclosure under Mozambican law and the public procurement documents, as discussed below.

In connection with this proceeding, I have been informed that PEL was ‘blacklisted’ by the Government of India and that the Supreme Court of India upheld the blacklisting and stated that PEL was not commercially reliable or trustworthy. *PEL never disclosed these material facts to the MTC or me. If these facts had been disclosed by PEL, as they should have, the MTC would have rescinded the MOI and any authorization for PEL to participate in the public tender, and would have ceased all further dealings with PEL.*

See **RWS-2**, Witness Statement of Paulo Zucula ¶ 24 (emphasis added).

216. Similarly, Mr. Chauque, who was the MTC legal counsel who engaged in the subject negotiations with PEL, also confirms in his witness statement that PEL’s representatives never disclosed these material facts to him or the MTC. See **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 25-27.
217. Both Mr. Zucula and Mr. Chauque confirm that, if these material facts had been disclosed to them or the MTC, the MTC would have rightfully ceased all further dealings with PEL. Accordingly, the record confirms that the PEL engaged in a fraudulent concealment that induced the MTC to have dealings with PEL.
218. The key dates are, as follows. As discussed above, on 20 May 2011, after issuing a Show Cause Notice to PEL, the NHAI debarred/blacklisted PEL from participating/bidding from future projects to be undertaken by NHAI for a period of one year from the date of issue of the letter dated 20 May 2011. On 2 August 2011, the Delhi High Court upheld the blacklisting rejecting PEL’s legal challenge. And, on 11 May 2012, the Supreme Court of India also rejected PEL’s legal challenge and held PEL to be “not commercially reliable and trustworthy.” This time period overlaps with the time period involving the critical negotiations and dealings between PEL and the MTC.
219. PEL and the MTC signed the MOI on 6 May 2011. See **Exhibit R-1 & R-2** (Portuguese and English versions of the MOI). Just 14 days later, on 20 May 2011, the NHAI issued its letter blacklisting and debarring PEL for one year. Nonetheless, and although it had just signed the MOI, PEL concealed from the MTC that it had been blacklisted, in order to induce the MTC to continue participating in the process under the MOI. Once it was blacklisted on May 20, PEL should have immediately disclosed its blacklisting to the MTC.

220. PEL did not provide the PFS to the MTC and request approval of the PFS until one year later on 15 May 2012, *see Exhibit R-9*, and the MTC did not accept the PFS until 15 June 2012, *see Exhibit R-10*. Therefore, it is clear that there was *a one-year period of time* (between PEL's blacklisting on 20 May 2011 and the MTC's acceptance of PEL's PFS on 15 June 2011) during which PEL fraudulently concealed from the MTC that PEL had been blacklisted in India and within which the blacklisting was in effect (since it lasted for one year). During this one-year period, the Delhi High Court upheld the blacklisted rejecting PEL's legal challenge on 2 August 2011, and the Supreme Court of India also rejected PEL's legal challenge and held PEL to be "not commercially reliable and trustworthy" on 11 May 2012. Therefore, within this one-year period, not only was PEL blacklisted by the Indian Government, but both the Delhi High Court and the Supreme Court of India rejected PEL's legal challenge to the blacklisting, and the Supreme Court of India held PEL to be "not commercially reliable and trustworthy." PEL concealed all these facts from the MTC.
221. As indicated by Mr. Zucula and Mr. Chauque above, if PEL had disclosed these facts to the MTC, the MTC would have stopped all further dealings with PEL. This means that the PFS would have never been approved by the MTC, because it was approved on 15 June 2012, after the Delhi High Court upheld the blacklisted rejecting PEL's legal challenge on 2 August 2011, and the Supreme Court of India also rejected PEL's legal challenge and held PEL to be "not commercially reliable and trustworthy" on 11 May 2012. If the PFS was not approved, it is clear that PEL would have had no rights under the MOI, and that would have ended all dealings between PEL and the MTC.
222. Under principles of good faith and fair dealing, the fact that the blacklisting in India ended after the PFS was approved did not end PEL's disclosure obligation thereafter, because PEL concealed the existence of the blacklisting from the MTC and fraudulently induced it to approve the PFS while it was in effect. PEL's argument that after the blacklisting ended, it no longer had an obligation to disclose is ludicrous, because if that were the case a party could simply conceal a blacklisting and ran out the clock. Given that PEL had fraudulently induced for over twelve months the MTC to continue dealing with it and approve the PFS, PEL had an ongoing obligation to reveal that fraud to the MTC even thereafter. Continuing concealment does not extinguish fraud and, instead, is further evidence of PEL's bad faith.

223. Indeed, PEL's fraudulent concealment continued. Lacking knowledge of the blacklisting, the MTC continue discussions with PEL after submittal of the PFS. As Minister Zucula recalls, although the PFS was insufficient, "[i]n good faith, the MTC continued discussions and gave PEL the benefit of the scoring advantage for the public tender contest PEL struggled to provide required information about its PFS and failed to reach agreement with CFM. PEL's position then changed and PEL asserted, instead, that it should be provided a direct award." See **RWS-2**, Witness Statement of Paulo Zucula ¶ 18. If the MTC had been informed of the blacklisting, the MTC would have ceased all further dealings with PEL, and never provided PEL with a bidding point advantage nor allowed it to participate in the bidding contest. This also would have rapidly ended any continued requests by PEL for a direct award.
224. On 18 June 2012, PEL sent a letter to the MTC purporting to "exercise" its right of refusal. See **Exhibit R-11**. In its June 18 letter, PEL continued to conceal from the MTC that, one month before on 11 May 2012, the Supreme Court of India had entered the Judgment upholding India NHA's blacklisting and adjudging PEL to be "not commercially reliable and trustworthy." *Id.* Had these facts been disclosed, the MTC would have had no further dealings with PEL and would have voided, assuming it was not void already, the MOI.
225. In a letter dated 22 June 2012 to the MTC, PEL undertook to have direct negotiations with CFM. PEL confirmed that it would "dialogue with CFM and keep [the MTC] apprised about the developments on a regular basis." See **Exhibit R-12**. Obviously, if PEL had disclosed its blacklisting to CFM, that also would have ended those conversions.
226. Then, PEL engaged in a new fraudulent act. On 15 August 2012, PEL wrote to the MTC stating that it had "initiated talks with CFM to set up a SPV to develop the PROJECT" and claiming to have "complied with all the requirements of the [sic. MOI]." See **Exhibit R-14**. PEL's representation to the MTC that PEL "complied with all the requirements" of the MOI was false and fraudulent, because its negotiations with CFM had not resulted in the formation of the joint company or joint venture envisioned under the MOI. It would not be until seven months later, in a 4 March 2013 letter, that PEL finally disclosed its "inability to reach an agreement with CFM on the terms of the partnership." See **Exhibit R-21**.

227. On October 5, 2012, PEL sent another letter to the MTC now arguing for the first time that “the concession agreement always comes first” and demanding that the MTC sign the concession agreement, although PEL was fraudulently concealing that it had not yet formed the joint company with CFM, and PEL had acknowledged that “per law” “the pre-requisites for signing of a concession agreement is that an SPV is formed with a nation[a] entity” See **Exhibit R-15**. Ultimately, PEL was unable to reach any agreement with CFM on the creation of a company to implement the subject project, rendering the MOI moot. PEL’s Mr. Daga admits that the venture with CFM was not realized. See SOC, CWS-1, Witness Statement of Kishan Daga ¶ 85.
228. On 28 November 2012, PEL wrote to the MTC admitting the MOI violated Mozambican law, and seeking to rewrite it. See **Exhibit R-16**. PEL acknowledged that the Mozambican law “*regime [for] the contracting of the public-private partnerships* provided by Law No. 15/2011 of 10 August, *which establishes the guiding principles for the process of contracting, implementing and monitoring undertakings of public-private partnerships, large scale projects and business concession[s] ... and its regulation[s], approved by Decree No. 16/2012 of 4 June, we understand that ... The standard regime for the contracting of the PPP is public tender, as stated in Article 13 of Law 15/2011.*” *Id.* (emphasis added). PEL has thus admitted that its interpretation of the MOI violated Mozambican law because PPP contracting must be through public tender.
229. Faced with the foregoing, PEL again changed course (as further example of PEL’s bad faith) and requested, for the first time, that it be granted “a direct award” under an extraordinary “last resort” exception to public tender in Mozambican law, although the MOI had never made any findings of extraordinary circumstances. In making this request for a direct award, PEL made new and further fraudulent concealments and misrepresentations to the MTC:

The vast experience that PEL has accumulated in the development of Infrastructure projects in Roads, Highways, port and railway infrastructure and other undertaking of large dimensions and responsibility, we believe that makes PEL a candidate that deserves the trust of a direct award.

See **Exhibit R-15** (5 October 2012 letter from PEL to the MTC; emphasis added).

230. However, although PEL was boasting of its alleged “vast experience” with highway infrastructure projects, PEL again fraudulently concealed from the MTC that PEL’s experience with “highways” in India was that it had been blacklisted. Because PEL was invoking its “experience” with highway infrastructure projects in order to induce the Mozambican government to find extraordinary circumstances to make a direct award to PEL, so PEL was under an obligation to communicate the truth, and the entire truth, to the MTC which included its recent blacklisting in the precise subject matter – highways.

231. PEL’s misrepresentations, in its 5 October 2012 letter to the MTC, are actually blatant and shocking. Seeking to induce the MTC to provide it with a direct award, PEL misrepresents to the MTC that PEL is trustworthy. PEL expressly misrepresents that it is

“a candidate that *deserves the trust* of a direct award.”

See **Exhibit R-15** (emphasis added). However, PEL again fraudulently conceals from the MTC that just five months before, on 11 May 2012, the Supreme Court of India had entered the Judgment instead adjudging *PEL to be*

“*not* commercially reliable and *trustworthy*.”

See **RER-3**, Expert Report of Gourab Banerji ¶ 23 (citing India Supreme Court judgment, Exhibit 7 thereto at ¶ 24 (emphasis added)).

232. This is a serious and intentional misrepresentation by PEL. The lack of “trust” was a significant issue in the blacklisting of PEL. As the Delhi High Court held in its judgment against PEL, PEL had “no qualms in *ditching the project at the nth hour*.” See **RER-3**, Expert Report of Gourab Banerji ¶ 14 (citing Delhi High Court judgment, Exhibit 6 to the Report at ¶¶ 20 and 21 (emphasis added)). PEL underbid the project in India to win it, and then “ditched it.” Indeed, as the Supreme Court of India explained, in holding that PEL “*is not (commercially) reliable and trustworthy*,” “[w]e cannot find fault with [the NHAI’s] conclusion because *[PEL] chose to go back on its offer* of paying a premium of Rs.190.53 crores per annum, *after realizing that the next bidder quoted a much lower amount*.” See **RER-3**, Expert Report of Gourab Banerji ¶ 23 (citing India Supreme Court judgment, Exhibit 7 thereto at ¶ 24 (emphasis added)). Giving this recent history, PEL’s representation to the MTC that it should be provided a direct award because it is worth the

- MTC's "trust" was an outright lie, or at the very least a new and further fraudulent concealment of material facts.
233. The foregoing demonstrates a very serious pattern of fraudulent conduct by PEL. It also confirms that PEL has absolutely no regard for the rule of law and was completely willing to disregard and ignore the judgment of the Supreme Court of India – the same judicial system of the country (India) where PEL is formed, exists and has its headquarters.
234. On 22 January 2013, PEL wrote to MTC, reiterating its old arguments, and again changing course now stating that “we also have SPI a local Mozambican company as our potential partner who are in this project right from the beginning and actively participating.” *See Exhibit R-18*. PEL asked the MTC “*to stall the tender process*” and “start negotiation on [a] concession agreement in parallel ...” *Id.* This request by PEL shows further disregard for the rule of law. By now, PEL had already written to the MTC admitting that, under Mozambican PPP Law, a public tender was required. Now, PEL blatantly requests that the MTC “stall the tender process” in order to provide PEL an undue advantage over the other bidders (although PEL was already been provided a bidding scoring advantage). Of course, the MTC was not going to “stall” the bidding process and, on 14 February 2013, the MTC wrote to PEL explaining that the public tender would go forward. *See Exhibit R-19*.
235. On or about 30 January 2013, the MTC published a request for manifestations of interest for the project. Twenty-five companies submitted expressions of interest, and the MTC then invited six to participate, including the PGS Consortium. *See Exhibits R-22 & R-23*. On 8 March 2013, a consortium consisting of PEL, Grindrod and SPI sent a written expression of interest to the MTC. *See Exhibit R-24*. However, this consortium also failed to disclose and continued to conceal PEL's blacklisting by the Indian Government. If these facts had been disclosed, the MTC would not have allowed PEL or its consortium to participate in the public tender process for this project.
236. As a further example of bad faith (this time in complete disregard of the rights of its consortium partners), just four days after sending the written expression of interest to the MTC *on behalf of the consortium*, PEL changes course again and sent another letter, dated 12 March 2013, to the MTC, now again arguing that PEL alone is entitled to the concession under the MOI. *See Exhibit R-25*. In its March 12 letter, PEL demands that it is “entitled

to proceed with the project as per the terms of the [MOI]” *Id.* This further confirms that total lack of corporate ethics at PEL, and this letter is apparently fraudulently concealed from PEL’s consortium partners because PEL does not copy them on this letter. PEL’s efforts to disrupt standard PPP procurement practices and receive a direct award constituted a violation of its commitments and duties to its other consortium members. PEL promised its more experienced PGS Consortium partners—Grindrod and SPI—that it would not “directly or indirectly, submit an EOI or participate in the Project other than through the Consortium and/or the SPV.” SOC, Ex. C-60, Memorandum of Understanding between PEL, Grindrod, and SPI, Clause 6 (“Exclusivity”). Yet, this was just another lie by PEL. Instead, at the time the PGS Consortium was participating in the public tender, PEL was seeking to invalidate that tender and receive a direct award, allegedly pursuant to the MOI (where Grindrod and SPI are neither mentioned nor parties). Ultimately the PGS Consortium lost the public bidding contest, even with the bidding scoring advantage. The PGS Consortium failed to file a formal appeal by the deadline.

237. As a result of PEL’s fraudulent concealments, the MTC and Mozambique may avoid any and all liability to PEL, because they were fraudulently induced by PEL to have enter into the MOI, approve the PFS, allow PEL to participate in the subject bidding contest, and have any dealings with PEL. “*A party may avoid the contract when it has been led to conclude the contract by the other party’s fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed.*” **RLA-128**, UNIDROIT Principles of International Commercial Contracts (2010), Art. 3.2.5 (emphasis added).⁹
238. The MOI and all subsequent dealings with PEL “had a fraudulent origin” and therefore no liability can arise from them to the MTC or Mozambique to PEL, because “nobody can

⁹ The International Institute for the Unification of Private Law (UNIDROIT) “is an independent intergovernmental Organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives.” See <https://www.unidroit.org/about-unidroit/overview>.

- benefit from his own fraud.” **RLA-30**, *Inceysa*, ICSID Case No. ARB/03/26 at ¶¶ 240, 242.
239. Just like “Inceysa acted improperly in order to be awarded the bid that made its investment possible and, therefore, it cannot be given the protection granted by the BIT,” *id.* at ¶ 243, PEL acted improperly in order to obtain the MOI and continue to induce the MTC and Mozambique to deal with it, and therefore PEL cannot be afforded by this Tribunal the protection granted by the MZ-India BIT.¹⁰ The MOI and everything that followed was “the result of a deliberate concealment amounting to fraud, calculated to induce” the MTC and Mozambique to deal with PEL, and this concealment “precludes the application of the protections of the [MZ-India BIT].” **RLA-31**, *Plama*, ICSID Case No. ARB/03/24 at ¶ 135.
240. It is telling that PEL’s lead representative, Kishan Daga, submits a forty-page Witness Statement, which includes 165 paragraphs, and continues to conceal, now from this Tribunal, the blacklisting of PEL and the Indian Supreme Court’s adjudication. Not one word is uttered by Mr. Daga about the blacklisting and adverse judgment. Mr. Daga simply ignores the blacklisting and PEL’s counsel makes specific reference to the fact that Mozambique has raised PEL’s “fraudulent concealment” of the “blacklisting” in the pending ICC arbitration between the parties. *See* SOC, CWS-1, Witness Statement Kishan Daga ¶ 264. PEL further acknowledges that “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.” *See* SOC ¶ 265. Nonetheless, not one word is said about it by Mr. Daga. Mr. Daga does not deny that he knew of the blacklisting and of the Indian Supreme Court judgment, and also does not deny that he fraudulently concealed it from the MTC and Mozambique. Nowhere in his Witness Statement does Mr. Daga assert that he ever disclosed the blacklisting and judgment to either the MTC or anyone else in the Mozambican government. By his silence,

¹⁰ **RLA-1**, Agreement Between the Government of the Republic of Mozambique and the Government of the Republic for India for the Reciprocal Promotion and Protection of Investments (“MZ-India BIT”).

therefore, in his Witness Statement, Mr. Daga has conceded that he concealed the blacklisting and judgment from the MTC and Mozambique.

241. Instead, Mr. Daga hides behind his lawyers, and lets PEL's counsel do the talking for him. But the arguments of PEL's counsel miss the point. PEL's lawyers argue that the blacklisting was after the MOI was signed and expired before the "Consortium" submitted its bid. See SOC ¶¶ 266-69. However, the blacklisting was in effect for one year after the MOI was signed and before the MTC was fraudulently induced to approve the PFS (and without that approval nothing else would have followed including the participation of the Consortium), and PEL never disclosed the blacklisting and Indian Supreme Court judgment during that one-year time period, as described above.
242. PEL's lawyers also argue that Mozambique law only required disclosure of Mozambican convictions, but that is incorrect because professional discipline must be disclosed, Mozambican law like all legal systems and the bidding documents require transparency and good faith, and such transparency is also required by internationally imposed principles of good faith and fair dealing. Indeed, it would be outrageous if a blacklisted contractor could simply conceal its blacklisting for the period the sanction is in effect (as was done by PEL here) and then simply claim later that the period has elapsed and somehow that excused its prior fraudulent concealment – it does not and those tactics are not *bona fide*.
243. As discussed above, PEL had a continuing obligation to disclose its blacklisting because it had concealed it to induce approval of the PFS, and also because it continued to make misrepresentations thereafter such as that PEL could be "trusted" in seeking to obtain a direct award, fraudulently concealing "anew" the Indian Supreme Court had held that PEL instead "was not reliable and trustworthy, and therefore everything that followed the PFS approval and later dealings with PEL, were fruits of a poisoned tree.
244. Accordingly, the effect of PEL's fraudulent concealment is that PEL's claims are rendered inadmissible, and/or this Tribunal lacks or should decline to exercise jurisdiction.

7. Second, PEL's Claims are Inadmissible because, at a Minimum, PEL Violated the Principle of Good Faith and Has Unclean Hands.

245. The *Inceysa* tribunal concluded that the violations of the good faith obligation by claimant Inceysa rendered its claims inadmissible:

The conduct mentioned above *constitutes an obvious violation of the principle of good faith that must prevail in any legal relationship*. This Tribunal considers that these *transgressions* of this principle committed by Inceysa represent violations of the fundamental rules of the bid that made it possible for Inceysa to make the investment that generated the present dispute. *It is clear to this Tribunal that, had it known the aforementioned violations of Inceysa, the host State, in this case El Salvador, would not have allowed it to make its investment.*

RLA-30, *Inceysa*, ICSID Case No. ARB/03/26 at ¶ 237 (emphasis added).

246. Here too, PEL’s fraudulent conduct constitutes a violation of the principle of good faith and, as discussed above, if the MTC had known of the blacklisting of PEL and the Indian Supreme Court’s judgment about PEL, the MTC and Mozambique could have had no dealings with PEL, or would have ceased to have further dealings with PEL. The MTC would have rescinded the MOI, would not have accepted the PFS, would not have gone forward with the process under the MOI, and would not have allowed PEL to participate in the public bidding contest.

247. In *Inceysa*, the tribunal noted that:

El Salvador gave its consent to the jurisdiction of the Centre, presupposing good faith behavior on the part of future investors. El Salvador did not have any basis to suppose that Inceysa would submit false information and would commit fraudulent acts for the purpose of establishing a legal relationship with MARN, which was embodied in the Contract that gives rise to this dispute.

Id. at ¶ 238 (emphasis added).

248. Here too, it also can be inferred that Mozambique presupposed good faith behavior on the part of future investors, and had no basis to know that PEL had been blacklisted and that the Indian Supreme Court entered the subject judgment about PEL. Like the claimant in *Inceysa*, PEL also committed fraudulent concealment “for the purpose of establishing a legal relationship” with the MTC, “which was embodied in the contract that gives rise to this dispute”: the MOI and its attendant bundle of rights.

249. As held by the *Inceysa* tribunal:

Faced with this situation, *this Tribunal can only declare its incompetence to hear Inceysa’s complaint, since its investment cannot benefit from the protection of the BIT*, as established by the parties during the negotiations and the execution of the agreement.

Id. at ¶ 239 (emphasis added).

250. Similarly, based on PEL’s bad faith and unclean hands, this Tribunal also must find PEL’s claims inadmissible or that it lacks jurisdiction, or must abstain from exercising jurisdiction.
251. Stated differently, because “the principle of good faith has long been recognized in public international law, as is also in all national legal systems,” in order to constitute an investment, assets must have been invested *bona fide*. **RLA-33**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) ¶¶ 106-107. “The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance.” *Id.* at ¶ 106. Even if PEL had made an investment, which it did not, it did so without *bona fide*.

8. Third, PEL’s Claims are Inadmissible because PEL Violated International Public Policy.

252. The *Inceysa* tribunal also concluded that claimant Inceysa’s fraudulent acts violated international public policy, rendering its claims inadmissible:

International public policy consists of a series of fundamental principles that constitute the very essence of the State, and its essential function is to preserve the values of the international legal system against actions contrary to it.

RLA-30, *Inceysa*, ICSID Case No. ARB/03/26 at ¶ 245.

In line with the foregoing, the inclusion of *the clause ‘in accordance with law’ in various BIT provisions is a clear manifestation of said international public policy*, which demonstrates *the clear and obvious intent of the signatory States to exclude from its protection investments made in violation of the internal laws of each of them*.

Id. at ¶ 246 (emphasis added).

Therefore, the inclusion of the clause ‘in accordance with law’ in the agreements for reciprocal protection of investments *follows international public policies designed to sanction illegal acts and their resulting effects*.

Id. at ¶ 247 (emphasis added).

253. Here, the MZ-India BIT contains such provisions. Article 1(b) defines an “investment” as one made “in accordance with the national laws of the Contracting Party in whose territory the investment is made ...” *See RLA-1*, MZ-India BIT, Art. 1(b). Further, Article 2

provides: “This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations” *Id.* at Art. 2.

254. Thus, the *Inceysa* tribunal commented:

It is uncontroversial that respect for the law is a matter of public policy not only in El Salvador, but in any civilized country. If this Tribunal declares itself competent to hear the disputes between the parties, it would completely ignore the fact that, above any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally.

RLA-30, *Inceysa*, ICSID Case No. ARB/03/26 at ¶ 248.

This Tribunal considers that assuming competence to resolve the dispute brought before it would mean recognizing for the investor rights established in the BIT for investments made in accordance with the law of host country. It is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which, as already indicated, is a principle of international public policy.

Id. at ¶ 249.

The Tribunal agrees with El Salvador and notes that *an interpretation of the Agreement that would afford protection to investments made fraudulently would have enormous repercussions for those States which signed agreements for reciprocal protection of investments and included the clause ‘in accordance with law’, in order to exclude from the protection of said treaties the investments not made in accordance with the laws and other norms of the State that receives the investment.*

Id. at ¶ 250 (emphasis added).

In light of the foregoing, not to exclude *Inceysa*’s investment from the protection of the *BIT* would be a violation of *international public policy*, which this Tribunal cannot allow. Consequently, this Arbitral Tribunal decides that *Inceysa*’s investment is not protected by the *BIT* because it is contrary to international public policy.

Id. at ¶ 252 (emphasis added).

255. PEL’s claims are therefore inadmissible or this Tribunal lacks or must abstain from exercising jurisdiction, because PEL’s actions violate international public policy, reflected in the principles of good faith and fair dealing, and that a claimant cannot benefit from its own fraud and wrongdoing.

256. In addition, PEL's claims are also inadmissible or this Tribunal lacks or must abstain from exercising jurisdiction, because PEL's fraudulent concealments violate the letter, if not the spirit, of Mozambique law, and the tender documents. As explained above, all legal systems infer into contractual dealings an obligation to deal in good faith. There is nothing in Mozambican law that excludes obligations of good faith and fair dealing. PEL's obligation of disclosure also arose by virtue of the prohibitions, under Mozambican law, against fraud in public procurement, as reflected in the tender documents, which enumerated "impediments" to participation in the public tender process, including, *inter alia*, where the bidder is subjected to "disciplinary sanctions" or has "conflicts of interest":

<p>8. Impediments</p> <ul style="list-style-type: none"> ▪ Article 19 ▪ Article 112 	<p style="text-align: center;">the pre-qualification phase.</p> <p>8.1. The proposals submitted by Bidders in relation to which any of the following situations takes place:</p> <ol style="list-style-type: none"> a) That has been condemned by final judgment, for any crime that threatens its professional integrity, while the penalty lasts; b) That has been disciplinarily punished for reasons of gross negligence in professional matters, while the sanction lasts; c) That has been sanctioned by anybody or institution of the State, with prohibition from contracting by reason of practice of an illicit act in contractual procedures, for the period of validity of the sanction; d) That has a direct or indirect control, of legal entities framed within the situations mentioned in paragraph c); e) That is an agent integrating the Contracting Entity staff and a person in charge of the decision to be uttered in the Bidding; f) That is controlled, directly or indirectly, by a person framed within the situations defined in the previous paragraphs; g) That has defrauded the State or that is involved in fraudulent bankruptcies of company; h) That is under bankruptcy or entered into arrangements with its creditors; and i) Bidders whose capital has proven illegal origin. <p>8.2. The Bidders who are in conflict of interests are prevented from bidding.</p> <p>8.3 Conflict of interests is considered to be situations that prevent the Bidder to provide professional advice, objectively and impartially and giving preponderance to the interests of the Contracting Entity. The Bidder is considered to be in situation of conflict of interests, when any one of the situations takes place:</p> <ol style="list-style-type: none"> a) The Bidder who has participated, directly or indirectly or under any condition, in the preparation of the Terms of Reference or other documents related to the matter subject to contracting; b) The Bidder hired by the Contracting Entity for the elaboration or execution of a task, concerning the subsequent provision of services related to the same, except in the cases of the previous Competition services executed by the Bidder itself; c) The Bidder, whose hiring for a service which, by its nature, conflicts with the service subject of this selection; d) The legal entity, from which the Bidder referred to in paragraph (a) is a director, shareholder or holder of more than
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	<p>5% (five percent) of the share capital;</p> <p>e) The Bidder who keeps a relationship with the Contracting Entity, direct or through a third party, which enables him to influence the decisions of the latter in the selection process; or</p> <p>f) Bidders or part of bidders who submit more than one proposal in this Tender.</p> <p>8.3 Public companies may participate only if they are legally and financially autonomous, should they operate within the commercial laws in force and should they not be institutions depending on the Contracting Entity.</p> <p>8.4 The integrating members of a Consortium cannot participate, in the same Bid, separately nor integrating another Consortium.</p> <p>8.5 Besides the rest of the situations, the provisions of the Law number 6/2004, of 17 June, are embodied to the Bid, which is for the purpose of fighting corruption crimes and unlawful Financial participation.</p> <p>8.6 The verification of a situation of conflict of interests shall result in the disqualification of the proposal submitted by the Bidder, or in the invalidity of the Contract.</p>
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See Ex. C-27 at 7-8; see also Ex. C-24 (PEL required to certify it was not “disqualified from conducting commercial activities” or convicted of a serious offense).

257. Here, PEL was subjected to “disciplinary sanctions” in connection with its professional capacity, for intentionally renegeing on its winning infrastructure bid in India. PEL’s renegeing, which resulted in its blacklisting was an intentional act, and therefore meets a higher burden than even gross negligence, and the prohibition lasted for one year, encompassing precisely the time between the signature of the MOI and the fraudulent inducement of the MTC’s approval of the PFS.
258. At all relevant times, PEL also had a conflict of interest in that it was in its interest to conceal its blacklisting, while at the same time it was in the best interests of the MTC to know about it so that it could avoid doing business with a fraudster: PEL.
259. Indeed, a Contracting Party “cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments *made in violation of their laws.*” **RLA-33**, *Phoenix*

Action, ICSID Case No. ARB/06/5 at ¶ 101 (emphasis added). “The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law. The fact that an investment is in violation of the laws of the host State can be manifest and will therefore allow the tribunal to deny its jurisdiction.” *Id.* at ¶ 102.

260. Therefore, also under Mozambique law principles, the Tribunal should find PEL’s claims inadmissible or refrain from exercising jurisdiction.

9. Fourth, PEL’s Claims are Inadmissible because PEL Would Be Unjustly Enriched.

261. The *Inceysa* tribunal also concluded that claimant Inceysa’s fraudulent acts if afforded protection under the BIT would constitute unjust enrichment, also rendering its claims inadmissible: “The acts committed by Inceysa during the bidding process are in violation of the legal principle that *prohibits unlawful enrichment*.” See **RLA-30, Inceysa**, ICSID Case No. ARB/03/26 at ¶ 253 (emphasis added). “The written legal systems of the nations governed by the Civil Law system recognize that, when the cause of the increase in the assets of a certain person is illegal, *such enrichment must be sanctioned by preventing its consummation*.” *Id.* at ¶ 254 (emphasis added).
262. “Applying the principle discussed above to the case at hand, *we note that Inceysa resorted to fraud to obtain a benefit that it would not have otherwise obtained*. Thus, through actions that violate the legal principles stated above, Inceysa tried to enrich itself, signing an administrative contract with MARN, which, without any doubt, *would produce considerable profit for it*.” *Id.* at ¶ 255 (emphasis added). “In conclusion, the Tribunal considers that, because Inceysa’s investment was made in a manner that was clearly illegal, *it is not included within the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre. Therefore, this Arbitral Tribunal declares itself incompetent to hear the dispute brought before it*.” *Id.* at ¶ 257 (emphasis added).
263. PEL’s claims also are inadmissible because, if this Tribunal were to make any award in favor of PEL, PEL would be unjustly enriched, because the MTC would have had no dealings with PEL had PEL “not resorted to fraud” and induced the MTC to deal with it.

If this Tribunal were to adopt PEL’s absurd theory that a losing bidder can spend allegedly an unproven and unspecified USD\$4 million in a PFS (where the MOI states that PEL is to bear those costs) where the PFS was approved as a result of PEL’s fraud, and nonetheless recover over USD\$100 million in speculative and unproven lost profits for a venture that never was awarded to PEL, and also given the rest of the circumstances presented here, this indeed would be a “considerable profit” constituting gross unjust enrichment. Such a result would make a mockery of the international investment treaty arbitration process and turn the law and practice of PPP contracting on its head.

10. Fifth, PEL’s Claims are Inadmissible because They Seek to Enforce an Illegal Purported “Investment”.

264. In *Fraport*, the tribunal stated that illegal investments are not protected under international law, and dismissed the BIT claims. See **RLA-32**, *Fraport*, ICSID Case No. ARB/03/25.
265. The Philippines argued that Fraport’s investment was illegal because it violated the Philippine Anti-Dummy Law (ADL), which limits foreign ownership and managerial control of public utilities. The tribunal found that Fraport had illegally circumvented these limitations by entering into secret shareholder agreements. The tribunal concluded that “Fraport knowingly and intentionally circumvented the ADL” and dismissed the case.

As other tribunals have recognized, there is an increasingly *well-established international principle which makes international legal remedies unavailable with respect to illegal investments*, at least when such illegality goes to the essence of the investment.

Id. at ¶ 332 (emphasis added).

266. The foregoing principle – that “*protection is not afforded to illegal investments*” – can be “either based on clauses of the treaties, as in the present case ..., or absent an express provision in the treaty, based on *rules of international law, such as the ‘unclean hands’ doctrine or doctrines to the same effect.*” *Id.* at ¶ 328 (emphasis added).

In light of the foregoing analysis, the Tribunal concludes that Article 1(1) of the BIT requires that an investment comply with the laws of the host State at the time it is made in order to be accorded protection under the BIT. The Tribunal’s assessment of Respondent’s jurisdictional objections will therefore focus on the time of entry of Claimant’s investment.

Id. at ¶ 333.

267. Thus, under *Fraport*, even if the BIT does not have an express legality requirement, international law makes illegal investment not subject to BIT protection. See **RLA-29**, *Hamester*, ICSID Case No. ARB/07/24 at ¶¶ 123-124 (“An investment...*will not be protected if it has been made in violation of the host State’s law.*”) (emphasis added); **RLA-35**, *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012) ¶ 308 (unofficial translation: “*The condition not to commit serious violations of the legal order is a tacit condition which exists in every BIT, because in any event it is inconceivable that a State would offer the benefit of protection through investment arbitration if the investor, to obtain that protection, has acted against the law.*”) (emphasis added). As cited above, the MZ-India BIT has legality requirements.
268. As discussed below, if the MOI is interpreted as PEL contends, then the MOI was an illegal agreement in violation of the Mozambican PPP law and regulations, and/or the MTC Minister would have signed it without actual authority and his acts would have been *ultra vires*, and as such the MOI would be rendered inadmissible as an illegal alleged investment.

B. PEL’s Claims Are Inadmissible or the Tribunal Must Decline Jurisdiction, Based on PEL’s Attempted Bribery of the MTC Minister.

269. It is settled that bribery, or attempted bribery for that matter, are grounds that also render an investment treaty claim inadmissible, and upon which jurisdiction should be denied.
270. In *Metal-Tech Ltd.*, the tribunal noted that, “[t]he idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or *tribunal cannot grant assistance to a party that has engaged in a corrupt act.*” **RLA-35**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/01/3, Award (4 October 2013) ¶ 389 (emphasis added).
271. Similarly, in *World Duty Free v. Kenya*, where the arbitral tribunal refused to enforce a contract because, under English and Kenyan laws (which governed the contract), a contract infected by corruption is unenforceable. The tribunal dismissed the claims on the basis of the “international public policy common to the community of nations”, as the original

investment was procured through bribery. See **RLA-36**, *World Duty Free Ltd. v. Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006) ¶ 17.

272. And as another example, in *Mamidoil v. Albania*, the claimant commenced arbitration to resolve a dispute in relation to a lease in the country's main port to build an oil storage container. The state objected to jurisdiction on the basis that the investor failed to acquire the necessary permits and the "purported investment . . . never acquired any legal status under Albanian law." The tribunal dismissed the objections to jurisdiction, but ultimately found in favor of the state on the merits. On jurisdiction, the tribunal noted that the BIT expressly required legality of an investment, and that illegality of an investment may occur through breach of substantive law or procedural "norms and regulations," *such as fraud or corruption*. See **RLA-37**, *Mamidoil Jetoil Greek Petroleum Products Société Anonyme SA v. Republic of Albania*, ICSID Case No. ARB/11/24, Award (30 March 2015) ¶ 372.

273. Here, PEL's claims also are inadmissible, or the Tribunal should decline jurisdiction, because PEL engaged in an attempt to bribe the MTC Minister Paulo Zucula.¹¹ Mr. Zucula describes the attempted bribery by Mr. Kishan Daga, the lead representatives of PEL:

Finally, in connection with these dealings, *PEL attempted to offer me a bribe, which I refused*. During the time period that PEL was struggling to gain traction with its post-PFS negotiations, I flew to Macuse with Mr. Daga from PEL. During this flight, Mr. Daga sat on the seat next to me on the airplane. I clearly recall that, while we were discussing PEL's difficulties, *Mr. Daga stated to me, in these specific words: that he was inviting me to 'come visit us in India, so that we may unlock these problems, and we will help you out.'*

See **RWS-2**, Witness Statement of Paulo Zucula ¶ 25 (emphasis added).

274. Mr. Zucula further explains:

I understood Mr. Daga's suggestion that PEL 'would help me out' *as an indirect or implicit offer of a bribe to me, a Mozambican government official*. It was illegal for PEL to offer to 'help me out.' My personal

¹¹ Mr. Zucula was charged by the Mozambican government with and admitted to corruption, in a matter unrelated to this dispute. Mr. Zucula authorized the payment of illegal allowances (remunerations) to managers of Mozambique's Civil Aviation Institute. Mr. Zucula endorsed the allowances without the approval of the Ministry of Finance. See **Exhibit R-55**, Macau Business, Mozambique: Former minister admits to authorizing allowances.

interests were irrelevant. I immediately told Mr. Daga that I was declining both his invitation for a trip to India and his offer to ‘help me out.’”

Id. at ¶ 26 (emphasis added).

275. Mr. Daga admits that he went on this trip with Mr. Zucula to Macuse, and that he “took the same flight as Minister Zucula.” *See* SOC, CWS-1, Witness Statement of K. Daga ¶ 73. Mr. Daga admits he was present in the specific circumstances where Mr. Zucula testifies that Mr. Daga offered him the bribe.
276. Mr. Daga’s offers (even if they were considered innocent, which they were not) would have constituted violated the MOI’s explicit anti-corruption clause:

Besides being an illegal bribe offer, Mr. Daga’s invitation of a trip to India and offer to ‘help me out’ also violated Clause 9 of the MOI (Anti-Corruption). Clause 9 prohibits corruption in connection with the MOI, including PEL from offering any ‘gifts, payments, remunerations or other types of offers’ to government officials. Clause 9 also states this prohibition applies to PEL and its ‘agents’ and ‘representatives,’ like Mr. Daga.

Id. at ¶ 26 (citing **RLA-1**, MZ-India BIT; **Exhibits R-1 & R-2**, Clause 9).

277. Mr. Zucula further recollects that: “When I checked on my return flight, I learned that Mr. Daga had booked the same flight and seat next to me again. I therefore changed my return flight so as not to be in the same flight again with Mr. Daga. I do not remember speaking with Mr. Daga ever again.” *Id.* at ¶ 27.
278. Mr. Daga’s offer of a bribe, or at a minimum of an illegal gift, constituted an attempt at corruption with a high-level Mozambican government official, and also renders PEL’s claims inadmissible or the tribunal should abstain from exercising jurisdiction.

C. PEL is Estopped from Asserting These Claims.

279. As a creation of equity, estoppel is grounded in the notion that a person ought not to benefit from his own wrongdoings. James Crawford, in his text *Brownlie’s Principles of Public International Law*, notes that “[a] considerable weight of authority supports the view *that estoppel is a general principle of international law*, resting on principles of good faith and consistency.” **RLA-126**, J. Crawford, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (8th Ed. 2012) at 420 (emphasis added). PEL is “estopped” from pursuing its

investment treaty claims as a purported investor, on account of its violations of the various principles discussed above.

D. PEL’s Claims Constitute Abuse of Process.

280. This Tribunal also should find PEL’s instant claims inadmissible because PEL has engaged in an abuse of process.
281. In the context of investor-state arbitration, arbitral tribunals have applied the doctrine of abuse of process. *See RLA-39, Gremcitel S.A., Renée Rose Levy v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (9 January 2015) ¶ 183 (citing *Phoenix Action*, ICSID Case No. ARB/06/5 at ¶ 144, *see RLA-33*).
282. In *Gremcitel*, the tribunal found an abuse of process and, therefore, also inadmissibility or lack of jurisdiction, because the claimant had engaged in a “corporate restructuring” for the purpose of seeking to create jurisdiction. *RLA-39, Gremcitel*, ICSID Case No. ARB/11/17 at ¶¶ 193-195. The tribunal’s holding indicates that the tribunal considered that these acts satisfied the high threshold of “exceptional circumstances” for abuse of process. *Id.* at 186.
283. “The theory of abuse of process, which is a variation of the prohibition of abuse of rights and, like the latter, an emanation of the principle of good faith” *RLA-40, Churchill Mining & Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/1, ARB/12/40 (6 December 2016) ¶ 492.
284. The facts before this Tribunal are even more egregious than those in *Gremcitel*. Even if the MOI and its attendant rights were considered to be an “investment” as PEL argues (which they are not), that alleged “investment” was acquired by PEL through a serious pattern of fraudulent concealment that commenced before the PFS was approved and continued until the filing of this arbitration proceeding. PEL engaged in fraud aimed at seeking to obtain rights to construct a rail and port. *See e.g., RLA-40, Churchill Mining*, ICSID Case No. ARB/12/1 at ¶ 528 (holding that “all the claims before it are inadmissible” because the claimant engaged in “fraud aimed at obtaining mining rights.”).
285. Abuse of process relates to an “abuse of right,” and PEL has abused the international arbitration system by commencing this arbitration and invoking jurisdiction on the basis of

alleged rights obtained and maintained by reasons if its fraudulent concealment. *See, e.g., RLA-39, Gremcitel*, ICSID Case No. ARB/11/17 at ¶ 186.

286. This Tribunal must dismiss PEL’s claims based on its fraudulent conduct and abuse of process. Indeed, “conduct that involves fraud and abuse of process deserves condemnation.” **RLA-41, Europe Cement Investment & Trade S.A. v. Republic of Turkey**, ICSID Case No. ARB(AF)/07/2, Award (13 August 2009) ¶ 180.¹²

E. PEL’s Chicanery Continues in this Arbitration.

287. PEL’s chicanery conduct continues in this proceeding.

288. PEL’s English version of the MOI has suspect features, while there is no factual evidence that Mozambique’s consistent versions of the MOI are inauthentic. **RER-5, Expert Report of Mark Lanterman**, at 3.

289. As discussed below, although PEL’s Portuguese version of the MOI matches the MTC’s Portuguese and English versions, PEL’s English version is different and contains additional language favorable to PEL that contradicts the rest of the MOI and is nonsensical in its reference to other provisions of the MOI. *See RLA-39, Gremcitel*, ICSID Case No. ARB/11/17 at ¶¶ 193-195 (in finding an abuse of process, the tribunal also noted the claimant’s reliance on “questionable documents”).

290. Second, PEL has submitted a number of English translations of letters sent by the MTC. However, PEL’s English translations have included the words “direct award” *which are not found anywhere* in the Portuguese version. These translations are intentional attempts

¹² Further, PEL’s institution of this UNCITRAL proceeding in violation of the parties’ ICC Arbitration Agreement also constitutes further abuse of process. PEL has ignored the parties’ express arbitration agreement, which is broad enough to include BIT claims, and by doing so has caused Mozambique to incur unnecessary costs, as well as incur the risk of inconsistent rulings. PEL also filed this arbitration under circumstances that further show abuse of process. PEL had been negotiating with Mozambique (which did not have counsel at the time). Once Mozambique instructed its undersigned counsel, PEL refused to provide Mozambique’s counsel with the opportunity to meet with its client (although this was at the outbreak of the COVID-19 epidemic and lockdowns precluded Mozambique and its counsel from meeting). Instead, not only did PEL fail to extend basic professional courtesies, but PEL also rushed to file this UNCITRAL arbitration, in complete disregard of the ICC Arbitration Agreement.

to mislead a person reading only the PEL's English translations to believe that the MTC referred to a "direct award" where the words are not even used by the MTC.

- For example, on 14 February 2013, the MTC wrote to PEL explaining that the public tender would go forward, that the MTC could not reverse the Council of Ministers' decision, and that PEL may compete and participate in the public tender with the advantage scoring. A copy of said letter and PEL's translation to English is attached hereto as Exhibit R-19. PEL's translation of this document misleadingly states "direct award" on the top of the first page of the translation, and those words are not found in the Portuguese version.
- Similarly, on 18 April 2013, the MTC sent a letter to PEL stating that the Council of Ministers decided to "invite [PEL] to start the process with a view of carrying out these projects." The letter reflected that the negotiation process and tentative project was subject to, *inter alia*, "a statement, agreement or *take or pay* memorandum with mining companies, in order to make the project in question feasible." *Id.* A copy of said letter and PEL's translation to English is attached hereto as Exhibit R-26. PEL's translation of this document also misleadingly states "direct award" on the top of the first page of the translation, and those words are not found in the Portuguese version.

291. Third, PEL also has taken contradictory positions in this UNCITRAL proceeding and in the ICC arbitration, arguing what is convenient when convenient, continuing in these proceedings the same pattern of flippant posturing PEL took with the MTC.

292. For example, when Mozambique filed a motion to bifurcate these serious and dispositive admissibility and jurisdictional issues and Mozambique's request for a stay of these proceedings, PEL opposed arguing that these issues and the merits are intertwined. After obtaining this Tribunal's order denying bifurcation, PEL did an about face in the ICC arbitration. In the ICC arbitration, PEL is instead asking that the ICC tribunal to bifurcate its arguments that the ICC arbitration should be stayed so that this case may proceed.

293. In summary, for the various independent reasons discussed above, and based on the totality of the circumstances, the Tribunal must hold that PEL's instant claims are inadmissible, or that it lacks or is declining to exercise jurisdiction, in these UNCITRAL proceedings.

IV. THIS TRIBUNAL LACKS JURISDICTION.

294. It is well accepted that instruments like this MOI are not "investments," because they are in the nature of an "option." Here, at best, the MOI provided PEL with an option (as PEL

had contended contemporaneously), and therefore there was no investment under the BIT. Without an investment, this Tribunal obviously lacks jurisdiction.

295. PEL inappropriately asks this Tribunal to expand the scope of BIT dispute resolution to pre-investment and pre-concession award disputes. This claim is a brazen attempt to vitiate the Parties' bargained-for choice of law (Mozambican law), and the Parties' bargained-for neutral dispute resolution (arbitration in Mozambique under ICC Rules), Mozambique's right to enact and enforce PPP laws that are in accordance with global procurement best practices and the public interest (requiring public tenders for complex PPP procurement), and sensible limitations on bid protest procedures and damages for procurement disputes that are recognized in Mozambique and States across the globe (strict timing requirements to allow for cancellation or redo of tender; no lost profits in bid protests; no expectation damages in disputes over preliminary agreements or memoranda of understanding).
296. Far from "protecting" or "promoting" investment, PEL attempts to have this *ad hoc* Tribunal disrupt settled expectations for the law applicable to pre-award, pre-concession activities and public tenders, and create new international standards for procurement disputes, with the purported right to unlimited expectation damages on a project the alleged "investor" was not even awarded and did not design, finance, build, operate or maintain. No contractor does, or should, legitimately expect to receive a guaranteed 30-year lost profit stream when a project is awarded to someone else—even if they are successful in protesting the procurement.
297. To break the new ground requested by PEL, this Tribunal would give an enormous advantage to certain foreign contractors fortunate enough to hail from a country with a BIT: the ability to attract, like PEL, third-party litigation financing and seek to force large settlements with demands premised on rosy 30-year profit forecasts, orders of magnitude larger than the cost of any alleged project pursuit "investment" like the PFS.
298. Indeed, that is precisely what has occurred here, where PEL seeks more than USD\$100 million in relief, exclusively composed of alleged lost profits, without even bothering to quantify the minimal cost of the PFS or other project pursuit costs commonly undertaken in conjunction with proposals for large infrastructure PPP projects.

