

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

**AND**

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

**BETWEEN**

**PATEL ENGINEERING LIMITED**

Claimant

and

**THE REPUBLIC OF MOZAMBIQUE**

Respondent

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**REPLY ON THE MERITS AND  
RESPONSE TO OBJECTIONS TO  
JURISDICTION**

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**9 AUGUST 2021**

 **ADDLESHAW  
GODDARD**

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## I. EXECUTIVE SUMMARY

- 1 Patel Engineering Limited ("**PEL**" or "**Claimant**") hereby submits its Statement of Reply on the Merits and Response to Objections to Jurisdiction, pursuant to Annex I *sexies* of Procedural Order No. 1.
- 2 As explained in PEL's Statement of Claim, ("**SOC**"), this case is a classic instance of the breach of an investment treaty by a host state. PEL, an experienced Indian infrastructure and construction company, conceived of and developed the original concept to build and operate a railway corridor in Mozambique between Moatize in the Tete province, and a port in the Zambesia province, to be built between Quelimane and Chinde to transport coal and other minerals from the land to the coast (the "**Project**"). The Project will open a novel internal logistics corridor that will transform Mozambique's prospects to transport and export coal to the world. Currently, Mozambique's export potential is constrained by its internal logistical constraints, including only having two existing ports in Beira and Nacala, both with limited capacity, which are distant from the Tete province, making transportation costly. These internal logistics constraints have hindered Mozambique's entire coal industry, and prevented Mozambique and its population from reaping the benefits of the country's most important mineral resource.
- 3 Prior to PEL's involvement, Mozambique had previously considered that the siltation and swampland along the Macuse coast made the area wholly unsuitable for a deep water port. But PEL believed in the Project and industriously turned to developing this game-changing logistics corridor into a reality. It convinced the Republic of Mozambique ("**Mozambique**", "**Government**" or "**Respondent**") to give serious consideration to the Project (which it previously dismissed as unfeasible), including by commissioning a preliminary study (the "**Preliminary Study**") to assess potential deep-water port locations. The Preliminary Study concluded that Ministry of Transport and Communications (the "**MTC**") agreed that PEL's concept appeared feasible and viable.
- 4 On 6 May 2011, the MTC and PEL entered into a Memorandum of Interest ("**MOI**").<sup>1</sup> The MOI set out the basis under which PEL would incur millions

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<sup>1</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011.

of dollars to conduct a prefeasibility study (the "**PFS**") to develop its unique Project concept. In exchange for PEL bringing this concept to the Government, and completing the PFS to the Government's full satisfaction, the MTC agreed to grant the project concession directly to PEL. Thus, the MOI provided that if Mozambique approved PEL's PFS, and if PEL decided to implement the Project through the exercise of its right of first refusal, then Respondent would grant "*a concession by the Govt. of Mozambique to PEL for the construction and operation of the project.*"<sup>2</sup> Mozambique also granted PEL exclusivity rights and committed to keep confidential documents, information, and data shared in relation to the Project.<sup>3</sup>

5 PEL delivered the PFS on time using a team of experts including geologists, marine consultants, and consultants specialising in water and infrastructure, to determine the route of the potential railway line and the location of the port. It conducted extensive field surveys, which included drives, and even walks, alongside the parts of the future railway line that were difficult to access. PEL even deployed an expert at the potential port location to monitor the weather conditions for almost a year. The PFS demonstrated that the Project was feasible and defined precisely the technical parameters according to which it could be implemented, as well as the basic terms and conditions for granting the project concession.

6 However, in breach of the bilateral investment treaty between India and Mozambique (the "**Treaty**" or the "**BIT**"), after it had approved the PFS and explicitly asked PEL to exercise its right of first refusal, Mozambique took PEL on a roller-coaster of contradictory and unlawful decisions. It successively promised PEL that it would abide by its commitment to grant it the concession directly, and then stated that it would not. At one stage, the Council of Ministers, Mozambique's highest executive body comprised of the President, Prime Minister, and all of Mozambique's ministries, even announced to PEL that it was in the "*national strategic interest*" to grant it a concession directly, only to reverse its decision a few weeks later on the basis of demonstrably false justifications.