299. In short, a jurisdictional decision in PEL’s favor would open the door to disappointed bidders of all types making BIT claims on the basis of their submittal of technical proposals or other alleged pre-award “investments,” to tactically assert liability and quantum positions unmoored from well-developed State contracting and public procurement jurisprudence. It would unfairly *prefer* certain international contractors (allowing them to bypass local and project-specific contract, procurement, and dispute resolution regimes in favor of investment treaty arbitration whenever it is perceived to be advantageous to do so); chill States’ appetite for international tenders involving contractors who hail from countries with an active BIT, and lead to more States following India’s lead in renegotiating or cancelling their BIT programs. Taxpayers of no State—much less developing countries—should have to fund windfalls to disappointed bidders for projects they did not design or construct. And no State should have their procurement procedures set aside by *ad hoc* international panels whose charge is limited to *investment* disputes.

A. PEL has the Burden of Proof.

300. The Tribunal should keep in mind that PEL has the burden of proof to establish jurisdiction. “Claimants have the burden of proving that this Tribunal has jurisdiction.” **RLA-42**, *Caratube Int’l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (27 September 2017) ¶ 309.¹³

B. The Tribunal Lacks Jurisdiction Because the MOI’s Arbitration Agreement Mandates International Arbitration before the ICC in Mozambique.

301. In the MOI, the parties elected a specific dispute resolution mechanism for international arbitration. That Arbitration Agreement is not a local judicial forum selection clause, and is not a mere local contractual arbitration clause, and therefore the investment treaty jurisprudence dealing with those situations is inapplicable here.

302. Instead, the Arbitration Agreement in the MOI provides for international arbitration before the International Chamber of Commerce (“ICC”), and under the ICC Arbitration Rules.

¹³ Because the Tribunal denied Mozambique’s request for bifurcation, and joined the jurisdictional question with the merits, the Tribunal must make the necessary factual findings in conjunction with its jurisdictional analysis, and there is no presumption that PEL would be able to establish its jurisdictional facts at a later merits stage.

The ICC administers investment treaty claims, and the MOI Arbitration Agreement is broad enough to include investment treaty claims, as well as the underlying contractual claims. The Arbitration Agreement constitutes also a permissible election under the MZ-India BIT.

303. PEL breached the MOI Arbitration Agreement by rushing to first file this UNCITRAL arbitration, but racing to filing does not obviate the parties' prior Arbitration Agreement. There is a pending international arbitration between the parties under the ICC Arbitration Rules, which addresses not only the subject contractual claims but also the investment treaty claims. The three arbitrators are recognized international arbitrators with substantial investment treaty arbitration experience. The ICC arbitration includes, not only, the Republic of Mozambique, but also the MTC (which executed the MOI and is not a party to this UNCITRAL proceeding).
304. This Tribunal must dismiss this improper UNCITRAL proceeding, and yield to that ICC arbitration which can decide all issues, including PEL's BIT claims.

1. The MOI's Arbitration Agreement.

305. Clause 10 of the MOI contains the parties' express "Arbitration Agreement," and provides as follows:

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.

Exhibit R-2, Clause 10 (emphasis added).

306. There are various aspects of this Arbitration Agreement that are worth highlighting.
307. The parties agreed that their Arbitration Agreement would be mandatory in nature. It mandates that "any dispute arising out of this memorandum between the parties *shall be referred* to arbitration." (Emphasis added). The reference to arbitration is therefore compulsory and does not provide the parties an alternative forum for dispute resolution. Similarly, the Arbitration Agreement provides that "[t]he arbitration *will be governed* by

Mozambique law ...” (Emphasis added). By adopting the words “will be,” the parties make the election of Mozambican law compulsory. Similarly, the Arbitration Agreement provides that “the rules of the International Chamber of Commerce *shall be followed.*” (Emphasis added). The parties again adopt the words “shall be,” expressing their agreement that their selection of arbitration under the ICC Arbitration Rules is also compulsory.

308. Therefore, there is no doubt that if the dispute falls within the ambit of the MOI’s Arbitration Agreement, the dispute must be resolved pursuant to arbitration under the rules of the International Chamber of Commerce.¹⁴

2. The MOI’s Arbitration Agreement Encompasses PEL’s BIT Claims.

309. The MOI’s Arbitration Agreement provides for international arbitration and is broad enough to encompass PEL’s claims pursuant to the MZ-India BIT.

310. There is no doubt that the ICC Arbitration Rules are broad enough to permit investment treaty arbitration, and that the ICC is fully capable to administer and does administer investment treaty arbitrations.

311. Although the fact that, pursuant to the ICC Arbitration Rules, the ICC administers investment treaty arbitrations is common knowledge, we need to look no further than this Tribunal President’s own biography for confirmation. For example, President Fernández-Armesto was chair, in 2016, of an ICC arbitration tribunal asked to decide a bilateral investment treaty claim: “Turkish Investor vs. North African State, chairman (co-arbitrators: P. Mayer and G. Khairallah), (Administrative Secretary: K. Baptista), *ICC, investment arbitration under BIT*, English language, (2016)” (emphasis added). See **Exhibit R-48**. Similarly, President Fernández-Armesto was chair, in 2014, of an ICC arbitration tribunal asked to decide another bilateral investment treaty claim: “European

¹⁴ In the Statement of Claim, PEL cites *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) ¶¶ 86-116. See SOC ¶ 289. That case is inapplicable here, because it involved a “exclusive jurisdiction clause” for local courts: “Article 16.4 of the Concession Contract between CGE and Tucumán provided for the resolution of contract disputes, concerning both its interpretation and application, to be submitted to the exclusive jurisdiction of the contentious administrative courts of Tucumán.” *Id.* at ¶ 11 (emphasis added). In contrast, here, the MOI contains an arbitration clause requiring arbitration under the ICC Arbitration Rules.

Company vs. European Republic, chairman, *ICC, investment arbitration under BIT, English language, (2014)*” (emphasis added).¹⁵ Similarly, President Fernández-Armesto was co-arbitrator, in 2012, of an ICC arbitration tribunal asked to decide another bilateral investment treaty claim: “Netherlands Investor vs. Government of Cuba and Public Cuban Company, coarbitrator designated by Claimant, *ICC, investment arbitration under BIT, (2012)*” (emphasis added).¹⁶ Similarly, President Fernández-Armesto was co-arbitrator, in 2009, of an ICC arbitration tribunal asked to decide another bilateral investment treaty claim: “Spanish Investor vs. Cuba, co-arbitrator, designated by Claimant, *ICC, investment arbitration under BIT, Spanish language, (2009)*” (emphasis added).¹⁷

312. For example, in *Cengiz*, the tribunal chaired by President Fernández-Armesto held that the ICC had jurisdiction to decide the investment treaty claim brought under the Turkey-Libya BIT under the ICC Arbitration Rules:

This is an investment arbitration dispute subject to the Rules of Arbitration of the International Chamber of Commerce, in force as from January 1, 2012.

RLA-43, *Cenzig Insaat Sanayi ve Ticaret A.S. v. The State of Libya*, ICC Case No. 201537/ZF/AYZ, Final Award (7 November 2018) ¶ 1 (emphasis added). The Turkey-Libya BIT provided for ICC arbitration, in addition to ICSID and *ad hoc* arbitration. *Id.* at ¶ 16. In that case, the claimant investor elected to arbitrate in the ICC. *Id.* at ¶ 17. In that case, the underlying agreement did not contain an arbitration clause; the offer to arbitrate was found only in the Turkey-Libya BIT, and was accepted when the claimant filed its ICC claim. *Id.* The tribunal awarded substantial damages (USD\$51 million) to the claimant. *Id.* at ¶ 693. This is but one example that confirms that the ICC is capable of administering and resolving investment treaty claims.

313. This is not a recent development. The ICC has been administering investment treaty arbitrations since 1996. *See* ICC, “2019 ICC Dispute Resolution Statistics,” ICC Dispute Resolution Bulletin (2020, Issue 2).¹⁸ Therefore, when the MOI was entered into in 2011,

¹⁵ *Id.* at p. 6.

¹⁶ *Id.* at p. 8.

¹⁷ *Id.* at p. 11.

¹⁸ Although the ICC has not administered the volume of investment treaty cases administered by, say ICSID, it has a twenty-five-year history of administering investment treaty arbitrations. *See*

the ICC was administering investment treaty arbitrations, and it was proper for the parties to agree to arbitrate all disputes, including treaty disputes, before the ICC.

314. In fact, the ICC Arbitration Rules were revised in 2021 because of the increasing number of investment treaty arbitrations brought before the ICC. “*Reflecting the increasing number of investment treaty arbitrations conducted under the ICC Rules*, the 2021 Rules include two provisions specifically intended to apply to this type of dispute.” See **Exhibit R-49**, Mantilla-Serrano, F. and Romero, D., Latham & Watkins, “ICC Launches Revised Arbitration Rules for 2021,” Client Alert Commentary, No. 2850 at 3 (20 January 2021) (emphasis added)¹⁹; **Exhibit R-50**, Wong, G., Clare Ryan, M., De Aguiar, S., “Newly Revised ICC Arbitration Rules,” Sherman & Sterling, Perspectives (12 November 2020) (“The 2021 ICC Rules also include two new provisions applying specifically to investment treaty arbitrations. *This reflects the growing number of such cases involving States and State-owned parties administered by the ICC in recent years.*”) (emphasis added); **Exhibit R-51**, Herbert Smith Freehills, “Successful ICC conference ‘Investment Treaty Arbitration: a ‘BIT’ of a problem?,’” Arbitration Notes (20 April 2012) (“although *investment treaty arbitrations may be administered by the ICSID, the ICC, the SCC or ad hoc under the UNCITRAL Rules, ICSID arbitration remains the most popular choice, followed by ad hoc UNCITRAL arbitrations and ICC arbitrations.*”) (emphasis added).²⁰

Exhibit R-56, ICC Dispute Resolution 2019 Statistics (“In 2019, two cases were filed on the basis of bilateral investment treaties (BITs). [...] Since 1996, when the first BIT case was registered, to date, ICC has administered 42 cases based on BITs.”).

¹⁹ “In particular, Article 13(6) of the 2021 Rules provides that, if the arbitration agreement is based on a treaty and unless the parties agree otherwise, the arbitrator shall not share the nationality of any of the parties. Article 13(6) mirrors Article 39 of the International Centre for Settlement of Investment Disputes (ICSID) Convention, which restricts the appointment of arbitrators that share the nationality of any of the parties.” *Id.* “In addition, Article 29(6)(c) of the 2021 Rules provides that the ICC Emergency Arbitrator Provisions are not available in treaty-based arbitrations. Article 29(6)(c) reflects the ICC’s view that emergency arbitrator proceedings are not suitable for investment treaty arbitration because states and state-owned companies do not have the ability to comply with their short time limits.” *Id.*

²⁰ This ICC Conference on investment treaty arbitration included as speakers Professor Zachary Douglas (Graduate Institute of International and Development Studies, Geneva and Matrix Chambers, London), Gavan Griffith QC (Barrister, Essex Court Chambers), Professor Vaughan Lowe QC (Chichele Professor of Public International Law All Souls College, Oxford; Barrister, Essex Court Chambers), Colin Brown (Lawyer, European Commission, Directorate General for

315. Specifically, the ICC may obtain jurisdiction over investment treaty disputes by arbitration provisions in an investment treaty or in an investment contract. *See Exhibit R-52*, “2021 ICC Rules of Arbitration Unveiled,” Cleary Gottlieb (12 November 2020) (The ICC may obtain jurisdiction to administer investment treaty arbitrations by investment treaty or by investment contract; “Thus, although investment treaty disputes have traditionally constituted only a small portion of the ICC’s case docket, the draft 2021 ICC Rules reflect the institution’s ambition to enhance its position as a favoured dispute resolution forum and mechanism for commercial and sovereign actors alike.”).
316. In the present case, PEL and the MTC (on behalf of the Republic of Mozambique) expressed their consent to arbitration under the ICC Arbitration Rules in the Arbitration Agreement found in their alleged investment contract, the MOI.
317. The MOI’s Arbitration Agreement is broad enough to encompass PEL’s investment treaty claims. As cited above, the parties’ Arbitration Agreement broadly requires that:
- Any dispute arising out of this memorandum between the parties shall be referred to arbitration ... and the rules of the International Chamber of Commerce shall be followed.*
- Exhibit R-2**, MOI, Clause 10 (emphasis added).
318. This Arbitration Agreement *contains no limitation* on the “type” of dispute that must be referred to arbitration – that is, the Arbitration Agreement applies to “any dispute” whether its nature be a commercial dispute, and investment treaty dispute or any other type of dispute. Because the Arbitration Agreement broadly applies to “any dispute,” it certainly includes investment treaty arbitration claims like this one. The Arbitration Agreement’s language, covering “[a]ny dispute arising out of this memorandum” is, certainly, broad enough to apply to investment treaty disputes arising from the MOI.
319. For example, in *Cambodia Power*, the tribunal held that three arbitration agreements with virtually identical “arising out of” language were broad enough to include investment treaty arbitration claims. *See RLA-44, Cambodia Power Co. v. Kingdom of Cambodia*,

Trade, Dispute Settlement and Legal Aspects of Trade Policy), Isabelle Michou (Partner, Herbert Smith LLP), Gaëtan Verhoosel (Partner, Covington & Burling LLP) and Matthew Weiniger.

Electricité du Cambodge, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011).

320. In *Cambodia Power*, the claimant brought ICSID arbitration claims arising out of three agreements related to an investment in a power plant. *Id.* at ¶ 141. Specifically, the claimant generally asserted investment law claims, contending that the “Respondents’ acts and omissions ... *contravene established principles of international investment law* ... for which Claimant is entitled to and claims such remedies and relief as may be just and proper” – such as for expropriation. *Id.* at ¶¶ 327-330.
321. The claimant was a power company that had entered into three agreements with Cambodia, with similar arbitration clauses. The Power Purchase Agreement contained an agreement to arbitrate, requiring arbitration “[i]f any dispute or difference of any kind whatsoever shall arise between Edc and the Company in connection with or *arising from this Agreement...*” *Id.* at ¶ 10 (emphasis added). The Power Purchase Agreement was later renovated with a similar arbitration clause, except only that it said “*arising out of this agreement*” instead of “*arising from this agreement.*” *Id.* at ¶ 11 (emphasis added). And, the Implementation Agreement contained an agreement to arbitrate, requiring arbitration “[i]f any dispute or difference *arises out of* or in connection with this Agreement” *Id.* at ¶ 12 (emphasis added).
322. The tribunal analyzed these arbitration clauses, and concluded that they were all sufficiently broad to include international investment law claims:

The Tribunal is also satisfied that the wording of each arbitration clause is itself *wide enough to cover claims based on customary international law*. The IA arbitration clause, for example, provides: ‘*[i]f any dispute or difference arises out of or in connection with this Agreement ... the provisions of this Section 12 shall apply.*’

Id. at ¶ 336 (emphasis added).

This broad form of arbitration clause (which appears, albeit with slightly different wording, in each of the agreements) *would allow the Parties to articulate claims on the basis of any remedies available in law or equity, including customary international law (as long as these are claims that could be said to arise out of or be in connection with each agreement)*. The Tribunal is satisfied that the Claimant is entitled to bring these claims in this case under each arbitration clause.

Id. at ¶ 337 (emphasis added).

323. Indeed, the language in the three *Cambodia Power* arbitration agreements is virtually identical to the language of the parties' Arbitration Agreement herein, which also broadly requires arbitration of "[a]ny dispute *arising out of this memorandum between the parties ...*" (that is, any dispute arising out of the MOI) (emphasis added). The focus of all these clauses is that the dispute must be grounded on the subject agreement (here, the MOI).
324. Specifically, PEL's investment treaty arbitration claims "arise out of" the MOI, because the MOI allegedly provides the underlying substantive rights which PEL seeks to protect pursuant to the MZ-India BIT. This is confirmed by PEL's pleadings. The "investment" PEL alleged in its Request for Arbitration was "*its rights under the MOI, including its valuable right to be awarded a concession for the USD\$3.115 billion Project that PEL had itself conceived of, and its right of first refusal, both of which were abrogated by the MTC.*" **Exhibit R-46**, Request for Arbitration ¶ 81 (emphasis added). In its Statement of Claim, PEL likewise defines its alleged "investment" through its flawed allegations regarding rights conferred through the MOI. *See* SOC ¶ 257(a) (the alleged "*direct award of a concession to implement the Project, as well as all of the rights under the MOI associated with the Project*") (emphasis added). To the extent PEL now also contends that any alleged "know-how" constitutes an investment that did not receive appropriate protection, those assertions, too, "arise out of" the MOI. PEL alleges its "know-how was explicitly protected by the MOI," *see* SOC ¶ 257(b), and contends it was Mozambique's alleged commitments in the MOI that formed "the fundamental basis upon which PEL invested in Mozambique" and caused PEL to "complete the PFS at its own costs," *see, e.g.,* SOC ¶ 324). Plainly, this dispute "arises out of" the MOI, which forms the "fundamental basis" of the alleged rights, and whose alleged breach is the *sine qua non* of the subject claims.
325. Therefore, the language in the MOI's Arbitration Agreement is broad enough to include investment law claims such as those brought by PEL under the MZ-India BIT.
326. Notably, the first *Cambodia Power* arbitration agreement provided for arbitration under ICC arbitration rules, and the second and third arbitration agreements provided for ICC arbitration until Cambodia became a party to the ICSID Convention. *See* **RLA-44**,

Cambodia Power, ICSID Case No. ARB/09/18 at ¶¶ 10-12. Thus, the “arising out of” language is sufficient to establish jurisdiction over investment law claims whether under the ICC or ICSID Convention arbitration rules.

327. Finally, the *Cambodia Power* tribunal stated that, the fact that each arbitration agreement was made subject to English law, did not exclude investment law protection. “*Customary international law is inevitably relevant in the context of foreign investment (and ICSID arbitration), given that it comprises a body of norms that establish minimum standards of protection in this field. It is simply unrealistic to assume that the parties to a foreign investment contract such as those in question here would have intended to exclude such inherent protection by simply choosing an applicable national law.*” *Id.* at ¶ 334 (emphasis added).

328. Rather, in order for the arbitration agreements to exclude jurisdiction over investment law claims, the arbitration clauses had to specifically exclude investment law protection:

[P]arties can always consent to exclude customary international law from the scope of their dispute resolution clause. However, one would expect this to be done expressly and unequivocally. In the present case, the PPA, IA, and DOG do not indicate that the parties expressly excluded customary international law from the scope of their consent.

Id. at ¶ 335 (emphasis added).

329. Similarly, here, the MOI’s Arbitration Agreement *does not* contain any exclusion of customary international law, including any exclusion of investor protection under bilateral investment treaties, and therefore the parties’ Arbitration Agreement must be interpreted to include PEL’s claims under the Mozambique-India BIT. Like the arbitration agreements in *Cambodia Power*, the MOI’s Arbitration Agreement *does not* indicate that the parties expressly excluded customary international law from the scope of their consent.

330. Therefore, the MOI’s Arbitration Agreement includes PEL’s instant BIT claims.

331. The MOI’s Arbitration Agreement also tracks the language of Article 25 of the ICSID Convention. Clause 10 of the MOI applies to “[a]ny dispute arising out of this memorandum ...” Article 25 of the ICSID Convention applies to “any legal dispute arising directly out of an investment ...” Here, PEL claims that MOI was its investment or the basis of its investment, and therefore its claims “arise out of” the MOI.

3. The MOI's Arbitration Agreement is Not Incompatible with the BIT.

332. The MZ-India BIT provides options for “Settlement of Disputes Between an Investor and a Contracting Party.” See **RLA-1**, MZ-India BIT, Art. 9.
333. Article 9(1) first states that:
- 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.
- See id.* at Art. 9(1).
334. Article 9(2) applies where a dispute is not amicably resolved: “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.” *See id.* at Art. 9(2) (emphasis added).
335. In their Arbitration Agreement, PEL and Mozambique agreed to submit their unresolved disputes for resolution in accordance with the laws of Mozambique: “[t]he arbitration *will be governed* by Mozambique law...” See **Exhibit R-2** (emphasis added). Therefore, PEL accepted Mozambique’s offer to arbitrate in Article 9(2) that the parties may agree to submit their dispute “*for resolution, in accordance with the law of the Contracting Party which has admitted the investment...*” See **RLA-1**, MZ-India BIT, Art. 9(2) (emphasis added). As cited above, the MOI’s Arbitration Agreement requires arbitration in accordance with the laws of Mozambique.
336. Further, Article 9(2) permits the parties to agree to submit their dispute to arbitration, not only in “in accordance with the law of the Contracting Party which has admitted the investment” but “*to that Contracting Party’s competent judicial, arbitral or administrative bodies.*” *See id.* (emphasis added). There is no doubt that the International Chamber of Commerce is a competent arbitral body in Mozambique. As discussed herein, there is a pending ICC arbitration between the parties in Maputo, Mozambique.

337. When the parties executed the MOI, they were presumed to have known that the MZ-India BIT was in existence (in fact, PEL must necessarily admit that it relied-upon that BIT as a purported investor). Thus, even if Article 9(2) was inapplicable, the parties agreed to arbitration pursuant to the ICC Arbitration Rules irrespective of the dispute resolution provisions in the MZ-India BIT.

4. The MOI’s Arbitration Agreement is Severable from the MOI and Enforceable.

338. “The *separability of an arbitration agreement* from the contract of which it forms part is a general principle of international arbitration law today.” **RLA-45**, *Duke Energy Int’l Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Annulment Proceeding (1 March 2011) ¶ 131 (emphasis added).

339. Therefore, the validity of the MOI’s Arbitration Agreement is independent of the validity of the MOI. The fact that Mozambique is challenging the validity of the MOI, does not defeat its ability to enforce the MOI’s Arbitration Agreement, and insist that this dispute be resolved in accordance with ICC Arbitration Rules, and not before this Tribunal.

5. PEL Waived by Contract its Right to UNCITRAL Arbitration and is Estopped from Invoking UNCITRAL Arbitration.

340. But even if the MZ-India BIT did not contain the provisions discussed above allowing the parties to elect arbitration under local law, the parties could have waived the provisions of the MZ-India BIT and elected to arbitrate in a specific manner, as they did under the MOI’s Arbitration Agreement.

341. In the Arbitration Agreement, PEL waived by contract its right to UNCITRAL arbitration (even if it had such a right) and is now estopped from invoking UNCITRAL arbitration. See **RLA-126**, J. Crawford, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, at 420 (“[a] considerable weight of authority supports the view that estoppel is a general principle of international law”).

6. This Tribunal is Not Called Upon to Decide which Arbitration Forum is More “Neutral.”

342. “An arbitral tribunal owes its jurisdiction solely to the consent of the parties.” **RLA-46**, *Emmis Int’l Holding, B.V., Emmis Radio Operating, B.C., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April

2014) ¶ 140. Thus, this Tribunal must give effect to the Arbitration Agreement’s mandate requiring arbitration pursuant to the ICC Arbitration Rules.

343. Although during the initial telephonic conference the Tribunal suggested that the parties may consider a “neutral” venue, this Tribunal is not being called upon to decide which arbitration forum is more “neutral,” and thus that should not be part of the analysis.
344. In any event, as discussed next, the ICC arbitration pending in Mozambique is an international arbitration, with three international arbitrators with substantial investment treaty arbitration experience, and none are from Mozambique or India; therefore, the ICC arbitration provides neutrality.

7. This Tribunal Must Dismiss this Arbitration Proceeding and Yield to the ICC Arbitration.

345. PEL and Mozambique were free to agree to resolve “any dispute *arising out of*” the MOI, including any investment treaty claims, pursuant to the ICC Arbitration Rules. The internationally-recognized principle of “freedom to contract” allows parties to select the terms of their agreement, including their method of dispute resolution.
346. In his Witness Statement, PEL’s lead negotiator Kishan Daga admits the parties met “three or four times to negotiate the terms of the MOI” and “exchanged two or three drafts before finalizing the MOI.” *See* SOC, CWS-1, Witness Statement of Kishan Daga ¶¶ 37-38. Therefore, there clearly was negotiation of the MOI’s terms.
347. It is an internationally recognized principle that “[t]he parties are free to enter into a contract and *to determine its content.*” **RLA-128**, UNIDROIT Principles of International Commercial Contracts (2010), Art. 1.1 (emphasis added). “The principle of freedom of contract is of paramount importance in the context of international trade.” *Id.* at Art. 1.1., Comment 1 (“Freedom of contract as a basic principle in international trade.”). Such rights “freely to agree on the terms of individual transactions, are at the cornerstones of an open, market-oriented and competitive international economic order.” *Id.*
348. Pursuant to the MOI’s Arbitration Agreement, there is currently a pending international arbitration between the parties under the ICC Arbitration Rules in Mozambique: *Republic of Mozambique and Mozambique Ministry of Transport and Communications v. Patel*

Engineering Ltd., ICC Case No. 25334/JPA (**Exhibit R-46**, attaching Mozambique and the MTC’s ICC Request for Arbitration) (hereafter, the “ICC Arbitration”).

349. The ICC Arbitration includes both the Republic of Mozambique and Mozambique Ministry of Transport and Communications as parties, unlike this UNCITRAL Arbitration which includes only the Republic of Mozambique. *Id.* Obviously, it was the MTC that signed the MOI and had the dealings with PEL.
350. The issues in the ICC Arbitration cover all issues in this UNCITRAL Arbitration, and more. The ICC Arbitration addresses not only the subject contractual claims but also the investment treaty claims. At the very least, there are substantial overlapping issues between the ICC arbitration and the UNCITRAL arbitration. The following is Mozambique’s and the MTC’s Request for Relief in the ICC Arbitration:

“280. Based on the foregoing, Mozambique and the MTC are entitled to and seek an Award:

280.1. declaring that:

- a. the correct Portuguese and English versions of the MOI are those submitted herein by Mozambique and the MTC, and the governing version is the one in Portuguese;
- b. the MOI is governed by the laws of the Republic of Mozambique;
- c. the MOI is void, voidable and voided, invalid, not legally binding and/or legally unenforceable, for the various reasons discussed herein;
- d. the purported first right of refusal provisions in Clause 2(2) of the MOI are void, voidable and voided, invalid, not binding and/or unenforceable, for the various reasons discussed herein;
- e. the purported exclusivity provisions in Clause 6 of the MOI are void, voidable and voided, invalid, not binding and/or unenforceable, for the various reasons discussed herein;
- f. the MOI was induced by PEL’s fraudulent concealment and fraud; and
- g. notwithstanding the foregoing, the Arbitration Agreement contained in Clause 10 of the MOI is severable and enforceable, and is governed by the laws of the Republic of Mozambique;

280.2. in the alternative, declaring that:

- a. the MOI is a preliminary, vague and nonbinding document, and, in the alternative, any purported right of first refusal, exclusivity, or direct award thereunder were preliminary, vague and nonbinding;
- b. PEL did not comply with the conditions precedent and/or requirements of, and/or has breached, the MOI, and/or has waived

its rights under the MOI, is estopped from asserting rights under the MOI and/or entered into an accord and satisfaction superseding and voiding any prior rights under the MOI;

c. a right of first refusal never arose under the MOI, and/or any purported right of first refusal, exclusivity, or a direct award were superseded by the PPP Law and PPP Regulations applicable to the Project, concession, and procurement process;

d. the subject project as proposed by PEL was not viable and/or feasible, which renders futile and moot any claim by PEL pursuant to the MOI, and makes PEL's alleged damages speculative and illusory;

e. Mozambique and the MTC have not breached the MOI;

f. PEL breached the MOI and/or anticipatorily repudiated the MOI, and released Mozambique and the MTC of any obligations thereunder, and caused damages to Mozambique and the MTC, by concealing its blacklisting and/or other material facts; by failing to disclose the impediments to its participation in the project and fraudulently concealing the same; by violating Mozambican law; by violating the confidentiality clause; and by violating the arbitration clause;

g. PEL is obligated under the MOI to bear the costs incurred in connection with its feasibility study;

h. the MOI does not provide for the recovery of any lost profits, consequential and/or incidental damages by PEL;

i. any and all obligations of Mozambique and the MTC under the MOI have been satisfied, released, extinguished and/or excused; and

j. any claims by PEL under the MOI are barred by the applicable statutes of limitation (prescription periods) under Mozambican law.

280.3. declaring that PEL lacks standing to bring any claims under or related to the public tender because the PGS Consortium is not asserting claims against the MTC or Mozambique and/or is not participating jointly with PEL in the international arbitration PEL has commenced;

280.4. declaring that 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 MOI against Mozambique and the MTC;

280.5. declaring that 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 public tender process, or under any other dealings or transactions that PEL had or was supposed to have with the MTC or Mozambique, against Mozambique and the MTC, because PEL's participation and said dealings and transactions was induced by PEL's fraudulent concealments an fraud, and PEL's acts and omissions violated Mozambican law and regulations, for the various reasons discussed herein;

280.6. declaring that even if PEL is entitled to damages, it is limited to the

reasonable cost of preparing the prefeasibility study, in an amount to be submitted by Mozambique and the MTC in this arbitration;

280.7. *enjoining PEL from proceeding with any other legal proceeding, court action and/or arbitration against Mozambique and/or the MTC that refers or relates to any dispute arising out of the MOI, including the international arbitration initiated by PEL pursuant to the MZ-India BIT. In the alternative, the request injunction should be granted and remain in place until after this Tribunal finally adjudicates the issues otherwise within its jurisdiction;*

280.8. *declaring that PEL lacks standing and cannot assert any claims under the MZ-India BIT, Mozambique and the MTC did not violate the MZ-India BIT in any manner whatsoever, and that 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 MZ-India BIT against Mozambique and the MTC;*

280.9. declaring that PEL has engaged in defamation of Mozambique and the MTC;

280.10. declaring that PEL engaged in fraudulent concealment and fraud, and indeed defrauded Mozambique and the MTC, for the reasons discussed herein;

280.11. declaring that PEL engaged in ethics and professional responsibility violations under Mozambican law, including procurement and PPP law, and acted in bad faith, for the reasons discussed herein;

280.12. awarding compensatory, actual, *per se* and/or punitive damages to Mozambique and the MTC to be paid by PEL for its fraud and defamation of Mozambique and the MTC, breach of the MOI if it is valid, ethics and professional responsibility violations, and other wrongful conduct described herein, in an amount according to proof to be presented by Mozambique and the MTC in this arbitration;

280.13. ordering PEL to pay Mozambique's and the MTC's attorneys' fees and all costs and expenses, and also without limitation all arbitrator, administrator and expert fees, incurred in connection with this arbitration; and

280.14. granting Mozambique and the MTC such further or other relief as the Tribunal shall deem to be just and appropriate.”

See **Exhibit-46**, Mozambique and the MTC's ICC Request for Arbitration ¶¶ 280 - 280.14 (emphasis added).

351. PEL has filed an Answer in the ICC Arbitration. *See* **Exhibit-47**.
352. Without doubt, the ICC Arbitration is an *international arbitration*. The three arbitrators are recognized international arbitrators with substantial investment treaty arbitration as well as commercial arbitration experience: Prof. Dr. Jan Kleinheisterkamp (president), Professor of law at the London School of Economics and Political Science²¹; Eduardo Silva Romero (co-arbitrator), Partner at Dechert LLP²²; and Stephen P. Anway (co-arbitrator), Partner at Squire Patton Boggs.²³
353. This UNCITRAL Tribunal must yield to the ICC arbitration and dismiss this proceeding.
354. In *Mobil Cerro*, the tribunal concluded that an ICC arbitration “*did not put an end to this [ICSID] case*” because “[*t*]he State was not a party to the ICC arbitration” and the treaty claims “[*were*] was not (and could not) have been resolved by the ICC tribunal, *which jurisdiction was limited to the contractual dispute.*” **RLA-47**, *Mobil Cerro Negro, Ltd., Mobil Cerro Negro Holding, Ltd., Mobil Corp., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Venezolana de Petróleos, Inc. Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014) ¶ 216 (emphasis added).
355. In sharp contrast to *Mobil Cerro*, here, Mozambique is a party (actually, the claimant) to the ICC Arbitration, and the ICC Tribunal does both have the jurisdiction, and without a doubt also the substantive expertise, to decide the BIT claims in addition to the contractual disputes, and all of these issues are in front of the ICC Tribunal.
356. This UNCITRAL Tribunal needs to have the courage to give effect to the parties’ MOI Arbitration Agreement and dismiss this improperly filed UNCITRAL Arbitration in favor of the ICC Arbitration.

8. At the Very Least, This Tribunal Should Suspend this Arbitration Proceeding Until After the ICC Arbitration is Completed.

357. First, this UNCITRAL Tribunal should suspend these proceedings until after the ICC Tribunal has decided its jurisdiction, because the ICC arbitration is subject to Mozambican

²¹ *See* <https://www.lse.ac.uk/law/people/academic-staff/jan-kleinheisterkamp>.

²² *See* <https://www.dechert.com/people/s/eduardo-silva-romero.html>.

²³ *See* <https://www.squirepattonboggs.com/en/professionals/a/anway-stephen-p>.

law, and therefore an ICC tribunal in Mozambique is the appropriate tribunal to determine whether there is ICC jurisdiction.

358. The tribunal in *Southern Pacific* took this approach, suspending the ICSID arbitration and yielding to the ICC arbitration:

Consequently, the question of whether the Parties have agreed on another method of dispute resolution is a *question prealable* to a finding of jurisdiction by this Tribunal. In other words, *before pronouncing on whether or not there is consent to ICSID jurisdiction in the present case it must be established that the parties have not effectively agreed upon another ‘manner’ of settling their investment dispute.*

RLA-48, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (27 November 1985) ¶ 79 (emphasis added). Here too, and to paraphrase, it must first be decided by the ICC whether the parties have “agreed upon another manner (that is, ICC arbitration) of settling their investment dispute.”

The question of whether the Parties have agreed on another method of dispute resolution is one which this Tribunal, as judge of its own jurisdiction, certainly has competence to resolve. However, the same question is also *sub judice* in another forum, where the proceedings involve the same Parties and the same dispute. The ICC tribunal has already answered this question in the affirmative, holding that Egypt and the Claimants agreed to resolve any disputes by ICC arbitration. The Paris Court of Appeals disagreed, but its decision has been appealed to the Court of Cassation, which will pronounce the final answer of the French judiciary on the matter.

Id. at ¶ 81.

While the *concurrent pursuit of a remedy in different jurisdictions* might be justified to protect legitimate interests of a claimant, it nevertheless *entails certain practical problems of international judicial administration, since it invites a clash between competing exercises of jurisdiction. This may result, not only in the concurrent exercise of jurisdiction by different tribunals, but also in a tribunal declining jurisdiction on the assumption, which later proves invalid, that another tribunal was the competent one to deal with the case.*

Id. at ¶ 83 (emphasis added).

When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. *However, in the interest of international judicial order, either of the tribunals may, in its discretion and*

as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.

Id. at ¶ 84 (emphasis added).

The law and the courts of the country where a tribunal sits are generally recognized as the proper law and the proper courts to pronounce on the validity and scope *ratione personae* of an arbitration clause. Thus, *establishing that arbitration should take place in Paris, those who concluded or approved the December Agreement subjected themselves by their own accord to French law and French courts for the determination of the validity and the scope ratione personae of the ICC arbitration clause.*

Id. at ¶ 85 (emphasis added).

Moreover, if the present proceedings on jurisdiction were stayed until such time as the question of ICC jurisdiction has been finally resolved by the French courts, such a stay would not appear to seriously disadvantage either Party.

Id. at ¶ 86 (emphasis added).

359. It is true that in *Southern Pacific* the ICC had already decide the issue and the matter was being reviewed by French courts, but that does not detract from the crux of the ruling, that because the ICC arbitration was subjected to French law by agreement, it was preferable for the ICC tribunal and then the French courts (if the parties sought resort to the courts, as they did in that case) to determine the question of the validity and scope of the ICC arbitration clause. Here, the MOI's Arbitration Agreement requires ICC arbitration subject to Mozambican law, and thus under this same rationale the ICC tribunal should decide the validity and scope of the ICC arbitration clause, and this ICSID tribunal should yield and suspend this ICSID arbitration (at least) until the ICC tribunal has reached a decision.
360. Without any doubt, an ICC tribunal is better suited to decide the question of the extent of the parties' ICC Arbitration Agreement, and therefore this ad hoc Tribunal should yield to the ICC Tribunal on this question, under principles of international comity. This Tribunal can exercise comity by staying or dismissing this proceeding without prejudice. In this regard, it may well be that before the April 2022 hearing in this proceeding, the ICC Tribunal may have already pronounced itself as to the ICC Arbitration Agreement.
361. Second, this UNCITRAL Tribunal should suspend this proceeding until after the ICC arbitration is completed (which may again happen before this proceeding goes to hearing)

because, at a minimum, jurisdiction over the contractual disputes is proper in the ICC arbitration, and a decision on the contractual disputes is a necessary precursor to BIT jurisdiction, because the BIT claims are based on the existence of rights under local Mozambican law. In other words, if the MOI, for example, is void and unenforceable as Mozambique contends, then PEL has not rights that it may seek to protect under the BIT.

C. In the Alternative, This Tribunal Lacks Jurisdiction (*Ratione Materiae*) Because the MOI is Not an Investment.

362. This Tribunal lacks jurisdiction because PEL has not made an investment. PEL argues that the MOI and its attendant rights, if any, constitute an investment. However, the MOI and its attendant rights, if any, is not an investment under the BIT, established investment treaty jurisprudence, and even considering the traditional *Salini* factors. The MOI simply provided an option (right of first refusal) to PEL, which was contingent on various conditions, and that amounts to a mere agreement to agree, not an investment. At best, PEL “got something” – an alleged bundle of rights – that is not an investment “in Mozambique” by PEL. The lack of an investment is further confirmed by the fact that the MOI spells out clearly that PEL incurs the costs of the PFS. At best, PEL made a pre-investment expenditure, but that is not an investment under the BIT or the decisions.

1. The MOI Is Not an Investment Under the BIT.

363. Each BIT is the product of negotiation and agreement between the two Contracting Parties. Therefore, the Tribunal must begin with the definition in the BIT. Here, the MOI and its attendant rights are not an “investment,” as that term is defined in the MZ-India BIT.

364. Article 1(b) of the BIT defines an “investment,” as follows:

The term ‘investment’ means 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 and in particular, though not exclusively, includes:

- (i) movable and immovable property as well as others rights such as mortgages, liens or pledges;
- (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company;
- (iii) *rights to money or to any performance under contract having a financial value;*

- (iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;
- (v) *business concessions conferred by law or under contract*, including concessions to search for and extract oil and other minerals...

RLA-1, MZ-India BIT, Art. 1(b) (emphasis added).

365. There was no “investment” by PEL under this definition, for various reasons.
366. First, the MOI and its attendant bundle of rights do not satisfy the definition of an investment in the MZ-India BIT, because no concession has been “established or acquired” by PEL, or “was conferred by law or contract” to PEL, pursuant to the MOI.
367. The overarching (or *chapeau*) definition of an “investment” in Article 1(b) provides that “[t]he term ‘investment’ means every kind of asset *established or acquired...*” *See id.* (emphasis added). Notice the specific use of the past tense of these words – “established or acquired.” Therefore, the definition in the MZ-India BIT contains *a specific limitation* that, to qualify as an investment, the particular asset must be one that has already been “established or acquired,” as opposed to a contingent asset or one not yet been established or acquired.
368. Further, Article 1(b)(v) of the MZ-India BIT provides, as examples of “investments,” specifically “business concessions *conferred* by law or under contract.” *See id.* (emphasis added). Again, notice the specific use of the past tense of the word – “conferred” – as opposed to “conferrable.” Therefore, to the extent that the asserted “investment” relates to a “concession,” the drafters of the MZ-India BIT expressly provided that it encompasses only concessions that have been “conferred” – again, in the past tense.²⁴
369. Therefore, comparing the overarching or *chapeau* definition of “investment” with the specific reference to concession leads to the inescapable conclusion that the Contracting

²⁴ In the Statement of Claim, PEL argues: “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.*’” SOC ¶ 258. However, PEL’s incomplete citations ignore that the definitions require that the concession and its attendant rights be actually conferred, established and acquired, and none of that ever happened here. PEL was never awarded the concession – it was awarded to the winning bidder.

Parties intended to limit “investments” under the MZ-India BIT to those concessions that were actually established, acquired or conferred, and not potential concession that were never actually established, acquired or conferred, like the one here with respect to PEL.

370. This interpretation of the MZ-India BIT’s definition of investment, that it actually must have been established or acquired, is also supported by a comparison of the MZ-India BIT with the definitions of investments found in other bilateral investment treaties entered into by Mozambique. For example, Article 1(d) of the US-MZ BIT²⁵ provides this overarching definition: “‘Investment’ ... means every kind of investment owned or controlled directly or indirectly by that national or company, and includes investment consisting or taking the form of” Similarly, Article 1(a) of the UK-MZ BIT²⁶ provides this overarching definition: “‘Investment’ means every kind of asset and in particular, though not exclusively, includes:” Similarly, Article 1(a) of the Japan-MZ BIT²⁷ provides this overarching definition: “the term ‘investment’ means every kind of investment owned or controlled, directly or indirectly, by an investor, including” Similarly, Article 1(a) of the Dutch-MZ BIT²⁸ provides this overarching definition: “the term ‘investments’ means every kind of asset and more particularly, though not exclusively”
371. Notably, none of the overarching definitions of “investment” found in the US-MZ BIT, UK-MZ BIT, Japan-MZ BIT and Dutch-MZ BIT include the additional limitation (that the investment must have actually been “established or acquired”) expressly included in the MZ-India BIT. This Tribunal must therefore give effect to the addition, in the MZ-India

²⁵ See **RLA-49**, Treaty between the Government of the United States of America and the Government of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment (1998) (“US-MZ BIT”).

²⁶ See **RLA-50**, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Mozambique for the Promotion and Protection of Investments (2004) (“UK-MZ BIT”).

²⁷ See **RLA-51**, Agreement between the Government of Japan and the Government of the Republic of Mozambique on the Reciprocal Liberalisation, Promotion and Protection of Investment (2013) (“Japan-MZ BIT”).

²⁸ See **RLA-52**, Agreement between the Government of the Republic of Mozambique and the Government of the Kingdom of the Netherlands Concerning the Encouragement and the Reciprocal Protection of Investments (2001) (“Dutch-MZ BIT”).

BIT, of the limitation that the “investment” must have been “established or acquired,” and specifically in the case of a concession one that has already been “conferred.”

372. Where Contracting Parties negotiate a bilateral investment treaty, and define an “investment” in a particular manner in their treaty, a strong degree of deference must be provided to their definition. Therefore, the MZ-India BIT requires that, in order to qualify as an investment, the concession must have been “established or acquired” by PEL, or must have been “conferred by law or contract” (here, by the MOI) to PEL.
373. However, the MOI and its attendant bundle of rights, even in their construction most favorable to PEL, do not satisfy the definition of an investment in the MZ-India BIT, because no concession was “established or acquired” by PEL, and no concession “was conferred by law or contract” (that is, by the MOI) to PEL. As discussed herein, at best, the MOI provides a mere option for a concession, which may be exercised by PEL assuming a number of conditions are first satisfied, but not the concession itself.²⁹
374. Even if PEL’s reading of the MOI is adopted, and the MOI actually required the MTC to award a concession to PEL upon the satisfaction of certain conditions, there is a critical difference between the MOI imposing on the MTC an obligation to award a concession and the MOI actually awarding a concession without more. Here, it is undisputable that, upon its execution, the MOI did not award a concession to PEL, without more.
375. Therefore, the MOI and its attendant bundle of rights cannot constitute a “investment” under the definition in the MZ-India BIT, because no concession has been established or acquired by PEL, and PEL also was not conferred any concession.³⁰ As discussed below,

²⁹ In the Statement of Claim, PEL incorrectly argues that “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.” SOC ¶ 257. But, in 2011, there was no investment in the concession. The concession had not yet been awarded to anyone, and was never awarded to PEL. PEL’s expenditures were just pre-investment expenditures and activities that do not qualify as an “investment” under the BIT (because the concession had not been awarded to PEL) and do not qualify as an investment under the jurisprudence (because such expenditures and activities (like preparation of the preliminary study and PFS) are considered to be “pre-investment” expenditures and activities), as discussed herein.

³⁰ Similarly, although Article 1(b)(iv) refers to “rights” to any “performance under contract having financial value,” this general provision is supplanted by the specific provision in Article 1(b)(v) that applies to “concessions.” In any event, PEL also did not establish or acquire any right to

and without prejudice, PEL may be able to assert commercial claims elsewhere, but there is no jurisdiction under the MZ-India BIT.

376. Second, Article 2 of the BIT further requires that the investment must be made “in the territory of the other Contracting Party.” Article 1(f)(ii) defines the “territory” of the Republic of Mozambique, as “the land territory as well as the maritime areas, including the exclusive economic zone, the seabed and subsoil, over which the Republic of Mozambique exercises, in accordance with international law, sovereign rights or jurisdiction.”
377. There is also no evidence in the record that PEL made an investment in the territory of Mozambique in connection with the MOI. Even if the expenses related to the MOI were considered to be an “investment” (rather, they are a mere commercial expenditure, as discussed herein), there is no evidence that the prefeasibility study was prepared, and the expenses related to the same were incurred, in Mozambique. By all indications, that work was performed, and the related expenses were incurred, in India. Indeed, in the Statement of Claim, PEL states can offer nothing more than this argument: “There is no doubt that the *Project was to be developed on Mozambique’s territory*, and that the Preliminary Study, the MOI, and the PFS were all developed *with the Mozambican territory in mind*.” SOC ¶ 261 (emphasis added). But PEL never received the concession, so the fact that it was to be developed in Mozambique does not show any actual investment by PEL. As discussed here, the concession was awarded to the winning bidder, and it (not PEL) made that investment. PEL’s argument that the preliminary study and PFS (or for that matter also the MOI, which as discussed herein are not investments) were “developed with the Mozambican territory in mind” is ludicrous. PEL would have this tribunal award it over USD\$100 million in damages, not because it ever made any investment in Mozambique, but because PEL prepared some pre-investment materials thinking of Mozambique.³¹

performance *by execution* of the MOI, because any rights of PEL under the MOI were “contingent” on PEL’s satisfaction of certain conditions. As discussed herein, at best, the MOI provides an option contingent on a number of contractual conditions, and PEL also has not presented evidence that the option had any market value in and of itself absent satisfaction of those conditions.

³¹ In its Statement of Claim, PEL cites *Nova Scotia*, ICSID Case No. ARB(AF)/11/1, but that case is inapplicable because it involved an actual contract to purchase coal. SOC ¶ 262. See **RLA-58** at ¶ 130. In contrast, here the MOI was contingent, as discussed herein.