7 Mozambique's host of contradictions eventually culminated with its decision, in breach of its commitments under the MOI, to organise a public tender in

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<sup>2</sup> *Id.* at Clause 1 ("*Objective*").

<sup>3</sup> *Id.* at Clauses. 6 and 11.

respect of the Project. To prepare that tender, it appropriated PEL's PFS and know-how by asking PEL to send its PFS without PEL's logo or signature on the false pretence that this was to be circulated internally between ministries. In reality, Mozambique was taking PEL's know-how and work product to manufacture a rigged tender process as a way of cutting PEL out of the very deal for which it had bargained and worked so hard.

- 8 The tender itself, in which PEL participated under protest, was expeditious, opaque, and unfair, as confirmed by both PEL's Mozambican law and international public procurement project experts. Among other irregularities, the criteria for the assessment of each of the proposals was only communicated to the tender participants *after* the results were announced, contrary to international standards of practice as well as Mozambican law. The assessment of the different proposals itself was clearly dubious *inter alia* as individual scores of the evaluators were almost perfect copies of one another. It resulted in the Italian Thai Development Company PCL ("**ITD**") being awarded PEL's Project with a near perfect score, while PEL's score was conspicuously and suspiciously low with no reference whatsoever to PEL's supposed "*scoring advantages*" in any of its financial scores and many of its technical ones either.
- 9 As Mozambique likely intended, ITD is now implementing PEL's Project through the Thai Mozambique Logistica Consortium ("**TML Consortium**"), a project company set up to implement the Project. The TML Consortium expects to make over *USD 300 million a year* in profits from the Project by the fifth operational year.<sup>4</sup> Mozambique will benefit handsomely from the Project via concession premiums, income taxes, and their 20% ownership in the Project, which PEL conceived of and developed. PEL is left with nothing.
- 10 Respondent is well-aware that these facts are devastating. As a result, instead of engaging with PEL's case, it has made every effort to detract the Tribunal's attention from it.
- 11 Mozambique's avoidance of PEL's case is obvious on the face of its 259-page Statement of Defence ("**SOD**"), which only addresses Mozambique's Treaty breaches in 46 pages. This is less than 20% of the SOD.

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<sup>4</sup> Exhibit R-42, p. 13.

- 12 It is further manifest from Mozambique's failure to adduce even a single document that could shed light on its conduct in this case, including its arbitrary decision making. *Out of the 56 factual exhibits Respondent adduced with its SOD, only 17 were new* to the Arbitration. The remaining 39 documents had previously been submitted by PEL, and Respondent simply *reintroduced those exhibits as its own*, presumably to give the false impression that its case is evidentially weightier than it is.
- 13 This pattern of failing to produce evidence to back up its purported defences was glaring during the document production process. As set out in **Section II.B.** below, Mozambique failed to comply with its document disclosure obligations, effectively *producing only 3 documents* not already in PEL's possession, as compared to the 232 documents produced by PEL. This is particularly alarming considering that the documents PEL requested *must exist* and Respondent *must maintain and archive them*, as a matter of Mozambican law.
- 14 Rather than engaging with PEL's case, Respondent relies on three red herrings which it unsubtly repeats like a mantra throughout its submissions. Yet, even an elementary analysis of the facts underlying these red herrings reveals they are nothing more than a diversionary tactic intended to detract from Mozambique's own internationally wrongful conduct and to paint PEL in a poor light.
- 15 Respondent's first red herring is a distorted presentation of PEL's temporary debarment from participating in projects with a single Indian entity, the National Highway Authority of India ("**NHAI**"), as some sort of "*blacklisting*" which PEL concealed from Mozambique. The words "*blacklist*", "*blacklisting*", and "*blacklisted*" are used no less than 177 times in its SOD.
- 16 The truth is much more benign. PEL's temporary debarment – for a limited period of 12 months – was a result of PEL not accepting a project that was awarded to it on account of an admitted calculation error. There was no fraud or *male fide*. As a result of the temporary debarment, PEL could not participate in further road projects with the NHAI for one year. This did not affect PEL's ability to enter into government contracts with other public authorities or private entities in India or abroad. Indeed, during the one-year temporary NHAI debarment, PEL was awarded over half a billion dollars' worth of

infrastructure contracts by Indian public authorities alone. Tellingly, once the year expired, PEL went back to entering into new projects with the NHAI and its affiliates.