378. And third, the MZ-India BIT contains express legality requirements, in both its definition of an investment and in its substantive requirements. Article 1(b) requires that the “investment” must be made “in accordance with the national laws of the Contracting Party.” Similarly, Article 2 requires that the investment must be “accepted as such in accordance with its laws and regulations,” referring to the laws and regulations of the Contracting Party in the territory of which the investment is made (here, Mozambican law).
379. “[I]t is clear that States may specifically and expressly condition access of investors to a chosen dispute settlement mechanism, or the availability of substantive protection. One such common condition is an express requirement that the investment comply with the internal legislation of the host State.” **RLA-29**, *Hamester*, ICSID Case No. ARB/07/24 at ¶ 125.
380. Of course, two Contracting Parties to a bilateral investment treaty may include specific conditions in the definition of an investment. For example, in the Israel-Czech BIT, a requirement was expressly stated that the investment accord with the laws of the host state, and the tribunal found this requirement was perfectly legitimate. **RLA-33**, *Phoenix Action*, ICSID Case No. ARB/06/5 at ¶ 101.
381. As discussed herein, PEL’s alleged investment was not made in accordance with Mozambican law, because, *inter alia*, the MOI was induced by a fraudulent concealment and constituted an illegal investment, and was not registered as an investment in Mozambique under the Mozambique Investment Law.

2. The MOI provides PEL, at Best, With an Option, and it is Settled that an Option is Not an Investment.

382. The definition an “investment,” set forth in a bilateral or multilateral investment treaty, must “be analyzed with due regard to the requirements of *the general principles of law*.” **RLA-33**, *Phoenix Action*, ICSID Case No. ARB/06/5 at ¶ 77 (emphasis added).
383. “The tribunal must identify precisely the dispute brought before it.” *See* **RLA-53**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) ¶ 41.

384. Thus, even if the asset or right fits within the general definition of an investment, or within one of the examples of an investment, in a BIT, the tribunal must still consider whether the asset or right may properly be considered an investment in the developing jurisprudence.

To conclude that a contingent liability is an asset under Article 1(a) of the Treaty and hence a protected investment, *would really go far beyond the concept of investment, even if broadly defined, as this and other treaties normally do.* The Company has also asserted that its claim falls within Article I(a)(iii) of the Treaty which includes within the scope of investment ‘claims to money or to any performance under contract having a financial value’, and that it also should be considered a ‘pledge’ under Article I(a)(i) of the Treaty. The Tribunal is not persuaded by this argument either. *Even if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterizing as an investment dispute a dispute which in essence concerns a contingent liability.*

See **RLA-53**, *Joy Mining*, ICSID Case No. ARB/03/11 at ¶¶ 45-47 (emphasis added).

385. As discussed above, the MOI and its attendant rights, if any, do not fit within the general definition of an investment, nor within one of the examples of an investment, in the MZ-India BIT. At best, the MOI and its attendant rights, if any, provide PEL only with an “option” (that is, a “right of first refusal”) that PEL may exercise after satisfaction of certain conditions. However, it is settled in the jurisprudence that *an option is not an investment.*

386. To paraphrase, even if the MOI and its attendant rights had a “financial value,” as PEL claims they have, “it cannot amount to recharacterizing as an investment dispute a dispute which in essence concerns a contingent liability.” Indeed, at best, the dispute between PEL and Mozambique about the MOI is a dispute over contingent obligations, not a dispute arising from an investment by PEL in Mozambique.³²

387. In his Witness Statement, PEL’s lead negotiator Kishan Daga admits the fundamental “contingent” nature of the MOI. Mr. Daga admits that the MTC “was insistent that, after reviewing the PFS, *the MTC would have discretion to approve it or not*, depending on how satisfied it was with the results.” *Id.* at ¶ 39 (emphasis added). This discretion makes the

³² The fact that PEL prepared a PFS also does not change the analysis. In *Joy Mining*, the contract was held not to be an “investment,” although it also “involve[d] a number of additional activities ... such as engineering and design, production and stocking of spare parts and maintenance tools and incidental services such as supervision of installation, inspection, testing and commissioning, training and technical assistance.” **RLA-53**, *Joy Mining*, ICSID Case No. ARB/03/11 at ¶ 55.

MOI contingent. Mr. Daga further admits that also had an “out” – that “PEL *would have a right of first refusal* of the concession award *in the case our circumstances had changed or the concession offered by the Government was no longer in our interests.*” *Id.* at ¶ 40 (emphasis added). If the right of first refusal must be interpreted as giving PEL that “out” of the concession, that further confirms that the MOI was contingent, and thus not an investment.

388. In *Mihaly*, the tribunal found that expenditures made in connection with option agreements were not an “investment” within the meaning of Article 25 of the ICSID Convention.³³ See **RLA-54**, *Mihaly Int’l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002). The same is true here, the alleged expenditures and efforts by PEL in connection with the MOI are not an investment – they are, instead, simply pre-investment activities that give rise to a contractual dispute over interpretation of the MOI, and nothing more, particularly where PEL did not win the bidding contest.
389. Indeed, in *Mihaly*, claimant Mihaly International, a U.S. company, sought to build a power plant in Sri Lanka. The claimant argued that expenditures it had made in preparation and in connection with a Letter of Intent, a Letter of Agreement, and a Letter of Extension were an “investment” although the claimant was not ultimately awarded the contract for the building, ownership, and operation of power station. The tribunal unequivocally concluded that such *pre-investment expenditures do not constitute an “investment” for purposes of the tribunal’s jurisdiction.*

It is in this factual setting that the Tribunal has been asked to consider *whether or not, the undoubted expenditure of money, following upon the execution of the Letter of Intent, in pursuit of the ultimately failed enterprise to obtain a contract, constituted ‘investment’* for the purpose of the Convention. The Tribunal has not been asked to and cannot consider in a vacuum whether or not in other circumstances expenditure of moneys might constitute an ‘investment’. A crucial and essential feature of what occurred between the Claimant and the Respondent in this case was that first, the Respondent took great care in the documentation relied upon by the

³³ Article 25 of the ICSID Convention does not define an investment, and thus the analysis in *Mihaly* reflects more properly international law, and is applicable in this UNCITRAL arbitration.

Claimant to point out that *none of the documents, in conferring exclusivity upon the Claimant, created a contractual obligation for the building, ownership and operation of the power station.* Second, the grant of exclusivity never matured into a contract. To put it rhetorically, what else could the Respondent have said to exclude any obligations which might otherwise have attached to interpret the expenditure of the moneys as an admitted investment? *The operation of SAEC was contingent upon the final conclusion of the contract with Sri Lanka, thus the expenditures for its creation would not be regarded as an investment until admitted by Sri Lanka.*

Id. at ¶ 48 (emphasis added). The facts are virtually identical to those presented here. PEL also claims that it made expenditures of monies, following the execution of the MOI, and did so in pursuit of its ultimately failed enterprise to obtain the subject concession in Mozambique. The MOI did not create a contractual obligation that PEL would receive the concession without more. The MOI also specifically envisions that it is contingent on various conditions, including the execution of a concession agreement if awarded to PEL. In his Witness Statement, Mr. Daga admits that the cost of the PFS were PEL's sole responsibility. SOC, CWS-1, Witness Statement of Kishan Daga ¶ 39.

390. The *Mihaly* tribunal further explained:

It is an undoubted feature of modern-day commercial activity that huge sums of money may need to be expended in the process of preparing the stage for a final contract. However, the question whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or small. Ultimately, it is always a matter for the parties to determine at what point in their negotiations they wish to engage the provisions of the Convention by entering into an investment. Specifically, the Parties could have agreed that the formation of a South Asia Electricity Company was to be treated as the starting point of the admitted investment, engaging the responsibility of the Respondent for the Claimant's failure to complete other arrangements to achieve the milestones by the due date mentioned in the Letter of Extension. The facts of the case point to the opposite conclusion. The Respondent clearly signaled, in the various documents which are relied upon by the Claimant, that it was not until the execution of a contract that it was willing to accept that contractual relations had been entered into and that an investment had been made. It may be and the Tribunal does not have to express an opinion on this, that during periods of lengthy negotiations even absent any contractual relationship obligations may arise such as the obligation to conduct the negotiations in good faith. These obligations if breached may entitle the innocent party to damages, or some other remedy. However, these remedies do not arise because an investment had been made, but rather

because the requirements of proper conduct in relation to negotiation for an investment may have been breached. That type of claim is not one to which the Convention has anything to say. They are not arbitrable as a consequence of the Convention.

Id. at ¶ 51 (emphasis added).

391. Indeed, like the letters of intent in *Mihaly*, the MOI also is not a concession agreement, and its provisions (if not its spirit) confirm that the parties envisioned that a concession agreement would be necessary after contingencies were satisfied, something that never happened. Under these circumstances, the “remedy” to PEL may be a contractual claim under the MOI, but “is not one to which the [BIT] has anything to say.” Therefore, PEL’s claims are “are not arbitrable as a consequence of the [BIT].”
392. Also like the claimant in *Mihaly*, PEL has failed to come forward with any evidence that pre- investment and development expenditures in the circumstances of the present case could automatically be admitted as “investment” in the absence of the consent of the host State to the implementation of the project, and there is no such consent.

The Tribunal is of the view that *de lege ferenda* the sources of international law on the extended meaning or definition of investment will have to be found in conventional law or in customary law. *The Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of States, let alone that of developing countries or Sri Lanka for that matter, to the effect that pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as ‘investment’ in the absence of the consent of the host State to the implementation of the project.* It should be observed that while the US-Sri Lanka BIT contains provisions regarding the definition of investment and conditions for its admission, they recognize the Parties’ prerogative in this respect.

Id. at ¶ 60 (emphasis added).

393. For these reasons, PEL has failed to establish an investment.

The Tribunal is consequently *unable to accept as a valid denomination of ‘investment’, the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment.*

Id. at ¶ 61 (emphasis added).

Failing to provide evidence of admission of such an investment, the Claimant’s request for initiation of a proceeding to settle an investment dispute is, to say the least, premature.

Id. at ¶ 61 (emphasis added). PEL has a mere claim for a contingent obligation arising from the MOI and that is an option that is not considered an “investment” in the jurisprudence.

394. Further, it also makes no difference that PEL accuses, repeatedly but without foundation, the MTC of not negotiating in good faith. As discussed below, these accusations are baseless because the MTC accommodated PEL through a scoring advantage. But, in any event, this also does not warrant finding an investment.

395. The *Mihaly* tribunal further noted that during the preparatory stages there are obligations to conduct negotiations in good faith. However, a breach of those obligations does not entail provide international investment treaty jurisdiction, and must be resolved elsewhere.

However, in finding the request to be unfounded, the Tribunal does not say that it is frivolous, vexatious or malicious. *Nor does the Tribunal’s determination that the subject-matter of the dispute, if any, falls outside the jurisdiction of ICSID and beyond the competence of the Tribunal preclude whatever recourse the Claimant may have at its disposal to pursue its claim arising out of a commercial, financial or other type of dispute.* The Tribunal’s conclusions are declared to be without prejudice to any rights of action which may be available before other instances, national or international, with the consent of the Parties, if required.

Id. at ¶ 61 (emphasis added). Instead, PEL may pursue its claims in the ICC arbitration, which is already pending between the parties in Mozambique.

396. Similarly, in *PSEG Global*, the tribunal also concluded that option agreements are not an investment. *See generally, RLA-55, PSEG Global Inc., The North Am. Coal Corp. & Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction (4 June 2004). Specifically, the tribunal held that one of three claimants lacked standing where its only link to the case was a Memorandum of Understanding that conferred an option to acquire an ownership interest by means of a Shareholders Agreement to be negotiated at a later time.

Whether the Memorandum is valid and in force is immaterial for the purpose of the Tribunal’s decision. *The Tribunal considers that the Respondent’s argument that the definition of investment does not include an option is persuasive as a general approach. Broad as many definitions of investment are in treaties of this kind, there is a limit to what they can reasonably encompass as an investment. Options such as this particular one cannot, in the view of the Tribunal, be interpreted as an ‘investment’.* The

Tribunal acknowledges that different circumstances from those which obtain in the present case may lead to a different conclusion.

Id. at ¶ 189 (emphasis added).

397. Here, not only does the MOI not fit within the definition of an “investment” in the MZ-India BIT, but the MOI and its attendant rights, if any, constitute a mere option, and options cannot be “interpreted as an investment. Indeed, “[t]o date, *most tribunals have been reluctant to consider pre-investment activities and expenditures, which do not ultimately come to fruition, as covered investments.*” **RLA-130**, Barton Legum, Investment Treaty Arbitration Review at 11 (Law Business Research Ltd. 2020) (emphasis added).³⁴ Here, not only did the MOI provide only an option, but the concession also never came to fruition.
398. In this regard, PEL’s pre-investment expenditures also are not considered to be an “investment.” Following the reasoning in *Mihaly*, in *Zhinvali*, which concerned the rehabilitation of a hydroelectric power plant, the tribunal held that because

the proposed Zhinvali Project transaction did not close and, thus, the costs of the ‘development phase’, in the words of the Mihaly Case, were not ultimately ‘swept up’ under the umbrella of an integrated, three phase investment project ... Consequently, rather than retrospectively having become part of the overall investment expenditures of a successfully closed project finance transaction, the ‘development costs’ in this case must either stand as an ‘investment’ solely on their own two feet or otherwise fall by the wayside as expenditures that fail to qualify either under the 1996 Georgia Investment Law or under the ICSID Convention.

RLA-56, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003) ¶ 410 (emphasis added).

399. Finding that the subject expenditures were not an “investment,” the *Zhinvali* tribunal noted that, during the “exclusivity period,” “the Respondent [had] *expressly insisted that all expenses involved in pushing the Project forward were for the Claimant’s account.*” *Id.* at ¶ 411 (emphasis added). Here too, during the exclusivity period, the MTC requested in the MOI that all expenses in preparing the PFS would be the exclusive responsibility of PEL. In *Zhinvali*, because the transaction did not close and the expenditures were for the claimant, the tribunal “decided that ... *there is no ‘investment’ in this case* under the 1996

³⁴ See https://thelawreviews.co.uk/digital_assets/3f101b9b-a1d8-42dc-989d-071eaf58183c/TLR-The-Investment-Treaty-Arbitration-Review---5th-Edition.pdf.

Georgia Investment Law or under Article 25(1) of the ICSID Convention. *As a result, the Centre is without jurisdiction, and this Tribunal is without competence, with regard to the merits of this arbitration.*” *Id.* at ¶ 417 (emphasis added). Similarly, here, because the MOI did not result in a concession agreement, this UNCITRAL Tribunal is without jurisdiction, and without competence, with regards to the merits of this arbitration. Also echoing the tribunal in *Mihaly*, the *Zhinvali* tribunal concluded by noting that the claimant’s recourse may properly be in another forum, but not at ICSID. *Id.* at ¶¶ 418-419. Again, the same is the case here – PEL’s remedy may be in recourse to the ICC arbitration, but not before the PCA in this UNCITRAL arbitration.

3. The MOI Is Also Not an Investment Applying the Traditional *Salini* Factors.

400. The so-called *Salini* test was proposed as a means to determine the existence of an investment under Article 25 of the ICSID Convention, but it is also helpful in defining the limits of an investment. See **RLA-57**, *Salini Costruttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ABR/00/4, Decision on Jurisdiction (16 July 2001) ¶ 44 (the tribunal held that “its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Convention, in accordance with the case law.”).
401. It is generally understood that the nature of an investment derives from more than mere definitions in a BIT. See, e.g., **RLA-58**, *Nova Scotia Power Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award Excerpts (30 April 2014) ¶ 80 (“No matter what the forum [that is, regardless of whether the proceedings are under the Convention or Additional Facility Rules], *the ordinary meaning of investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for an examination of the inherent features of an investment.*”) (emphasis added).
402. The *Salini* tribunal held that these factors were useful considerations:

The doctrine generally considers that investment infers: *contributions, a certain duration of performance of the contract and a participation in the risks of the transaction.* In reading the Convention’s preamble, one may add the *contribution to the economic development of the host State* of the investment as an additional condition.

In reality, these various elements may be *interdependent*. Thus, *the risks of the transaction may depend on the contributions and the duration of*

performance of the contract. As a result, these various criteria should be *assessed globally* even if, *for the sake of reasoning*, the Tribunal considers them *individually* here.

RLA-57, *Salini*, ICSID Case No. ABR/00/4 at ¶ 52; *see also*, **RLA-33**, *Phoenix Action*, ICSID Case No. ARB/06/5 at ¶ 114 (“to establish an investment, “the Tribunal considers that the following six elements have to be taken into account: 1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested *bona fide*.”).

403. “The Tribunal agrees that the three criteria identified by the *Salini* tribunal – contribution of capital, certain duration and assumption of risk – are not independent or free-standing criteria but interdependent in the sense that a commitment of capital to a business venture – “contribution” of capital – implies, in itself, a certain duration for the contribution in question and a risk of loss of the capital contributed.” **RLA-59**, *Içkale Insaat Ltd. Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016) ¶ 290.
404. First, there must be a contribution in money or other assets, and here there was none that qualified as such under the jurisprudence. In the Statement of Claim, PEL’s sole argument with respect to this factor is that “PEL expended several million dollars to fund the preliminary study and the PFS.” SOC ¶ 276(a). However, as discussed above, the contribution must be towards the investment itself, and *not towards pre-investment activities*. Here, PEL’s contribution of money and assets were made towards satisfying the contingencies in the MOI like the preparation of the preliminary study and PFS, and not towards activities that constitute the investment itself. As discussed above, the jurisprudence is clear that pre-investment expenditures are not considered to be made towards an investment, and that is particularly so where the concession was never awarded to the claimant, as with PEL.³⁵

³⁵ In the Statement of Claim, PEL also refers to its alleged “profit” and the total value of the project, but the profit is incoming to PEL (not an investment by PEL) and the total value of the project is irrelevant because PEL was not awarded the project nor made any investment in the project itself, which is being developed and invested in instead by the winning public tender bidder. It is the winning bidder that is investing in the project, not PEL. SOC ¶ 276(a).

405. Second, the investment must be of a certain duration. Here, there was no “investment” in the first place, so the duration factor also cannot be satisfied. Further, even PEL’s pre-investment expenditures and efforts were considered, under the MOI PEL was required to provide the PFS within 12 months, and one year falls short of the minimal length of time upheld by the doctrine, which is from 2 to 5 years. See **RLA-57**, *Salini*, ICSID Case No. ABR/00/4 at ¶ 53 (““Although the total duration for the performance of the contract, in accordance with the CCAP, was fixed at 32 months, this was extended to 36 months. The transaction, therefore, complies with the minimal length of time upheld by the doctrine, which is from 2 to 5 years.”) (citations omitted); **RLA-33**, *Phoenix Action*, ICSID Case No. ARB/06/5 at ¶ 124 (“duration criterion generally requires that the investment project be carried out over a period of at least two years.”).³⁶
406. Third, there must be an element of “investment” risk, but that factor is also not satisfied.
407. Although “[i]t has been said by other tribunals that risk for the purposes of ‘investment’ is relatively easy to establish, and that the very existence of a dispute shows that a risk was present. The Tribunal does not find such analysis helpful. *It may be that any transaction involves a risk, but what is required for an investment is a risk that is distinguishable from the type of risk that arises in an ordinary commercial transaction. Furthermore, the relevant risk is that which is specific to the investment which did take place, not the lost opportunity to make a different investment or commercial decision.*” **RLA-58**, *Nova Scotia*, ICSID Case No. ARB(AF)/11/1 at ¶ 105 (emphasis added).
408. Here, there was no “investment risk,” because PEL’s expenditures and actions were “pre-investment activity.” PEL took the risk it may not be awarded the concession, if it could not meet the conditions and could not win the public tender, but that is a commercial risk. This Tribunal could not hold that PEL’s pre-investment activities presented an investment risk, because it would create a precedent that turns the jurisprudence on its head, and would

³⁶ In the Statement of Claim, PEL tries to expand the one-year period it admits it spent preparing the PFS by including time before the MOI was signed. If pre-investment activities such as the preparation of the PFS do not count towards an investment, then certainly pre-MOI activities also do not count. SOC ¶ 276(b) PEL’s reference to the three years estimated for the project also is irrelevant because, again, the project is being developed and invested in instead by the winning public tender bidder, not PEL.

open that door to every disappointed bidder in a public bidding contest to claim that it made an investment and can assert BIT claims.

409. The risk assumed by any bidder or in a letter of interest (like the MOI) is that the opposing party may default in its obligations – that risk is merely a commercial risk. “A commercial risk covers [...] the risk that one of the parties might default on its obligations, which risk exists in any economic relationship.” **RLA-60**, *Poštová Banka, a.s., Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, (9 April 2015) ¶ 369 (emphasis added); **RLA-61**, *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280, Award (26 November 2009) ¶ 229 (“All economic activity entails a certain degree of risk. As such, *all contracts – including contracts that do not constitute an investment – carry the risk of nonperformance*. However, *this kind of risk is pure commercial, counterparty risk*, or, otherwise stated, *the risk of doing business generally*.”) (emphasis added).³⁷
410. Therefore, in confirming the lack of an investment risk, it is significant that PEL was never awarded the concession. In sharp contrast to this dispute, in *Salini*, Morocco “issued an international invitation to tender for the construction of a highway joining Rabat to Fes.” The claimant Italian companies “submitted a joint tender” for the construction of a section of the highway, and “[t]he construction of this section was awarded to the Italian companies” “The negotiations that followed the award of section No. 2 resulted in the signature of Contract 53/95” **RLA-57**, *Salini*, ICSID Case No. ABR/00/4 at ¶ 2. “The works were completed” after 36 months and the government took over the completed project. *Id.* at ¶¶ 3, 4. As a result, the *Salini* tribunal concluded that “[a] construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor.” *Id.* at ¶ 56.
411. Similarly, in *Beijing Urban*, the claimant entered into a contract with Yemen to construct an international airport. During phase two of construction (after phase one was completed), the claimant alleged that Yemen use military force to prevent its entry into the project and

³⁷ Indeed, in the Statement of Claim, PEL can only make this argument about “risk”: “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.” SOC ¶ 276(c). But those are plain “commercial risks,” and not investment risks, as discussed above. PEL has failed to show any investment risk.

- then terminated the contract. **RLA-62**, *Beijing Urban Construction Group Co Ltd v. Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, (31 May 2017) ¶¶ 22-27. The tribunal held these facts satisfied the *Salini* factors. *Id.* at ¶ 136. The tribunal concluded: “It is obvious that construction of an international air terminal worth in excess of a hundred million dollars contributes to the host State’s economic development.” *Id.* at ¶ 137. “[T]he Tribunal has no difficulty in concluding that BUCG did make an investment in Yemen that qualified for protection under both Article 25(1) of the ICSID Convention and Article 1(1) of the China-Yemen BIT.” *Id.* at ¶ 138.
412. In similar vein, in *Toto Costruzioni*, there was a contract for construction between the parties. “The dispute arose from a Contract dated 11 December 1997 entered into between the *Lebanese Republic — Conseil Exécutif des Grands Projets*, on one hand, and *Toto Costruzioni Generali S.p.A.*, on the other hand, in the context of the construction of a portion of the Arab Highway linking, *inter alia*, Beirut to Damascus. Pursuant to the Contract, Toto undertook to build the section of the Arab Highway identified as the “Hadath Highway-Syrian Border-Saoufar-Mdeirej Section.” See **RLA-63**, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009) ¶ 16. The tribunal stated that a construction contract in which the execution of the works extends over a substantial period of time involves by definition the necessary element of risk. *Id.* at ¶ 78. “Thus, it is the considered conclusion of this Tribunal that the construction carried out by Toto in Lebanon was an ‘investment’ according to Article 25 of the ICSID Convention, and as such, the disputes related to this construction qualify for the ICSID arbitration.” *Id.* at ¶ 87.
413. Here, the MOI did not award the subject concession, PEL did not meet the various contingencies of the MOI, PEL’s consortium did not prevail in the public bidding contest and did not appeal the contest outcome, and PEL was never awarded the concession. There was a total absence of “investment risk,” and thus PEL also cannot satisfy this factor.
414. Fourth, there must be a contribution to the economic development of the host State, which is also absent here.
415. In *Salini*, “the contribution of the contract to the economic development of the Moroccan State [could not] seriously be questioned. In most countries, the construction of

infrastructure falls under the tasks to be carried out by the State or by other public authorities. It cannot be seriously contested that the highway in question shall serve the public interest. Finally, the Italian companies were also able to provide the host State with know-how in relation to the work to be accomplished.” **RLA-57, *Salini***, ICSID Case No. ABR/00/4 at ¶ 57. “Consequently, the Tribunal considers that the contract concluded between [Morocco] and the Italian companies constitutes an investment ... [within] the Bilateral Treaty concluded between the Kingdom of Morocco and Italy ... as well as Article 25 of the Washington Convention.” *Id.* at ¶ 58. Unlike *Salini*, where “[t]he works were completed” after 36 months and the government took over the completed project, *id.* at ¶¶ 3 & 4, there was no contract for a concession between PEL and the MTC, and PEL constructed nothing.³⁸

416. Fifth, the alleged investment must be in accordance with the laws of the host State. As discussed below, if the MOI were interpreted to require a concession, as PEL urges, then it violated Mozambican law, including the PPP Law, and the MOI also suffered of multiple other infirmities, such as that the Minister lacked authority to sign it and it was never duly authorized by the required public authorities, including the administrative court. In its Statement of Claim, PEL – not surprisingly – ignores this factor requiring legality.
417. And sixth, it must be a *bona fide* investment, and this requirement is also lacking here. As discussed above, PEL fraudulently induced the MTC to deal with PEL, by concealing that PEL had been blacklisted in India precisely in a transportation infrastructure project, and that the Supreme Court of India had held PEL to be “not commercial reliable and trustworthy.” In its Statement of Claim, PEL – not surprisingly – also ignores this factor requiring good faith. Under these circumstances, there was no *bona fide* investment.

³⁸ Indeed, in the Statement of Claim, PEL mistakenly argues that “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.” SOC ¶ 276(d). This is also irrelevant to PEL, because PEL did not receive the project and the project is being developed and invested in instead by the winning public tender bidder, not PEL. PEL cannot benefit from something it did not do, and cannot claim an investment where the investment is done by someone else.

418. Additionally, the most-favored-nations clause also cannot be used to create jurisdiction where “there is no investment within the meaning of the BIT.” **RLA-58**, *Nova Scotia*, ICSID Case No. ARB(AF)/11/1 at ¶ 146.

419. In sum then, consideration of the *Salini* factors simply reinforces the conclusion above that there was no investment because the MOI provide a contingent option which is not an investment under the BIT or under the jurisprudence.

D. This Tribunal Lacks Jurisdiction (*Ratione Materiae*) Because This Is a Purely Contractual Dispute; There was no Exercise of Sovereign Power.

420. In *Abaclat*, the tribunal stated:

[A]n arbitral tribunal has no jurisdiction *where the claim at stake is a pure contract claim*. [...] *A claim is to be considered a pure contract claim where the Host State, party to a specific contract, breaches obligations arising by the sole virtue of such contract*. This is not the case where *the equilibrium of the contract and the provisions contained therein are unilaterally altered by a sovereign act of the Host State*. This applies where the circumstances and/or the behaviour of the Host State appear to derive from *its exercise of sovereign State power*. Whilst the exercise of such power may have an impact on the contract and its equilibrium, *its origin and nature are totally foreign to the contract*.

RLA-64, *Abaclat and Others. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) ¶ 318 (emphasis added); *see also*, **RLA-65**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) ¶ 544 (“A claim is to be considered a pure contract claim where the Host State, party to a specific contract, *breaches obligations arising by the sole virtue of such contract*.”) (emphasis added).

421. The MTC’s actions are not “totally foreign to the” MOI. The MTC provided PEL with a scoring advantage in the bidding contest, and interpreted the MOI and Mozambican law to require a bidding contest in order to be fair and equitable to all interested bidders.

422. Further, in *Weltover*, the United States Supreme Court addressed the *distinction between sovereign activity and commercial activity* in an action involving the issuance of sovereign bonds. The Supreme Court held that a State engages in commercial activity when it exercises “only those powers that can also be exercised by private citizens,” as distinct

from those “powers peculiar to sovereigns.” **RLA-66**, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Put differently, a foreign state engages in commercial activity “in the manner of a private player within” the market. *Id.* The Supreme Court further explained that whether a state acts “in the manner of” a private party is a question of the objective nature of the particular act, not a subjective question of motivation:

[B]ecause the Act provides that the commercial character of an act is to be determined by reference to its ‘nature’ rather than its ‘purpose,’ the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in ‘trade and traffic or commerce.’

*Id.*³⁹

423. Here, the MTC did not exercise any “sovereign power” to change the equilibrium of the MOI. A private party also can enter into a contract and implement a tender contest – in the private sector, a tender contest is called an “RFP” – request for proposals. A private party can agree to give an RFP bidder a scoring advantage. Just because the disappointed bidder, in a public procurement contest or on in the private setting on an RFP, claims the MOI or RFP was breached, it does not mean it was through an exercise of sovereign power. PEL claims the MTC breached its obligations under the MOI; this is a commercial dispute.⁴⁰
424. “As a general rule, a mere non-performance of a contractual obligation does not by itself fall within the scope of the State’s undertakings under the Treaty.” **RLA-63**, *Toto Construzioni*, ICSID Case No. ARB/07/12 at ¶ 103. “A State could, as an ordinary

³⁹ *Weltover* was cited in *Poštová Banka*, ICSID Case No. ARB/13/8, at ¶ 320 n.490. See **RLA-60**.

⁴⁰ It also does not matter that PEL’s lawyers are asserting a purported expropriation or other purported claims under the MZ-India BIT. The questions are not what lawyers artfully plead, but instead what the dispute is really about. See **RLA-75**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003) at 404 (contract claims cannot fall within the competence of ICSID arbitration panels even when expropriation was alleged.); **RLA-103**, *Waste Management*, ICSID Case No. ARB(AF)/00/3 at ¶ 175 (Breach of contract and expropriation are two different things: the former can be committed by anyone, while the latter is inherently governmental in character. In the first case, unless the breach is the result of governmental prerogative such as a legislative decree, the answer will be the filing of a complaint on the domestic level. Only when this has been done will the path be cleared for action on the international level.).

contracting partner, have a dispute with an investor. For a breach of Article 2 of the Treaty, however, the State or its emanation has to go beyond what an ordinary contracting partner would do and act within its sovereign authority.” *Id.* at 104. “The authority to expropriate is a typical example of a prerogative that can only be exercised by the State (or by its emanation) as holder of the ‘*puissance publique*.’” *Id.* at 107. “Thus, clearly, in the matter at hand, expropriation by Lebanon through the CDR is a prerogative that does not pertain to the simple performance of ordinary contractual duties. It falls within the scope of the ‘*puissance publique*’ that must be used to allow performance of the contract by Toto and enters within the scope of Article 2, paragraph 3 of the Treaty.” *Id.* at 108.

425. But here, there was no “expropriation.” There was no expropriation law enacted and there was no indirect expropriation. At best, PEL can point only to a breach of the MOI’s contractual terms. In other words, “[a] violation can certainly result from the violation of the contract, but without a possible violation of the contract constituting, *ipso jure*, and in itself, a violation of the Treaty.” **RLA-67**, *Consortium RFCC v. The Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award (22 December 2003) ¶ 48.

426. For the reasons discussed above, this Tribunal lacks jurisdiction (*Ratione Materiae*).

E. The Tribunal Lacks Jurisdiction (*Ratione Personae*) Because PEL is Not an Investor.

427. First, jurisdiction is lacking because PEL was not an investor. “[A]n investor seeking access to international jurisdiction pursuant to an investment treaty must prove that [he] was an investor at the relevant time, *i.e.*, at the moment when the events on which it claim is based occurred.” **RLA-68**, *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award (17 September 2009) ¶ 112; *see also* **RLA-69**, *ST-AD GmbH v. Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013) ¶ 300 (“a BIT cannot apply to the protection of an investor before the latter indeed became an investor under said BIT.”). Because, as discussed above, there was no investment by PEL, PEL also was not an investor.

428. And second, tribunals have held they lacked jurisdiction over disputes arising from investments where claimants failed to meet the local registration requirements as foreign

investors. Here, this requirement is expressly imposed by the MZ-India BIT and PEL has failed to establish that it registered its alleged investment under Mozambican law.

429. For example, in *Tamimi*, the claimant submitted claims against the Sultanate of Oman, arising out of the claimant’s investment in the development and operation of a limestone quarry in Oman. **RLA-70**, *Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015) ¶¶ 1, 45-48. The claimant’s investment was created through two lease agreements signed between, respectively, his companies Emrock Aggregate & Mining LLC (“Emrock”) and SFOH Limited (“SFOH”), and the Omani state-owned enterprise Oman Mining Company LLC (“OMCO”). *Id.* at ¶ 49. The respondent raised a number of jurisdictional arguments, including that the OMCO-SFOH Lease Agreement never came into force because SFOH was never registered in Oman. *Id.* at ¶ 98. Such registration was required under Omani law. *Id.* The respondent asserted that Omani law did not recognize the existence of companies not registered in Oman, or the contracts those companies enter into and that the claimant did not register SFOH. *Id.* at ¶ 99.
430. The tribunal held that it had no jurisdiction *ratione temporis* over the OMCO-SFOH Lease Agreement, because the agreement was rendered null and void prior to 1 January 2009 as a result of SFOH’s failure to register in Oman. The tribunal found that the law was clear that a limited liability company must be registered. *Id.* at ¶ 301. The tribunal acknowledged that “foreign investors wishing to conduct business in Oman are subject to the Foreign Capital Investments Law (“FCIL”). Under the FCIL, non-Omanis may not conduct a ‘commercial, industrial or tourism’ business in Oman unless they first obtain a license. The Commercial Register Law Amendment also requires “any natural or legal person” must obtain a “license from the Ministry of Commerce and Industry” before “exercising commerce in the Sultanate.” *Id.* at ¶ 302 (emphasis in original). The tribunal held that as a non-Omani entity doing business in Oman, SFOH was required to register on the Commercial Registry of Oman and obtain a license from MOCI. *Id.* at ¶ 309.
431. Here, the MZ-India BIT specifically requires compliance with Mozambican laws.
432. Article 1(b) of the MZ-India BIT defines an “investment,” as follows:

The term ‘investment’ means 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 and in particular, though not exclusively, includes...

RLA-1, MZ-India BIT, Art. 1(b) (emphasis added).

433. Similarly, Article 2 of the MZ-India BIT provides that:

This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, *accepted as such in accordance with its laws and regulations...*

Id. at Art. 2 (emphasis added).

434. Similarly, Article 12(1) (Applicable Laws) of the MZ-India BIT provides that:

Except as otherwise provided in this Agreement, *all investment shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.*

Id. at Art. 12(1) (emphasis added).

435. In this regard, Article 22(1) of the MIL required PEL to register the alleged investments, but PEL failed to do so. Article 2 (Object of the Law), Section 1, states that:

[t]he present law seeks to establish *the basic and uniform legal framework for the process of carrying out both national and foreign investments* eligible for the guarantees and incentives provided for in this law, in the Republic of Mozambique.

RLA-8 (emphasis added). Further, Article 2, Section 2, specifies that:

[t]hose undertakings in which investments are being made or have been made *without compliance of the provisions of this Law and Regulations shall not be eligible to benefit from the guarantees and incentives herein contemplated.*

Id. (emphasis added).

436. Article 22 (Registration of Direct Foreign Investment) Section 1, of the MIL states that a

foreign investor, within one hundred and twenty (120) days counted from the date of notification of the decision authorizing the investment project, *shall register the undertaking involving direct foreign investment with the authority responsible for monitoring the inflow of capital, and register subsequently each actual capital import operation that takes place.*

Id. (emphasis added).

437. Article 9 (Forms of Direct Foreign Investment) of the MIL states that “[d]irect foreign investment may consist of any of the following forms valuable in monetary terms”: “currency” and “equipment.” *Id.*

438. PEL has failed to establish that it complied with the registration requirements of the MIL with respect to its alleged investment. As such, the alleged investment is not “authorized” and recourse to arbitration under the MZ-India BIT is not available.

F. The Tribunal Lacks Jurisdiction (*Ratione Temporis*) Because the BIT was Terminated and the Sunset Clause Does Not Apply.

439. Article 15 (Duration and Termination) of the BIT provides:

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

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

RLA-1, Art. 15 (emphasis added).

440. As discussed above, under the facts of this case, the definition of an “investment” set forth in the MZ-India BIT, and the applicable jurisprudence discussed above, PEL did not “make or acquire” an investment. At best, PEL acquired only an option or right of first refusal, and has a claim for alleged breach of those contractual obligations.

441. However, the sunset clause in the MZ-India BIT expressly requires that an investment be “made or acquired before the date of termination of this Agreement.” Accordingly, PEL cannot invoke the sunset clause because it did not make or acquire an investment before the date of termination of the BIT. The Tribunal lacks jurisdiction also for this reason.

G. PEL Lacks Standing Because it Assigned its Rights to the PGS Consortium.

442. International law recognizes that “[t]he assignment of a right *transfers to the assignee: (a) all the assignor’s rights to payment or other performance under the contract in respect of the rights assigned, and (b) all rights securing performance of the rights assigned.*” **RLA-**

- 128**, UNIDROIT Principles of International Commercial Contracts (2010), Art. 9.1.14 (emphasis added). The same result is warranted under estoppel principles, discussed above.
443. By participating in the PGS Consortium, PEL assigned – by its actions – to the consortium the benefit of the scoring point advantage under the MOI. In other words, PEL assigned to the consortium members its rights (scoring advantage) under the MOI. The MTC relied on that assignment to the consortium, by providing the scoring advantage to the consortium and allowing PEL to participate in the bidding contest through a consortium. After losing the bidding contest, PEL cannot undo the assignment, and revert to insisting on the MOI alone, to the detriment of the MTC. As cited above, all rights to payment and other performance are now vested in the consortium, as well as all rights securing performance of the rights assigned, which include BIT claims for them, in essence, secure performance. PEL lacks standing to bring the subject claims alone, because the “PGS Consortium” is not asserting claims or participating jointly with PEL in this UNCITRAL arbitration.
444. The *Monetary Gold* case established the *Monetary Gold* principle, that an international tribunal should refuse jurisdiction over a dispute if its resolution involves the determination of the rights and obligations of a non-party to the proceedings. *See generally*, **RLA-71**, *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, and others)*, ICJ Reports 1954 (15 June 1954) (“*Monetary Gold*”).
445. UNCITRAL tribunals, like in *Larsen*, have followed this principle:
- [U]nder international law, there is a general principle that a non-national tribunal cannot deal with a dispute if its very subject matter will be the rights or duties of an entity not a party to the proceedings, or if as a necessary preliminary to dealing with a dispute it has to decide on the responsibility of a third party over which it has no jurisdiction.
- RLA-72**, *Larsen v. The Hawaiian Kingdom*, PCA Case No. 1999-01, Award (5 February 2001) ¶ 13 (citing *Monetary Gold* and additional ICJ decisions); *see also* ¶ 11.8. Importantly, the tribunal held that the *Monetary Gold* principle was not confined to the ICJ, but was applicable to UNCITRAL proceedings and “it can see no reason either of principle or policy for applying any different rule.” *Id.* at ¶¶ 11.16-11.17. The tribunal concluded

- that the proper test was not whether there was a substantial risk of prejudice to the absent party, but rather the “very subject matter test.” *Id.* at ¶¶ 11.20-11.21.
446. Proceeding with this arbitration without the consortium members exposes Mozambique to potential duplicative liability as well as inconsistent awards or judgments.
447. Further, if PEL joined the consortium partners, it would defeat jurisdiction (even if there was jurisdiction, which there is none). The reason is that the two consortium partners are (a) GRINDROD LIMITED, based on public information a freight logistics company based in Durban, South Africa, and (b) SPI – GESTÃO E INVESTIMENTOS, SARL, based on public information a consulting company based in Maputo. *See* SOC, CWS-1, Witness Statement of Kishan Daga ¶ 123(a) (Grindrod is a South African company) & ¶ 123(b) (SPI is a Mozambican company); **Exhibit R-53**, Câmara de Comércio de Moçambique, Lista dos Membros; **Exhibit R-54**, Grinrod Limited website, About Us.
448. Obviously, their nationalities would defeat jurisdiction under the MZ-India BIT, because the consortium is a “partnership,” and was never incorporated by PEL into a separate juridical entity. In his Witness Statement, PEL’s lead representative Mr. Daga admits that “PEL partnered with” Grindrod and SPI. SOC, CWS-1, Witness Statement of Kishan Daga ¶ 123.
449. As such, the nationalities of each of the members of the partnership are considered in establishing jurisdiction under the subject BIT. *See* **RLA-1**, MZ-India BIT, Art. 1(c) (defines an “investor” as “any national or company of a Contracting Party”); Art. 1(d)(i) (defines “nationals” “in respect of the Republic of India, [as] persons deriving their status as Indian nationals from the law in force in India.”); & Art. 2 (“This Agreement shall apply to all investments *made by investors of either Contracting Party* in the territory of the *other Contracting Party ...*”) (emphasis added).
450. In sum, this Tribunal should abstain from exercising jurisdiction also because the necessary parties for the fair and complete adjudication of this dispute have not been joined by PEL, and proceeding without all the consortium members exposes Mozambique to potential inconsistent and duplicative liability. PEL’s failure to join the consortium members also constitutes an abuse of the international arbitration process, because PEL concealed their

nationalities to attempt to fabricate jurisdiction that otherwise would be defeated under the MZ-India BIT because the consortium partners are from Mozambique and South Africa.

H. PEL Failed to Exhaust Local Remedies in Mozambique.

451. PEL also has failed to exhaust local remedies.
452. As discussed below, under Mozambican law, there is an appeal procedure available for bidders wishing to challenge the outcome of a public bid contest. PEL failed to file a timely appeal of the bid contest and waived its right to challenge the bid results. Therefore, PEL is stopped and cannot now challenge the bid results. At a minimum, PEL's challenge of the bid results is inadmissible and cannot serve as a basis for its BIT claims.
453. Also as discussed below, under Mozambican law, there is recourse to the courts after a bid contest. PEL failed to seek recourse before the courts and waived its right to challenge the bid results. Therefore, PEL is stopped and cannot now challenge the bid results, also on this additional ground.
454. Finally, even if the ICC Arbitration Agreement were considered by this Tribunal to provide for local arbitration only and be limited to disputes relating to the formation, validity, breach and enforcement of the MOI, PEL also failed to exhaust that local remedy prior to initiating this UNCITRAL arbitration, and therefore this UNCITRAL arbitration must be dismissed without prejudice or stayed pending resolution of the pending ICC arbitration between the parties in Mozambique.⁴¹

⁴¹ For example, in *Parkerings*, the tribunal held that an investor must first seek a preliminary determination of the existence of a contractual breach under the contractually chosen forum before it can bring an international claim that such breach amounted to indirect expropriation. Only if the investor demonstrates that she was legally or practically denied the possibility of seeking local remedies should a tribunal decide whether her international rights were violated. Turning to the facts, the tribunal found that the claimant could have complained about the alleged contractual breach before Lithuanian courts. That it did not do so or show "any objective reason to question the Lithuanian Courts' ability to dispose of the case fairly, competently, impartially and within a reasonable period of time" was decisive for the tribunal to reject the indirect expropriation claim. **RLA-87**, *Parkerings*, ICSID Case No. ARB/05/8 at ¶ 453.

V. MOZAMBIQUE PREVAILS ON THE MERITS. PEL HAS NO UNDERLYING RIGHTS TO PROTECT UNDER THE BIT AND MOZAMBIQUE BREACHED NO TREATY OBLIGATIONS.

455. Mozambique did not breach any Treaty obligation. A crucial threshold matter is that PEL had no underlying legal rights to a concession that are protected by the Treaty. In sum, the MOI was a six-page, preliminary “Memorandum of Interest,” an “agreement to agree” at most, that would have provided for and required a further negotiated contract and governmental approvals. The MOI does not specify even the basic terms and conditions of a concession or reflect a meeting of the minds as to key terms. The existence of competing versions of the document further confirms the lack of agreement or creation of relevant enforceable rights. The MOI did not (and could not) grant PEL the alleged right to an undefined concession without a public tender, as confirmed by investment treaty decisions, Mozambican law controlling with respect to the creation and scope of the alleged investment and rights, the terms of the MOI itself, and PEL’s discordant articulation of the alleged “right of first refusal.” In fact, the Parties’ Mozambican law experts appear to agree that Mozambican law did not provide for a direct award of this type of Project at the time of the execution of the MOI. The later PPP law—which confirmed that public tenders are required for PPP projects, contained only a narrow “last resort” exception for direct negotiations, and defined the *direito de preferência* to be provided proponents of such PPP projects—confirms that PEL’s alleged “rights” to a concession did not exist and are not enforceable. The correct interpretation of the MOI is that it specified the process by which PEL may be entitled to the *direito de preferência* specified in the PPP Law, which was a 15% scoring advantage in the public tender. The MOI is not an enforceable contract conveying the legal rights and obligations alleged by PEL, and would in any event be void in relevant part due to, *inter alia*, PEL’s blacklisting, the procurement processes required by Mozambique’s subsequent PPP law, and PEL’s choice to accept the 15% right of preference, participate in a public tender, and exclusively seek to participate in the Project as part of the PGS Consortium which was not party to the MOI.
456. Nor has PEL met its burden of proving that Mozambique did not accord fair and equitable treatment, breached any standard suggested by the Treaty’s MFN clause, or expropriated any alleged investment. *See infra*, Sections VI, VII, VIII. In accordance with procurement

best practices in Mozambique and globally, MTC conducted a public tender for this proposed USD\$3 billion, 30-year new rail and port concession, and awarded said concession to the winning bidder. The PGS Consortium scored in third place and did not pursue an appeal. As a result of PEL's MOI and PFS, MTC accorded PEL the 15% right of preference in the public tender, notwithstanding that PEL participated in the tender as part of the separate PGS Consortium, and even though it is now evident that PEL failed to disclose that it was blacklisted and not qualified for the Project. The MOI does not override Mozambican procurement law or require anything more. PEL had no objective legitimate expectation for a direct award of a USD\$3 billion concession (much less lost profits on such a concession—which are not awarded in procurement disputes) on the basis of a six-page MOI and a minimal “Pre-Feasibility” study that did not define the basic terms and conditions of the concession, or reflect a high degree of design development or engineering effort. PEL never established feasibility for the Project, secured the offtake agreements necessary to make the project a reality, or negotiated the necessary partnership with CFM. Mozambique acted transparently, repeatedly told PEL that the right of preference would be afforded in a tender, and acted in a good faith, non-arbitrary matter to conduct a PPP procurement consistent with the law and utilizing a public tender pursuant to global best practices for PPP procurement. The MFN clause should not be utilized to expand jurisdiction and import what it, in essence, a breach of contract claim (especially where the MOI contained a separate, severable arbitration agreement), and in any event Mozambique observed the alleged contract obligations and did not breach the MOI. PEL was never awarded the concession, thus its new assertion (not made in its Request for Arbitration) that something was “expropriated” is anomalous, and also incorrect for the same reasons that PEL's other claims fail.

A. PEL has the Burden of Proof on Claims and Damages.

457. As a prefatory matter, the Tribunal should keep in mind that PEL has the burden of proof their claims and damages: “Claimants have the burden of proof of the merits of their claims, including the alleged damages.” **RLA-42**, *Caratube*, ICSID Case No. ARB/13/13 at ¶ 307.