- 17 Further and in any event, PEL did not have a duty to disclose its temporary debarment to Mozambique, either under Mozambican or international law. Such a duty would be hard pressed to exist where Mozambique never even asked PEL to make such a disclosure or bothered to search the information on the internet where it is publicly available (which it would surely have done had it been important information for it to know). Moreover, even if PEL had made such a disclosure, Mozambique cannot credibly show that it would have stopped a unique mega project for the benefit of its people dead in its tracks because of a minor, one-year administrative issue between PEL and a sole Indian entity back in India.
- 18 Respondent's second red herring is a bold allegation that Mr Daga, PEL's Director of Projects, sought to bribe Minister Zucula, the then MTC Minister, on a plane journey by telling him that he would "*help him out*" if he came to India. Despite the gravity of a corruption allegation, Respondent has thrown this allegation in casually, with no proper evidence.
- 19 Indeed, the allegation is made on the sole basis of the testimony of Minister Zucula, who has been convicted of dishonesty offences, and gave such testimony while he was in Mozambique's prisons being investigated for further dishonesty offences. Minister Zucula tellingly never raised any concerns or reported any inappropriate conduct prior to this Arbitration. Mr Daga vehemently denies the allegation. The Tribunal needs to have sufficient evidence to make any finding of corruption. Respondent's evidence does not even come close to meeting any recognised standard.
- 20 The third red herring is an inconsequential and unfounded allegation that PEL's English version of the MOI is forged, supposedly because it does not correspond to the Parties' Portuguese version of the document.
- 21 There is only one sub-clause that differs in the two versions of the MOI and it has no impact on the Parties' overall rights and obligations. It is also the first time this allegation is raised, even though the sub-clause was used by PEL in contentious *contemporaneous* correspondence with Mozambique, which never



took any issue with it. Mozambique's own draft MOI, submitted a few hours before the final versions were signed, further confirms that PEL did not forge its English version of the MOI. This is also confirmed by PEL's forensic expert Mr LaPorte, who has analysed PEL's original versions of the MOI.

22 In this context, Respondent did not instruct a forensic expert of its own but instead an IT expert, who conducted an irrelevant analysis on the metadata of the exhibits created on law firms' computers. That Respondent shied away from instructing its own forensic expert is perhaps unsurprising considering that it supposedly cannot find the originals of the copy versions of the MOI it puts forward in this Arbitration, notwithstanding its obligation to keep such documents under Mozambican law and how critical originals are for forensic examination.

23 Respondent also puts forward several mostly unorthodox jurisdictional and admissibility objections, by disputing well-established principles of investment treaty law, making fallacious distinctions of cases, using truncated (and hence misleading) quotes from arbitral awards, referring to the respondent states' submissions instead of tribunal decisions, and even creating new legal principles out of thin air.

24 Finally, Respondent has relied upon an erroneous presentation of Mozambican law, essentially to argue that the MOI was illegal. Mozambican law supports PEL's claim that the MOI was a valid and binding agreement and that Mozambique's conduct was illegal. By way of example, Professor Medeiros' report confirms that the MOI granted PEL a right to a concession agreement subject to conditions that it fulfilled, that Mozambique was allowed to grant a concession by direct award to PEL, and that the Council of Ministers' reversal of its decision to do so was an outright breach of Mozambican law. While it is the *lex specialis* of the Treaty and international law in general that governs the merits of this dispute, the factual predicate established under Mozambican law is decidedly in PEL's favour.

25 Respondent has such little faith in its own defence that it has already taken measures to mitigate its defeat. As discussed in greater detail in Section II.A, Mozambique hurriedly commenced parallel proceedings (the "**ICC Arbitration**") in reaction to this Arbitration, as a means of undermining this proceeding. For instance, Respondent recently submitted an ICC Statement of

Claim that is a plagiarised version of the SOD, with nearly identical exhibits, legal authorities, witness statements and expert reports. By creating a near total overlap between the cases, Respondent hopes to create as many potential contradictions as possible between this Tribunal and the ICC tribunal, presumably for use in later set aside or enforcement proceedings.