458. “The principle of *onus probandi actori incumbit* – that a claimant bears the burden of proving its claims – is widely recognized in practice before international tribunals.” **RLA-73**, *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Award, (26 July 2007) ¶ 121.

B. PEL has No Underlying Legal Rights Under the MOI to Be Protected Pursuant to the BIT.

459. The main role of domestic law is in defining the scope of the investment allegedly protected under international law. “In order to determine whether an investor/claimant holds property or *assets capable of constituting an investment it is necessary in the first place to refer to host State law*. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.” **RLA-46**, *Emmis*, ICSID Case No. ARB/12/2 at ¶ 162 (emphasis added).

460. In the present case, PEL has not established that it has its claimed legal rights to a concession, or that any rights were violated.

1. Mozambique’s Version of the MOI is the Correct Version.

461. As noted above, on 6 May 2011, PEL and the MTC purported to enter into a MOI. The correct versions of the Portuguese and English versions of the MOI are those attached as **Exhibit R-1** and **R-2**. **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 28-29; **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 4-16.

2. The Portuguese Version of the MOI Controls over the English Version.

462. The parties have offered both Portuguese and English versions of the MOI. *See Exhibits R-1 & R-2* (MTC), **R-6A & R-6B** (PEL). The Portuguese versions of the MOI offered by PEL and MTC are substantively identical. *Compare Exhibit R-1 with Exhibit R-6B*.

463. The MOI is governed by Mozambican law. Under Mozambican law, the Portuguese version (Exhibit R-1) controls over the English version (Exhibit R-2). **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 29 (“De qualquer forma, de acordo com a lei moçambicana, a versão legalmente vinculativa do MOI é apenas a versão em português.”)⁴²;

⁴² In English: “In any case, according to Mozambican law, the legally binding version of the MOI is only the Portuguese version.”

RER-2, Expert Report of Theresa Muenda ¶ 3; *see, e.g.*, **Exhibits RLA-2** (Constitution of the Republic of Mozambique at Article 10) & **RLA-3** (MZ Decree No. 15/2010 of 24 May – Regulations on Contracting of Public Works Projects, Supply of Goods and Provision of Services to the State – at Article 5(1)).

3. To the Extent Relevant, Mozambique’s Version of the MOI is the Correct English Version.

464. Although the parties offer different versions of the English MOI, *see Exhibits R-2 & 6-B*, the correct version is offered by Mozambique attached as Exhibit R-2. This is confirmed by Minister Zucula (who signed the MOI) and other MTC personnel present. **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 4, 11-12; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 28-29.

465. As an initial matter, the English version of the MOI offered by PEL is inconsistent with the Portuguese versions of the MOI offered by both PEL and MTC. *Id.*; *compare Exhibit R-6B with Exhibits R-1 & R-6A*.

466. Moreover, the English version of the MOI offered by PEL is internally inconsistent by, for instance, purportedly both requiring that Mozambique “*shall issue* a concession of the project to PEL” while also granting PEL a right of first refusal and the unilateral ability to walk away from the concession. *See Exhibit R-6B* at Clauses 2(1) and 2(2). Minister Zucula explains:

12. Clause 2, section 1 in the English version of Exhibit R-6, submitted by PEL, is incorrect and is not the clause agreed to and signed by the parties.

13. PEL’s English version of Clause 2, section 1 allegedly states that “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 of Clause 7 of this memorandum are approved, the Govt. of Mozambique shall issue a concession of the project in favour of PEL.” The MTC and I never agreed to this language. This language also makes no sense and is contradictory of the rest of the MOI.

14. First, PEL’s English version of Clause 2, section 1 states that allegedly once the terms of “Clause 7 of this memorandum are approved, the Govt. of Mozambique shall issue a concession of the project in favour of PEL.” However, Clause 7 deals with the opposite situation. Clause 7

deals with the situation where the Project is found to be “commercially unviable,” and provides that the parties will, instead, “agree to sign a new memorandum to undertake another study of a similar project.” If Clause 7 applies, the MTC and PEL would sign a new memorandum for another project, not go forward with this Project.

15. Second, PEL’s English version of Clause 2, section 1 states that allegedly “the Govt. of Mozambique shall issue a concession of the project in favour of PEL.” This contradicts Clause 2, section 2 of PEL’s English version, which provides that after the PFS approval, PEL shall have a “first right of refusal.” If under Clause 2, section 1 PEL was allegedly granted the concession, there is no need for PEL to also be granted a right of first refusal.

16. I understand that PEL claims that they did not understand Portuguese. That is incorrect, because the PEL team had Portuguese speakers, as I remember.

RWS-2, Witness Statement of Paulo Zucula ¶¶ 12-16.

467. An attorney for the MTC, Mr. Chauque, who was present at the execution of the MOI likewise confirms that PEL’s alleged English version of the MOI was not what was agreed to or executed:

28. Em seu Aviso de Arbitragem, a PEL anexa uma suposta versão do MOI. Veja a prova R-6. A versão em português apresentada pelo PEL é consistente com a versão em português apresentada pelo MTC, ambas obtidas a partir dos registos do MTC. A versão em inglês do MOI apresentada pelo PEL tem linguagem adicional na Cláusula 2(1) que pretende obrigar o MTC a tomar certas acções. A versão em inglês do MOI apresentado pela PEL não é a versão verdadeira do MOI, e não é encontrada nos registos do MTC. A versão em inglês do MOI apresentada pela PEL é inconsistente também com a versão verdadeira do MTC em português.

29. De qualquer forma, de acordo com a lei moçambicana, a versão legalmente vinculativa do MOI é apenas a versão em português. Estive presente na execução do MOI, e entendi que tanto as versões em inglês quanto de português continham os mesmos termos e reflectiam o produto final do memorando de entendimento das partes. Não houve acordo para o idioma adicional na Cláusula 2(1) que só existe na versão em inglês que Patel apresenta. Para ser claro, não era, nem poderia ser, a intenção da MTC de prometer um prémio directo a Patel ou qualquer forma de ajuste directo sem

obedecer aos requisitos. Aliás, as leis moçambicanas não permitiriam tais práticas.⁴³

468. Finally, the circumstances of the English version submitted by PEL are suspect, while there is no factual basis to conclude that MTC's consistent versions are inauthentic. **RER-5**, Expert Report of Mark Lanterman, at 3.
469. Accordingly, the evidence indicates that the correct version of the MOI is the Portuguese version that is controlling under Mozambican law and found in the archives of both parties.
470. PEL's response is that its representatives did not speak Portuguese, but this is false. Minister Zucula confirms that PEL's team included Portuguese speakers. **RWS-2**, Witness Statement of Paulo Zucula ¶ 16. In his Witness Statement, PEL's Kirshan Daga likewise admits that PEL's team of representatives included Portuguese speakers: "Mr. Bantwal Subraya from Aries Consulting LDA, who was PEL's accountant in Mozambique and a Portuguese speaker, who frequently accompanied me to meetings" and "Sal & Caldeira Advogados, PEL's legal counsel in Mozambique." SOC, CWS-1, Witness Statement of Kishan Daga ¶ 17. "Sal & Caldeira Advogados are well renown lawyers in Mozambique and they had recently assisted in drafting the Public-Private Partnership Law ..." *Id.* at ¶ 36.

⁴³ **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 28-29. In English:

28) In its Arbitration Notice, PEL attaches an alleged version of the MOI. See proof R-6. The Portuguese version presented by the PEL is consistent with the Portuguese version presented by the MTC, both obtained from the MTC records. The English version of the MOI presented by the PEL has additional language in Clause 2 (1) which intends to compel the MTC to take certain actions. The English version of the MOI presented by PEL is not the true version of the MOI, and is not found in the MTC records. The English version of the MOI presented by PEL is also inconsistent with the true version of the MTC in Portuguese.

29) In any case, according to Mozambican law, the legally binding version of the MOI is only the Portuguese version. I was present at the execution of the MOI, and understood that both the English and Portuguese versions contained the same terms and reflected the final product of the parties' memorandum of understanding. There was no agreement for the additional language in Clause 2 (1) that exists only in the English version that Patel presents. To be clear, it was not, and could not be, the MTC's intention to promise Patel a direct award. In fact, Mozambican laws would not allow such practices.

471. It strains credulity to believe that none of PEL’s Portuguese speakers caught the significant discrepancies between PEL’s purported English version and all other versions of the MOI when the document was executed (or thereafter), especially if the MOI carries the significance that PEL now assigns it. PEL’s current claim that it could not understand the Portuguese version of the MOI because the PEL representative who signed it did not speak the language is unsupported and counterintuitive.
472. In sum, the MOI did not provide for a right to a direct award contingent only on approval of the PFS. The Clause 2(1) language that PEL principally relies on for this alleged right does not exist and would be nonsensical, because (among other things):
- 472.1. PEL’s hoped-for language is found only in its highly suspect English version of the MOI that is contrary to the testimony of MTC witnesses, and is different from all other executed versions of the MOI—including PEL’s own Portuguese-language MOI, as explained above;
- 472.2. a direct award right for a PPP project of this type would be illegal and void under the Mozambican procurement laws and practices (including the law then in force, 15/2010),⁴⁴ as even PEL’s legal expert all but concedes;⁴⁵
- 472.3. a direct award right for a PPP project of this type would be beyond the authority of the MTC to promise or grant;⁴⁶

⁴⁴ **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 14 (explaining that in the legal regime, an award by direct agreement for a project of this nature does not meet the requirements and would not be allowed); **RER-2**, Expert Report of Teresa Muenda ¶¶ 3, 11 (any MOI direct award right contrary to, among other things, Article 113 of Decree 15/2010); *see* **RER-1**, Expert Report of MZBetar ¶¶ 119-126 (direct award of this project contrary to Mozambican and international procurement practices and preferences, and Mozambican procurement laws known to industry).

⁴⁵ SOC, CER-3, Expert Report of Rui Medeiros ¶ 34 (“The case at the base of the MoI does not fit within any of the sub-paragraphs in Article 113(2)” of Decree 15/2010, which list the “cases in which direct award may be adopted”).

⁴⁶ **RWS-2**, Witness Statement of Paulo Zucula ¶ 5 (“A direct award also would have required approvals not present here. I would not have had the actual authority to grant a direct award to PEL through the MOI, and did not do so.”); **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 32, 50 (“Ainda assim, nos termos da lei, o ajuste directo, deve ser autorizado pelo Governo e nunca pelo Ministro. Nestes termos, o MTC não seria competente, nos termos da lei, para tomar

- 472.4. the language PEL offers is inconsistent with the rest of the “Memorandum of Interest,” including the immediately subsequent Clause 2(2), which provides for a “first right of refusal” or, more accurately in Portuguese, a “*direito de preferência*” that presumed competition and not a direct award;⁴⁷
- 472.5. the language PEL offers for Clause 2(1) is internally unintelligible, requiring that MTC “approve” the “terms under Clause 7 of this memorandum,” which plainly would not be done in the event of a direct award, since Clause 7 applies to when the project is *not* techno-commercially feasible; and, in any event, MTC never found that the Project was techno-commercially feasible;⁴⁸
- 472.6. PEL’s purported Clause 2(1) includes conditions precedent that were not met, such as that the PFS “finalize the rail route.” **Exhibit R-6B**, PEL Clause 2(1). The PFS plainly did not “finalize the rail route,” or even purport to do so: the PFS was an early-stage pre-feasibility study, conducted prior to significant site studies, evincing minimal design development or detail, that did not define the basic terms and conditions of a concession, and failed to even finalize the *port* location to which the rail line would connect (offering two options 75 km apart);⁴⁹
- 472.7. it would be contrary to industry practices (and expectations legitimately held by unsolicited bidders on a PPP Project) for an agency to promise a direct award of a PPP infrastructure concession based only on approval of a *Pre-Feasibility study*,

nenhuma decisão sobre esta adjudicação da concessão”) (Translation: “Even so, under the law, direct agreement must be authorized by the Government and never by the Minister. Accordingly, the MTC would not be competent, under the terms of the law, to make any decision on this concession award.”); **RER-2**, Expert Report of Teresa Muenda ¶ 11 (necessary authorizations for a concession award lacking from MOI).

⁴⁷ **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 5-15; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 13-14, 28-29.

⁴⁸ **RWS-2**, Witness Statement of Paulo Zucula ¶ 14; *see* **Exhibit R-6B** (PEL’s purported English MOI, including Clause 7: “in 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”).

⁴⁹ **RER-1**, Expert Report of MZBetar ¶¶ 13, 47-48, 58-59.

with no definition of even the most basic terms of a concession, and no vetting or benchmarking of the technical, price, or quality terms offered by the project proponent.⁵⁰

4. The MOI is Governed by Mozambican Law.

473. The MOI at Clause 8 expressly requires that project implementation shall be done within the laws approved by the Republic of Mozambique. *See Exhibits R-1, R-2, R-6A, & R-6B; RWS-1*, Witness Statement of Luis Amandio Chauque ¶ 19; *RER-2*, Expert Report of Teresa Muenda ¶¶ 1-2, 14.
474. In the context of the MOI, this as a forward-facing promise and/or obligation to comply with Mozambican local law – including later-enacted Mozambican law. *Id.*
475. The correspondence between PEL and the MTC, during the course of their subject dealings, further confirms that PEL understood and concurred that the MOI, and more generally that any dealings and obligations between them, if any, were governed by the laws of the Republic of Mozambique, including later-enacted PPP laws and regulations. *E.g.*, **Exhibit R-16** (PEL understood the “standard regime for contracting of the PPP is public tender, as stated in Article 13 of Law 15/2011”).
476. In any event, once Mozambican law comes into effect, it needs to be followed, notwithstanding the terms of a MOI. **RER-2**, Expert Report of Teresa Muenda ¶¶ 1-2, 14.

5. The MOI is Void, not Legally Binding, and Unenforceable.

477. The MOI rights, and most especially any right to a concession that PEL alleges it gained through the MOI, do not exist—and would be superseded (by subsequent law controlling on the procurement) or voided (by PEL’s breaches and blacklisting, among other things) if they did exist.
478. As set forth below, PEL’s attempt to define a “right” or “commitment” to a concession in the MOI is contrary to:

⁵⁰ *Infra* § V(B)(5)(e); **RER-1**, Expert Report of MZBetar, at 57-60, 66.

- 478.1. Investment treaty decisions that deny claims premised on alleged rights in pre-concession, preliminary agreements, and confirm an alleged promise to agree to a later concession agreement is a non-binding “agreement to agree”;
 - 478.2. Mozambican law, which is controlling as to the creation of the alleged rights, and confirms that for numerous reasons the MOI did not provide PEL the rights it alleges. This is due, among other things, to PEL’s fraud and failure to disclose its blacklisting; the illegality of a direct award under Law 15/2010; the inapplicability of the narrow “last resort” exception for direct negotiations in Law 15/2011 or other laws and regulations applicable to the procurement; the lack of a meeting of the minds or complete absence of contractual terms necessary for a direct award; the failure to secure necessary authorizations and approvals for any contract providing a direct award; and PEL’s failure to register any investment. As discussed further in subsequent sections, to the extent the MOI is binding in any part, it provides merely the contingent *direito de preferência* that MTC gave PEL in the public tender;
 - 478.3. Indian law, that while not binding, further confirms that PEL had no right or legitimate expectation to a binding concession on the basis of a “Memorandum of Interest”;
 - 478.4. The law of other nations, including English common law and the United States, which likewise do not afford binding effect (and expectation damages) to preliminary documents like the MOI; and
 - 478.5. Crucially, PPP industry practices globally, which confirm that analogous PPP projects are not awarded via direct negotiations and six-page Memorandums of Interest, and that proponents of unsolicited project proposals—like PEL claims to be—typically receive precisely what MTC provided PEL: a right of preference in scoring the public tender.
479. In sum, the MOI is a preliminary document and not an award or promise of a concession. A sophisticated concessionaire does not, and should not expect to, gain an unconditional, open-ended, irrevocable right to award of an incompletely defined 30-year, USD\$3 billion

concession through a six-page MOI and a “prefeasibility” study. The process to award such a PPP concession requires extensive subsequent negotiations, further feasibility studies, and numerous third-party approvals, and is subject to later-enacted laws and regulations pertaining to PPP procurement and public tender requirements.

a. Investment Treaty Decisions.

480. The language of the MOI demonstrates it is a nonbinding expression of interest by PEL (see **Exhibit R-2**, MOI English Version):

- MOI recital – “MTC is *interested* in developing a Port ... with a corresponding rail line ... through a *Public Private Partnership (PPP)*.”
- MOI recital – “PEL has shown keen *interest* in the development of said Project by *forming a JV* with the Gov’t of Mozambique *on a Built Operate and Transfer (BOT) basis*.”
- MOI recital – “PEL *shall provide assistance* in the successful construction and commissioning of said project to facilitate successful transport system *on Public Private Partnership mode*.”
- MOI recital – “PEL *agrees to undertake at its own cost and expense an initial prefeasibility study* for the Project *to identify a probable area* of the port and the railway line *with the assistance of MTC*.”
- MOI Clause 1 – “*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 ... under a Public Private Partnership (PPP) 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.”

481. Thus, the MOI is in the nature of a letter of interest or, at most and in the alternative, as the parties describe in some correspondence, a memorandum of understanding. A letter of interest or intent, or even a memorandum of understanding, is a preliminary document – it is not a binding contract for a later concession. As stated by Minister Zucula, the MOI was “a contingent document, or gentlemen’s agreement to try to agree, and not a binding contract for a concession.” **RWS-2**, Witness Statement of Paulo Zucula ¶ 14.

482. In the context of infrastructure and development projects, international tribunals “have been very reluctant to acknowledge that an investment has actually been made until the contract has been signed or at least approved and acted upon.” **RLA-74**, *F-W Oil Interests Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 March 2006) ¶ 126 (citing *SGS v. Philippines*).

483. Tribunals have smartly rejected attempts to conjure treaty jurisdiction or treaty violations on the basis of pre-concession or preliminary agreements—even in instances where the purported investor presents a significantly stronger case than PEL. For example, in *F-W Oil*, the claimant executed a “*Confidentiality Agreement*,” was *the winning bidder* in a public tender, was “*awarded the tender* ‘subject to the negotiation and execution of a mutually agreeable operating agreement,’” and received a “*Letter of Intent*” together with draft “*Heads of Agreement*.” *Id.* ¶¶ 8, 27, 63, 89-90 (emphasis added). The Tribunal, however, appropriately looked to domestic law to evaluate the existence of contractual rights from dealings before the conclusion of a formal concession agreement. *Id.* ¶ 15. It observed that:

In the common law, a contract to negotiate, even when supported by consideration, is not regarded as a contract known to law—it is too uncertain to have any binding force; and no Court can estimate the damages for breach of such an agreement.

Id. ¶ 177-178.

484. Accordingly, the *F-W Oil* Tribunal rejected claimant’s assertion that there was a “Definitive Operating Agreement” or any other locally enforceable contract rights arising from the parties’ activities prior to execution of a mutually acceptable concession agreement, and declined jurisdiction. *See, e.g., id.* ¶¶ 162-164, 183. The Tribunal likewise rejected claimant’s argument that alleged “contribution of intellectual property,” including its alleged “confidential plans and economic models, produced as part of its offer,” represented an “investment” *Id.* ¶ 184.

485. Compared to *F-W Oil*, PEL offers far fewer facts evincing agreement to substantive concession terms or intent to be bound to a definitive concession agreement. PEL was *not* the winning bidder; was *not* awarded a concession of any type (even subject to negotiation); and did *not* negotiate a letter of intent and heads of agreement pertaining to the substantive terms of a concession agreement.

486. As in *F-W Oil*, “the real complaint of the Claimant in this case is that it was prevented (by the actions of various parties on the [State] side) from acquiring the investment to which it believed it had become entitled.” *Id.* ¶ 213. PEL, like *F-W Oil*, has not shown that it

“acquired any legal right to that effect.” *Id.* This is fatal to PEL’s claim on the merits and jurisdictionally.

487. Other tribunals have also prudently declined to find binding concession rights in documents that are not binding concession agreements. For example:
- 487.1. The *Mihaly* tribunal found expenditures made in preparation and in connection with a “*Letter of Intent*,” “*Letter of Agreement*,” and “*Letter of Extension*” were not an “investment.” See **RLA-54**, *Mihaly*, ICSID Case No. ARB/00/2.
- 487.2. The *Zhinvali* tribunal found that development expenditures incurred where the parties failed over a three-year period “to conclude a definitive set of agreements to finance and implement” an infrastructure project were *not* an investment— notwithstanding alleged promises or “*preliminary agreements*” to sign an already “*fully negotiated*” concession agreement. **RLA-56**, *Zhinvali*, ICSID Case No. ARB/00/1 at ¶¶ 1-2, 190-195, 410-412.
- 487.3. The *Generation Ukraine* Tribunal declined to give legal effect to a “*Protocol of Intentions*” defining “the basis on which the parties will endeavor to identify, research, finance, and complete” certain rail estate and development projects, calling it merely “an *agreement to agree*.” **RLA-75**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9 (Award) (16 September 2003) ¶¶ 18.8-18.9.
- 487.4. In *Genin*, a “*tentative agreement*” setting forth substantive terms, characterized as a “*memorandum of understanding*,” was found to not be a binding agreement, and thus there was no violation of the subject BIT. **RLA-76**, *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) ¶¶ 177, 341, 346.
- 487.5. And in *Nagel*, a “*Cooperation Agreement*” between a State-owned company and the claimant, whereby “the parties would jointly seek to obtain” a telecommunications license, was not a binding “guarantee that a license would in fact be obtained.” **RLA-77**, *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award (9 September 2003) ¶¶ 1, 326-328.

PEL cites no analogous case where a “Memorandum of Interest” was found to be a binding award of a concession or agreement to concession terms. As is evident from the language of the MOI itself, a letter of intent is at most an “agreement to agree” and, therefore, is not legally binding for this reason. To be binding, a letter of intent must include, among other things, material terms of the subject-matter of the letter – in this case, of the subject PPP concession project. As discussed below in further detail, the MOI does not include all material terms of the subject PPP concession project and, thus, it is not and could never be a legally binding agreement by Mozambique to award the subject undefined or insufficiently defined PPP concession to PEL.

b. Mozambican Law.

488. Under Mozambican law, the MOI does not create or convey the rights alleged by PEL in this action, and even if given the flawed interpretation sought by PEL would be void and unenforceable. The MOI does not provide PEL a direct award of the concession or give it the “right of first refusal” that PEL inconsistently claims was “waived” and “exercised” to give it an unconditional right to an undefined concession.
489. As noted, domestic law controls the existence and scope of the alleged property rights at issue. *See, e.g., RLA-46, Emmis*, ICSID Case No. ARB/12/2 at ¶ 162. Where a purported investment is under domestic law illegal or invalid, it is not an investment to be afforded protection under the BIT. *E.g., Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) at ¶ 135 (dismissing claim where alleged investment *obtained through fraudulent concealment*); **RLA-33, Phoenix Action**, ICSID Case No. ARB/06/5 at ¶¶ 106-107 (A Contracting Party “cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments *made in violation of their laws*”); **RLA-78, Saluka Investments B.V. v. The Czech Republic**, UNCITRAL, Partial Award (17 March 2006) (tribunal considered compliance with host State law an implicit requirement of an investment).
490. In Mozambique, all persons and entities within the jurisdiction of the Republic of Mozambique are presumed to know the law, and must abide by and comply with the law. Ignorance or misinterpretation of the law do not justify a failure to comply with the law,

nor does it exempt people from the sanctions available for a failure to abide by the law. *See RLA-4* (Mozambique Civil Code, Art. 6); **RER-2**, Expert Report of Teresa Muenda ¶ 6.

491. When a public or governmental official executes a contract (like the MOI in this instance) without actual authority, the contract is null and void *ab initio*. *Id.* ¶ 11. Here, Minister Zucula was without authority to grant a direct award of a concession. *Id.* Further, the MOI omits essential contractual clauses necessary for procurement, and did not receive the required approvals. *Id.* These factors (combined, of course, with the fact that direct awards were not authorized by law; the alleged right to a direct award in Clause 2(1) does not exist; and the alleged right to a direct award would be inconsistent with the *direito de preferência* in Clause 2(2)) all demonstrate that the MOI did not provide PEL an award or right to a direct award of a concession. To the extent the MOI purported to do so, the document would be illegal, null and void. *Id.*

(i) Fraudulent Inducement under Mozambican Law.

492. As discussed *supra* in Section III, PEL fraudulently concealed its blacklisting from MTC, and misrepresented that it was a company in good standing, to induce MTC to proceed under the MOI, approve PEL's PFS, and allow the PGS Consortium to participate in the public tender. *See also RWS-1*, Witness Statement of Luis Amandio Chauque ¶¶ 25-27.
493. Under Mozambican law, PEL had an obligation to act in good faith—which certainly meant not engaging in concealments of this type. **RER-2**, Expert Report of Teresa Muenda ¶¶ 7-10.
494. Had PEL been forthright and complied with its duty to disclose this information, MTC would not have dealt with PEL, and all further discussions would have by necessity ceased. *E.g., id.*
495. PEL's blacklisting and related behavior, including its fraudulent concealments of said blacklisting, also constituted an impediment under the public tender, under Mozambican laws, PPP Law, general procurement law, and/or its anti-corruption laws, precluding award to an entity with such impediments. *Supra* § III. As relevant here, this makes any alleged rights to an award under the MOI void and nonbinding, and PEL's purported assertion of rights under the MOI futile. **RER-2**, Expert Report of Teresa Muenda ¶¶ 7-10.

(ii) Continuing Fraud under Mozambican Law.

496. PEL’s fraud was continuing in nature. As noted, PEL did not disclose the circumstances of its blacklisting at any stage of the parties’ discussions—near the time of the MOI, or while working on or submitting the PFS, or in subsequent discussions with MTC. Nor did PEL disclose its blacklisting when seeking prequalification to participate in the public tender, where it expressly was required to “state, under oath that it and his its shareholders, as well as its subsidiaries and affiliates . . . have not been . . . disqualified from conducting commercial activities” and “have not been convicted of a serious offense.” SOC, Ex. C-24, Tender Notice § 2.3. After being prequalified, PEL never corrected the record about its qualifications, and instead continued to conceal its blacklisting notwithstanding the impediments listed in the tender and in Mozambican law. *Supra* § III.
497. As a threshold matter and before even reaching the issue of the potential existence of PEL’s alleged rights, the Tribunal can conclude that PEL’s blacklisting extinguished any rights and made an award of a concession to PEL an impossibility. PEL’s blacklisting precludes the alleged rights as a matter of fact and law. **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 25-27; **RER-2**, Expert Report of Teresa Muenda ¶¶ 7-10.

(iii) Mozambique General Contract Law.

498. The rights PEL alleges are contained within the MOI, particularly an alleged right to a concession, are unenforceable because the MOI is only a preliminary document suggestive of later negotiations (which may or may not result in a concession), and in any event, there was no meeting of the minds, given numerous unspecified terms and conflicting versions with inconsistent material terms.
499. As noted, the proper version of the MOI does not and could not contain PEL’s suggested language in Article 2(1) that MTC shall issue the subject concession to PEL. *Supra* § V(B)(3).
500. In light of the disputed versions of the MOI, the parties’ widely divergent views on the MOI’s meaning, and the absence of any actual terms of a concession agreement, the MOI cannot constitute a binding, enforceable contract for a concession. As reflected in the legal opinion of Teresa Muenda, **RER-2** ¶ 11, the MOI is not a valid and enforceable contract because, among other things:

- 500.1. It is indeterminable and inconsistent;
- 500.2. There is no meeting of the minds as required for contract formation in Mozambique and elsewhere;
- 500.3. The MOI omits essential contractual clauses, including clauses required for concessions under Mozambican procurement laws;
- 500.4. Direct awards were not authorized for projects of this type, particularly in light of the conflicting terms and conflicting versions; in Mozambique, there must a meeting of the minds;
- 500.5. It lacked necessary approvals for a concession and a direct award was beyond MTC's power to give.
501. The Expert Report of MZBetar, engineers experienced in Mozambique, likewise confirms that the MOI—even when viewed in conjunction with the PFS— did not “define the basic terms and conditions for the granting of a concession” and “would not be a valid basis, based on industry standards and our experience, to award a concession.” **RER-1**, Expert Report of MZBetar, at 13, 30, 64. The MOI includes no terms or conditions for a concession. The PFS omitted all mention of core commercial terms—such as the concession fee and means of social responsibility--and did not address crucial elements of a concession such as economic/social-economic viability, environmental matters, and the like. *Id.*
502. The MOI also is not a binding contract because MTC retained an unfettered right to cancel the project or find it not viable, and PEL had a right, according to its own theory of the case, to walk away from the proposed concession. *See, e.g.*, **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 25-27.

(iv) Mozambique Law No. 9/2002.

503. Had the MOI truly given PEL a right that bound the government, it would have required approvals not present on these facts. First, under Article 16 of Law No. 9/2002 (“SISTAFE”) of the Republic of Mozambique, *see Exhibit RLA-5*, international agreements that give rise to the assumption of financial responsibility on the part of the State or that involve fiscal matters, require the prior authorization of the Minister of

- Finance. The lack of authorization has the effect of rendering the international agreement null and void. *See* **RER-2**, Expert Report of Teresa Muenda ¶ 11(f).
504. Article 16(1) of SISTAFE provides that the signing of international contracts and agreements that implicate the Mozambican State in assuming financial responsibilities or that involve public revenue requires prior authorization by the Mozambican Minister in charge of Finances, even if the State Budget contains a budget line for such expenditures. *See* **Exhibit RLA-5**.
505. Article 16(2) of SISTAFE provides that the lack of authorization by the Mozambican Minister in charge of Finances will result in the contract or agreement being null and void. *Id.*
506. SISTAFE applies to the MTC. *Id.* at Art. 2(1).
507. The MOI was never approved by the Mozambican Minister of Finance as required by SISTAFE and, therefore, does not and could not create the rights alleged by PEL.
508. Thus, if the MOI did what PEL alleges (which it does not), the Minister of Transport and Communications' execution of the MOI was an *ultra vires* act that does not and cannot bind the MTC or Mozambique. (The MOI also did not comply with Article 17 of SISTAFE, which requires annual budgets for contracts extending over one year. *Id.*)

(v) Administrative Court Approval.

509. Second, the MOI lacked authorization of the Administrative Court. Because it was never approved the Administrative Court, the MOI could not be deemed a basis for granting a concession. **RER-2**, Expert Report of Teresa Muenda ¶ 11(g); **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 7, 32.
510. According to the law of procurement, contracts for the supply of services to the State, such as the MOI or any resulting PPP agreement, are subject to various governmental approvals. For example, and not by way of limitation, the contracting processes must be initiated by the Management Unit for the Execution of Acquisitions, through the opening of an administrative process, containing the written authorization of the Competent Authority for its performance, *see* **Exhibits RLA-3** (MZ Decree No. 15/210 at Art. 11) & **RLA-6** (Mozambique Law No. 15/2011 at Arts. 23 & 38), in this case including the Administrative

Court. Absent such approval—something particularly important in the context of a USD\$3 billion procurement—the MOI, to the extent it is wrongly interpreted to convey any legal right to an award, is null, void, and unenforceable.

(vi) **Mozambique Law No. 15/2011 (“PPP Law”).**

511. The MOI, particularly to the extent it is wrongly interpreted as a right to a direct award, does not comply with the requirements of Mozambique Law No. 15/2011, which was published and went into effect on 10 August 2011. *See Exhibit RLA-6.*
512. Public Private Partnership agreements in Mozambique are regulated by Law No. 15/2011 (“PPP Law”) and related decrees of the Republic of Mozambique. Law No. 15/2011 establishes the guidelines for the process of contracting, implementation and supervision of public-private partnership (“PPP”) projects, large scale projects (“LSPs”) and business concessions (“BCs”). *Id.* at Arts. 2(1) & 3.
513. PPPs are considered to be all projects that involve an agreement between the public administration and private entities under which the latter gives an undertaking to the public partner to implement and manage these public interest projects, services and activities in an efficient manner, while bearing all or part of the financing and the risk involved. *Id.* at Art. 2(2). The project envisioned in the MOI could only be memorialized through a PPP.
514. Under Law No. 15/2010, which provides that the general rules for public works contracts, supplying goods and providing services to the State, require a public tender. As explained in Law No. 15/2011, the system for contracting PPP projects is, as a general rule, the public invitation to tender, with the rules that govern public procurement applying on a subsidiary level (Decree 15/2010 of 24 May – Regulations on Contracting of Public Works Projects, Supply of Goods and Provision of Services to the State at Article 7). *Id.* at Art. 13(1).
515. To respond to the public interest, and if the applicable legal requirements are met, the contracting of the PPP may take the form of a tender with prequalification or a two-stage tender. *Id.* at Art. 13(2). Only in extraordinary situations and where there are proper grounds, and as a last resort subject to the prior authorization of the Government, the contracting of the PPP project may, exceptionally, take the form of negotiation and private treaty. *Id.* at Art.13(3).

516. The Government and the other entities with authority over the respective areas of activity and responsibility must prevent and control the occurrence of the risks provided for in Article 16 of Law No. 15/2011 (for example, measures or acts with effects that are negative and adverse to the normal operation and management of the PPP project or to its competitiveness and economic and financial viability).
517. In turn, the private partner and the contracting authority are also responsible for the prevention and mitigation of the risks provided for in Article 17 of Law No. 15/2011 (for example, financial and exchange rate risks inherent to the project and commercial, management and performance risks of the project).
518. The bidder and the contracting authority must give financial guarantees that ensure full compliance with the obligations they have taken in connection with the PPP project. The guarantee is calculated according to the size of the project and the complexity of its aim. *Id.* at Arts.19 & 20.
519. Law No. 15/2011 specifically identifies the types of agreements that may grant a PPP project, including a concession agreement, assignment of operation agreement, and management contract. *Id.* at Art.21. There is nothing in Article 21, or otherwise in Law No. 15/2011, that allows a concession to be granted through a MOI, a memorandum of understanding or any other similar document.
520. Nor is there anything in the MOI (or PFS) indicative of or making a declaration that there are exceptional circumstances warranting any exception to the PPP Law's requirement for a public tender. Technical analysis confirms that this project was not shown to be appropriate for the "last report" exception to Mozambique's public tender practices. **RER-1**, Expert Report of MZBetar, at 57-63.
521. Therefore, the MOI and PFS cannot be considered to be, or be interpreted to constitute, a binding commitment by the MTC or Mozambique to grant the subject PPP project or concession to PEL, because it would be in violation of Law No. 15/2011.
522. Any provisions of the MOI suggestive of a procurement process contrary to the PPP Law were voided and unenforceable upon the promulgation of law governing the project and its award; for example, exclusivity or a right of first refusal (as articulated by PEL) have no

application in a public tender process for a PPP concession. As noted, the MOI itself provides that further project implementation would be subject to Mozambican law; PEL's dealings with MTC after the MOI was executed demonstrated its awareness that the later-promulgated PPP law applies to the process for project procurement and award.

(vii) **Mozambique Decree No. 15/2010 (“Public Works Law”).**

523. Likewise, the MOI also does not comply with the requirements of Mozambique Decree No. 15/2010, *see* **Exhibit RLA-3**, which was published and went into effect on 24 May 2010, and requires public contests, and also is made directly applicable to PPP projects by Law No. 15/2011.
524. Crucially, a direct award right for a PPP project of this type would be illegal and void under Law 15/2010, because this Project does not meet any of the narrow exclusions for when direct awards (instead of the general regime of public tenders) is acceptable.⁵¹
525. This point is all but conceded by PEL's legal expert, who acknowledges that “[t]he case at the base of the MoI does not fit within any of the sub-paragraphs in Article 113(2)” of Decree 15/2010, which list the “cases in which direct award may be adopted.” **CER-3**, Expert Report of Rui Medeiros ¶ 34.
526. Technical evaluation confirms that this project does not meet any of the narrow exceptions for direct awards under Law 15/2010. As outlined by MZBetar, a direct award is an “exceptional regime” to be “applied under limited circumstances,” such as in certain “emergency situations,” none of which were shown or established by the MOI or the PFS. **RER-1**, Expert Report of MZBetar, at 57-58.
527. In short, then, PEL's inaccurate interpretation of the MOI—that it provided for a right to a direct award—would conflict with the procurement laws applicable to this Project. This is

⁵¹ **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 14 (explaining that in the legal regime, an award by direct agreement for a project of this nature does not meet the requirements and would not be allowed); **RER-2**, Expert Report of Teresa Muenda ¶¶ 3, 11 (any MOI direct award right contrary to, among other things, Article 113 of Decree 15/2010); *see* **RER-1**, Expert Report of MZBetar ¶¶ 119-126 (direct award of this project contrary to Mozambican and international procurement practices and preferences, and Mozambican procurement laws known to industry).

reason both for rejecting PEL's flawed interpretation or, in the alternative, finding that the purported MOI right is illegal, unenforceable, and void.

(viii) Mozambique Law No. 16/2012 ("PPP Regulations").

528. PPP Contracts in Mozambique are further regulated by Law No. 16/2012 ("PPP Regulations"), promulgated pursuant to the PPP Law. *See Exhibit RLA-7.*
529. The MOI also does not comply with the PPP Regulations, for the reasons stated above, and also because:
- 529.1. Article 6 of the PPP Regulations states that the Ministry of Finance must provide the budgetary framework for the subject venture, as well as oversee the draft of the feasibility studies and the risk/benefit sharing assessment. Consistent with Mozambican law, the MOI could not award the project to PEL based on the unilateral decision of the MTC. PPP Regulations require a public tender in all but extraordinary circumstances not applicable here or to the MOI. *Id.*, Art.6.
- 529.2. Article 9 provides that the PPP project process comprises, as a rule, of the following phases: (a) design; (b) definition of basic guiding principles; (c) drawing up technical, environmental and economic and financial feasibility studies; (d) promotion of the enterprise initiative and launch of the competition; (e) analysis and evaluation of competitors' tenders; (f) procurement; (g) negotiation; (h) approval of the undertaking and its investment project; (i) conclusion of contract (j) passing on the undertaking; (k) implementation; (l) management, operation and maintenance; (m) monitoring and evaluation; (n) return. *Id.* at Art.9(1). The MOI, if interpreted to constitute a right to a concession, is therefore, fundamentally contrary to Article 9. The entity responsible for sectoral oversight may dispense with the steps set out in points (a) to (c) of the previous paragraph, where the proposal for the enterprise project contains all the information required under those points, but the MOI also does not comply with that requirement. *Id.* at Art. 9(2). Under Mozambican law, contract law, and accepted procurement principles, a MOI executed at the prefeasibility stage should not absolve PEL of compliance with PPP laws and regulations that are in force or come into force.

- 529.3. Article 11 sets forth the requirements of the preparation of the feasibility study. The preparation of the feasibility study for each undertaking shall cover the articulation and compilation of relevant and demonstrable technical, environmental and economic and financial feasibility studies and their sensitivity analyzes. *Id.* at Art.11.
- 529.4. For example, pursuant to Article 11(2)(a), the feasibility study shall include “the underlying assumptions of the study, such as the estimate level of tangible and intangible investment, the capacity to install and its levels of use, equity and loans, buying and selling prices, interest rates, inflation, production volume, amortization rates and expected risks.” *Id.* at Art.11(2)(a). The MOI and the “prefeasibility” study envisioned under the MOI, are therefore insufficient to meet also these requirements of the PPP regulations.
- 529.5. Articles 13-16 specifically require public tenders, and impose various additional conditions to the granting of a PPP project or concession per these public tenders, that the MOI also does not satisfy. *Id.* at Arts.13-16.
- 529.6. In this regard, the subject public tender in which PEL participated was a prequalification public tender under Article 15. It specifically requires that the public procurement for the enterprise through the competitive tendering procedure with a prior qualification comprise the stages provided for in Article 9, revising the launch of the final competition restricted to the candidates selected in the pre-qualification competition. *Id.* at Art.15.
- 529.7. Article 17 contains the requirements for direct contracting, but they do not apply to the subject circumstances and are not satisfied in the MOI. For example, direct contracting may only be used as a “last resort” where the contracting authority has a strong and duly substantiated claim, with prior and express authorization of the required authorities. *Id.* at Art.17. None of these requirements were satisfied in the subject circumstances, as noted above.
530. Without prejudice to the applicable laws, Article 37 further elaborates on the required terms of obligatory clauses that must be “explicitly included” in PPP agreements—*all missing from, and not contemplated by, either the MOI or the PFS*: (a) the identification and quality

of the contracting and contracting parties; (b) a description of the object and objectives of the undertaking; (c) results, indicators, levels and standards of services or goods intended; (d) definition of the obligations, rights and responsibilities of the parties involved or actors involved; (e) the duration of the contract; (f) the right to use and use land, licenses, licenses and relevant authorizations where applicable; (g) rates and forms of remuneration and the updating of agreed contract values; (h) objectives, criteria, standards and indicators for performance and management evaluation; (i) the provision of performance guarantees by the contractor; (j) the provision of any necessary guarantees by the State in economically viable but financially unviable strategic undertakings; (k) eligibility for investment guarantees and incentives, including the applicable tax regime; (l) carrying out surveys or audits of investments made and of assets reversible to the State; (m) ways of determining and adjusting the prices of services or goods in areas of public-domain activity or having an impact on economic and social activity; (n) organization of general and specialized accounting records and statistical, fiscal and labor information in accordance with the legislation in force; (o) the obligation to provide regular statistical, fiscal, accounting and labor information to competent authorities; (p) the methods of remedying healthy irregularities; (q) indication of the penalties applicable and the manner in which they are to be enforced in cases of non-compliance or other breach of the contract; (r) definition and ways of mitigating the risk of force majeure and exceptional unforeseeable risks; (s) forms or mechanisms for mitigating the effects of a substantial change in circumstances taken on by the parties when engaged; (t) treatment of unforeseen extraordinary benefits and risks; (u) the decisive reasons for the revision and the change of contract; (v) the decisive reasons for termination or termination of contract and the methods and value of compensation, with or without due cause; (w) forms or mechanisms for settling disputes; (x) indication of the application of Mozambican legislation to the contract; (y) the conditions under which the contract is terminated and, in the case of PPPs and Ecs at the undertaking of the State, its return with its assets and other assets of the State; and the (z) anti-corruption clause. *Id.* at Art.37. The MOI fails to comply also with these requirements, and therefore should not be interpreted as a binding commitment to a concession, and cannot legitimately bind the MTC or Mozambique.

531. The existence of numerous terms that must be developed and negotiated prior to reaching a mutually satisfactory concession through a PPP agreement, in addition to uncertainties regarding project scope, feasibility, and existence, is confirmation that the MOI is, at most, an unenforceable “agreement to agree,” a non-binding preliminary document, and not a basis for any non-speculative damages on behalf of PEL.

(ix) Mozambique Investment Law (“MIL”).

532. A further ground for why the MOI should not be interpreted to provide a binding right to a concession (and would be void if it did), PEL never registered a foreign investment or as a foreign investor. *See* **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 32; **RER-2**, Expert Report of Teresa Muenda ¶ 11(h).

533. More specifically, Article 22 (“Registration of Direct Foreign Investment”), Section 1, of the Mozambique Investment Law (“MIL”) (**RLA-8**) provides that a “foreign investor, within one hundred and twenty (120) days counted from the date of notification of the decision authorizing the investment project, shall register the undertaking involving direct foreign investment with the authority responsible for monitoring the inflow of capital, and register subsequently each actual capital import operation that takes place.” *See* **Exhibit RLA-8**, Art.22; *see also* **RER-2**, Expert Report of Teresa Muenda ¶ 11(h).

c. Indian Law.

534. PEL’s attempt in this litigation to exaggerate the import of a mere MOI is contrary even with the law in its home country. As explained in the Expert Report of Mr. Gourab Banerji, a Memorandum of Interest or Intent is generally *not* considered to be binding, but is instead only an agreement to agree. **RER-3** ¶¶ 33-39.

535. For example, in *Dresser Rand S.A. v. Bindal Agro Chem Ltd.* (2006) 1 SCC 751, the Supreme Court construed a Letter of Intent and observed:

It is now well settled that a letter of intent merely indicates a party's intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract...

Id. at ¶ 39 (emphasis added).

536. **RER-3**, Expert Report of Gourab Banerji ¶ 35. It is a “well-settled legal position that an agreement to enter into an agreement is not enforceable.” *Id.* ¶ 36, quoting *Speech and Software Technologies (India) (P) Ltd. v. Neos Interactive Ltd.* (2009) 1 SCC 475. Even in the context of a *draft concession agreement which formed part of the RFP document*, the Indian Supreme Court found there was “no absolute and unqualified acceptance by the letter of award.” **RER-3**, Expert Report of Gourab Banerji ¶ 37-38, quoting *PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust*, (2018) 10 SCC 525.
537. Thus, Indian law, while not binding, is further evidence that PEL did not acquire the alleged right (or legitimate expectation) to a USD\$3 billion concession on the basis of a six-page “Memorandum of Interest.”

d. Other Jurisdictions (US and UK).

538. Mozambican and Indian law certainly are not unique in declining to attribute binding effect to preliminary documents and agreements to agree.
539. As noted above, international tribunals, interpreting the law of several nations, have reached the same conclusion.
540. Under English common law, “a contract to negotiate, even when supported by consideration, is not regarded as a contract known to law—it is too uncertain to have any binding force; and no Court can estimate the damages for breach of such an agreement.” **RLA-74**, *F-W Oil*, ICSID Case No. ARB/01/14 at ¶¶ 177-178.
541. Likewise, in the United States, while the articulation of common law varies by state, there is “a strong presumption against finding binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents.” *See e.g.*, **RLA-79**, *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 70, 73 (2d Cir. 1989) (internal citations omitted) (declining to find binding obligations in a “four-page memorandum of understanding outlining areas of agreement concerning the assets to be purchased, the purchase price, and an option for . . . purchase”).

e. **PPP Industry Practice.**

542. Public-private procurement practices strongly militate against PEL's broad assertion of rights in a six-page, pre-concession MOI, and claim to award of a USD\$3 billion project without a public tender.
543. For example, the World Bank's Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects discuss the "challenges" of unsolicited proposals such as that PEL claims to have provided, including "providing poor value for money," "patronage" and "lack of transparency, particularly in developing countries." **Exhibit R-45**, World Bank Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects, at vii. Unsolicited proposals "are often associated (or perceived to be associated) with corruption . . . particularly when directly negotiated." *Id.* at 9. Unsolicited proposals are "likely to lead to higher costs and lower value for money." *Id.* at 22. For those and other reasons, the "Guidelines advise governments to competitively tender [unsolicited proposals] whenever possible." *Id.* The World Bank Group, carrying out a comprehensive review of procurement practices in over 15 countries across the globe, concluded unsolicited proposals should only be "managed and used with caution as an exception to the public procurement method." *Id.* at vii.
544. Likewise, the World Bank's Public-Private Partnerships Reference Guide confirms that PEL's alleged "initial concept" and "pre-feasibility study" is, *even in the context of unsolicited proposals*, merely the first of a long chain of steps that typically occur in PPP development, with many subsequent "exits" to the process. *See Exhibit R-44*, World Bank PPP Reference Guide, at p.197. PEL never defined "key commercial terms" or drafted and agreed to a PPP contract. *Id.*
545. The PPP Reference Guide confirms that competitive public tenders are the global best practice for PPP procurement. *Id.* at 190-196. Its survey of numerous States shows that proposers of unsolicited proposals for PPP projects, if given a right of preference, are generally entitled to either (1) automatic short-listing, (2) a "bid bonus"—typically far less than the 15% right of preference MTC provided to PEL, (3) less commonly, a "right to match" competing proposals in a tender, or (4) a developer's fee. *Id.* In *no* instance is a proposer entitled to the concession (much less the alleged 30-year profits of a concession)

because it brought the unsolicited proposal to the government’s attention, developed the “initial concept,” or performed “preliminary feasibility studies.” *See id.*

546. Technical experts confirm that in Mozambique and elsewhere, public tenders are the appropriate procurement method for this type of project. MZBetar explains:

119. In accordance with our experience in the Infrastructure sector, in Mozambique and Internationally, “Direct Award” involves important commercial and reputational risks for the Employer (Contracting authority), since it implies that the Work/service/good is procured direct from one supplier/contractor with no competitive process. Without competition between different bidders duly qualified for the Tender, benchmarking is almost impossible, and is not possible to guarantee that the one supplier Proposal is the most innovative, efficient and cost-effective. This is an important limitation on a context where the increasing public demand for greater transparency and efficiency is a reality;

120. On Developing Countries, such Mozambique, where Public agencies usually have important limitations in terms of resources (with a direct impact on the ability to allocate important technical resources to a Project only) the “Direct Award” of Complex Enterprises (the ones that usually are involved on PPP Procurement) can even be more risky, considering that usually the Private Investor has the ability to allocate important Resources for the Negotiation, aiming to protect its own interests and with consequences for the Public Interest;

121. The above listed considerations justify why usually there are (limited) exceptional circumstances in which a Public Contracting authority has real interest in promoting direct award Contracts without advertised competition. The relevant Mozambican Laws in what PPP Procurement required (at the time), reveals that conclusion and clearly promote Public Tenders and limits the use of the Direct Award process.

RER-1, Expert Report of MZBetar ¶¶ 119-121. Neither the PFS nor the MOI evince that this project fell within the “last resort” exceptions to bypass the preferred, normal, and expected procedure of a public tender. *Id.* at ¶¶ 121-126.

547. Frankly, the right PEL alleges here—the automatic concession of a very large PPP project (\$3 billion is 20% of Mozambique’s annual GDP); based merely on a six-page MOI and a *pre-feasibility* study; without actual feasibility studies, definition or negotiation of key commercial terms; or an agreed-upon PPP agreement, all without a public tender—is wholly outside of PPP industry practices and procurement norms. Such a right would exemplify all the serious concerns about unsolicited PPP proposals: “lack of transparency”;

“poor value for money” and “opportunities for corruption” due to “lack of competitive tension”; the proposer’s furtherance of its own interests over the public interest; failure to adequately assess project risks; and failure to integrate with broader government and sector plans. PPP Reference Guide, at 190-191. Unsurprisingly, such a right was not intended by MTC, and did not exist, here. *See* **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 5-6; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 29 & § IX.

548. Notably, PEL’s claim for damages in the form of alleged lost profits, when viewed against global procurement practices and expectations, is incredible. Not only is a MOI and a pre-feasibility study neither an award nor guarantee of a successful PPP concession, lost profits are not an allowable or legitimately expected remedy in the industry—even when bid protests are successful. **RER-1**, Expert Report of MZBetar ¶ 99 (“[I]n Mozambique and other countries, even if a bid protest is successful a disappointed bidder is not entitled to lost profits on the proposed project or concession. The typical remedy is cancellation or redo of the tender.”).

6. Even if the MOI Was Not Void *Ab Initio*, the Enactment of the PPP Law and PPP Regulations Invalidated the MOI and it Lost Force upon Their Enactment.

549. As demonstrated above, PEL’s alleged “right” to a direct award and concession does not exist in the MOI because, among other things, PEL’s suspect English version with its preferred Clause 2(1) is not correct. If the MOI was viewed as a promise to agree to a concession agreement, it is simply an agreement to agree and is non-binding under international treaty decisions, Mozambican law, and law of other nations. PEL’s flawed interpretation of the MOI also conflicts with PPP industry practices.
550. Yet even if the MOI suggested the rights PEL claims (it does not) and PEL proved it was enforceable notwithstanding the serious obstacles noted, PEL still would not hold the right it alleges.
551. The enactment of the PPP Law and PPP Regulations—which, in the alternative, added the sensible requirement that a PPP project must be put out to public tender under these circumstances—would have superseded any alleged right to a direct award that PEL (wrongly) asserts was included within the MOI.

552. As noted, the PPP Law and PPP Regulations, enacted after execution of the MOI, required a public tender for a PPP concession in all but the most exceptional, “last resort” circumstances, none of which exist here. The Director of MTC’s Legal Office, Mr. Chauque, explains:

48. A legislação aplicável sobre a matéria (Concessões), é a Lei das Parcerias Público-Privadas, Lei nº15/2011, de 10 de Agosto e seu Regulamento aprovado pelo Decreto nº 16/2012 de 4 de Junho, que regula o objecto e o âmbito de aplicação e se estende a todos empreendimentos de parceria público-privada em áreas de domínio público. Recorde-se que os portos e as linhas férreas são bens do domínio público do Estado.

49. Se assim é, como princípio geral, a autorização para as concessões devem ser feitas a partir de um concurso público – artigo 13, nº 1 da Lei supra. A única excepção a esta regra é o previsto no nº 3 no mesmo artigo 13, quando indica que *“Em situações ponderosa e devidamente fundamentadas e como medida de último recurso sujeita a prévia autorização expressa do Governo, a contratação de empreendimento de PPP pode, excepcionalmente, assumir a forma de negociação e ajuste directo”*. – fim da citação.

50. Ainda assim, nos termos da lei, o ajuste directo, deve ser autorizado pelo Governo e nunca pelo Ministro. Nestes termos, o MTC não seria competente, nos termos da lei, para tomar nenhuma decisão sobre esta adjudicação da concessão.⁵²

⁵² In English:

48) The applicable legislation on the matter (Concessions), is the Public-Private Partnerships Law, Law No. 15/2011, of 10 August and its Regulation approved by Decree No. 16/2012 of 4 June, which regulates the object and the scope and extends to all public-private partnership ventures in areas of public domain. It should be remembered that ports and railways are goods in the public domain of the State.

49) If so, as a general principle, authorization for concessions must be made following a public tender - article 13, paragraph 1 of the above law. The only exception to this rule is that provided for in paragraph 3 of the same article 13, when it states that *“In ponderous and duly justified situations and as a measure of last resort subject to prior express authorization from the Government, the contracting of a PPP venture can, exceptionally, take the form of negotiation and direct agreement”*. - end of quote.

50) Even so, under the law, direct agreement must be authorized by the Government and never by the Minister. Accordingly, the MTC would not be competent, under the terms of the law, to make any decision on this concession award.

RWS-1, Witness Statement of Luis Amandio Chauque ¶¶ 48-50.

553. The legal opinion of Theresa Muenda and expert report of MZBetar likewise confirm that the PPP Law and PPP Regulations require a public tender in all but the most exceptional, “last resort” circumstances. **RER-1**, Expert Report of MZBetar, at 57 *et seq.*; **RER-2**, Expert Report of Teresa Muenda ¶¶ 17 *et seq.* Such circumstances were never mentioned, much less substantiated, in either the MOI or the PFS—or ever found by the Government. *Id.*
554. For avoidance of doubt, the MOI contains forward-facing agreements that the Project comply with Mozambican law and applicable legislation—including in the purported exclusivity in Clause 6 (subjecting exclusivity to “the terms of the specific legislation”) and Clause 8 (project implementation shall comply with Mozambican law). *See Exhibits R-1 & R-2*, Portuguese and English MOIs, respectively. Thus, under the MOI, enactment of the PPP Law and PPP Regulations required the Project to go to a public tender, irrespective of any contrary right PEL alleges the MOI provided in its invalid Clause 2(1) or confused interpretation of the “right of first refusal.” A prefeasibility MOI cannot reasonably be said to trump the law; obligate MTC to utilize exceptional “last resort” exceptions to the law; or absolve PEL of compliance with the requirements then applicable to further studies and award of a PPP megaproject concession.

7. Even if the MOI was Valid, the MTC and Mozambique Have No Obligations to PEL Under the MOI.

555. The evidence is overwhelming that the MOI, if interpreted in the matter suggested by PEL, would be illegal, void, and non-binding, and in any event superseded by the PPP Law and PPP Regulations.
556. All this points to a more credible scenario: the MOI, properly interpreted, does not provide the right to a concession that PEL alleges.
557. As detailed *infra*, in actuality, the MOI simply provides for a *direito de preferência*. Far from being a guarantee of an undefined concession once it is either “exercised” or “waived” (as PEL inconsistently alleges), the *direito de preferência* indicated in the MOI is the same *direito de preferência* set forth in the PPP Law: a 15% *direito e margem de preferencia*

that, consistent with industry practices, acts as a bid bonus for the proponent of the unsolicited PPP proposal in the public tender process. This *direito de preferência* is certainly *not* a binding right, promise or commitment of a concession itself—and was precisely what MTC provided to PEL. *See, e.g., RWS-1*, Witness Statement of Luis Amandio Chauque ¶¶ 7, 13-14, 23-24; *RWS-2*, Witness Statement of Paulo Zucula ¶¶ 5-22; SOC, Ex. C-19.

558. The MOI’s exclusivity provision accords with this sensible, harmonizing interpretation of the MOI. The exclusivity in MOI Clause 6 relates to the period of review and approval of the pre-feasibility studies, and is subject to the terms of the applicable legislation. *See Exhibits R-1 & R-2*, Portuguese and English MOIs, respectively. Neither exclusivity nor confidentiality are binding rights, promises or commitments to a concession itself, and in any event these rights were not breached by MTC.
559. Likewise, PEL did not satisfy the conditions precedent necessary to gain the rights it wishes for in the MOI. Neither the PFS nor the MOI define the basic terms and conditions of a concession, nor would PEL’s minimal PFS be sufficient to allow for a direct award. PEL’s actions in participating in the public tender as part of the PGS Consortium, and agreeing to exclusively pursue the project as part of that entity, extinguish and act as an estoppel, waiver, and accord and satisfaction of its wrongly alleged right to a direct award absent a public tender. Thus, in the alternative, even if the MOI was enforceable in some respects, PEL does not hold and is not entitled to the rights it claims, or to any relief.

a. PEL Misinterprets the Specific MOI Provisions that it Relies Upon.

560. Key to PEL’s case is its assertion that the “right of first refusal” in Clause 2(2) gave PEL a right to a direct award of a concession, contingent only on approval of the PFS and (confusingly) either the “exercise” or “waiver” of this alleged “right of first refusal.”
561. Clause 2(2) does no such thing. Minister Zucula explains the intent:

Clause 2, section 2 provides that, after the government approved the PFS, PEL would have been awarded the “right of first refusal” for the Project. Again, the MOI did not award the Project or the concession to PEL. It provided PEL with this right of first refusal. As stated in Portuguese, PEL was given a preferential position – *a direito de preferência*. This preference

entitled PEL to a scoring advantage in the public tender, which PEL was indeed provided when PEL participated in the public tender for this Project through a consortium. There would be no need for a right of first refusal if the concession had been awarded by the mere PFS approval. The MOI also envisions that a concession would need to be negotiated and entered into (Clauses 1 and 2), because the MOI does not comply with the requirements, under Mozambican law, regulations and practice, for negotiation and award of the Project or its concession.

RWS-2, Witness Statement of Paulo Zucula ¶ 10.

562. MTC’s Legal Director, Mr. Chauque, confirms this understanding and explains the “*direito de preferência*” contemplated in the MOI, to be provided to PEL under certain contingencies, such as the approval of the Pre-Feasibility Study, was the “*direito de preferência*” specified in Mozambican law with respect to unsolicited PPP proposals:

O “*direito de preferência*” contemplado no MOI, a ser fornecido à PEL mediante certas contingências, como a aprovação do Estudo de Pré-Viabilidade, era o “*direito de preferência*” especificado na lei moçambique no que respeita a propostas de PPP não solicitadas ou da iniciativa privada. Este “*direito de preferência*” foi definido na Lei n° 15/2011, artigo 13 (5), como um “*direito e margem de preferência de 15%*”. Isto é, o “*direito de preferência*” da Cláusula 2 (2) do MOI é o mesmo “*direito de preferência*” de 15% que a lei moçambicana fornece às propostas de PPP apresentadas por iniciativa privada, que requerem um concurso público. A lei moçambicana, tal como prevê o Artigo 13 (5) da Lei n° 15/2011, é também claro que no contexto de propostas não solicitadas, como a sugerida pela PEL, a entidade considerada como proponente recebe a vantagem de pontuação e não tem direito a compensação por os custos incorridos na preparação da proposta.

O MOI, celebrado pouco antes da Lei n° 15/2011, tinha como objetivo confirmar o processo pelo qual a PEL poderia receber o “*direito de preferência*” de 15% e confirmar que os custos incorridos pela PEL para o PFS eram de responsabilidade da PEL. Refira-se ainda que, no regime em vigor anterior a Lei n° 15/2011, não seria permitida a adjudicação por ajuste direto para um projeto desta natureza, que não cumpre os requisitos.⁵³

⁵³ In English:

The “*direito de preferência*” contemplated in the MOI, to be provided to PEL under certain contingencies, such as the approval of the Pre-Feasibility Study, was the “*right of preference*” specified in Mozambican law with respect to unsolicited PPP proposals or private initiative. This “*direito de preferência*” was defined in Law No. 15/2011, article 13 (5), as a “*direito e margem de preferência de 15%*”. That is, the “*direito de preferência*” of Clause 2 (2) of the MOI is the same 15% “*direito de preferência*” that Mozambican law provides for PPP proposals submitted

RWS-1, Witness Statement of Luis Amandio Chauque ¶¶ 13-14.

563. The technical experts at MZBetar make the same observation, explaining the importance and industry context of the *direito de preferência* in the expected public tender process (**RER-1**, Expert Report of MZBetar ¶¶ 122-125):

by private initiative, which require a public tender. Mozambican law, as provided for in Article 13 (5) of Law No. 15/2011, is also clear that in the context of unsolicited proposals, such as that suggested by the PEL, the entity considered as the proposer receives the scoring advantage and is not entitled to compensation for the costs incurred in preparing the proposal.

The MOI, signed shortly before Law No. 15/2011, aimed to confirm the process by which PEL could receive the "*direito de preferência*" of 15% and confirm that the costs incurred by PEL for PFS were responsibility of PEL. It should also be noted that, in the previous regime, Law No. 15/2011, the award by direct agreement for a project of this nature, which does not meet the requirements, would not be allowed.

122. Though the Law has the clear intention to limit the use of “Direct Award” to very specific situations and incentive “Public Tendering”, it shall be mentioned that proposals for PPP’s enterprises from Private initiative are contemplated and encouraged.

PPP Procurement Law (law nº15/2011) define at item (5) of the Article 13 that these unsolicited proposals, i.e. from Private Initiative (translating): *“shall be subject to the Public Tender for gauging or adjusting [MZBETAR Remark: “benchmarking”] of its technical and quality terms, the price and others conditions offered by the proponent, that shall enjoy from the right and margin of preference of 15% in the evaluation of the Proposals (...) and without the right to be compensated for the costs incurred (...)”*

Thus, even in Projects from Private Initiative the “Public Tender” is the rule, despite the preference (at the evaluation) given to the Project Proponent, to compensate the “eventual” additional costs and efforts incurred to demonstrate the Project advantages and/or specific requirements. Is relevant to underscore that in accordance with Law 15/2011 the Private entity that suggested the Project shall apply for “Public Tender” and “without the right to be compensated for the costs incurred”.

123. About the previous paragraph it shall be noted that the Portuguese wording at Law nº15/2011 about the right and margin of preference is (underlined added) *“(...) gozando este do direito e margem de preferência”*; This wording is the same adopted at Portuguese Version of MOI, Clause 2 (2), *“(...) a PEL terá o direito de preferência (...)”*; Is our understanding that both reference to the same (i.e. 15% of leverage on the Evaluation on a Public Tender);

124. From the above paragraphs is evident that the normal (and expectable) Procedure for PPP Tender are the “Public Tender”, even for Projects from Private Initiative. Direct Award, although possible, are an exceptional procedure that should be carefully justified and applicable only in very few situations. It is noted that MOI and PFS did not address this fact clearly, much less justify why this Project should have an “exceptional regime”.

125. We recall that was established as an objective at the MOI that the PFS should *“define the basic conditions and terms”* for the grant of a Concession. But as shown at previous sections, PEL’s PFS is absent information about the modality for the negotiation and award of the Concession. In our experience if, as claimed by PEL, the Direct Award was the final objective this should had been clearly discussed and justified at PFS because this is an Exceptional Regime that needs to be supported (as established in the applicable procurement Law and procedures) and approved. It also shall be underlined that in the MOI nothing was established (or mentioned) about the use of Exceptional Contracting Modalities for the award, either.

564. The Legal Opinion of Theresa Muenda likewise confirms that the *direito de preferência* in the PPP Law is what applies—and that its 15% *direito de preferência* in the public tender

- is in no way equivalent to say that PEL was guaranteed a concession. **RER-2**, Expert Report of Teresa Muenda ¶¶ 20-22.
565. Thus, the correct interpretation is simple: Clause 2(2) of the MOI provided, at most, a contingent “*direito de preferência*,” as stated in each party’s controlling Portuguese version of the MOI. **Exhibit R-1**; SOC, Ex. C-5B. The “*direito de preferência*” is expressly defined in the Mozambican PPP Law, 15/2011, that PEL alleges was known to its attorneys at the time of drafting the MOI. See SOC, CWS-1, Witness Statement of Kishan Daga ¶¶ 35-36. In the PPP Law, *public tenders are required* absent a finding of exceptional, “*last resort*” circumstances (a finding never made in the MOI or PFS), and entities deemed to be the proponent of an unsolicited PPP proposal—what PEL claims to be—are provided a “*direito e margem de preferencia de 15%*” in the public tender. **RLA-6**, Mozambique Law No. 15-2011, Art. 13(1) & (5). The PPP Law further confirms that the proponent of an unsolicited proposal is *not entitled to compensation for the costs incurred in preparing its proposal*. *Id.* at Art. 13(5).
566. In short, the “*direito de preferência*.” in Clause 2(2) of the MOI is the “*direito de preferência*” in Article 13(5) of Mozambique law 15/2011—which is the 15% public tender scoring advantage that MTC provided to PEL. The MOI was intended to outline the process by which PEL may be able to exercise the “*direito de preferência*” in the PPP Law. The MOI also confirmed that, as reflected in the PPP Law, PEL would be performing the PFS at its own cost, as part of its project pursuit marketing that private proposers commonly undertake in the context of unsolicited PPP proposals.
567. Logically and as previously detailed, MTC’s interpretation is also the only reading of the MOI that accords with industry practices for PPP Procurement. In the industry, proponents of unsolicited proposals do not legitimately expect to receive a direct concession award on the basis of pre-feasibility studies. *Supra* § V(B)(5)(e). The World Bank’s PPP Reference Guide and its Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects survey procurement practices across the globe, strongly discourage direct awards for PPP projects, and confirm that PPP project proponents, if entitled to any right of preference at all for their submittal of technical proposals or studies, are provided either (1) automatic shortlisting in a public tender, (2) a scoring advantage in a public tender

(typically of a less generous percentage than MTC provided PEL), or, (3) less commonly, a “right to match” competing offers in a public tender. *Id.*

568. Thus, MTC’s use of a public tender process for this project, with PEL receiving a 15% “direito de preferência” in light of the MOI and PFS, is proper and wholly consistent with the intent and language of the MOI,⁵⁴ Mozambican law,⁵⁵ Mozambican procurement practices,⁵⁶ and sensible global industry practices for unsolicited proposals on infrastructure PPP projects. *Supra* § V(B)(5)(e); *see also* **RER-1**, Expert Report of MZBetar, at 63 (Conclusion F). PEL has no countervailing right to a “direct award” on the basis of a “right of first refusal” that it cannot consistently define or harmonize with industry practices for unsolicited PPP proposals.

569. PEL also exaggerates its alleged rights under Clause 6 of the MOI, related to exclusivity. Mr. Chauque testifies:

O MOI contém uma cláusula de exclusividade, que refere que “Enquanto durar o estudo e o processo de aprovação da proposta da PEL, o MTC concorda, nos termos da legislação específica, em não solicitar qualquer proposta de estudo para o objecto do presente memorando, assim como não conceder qualquer direito/ autorização a qualquer outra parte para o desenvolvimento /expansão de um porto entre Chinde e Pebane para fins semelhantes, nem para o desenvolvimento /expansão de qualquer corredor Ferroviário na faixa de Tete à Costa da Província da Zambézia dentro da faixa referida e objecto do presente memorando”. Vide a Cláusula 6.

A exclusividade referida na cláusula 6, só podia ser usado “Enquanto durar o estudo e o processo de aprovação da proposta da PEL” não se pode alegar a exclusividade para toda a vida do projecto. O Governo cumpriu esta cláusula pois, “ Enquanto durar o estudo e o processo de aprovação da proposta da PEL....., não assinou nenhum outro memorando com nenhuma outra entidade.

O MTC seguiu o Memorando, razão pela qual, durante a vigência do Memorando, o MTC trabalhou apenas com a PATEL, obedecendo a tudo quanto foi acordado.⁵⁷

⁵⁴ *See, e.g.*, **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 7, 13-14, 23-24; **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 5-22; *see* SOC, Ex. C-19.

⁵⁵ *See, e.g.*, **RER-2**, Expert Report of Teresa Muenda ¶¶ 20-22; **RLA-6**, Mozambican Law No. 15-2011, Art. 13.

⁵⁶ *See, e.g.*, **RER-1**, Expert Report of MZBetar, at 63 (Conclusion F); **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 7, 13-14, 23-24.

⁵⁷ In English:

RWS-1, Witness Statement of Luis Amandio Chauque ¶¶ 16-18.

570. In addition, if the exclusivity clause is interpreted more broadly than applying to just the prefeasibility study, the clause is invalid and contrary to the PPP law, which sensibly requires a public tender for PPP megaprojects like this. The exclusivity clause must be construed as being limited by the requirements of applicable law, as the plain terms of Clauses 6 and 8 demonstrate. Applicable law said that the PPP needed to go to a public tender in all but the most extraordinary of circumstances, which were not presented here. The law controls over a MOI.

b. The MOI Provisions that PEL Relies Upon are Self-Limiting.

571. As described, the “right of first refusal” (actually a *direito de preferência*) in Clause 2(2) of the MOI is properly interpreted, and limited to, the “*direito de preferência*” expressly described in Article 13(5) of Mozambique law 15/2011: *which is the 15% public tender scoring advantage that MTC provided to PEL*. There is no evidence in the MOI of a broader right of first refusal. Indeed, Clause 2(2) is silent about the terms and conditions upon which such option would be exercised—which is very anomalous if the intended right

The MOI contains an exclusivity clause, which states that “While the study and the approval process of the PEL proposal lasts, the MTC agrees, under the terms of the specific legislation, not to request any study proposal for the object of this memorandum, as well as not granting any right / authorization to any other party for the development / expansion of a port between Chinde and Pebane for similar purposes, nor for the development / expansion of any Railway corridor in the Tete strip to the Zambezia Province Coast within the aforementioned range and object of this memo.” *See* Clause 6.

The exclusivity referred to in clause 6, could only be used “*As long as the study and approval process of the PEL proposal lasts... .. one cannot claim exclusivity for the entire life of the project*. The Government complied with this clause because, “... .. *While the study and the approval process of the PEL proposal lasts....*”, it did not sign any other memorandum with any other entity.

The MTC followed the Memorandum, which is why, during the term of the Memorandum, the MTC worked only with PATEL, obeying everything that was agreed.

Accord **RWS-2**, Witness Statement of Paulo Zucula ¶ 17 (Clause 6 essentially “meant that PEL would be exclusively provided the preferential position at the public tender”).

of first refusal was something that could be exercised to grant a concession or a right to match competing offers.

572. The exclusivity clause is similarly self-limiting, both under its plain language and with reference to the legal context of the MOI and PPP procurement. The exclusivity clause (MOI at Clause 6) includes language limiting it to the prefeasibility study and early approval duration, and is subject to “the terms of the specific legislation,” as earlier described. It does not preclude holding the public tender or awarding the concession to the winning bidder. *See, e.g., RWS-1*, Witness Statement of Luis Amandio Chauque ¶¶ 16-18.
573. Notably, even if the right of first refusal was interpreted as an ability to match completing offers, that right has no value to PEL. PEL required a separate entity (a consortium) to even complete in the tender process, and that consortium came in third place in significant part due to inferior *technical* qualifications. *See, e.g., RER-1*, Expert Report of MZBetar § 5.3. A purported right of first refusal does not obligate MTC to give the project to a party with a technically inferior proposal and qualifications, even if said party would be willing to match financial terms.

c. PEL Did Not Satisfy or Comply with the Requirements and Conditions Precedent of the MOI.

574. “A contract or a *contractual obligation may be made conditional upon the occurrence of a future uncertain event, so that the contract or a contractual obligation only takes effect if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).*” **RLA-128**, UNIDROIT Principles of International Commercial Contracts (2010), Art. 5.3.1 (emphasis added). A “suspense conditions” is also referred to as a “condition precedent.” *Id.* at Art.5.3.1, cmt. 3. “Parties to a contract may make their contract or one or several obligations arising under it dependent on the occurrence or non-occurrence of a future uncertain event. A provision to this effect is called a condition.” *Id.* at Comment 1. “A condition may refer to a range of events, including ... acts of a third person.” *Id.*

575. Even if the MOI generally, and specifically the first right of refusal and exclusivity provisions on which PEL relies, were valid and enforceable, PEL did not comply with the conditions precedent of the MOI necessary for PEL’s alleged rights to arise.
576. For example, the PFS did not define “the basic terms and conditions of the Concession,” as confirmed by MZBetar’s thorough technical evaluation of the PFS. **RER-1**, Expert Report of MZBetar, at 61 (Conclusion A). The PFS was limited to a high-level conceptual review of only the Technical Feasibility of the Project (lacking discussion of necessary economic, financial, commercial, and environmental matters); utilized internet sources, lacked site studies, and did not reflect a high degree of design development or mobilized resources; did not actually establish technical feasibility; did not go through the approval process necessary for the award of a concession; and would *not* “be viewed as a sufficient and prudent basis to grant a concession for a Project of this size, type and complexity.” *Id.* at 61-65.
577. Minister Zucula similarly explains that the PFS, while perhaps sufficient to allow PEL to receive the 15% *direito de preferência* in the public tender, did not satisfy the requirements of a direct award of a concession:

The PFS that PEL submitted was conceptual, discussed ideas the MTC already had, and was not a study of the quality the MTC expected. It also did not define the basic terms and conditions of a concession. In good faith, the MTC continued discussions and gave PEL the benefit of the scoring advantage for the public tender contest, if PEL wished to proceed and could form the planned partnership with CFM. PEL struggled to provide required information about its PFS and failed to reach agreement with CFM. PEL’s position then changed and PEL asserted, instead, that it should be provided a direct award. However, Pel was again informed that the required public tender process would be employed and that – consistent with the MOI – PEL could compete with a bidding advantage and be awarded a right of first refusal if it prevailed in the tender.

RWS-2, Witness Statement of Paulo Zucula ¶ 10; *see also* **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 37 (PFS does not satisfy requirements for a concession).

578. All this evidence supports common-sense intuition and PPP industry practice: a six-page “Memorandum of Interest” and limited, conceptual *Pre-Feasibility Study* does not guarantee or grant automatic rights to a USD\$3 billion, 30-year concession.

d. The Doctrine of Estoppel Precludes PEL From Seeking Relief under the MOI.

579. As described in the factual background, when PEL began to insist on a direct award, the matter was elevated to the Mozambican Council of Ministers. In accordance with Mozambican law, and after consulting with legal counsel, the Council of Ministers also concluded that the project must be submitted to a public bidding process. *Supra* §§ II (H)-(I).
580. MTC invited PEL to participate in the public bidding process. PEL accepted that invitation and participated in the public bidding process through the PGS Consortium. *Id.*
581. Indeed, the project was duly submitted to public bidding in accordance with the requirements of Mozambican law, and the PGS Consortium participated in the public bidding process. PEL's participation in the public tender, recognition of the applicability of the PPP Law, and agreement with its PGS Consortium members to exclusively pursue the project through the Consortium entity are all inconsistent with any continued pursuit of an alleged right to a direct award. *Id.*; see **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 68-72; **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 19-23; **RER-2**, Expert Report of Teresa Muenda ¶ 21. Notably, Article 78 of Decree No. 15/2010 provides that the evaluation of bids must be based solely on the criteria established in the tender document. *See* Exhibit R-3. In any event, and consistent with the PPP Law, the PGS Consortium was granted a preference in the tender process attributable to its efforts with the proposal, which the PGS Consortium accepted.
582. However, the PGS Consortium was not the winning bidder. Pursuant to the scores duly allocated to each tender under a specific formula that which had been published during the tender process, the Italian Thai Development Company ("ITD") was awarded 95 points, CLZ Consortium was awarded 80 points, and the PGS Consortium came in last place awarded 72.5 points. On 26 July 2013, the MTC formally notified PEL of its decision to award the concession to the winning bidder, ITD. *Supra* §§ II(I)-(J).
583. MTC confirmed the award of the concession to ITD on 27 August 2013. It was not until after the award was confirmed by the MTC that PEL, on 28 August 2013, purported to seek a belated formal appeal, but it was rejected. *Id.*

584. Technical evaluation confirms that the public tender “followed the applicable rules and procedures,” there were no material errors or mistakes, and that the PGS Consortium did not comply with the clearly stated requirements for protesting or appealing the tender. **RER-1**, Expert Report of MZBetar, §§ 5.3 & at 62 (Conclusion C).
585. PEL failed to obtain recourse from the courts of the Republic of Mozambique, and thus waived its right to seek any remedy with respect to alleged defects in the tender process. *Supra* §§ II(I)-(J); **RER-2**, Expert Report of Teresa Muenda ¶¶ 21-22.
586. Further, because other bidders were found superior on both financial *and technical* metrics, PEL did not, and could not, assert a right of first refusal to perform the concession on the same terms and price, if such a right existed.
587. Under these circumstances, PEL should be estopped from claiming the rights it alleges in this proceeding. “A considerable weight of authority supports the view *that estoppel is a general principle of international law*, resting on principles of good faith and consistency.” **RLA-126**, J. Crawford, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, at 420 (emphasis added). By choosing to participate in a public tender as part of the PGS Consortium, accepting the 15% right of preference afforded by the MOI and further defined in the PPP Law, agreeing with its PGS Consortium partners not to pursue the project outside the of the Consortium, *see* SOC, Ex. C-60, PGS Consortium MOU, at 6 “Exclusivity,” and then not pursuing its bid protest remedies or ever making a claim under the MOI and its ICC arbitration clause, PEL should be estopped from now asserting any rights to a direct award.

e. The Doctrines of Release and Waiver Preclude PEL From Seeking Relief under the MOI.

588. “An obligee may release its right by agreement with the obligor.” **RLA-128**, UNIDROIT Principles of International Commercial Contracts (2010), Art. 5.1.9. “*The release may either be a separate act, or constitute a part of a more complex transaction between the parties*” *Id.* at Art.5.1.9, cmt. (emphasis added).
589. For the similar reasons that PEL is estopped from claiming its alleged right to a direct award, PEL also waived any right to seek relief under the MOI. For example, instead of

making a claim or seeking relief under the MOI's dispute resolution provision, PEL knowingly formed a separate consortium to participate in a public tender whose purpose was to award the subject concession. PEL likewise did not bring an action under the MOI's dispute resolution provision even after the 2013 implementation of the public tender process that awarded the project to another entity. Nor did PEL timely initiate and pursue any of the bid protest or tender appeal processes available under applicable law. PEL's actions are inconsistent with its assertion of rights under the MOI and constitute waiver.

f. The Doctrine of Accord and Satisfaction Precludes PEL From Seeking Relief under the MOI.

590. It does not appear to be disputed that PEL was on notice that MTC intended to award the project via a public tender, consistent with the PPP Law and PPP Regulations then in effect, and was or should have been on notice of said Mozambican laws.
591. PEL did eventually dispute that a public tender was the proper course of action. Yet, as noted, instead of seeking to enforce its alleged rights under the MOI, PEL agreed to participate in the public tender process (choosing to form a separate Consortium with more local entity involvement) and accept MTC's offer of a preference in the tender process.
592. PEL's actions, in proceeding with a public tender process contrary to its alleged rights under the MOI, and accepting a tender scoring preference, therefore also constitute an enforceable accord and satisfaction that extinguished PEL's rights to seek any or further relief under the MOI. This accord and satisfaction is also in the nature of a settlement of a prior dispute.

g. All Remaining Obligations of the MTC and Mozambique, if any, under the MOI Were Excused and/or Released.

593. In sum, consistent with the *direito de preferência* contemplated in the MOI, MTC conducted a public tender that afforded PEL the 15% *direito e margem de preferência*. PEL chose to accept the *direito de preferência* and participate in the public tender process whose purpose was to award the subject concession. Although PEL was disappointed with the results of that process, in which the jury deemed PEL the third-place bidder after weighing both technical and financial scores, PEL did not utilize the necessary and

appropriate procedures to protest and appeal the tender. Thus, Mozambique has no further obligations under the MOI: the project was put to a public tender as contemplated by the MOI, PPP Law, and PPP Regulations; PEL participated in that process without making a claim; PEL was not the winning entity in the tender process; and PEL did not contest the tender process.

594. In any event, PEL could not have received the award and proceed with the project because, among other things, it was blacklisted and found to be commercially untrustworthy on another PPP project (constituting a disqualifying impediment under the tender and Mozambican law) and the project as proposed was not feasible in fact. For these reasons and the others specified herein, all of Mozambique's obligations under the MOI are satisfied, excused, and/or released.

h. The MTC's and Mozambique's Actions Were Legally Justified.

595. As the factual background demonstrates, PEL improperly and repeatedly insisted that the MTC ignore the Mozambican legal requirements mandating a public bidding process, that MTC public officials violate their legal duty to act in accordance with Mozambican law, and that MTC public officials illegally, corruptly and automatically award the project to PEL. Under Mozambican law, the MTC justifiably refused to automatically award the project to PEL.
596. Overriding the results of the tender, as PEL requested, only to give further preferential treatment to a disappointed bidder like PEL and/or its consortium, on the basis of a void, non-binding, 6-page MOI that never did, or could, guarantee direct source procurement to PEL, is an action that could subject MTC to liability. What MTC did in putting this to tender, and respecting the outcome, was consistent with applicable law and protective of the interests of the people of Mozambique and international investors, concessionaires and contractors. PEL's minimal PFS did not demonstrate the necessary understanding of the project, nor would it be deemed sufficient to award a concession in the industry. **RER-1**, Expert Report of MZBetar, at 61-65. MTC's actions were fully in accordance with the MOI, Mozambican and international law, PPP procurement practices, and the public interest.

i. The MTC and Mozambique Did Not Breach the MOI.

597. To summarize, PEL relies on a six-page preliminary MOI containing alleged right of first refusal and exclusivity clauses, to purport to overcome the normal and expected public tender procurement process for this project (still early in development) and similar PPP projects as mandated by the PPP Law and PPP Regulations.
598. More than that, PEL contends the government's actions in following applicable law for a still-conceptual, pre-award project somehow violated (which it did not) the MOI (without PEL even bringing a claim under the MOI – as noted herein, PEL is instead pursuing international treaty arbitration), and violated public procurement rules (without PEL even bringing a timely administrative appeal for bid protests or seeking judicial review).
599. Yet, as described, the MTC and Mozambique were simply doing what the PPP Law and PPP Regulations require for projects of this type—and what the MOI stated, since Clause 8 of the MOI requires compliance with Mozambican law. MTC provided the *direito de preferência* that was specified in both Clause 2(2) of the MOI and Article 13(5) of the PPP Law. PEL has not established a legally recognizable right to a direct award in the MOI, nor has it shown that MTC breached the MOI.

8. PEL Repudiated the MOI.

600. PEL's positions as to the existence of a right to a direct award suffer from additional, fatal flaws. PEL's actions, including its failure to disclose its blacklisting and other breaches of the MOI described herein, improper insistence that MTC forgo the necessary public tender, and then acceptance of the right of preference and participation in the tender, can be viewed as a repudiation of the MOI with reference to estoppel principles (as described above) and as an anticipatory breach of the MOI by PEL.

9. PEL Breached the MOI.

601. If the MOI is valid, PEL breached the MOI by its acts and omissions, including the following:
- 601.1. First, PEL breached the MOI by concealing its blacklisting and/or other material facts. As noted, PEL concealed and did not disclose that it was found to be commercially untrustworthy and blacklisted due to its actions with respect to

another PPP project in its home country. Through its actions and blacklisting, PEL also failed to maintain its qualification for participating or seeking participation in the Project, itself a necessary condition of the MOI. *Supra* § III.

- 601.2. Second, PEL breached the MOI by violating the confidentiality clause. As described in the factual background, PEL publicly disclosed the existence of the MOI, the nature of the proposed project, and other information deemed confidential under the MOI's confidentiality clause to the press and contractors. *Supra* § II (L).
- 601.3. Third, PEL breached the MOI by violating Mozambican law. The MOI required that “[t]he implementation of a project must be done within the laws approved by the Govt. of Mozambique.” **Exhibits R-1 & R-2**, MOI, Clause 8. PEL breached this obligation, by demanding that further negotiations and award proceed without the necessary approvals, and without the public tender process specified in the PPP Law and PPP Regulations, as described earlier in this section. PEL also breached this obligation by, among other things, failing to disclose the impediments to its participation in the project and fraudulently concealing the same. *Supra* § III.
- 601.4. Fourth, in the alternative and without admitting that the PEL was a concessionaire, PEL also breached the MOI by violating Law 6/2004. *See Exhibits R-1 & R-2*, MOI, Clause 9. Law No. 6/2004, *see RLA-9*, applies to “private companies outsourced to provide public services.” Art. 2. “When carrying out their duties, the entities mentioned in the Article above shall adhere to the principles of *legality*, equality, non-discrimination, impartiality, *ethics*, public spirit and fairness.” **RLA-9**, Law No. 6/2004, Art.3(1). “Compensation shall be made for damages caused to public or private property or interests as a result of the actions or omissions of the managers or civil servants.” *Id.* at Art.3(2). “All assets accruing to the entities mentioned in the Article above, who become illegally enriched as a result of the actions or omissions referred to in clause 2 of this Article shall be forfeited to the ...” *Id.* at Art.3(3). PEL's actions, both relative

to its blacklisting and attempted bribery, do not demonstrate compliance with Mozambican law as required by the MOI. *Supra* § III.

601.5. Fifth, PEL breached the MOI by violating the arbitration clause. *See* MOI Clause 10. Instead of utilizing the parties agreed-upon mechanism for disputing arising out of the MOI, PEL sat on its alleged rights for years, and then filed an international arbitration premised on its alleged rights under the MOI and seeking enormous, never-contemporaneously-claimed damages on a project that has not come to fruition. *Supra* § IV(B). PEL likewise breached the MOI by failing to satisfy conditions precedent to further negotiations and project award, including securing third-party agreements and approvals necessary for project feasibility as specified. *See, e.g., supra* § II(F).

10. Additional Defenses

602. Additionally, PEL has no rights in the MOI based on the following additional defenses.

a. The Approval of the Prefeasibility Study Violated Mozambique law.

603. The approval of the prefeasibility study, particularly to the extent PEL claims it acted to create a right to a direct award of the concession, is null and void for the same reasons earlier discussed relative to the MOI. Among other things:

O MOI e o PFS *de per se*, não dão acesso a Concessão. Não havendo comprovativo da aprovação da viabilidade financeira do projecto, da verificação dos requisitos legais para concessão, pois não foi aprovado o projecto de PPP; não foi concedido de acordo com o processo de concurso público; não foi registado como investimento estrangeiro, não foi aprovado pelo Governo, que é a entidade legalmente indicada para autorizar a concessão e nem teve o visto do Tribunal Administrativo, não se mostraram reunidas as condições legais para se designar a PEL como detentora de uma concessão. Isto é, a PEL nunca foi Concessionário do Projecto.⁵⁸

⁵⁸ In English:

[The] MOI and PFS per se do not provide access to the Concession. In the absence of proof of approval of the financial viability of the project, verification of the legal requirements for the concession, as the PPP project was not approved; it was not awarded according to the public tender procedure; it was not registered as a foreign investment, it was not approved by the Government,

RWS-1, Witness Statement of Luis Amandio Chauque ¶ 32.

604. MZBetar likewise confirmed that, based on its analysis and experience, the PFS did not “define the basic terms and conditions of the concession” and would not “be viewed as sufficient or prudent to grant a concession for a Project of this size, type of complexity.”

RER-1, Expert Report of MZBetar, at 61 (Conclusion A).

b. PEL’s Participation in the Public Tender Was Induced by Fraud and PEL Had a Conflict of Interest.

605. As more fully discussed in Section III, PEL’s participation in the public tender was induced by PEL’s fraudulent concealments, and PEL’s and its consortium’s participation would not have been permitted, or they would have been disqualified, if the MTC or Mozambique had known the concealed facts. MTC witnesses confirm this to be true, explaining how blacklisting would have precluded further discussions or negotiations with PEL. **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 25-27; **RWS-2**, Witness Statement of Paulo Zucula ¶ 24.

606. PEL’s participation in the public tender also was improper, and null and void because PEL had a conflict of interest. Although PEL was purporting to represent a consortium, at the same time PEL was advocating for itself separately and in conflict with the consortium, which also is grounds to disqualify PEL and the consortium. In his Witness Statement, PEL’s lead representative Mr. Daga admits that it was PEL’s plan “not to waive any of our rights under the MOI by participating in the public tender as part of the PGS Consortium.” SOC, CWS-1, Witness Statement of Kishan Daga ¶ 141. Mr. Daga further admits that he “was not happy about having to participate in a public tender as art of a consortium ...” *Id.* PEL’s plan was in conflict with the interests of PGS Consortium, and PEL’s commitments to the PGS Consortium. *See* SOC, Ex. C-60 at 6 (exclusivity clause).

which is the entity legally indicated to authorize the concession, nor did it have a visa from the Administrative Court, the legal conditions to designate PEL as holder of a concession are not met.

c. PEL's Claims Are Time-Barred.

(i) PEL's claims violate Mozambique's statutes of limitations.

607. PEL's claim to enforce its alleged rights under the MOI, arising from its participation in the public tender, or otherwise, are barred by the statutes of limitation (prescription periods) applicable under Mozambican law.
608. Mozambican statutes of limitation applicable to PEL's claims are, as follows:
- Article 104 of Mozambique Law No. 9/2001, of 7 July which provides a one-year statute of limitations. *See Exhibit RLA-10.*
 - Article 317 of the Mozambican Civil Code which provide a two-year statute of limitations. *See Exhibit RLA-11.*
 - Articles 227(2) and 498(1) of the Mozambican Civil Code which provide a three-year statute of limitations. *See Exhibits RLA-12 & RLA-13.*
609. “[T]he limitation period starts to run when the right can be exercised” *See RLA-14*, Mozambique Civil Code, Article 306(1). .
610. At the latest, PEL's various claims arose no later than 27 August 2013, when the MTC sent a letter to the PGS Consortium stating that, “in the absence of pending appeals,” the MTC was giving final confirmation of the award of the concession to ITD. *See Exhibit R-37.* Any claim by PEL to enforce its alleged rights under the MOI would be time-barred.

(ii) PEL's claims are barred by the doctrine of laches.

611. “Laches is an equitable defense asserted to bar the adjudication of stale claims. The doctrine is premised on the theory that a claim that is plagued with undue delay prejudices a defendant because evidence is no longer available to defend against the claim.” **RLA-80**, *Confor & Tembec v. USA*, UNCITRAL, Order of the Consolidation Tribunal (7 September 2005) ¶ 165.
612. “Often called ‘extinctive prescription’ [or prescriptive extinction] in international law, the doctrine of laches is defined generally by international jurists and scholars as the bar of claims by lapse of time. Although variations of this definition exist, the underlying concept remains constant: Undue delay in the presentation of an action before an international tribunal will vitiate the merits of the claim and work inequity between the litigation parties. Laches, in its most basic application, addresses the right to adjudicate an action under

- international law regardless of the substantive merits at issue.” **RLA-81**, A. R. Ibrahim, *The Doctrine of Laches in Int’l Law*, 83 VA. L. Rev. 647, 650-51 (April 1997). “Laches...rejects a claim simply because it is stale, regardless of whether the passage of time indicates the respondent state’s willingness to adjudicate the stale claim.” *Id.* at 652. “In the case of laches...the critical injury is the age of the claim and the resulting unfairness to the defending state... [N]o inquiry into incidental issues relating to state of mind, reliance, or consent is necessary.” *Id.* at 655.
613. “The decisive factor is...whether the respondent has suffered prejudice because it could reasonably have expected that the claim would no longer be pursued.” **RLA-82**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011) ¶ 88. “It is for the Tribunal to determine whether the passage of time in this case is such as to render [the Claimant’s] claim inadmissible...” *Id.* at ¶ 89.
614. “[F]or extinctive prescription to operate, the delay must be unreasonable and be attributable to the claimant... [I]t appears...that prejudice to the respondent, in the sense of creating difficulties in answering the claimant’s claim, is an element of prescription.” *Id.* at ¶ 90.
615. “It has been suggested that, at a minimum, a state cannot invoke the doctrine of laches for a delay of less than one year. Beyond that, there has been no established pattern and tribunals have applied the doctrine flexibly.” **RLA-81**, A. R. Ibrahim, *The Doctrine of Laches in Int’l Law*, 83 VA. L. Rev. 647, 650-51 (April 1997).
616. “[A] stale claim presented before an international tribunal raises an important presumption: The respondent is prejudiced by the undue delay.” *Id.* Thus, “[a]ny substantial delay in presenting the claim must be accompanied by an exculpatory reason overcoming the respondent’s defense of laches. Otherwise, the delay will be presumed negligent and unreasonable.” *Id.* at 678.
617. Here, according to PEL, it entered an MOI with Mozambique’s MTC on 6 May 2011. *See* SOC ¶ 10. Also, according to PEL, the MOI allegedly guaranteed PEL a direct award of a concession for the rail/port project. *See id.* at ¶ 95. PEL next alleges that MTC issued a letter on 11 January 2013, “in which it announced the forthcoming public tender for the Project.” *Id.* at ¶ 181.