- 26 The SOD is therefore no more than a smokescreen. Once the smoke is cleared and Respondent's allegations are weighed and measured against the paucity of evidence it has produced to support them, Respondent has no defence to the fact that its conduct breached the Treaty. PEL must be compensated for such breaches.

## II. PROCEDURAL BACKGROUND

A. *Mozambique Has Continued to Employ the ICC Arbitration to Undermine and Derail These Proceedings, and to Create a Basis for Challenging this Tribunal's Final Award.*

27 As set out in PEL's SOC,<sup>5</sup> Respondent instituted parallel proceedings as a tactic aimed at undermining this Arbitration and/or setting aside and/or challenging this Tribunal's final award, should it not be to Mozambique's liking. This is apparent from Mozambique's:

- (a) obstinate refusal to reach any compromise to allow for the consolidation of the parallel arbitrations it created;<sup>6</sup>
- (b) determination to disregard principles of transparency between the two proceedings when beneficial to Mozambique, but to insist upon them when detrimental to PEL. Mozambique's only aim is to deprive PEL of a key means of ensuring transparency and avoiding inconsistent findings between the parallel proceedings, so that it can later use any such inconsistent findings to set aside or challenge this Tribunal's final award, should it not be in Mozambique's favour;<sup>7</sup>
- (c) written pleadings in the ICC Arbitration, which are largely plagiarised from its pleadings in this Arbitration, creating the highest possible risk of conflicting awards between the two tribunals.<sup>8</sup>

Mozambique is determined to make life as difficult and costly for PEL as possible with little regard for truth, fairness or due process.

28 Mozambique's Statement of Claim in the ICC Arbitration chiefly seeks declaratory relief, a nominal USD 1 dollar, and punitive damages, which do not even exist under Mozambican law (a point Respondent does not contest).<sup>9</sup>

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<sup>5</sup> SOC, paras. 34-49.

<sup>6</sup> **Exhibit C-179**, Letter from Addleshaw Goddard to Dorsey & Whitney, dated 19 June 2020; **Exhibit C-180**, Letter from Addleshaw Goddard to Dorsey & Whitney, dated 14 July 2020; **Exhibit C-181**, Letter from Addleshaw Goddard to Dorsey & Whitney, dated 21 July 2020; **Exhibit C-182**, Letter from Dorsey & Whitney to Addleshaw Goddard, dated 21 July 2020; **Exhibit C-183**, Letter from Dorsey & Whitney to Addleshaw Goddard, dated 20 July 2020; **Exhibit C-184**, Letter from Dorsey & Whitney to Addleshaw Goddard, dated 21 July 2020; **Exhibit C-185**, Email from Addleshaw Goddard to Dorsey & Whitney, dated 27 July 2020.

<sup>7</sup> **Exhibit C-186**, Email from Addleshaw Goddard to Dorsey & Whitney, dated 20 July 2020; **Exhibit C-187**, Exchange of emails between Addleshaw Goddard and Dorsey & Whitney, dated 3 August 2020.

<sup>8</sup> **Exhibit C-334**, Comparison of the UNCITRAL Jurisdictional Objections & Statement of Defence and the ICC Statement of Claim.

<sup>9</sup> **Exhibit C-335**, Mozambique ICC Statement of Claim, dated 19 May 2021, para. 280.

It is not a genuine claim by genuine claimants. Rather, it is nearly entirely plagiarised from its SOD in this proceeding.<sup>10</sup> The exhibits and legal authorities are nearly identical in both cases.<sup>11</sup> Respondent's five expert reports and two witness statements are now before both tribunals, containing only negligible changes. The relief sought by Mozambique tracks in both proceedings, so much so that Mozambique even asks the *ICC* tribunal to determine the merits of PEL's *treaty* claims (which are only before this Tribunal), to *dismiss* PEL's quantum claims (which are only before this Tribunal), and to enjoin PEL from proceeding in this Arbitration.