618. PEL also alleged that MTC reversed course and wrote PEL on 18 April 2013 that it would grant PEL a direct award. *Id.* at ¶ 211. But MTC allegedly reversed course a third time when, by letter dated 13 May 2013, it decided to proceed with the public tender. *Id.* at ¶ 216. PEL alleged that it submitted a formal appeal to MTC on 28 August 2013. *Id.* at ¶ 212.
619. Even assuming, *arguendo*, these facts are true (they are not), “PEL notified the Republic of an investment dispute between the Parties relating to the Project...on 25 June 2018,” just one month shy of five years from PEL’s submission of the formal appeal. *See id.* at ¶ 34. PEL then waited another two years, approximately, before commencing this arbitration on 20 March 2020. *See id.* at ¶ 37.
620. A five-year delay before informing Mozambique or MTC of any dispute is unreasonable. Waiting another two years before pursuing arbitration—even taking into account the six-month “cooling off” period—is further proof of negligence or downright willful disregard for its own purported “rights” and its opponents. Even PEL’s allegations demonstrate the delay was due to its own decision-making and not because of any act or omission by Mozambique or MTC.
621. This five- or seven-year delay raises the presumption that Mozambique and MTC are prejudiced thereby. *See RLA-81*, A. R. Ibrahim, *The Doctrine of Laches in Int’l Law*, 83 VA. L. Rev. 647, 650-51 (April 1997). Specifically, MTC employees and ministers have separated from the ministry, as can be expected to occur in the ordinary course of business. Consequently, certain institutional or historical knowledge is lost—in addition to the loss of memory of the minutiae from such a long time ago, on which minutiae PEL attempts to rely in developing its case. *See e.g.*, SOC ¶¶ 122-134.
622. Because the delay “vitiates the merits of [PEL’s] claims,” Mozambique and MTC respectfully request this Tribunal exercise its discretion in disallowing PEL to abuse the international judicial system by unreasonably delaying the pursuit of any claim (however attenuated), only to sue for more than *one hundred and fifteen million dollars (USD)* at its whim.

d. PEL's Claims Are Implausible, Moot, and Futile.

623. Ultimately, the project as proposed by PEL was not viable and/or feasible, which renders moot any claim by PEL pursuant to the MOI. PEL's claims are implausible and futile because, even if PEL was entitled to the alleged direct award, the project would not have come to fruition under terms proposed by PEL and because it had no agreement with CFM. *Supra* § II(K) (factual background, current project status); *see infra* § IX(B) (PEL's project as reflected in the PFS was not economically feasible), § IX(C) (The TML project is materially different than what PEL considered—and still has not been built)
624. As noted, PEL's efforts to equate the current Project envisioned (but still not built) by ITD, with what was outlined in any way in the PFS, are entirely inappropriate. *See* SOC ¶ 2.
625. The PFS contemplated the “development of **25 MTPA** handling capacity Port at Macuse” and a “516km **standard gauge** rail corridor from Macuse to **Moatize**.” *E.g.*, Exhibit R-7, PEL PFS, at 1.
626. *Every fundamental term is different in the TML Project.* TML proposes a **33 MTPA** handling capacity port, located on **the other side of the river** in Macuse, connecting to a **cape gauge** railway, that is **639 km** long—terminating not in Macuse, but rather at in **Chitima**, to **secure offtake from mines never contemplated in the PFS**. *E.g.*, RER-1, Expert Report of MZBetar, at 62 (Conclusion E). Numerous other significant differences exist. *Id.* § 5.5 (discussing differing axle loads, train formations, port parameters, port capacities, vessel sizes, length and layout of terminal berths and port, alignment of the rail route, and so forth). The project as proposed by PEL or the PGS Consortium would not have been techno, commercially and/or financially viable or feasible. *See id.*; *infra* § IX. This is discussed in more detail *infra*, relative to PEL's asserted damages, but the point applies with equal force here: PEL has no plausible right or claim under the MOI, because the Project PEL allegedly conceptualized through the PFS had no positive net present value.
627. Simply stated, a claim of right to a project that has no value is implausible, moot, futile, and itself without financial value.

VI. **MOZAMBIQUE DID NOT BREACH THE TREATY’S FAIR AND EQUITABLE STANDARD.**

628. “[T]he fair and equitable treatment standard [“FET”] requires States to maintain stable and predictable investment environments consistent with reasonable investor expectations.” L. Reed, J. Paulsson, N. Blackaby, *Guide to ICSID Arbitration*, KLUWER LAW INT’L (2004). It “is a standard entailing reasonableness and proportionality” and “ensures basically that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances.” **RLA-84**, *El Paso Energy Int’l Co. v. Argentina*, ICSID ARB/03/15, Award (31 October 2011) ¶ 373.

629. A comprehensive definition of the FET Standard is found in *Tecmed*, although several subsequent tribunals have limited its reach:

The Arbitral Tribunal considers this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. . . . The investor also expects the State to use the legal instruments that govern the actions of the investor or investment in conformity with the function usually assigned to such investments, and not to deprive the investor of its investment without the required compensation.

RLA-85, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) ¶ 154.

630. A violation of the FET standard “occurs only when it is shown that an investor has been treated in such an *unjust or arbitrary manner* that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in light of the *high measure of deference* that international law generally extends to the right of domestic authorities to regulate matters within their own borders.” **RLA-86**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award (13 November 2000) ¶ 263 (emphasis added).

631. “Moreover, in the event a contract has allegedly been breached *and the investor has access to the domestic courts, the threshold for a fair and equitable treaty protection may be higher.*” See **RLA-63**, *Toto Costruzioni*, ICSID Case No. ARB/07/12 at ¶ 163 (emphasis added). When the party has access to domestic courts, it must “establish that it diligently pursued the settlement of its contractual claims.” *Id.* at ¶ 164.
632. “[A] possible breach of an agreement does not necessarily amount to a violation of a BIT.” **RLA-87**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007) ¶ 289. “[E]ven if a contractual breach had occurred, [if] the evidence in the record does not show any comparison made by the Claimant with another investor which could bring under the BIT the actions mentioned in those arguments,” no breach of the FET Standard is established. *Id.* at ¶ 290.
- A. Mozambique did not frustrate any legitimate expectations.**
633. “[L]egitimate expectations must be assessed at the time of the investment, adding that the investor’s due diligence about the conditions of the given investment is a prerequisite for reasonable and legitimate expectations.” **RLA-88**, *Jan Oostergetel & Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award (23 April 2021) ¶ 220. See also **RLA-89**, *AES Summit Generation Ltd. et al v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 September 2010) ¶¶ 9.3.8-9.3.9 (quoting *Duke Energy Int’l Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Annulment Proceeding (1 March 2011): “To be protected, the investor’s expectations must be legitimate and reasonable at the time when the investor makes the investment.”)
634. “The focus should be the investor’s legitimate expectations and not its subjective standpoint.” **RLA-90**, *EDF v. Republic of Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) (“EDF v. Romania”) ¶¶ 176 & 219 (“Legitimate expectations cannot be solely the subjective expectations of the investor.”). Stated plainly, FET is an objective standard. **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 356. “[M]ere hopes are not equivalent to reasonable expectations which benefit from treaty protection.” **RLA-91**, *Cargill, Inc. v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award (29 February 2008) ¶ 510.

635. For example, where a contract does not exist “and the expectation that they could have been available in the near future is an uncertain fact,” an “uncertain expectation” that cannot “provide a solid enough ground on which to construct a legitimately affected interest.” **RLA-92**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID), Award (31 March 2010) ¶ 258.
636. Therefore, “[t]he obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have.” **RLA-93**, *Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award (9 April 2015) (“Suez v. Argentina”) ¶ 205 (quoting the Annulment Committee in *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 (21 March 2007) (“MTD Chile”), which criticized the *Tecmed* ruling as being overbroad).
637. Additionally, “a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest.” **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 358.
638. Not every breach will support a claim of an FET violation: “[D]e minimis violations do not meet the necessary threshold for treaty violations.” **RLA-94**, *Photovoltaik Knopf Betriebs GmbH v. Czech Republic*, PCA Case No. 2014-21, Award (15 May 2019) ¶ 496. “[A]n impairment needs to be substantial in order to constitute a treaty breach.” *Id.* at ¶ 596.
639. To prove an FET violation by thwarting an investor’s legitimate expectations, a claimant must show (a) the host State made a promise; (b) the claimant relied on the promise; and (c) the claimant’s reliance was reasonable. **RLA-95**, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. & S.C. Multipack S.R.L. v. Romania*, ICSID ARB/05/20, Award (11 December 2013) ¶ 668. Importantly, “[t]he element of reasonableness cannot be separated from the promise, assurance, or representation...” *Id.* at ¶ 669.

1. The host State must have made a promise (it did not).

640. “[T]o establish a breach of the fair and equitable treatment obligation,” a claimant must show the State “made a promise or assurance.” **RLA-95**, *Micula*, ICSID ARB/05/20 at ¶

668. “For an alleged breach of contract to be considered as a breach of the fair and equitable treatment principle, State conduct is required.” See **RLA-63**, *Toto Construzioni*, ICSID Case No. ARB/07/12 at ¶ 161. See also **RLA-96**, *Saint-Gobain Performance Plastics Europe v. Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and Principles of Quantum (30 December 2016) ¶ 531. “[O]nly when the State acted as a sovereign authority – and not merely as a contracting partner – was there treaty protection of fair and equitable treatment.” *Id.* at ¶ 162 (emphasis added). See also **RLA-92**, *Merrill, UNCITRAL (ICSID)* at ¶ 150 (“[F]or [a legitimate] expectation to give rise to actionable rights requires there to have been some form of representation by the state.”).
641. The duty is determined objectively. **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 356.
642. “[L]egitimate expectations depend on *specific* undertakings and representations made by the host State to induce investors to make an investment. Provisions of *general* legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.” **RLA-97**, *Philip Morris Brands Sarl, Philip Morris Products S.A., Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) ¶ 425.
643. For example, in *MTD Chile*, which PEL cites in support of its FET claim, the tribunal “concluded that, under the BIT, the fair and equitable standard of treatment...protect[s] investments...” **RLA-98**, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004) ¶ 104. The investor had an actual, legally binding contract with the State. See e.g., *id.* at ¶ 54. The *contract* gave rise to legitimate expectations. At its root, the dispute was that the State failed to provide certain zoning permits necessary for the investor to operate under the contract, which neutralized the investor’s ability to use its contractual rights. See *id.* at ¶¶ 103, 178, 188 (“The Tribunal accepts that the authorization to invest in Chile is not a blanket authorization but only the initiation of a process to obtain the necessary permits and approvals from the various agencies and departments of the Government. **It also accepts that the Government has to proceed in accordance with its own laws and policies** in awarding such permits and approvals. [The relevant] Contracts would be meaningless if it were otherwise.”).

644. While “neutralization” is a sub-element of an FET claim discussed further below, it is important at the outset to distinguish that case from the one at hand: PEL did not have a legally binding contract, and Mozambique took no action that neutralized PEL’s ability to use any rights it purportedly (but did not) own. The *MTD Chile* case is inapplicable for that reason.
645. As far as timing, the investor must have relied upon statements from the host State *before* making the complained-of investments. See **RLA-94**, *Photovoltaik*, PCA Case No. 2014-21 at ¶ 470. Although PEL never definitively outlines its actual investment, distinct from the rights allegedly flowing therefrom, it appears PEL’s position is that *the PFS* was its investment. Thus, the statements by the State must have been made before the PFS. The only statements on which PEL relies before the PFS are those contained in the MOI-
646. Here, Mozambique did not make the “promise” or “commitment” that PEL alleges. PEL’s case hinges on the assertions that “Mozambique made its specific promises to PEL through the MOI,” SOC ¶ 319, and that “under the MOI, PEL was awarded the 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” (SOC ¶ 318).
647. PEL cites *Tethyan Copper* in support of its FET claim. In marked contrast between the *Tethyan* case and the one before this Tribunal, the State there had made specific assurances that the tribunal found gave rise to legitimate expectations, *i.e.*, the express obligation in the operative agreement that the State would essentially provide whatever support necessary (at its own expense) to ensure the investor obtained all “authorities of any kind whatsoever being necessary for the conduct of Joint Venture Activities.” **RLA-99**, *Tethyan Copper Company Pty Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability (10 November 2017) ¶ 944 (emphasis added). Not to mention that the contract in the *Tethyan* arbitration actually established a “Joint Venture,” *i.e.*, a final combination of parties to carry out certain business operations. See *id.* at ¶ 217.
648. One main facet of the dispute was the meaning of the phrase “subject to compliance with routine Government requirements.” See *id.* at ¶ 916. The tribunal found that an analysis

of the claimant’s expectations would not be complete without considering the regulatory framework concerning those “routine Government requirements.” *See id.* Although the phrase contemplates discretion on the part of the government, the tribunal found that the State created the impression that such discretion had already been exercised. *See id.* at ¶ 909. Thus, when the State statute required that any agreement like the Joint Venture be allowed *only* “in the interest of the development of the mineral resources,” the tribunal ruled it was reasonable for the investor to believe the State had *already* found the Joint Venture to be in the interest of the development of the mineral resources—or else it would not have permitted the Joint Venture agreement to be formed. *See id.* at ¶¶ 928-29.

649. Another noteworthy aspect of the award is the finding that the State sought to give investors comfort in securing their right to an ultimate benefit based on their investment efforts put toward exploration. *See e.g., id.* at ¶ 930.
650. As stated previously, the MOI was not a legally binding contract under Mozambican law. There certainly was no joint venture here. In fact, additional evidence of the lack of a binding contract specifically awarding PEL a concession, or guaranteeing such award, is the fact that MTC and PEL “agree[d] to sign a new memorandum to undertake another study of a similar project” if the Macuse project study failed. *See* Exhibits R-1 & R-2 (MOI), Clause 7.
651. Additionally, in further contrast from the *Tethyan* case where the State agreed to ensure the investor obtained any and all necessary licenses and permits—at the State’s own expense, what the MOI expressly provides is that PEL will pursue a pre-feasibility study *at its own expense*, which requirement is incorporated directly from the PPP law. *See Exhibit R-1 & R-2* (MOI), Clauses 1 & 4; **RLA-6**, PPP Law.
652. As in *Tethyan*, this Tribunal must consider the regulatory framework at play regarding the MOI. And, as affirmatively attested by PEL’s Kishan Daga, he specifically relied on the PPP law in executing the MOI. *See* SOC, CWS-1, Witness State of Kishan Daga ¶ 21. Any expectation PEL might have must be measured against that law. Rather than giving comfort to investors in their ability to secure their right to an ultimate benefit after expending resources in pursuing any proposal or study, the PPP law makes clear that (a) such proposal or study is undertaken at the investor’s own expense and (b) subject to a

- public tender, except in exceptional, “last resort” circumstances none-existent here. Tellingly, PEL does not suggest such circumstances existed.
653. Much ink has already been spilled in this Statement of Defense, including in the factual background and in the preceding section (“PEL Has No Underlying Legal Rights to Protect Under The BIT”), demonstrating that Mozambique never made such a promise.
654. All those facts and law, while incorporated into the argument, need not be repeated here. Rather, this section will briefly state the chief reasons rebutting each of PEL’s assertions in its argument that Mozambique “frustrated Claimant’s legitimate expectations by renegeing on the specific assurances contained in the MOI and Mozambican law.” SOC ¶¶ 316 *et seq.*
655. First, PEL cannot consistently and cogently articulate what it believed the six-page “Memorandum of Intent” promised. In paragraph 318 of the Statement of Claim, PEL claims that “under the MOI, PEL *was awarded* a concession,” subject only to the “contingencies” of approval of the PFS and PEL “*waiv[ing] its right of first refusal upon presentation of the concession document.*” But just six paragraphs later, PEL claims the opposite, stating the MOI did not already award the Project subject to contingencies—rather, it “*committed to award* PEL the concession once the PFS had been approved and PEL had *exercised* its right of first refusal.” *Id.* at ¶ 324.
656. As noted, this incoherent inconsistency—that the MOI (1) *already awarded the concession* subject to a “*waiver of a right of first refusal upon presentation of a concession agreement*” and (2) *committed to* a future award if PEL “*exercised*” its right of first refusal—is found throughout PEL’s Statement of Claim. *Contrast* SOC ¶¶ 98, 100, 156, 318, 321, 342, 372 (MOI required that PEL “waive” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession) *with* SOC ¶¶ 16, 153, 157, 183, 184, 197, 324, 326, 334, 337, 360 (MOI required that PEL “exercise” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession). A MOI cannot both *already award* and *commit to award* a PPP project (in fact, it can do neither). Nor can a right of first refusal be both *waived* and *exercised*. The irony, of course, is that PEL accuses *Mozambique* of “flip-flopping.”

657. In actuality, neither of PEL's internally-inconsistent interpretations are correct. The MOI is simply a non-binding "Memorandum of Intent" that evidenced no meeting of the minds on the necessary and material terms of a concession, and certainly did not constitute a concession "award." This is confirmed by Mozambican law, international law, and PPP procurement practices, *supra* § V, and testimony of the MTC personnel involved in its negotiation. **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 3-22; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 6-24, 28-29.
658. The so-called "right of first refusal" was properly understood by MTC to provide PEL a scoring advantage in the public tender should it submit a PFS that was approved for that purpose. *Id.* This is readily evident from review of the controlling Portuguese version of the MOI, and use of the same terms in Mozambique's PPP Law.
659. Clause 2(2) of the MOI provides for a "*direito de preferência*" contingent on approval of the PFS. PEL alleges that the MOI was developed by its attorneys with knowledge of what the forthcoming PPP Law would provide. *See* SOC, CWS-1, Witness Statement of Kishan Daga ¶¶ 35-36. That PPP Law confirmed that PPP procurement would be by public tender in all but the most exceptional "last resort" circumstances, not present or found for this project. **RER-1**, Expert Report of MZBetar § 5.6; **RER-2**, Expert Report of Teresa Muenda ¶¶ 18-22; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 48-50.
660. Crucially, the PPP Law *defines what is meant* by a "*direito de preferência*" in a PPP Project. The PPP Law specifically addressed the situation PEL alleges to have occurred here, where a private entity sought to propose a PPP project, and states that the entity deemed to be a proposer of a PPP Project is provided a "*direito e margem de preferencia*" in the form of a 15% scoring advantage in the public tender. **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 13-14; **RER-1**, Expert Report of MZBetar § 5.6; **RER-2**, Expert Report of Teresa Muenda ¶¶ 18-22; **RLA-6**, Mozambique Law No. 15-2011, Art. 13(5). The PPP further confirms that a PPP project proponent like PEL is not entitled to the costs incurred in developing its proposal. *Id.*
661. Mozambique's award of a right of preference, in the form of a 15% "*direito de preferência*," to the entity making an unsolicited proposal for a PPP project and submitting

- preliminary studies is consistent with international PPP custom and practices. In fact, is a *more generous* right of preference than most countries provide. *Supra* § V(B)(5)(e).
662. In later correspondence and communications, MTC confirmed that upon approval of the PFS, it would continue discussions with PEL if PEL expressly exercised its “*direito de preferência*” and secured a mutually agreeable partnership with CFM (as both parties understood was common in Mozambique and elsewhere). *See* SOC, Ex. C-12; *See* **RWS-2**, Witness Statement of Paulo Zucula ¶ 6.
663. Consistent with this simple, harmonizing interpretation of the *direito de preferência*, MTC conducted a public tender, gave PEL the 15% *direito de preferência* even though PEL only participated in the public tender indirectly through the PGS Consortium, reasonably and appropriately scored the tender, and awarded the concession to the winning bidder ITD. *See supra* § V(B)(7). The PGS Consortium never formally appealed the tender outcome; PEL never made a claim under the MOI; and PEL never brought an arbitration under the MOI’s dispute resolution clause. *Id.*
664. Importantly, it is not genuinely disputed that at the time the MOI was executed, a direct award of a concession of this type *would not have been allowable* under Mozambican procurement law.⁵⁹ The later promulgation of the PPP Law, providing for a narrow exception to public tenders in instances where the Government makes certain “last resort” findings, is no aid to PEL’s position. *Id.*; *see also supra* § V(b)(5)-(7). As noted, that PPP Law defined the “*direito de preferência*” consistent with MTC’s understanding. If PEL’s attorneys truly were aware of the PPP Law, and PEL truly intended for the parties to directly award a USD\$3 billion concession simply upon approval of a *Pre-Feasibility Study*, then the agreement should not have been drafted as a “Memorandum of Interest”; it

⁵⁹ **RWS-1**, Witness Statement of Luis Amandio Chauque ¶ 14 (explaining that in the legal regime, an award by direct agreement for a project of this nature does not meet the requirements and would not be allowed); **RER-2**, Expert Report of Teresa Muenda ¶¶ 3, 11 (any MOI direct award right contrary to, among other things, Article 113 of Decree 15/2010); *see* **RER-1**, Expert Report of MZBetar ¶¶ 119-126 (direct award of this project contrary to Mozambican and international procurement practices and preferences, and Mozambican procurement laws known to industry). *Compare* SOC, CER-3, Expert Report of Rui Medeiros ¶ 34 (“The case at the base of the MoI does not fit within any of the sub-paragraphs in Article 113(2)” of Decree 15/2010, which list the “cases in which direct award may be adopted”).

- should have expressly said that no public tender would occur and provided for the findings necessary to allow for a direct award under the PPP Law; and it certainly should not have used the same “*direito de preferência*” language as what the PPP Law uses to describe the typical scoring advantage afforded to PPP bidders submitting proposal documents like the PFS.
665. PEL’s assertion that its English version of Clause 2(1) provided for a direct award is baseless. *See supra* § V(B)(3) (detailed discussion). That language is nowhere found in either of the parties’ Portuguese versions or MTC’s English version of the MOI. PEL’s purported Clause 2(1) is also internally inconsistent, in that it would negate the need for a “first right of refusal” or “*direito de preferência*” in Clause 2(2). **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 5-15; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 13-14, 28-29. PEL’s invalid Clause 2(1) also makes the alleged right to a direct award contingent on an unintelligible reference to approval of “the terms under Clause 7” (which relates to when the project is not techno-commercially feasible). *Id.* Further, PEL’s alleged right to a direct award in Clause 2(1) would require the PFS “to finalize the rail route,” which it certainly did not do. **RER-1**, Expert Report of MZBetar ¶¶ 13, 47-48., 58-59.
666. In sum, PEL had no legal right or legitimate expectation to an undefined USD\$3 billion PPP new rail and port concession on the basis of the MOI. *See also supra* §§ II, V. To the extent the MOI was deemed binding and given PEL’s inaccurate and inconsistent interpretation, the MOI and any promise of a direct award would have been set aside by the later enactment of the PPP law, invalidated by PEL’s blacklisting, fraud, and breaches, and made ineffectual by PEL’s failure to satisfy conditions precedent and define a feasible project. *Id.*
667. PEL’s ancillary arguments are inapposite. In quoting the “exclusivity” clause (Clause 6) of the MOI, PEL omits the express limiting language in that clause, i.e., that it applies only “[d]uring the prefeasibility study and the process of approval for the project,” and is subject to “the terms of the specific legislation.” Exhibit R-2, Clause 6; *cf.* SOC ¶ 321(c) (omitting relevant language). PEL presents no evidence that MTC solicited other study proposals or awarded concession rights to any other entity during the PFS process or prior to PEL’s exercise of its *direito de preferência*. The exclusivity clause is limited in duration,

- consistent with the public tender process required in the PPP legislation, and was not violated by MTC. **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 16-18.
668. PEL’s self-serving assertion that it “only would have committed to complete the PFS at its own costs” if it was “assured that the Project and the profits corresponding to it would insure to PEL’s benefit in the event the PFS was approved” is contrary to industry practice, common sense, and the language and intent of the MOI. Industry practice confirms that unsolicited proposers of PPP projects create and submit their proposals, including pre-feasibility studies, as project pursuit costs, and that if any right of preference is accorded as a result of those efforts, those rights take the form of automatic short-listing, a scoring advantage (typically less than what MTC provided PEL), or the “right to match” competing offers in a public tender. *Supra* § V(B)(5)(e).
669. Technical experts likewise confirm that in Mozambique and elsewhere, “it is not uncommon for entities pursuing PPP projects to provide proposals that are more comprehensive and demonstrate a higher degree of mobilized resources than the PFS, without any expectation of winning the tender or receiving the award (as shown by the bidder in the public tender for the subject project).” **RER-1**, Expert Report of MZBetar, at 61 (Conclusion A). In fact, this was done *in the context of this specific project*, where the PGS Consortium submitted a more-than-900-page Technical Proposal in the public tender (dwarfing the PFS) expressly with knowledge that the costs of developing the proposal would not be recovered. *Id.*; SOC, Exs. C-190A through C-190I (PGS Consortium Technical Proposal).
670. The “flip flop” narrative that PEL pursues for purposes of Treaty claims collapses with the understanding, as explained above, that the MOI provided for at most a “*direito de preferência*” in the context of early-stage conceptual development of a large-scale potential PPP rail and port project. In allegedly “approving” the PFS, the MTC did not agree to a direct award—rather, consistent with the MOI, it allowed PEL to expressly exercise its “*direito de preferência*” and negotiate with CFM. SOC, Ex. C-12; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 13-14; **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 5-23.

671. PEL failed to reach agreement with CFM, and as PEL noted, CFM lacked the funds at that time to participate in the fashion proposed by PEL. *Id.*; **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 33-42. PEL never describes the terms on which it allegedly offered 20% equity to CFM, and notes—but does not disprove—the observation that CFM lacked funds to participate in the project as envisioned by PEL. (The magnitude, form and mode of payment PEL required CFM to pay for 20% equity is plainly a crucial consideration, beyond the simple equity percentage discussed).
672. Contrary to PEL’s assertions, MTC did not “renege” on any specific promise or legal right when indicating to PEL, following months of PEL failing to successfully negotiate with CFM, that a public tender would be organized. Consistent with the MOI and the legal regime of the PPP Law upon which PEL claims the MOI was negotiated, Minister Zucula confirmed in his 11 January 2013 letter that (as he had been communicating to PEL for months beforehand) the MOI’s “*direito de preferência*” was to be materialized through a scoring advantage in the public tender. *See* SOC, Ex. C-19; *See* **RWS-2**, Witness Statement of Paulo Zucula ¶¶ 6, 10.
673. PEL inaccurately contends the 18 April 2013 letter from Minister Zucula constituted a “U-turn” and was an “act establishing rights.” *See* SOC ¶ 333-34. In that letter, Minister Zucula indicated the Council of Ministers had found it in the “national strategic interest” to “accelerate” the project and thus invite PEL “to start the process” of negotiations, subject to a guarantee and PEL “present[ing] a statement, agreement or *take or pay* memorandum with mining companies, in order to make the project in question feasible.” SOC, Ex. C-19. As Minister Zucula explains, although the Council of Ministers suggested further discussions with PEL at that time, it “did not directly award the concession to PEL.” *See* **RWS-2**, Witness Statement of Paulo Zucula ¶ 19. This is apparent from the letter itself, which merely indicates a willingness to entertain direct negotiations, and in any event requires a crucial condition precedent to an award that PEL never provided: a *take or pay* memorandum with mining companies. SOC, Ex. C-19. The Council of Minister’s suggestion to *start* negotiations subject to contingencies certainly did not presume the outcome of negotiations or constitute a “direct award” of the Project; was not a resolution finding and substantiating the “last resort” exceptional circumstances necessary to forgo a public tender under the PPP Law; and cannot reasonably be viewed as an independent “act

establishing rights.” *See, e.g., RWS-1*, Witness Statement of Luis Amandio Chauque ¶¶ 48-72; *RER-2*, Expert Report of Teresa Muenda ¶¶ 12 *et seq.*

674. In any event, whatever confusion existed was quickly clarified when just a few days later, on 3 May 2013, Minister Zucula conveyed that the Council of Ministers had heard from stakeholders and reviewed the applicable PPP legal and regulatory framework. SOC, Ex. C-34. Consistent with MTC’s intent and understanding of the MOI and the legal regime, the Council of Ministers “came to a conclusion that the current public tender represents the correct option,” and that PEL “is encouraged to continue in the bidding, enjoying from the start” the “*direito de preferência*” of 15% as provided in the PPP Law. *Id.* Minister Zucula confirms this was the conclusion of MTC’s legal counsel and the intent of the MOI. *See RWS-2*, Witness Statement of Paulo Zucula ¶ 20; *accord RWS-1*, Witness Statement of Luis Amandio Chauque ¶¶ 13-14, 65-66.
675. Thus, MTC’s actions throughout this process were consistent with the proper interpretation of the MOI: at most, it granted a “*direito de preferência*,” and that “*direito de preferência*” is defined in the PPP Law as a 15% bidding preference consistent with Mozambican and international practices for PPP infrastructure procurement. PEL’s inconsistent articulation of any “legal rights,” “promises,” “assurances,” or “legitimate expectations” to a direct award of a USD\$3 billion concession on the basis of a mere MOI and PFS are contrary to the facts, local and international law, industry practice, and common sense. *See also supra* § V.
676. PEL groundlessly asserts that the 15% scoring advantage was a “mere preference right,” “not reflective of the commitments made by Respondent pursuant to the MOI,” and an “entirely distinct right” from that specified in the MOI. *See* SOC ¶ 337. As noted, the “*direito de preferência*” in the MOI is the *direito e margem de preferencia* specified in the PPP Law. Instead of adopting either of the inconsistent meanings of the “right of first refusal” offered by PEL (something that, confusingly, either had to be *waived* or *executed* to allegedly automatically convey a direct award), the more reasonable harmonizing interpretation of the MOI is that it confirmed the process (submittal and approval of the PFS) upon which PEL would be afforded the *direito e margem de preferencia* specified in the PPP Law which PEL claims its lawyers were involved in drafting. The 15% *direito de*

preferência in the PPP Law is, if anything, more generous treatment than most countries would afford entities submitting proposals and pre-feasibility studies in the context of unsolicited proposals. *Supra* § V.

677. The parties' actions during and following the public tender do not aid PEL's position. Instead of bringing any claims under the MOI or availing itself to the MOI's arbitration provisions, as may be expected from a party claiming the MOI gave it a legal right to a direct award, PEL chose to exclusively pursue to the project through a consortium with more experienced entities. *See* SOC, Ex. C-60.
678. In the public tender, the PGS Consortium scored third place. Technical evaluation disproves PEL's speculation about "irregularities" or an "absurd" result. **RER-1**, Expert Report of MZBetar § 5.3 (the tender "followed the applicable rules and procedures" without "material error or mistake"). In any event, the PGS Consortium admittedly did not pursue the necessary, well-established appeal procedure. PEL cannot now seek to overturn an award it did not contest—and this Tribunal should not become a forum for belated bid protests of any type, much less those brought by one entity in a consortium that is not a party to the proceeding.
679. *Tethyan Copper*, cited by PEL, is distinguishable. As PEL acknowledges, in *Tethyan* the claimant had an existing "joint venture contract"—the complained-of action was failure to grant a subsequent mining license. Here, however, there was no agreed-upon joint venture, and this it is not a situation where concession rights had been granted but then subsequent routine licenses were denied. Likewise, PEL's minimal *Pre-Feasibility Study*, which did not define the basic terms and conditions of a concession or purport to establish project feasibility, does not equate to "extensive exploration and feasibility work." *Contra* SOC § 341-42. *MTD Chile* is similarly distinguishable, as there was a preexisting contract for a project and the issue involved denial of subsequent permits for alleged zoning reasons.
680. Far more analogous to the present circumstances are *F-W Oil* and many other cases previously discussed (*see, e.g., supra* § V(B)(5)(a)), where "letters of interest" and other preliminary, pre-concession agreements were appropriately found not to establish the legal rights or promises alleged by claimants.

To conclude, the MOI “rights” PEL hyperbolically asserts MTC “annihilated” did not exist—and thus did not create “legitimate expectations” that were violated. MTC appropriately provided PEL with the *direito de preferência* contemplated in the MOI and PPP Law. The MOI never contained the basic terms and conditions of a concession, and did not, and could not, promise anything more than the *direito de preferência* provided to PEL by MTC.

2. PEL must have relied on the promise (it could not).

681. In addition to the above requirement that the State made a promise or assurance, to establish breach of the FET provision, a claimant must demonstrate it “relied on that promise or assurance as a matter of fact.” **RLA-95**, *Micula*, ICSID ARB/05/20 at ¶ 668. If expectations are to “give rise to actionable rights,” there must be “some form of representation by the state **and** reliance by an investor on that representation in making a business decision.” **RLA-92**, *Merrill*, UNCITRAL (ICSID) at ¶ 150 (emphasis added). *See also* **RLA-95**, *Micula*, ICSID ARB/05/20 at ¶ 672. At least one tribunal considers that reliance includes investing capital. *See* **RLA-93**, *Suez v. Argentina*, ICSID Case No. ARB/03/19 at ¶ 207.
682. In the instant matter before this Tribunal, PEL has not demonstrated that it relied on any representation by Mozambique in making an investment. Instead, PEL demonstrates it is confused about its own rights under the MOI. “Conflating the ability to *apply for a transfer* and the *actual transfer* is an interpretation of the applicable rules that [the investor] chose to make; [the State] cannot be held liable for the consequences of [the investor’s] own choice.” *See* **RLA-100**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award (27 March 2020) ¶ 557. The *Global Telecom* tribunal ruled there was no legitimate expectation that was violated. *Id.* at ¶ 558.
683. Here, PEL conflates the ability to undertake a prefeasibility study to determine whether a project is even possible with the absolute right to a concession for such project. Mozambique cannot be held liable for the consequences from PEL’s own choice. PEL did not have a legitimate expectation based on its erroneous interpretation.

684. PEL contends it relied on the MOI's alleged "commit[ment] to award PEL the Project concession once the PFS had been approved and PEL had exercised its right of first refusal" in conducting the PFS. SOC § 324-326.
685. PEL's assertions are inaccurate for the reasons stated above. PEL's own inconsistent versions of the MOI—with only its English version providing for an alleged right to a direct award in Clause 2(1), and that clause making a nonsensical reference to approval under Clause 7—demonstrate there was no meeting of the minds or reliance on that term.
686. Likewise, PEL's diametrically opposed articulations of the "right of first refusal"—each inconsistent with the reasoned interpretation that the *direito de preferência* was the 15% *direito de preferência* in the PPP Law—and its participation in the public tender demonstrate PEL did not conduct the PFS on the belief that a pre-feasibility study alone would entitle it to a direct award.
687. PEL's actions in submitting more significant proposals than the PFS as part of the public tender process, expressly with the understanding that those project pursuit costs are not to be reimbursed, likewise demonstrates PEL did not conduct the PFS on the belief that the MOI gave it a direct award.
688. Industry practices for unsolicited PPP proposals further confirm that interested concessionaires like PEL submit proposals and pre-feasibility studies without the expectation of a direct award. Indeed, typical practice is precisely what MTC provided (and what the MOI and PPP Law contemplated): a bid bonus in the eventual public tender.
689. International awards, and Mozambican, Indian, and common law, all confirm that a binding concession would not be conveyed through a six-page "Memorandum of Interest," which was at most a non-binding agreement to agree.
690. As noted above, MTC's communications following the MOI and PFS, refusal to directly award the Project to PEL, and use of the public tender process (affording PEL a *direito de preferência*) are consistent with the reasoned interpretation of the MOI, Mozambican PPP Laws, and PPP procurement practice.
691. Additionally, the evidence in this case demonstrates that PEL submitted its PFS and bidding documents with knowledge that it was blacklisted in India, and not qualified to

participate in this Project. PEL thus could not rely (much less reasonably rely) on the MOI and PFS granting it the rights PEL alleges.

3. PEL’s reliance must have been reasonable (it was not).

692. Lastly, as to legitimate expectations, a claimant’s “reliance (and expectation)” must be reasonable. **RLA-95**, *Micula*, ICSID ARB/05/20 at ¶ 668. Reliance is not reasonable when the circumstances in the host State have drastically changed, and when there are warning signs to the investor of impending change. *See RLA-94*, *Photovoltaik*, PCA Case No. 2014-21 at ¶¶ 509, 511.

693. Accordingly, it is unreasonable for a claimant to rely on the “freezing” of a host State’s economic or legal framework:

Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework. Such expectation would be neither legitimate nor reasonable.

RLA-97, *Philip Morris*, ICSID Case No. ARB/10/7 at ¶ 424 (quoting *EDF v. Romania*, ICSID Case No. ARB/05/13, *see RLA-90*).

694. This is so because “economic and legal life is by nature evolutionary,” meaning “the notion of stability of the legal framework and business environment as an element of FET cannot be equated to an absolute obligation of immutability of the regulatory framework.” **RLA-88**, *Oostergetel*, UNCITRAL at ¶ 223. *See RLA-84*, *El Paso*, ICSID ARB/03/15 at ¶ 352. If it were, “legislation could never be changed.” *Id.* at ¶ 350.

695. It follows, then, that “absent an undertaking of the host State to stabilize the regulatory framework in the sector where the investment is made, a change in that framework to reflect the market evolution that is not arbitrary or aimed to harm the investor is not a breach of the FET standard.” **RLA-100**, *Global Telecom*, ICSID Case No. ARB/16/16 at ¶ 563. To hold otherwise would not be realistic, “nor is it the BITs’ purpose that States guarantee that the economic and legal conditions in which investments take place will remain unaltered *ad infinitum*.” **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 350.

696. Stated another way:

Firstly, *economic stability* cannot be a legitimate expectation of any economic actor...

Secondly, it is inconceivable that any State would accept that, because it has entered into BITs, it can no longer modify pieces of legislation which might have a negative impact on foreign investors, in order to deal with modified economic conditions and must guarantee absolute *legal stability*.

It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify, or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.

The State has to be able to make the reasonable changes called for by the circumstances and cannot be considered to have accepted a freeze on the evolution of its legal system.

[I]t is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze.

RLA-84, *El Paso*, ICSID ARB/03/15 at ¶¶ 366-68, 371-72 (emphasis in original).

697. For such legislative or regulatory action to be reasonable, “it must bear a reasonable relationship to rational policies,” which analysis requires consideration of two elements: “the existence of a rational policy and the reasonableness of the act of the state in relation to the policy.” **RLA-95**, *Micula*, ICSID ARB/05/20 at ¶ 525. “[A] policy is rational when the state adopts it following a logical (good sense) explanation and not with the aim of addressing a public interest matter, and an action is reasonable when there is an appropriate correlation between the state's public policy objective and the measure adopted to achieve it.” *Id.* In other words, the state's acts must be “appropriately tailored to the pursuit” of the rational policy. *Id.*
698. Aside from the natural changes to a legal and economic framework, no reliance (and thus no legitimate expectation) is reasonable when the reliance is upon a statement by the State based on the investor's lack of disclosure. In *Thunderbird*, the investor (Thunderbird) operated “gaming” machines. See generally, **RLA-101**, *Int'l Thunderbird Gaming Corporation. v. The United Mexican States*, UNCITRAL (NAFTA), Award (26 January 2006). To summarize, the Mexican government forbids *gambling* machines, which Thunderbird knew by virtue of (a) another company operating gambling machines that

- faced “legal resistance” by the government and (b) a specific letter warning Thunderbird that it “shall” not operate gambling machines. *See id.* at ¶¶ 162, 164.
699. Thunderbird submitted a *Solicitud* to the government, containing information about its operations, and failed to disclose that its gaming machines operated by luck as opposed to skill. *See id.* at ¶¶ 163-64. “In the Tribunal’s view, the *Solicitud* did not give the full picture, even for an informed reader.” *Id.* at ¶ 159. Nevertheless, Thunderbird purported to rely on a letter from the government to bless Thunderbird’s gaming operations—even though that letter was based on Thunderbird’s lack of disclosure. *See e.g., id.* at ¶¶ 163-64.
700. Here, any purported reliance by PEL was unreasonable for the same reasons stated above. Sophisticated concessionaires objectively have no reasonable, legitimate expectation to a direct award of a USD\$3 billion PPP project, on the basis of a six-page MOI and PFS. This is especially true where, as here, the MOI merely provided for a *direito de preferência* that, consistent with international PPP practices, was defined by Mozambican law as a 15% scoring advantage in a public tender.
701. *First*, PEL contends that it relied on the “promise” of a direct concession award. In the same breath, PEL affirmatively offers that it *actually relied on* the enactment of the PPP law in deciding to execute the MOI. *See* SOC, CWS-1, Witness Statement of Kishan Daga ¶ 21 (“I was very keen that this should be a Public Private Partnership (PPP) project...[I] had always envisaged that this would be done on a PPP basis.”). *That* reliance on the PPP law was reasonable, considering the MOI several times that it will be implemented within, and governed by, the laws of Mozambique. Actually, throughout the course of dealings between the parties, PEL alleges that it referred to and relied upon the PPP law. By way of example only, *see* SOC at CWS-1 ¶ 89 (“In this letter [to MTC], I clearly mentioned that ‘in order to accelerate the project we hereby undertake that up to 20% of equity will be allotted...on the terms provided in PPP law.’”).
702. Under this PPP law, a direct concession award is not permitted under the PPP law except for exceptional, “last resort” circumstances, not present here—which PEL never referenced in the MOI and PFS, and does not substantiate in its Statement of Claim. PEL’s arguments,

when read together, indicate that PEL relied on the PPP law but also “relied” on the government *violating* that law, which is unreasonable.

703. *Second*, PEL also proudly boasts that its lawyer who was involved in the MOI-PFS process also participated in the drafting of the PPP law. SOC ¶ 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...”) & ¶ 103 (“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 10 August 2011, days after the MOI was executed.”); SOC at CWS-1 ¶ 36 (“Sal & Caldeira are well renowned lawyers in Mozambique and they had recently assisted in drafting the Public-Private Partnerships Law (the “**PPP Law**”)...”). If the very lawyers negotiating the MOI also negotiated the PPP law *while representing PEL* (considering the law passed just “days” after the MOI was signed), there is no reasonable basis for PEL to state it expected no change in the law or that it did not understand the law or how it would be implemented.
704. *Third*, PEL’s pursuit of this Project while failing to disclose its home-country blacklisting is, in PEL’s words, the “*coup de grâce*” on its claim to legitimate expectations. *Contra* SOC § 335. Regardless of when the blacklisting rulings were made by any court, such rulings were final before PEL submitted the PFS in 2012. *Supra* § III. At no time has PEL ever disclosed that it was blacklisted, and certainly not the reasons for it. Much like in *Thunderbird*, PEL failed to give MTC and Mozambique a “full view” of PEL as a potential investor. *See RLA-101, Thunderbird, UNCITRAL (NAFTA)* at ¶ 159. Even assuming PEL proved the other aspects of reliance discussed here, it would be grossly unreasonable for PEL to rely upon any purported promise to grant a direct concession award to an entity that, unbeknownst to Mozambique, had been blacklisted as an investor *by its own home country*.

B. Mozambique acted consistently and transparently.

705. Another aspect of the FET standard requires consistency and transparency when interacting with investors. *See RLA-88, Oostergetel, UNCITRAL* at ¶ 221; *RLA-90, EDF v. Romania, ICSID Case No. ARB/05/13* at ¶ 104. “Transparency means that the legal framework for the investor’s operations is readily apparent and that any decisions affecting

the investor can be traced to that legal framework.” **RLA-95, *Micula***, ICSID ARB/05/20 at ¶ 530. “In addition, the Tribunal considers that transparency must include a requirement that information about relevant changes in the investment framework are communicated well in advance.” **RLA-94, *Photovoltaik***, PCA Case No. 2014-21 at ¶ 536.

706. This aspect of the FET standard must be considered in light of all the circumstances and not in a vacuum:

[I]f taken too literally, they would impose upon host States obligations which would be inappropriate and unrealistic... The question before the Tribunal is thus not whether [Respondent-State] has failed to make full disclosure of or grant full access to sensitive information; it is whether, in the event that [Respondent-State] failed to do so, [Respondent-State] acted unfairly and inequitable with respect to the Claimants... The same applies to consistency...whether, in acting inconsistently, it has been unfair and inequitable with respect to the Claimants.

RLA-95, *Micula*, ICSID ARB/05/20 at ¶ 533.

707. Considering all the circumstances, it is evident here that Mozambique acted consistently and transparently. PEL first contends that the conduct of MTC, the Council of Ministers, and CFM “in respect of the direct award of the concession to PEL was erratic and unreasonable.”
708. As discussed in detail above, PEL’s allegations collapse with the understanding that there was no right to a direct award in the MOI, but rather, at most, a *direito de preferência*. After the PFS, MTC asked PEL to exercise its *direito de preferência*—not to jump into direct negotiations. MTC offered a path of negotiations with CFM, but PEL failed to reach agreement with CFM—and PEL presents no evidence that CFM took conflicting stances on its willingness and capability to partner with PEL.
709. When discussions with CFM fell through, MTC indicated it would conduct a public tender. A public tender is precisely the procurement method established in Mozambique’s PPP Law, and strongly recommended by the World Bank and in the industry—precisely because it *promotes* transparency in public procurement.
710. After PEL complained about the public tender, it is true that for a brief period the Council of Ministers contemplated further discussions. *See* SOC, Ex. C-29; **RWS-2**, Witness Statement of Paulo Zucula ¶ 19. But it is not true, as PEL alleges, that the Council of

Ministers had “decided to award the Project directly PEL.” *Contra* SOC ¶ 351. Rather, as evident in the cited letter, it was merely an invitation to negotiate subject to unmet contingencies, including the crucial need for a commitment for *take or pay* memoranda from mining companies to make the project feasible. SOC, Ex. C-29. Likewise, it is not true, as PEL alleges, that a “concession would be issued by 24 April 2013.” *Contra* SOC ¶ 351. Rather, as evident in the cited letter, it was simply mentioned that a “draft concession agreement in Portuguese” was planned to be shared by that date. SOC, Ex. C-31. A draft concession agreement to be discussed in negotiations is not confirmation of a direct award, and in any event, before negotiations took place, the MTC confirmed that the Council of Ministers—acting with input from stakeholders and upon the advice of legal counsel—reconfirmed that a public tender was the appropriate course, with PEL afforded the *direito de preferência* indicated in the MOI and PPP Law. SOC, Ex. C-34.

711. The above recitation fairly demonstrates that MTC apprised PEL of MTC’s positions, afford PEL the *direito de preferência* indicated in the MOI, gave consideration to PEL’s positions and discussed them with the Council of Ministers, and then conveyed the Council of Ministers’ interim and final decisions to PEL.
712. None of this is a breach of the Treaty. To the extent PEL’s recitation suggests any confusion about the *direito de preferência*, Respondent respectfully suggests that accusation should be viewed in light of PEL’s own Statement of Claim, which itself sets forth two inconsistent interpretations of the right of first refusal—each contrary to the law and the actual language of the MOI and PPP Law. *Contrast* SOC ¶¶ 98, 100, 156, 318, 321, 342, 372 (MOI required that PEL “waive” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession) *with* SOC ¶¶ 16, 153, 157, 183, 184, 197, 324, 326, 334, 337, 360 (MOI required that PEL “exercise” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession). PEL’s accusations of lack of transparency should likewise be viewed skeptically in light of PEL’s failure to disclose that it was *blacklisted in India*.

C. Mozambique did not act in an arbitrary manner.

713. Lastly, the FET standard also contemplates that a State will refrain from taking arbitrary or discriminatory measures in its interactions with investors. *See RLA-88, Oostergetel*,

- UNCITRAL at ¶ 221; **RLA-90**, *EDF v. Romania*, ICSID Case No. ARB/05/13 at ¶ 104. The FET standard prohibits conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, involves a lack of due process leading to an outcome which offends judicial propriety...” **RLA-102**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) ¶ 529 (quoting *Waste Mgmt. v. Mexico (No. 2)*) & ¶ 602.
714. The term “arbitrary” means the action is “not governed by any fixed rules or standard,” is “performed without adequate determination of principle, without cause based upon the law,” or results “from a failure to exercise honest judgment.” **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 319. “Reasonableness requires that the State’s conduct bears a reasonable relationship to some rational policy...” **RLA-102**, *Biwater*, ICSID Case No. ARB/05/22 at ¶ 693.
715. Mozambique acted in a reasonable manner toward PEL. PEL’s argument to the contrary is based on its assertions that Mozambique performed “U-turns” that were “not justified in fact or in law.” SOC §§ 367 *et seq.* As noted above, PEL’s assertions are counterfactual; only Mozambique offers a coherent, consistent interpretation of the MOI, PPP Law, and the *direito de preferência*; and the MTC’s actions in conducting a public tender and affording PEL a 15% *direito de preferência* are wholly consistent with international PPP practices and controlling Mozambican law.
716. PEL presents no independent technical evaluation of the public tender. Contrary to PEL’s speculation, it was scored and conducted appropriately. **RER-1**, Expert Report of MZBetar § 5.3. PEL did not “conceive” of the Project idea, *id.* § 5.4, and in any event, the areas where PEL complained about the evaluators awarding low technical low scores relate to its experience (for which PEL had little), broader understanding of the project (“*entendimento para alem do objecto*”), and strategic vision—none of which were discussed at depth in PEL’s PFS. See SOC, Ex. C-42 at 4. The financial formula PEL suggested, after the fact, that MTC utilize leads to absurd results and is contrary to typical practices and the tender documentation. **RER-1**, Expert Report of MZBetar § 5.3. In sum,

the use of a prudent public tender mechanism for this PPP Project, and scoring of the tender, certainly does not suggest “arbitrary” or “capricious” behavior of any type.

D. Mozambique acted in good faith.

717. In the context of the FET Standard, “good faith” means not acting in a manner that is intended to “destroy or frustrate the investment by improper means.” **RLA-103**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) ¶ 138. Just as legitimate expectations are based on an objective standard, so too is good faith—the standard does not turn on whether the State acted with subjective, bad faith intent. See **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 357; **RLA-104**, *Jan de Nul N.V. & Dredging Int’l N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008) ¶ 185 (“It is accepted today that a breach of fair and equitable treatment does not presuppose bad faith on the part of the State.”).

718. In practical terms:

A host State’s government is not under an obligation to accept whatever proposal an investor makes... Neither is a host State under an obligation to give preference to an investor’s proposal over similar proposals from other parties. An investor is, however, entitled to expect that the host State takes seriously a proposal that has sufficient potential to solve the problem and deal with it in an objective, transparent, unbiased, and even-handed way.

RLA-78, *Saluka*, UNCITRAL at ¶ 363.

719. In reviewing the various aspects of the FET standard and Mozambique’s conduct in relation thereto, Mozambique acted in good faith. Rebuttals to PEL’s “U-turn” accusations and other allegations have been stated above, and for brevity need not be repeated here. The *direito de preferência* granted to PEL in good faith—even though it participated in the tender as part of a separate PGS Consortium—is the *direito de preferência* specified in the MOI and the PPP Law.

720. If any bad faith is to be found, it is on the part of PEL, who (among other things) failed to disclose its blacklisting; offers a version of the MOI that is inconsistent with all other versions held by the parties; makes claims based on internally inconsistent and implausible allegations; and who, notwithstanding an exclusivity provision in the PGS Consortium MOU, sought a direct award that would cut out its PGS Consortium members who were

pursuing the project through the public tender (SOC, Ex. C-60). *See also supra* § III. Mozambique briefed the issue of “investment” in section IV, *supra*. In short, PEL made no investment, and an alleged contingent option for a “right of first refusal” or *direito de preferência* in the public tender is not an investment.

VII. MOZAMBIQUE DID NOT BREACH THE TREATY’S MOST-FAVORED NATION CLAUSE.

721. The purpose of the most favored nation (“MFN”) clause “is to provide a level playing field between foreign and local investors, as well as between foreign investors from different countries.” **RLA-105**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) ¶ 387. In the BIT at issue here, the provision specifically contemplates equal treatment for “investors” and “investments.” *See* BIT Art. 4. Thus, in considering whether there has been any breach of the MFN clause, PEL must first establish it was an investor or it had an investment that suffered unequal treatment.
722. In short, MFN clauses ensure non-discrimination of investors and investments (scope of treatment). *See* **RLA-59**, *Içkale*, ICSID Case No. ARB/10/24 at ¶ 328 (“Thus the legal effect of the MFN clause, properly interpreted, is to prohibit discriminatory treatment of investments of investors of a State party (the home State) in the territory of the other State (the host State) when compared with the treatment accorded by the host State to investments of investors of any third State.”). The MFN obligation “exists only insofar as the investments of the investors of the home State and those of the investors of the third State can be said to be in ‘a similar situation.’” *Id.* “Conversely, the MFN treatment obligation does not exist if and when an investment of an investor of the home State is not in a ‘similar situation’ to that of the investments of investors of third states; in such a situation there is *de facto* no discrimination.” *Id.* (emphasis in original).
723. The analysis properly includes a comparison of the treatment afforded these different investors. *See id.* at ¶ 329. The *Içkale* tribunal made clear that merely including other or additional provisions in other investment treaties does not amount to “more favorable treatment.” *See id.* And investors are not similarly situated simply because they invested in the same State. *See id.*

724. The *Içkale* tribunal “rejected” the claimant’s argument that it could import substantive standards from other investment treaties entered into by the Respondent-State. *See id.* at ¶ 332. Instead, “[w]hen including the terms ‘similar situations’ [in the MFN clause], the State parties must be considered to have agreed to restrict the scope of the MFN clause so as to cover discriminatory treatment between investments of investors of one of the State parties and those of investors of third States, insofar as such investments may be said to be in a factually similar situation...The Claimant is therefore only entitled to invoke those investment protection standards specifically included in the BIT. These standards include the entitlement to MFN treatment ‘in similar situations.’” *Id.*
725. However, other arbitral tribunals allow MFN clauses to *import* substantive provision of *other* treaties beyond merely ensuring non-discrimination (content of treatment). Although some tribunals have employed this importation mechanism, international law is still unsettled on whether importation is even appropriate.⁶⁰ *See RLA-106*, Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 Am. J. Int’l L. 873, 900-905 (2018) (discussing Canada, Mexico, and United States’ opposition to MFN importation in NAFTA arbitration) & at 905-07 (highlighting express limitations in new investment treaties, including EU-Canada Comprehensive Economic and Trade Agreement (CETA), EU-Japan Economic Partnership Agreement, draft Pan-African Investment Code, and the Protocol of Cooperation and Intra-Mercosur Investment Facilitation).
726. One of the substantive laws that other arbitral claimants attempt to import through the MFN is an “umbrella clause,” as PEL attempts here. SOC ¶¶ 383-407.
727. An umbrella clause “establishes an international obligation for the parties to the BIT to observe contractual obligation[s] with respect to investors.” **RLA-107**, *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

⁶⁰ PEL asserted that “[a] significantly greater number of cases have adopted the approach of the tribunal in *SGS v. Paraguay*,” citing to a handful of cases. *See* SOC ¶ 397. PEL does not address in its analysis the countervailing views in the cases Mozambique has presented. More importantly, simply following a crowd, if based on unfounded assumptions, does not make the resulting law any more reasonable, just, or legitimate.

- 2012) ¶ 141. “The purpose of the umbrella clause is to cover or ‘elevate’ to the protection of the BIT an obligation of the state that is separate from, and additional to, the treaty obligations that it has assumed under the BIT.” **RLA-95**, *Micula*, ICSID ARB/05/20 at ¶ 417. *See also* **RLA-107**, *Bureau Veritas*, ICSID Case No. ARB/07/9 at ¶ 129 (“The case law has consistently upheld that the effect of umbrella clauses is to elevate a breach of contract into a breach of treaty.”).
728. Where importation has been employed (despite there being no discussion within the tribunals’ awards of whether the MFN clause may actually be used to import any provisions of another BIT as opposed to merely ensuring no discrimination) is the situation where the underlying treaty expressly references the subject matter sought to be imported. *See* **RLA-108**, *Teinver S.A., Transportes de Carcanias S.A. & Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award (21 July 2017) ¶ 890. “In this case, Claimants seek to invoke the MFN Clause to incorporate an umbrella clause in circumstances where there is no umbrella clause in the Treaty, nor any reference to or mention of such a clause.” *Id.* As a result, in the *Teinver* case, the tribunal ultimately ruled the claimants could not invoke the umbrella clause. *See id.* at ¶ 892.
729. Indeed, the cases PEL describes in further detail in its Statement of Claim all take advantage of the MFN importation tool. *See* SOC ¶¶ 385-387. But *none of those cases* actually discuss whether there were other investors under other treaties that were similarly situated with the claimant. *None of those cases* actually discuss, in comparing the other investors and the claimant, whether the claimant was discriminated against (*i.e.*, did not receive the “more favorable treatment” expressly set forth in the MFN clause). And *none of those cases* actually discuss how an additional provision amounts to “more favorable treatment,” if at all. In short, PEL’s selected cases merely regurgitate legal opinions formed on a foundation of assumptions that lack these critical analyses.
730. As further distinction, in *MTD Chile*, the tribunal considered whether the existing *combined* FET/MFN provision in the operative BIT could be expanded via MFN importation—not whether an umbrella clause could be imported wholesale and create new rights thereby. *See* **RLA-98**, ICSID Case No. ARB/01/7 at ¶¶ 100-104.

731. In *Arif v. Moldova*, the relevant BIT article was entitled “Specific Commitments” (*i.e.*, undertakings or obligations) and expressly provided for the protection of “specific commitments” via its own MFN clause. See **RLA-109**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of the Tribunal (8 April 2013) ¶ 385. It naturally flowed to expand the protection within that BIT of “specific commitments” by importing another treaty’s umbrella clause further providing for protection of “specific commitments.” See *e.g.*, *id.* at ¶ 395 (explaining a breach of “specific undertakings” under an umbrella clause will breach the BIT). That tribunal was not faced with the situation, as here, where the importation of the umbrella clause would create completely new rights not referenced in or contemplated by the BIT at issue.
732. In *EDFI v. Argentina*, the respondent relied upon a concession agreement’s forum selection clause to oppose the MFN importation, but the claimant was not a party to the concession agreement. See **RLA-110**, *EDF Int’l S.A., SAUR Int’l S.A. & León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23 (11 June 2012) (“*EDFI v. Argentina*”) ¶ 930. Accordingly, the tribunal was not required to analyze the effect of such forum selection clause. Neither did the tribunal have the need to analyze the effect of using MFN importation of an umbrella clause to invoke only portions of a contract versus the entirety of the contract (including an exclusive jurisdiction provision). *Cf.* **RLA-107**, *Bureau Veritas*, ICSID Case No. ARB/07/9 at ¶ 148 (“[T]he parties to a contract are not free to pick and choose those parts of the Contract that they may wish to incorporate into an ‘umbrella clause’ provision...and to ignore others.”). Briefed more fully below, the purported contract PEL seeks to incorporate via the umbrella clause here is the MOI—to which PEL was a party—with an exclusive jurisdiction provision, rendering the *EDFI v. Argentina* case inapposite.
733. As for the *Eureko v. Poland* case, the relevant BIT actually contained an umbrella clause such that no MFN importation was at issue, and the tribunal found specific obligations “*pertain[ing] to an investment*” (and breach) by the respondent-State. See **RLA-111**, *Eureko B.V. v. Republic of Poland*, Ad Hoc Arb., Partial Award (19 August 2005) ¶¶ 244-250 (emphasis added). Here, there is no umbrella clause in the Mozambique-India BIT. There also is no obligation by Mozambique, let alone “*pertaining to an investment*” by PEL.

734. Also, notably, PEL has not shown there is any similarly situated investor, *period*, let alone one that is receiving more favorable treatment. Consequently, PEL has not shown, and cannot show, that it is the recipient of discriminatory treatment in comparison to such similarly situated investor. PEL also has not shown how the additional umbrella clause actually amounts to more favorable treatment (beyond mere self-serving accusation that it does), especially considering PEL has no similarly situated investor by which to develop such comparison.
735. Putting aside the argument of substantive versus procedural rights not at issue here, the inquiry here is much simpler. Because the umbrella clause from the Mozambique-Netherlands BIT is a *new* right not mentioned anywhere in the Mozambique-India BIT, the MFN clause may not be used to incorporate an umbrella clause from an outside treaty. *See RLA-108, Teinver*, ICSID Case No. ARB/09/1 at ¶ 884 (An MFN clause may not be used to incorporate an umbrella clause because it “would result in the incorporation of a new right or standard of treatment not provided for [in] the Treaty.”).
736. Considering that a tribunal’s jurisdiction does not extend to contract claims but only alleged breaches of a treaty, importing contractual claims via an umbrella clause is no insignificant act. Rather, it alters the contracting parties’ agreement and expectations with respect to the BIT they specifically negotiated, *and* it grants the tribunal jurisdiction it otherwise would not have, thereby circumventing (or wholly obviating) the jurisdictional limits placed on arbitral tribunals adjudicating *treaty* disputes. Conversely, with the purpose of the MFN being to ensure the same favorable treatment as others (*i.e.*, no discrimination between *similarly situated* investors), “the MFN Clause would not be deprived of any meaning or effect were its scope to be limited to rights or standards contained in the Treaty.” *Id.* at ¶ 885.
737. The tribunal in *Paushok* held similarly: “[A] clause in a BIT whereby the definition of fair and equitable treatment would be written in broader terms than in the case of the Treaty would clearly be covered by the MFN clause contained in it.” **RLA-118, Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia**, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) ¶ 571. Stated plainly, “[i]f there exists any other BIT between Mongolia and another State which

provides for a more generous provision relating to fair and equitable treatment, an investor under the Treaty is entitled to invoke it. But such an investor cannot use that MFN clause to introduce into the Treaty complete new substantive rights, such as those granted under an umbrella clause.” *Id.* at ¶ 570.

738. Note, however, that even the theory that an expressly-referenced provision or standard in a treaty may be expanded through MFN importation is not a uniformly accepted notion: “Canada also shares Respondent’s understanding that an MFN Clause cannot alter a treaty’s explicit FET standard... [O]nce contracting parties define the scope of a treaty’s FET protection, a claimant cannot expand those protections by invoking an MFN Clause. This Tribunal must give effect to this interpretation and reject Claimant’s attempt to import an autonomous FET standard.” **RLA-113**, *Bear Creek Mining Corp. v. Peru*, ICSID Case No. ARB/14/21, Award (30 November 2017) ¶ 532.

739. In conclusion, because the Mozambique-India BIT does not include a provision for, or refer to, any umbrella clause (or undertakings clause or obligations clause or any interchangeable terminology), PEL may not import the umbrella clause from the Mozambique-Netherlands BIT as it would create a new right or standard of treatment not provided for in the Mozambique-India BIT.

A. The contractual obligations to be imported by an umbrella clause must be an “investment.”

740. For the sake of argument, Mozambique continues with the analysis concerning the umbrella clause to further disprove its application. Notably, as with the overall MFN clause, an umbrella clause is expressly limited to “investments”: “[T]he ‘umbrella clause’ does not extend to those contracts between an investor and a host State that cannot be characterized as an investment agreement.” **RLA-114**, *BP Am. Prod. Co. et al v. Argentina*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections (27 July 2006) ¶ 114.

741. The treaty PEL wishes to import here also explicitly refers to “investments”:

Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.

See SOC ¶ 388 (quoting the Mozambique-Netherlands BIT’s umbrella clause) (emphasis added).

742. Regardless of the existence of an “investment,” when the claims are contractual, the tribunal will still lack jurisdiction: “[E]ven if for the sake of argument there was an investment in this case, the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifie[s] the finding that the Tribunal lacks jurisdiction.” **RLA-53**, *Joy Mining*, ICSID Case No. ARB/03/11 at ¶ 82. See also *id.* at ¶ 89 (“Having concluded that there is no investment in this case and that, moreover, all the claims involved are in any event contract-based claims, it is necessary to conclude that in the absence of any ICSID jurisdiction only the forum selection clause stands.”).
743. Mozambique briefed the issue of “investment” in section IV, *supra*. In short, PEL made no investment, and an alleged contingent option for a “right of first refusal” or *direito de preferência* in the public tender is not an investment.
744. Because PEL did not have an investment, the umbrella clause from the foreign BIT cannot be imported to cover the dispute here. See **RLA-114**, *BP Am. Prod. Co.*, ICSID Case No. ARB/04/8 at ¶ 114.

B. The State must have undertaken an obligation as defined by State law.

745. Further assuming, *arguendo*, that PEL demonstrated that it made an investment, it must next establish the State entered into a specific obligation concerning the investor. See **RLA-90**, *EDF v. Romania*, ICSID Case No. ARB/05/13 at ¶ 316 (“This provision, when applied to the present case, clearly refers to obligations entered into by Romania with regard to Claimant’s investments. There is no evidence of the assumption by Respondent of direct obligations toward Claimant, whether by contract or otherwise.”). The State has no liability under an umbrella clause when it is not a party to the contract and has not directly assumed contractual obligations “the breach of which is invoked.” See *id.* at ¶ 317.
746. The obligation or promise under an umbrella clause is governed by the law of the host State. See **RLA-115**, *Baywa R.E. Renewable Energy GmbH et al v. Kingdom of Spain*, ICSID Case No. ARB/15/16 (2 December 2019) ¶ 443.

747. A separate tribunal ruled that, whether statements or assurances made by a host State “constitute genuine obligations or mere advertisements will be a matter for determination under the applicable law, normally the law of the host State.” **RLA-116**, *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) ¶ 117.
748. Yet a third tribunal reasoned that elevating to BIT protection an obligation of the State “separate from, and additional to, the treaty obligations...depends on the law governing that obligation, and so the interpretation of the term ‘obligation’ for purposes of the umbrella clause would rely primarily on that law rather than on international law. *In other words, to be afforded protection of the BIT, the obligation must qualify as such under its governing law.*” **RLA-95**, *Micula*, ICSID ARB/05/20 at ¶ 417 (emphasis added).
749. For further clarification, the *SGS v. Philippines* tribunal distinguished that an umbrella clause “addresses not the *scope* of the commitments entered into with regard to specific investments but the *performance* of these obligations, once they are ascertained.” **RLA-116**, *SGS v. Philippines*, ICSID Case No. ARB/02/6 at ¶ 126 (emphases in original). Therefore, the obligation must first be ascertained under State law.
750. PEL bears the burden of proof to establish that any “undertaking” by Mozambique amounts to an obligation under Mozambique law, such that Mozambique’s actions could have breached it. See **RLA-95**, *Micula*, ICSID ARB/05/20 at ¶ 449. “*If there is no obligation under [State] law, the umbrella clause is not triggered.*” *Id.* at ¶ 447. See also **RLA-117**, *Oxus Gold PLC v. Republic of Uzbekistan et al*, Ad Hoc Arb., Final Award (17 December 2015) ¶¶ 366-67 (“First of all, the obligation which is alleged to be breached must exist. If the obligation brought forward by the claimant does not exist, it can *a fortiori* not be breached.”).
751. The *Micula* tribunal found that the claimant failed to satisfy the burden of proof and did not provide sufficient evidence or legal argument demonstrating the existence of an obligation under State law for protection by the umbrella clause. See **RLA-95**, *Micula*, ICSID ARB/05/20 at ¶ 459.
752. The *Oxus Gold* tribunal also found no breach. According to that tribunal, the operative agreement “did not secure the unconditional right to develop...but only a right to formal,

exclusive and good faith negotiations to develop [the project] jointly...on mutually agreeable terms.” **RLA-117, *Oxus Gold***, Ad Hoc Arb. at ¶ 375. It followed that the “relevant ‘obligation’ under the umbrella clause...is the duty to negotiate on an exclusive basis and in good faith...” *Id.* “Thus, firstly, the mere failure to be granted such development rights cannot be deemed to constitute a breach of an ‘obligation’ in the sense of the umbrella clause...as such contractual obligation did not exist.” *Id.* at ¶ 376. Because the tribunal found no breach of the FET standard, “it is difficult to see how it could breach the umbrella clause based on a breach” of the operative agreement. *Id.*

753. Here, the governing law of the MOI (the purported “contract” at issue) is Mozambican law.

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...**The venue of arbitration shall be at the Republic of Mozambique.**

Exhibits R-1 & R-2, Clause 8 (emphases added).

754. PEL has failed to meet its burden in demonstrating that Mozambican law would affirm any obligation from Mozambique by virtue of the MOI.

755. In fact, under Mozambican law, the MOI is not a legally valid or binding contract—it is merely a memorandum outlining the parties’ interest in possibly pursuing an infrastructure development project, subject to several contingencies. *Supra* § V (B).

756. As with the *Oxus Gold* claimant, PEL did not secure any unconditional right to develop the Macuse rail/port infrastructure project. *See* **RLA-117, *Oxus Gold***, Ad Hoc Arb. at ¶ 375. Instead, PEL held a right to “exclusive and good faith negotiations” during the operative duration of the MOI, subject to the PPP law. *See id.* Consequently, even if Mozambican law recognized that Mozambique owed any “obligation” to PEL, such obligation would be no more than the “duty to negotiate on an exclusive basis and in good faith.” *See id.*

757. Nevertheless, for the MOI to be a legally binding contract under Mozambican law (separate from any actual, later concession agreement), the parties must have submitted the agreement to the Minister of Finance for formal approval. *See* Law No. 9/2002 (“SISTAFE”) Art. 16. Without such authorization by the Minister of Finance, the contract is null and void. *See id.* at Art. 16(2). *Supra* § IV(B)(5)(b)(iv). The parties separately

must have presented the MOI for approval by the Administrative Court. *Supra* § IV(B)(5)(b)(v). Other requirements to constitute an enforceable contract in Mozambique or elsewhere were likewise not satisfied by PEL’s six-page “Memorandum of Interest.” *Supra* § IV(B)(5).

758. Because the MOI did not satisfy the requirements for a binding contract for a concession in Mozambique, and was never submitted for approval by the Minister of Finance or the Administrative Court (among other things), it therefore never became a legally binding contract.

C. Because there was no “investment,” the Mozambican forum selection clause governs.

759. Further, in the event there is no “investment” and the claims are merely contractual, the contract’s forum selection clause governs. *See RLA-53, Joy Mining*, ICSID Case No. ARB/03/11 at ¶ 90 (“The situation in this case is precisely that which the *Vivendi Annulment* Committee envisaged when holding that ‘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.’”).
760. As another tribunal reasoned, if the umbrella clause imports contractual obligations, that would include the forum selection clause, which “raises an issue of admissibility.” *See RLA-107, Bureau Veritas*, ICSID Case No. ARB/07/9 at ¶ 142. “[T]he parties to a contract are not free to pick and choose those parts of the Contract that they may wish to incorporate into an ‘umbrella clause’ provision...and to ignore others.” *Id.* at ¶ 148. The fact that the parties executed the agreement with the exclusive jurisdiction provision *after* the BIT was ratified suggests the parties “intended the exclusive contractual jurisdiction...to be absolute and without exception...” *Id.* at ¶ 146.
761. In unequivocal terms, “the Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively.” **RLA-116, *SGS v. Philippines***, ICSID Case No. ARB/02/6 at ¶ 155. “[I]f the parties to the contract have agreed on an exclusive jurisdiction to resolve a dispute under the contract...then it is exclusively for that forum to resolve all aspects of the dispute

under the exclusive jurisdiction clause.” See **RLA-107**, *Bureau Veritas*, ICSID Case No. ARB/07/9 at ¶ 154.

762. Expressly outlined in the MOI is the forum selection clause whereby the parties agreed to the exclusive jurisdiction of an arbitral panel seated in Mozambique, applying Mozambican law and ICC Rules. See Exhibits R-1 & R-2, Clause 8. Because there is no “investment” and PEL’s claims are merely contractual, those claims are not admissible before this Tribunal. “[I]t is exclusively for the [Mozambican arbitral] forum to resolve all aspects of the dispute under the exclusive jurisdiction clause.” See *id.*; **RLA-107**, *Bureau Veritas*, ICSID Case No. ARB/07/9 at ¶ 154.

D. Regardless, PEL’s MFN claim still fails because there was no breach.

763. Even if PEL somehow overcame all these legal obstacles (it has not and cannot), it still must prove breach of the purported contract. “[A]bsent a breach” of the operative contract “under the governing law, there can be no State responsibility under international law for violation of the umbrella clause.” **RLA-118**, *Paushok*, UNCITRAL at ¶ 319.
764. As briefed in section V, *supra*, PEL failed to demonstrate any breach. Indeed, there was no right to which PEL was entitled that Mozambique could have breached, considering, at bottom, that the MOI at most provided a contingent *direito de preferência* as defined in Mozambique’s PPP Law. MTC provided PEL the *direito de preferência* in the public tender in accordance with the PPP Law and PPP industry practice.
765. In sum, PEL’s claim for breach of the MFN clause based on the imported umbrella clause fails for the various reasons stated herein. Mozambique respectfully requests this Tribunal dismiss PEL’s claims with prejudice.

VIII. MOZAMBIQUE DID NOT INDIRECTLY EXPROPRIATE PEL’S ALLEGED INVESTMENT.

766. For an alleged breach of contract to “constitute a violation of the BIT, it must be the result of behavior going beyond that which an ordinary contracting party could adopt. *Only the State in the exercise of its sovereign authority...* and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages

were a consequence of the behavior of the Host State acting in breach of the obligations it had assumed under the treaty.” **RLA-102**, *Biwater*, ICSID Case No. ARB/05/22 at ¶ 458 (quoting *Impregilo*, ICSID Case No. ARB/07/17 at ¶ 281 (“[O]nly measures taken by Pakistan in the exercise of its sovereign power (“*puissance publique*”), and not decisions taken in the implementation or performance of the Contracts, may be considered as measures having an effect equivalent to expropriation.”), see **RLA-82**). In fact, this requirement that the State act in its sovereign authority is of utmost importance, the lack of which “justifies the finding that the Tribunal lacks jurisdiction.” *Id.* at ¶¶ 458-59 (quoting *Joy Mining*, ICSID Case No. ARB/03/11 at).

767. One tribunal clarified as follows:

In the present case, the Claimant has suggested that a breach of the Contract as a result of governmental directives would suffice for a finding of expropriation. The Tribunal disagrees. First, not every contract breach deprives an investor of the substance of its investment. Second, even where it does and the breach stems from a governmental directive, it would not necessarily follow that the contractual breach is the result of a sovereign act, as a directive of the State may be given in the framework of the contract.

RLA-105, *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 445.

768. Another ruled that, “only measures taken by Pakistan in the exercise of its sovereign power (“*puissance publique*”), and not decisions taken in the implementation or performance of the Contracts, may be considered as measures having an effect equivalent to expropriation.” **RLA-82**, *Impregilo*, ICSID Case No. ARB/07/17 at ¶ 281.

769. “[I]t is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum. The law of breach of contract is not secreted in the interstices . . . of NAFTA.” **RLA-103**, *Waste Management*, ICSID Case No. ARB(AF)/00/3 at ¶ 175.

770. Indeed, in *Vannessa Ventures*, a contract involving the sale of shares was breached and the claimant alleged expropriation. See **RLA-119**, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award (16 January 2013). The tribunal noted that “in order to amount to an expropriation under international law, it is

necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt.” *Id.* at ¶ 209.

771. At a basic level, “[t]he concept of expropriation is reasonably clear: it is *a government taking of property* for which compensation is required.” C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration*, OXFORD UNIVERSITY PRESS (2008) ¶ 8.03 (emphasis added).
772. Relatedly, “not all governmental regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is expropriation.” **RLA-98**, *MTD Chile*, ICSID Case No. ARB/01/7 at ¶ 209. *See also* **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 233 (“As a matter of principle, general regulations do not amount to indirect expropriation.”).
773. “[F]or there to have been an expropriation of an investment *or return* (in a situation involving legal rights or claims as distinct from the seizure of physical assets) *the rights affected must exist under the law which creates them ...*” **RLA-121**, *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN 3481, Award (3 February 2006) ¶ 184 (emphasis added).

A. PEL does not have a legitimate claim to assets that were expropriated.

774. “The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated.” **RLA-105**, *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 442. “[I]t is a well-established principle of international law that an investor cannot seek compensation from a State because of its own poor performance and weak business planning.” **RLA-102**, *Biwater*, ICSID Case No. ARB/05/22 at ¶ 440. “[I]t is not the function of the international law of expropriation...to eliminate the normal commercial risks of a foreign investor, or to place on [the State] the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance.” *Id.* at ¶ 442.

775. In other words, “[t]he right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. This reasoning underlies the *Feldman* tribunal’s conclusion that *an investor cannot recover damages for the expropriation of a right it never had. Expropriation cannot affect potential interests.*” **RLA-92**, *Merrill*, UNCITRAL (ICSID) at ¶ 142 (emphasis added).
776. Simply put, “[t]here cannot be an expropriation of something to which Claimant never had a legitimate claim.” **RLA-102**, *Biwater*, ICSID Case No. ARB/05/22 at ¶ 450.
777. PEL did not have a legitimate claim to an asset that could be expropriated here. Essentially, PEL asserts three “rights” under the MOI: a direct concession award, the right of first refusal, and exclusivity.
778. *First*, discussed in depth in sections V and VI, *supra*, the Clause 2(1) that PEL relies on for an alleged direct award right is inconsistent with all other versions of the MOI—including PEL’s own Portuguese version of the MOI—and was never agreed upon; would be illegal and void under Mozambique’s procurement laws; is internally inconsistent; required additional conditions that were not satisfied; and simply does not exist. *Supra* § V(B)(3). PEL entered into the MOI that expressed *interest* for possible, future negotiations, contingent on several other successful events, and provided for a *direito de preferência*—not a right to a direct award. *Id.* Such “potential interest” is not affected by any purported expropriation. *See* **RLA-92**, *Merrill*, UNCITRAL (ICSID) at ¶ 142.
779. Even if the MOI was inaccurately deemed to include the language PEL desires, it would be at best an agreement to agree on a future concession agreement, and not a legally binding contract. *Supra* § V(B)(5).
780. And if the MOI was inaccurately interpreted as a commitment for a binding concession agreement, the PFS failed to satisfy the conditions in PEL’s preferred Clause 2(1), and certainly did not “define the basic terms and conditions of the concession,” much less establish project feasibility. *Supra* § V(B)(7). In effect, PEL is seeking compensation from Mozambique for PEL’s “own poor performance and weak business planning.” *See* **RLA-102**, *Biwater*, ICSID Case No. ARB/05/22 at ¶ 440. Indeed, technical and financial analyses demonstrate that the project PEL suggested in the PFS is not what is currently

under consideration, and would not be feasible. *See, e.g., supra* § II(K) (ITD project materially different than PEL PFS); *infra* § IX(B)-(C) (value of PEL’s 2012 proposal is zero). Despite the fact that PEL did not satisfy the conditions precedent to being entitled to the concession award, or what PEL asserts as the right of first refusal, Mozambique could not have awarded PEL the concession because its submission was infeasible and unworthy of any such concession.

781. *Second*, also discussed previously in section V, *supra*, the argument that PEL had a right of first refusal contradicts with its claim that it had a right to a direct concession. There would be no reason to have a right of first refusal if PEL would be awarded the concession outright. Relatedly, a right of first refusal as suggested by PEL witnesses presupposes possible competition—a competitor would first have to submit a proposal or bid that PEL would be given the right to “match” or “best” in exercising its option. Such common application of ROFR belies PEL’s notion that it was *also* entitled to a direct concession.
782. *Third*, concerning PEL’s alleged right to exclusivity, such “right” was limited by the MOI “within the terms of the specific legislation”—which provided for a public tender in all but exceptional “last resort” circumstances—and to a limited period of evaluation. *See Exhibit R-2*, Clause 6. MTC did not violate the exclusivity clause, and in any event, an alleged right to “exclusivity” is not a right to an award. *See, e.g., RWS-1*, Witness Statement of Luis Amandio Chauque ¶¶ 16-18.

B. PEL has not identified expropriatory conduct.

783. “Having identified the assets, the next step is to identify the allegedly expropriatory conduct.” **RLA-105**, *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 443.
784. “[E]xpropriation occurs when the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.” **RLA-102**, *Biwater*, ICSID Case No. ARB/05/22 at ¶ 438. For example, a NAFTA tribunal said the losses “had to be of a certain magnitude or severity,” and an ICSID tribunal said the losses could not be temporary. *See id.* “[A] substantial deprivation of rights, for at least a meaningful period of time, is required.” *Id.* at ¶ 463.

785. “A necessary condition for expropriation is the neutralization of the use of the investment. This means that at least one of the essential components of the property rights must have disappeared. This means also, *a contrario*, that a mere loss in value of the investment, even an important one, is not an indirect expropriation.” **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 233. Similarly, a mere loss of benefits or expectations does not amount to expropriation. *Id.* at ¶ 249.
786. Importantly, many claimants misapply the holding in *Metalclad* “in support of the proposition that a mere loss in value of an investment is an expropriation.” *Id.* at ¶ 252. As the *El Paso* tribunal clarified, the *Metalclad* tribunal “did not hold that there was an expropriation because the benefits of an investor were not as expected, but decided that there was an expropriation of the investment because, *after the investor was granted the federal permit to exploit the land, and given assurances that it would receive the municipal permit to the same effect*, the latter was not granted, rendering the whole project impossible to pursue: *it was because there was a complete neutralization of the investment project that an expropriation was found.*” *Id.* (emphasis added).
787. “It is generally accepted that the decisive element in an indirect expropriation is the ‘loss of control’ of a foreign investment, in the absence of any physical taking.” *Id.* at ¶ 245. Therefore, “[i]f the measures do not interfere with the control of the property, there can be no expropriation.” *Id.* at ¶ 248.
788. Here, PEL did not control property that Mozambique expropriated. To neutralize “the use of the investment,” there must first be an investment. See **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 233 (“A necessary condition for expropriation is the neutralization of the use of the investment.”). As explained throughout this Statement of Defense, PEL did not have an “investment,” meaning there could be no neutralization to support a finding of expropriation.
789. In *Metalclad* the investor had a legally binding contract that required only a routine permit for the investor to begin operations. In *Tecmed*, the investor also had a legally binding contract, requiring only a renewal of its permit to operate a landfill. Here, in contrast, PEL did *not* have a legally binding contract. Even if it did, the contingencies to be met for PEL to be awarded the concession were more than “routine.” Had PEL been awarded the

concession, there still would have been more requirements beyond a “routine permit” for PEL to begin operations. In comparison, nearly 10 years after the award to TML, no construction has begun on the project—let alone any operations. *Infra* § IX(C).

790. Assuming *arguendo* that PEL made an investment, “at least one of the essential components of the property rights must have disappeared.” *See id.* *See also* **RLA-102**, *Biwater*, ICSID Case No. ARB/05/22 at ¶ 438 (“[E]xpropriation occurs when the owner was deprived of fundamental rights of ownership...”). Briefed *supra* in section V, PEL did not own any property rights, contractual or otherwise.

C. Mozambique is not liable to PEL for any exercise of its sovereign authority.

791. “The third step in this inquiry consists in examining whether the alleged interference with the property or the rights of the investor has been made in the State’s exercise of its sovereign powers.” **RLA-105**, *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 444.

792. However, a State acting in its sovereign authority does not always result in a proper claim for expropriation. To the contrary, “Governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.” **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 239.

793. In fact, “[t]he principle that the State’s exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is indisputable.” *Id.* at ¶ 239.

794. “But the clearest and strongest assertion of the principle can be found in the *Saluka* award, an UNCITRAL investment arbitration under a BIT:

It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.

Id.

795. Just as clearly, Mozambique is not liable to PEL for any exercise of its sovereign authority. Not only did Mozambique exercise its “sovereign powers” in enacting the PPP law, Kishan Daga, PEL’s Director of Projects mainly responsible for *this* project, voluntarily admitted that he relied on the implementation of the PPP law in entering the MOI. It is hard to understand how PEL can rely upon the PPP law, on the one hand, but condemn Mozambique for having enacted the law.
796. The PPP law was adopted and applied in a non-discriminatory manner. When Mozambique initiated the public tender, all potential bidders received the same information. When the proposals were scored, all potential bidders were scored with the same criteria. If anything, PEL received *more favorable treatment* by virtue of the 15% preference or advantage points to be included in its proposal scoring. **RWS-1**, Witness Statement of Luis Amandio Chauque ¶¶ 73-82.
797. By claiming Mozambique acted in a discriminatory manner, what PEL is actually saying is that it should have received singular treatment via a direct concession award to the exclusion of any other bidder. *See* SOC ¶¶ 419, 421. Specifically, PEL argues that Mozambique breached PEL’s right to a direct concession award and to exclusivity by (a) CFM refusing to negotiate, (b) MTC refusing to grant the concession, (c) MTC holding a public tender *and* awarding the concession to another bidder, and (d) use of confidential information.
798. *First*, PEL has not shown how CFM’s alleged refusal to negotiate was a sovereign and discriminatory act of Mozambique. Neither has PEL shown that CFM’s alleged refusal to negotiate neutralized the use of any rights PEL actually owned.
799. *Second*, as stated previously, by alleging MTC expropriated PEL’s “rights,” PEL is saying Mozambique *should have* acted discriminatorily—just in PEL’s favor. PEL expressly relied on the PPP law—in which its own lawyers were involved in drafting, allegedly⁶¹—which requires public tender. PEL also received a scoring advantage. And still PEL’s submission was inferior. Remember, however, “it is a well-established principle of

⁶¹ CWS-1 ¶¶ 35-36.

international law that an investor cannot seek compensation from a State because of its own poor performance and weak business planning.” **RLA-102**, *Biwater*, ICSID Case No. ARB/05/22 at ¶ 440.

800. *Third*, PEL makes a conclusory accusation that the current concessionaire “is now most certainly” using PEL’s confidential information. *See* SOC ¶ 421. PEL does not allege any facts demonstrating that ITD is using *any* information of PEL’s, let alone confidential information. To that end, PEL also does not demonstrate what specific confidential information is at issue. To the contrary, PEL makes a boldly statement, easily controverted, that the Macuse port/rail project was PEL’s “very idea.” In fact, in June of **2009**, Mozambique had issued a public resolution encouraging private investment proposals for a port/rail project to be developed *in Macuse*, two years before PEL submitted its first “expression of interest” letter in 2011. *Compare* RLA-15 with SOC, Exs. C-3 & C-55.
801. As far as any purported disclosure of PEL’s confidential information, which Mozambique vehemently disputes, PEL itself boasts of the many people to whom it shared this “very idea.” *See* SOC ¶¶ 56-57 (a Maputo professor) ¶ 58 (“a number of individuals,” including former CFM chairman) ¶ 59 (“the manager of Maputo Port”) ¶ 62 (“a team of experts”) & ¶ 66 (“funding agencies in India and elsewhere, to assess whether potential investors might be interested in PEL’s idea”). On the other hand, PEL failed to allege facts that it kept any information “confidential.”
802. More relevant to the issue of expropriation, PEL has not demonstrated how its *unsupported* allegation that Mozambique disclosed PEL’s *undefined* confidential information neutralized PEL’s use of any right it purportedly owned.

D. Mozambique complied with the conditions specified in the BIT.

803. “The fourth step in assessing the existence of an expropriation in breach of the Treaty is the analysis of the conditions specified in the [BIT].” **RLA-105**, *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 446.
804. The Mozambique-India BIT governing this dispute outlines the specific conditions as:
- a. The economic impact of the measure or a series of measures, although the fact that a measure of 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;

- b. 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;
- c. The extent to which the measures or series of measures interfere with distinct, reasonable, investment-backed expectations; and
- d. The character and intent of the measures or series of measures, whether they are bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate.

RLA-1, MZ-India BIT, Annexure ¶ 2.

1. PEL has sustained no economic impact amounting to expropriation.

805. “The critical element for a finding of expropriation is the economic effect of the measure rather than the intent underlying it.” **RLA-105**, *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 459.
806. Because PEL owned no right that could have been expropriated, PEL could not suffer any economic impact.

2. Mozambique did not employ discriminatory measures.

807. “[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.” **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 243.
808. Although stated in the context of the FET standard, *El Paso* is also instructive in defining what kind of conduct is discriminatory. According to that tribunal, discrimination exists “only in similarly situated groups or categories of people.” *Id.* at ¶ 293. “[D]iscrimination supposes a differential treatment applied to people who are in similar situations.” *Id.* at ¶ 305.

809. Whereas the *El Paso* tribunal sets forth law that expropriation occurs when, in part, the government makes specific commitments that it will refrain from regulation, here, PEL affirmatively stated that it *relied on* the governmental regulation (PPP law) in entering the MOI. *See, e.g.*, SOC, CWS-1, Witness Statement of Kishan Daga ¶¶ 35-36. Also, according to PEL, its own lawyer was involved in the *very drafting* of the MOI. *Id.* It would be disingenuous for PEL to claim that it relied on any specific commitment or assurance that Mozambique would refrain from regulation.

810. Instead, PEL argues that it should have been granted unequal, more favorable treatment under that PPP law to the exclusion of the other bidders, which would be unlawful discrimination against *those* bidders.

3. Mozambique did not interfere with PEL’s “reasonable” expectations.

811. “To establish an expropriation of its rights as a result of [the State’s] exercise of its own contractual rights, [the Claimant] must start by proving that its contractual rights were not limited by [the State’s] contractual rights or that [the State] took an action that, although allegedly based on the Contract’s terms, was in fact clearly in breach of such terms.” **RLA-105**, *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 460.

812. For the various reasons briefed throughout this Statement of Defense, PEL cannot prove that its contractual rights were *not* limited by Mozambique’s contractual rights. In actuality, PEL’s alleged rights are based on an incorrect interpretation of the MOI, itself a preliminary agreement to agree, and were contingent and never materialized. Moreover, nothing in the MOI ossified Mozambique’s procurement laws and practices, or would preclude it from conducting the public tender process specified in the law and strongly encouraged in industry practice.

813. Also previously briefed herein, PEL has not shown that Mozambique breached the MOI. MTC provided PEL the contingent *direito de preferência* referenced in the MOI and defined in the PPP Law. In any event, the MOI—especially as interpreted by PEL—was not a legally, binding contract under Mozambican law. *Supra* § V.

4. Mozambique's actions were reasonable and proportional to the aim sought to be realized.

814. “There must be a reasonable relationship of proportionality between the charge or weight to the foreign investor and the aim sought to be realized by any expropriatory measure.” **RLA-84**, *El Paso*, ICSID ARB/03/15 at ¶ 243.
815. Mozambique was within its rights to enact a law to encourage public-private partnerships to stimulate its economy. PEL takes no issue with that right or the enactment of the law.
816. Mozambique was within its rights to *apply* the law as set forth in the relevant statutes, considering it was under an obligation to act fairly toward *all* investors.
817. What would not be “reasonable” or “proportional” is if Mozambique shirked its obligation to all investors for the sake of one, essentially creating and deploying the PPP law for PEL’s sole benefit.
818. For the many reasons presented, PEL has failed to demonstrate any expropriation of any sort. Mozambique respectfully requests the Tribunal dismiss PEL’s claim with prejudice.

IX. PEL IS NOT ENTITLED TO RECOVER ANY DAMAGES.

819. Based on all of the above, PEL has not entitled to recovery any damages.
820. First, as fully set forth above, in Sections III through VIII, MTC is not liable to PEL under the MOI or otherwise, and damages cannot be awarded in the absence of liability.
821. While MTC does not disagree with *Chorzów Factory* and the principle of “full reparation” as a general statement of international law, that general principle does not justify PEL’s claims of damages in this case.

A. PEL Is Not Owed Damages Based Upon The Value Of The Alleged Right in The MOI To Direct Negotiation Of A Concession.

1. The Value Of An Illegal Alleged Right to Direct Negotiation of the Concession Is Zero.

822. The Exclusivity provision of the MOI was expressly subject to “the terms of the specific legislation,” (MOI Clause 6), and “the implementation of the project shall be done within

- the laws approved by the Govt. of Mozambique.” (MOI Clause 8) Mozambique law requires a public tender for the award of a concession.
823. PEL now urges the Tribunal to enforce the MOI in contradiction of Mozambique law, and to interpret the MOI as granting PEL the right to a concession outside of the public tender process. The value of such a claimed right in the MOI is zero, since by its own terms, the MOI is subject to Mozambique law, and the agreement could not be read as agreeing to do an illegal act.
824. As PEL itself states, fair market value (“FMV”) is “typically 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’ length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge the relevant facts.’” (SOC ¶430)
825. No willing buyer, with reasonable knowledge of the facts, including the fact that Mozambique law requires a public tender, would pay value for an MOI under the theory that it illegally granted a right to a concession.
826. While a willing buyer, with reasonable knowledge of the facts, might pay a nominal amount for the 15% preferential scoring afforded PEL, as a theoretical advantage, in fact, PEL received that advantage already, as part of its participation in the public tender. The advantage, however, did not result in the award of the concession to PEL or the PSG consortium.

2. International Law Does Not Permit An Award For the Value Of A Concession PEL Never Had and Utterly Failed to Demonstrate Would Have Existed for PEL.

827. Based on PEL’s theory of the case, a concession was owed to PEL based solely on the MOI, and PEL seeks damages for the full value of projected future profits of this unawarded, non-existent concession. But there were clearly (even in PEL’s theory) substantial negotiations yet to be undertaken between PEL and MTC before any concession could have been awarded. It is wholly speculative to attempt to assume whether or on what terms agreement as to a concession would have been reached. Where a project’s “future

- profits are so dependent on as yet unobtained preferential treatment from the government that any prediction of them would be entirely speculative,” a discounted cash flow (“DCF”) projected future damages analysis is not appropriate. *See RLA-28, Metalclad*, ICSID Case No. ARB(AF)/97/1 at ¶¶ 119-20, 122.
828. More importantly, no damages (regardless of how calculated or estimated) should be awarded for the “value” of a concession that is never awarded. Particularly instructive regarding the lack of damages for a concession that was never awarded is *Bosca v. Republic of Lithuania*. *See generally RLA-83, Luigiterzo Bosca v. Republic of Lithuania*, UNCITRAL, PCA Case No. 2011-05, Award (17 May 2013). The claimant Bosca had been the winning bidder in a public tender for the acquisition of beverage producer. *Id.* at ¶¶ 5, 84. Lithuania was accused of wrongdoing in the process of negotiating the final award of the tender to Bosca, and Bosca claimed damages, supported by a DCF analysis. *Id.* at ¶ 285.
829. The *Bosca* tribunal rejected Bosca’s claims of damages relating to the value of the acquisition it never received. *Id.* at ¶ 301. Central to the tribunal’s analysis, while Bosca had “legitimate expectations” that Lithuania would approve the final contract, the “outcome of the process was by no means certain.” The parties “were still in pre-contractual negotiations.” *Id.* at ¶¶ 292, 296. Even but for Lithuania’s alleged breach, “it [was] not out of possibility” that either party or both would have “held to its guns” in the final negotiations, and no deal would have been reached. *Id.* at ¶¶ 293-94.
830. Much more so, in this case, the final outcome of any negotiations allegedly owed by the MOI are so uncertain as to be pure conjecture. The MOI does not propose the terms of a concession. Nor does the PFS describe those terms. That is, even but for the alleged breach, at the time of the breach, the best PEL could possibly claim was a right to a negotiation. The specific terms and more important, whether there would have ever been a meeting of the minds on a concession, PEL has failed to demonstrate.
831. “Claimants have the burden of proof of the merits of their claims, including the alleged damages.” *RLA-42, Caratube*, ICSID Case No. ARB/13/13 at ¶ 307. The negotiations and contingencies still remaining between the alleged satisfaction of the MOI and the terms of any concession are too attenuated to demonstrate causation between the alleged breach

of the MOI and the eventual terms of any concession. *See RLA-28, Metalclad*, ICSID Case No. ARB(AF)/97/1 at ¶¶ 119-20, 122.