29 Every small finding, even on the credibility of a witness or of a document, will create a risk of contradiction between the tribunals. This overlap is so complete (by design) that the risk of contradictory findings and subsequent set-aside proceedings and challenges to enforcement as to which tribunal was correct is palpable and substantial and plays entirely into Mozambique's hands.<sup>12</sup>

30 There is only one explanation for *why* Mozambique commenced parallel proceedings, for *when* it did, and for *how* it is using them to seek contradictory findings. There is only one explanation for its refusal to have any consolidation or transparency between the parallel proceedings it created. That explanation is cavalier: Mozambique is employing the parallel proceedings to undermine and/or derail this Arbitration, and to manufacture a basis to subsequently set aside and/or challenge this Tribunal's award, should Mozambique be displeased with the result.<sup>13</sup>

*B. Adverse Inferences Should Be Made Against Mozambique for Its Failure to Produce Documents*

31 Mozambique's guerrilla tactics are not confined to causing chaos by commencing parallel proceedings. Its conduct *within* this Arbitration also lays

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<sup>10</sup> **Exhibit C-334**, Comparison of the UNCITRAL Jurisdictional Objections & Statement of Defence and the ICC Statement of Claim.

<sup>11</sup> All exhibits submitted with Mozambique's Statement of Claim in the ICC Arbitration were either exhibits to Mozambique's SOD or PEL's Notice of Arbitration and SOC in this Arbitration.

<sup>12</sup> Likewise, Mozambique has tempered the pace of this proceeding by filing a weak motion for bifurcation, and by requesting and receiving a large extension of time for filing its SOD. In contrast, it seeks to accelerate the ICC arbitration by pushing for an expeditious schedule (which it was granted) such that on the current timetable, the hearing in the second-in-time ICC Arbitration will take place before the hearing in this case, with both tribunals presiding over the same documentary evidence, witness, and experts.

<sup>13</sup> To set the overall dispute between the Parties on a track that is fair, efficient, and just, PEL submitted a stay application in the ICC Arbitration requesting the ICC tribunal to stay its proceedings until a final award is made in this Arbitration. Mozambique objected to the application, reiterating that this Tribunal lacks jurisdiction. On 29 July 2021, the ICC tribunal held a hearing on PEL's stay application, and the parties await its decision.

bare its intention to disrupt the process and to seek to deny PEL a fair opportunity to present its case, seemingly at any cost.

32 Continuing to disregard all principles of fairness and transparency, Respondent refused to disclose documents requested by PEL in good faith. Rather, it voluntarily disclosed *only 9 documents* in response to the entirety of Claimant's requests, an astonishingly low number given that *many of Claimant's requests pertain to documents that Mozambique is required to maintain pursuant to Mozambican law*. Out of the 9 voluntarily-disclosed documents, 3 had previously been exhibited, 2 were publicly available legislation and 1 was a letter from PEL. When this is taken into account, Mozambique *only produced 3 documents* that were not already in PEL's possession. In contrast, PEL voluntarily disclosed *76 responsive documents*.

33 PEL raised this issue with the Tribunal in its comments to Mozambique's responses to Claimant's Document Production Schedule on 10 May 2021.<sup>14</sup>

34 On 14 June 2021, following the Tribunal's order, *Claimant disclosed an additional 156 documents*. *No additional documents were disclosed by Respondent*. Accordingly, the *tally stands at 232 documents disclosed by PEL and only 3 by Mozambique*.

35 In the course of the document production process, Respondent purported to give the impression that it had completed searches in response to a number of Claimant's document requests but had not identified any relevant documents notwithstanding such searches. Claimant is not convinced by Mozambique's responses, and the Tribunal should not be either. It is not possible that no responsive documents exist with respect to a number of PEL's requests, in that these documents *must* exist and Respondent *must maintain them in its national archives*, as a matter of Mozambican law.<sup>15</sup>

36 These obligations are elaborated on further in this submission. It is worth highlighting to the Tribunal that if Mozambique is to be believed in its responses to the Tribunal's document production orders, then Mozambique has disregarded its own laws repeatedly – laws which are designed to ensure integrity, transparency and honesty within Mozambique's own government –

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<sup>14</sup> Claimant's Document Production Schedule, dated 10 May 2021.

<sup>15</sup> Section IV.K.6 and Section III.C.5.

in relation to numerous categories of documents, but most troubling, in relation to:

- (a) the executed originals of the MOI;
- (b) relevant meetings minutes within the MTC;
- (c) the public tender file; and
- (d) the Council of Ministers meetings.