3. The Alleged MOI Rights Were Procured By Fraud, and No Damages Can Be Awarded.

832. Damages cannot be awarded where the claimed “right” or “contract” was procured by PEL’s fraud. The MOI was procured by PEL’s fraud, in that, as fully set forth in, among other places, Section III (A) and (B), PEL hid from, and or did not disclose to, MTC that PEL had been blacklisted at the time of the MOI. If PEL had disclosed that it was currently blacklisted by the Indian government, MTC would not have entered into the MOI, and certainly would not have entered into a concession agreement with PEL.
833. Moreover, while PEL claims that the PFS was “approved,” triggering the alleged rights to the concession. In fact, that approval was obtained by a second fraud.
834. When PEL submitted its PFS, PEL did not include meaningful information on the economic feasibility of the project. PEL itself admitted in May 2012 that “at this stage of prefeasibility our more emphasis was on the technical feasibility. . . .” Exhibit C-9 at 1. PEL did not submit a Statement of Fund Utilisation and project/estimated cash for the entire project until 15 May, 2012, after MTC requested this information from PEL.
835. The fact that PEL was describing its proposed project as “feasible” even before it had actually presented even a preliminary cash flow for the projected project itself suggests a significant level of inexperience and inadequacy to the PFS.
836. Even more problematic, when PEL belatedly provided its 15 May 2012 “cash flow” analysis, those numbers – while facially appearing to demonstrate cash flow – actually demonstrate that, at the time of the PFS, PEL could not have justified the substantial expenditures needed to complete the project before experiencing revenues. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶¶ 34-38.
837. In its 15 May 2012 letter to MTC regarding financial projections, PEL purportedly used an “estimated and projected commercial model” with projections of the expected revenue stream and projected costs, including initial capital expenditures. *See Exhibit R-14*, at 1, 4, 5; *RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 35.

838. PEL's 15 May 2012 "analysis" focused on whether the Project as envisioned at the time of the PFS would have generated enough revenues to pay back the projected amount of debt required to finance its construction, under different assumptions of financial leverage and interest rate on the debt. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 35.
839. PEL, however, utilized the wrong analysis and failed to conduct a proper or even meaningful analysis of whether the Project as proposed by PEL at the time of the PFS would cash flow. In order to assess whether the Project was financially viable, PEL should have used its projected cash flows to calculate the net present value ("NPV") of the Project. That exercise is routine whenever projecting the potential financial viability of a multi-year infrastructure project, and requires determining the discount rate to use to properly relate the projected future cash flows back to the valuation date. PEL's 15 May 2012 letter does not provide a discount rate, nor does the analysis even suggest any discount rate was employed by PEL. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶¶ 36-37.
840. As explained below in Section IX(B), the proper analysis, when run, demonstrates the Project as proposed by PEL in the PFS does not cash flow and is not economically viable.
841. If MTC had known, or realized, in May 2012, that the financials presented by PEL did not in fact support the project as proposed, MTC certainly would not have "approved" the PFS, much less negotiate and offer a concession.
842. "Approval" of the PFS was, by PEL's allegations, a prerequisite to PEL's alleged rights under the MOI, and such alleged "approval" was secured by PEL's false and misleading statements that the project was "viable" when in fact the project was not economically viable as proposed and supported in May 2012.

B. Any Attempt to Value Damages Based Upon the Project As Proposed and Assumed By PEL in 2012 Would Yield Zero Damages

843. Not only did the financials submitted to support the May 2012 PFS provide a false impression that the project was economically viable as proposed by PEL, but those same estimates, if properly analyzed, demonstrate that PEL has suffered no damages.

844. MTC's expert, Quadrant, ran the standard NPV analysis on PEL's 15 May 2012 financials in two different ways. First, Quadrant applied a discount rate to PEL's 15 May 2012 financials, using the discount rate estimated by PEL's expert Versant in Versant's damages analysis. When Versant's discount rate is applied, the Project would have no value according to Patel's projected cash flows as of 15 May 2012. In fact, Patel's projected cash flows result in zero value of the Project for any discount rate higher than 7%. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 37.
845. Second, Quadrant used PEL's own inputs that PEL provided to its expert Versant for use in its DCF analysis. Using PEL's own 37% projected EBITDA margin for the Project, also shows the Project would not result in a positive cash flow at the time proposed by PEL. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 37.
846. Thus, the financial projections given to MTC on 15 May 2012, while claiming a positive cash flow, actually demonstrate the Project as conceived in the PFS submitted by PEL was not financially viable.
847. In short, prior to the alleged breach, in May 2012, PEL's own cash flow estimates would not support any damages. Not only is this fatal to PEL's claims now for damage, but these poor financials provide further support for the fact that neither PEL nor MTC could have genuinely intended that they were to have entered into a binding concession agreement on the basis of such an underdeveloped submission.
848. Given that PEL's own financial estimates do not demonstrate a plan for a financially viable project as of May 2012, it should come as no surprise that PEL's damages expert simply ignores the May 2012 cash flow estimates in purporting to quantify damages. The May 2012 PEL estimates, however, should not be so easily dismissed. It is PEL's own theory that as of May 2012, PEL was entitled to a concession – but if the breach exists as of May 2012, there is no factual basis to conclude that PEL's project would be economically viable at that point.

C. PEL's Damages Based Upon Alleged Breach Of The MOI Cannot Be Determined Using A Purported FMV Of The TML Project.

1. The TML Project Is Materially Different Than Any Version Of A Project Ever Proposed By PEL, Or Even the PSG Consortium.

849. PEL and its damages expert, Versant, purport to determine the FMV of the concession to TML (which has been significantly delayed and modified since the concession was awarded), based upon Versant's baseless assumptions regarding TML's project.
850. The current version of the project being undertaken TML is significantly different than the project PEL proposed in its PFS, in at least the following ways:
- a. PEL proposed capital expense to build the project of approximately USD\$3.115 billion. TML's current Bankable Feasibility Study ("BFS"), on the other hand, proposes a bigger (nearly 20% longer), better (more than 30% more capacity per year) railway, for approximately the same price. **Exhibit R-42** at 4.
 - b. The project proposed by PEL in the PFS was a 516 km line between Moatize and Macuse. Indeed, four different "alignments" were considered in the PFS, ranging from 493 km to 518 km; none was longer than 518 km. **Exhibit R-7**.
 - c. On the other hand, the current TML Bankability Study envisions a total of 611 km, extending TML's project 129 km to unlock an additional thermal coal rich area not included in any version of PEL's MOI or PFS. **Exhibit R-42** at 7.
 - d. The additional length of the TML project is meant, in part, to accommodate the plan for 33 MTPA of coal. **Exhibit R-42** at 4. PEL's project proposed only a maximum of 25 MTPA.
 - e. The additional length is the result of TML needing to secure offtake agreements with several mines along the extended route – mines PEL did not even purport to service with either its PFS or public tender submission, in an effort to make the project bankable. **Exhibit R-42** at 7.
 - f. Based upon what little can be gleaned from the rough maps of the PEL PFS, the course of the PEL-proposed railway and the TML-proposed railway are significantly different in other respects as well.

- g. The project proposed by PEL assumed standard gauge rail lines, while the current TML Bankability Study calls for cape gauge rail construction to ensure compatibility with Mozambique’s existing rail system. **Exhibit R-42** at 7.
- h. The port solution developed by PEL had not actually finalized the location of the port as between two locations on the north bank of the river in Macuse. The PEL port also assumed a massive 1,500 m quay. **Exhibit R-7**.
- i. The project proposed by PEL had been proposed to be commissioned with six years of a concession agreement. *See* Ex. C-8. The TML project concession agreement was signed in in December 2013, and four years later, the project completion was then estimated as Q4-2022, or some nine years after the concession.
- j. In fact, as of Q1-2021, construction on the TML project is scheduled now to begin only this year.⁶² With at least a 3.5-year construction period, **Exhibit R-42** at 5, the project cannot reasonably expect to experience revenues until at least 2024.
- k. Eventual completion of the project in 2024 is by no means certain. As of November 26, 2020, TML chairperson Orlando Marques put the cost of the Macuse rail and port complex and USD\$3.2 billion, of which about USD\$400 million was currently available (less than 15%).⁶³

851. PEL provides no facts, causal or otherwise, demonstrating that at the time of the alleged breach of the MOI PEL would have undertaken the project as eventually developed by TML.

852. To the contrary, the substantial differences between the PEL proposal and the TML project compel the conclusion that even in the event the Panel were to find liability, PEL’s alleged

⁶² **RER-4, QE-5**, Jorge Marcos, “Mozambique: Construction works on Port of Macuse in Zambézia to start in 2021,” Club of Mozambique, 27 November 2020; **RER-4, QE-6**, Club of Mozambique, “Mozambique: Work on Macuse port to begin next year – AIM Report,” 30 November 2020.

⁶³ **RER-4, QE-6**, Club of Mozambique, “Mozambique: Work on Macuse port to begin next year – AIM Report,” 30 November 2020.

damages cannot be valued by purporting to determine FMV of TML's project, rather than PEL's alleged project.

2. Substantial Differences Between PEL, On The One Hand, And TML, On The Other, Compel The Conclusion That PEL Could Not Have Undertaken the TML Project.

853. Not only is there no reason to suppose that PEL would have proposed the TML project (when it clearly did not), PEL has not demonstrated that it could have entered into an agreement to build the project as proposed by TML, let alone actually undertake the project as proposed by TML. Substantial evidence indicates that PEL could not have performed on the TML project as conceptualized and bid by TML.

a. PEL's Blacklisting Would have Prevented PEL from Completing Any Project In Mozambique, Let Alone the TML Project

854. As fully explained in Section III (A). above, PEL's blacklisting was effectively a "civil death," and if PEL had properly disclosed its blacklisting, MTC would not have engaged in any contract, or project, with PEL.

b. TML Is A Substantially Different Company, With More Experience, Capacity and Ability to Undertake the Project.

855. The projects in which PEL participated prior to the public tender for the Concession do not make apparent any significant railway or port projects. PEL's consortium public tender cites to PEL's hydro power and road concessions,⁶⁴ with no mention to any PEL's experience in constructing or operating railways or ports.

856. The fact that PEL saw fit to assemble a consortium when it actually submitted its public tender demonstrates PEL's lack of experience and qualifications to receive a direct, stand-alone concession for itself.

⁶⁴ SOC, Ex. C-190D, Technical Proposal, 27 June 2013, at 16; SOC, Ex. C-190F, Technical Proposal, 27 June 2013, at 19.

857. While the PEL public tender does include Grindrod, with more relevant experience than PEL, the MOI (upon which PEL is making its claim of breach), does not even allegedly extend any rights to Grindrod, nor does it even allegedly contemplate awarding a concession to a consortium, including Grindrod or otherwise.
858. In addition, PGS consortium documents make clear that despite PEL’s relative lack of experience, PEL still envisioned itself as having a preferential right to provide to its services as the main Engineering, Procurement and Construction (“EPC”) contractor for the execution of the entire Project, at mutually acceptable terms and conditions including but not limited to the pricing.⁶⁵
859. As compared to the TML consortium, however, PEL was and is less qualified.
860. The EPC contractors of the TML consortium are China National Complete Engineering Corporation (CNCEC) and Portugal’s Mota Engil, with extensive experience in implementing major infrastructure projects, including railways and ports. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 57.
861. Mota Engil, in particular, has in-country experience in this precise area; Mota Engil was the EPC contractor that built 245 km of the Nacala corridor’s railway, namely, the renovation of 100 km of already existing railway line and the construction of a 145 km of new railway line. *See id.*
862. Second, the breadth and scale of Italian Thai Development is staggering compared to that of PEL. According to its most recent annual report, Italian Thai Development has 32,156 employees, of which 11,233 employees in its “Highways, Railways, High Speed Rails, Viaducts, Track Works, MRT Systems, Bridges and Expressways” division alone, and 2,615 employees in its “Airports, Ports, Jetties, River Protection, Dredging & Reclamation, Marine Works” division alone. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶¶ 57-79. The same annual report, as well as the company’s website, confirm Italian Thai Development’s involvement in a number of railway projects.

⁶⁵ *See RER-4*, Quadrant Report ¶¶ 55-57 (reviewing PSG Consortium MOU clauses 3.1.1. and 3.1.2.).

863. By contrast, PEL's latest annual report shows a total number of 1,743 employees, of which 1,217, or about 70% of the total, are "hired on temporary/contractual/casual basis." *See id.*
864. By PEL's own admission, the PEL-proposed PFS represented "potentially one of the biggest projects in PEL's history." *See* SOC, CWS-1, Witness Statement of K. Daga ¶ 49. There is no reason to believe that PEL was (or is) as or more qualified than TML to undertake this project.
865. More to the point, there is no basis to conclude or even assume that PEL would or could have moved past the thoroughly inadequate PFS, or the PSG consortium public tender, to undertake the better, cheaper project developed by the substantial resources and experience of TML.

3. Concerns regarding coal demand, prices, and Mozambique coal production create serious delays, and continued doubts, as to the viability of the TML project, let alone the project as proposed by PEL.

a. Concerns regarding coal demand and prices

866. Not only would it be wholly speculative to suppose that PEL would ever have profitably completed the project it proposed, but even the TML project has been beset by difficulties and delays, due largely to its reliance on a coal export market that is worsening.
867. PEL's project was justified almost entirely as a means to transport coal for export. As of 2019, China and India account for almost 40% of the global import of coal, and PEL's damages calculations assume that approximately 65% of the volume of coal to be transported by its alleged project would be exported to India. In fact, at least 20 of the 30 MTPA Versant assumes would have been transported by the Project, would be extracted from mines operated by Indian companies Jindal Steel and Power Limited ("Jindal") and International Coal Ventures Limited ("ICVL"), which would transport the product to India for their own consumption in power generation or steel production. *See* **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶¶ 68-69.
868. In 2019, India imported about 250 Mt of coal, 80% of which was thermal and 20% metallurgical. However, there are clear signals that India could stop importing thermal coal in the near future to fully rely on domestic production. Coal India, a partner of ICVL,

the joint venture operating the Benga mine in Mozambique, aims to replace its imports of thermal coal by 100 Mt in 2021 and 150 Mt in 2022 with domestic production. Similarly, Jindal Power, a subsidiary of Jindal, the company operating the Chirodzi mine, has recently declared that it expects to completely stop importing thermal coal. These statements follow the Indian government's decision to auction 41 domestic coal blocks with a production capacity of one third the total national output, and Prime Minister Narendra Modi's ambition for India to become a net coal exporter. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 70 (and citations therein).

869. PEL's damages claims entirely ignore the risk that a steep increase in coal production in Mozambique may not find enough demand for the product. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 71.

b. Coal Production in Mozambique As It Relates to Coal Transportation Capacity

870. Currently, there are two railway corridors transporting coal from the Tete region to the coast of Mozambique: the Sena railway and the Nacala railway. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 86.
871. The Sena railway connects Moatize to the Beira port. It is approximately 600 km long, with a capacity of 20 Mtpa. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 87.
872. The Sena railway and Beira port have been significantly improved in recent years. In 2016, the capacity of the railway was tripled, from 6.5 Mtpa to 20 Mtpa. SOC, Ex. C-102, Macuahub, Capacity of Sena Railroad in Mozambique Increases to 20 million Tons Per Year, 11 January 2016; SOC, Ex. C-103, Club of Mozambique, Sena Railway Line Expansion Completed, 11 July 2016. In 2018, dredging works at the Beira port allowed access to vessels up to 60,000 DWT, doubling the previous maximum capacity. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 89 (citing SOC, Ex. C-107, Dutch Water Sector, Van Oord Completes Dredging Access Channel to Port, Beira, Mozambique, 23 April 2018).

873. The Nacala railway was developed by Vale to transport coal from its Moatize mine, the largest coal mine in Mozambique, to the Nacala port, passing through Malawi. The Nacala railway is about 900 km long, with a capacity of 22 Mtpa. The Nacala port is the deepest natural port in eastern Africa and can accommodate large cargo vessels up to 180,000 DWT. *See RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 92 (citing SOC, CER-2, Versant Report ¶¶ 67-74, Table 2).
874. That is, between Sena railway and Nacala railway, Mozambique already has 42 MTPA of capacity to export coal from Moatize to coastal ports.
875. Current estimates of Mozambique exports of coal, on the other hand, are well below 42 MTPA, and the already existing railways are underutilized. *See generally, RER-4*, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶¶ 86-104.
876. In short, while PEL and their damages expert Versant seem to assume that there is burgeoning capacity to mine and export coal, and reason to believe that completion of this project would have been likely to result in 90 or 100% utilization of the capacity, the opposite is in fact true.
877. As a result, there is fundamental uncertainty whether the project, particularly as originally planned by PEL, without the additional offtake agreements and additional 120 km of railway, would ever have been profitable or viable.

D. Given the Fundamental Uncertainties Surrounding the PEL Project, A DCF Analysis Is Not A Proper Methodology For Valuing PEL's Damages

878. Even if one ignores the above problems with the PEL damages claims, PEL claims more than USD\$115 million in damages, relying on a Discounted Cash Flow (“DCF”) analysis of the TML project by Versant.
879. PEL treats DCF analyses as essentially so ubiquitous that use of a DCF here would be nearly a foregone conclusion. However, a DCF methodology is inappropriate here.
880. While “[v]aluations based on the DCF method have become usual in investment arbitrations, whenever the fair market value of an enterprise must be established,” “DCF, however, cannot be applied to all types of circumstances. . . .” **RLA-122**, *Rusoro Mining*

v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) ¶ 758.

881. As the *Rusoro* tribunal observed:

DCF is not a friars' balm which cures all ailments. It is simply a financial technique, in which an expert is able to estimate with reasonable certainty a number of future parameters (income, expenses, investments), and then discount the net income at an appropriate rate. If the estimation of those parameters is incorrect, the results will not represent the actual fair market value of the enterprise. Small adjustments in the estimation can yield significant divergences in the results. For this reason, valuations made through a DCF analysis must in any case be subjected to a "sanity check" against other valuation methodologies.

Id. at ¶ 760.

882. The *Rusoro* tribunal also set forth several factors are indicative of instances in which application of a DCF analysis might be proper. *See id.* at ¶ 759. At least the following such factors are not satisfied here:

- a. The enterprise does not have an established historical record of financial performance.
- b. There are not reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted in tempore insuspecto, prepared by the company's officers and verified by an impartial expert. To the contrary, the only financials prepared by PEL would show that the project they proposed is non-viable (if they can be relied upon at all), and PEL's expert ignores these financials entirely.
- c. The price at which the enterprise will be able to sell its products or services cannot be determined with reasonable certainty. To the contrary, even PEL's expert is not clear about the pricing for the project, and pricing is currently subject to substantial uncertainty, given that two competing railways are underutilized.
- d. The business plan cannot be financed with self-generated cash, and there remains uncertainty regarding the availability of financing. Indeed, there was no financing ever secured regarding the PEL proposed project, and even the

project as proposed by TML has only USD\$400 million of the needed USD\$3.2 billion currently available.⁶⁶

883. Numerous authorities are in agreement that a DCF is not appropriate in these circumstances.
884. The *Khan Resources* tribunal, for instance, rejected use of a DCF analysis where there were uncertainties, including but not limited to:
- a. Uncertainties regarding how the project would have been financed;
 - b. Uncertainties regarding whether further strategic partners would have been brought into the project, and whether the claimant was capable of completing the project itself; and
 - c. Uncertainties regarding the commercial terms, finalization and signing required agreements.

See RLA-123, Khan Resources, Inc. v. Government of Mongolia, PCA Case No. 2011-09, Award on the Merits (2 March 2015) ¶ 392.

885. The factors and uncertainties recounted in *Khan Resources* are particularly noteworthy and equally applicable here. There are substantial uncertainties remaining in financing the project PEL proposed. PEL itself claims to have had a right to the concession based on the MOI, but proposed to bring in strategic partners for the public tender it lost. And there is, of course, substantial uncertainty regarding the terms of a concession PEL was never granted.
886. Other international arbitration awards similarly reject the DCF approach in circumstances like this, where such an approach is too speculative. In *Metalclad*, for instance, the tribunal rejected use of a DCF analysis where a landfill had been built, but where the enterprise had not operated for a sufficiently long time to establish a performance record. *See RLA-28, Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) ¶¶ 119-20. Because “the landfill was never operative and any award based

⁶⁶ For the full list of criteria, the Rusoro tribunal found relevant to applying a DCF analysis, *see id.* at ¶ 759.

on future profits would be wholly speculative,” a DCF analysis was found to be inappropriate. *Id.* at ¶¶ 121-22 (citation omitted); *see also* **RLA-83**, *Bosca*, PCA Case No. 2011-05.

887. Similarly, DCF damages analyses are routinely rejected by Tribunals as too speculative where the claimant is not a going concern, has no historical data to rely on, and has no existing income producing assets. *See* **RLA-120**, *Wena Hotels, Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (8 December 2000); **RLA-38**, *Phelps Dodge v. Islamic Republic of Iran*, IUSCT Case No. 99, Award No. 217-99-2 (19 March 1986); **RLA-28**, *Metalclad*, ICSID Case No. ARB(AF)/97/1 at ¶¶ 116-20.

E. Versant’s DCF Analysis Is Fundamentally Flawed, Further Demonstrating Why A DCF Analysis Is Inappropriate

1. Flaws in Versant’s DCF Analysis

888. A standard damages analysis, consistent with International Law, requires a damages calculation as of the date of the alleged expropriation or, in this case, breach of contract. *See* **RLA-120**, *Wena Hotels*, ICSID Case No. ARB/98/4; **RLA-38**, *Phelps Dodge*, IUSCT Case No. 99; **RLA-28**, *Metalclad*, ICSID Case No. ARB(AF)/97/1 at ¶¶ 116-120; **RLA-85**, *Tecmed*, ICSID Case No. ARB(AF)/00/2.
889. PEL’s damages expert, Versant, failed to use in its damages analysis the 26 July 2013 date that PEL claims the breach occurred. Instead, Versant uses a “present” day date of 30 September 2020. Versant also uses four years’ worth of data about the project winner TML, in conducting its DCF analysis.
890. Had Versant selected an *ex ante* date of 26 July 2013, or even earlier, given the alleged breach of the MOI in May 2012, and run a NPV analysis based on PEL’s own financial submissions to MTC from 15 May 2012, that analysis would yield no damages. As discussed in Section IX.B, PEL’s own financial “model” and assumptions given to TMC before the alleged breach showed the Project *as proposed* by PEL was not financially viable.
891. Versant then compounds its error by using unsupported and speculative projections in its *ex post* DCF analysis. All DCF analyses rely on projections and many variables, which

often contain underlying assumptions. When those underlying assumptions are unsupported with factual facts, a DCF analysis becomes highly speculative and unreliable.

892. Quadrant identified six non-exhaustive major flaws in Versant's DCF analysis, any one of which alone renders the entire calculation speculative and unreliable. Combining all six flaws into one analysis demonstrates a lack of rigor and lack of sophistication in Versant's analysis. The six flaws relate to the following inputs in Versant's DCF analysis (1) Revenues, (2) Operating and Maintenance Costs, (3) Capital Expenditures, (4) Taxes and Concession Premium, (5) Debt Financing, (6) Discount Rate.

a. Versant's Analysis Overstates Revenues 100%

893. Versant calculates projected annual revenues for the Project as the product of quantities, measured as tonnes of coal transported via the railway and port, and prices, expressed in terms of a railway tariff in dollars per tonne-km and a port tariff in dollars per tonne. Thus, Versant assumed both a quantity (throughput) and a price (railway and port tariffs) to arrive at projected future revenues. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 109.
894. With respect to the quantity variable, Versant assumed a speculative and unsupported throughput of 30 Mtpa of coal throughput once the Project is operational. Versant's revenue projections for future revenue streams are entirely dependent on this 30 Mtpa coal throughput assumption, which exists nowhere in any documents submitted by PEL and is not contained in any TML data allegedly reviewed or relied on by Versant. The 30 Mtpa throughput assumption exceeds Vale's (the Nacala lines prior operator's) throughput by 76%. It also exceeds PEL's own claimed throughput as proposed in the PFS of 25 Mtpa by the same 76%. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 104.
895. Utilizing the 25 Mtpa throughput proposed by PEL in 2012 and actually achieved by Vale as a revenue input as the quantity variable in Versant's DCF model yields no damages. The overstatement of revenues by including just this one unsupported assumption completely eliminates any damages. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 110.

896. The pricing variable suffers from similar, fatal flaws. Two potential tariffs exist, which have two different assumed prices in Versant’s analysis: a rail tariff and a port tariff. First, it is not clear and not a reasonable assumption to count both tariffs on the same load of coal from the mine to ship. Versant’s analysis must assume both at the rates assumed by Versant to yield any damages. If PEL could not claim both a rail and a port tariff on the same shipment of coal, but only the higher rail tariff, the Versant’s analysis is again overstated by 100% and yields no damages. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 114.
897. Even assuming both tariffs can be charged on a load of coal, Versant’s projected tariff rates are speculatively high and not supported in the documents Versant utilized. For rail, Versant assumed a rail tariff USD\$0.05 tonne-km, then applied that price to the exact distance of two railway lines (520 km and 639 km). But the 2017 press conference Versant relied on for this assumption stated TML “expected the railway to charge 25 dollars a tonne for transport between the mine and the ship.” Versant failed to use this USD\$25 tonne figure. Instead, it recalculated a per tonne-km rate based on unrelated comments and approximations in the same 2017 briefing, instead of using actual distance.
898. The effect is Versant’s conversion increased the effective rail tariffs to USD\$26 and USD\$32 per tonne depending on the distance traveled. It then applied these inflated per tonne prices to its already inflated throughput numbers. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 112.
899. Using TML’s stated estimate of a USD\$25 per ton tariff instead of Versant’s higher, recalculated assumption reduces the DCF damages analysis by 49.6%, all else constant. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 113.
900. Versant also used a general “break bulk cargo” tariff rate from 2012 in assuming its port tariff. The same report relied on by Versant to make this assumption lists a lower tariff of USD\$10.7 per tonne specific to mineral products. Assuming all other inputs remained the same, and reducing the assumed port tariff to USD\$10.7 per tonne along reduces Versant’s calculation by Converting based on a different quote but this methodology miscalculates and overstates projected damages by nearly 50%, assuming all other variable remained as stated by 25%.

b. Versant's Analysis Understates Operations and Maintenance Costs, Effectively Overstating Margins by 13 points

901. Versant assumed average operations and maintenance costs from 2015-2019 to be 54% of revenues for the railways, which implies an EBITDA margin of 46%. Versant then assumed operations and maintenance costs from 2015-2019 to be 50% of revenues for the ports, which implies an EBITDA margin of 50%. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 118.
902. However, PEL's own 5 May 2012 financial projections assumed an EBITDA margin of only 37%. Using PEL's operations and maintained costs at 63% of revenues instead of Versant's 54% for rail and 50% for ports, eliminates any damages, keeping all other Versant assumptions constant. Quadrant found that utilizing an average operating and maintenance costs higher than 59% of revenues (that is, EBITDA margins lower than 41%) eliminates Versant's damages entirely, all else constant. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 120.

c. Versant's Analysis Grossly Understates Capital Expenditures

903. Versant's capital expenditure projections suffer from three issues: (i) the total amount of capital expenditure, that is, the issue of cost overruns; (ii) the duration of the construction period, that is, the issue of construction delays; and (iii) how costs are spread over the assumed construction period. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 122.
904. First, even assuming that the construction period would indeed last only 4 years, it is common that 9 out of 10 mega infrastructure projects like this experience cost overruns. Cost overruns of up to 50% are common. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 123 (and citation therein).
905. Construction has yet to start on the Project, meaning Versant has no actual data on which to base its assumptions. Instead, Versant simply borrowed TML's projected USD\$3,200 million capital expenditure figure. Versant's analysis fails to factor in the possibility of any cost overruns, despite some contingency cost overruns are occurring on 90% of similar projects. By failing to factor in any contingency or potential for cost overruns on the

- Project, Versant's analysis effectively understates the capital expenditures. Assuming a cost overrun of 10%, that is, construction costs of USD\$3,520 million, reduces Versant's damages by USD\$69.1 million or 60.0%, all else constant. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 124; **RER-4, QE-3**, Sensitivities, tab "Control Panel"; and Figure 5. Indeed, cost overruns higher than 17% eliminate Versant's damages entirely, all else constant. *Id.*
906. Second, Versant's analysis fails to account for any delay in the construction schedule. Any delay of the end of the construction period results in a delay of the start of the operation period, with a significant negative impact on value. Counter to Versant's assumption, the construction of the Project has yet to start, and the Project is now expected to commence operations not earlier than 2024. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 125; **RER-4, QE-5**, Club of Mozambique, "Construction works on Port of Macuse in Zambézia to start in 2021" (27 November 2020) at 1; SOC, CER-2, Versant Report, Figure 11, Appendix C.1. Therefore, Versant's assumption in its DCF model of operations starting in 2023 ought to be delayed by at least one year, *see* SOC, CER-2, Versant Report, Figure 11, Appendix C.1, which reduces Versant's damages by USD\$36.7 million or 31.8%, all else constant. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 125; **RER-4, QE-3**, Sensitivities, tab "Control Panel"; Figure 5. A two-year delay reduces Versant's damages by USD\$67.2 million or 58.3%, all else constant. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 125; **RER-4, QE-3**, Sensitivities, tab "Control Panel"; Figure 5.
907. Third, Versant does not provide any source to support its assumption of a 20%/80% split of construction costs over the first and second half of its assumed 4-year construction period. SOC, CER-2, Versant Report ¶ 173. As future capital expenditures are discounted in Versant's NPV calculation, the later they are projected to be incurred, the lower their present value, the higher the NPV of the Project. Contrary to Versant's assumptions, PEL's PFS projects capital expenditures over a 7-year period, of which almost 65% incurred in the first three years. SOC, Ex. C-6, Pre-Feasibility Study and Annexures 1 – 18 (2 May 2012) at 191.

d. Versant's Tax Rates and Concession Premiums Are Unsupported

908. Versant also makes assumptions regarding tax rates and concession premiums. Versant assumes an income tax rate of 32%, a loss carry-forward period of five years, and an investment tax credit (applied to capital expenditures) of 20%, based on publicly available reports from PwC and Deloitte commenting on Mozambican tax laws. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 127 (citing SOC, CER-2, Versant Report ¶ 172; SOC, Ex. C-143, PwC, Worldwide Tax Summary 2018-2019, Mozambique; SOC, Ex. C-144, Deloitte, Mozambique's Economic Outlook, December 2016). Versant's assumptions on loss carry-forward and investment tax credit result in an effective income tax rate of 0% for the 2020-2029 period and of 32% for the 2030-2048 period. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 127 (citing SOC, CER-2, Versant Report, Appendix C.1).
909. Versant includes a USD\$5 million payable by the Project upon signature of the concession agreement, *see* **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 128 (citing SOC, CER-2, Versant Report ¶¶ 168-169), and an additional USD\$5 million spread over Versant's assumed 30-year concession period from 2019 through 2048, that is, an annual payment of USD\$0.17 million, *see id.* at ¶ 129. Versant also includes annual contributions to the corporate social responsibility ("CSR") reserve of 0.5% of capital expenditures, which apply mostly during the construction period, and of 0.5% of revenues, which apply during the operating period. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 129 (citing SOC, CER-2, Versant Report ¶ 169, Appendix C.1).
910. Versant's assumptions related to taxation and concession premium are based on information about TML's concession agreement, not the concession agreement itself. More to the point, Versant's assumptions are not based upon any analysis of whether such provisions would have applied to a hypothetical concession agreement negotiated with PEL instead of TML. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 130.

e. Versant's Debt Financing Assumptions Alone Overstate Damages by 22.8%

911. Like so many other assumptions, Versant used a counterfactual assumption that the capital expenditures of the Project would be financed using 75% debt, with a 20-year loan at 6% interest rate, and a grace period of four years. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 131.
912. This 75/25 split on debt-to-equity financing assumption appears to come from PEL's financial proposal as submitted for the public tender in June 2013. This appears to be one of the few PEL assumptions from the PFS or public tender offer that Versant used in its DCF. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 133.
913. In a press article cited by Versant, however, TML stated that "[t]hirty percent of the work will be financed by shareholders and the remainder by third parties." **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 134; (citing SOC, CER-2, Versant Report ¶ 108 *referring to* SOC, Ex. C-133, Capital Markets in Africa, Mota-Engil, CMEC of China Win USD\$2.3 Billion Mozambique Project). Similarly, the Nacala Corridor was financed with 70% debt, according to its feasibility study. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 134; (citing SOC, Ex. C-136, Vale, Feasibility Study for Nacala Rail Corridor, September 2011, p. 72).
914. Utilizing a debt-to-equity ratio of 70/30, as TML proposed and as Nacala corridor actually did in practice, reduces Versant's damages claim by USD\$26.3 million or 22.8%, all else constant. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 134; **RER-4**, **QE-3**, Sensitivities, tab "Control Panel"; Figure 5.

f. Versant's Discount Factor is Unreasonably Low, Excludes Known Risk Factors, and Ignores Key Ex Post Facts While Simultaneously Relying on Others

915. The discount rate represents the minimum rate of return that investors would require to invest in the Project instead of other ventures. In a DCF valuation, a discount rate is applied to account for the inherent uncertainties of the cash flows' projections.

916. Versant used the accepted Capital Asset Pricing Model (“CAPM”) to calculate a cost of equity for the project of 19.56% as of Versant’s 30 September 2020 valuation date. A discount rate under 25% for a non-operational railway and port greenfield project in Mozambique is unreasonably low. **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 136.
917. While the CAPM model is qualitative and fairly formulaic, Versant’s inputs on three main components were flawed, understated and failed to account for how real assets are evaluated in the real world. Versant makes three main errors in its discount rate calculations: (i) it understates country risk by incorrectly excluding certain risk factors; (ii) it ignores that the Project is not in operation; and (iii) it ignores the illiquid nature of the Project. Correcting these errors, the cost of equity for the Project is 27.42% as of September 2020, converging to 19.92% once the Project’s debt is fully repaid. Using this properly calculated cost of equity eliminates Versant’s alleged damages entirely, all else being the same. *See* **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 136; **RER-4, QE-3**, Sensitivities, tab “Control Panel”; Figure 5 below. In fact, any cost of equity higher than 24.27% (converging to 16.78% when debt is fully repaid) would eliminate Versant’s damages entirely, all else being the same. *See* **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 136; **RER-4, QE-3**, Sensitivities, tab “Control Panel”; Figure 5 below.

2. The Severity Of The Impact Of Reasonable Corrections To Versant’s DCF Analysis Demonstrates That Versant’s DCF Analysis Cannot Be Relied Upon To Quantify Damages

918. As the sections immediately above, and the Report of Quadrant Economics fully recounts, each of the above errors in Versant’s DCF analysis has a severe impact on damages, ranging from a -22.8% (corrected leverage assumptions) to -100%, i.e., no damages at all (tonnage throughput, port tariffs, EBITDA margins, cost overruns, and cost of equity). Figure 5 from Quadrant Economics’ report demonstrates these impacts:

Figure 5
Sensitivities to Versant's Damages Calculation

	Assumption		Impact of Alternative Assumption		
	Versant	Alternative	Value	Change in Value	Percentage Change
	(1)	(2)	(US\$ Millions)	(US\$ Millions)	(Percent)
1. Versant			115.3		
Revenues					
2. Throughput	30 Mtpa	25 Mtpa	No Value	-115.3	-100.0%
3. Railway Tariff	US\$ 26-32	US\$ 25	58.1	-57.2	-49.6%
4. Port Tariff	US\$ 12	US\$ 10.7	86.1	-29.2	-25.3%
5. Port Tariff	US\$ 12	None	No Value	-115.3	-100.0%
Costs					
6. EBITDA Margin	46.1% - 50.3%	41.3%	No Value	-115.3	-100.0%
7. EBITDA Margin	46.1% - 50.3%	36.8%	No Value	-115.3	-100.0%
Capex					
8. Cost Overrun	None	10%	46.2	-69.1	-60.0%
9. Cost Overrun	None	16.7%	No Value	-115.3	-100.0%
10. Delay	No Delay	1-year	78.6	-36.7	-31.8%
11. Delay	No Delay	2-year	48.1	-67.2	-58.3%
Debt Financing					
12. Cost of Debt	6.0%	8.5%	59.3	-56.0	-48.5%
13. Leverage	75.0%	70.0%	89.0	-26.3	-22.8%
Discount Rate					
14. Cost of Equity	19.6% - 13.9%	24.3% - 16.8%	No Value	-115.3	-100.0%
15. Cost of Equity	19.6% - 13.9%	27.4% - 19.9%	No Value	-115.3	-100.0%

919. These impacts are the result of corrected inputs for each of these flaws in the Versant analysis *individually*; collectively, these flaws would create still more severe impacts in the DCF analysis.
920. As Quadrant Economics concludes: “The severity of the impact that reasonable corrections produce on Versant’s analysis unambiguously shows that Versant’s DCF valuation cannot be relied upon to quantify damages in this case and should be rejected.” **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 138.

3. Versant’s So-Called “Reasonableness-Check” Demonstrates That PEL Cannot Claim Damages Based Upon Perceived Value Of The TML Project

921. Not only is Versant’s DCF analysis demonstrably flawed and unreliable, but Versant’s claimed “reasonableness check” actually refutes, rather than supports, Versant’s DCF analysis.
922. Tribunals have noted the uncertainties involving DCF analyses, and have recommended using another valuation approach to provide a “sanity check” against the results of such an analysis. *See RLA-122, Rusoro*, ICSID Case No. ARB(AF)/12/5 at ¶ 758. For this reason, valuations made through a DCF analysis must in any case be subjected to a “sanity check” against other valuation methodologies. *See id.* at ¶ 760.
923. Versant claims to provide such a “reasonableness check” for its *ex post* DCF valuation by reviewing a transaction involving a railway and port infrastructure project connecting Moatize to the port of Nacala (the “Nacala Corridor”). *See* SOC, CER-2, Versant Report ¶ 39. Specifically, Versant considers the transaction in which Japan’s Mitsui & Co, Ltd. (“Mitsui”) purchased a 35% equity stake in the Nacala Corridor from Brazil’s Vale S.A. (“Vale”) for USD\$ 348 million in March 2017, as “broadly comparable.” *See* SOC, CER-2, Versant Report ¶¶ 40, 207. Versant uses the above data to imply a value of USD\$ 994 million for 100% of that project.⁶⁷
924. Although perhaps “broadly comparable” in some respects, there exist important factor that makes the Nacala Corridor more valuable than the Project.
- a. First, the Nacala Corridor was mostly a brownfield project: 75% of the total railway distance consisted of rehabilitating an existing railway line, and Vale’s coal terminal was built on the other side of the bay at Nacala, one of the deepest natural port in Africa, in which a cargo terminal already existed and operated since 1951. In contrast, the TML Project is a pure greenfield venture, consisting

⁶⁷ That is, USD\$348 million / 35% = USD\$994 million. *See* SOC, CER-2, Versant Report ¶¶ 40, 208.

of a new railway and port in locations with no existing infrastructure, that would carry significantly higher development risks.

- b. Second, Vale rehabilitated Nacala to serve its own transportation needs in relation to a planned production ramp up of the Moatize mine, the largest coal mine in Mozambique, also owned by Vale. That is, differently than the Project, Nacala is not an independent logistics corridor seeking to transport coal from an uncertain number of existing and prospective suppliers of coal, but rather a required investment connected to the planned expansion of its captive customer, which would offer a predictable source of revenues. In fact, at the time of the transaction in 2017, Mitsui also bought a stake in the Moatize mine.
- c. Third, as Versant acknowledges, a substantial portion of the Nacala Corridor was already completed at the time of the Mitsui transaction. That is, the value implied by a transaction involving a nearly fully developed project ought to be higher than that of a project which has seen negligible investment to date, all else constant.

RER-4, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶¶ 47-49.

925. However, assuming comparability between the Nacala Corridor and the Project, the Nacala Corridor actually demonstrates the sheer speculativeness of PEL.
926. In 2019, Vale fully impaired its coal assets in Mozambique in 2019 due to technical and operational issues, recording an impairment loss of USD\$ 1.7 billion. On 21 January 2021, less than four years after the 2017 transaction, Mitsui is selling its 35% equity stake in the Nacala corridor (as well as its 15% stake in Vale’s Moatize mine) back to Vale for a nominal amount of USD\$ 1.⁶⁸
927. Therefore, even according to its own “reasonableness check,” Versant’s *ex post* equity value of the Project is grossly overstated and should be, based upon Versant’s use of Mitsui’s purchase a 35% equity stake in the Nacala Corridor as a comparable, zero (or

⁶⁸ Vale will take on Mitsui’s USD\$2.5 billion debt in Nacala. See **RER-5**, African Mining Brief, “Vale Pulling Out – This is the End of Coal” (27 January 2021) at 2.

USD\$ 0.47 (\$1 x 46.22%). **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) ¶ 51.

F. If Any Damages Were Owed, It Could Only Be the Amount Spent In Preparing the PFS.

928. Commentators recognize that some cases are simply not appropriate for an award based upon lost profits, even where damages are otherwise found. For instance, ILC, “Draft Articles of Responsibility of States for Internationally Wrongful Acts, with commentaries” Article 36(2), cited by PEL, (SoC 429), actually demonstrates why such damages are inappropriate here.

Paragraph 2 of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate.

* * * *

Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements. When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. (CLA-177)

929. Based upon all of the facts and arguments of this Response, no damages should be owing in this arbitration. If, however, the Tribunal were to disagree, the only methodology for determining damages that would be appropriate would be a cost-based valuation. *See e.g., RLA-122, Rusoro*, ICSID Case No. ARB(AF)/12/5, *supra* (rejecting a DCF methodology in favor of damages based upon a cost-based methodology).
930. To be clear, even such cost-based damages are not actually appropriate here. “To date, most tribunals have been reluctant to consider pre-investment activities and expenditures, which do not ultimately come to fruition, as covered investments.” As the tribunal in *Zhinvali*, explained:

“[T]he proposed Zhinvali Project transaction did not close and, thus, the costs of the ‘development phase’, in the words of the Mihaly Case, were not ultimately ‘swept up’ under the umbrella of an integrated, three phase investment project ... Consequently, rather than retrospectively having become part of the overall investment expenditures of a successfully closed

project finance transaction, the ‘development costs’ in this case must either stand as an ‘investment’ solely on their own two feet or otherwise fall by the wayside as expenditures that fail to qualify either under the 1996 Georgia Investment Law or under the ICSID Convention.”

RLA-56, *Zhinvali*, ICSID Case No. ARB/00/1 at ¶ 410.

931. The parties in *Zhinvali* had expressly provided that “all expenses involved in pushing the Project forward were for the Claimant’s account.” *Id.* at ¶ 411. Likewise, the parties here agreed that “[t]he direct costs necessary to conduct the feasibility study shall be entirely borne by PEL.” *See* & **R-2**, MOI, Clause 4. Awarding damages contrary to those provisions of the MOI would be inappropriate.
932. In all events, and even if PEL were entitled to the direct costs of the PFS as damages, PEL has not heard attempted to meet its burden establishing what those direct costs would be. *See* **RER-4**, Expert Report of Dr. Daniel Flores (Quadrant Economics) § III (B).
933. PEL states that, in 2014, it approached Respondent with a request for compensation that 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 conceptualization.

SOC ¶ 237.

934. PEL does not specify what costs it had incurred. Regarding the USD\$ 4 million, it is unclear what that amount refers to and, accordingly, it cannot be included in a damages calculation.

X. MOZAMBIQUE SHOULD BE AWARDED ITS ATTORNEYS FEES AND COSTS AGAINST PEL AND ITS LITIGATION FUNDER.

935. In addition to PEL, the Tribunal also should order PEL’s litigation funder to pay Mozambique’s arbitration fees and costs. PEL’s counsel is a UK-based law firm and thus the matter is governed by UK law.
936. In *Arkin* the UK court established the important principle that a non-champertous third-party professional litigation funder may be held liable for a third-party costs order

under section 51 of the Supreme Court Act 1981 (now the Senior Courts Act 1981), but that such liability should be limited to the extent of the funding provided (the so-called “Arkin cap”). See **RLA-124**, *Arkin v. Borchard Lines Ltd. and Others*, EWCA Civ 655 (26 May 2005).

937. The *Arkin* court explained its approach, as follows:

“40. *The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party’s costs without limit should the claim fail...* Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation *in a manner which facilitates access to justice and which is not otherwise objectionable*. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.

41. We consider that a professional funder, who finances part of a claimant’s costs of litigation, should be potentially liable for the costs of the opposing party *to the extent of the funding provided*. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear

42. If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate... Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.

43. *In the present appeal we are concerned only with a professional funder who has contributed a part of a litigant's expenses through a non-champertous agreement in the expectation of reward if the litigant succeeds. We can see no reason in principle, however, why the solution we suggest should not also be applicable where the funder has similarly contributed the greater part, or all, of the expenses of the action."*

Id. at ¶¶ 40-43 (emphasis added).

938. Similarly, in the recent decision of the Irish Supreme Court in *Moorview*, the court examined the jurisdiction of the courts to award costs against a non-party. See **RLA-125**, *Moorview Development Ltd. & Others v. First Active PLC & Others*, IESC 33 (27 July 2018). It was held that the High Court was correct in finding a non-party funder of litigation who has an interest in the proceeding to be liable to pay the cost of the successful party.
939. Accordingly, under these precedents, PEL's litigation funder also should reimburse Mozambique for its fees and costs incurred herein.

XI. RELIEF SOUGHT

940. Based on the foregoing, Respondent is entitled to and seeks an Award, as follows:
- 940.1. Dismissing PEL's claims as inadmissible or, alternatively, declining jurisdiction;
- 940.2. Sustaining Respondent's objections to jurisdiction;
- 940.3. In the alternative, dismissing Claimant's case on the merits;
- 940.4. Awarding Claimant no damages;
- 940.5. Ordering that PEL and its litigation funder pay Respondent's attorneys' fees and all costs and expenses; and
- 940.6. Granting Respondent such further or other relief as the Tribunal shall deem to be just and appropriate.

Dated: 19 March 2021.

Respectfully submitted,



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