37 As Professor Medeiros explains, under Mozambican administrative law, Mozambique has a duty "*to keep and preserve administrative documents - such as those relating to a public tender procedure or the minutes of meetings of the Council of Ministers – and this is instrumental in giving effect to the right to access administrative information and, therefore, giving effect to the principle of administrative transparency.*"<sup>16</sup>

38 When transparency is discarded, as Mozambique does in this case, it "*is not possible to adequately and effectively monitor the legality of [Mozambique's] actions or assess the impartiality and equidistance required of all administrative decisions without exception.*"<sup>17</sup>

39 The effect is to force PEL to pursue its claim with one hand tied behind its back. For example, only by reviewing the complete tender file is PEL able to establish with certainty that the scoring applied in the tender process was arbitrary and discriminatory against PEL.

40 In light of Mozambique's failure to produce these documents (which it must preserve and archive pursuant to its own laws), adverse inferences should be drawn against Mozambique, and the burden of proving that the tender process was conducted in a fair and transparent manner in accordance with Mozambican law should shift to Respondent. The same applies to the above categories of documents which Respondent must have, but has chosen not to produce.

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<sup>16</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 78.6.  
<sup>17</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 78.3.2.

C. *Mozambique's Unsubstantiated Allegations Must Be Handled with Caution and Scepticism*

- 41 Adding insult to injury, Mozambique proffers allegations that it cannot even begin to substantiate, and it continues to maintain these allegations even when PEL produces conclusive evidence disproving Mozambique's damaging assertions.
- 42 These salacious red herrings (including the "*suspect*" MOI; attempted bribery allegations, and the temporary debarment by PEL *vis-à-vis* the NHAI in India) are repeated over and over again, in every section of Respondent's SOD. They are made without compunction, unsupported by evidence, and pervasive. In light of this litigation tactic, the Tribunal should be alive to the confirmation bias which Mozambique seeks to infect into these proceedings. Just because Mozambique makes these allegations over and over again, does not make them true. For this reason, PEL urges the Tribunal to treat Respondent's salacious allegations with the scepticism they deserve, and to turn to the contemporaneous documentary evidence in this case, which demonstrates that Mozambique's breaches of the Treaty are manifest.
- 43 Mozambique has made serious but unsubstantiated allegations of fraud against PEL, in both parallel proceedings. It alleged in its ICC Request for Arbitration that "*the English version of the MOI submitted by PEL in the UNCITRAL Arbitration suggests it may have been fabricated.*"<sup>18</sup> This was the first time any issue was raised in relation to the English language MOI upon which PEL relies, and upon which PEL relied contemporaneously through correspondence following the PFS's approval and during the fruitless settlement negotiations. Mozambique maintains its baseless position in its SOD, arguing that "*PEL attaches a purported different, suspect version of the MOI.*"<sup>19</sup>
- 44 Allegations of fraud should not be made lightly and must be taken seriously. PEL has therefore responded appropriately. The documentary and expert evidence produced by PEL in this Arbitration show definitively that PEL's English language MOI and Portuguese language MOI are original copies. These copies have been rigorously examined and assessed by PEL's forensic document expert, Mr Gerry LaPorte.

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<sup>18</sup> Exhibit C-178, ICC Request for Arbitration, para. 53.  
<sup>19</sup> SOD, para. 77.

- 45 Mozambique's electronic data expert, Mr Mark Lanterman, is unable to respond to Mr LaPorte's findings because Mr Lanterman's expertise does not lie in authenticating original documents, but rather in analysing electronic documents and the data attached to them. Mr Lanterman's report is therefore not a proper response to Mr LaPorte's expert report, as Mozambique well knows.
- 46 It is unclear why Mozambique sought the expert opinion of Mr Lanterman as an electronic data expert when Mozambique's own allegations do not go to the electronic versions of the documents in question but rather to the original copies. Mozambique is fully aware that the proper way to finally put to bed its baseless allegations would be to allow forensic document experts for both Parties to examine and analyse the original copies on which each Party relies.
- 47 However, Mozambique has failed to produce its original versions of the MOI for inspection by Claimant's expert.<sup>20</sup> It ignored *all* of PEL's requests to have a thorough examination of the Parties' respective original documents. It was only after being prompted by PEL's reporting to the Tribunal that Mozambique explicitly acknowledged that it could not find its own original copies of the MOI, notwithstanding its legal obligation to archive them.<sup>21</sup>

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<sup>20</sup> See Section III.C.5.

<sup>21</sup> **Exhibit C-269**, Letter from Sarah Vasani of Addleshaw Goddard LLP to the Tribunal, regarding the inspection protocol, dated 29 June 2021; **Exhibit C-270**, Letter from Juan Basombrio of Dorsey & Whitney LLP to the Tribunal, regarding originals of the MOI, dated 1 July 2021.



### **III. MOZAMBIQUE HAS MADE GRAVE YET WHOLLY UNSUBSTANTIATED FRAUD AND DISHONESTY ALLEGATIONS**

48 Mozambique's case is weak. It made a clear written promise to PEL to grant it a concession in respect of the Project, subject to conditions that PEL fulfilled. Not only did Mozambique breach this promise to PEL, it reversed course several times, successively offering to abide by its commitments to PEL and then refusing to honour them. It then incomprehensibly awarded the concession to ITD, through a sham tender process which lacked transparency and predictability, after it had appropriated PEL's know-how by providing information from PEL's PFS to the other bidders behind PEL's back.

49 Mozambique failed to provide any explanation for its arbitrary decision-making or to produce any of the documents that could have shed light on those decisions. Instead, Mozambique has sought to raise the red herrings of fraud and dishonesty, in the hope that these allegations will stop (or at least distract) the Tribunal from looking at the substance of this case.

50 Respondent has not been subtle about it. Instead of responding to Claimant's submissions, after every fact that inconveniences it, Respondent has rehashed its fraud and dishonesty allegations. Respondent's attempts to change the conversation are plain for all to see and pervade the entire SOD.

51 It is regrettable that such grave allegations have been put forward with no evidence to support them. But PEL is nonetheless forced to defend Mozambique's series of red herrings, resulting in increased cost to PEL and time away from arguing the true merits of this Arbitration.

#### *A. Mozambique's First Red-herring: Purported "Blacklisting"*

52 This is Respondent's primary line of attack. It has taken a minor, temporary issue between PEL and a single Indian administrative authority and turned it into the centrepiece of its defence in this Arbitration. As set out in more detail in Section VI.A and B below, Mozambique is misrepresenting the facts around this issue, fails to establish any duty of disclosure under the relevant law, and cannot demonstrate any proximate connection or legal consequence between this issue and Mozambique's breach of the Treaty.

*B. Mozambique's Second Red-herring: Alleged Bribery*

53 Mozambique alleges that Mr Daga has attempted to bribe Minister Zucula by offering "to help [him] out" during a flight on an aircraft where they sat beside one another.<sup>22</sup>

54 The only purported piece of evidence relied upon by Mozambique is the testimony of Minister Zucula. His testimony is inherently suspect for several reasons.

55 First, Minister Zucula was found guilty of having made undue payments to members of Mozambique's aviation board.<sup>23</sup> He also has been charged with a number of dishonesty offences arising out of allegations that the price of two airplanes were unduly inflated such that Minister Zucula personally benefitted from the deal.<sup>24</sup>

56 Second, he was imprisoned by Mozambique in relation to a pending investigation arising out of allegations that he took bribes in the context of the construction of the Nacala International Airport, in Northern Mozambique.<sup>25</sup> It appears that his witness statement in this Arbitration was made while he was in Mozambique's prisons being investigated in respect of these allegations.<sup>26</sup> Any witness statement provided by Minister Zucula while he was in Mozambique's custody, and under investigation, should be viewed with inherent scepticism.

57 Third, the allegation is also considerably weakened by the fact that no contemporaneous report of the alleged bribery attempt was ever made. The absence of any such reports is confirmed by Respondent's response to Claimant's Document Request No. 6, which sought "[a]ny documents relating to the actions taken by Minister Zucula to report or record Mr Daga's purported offer of a bribe to him during a visit to Macuse in May/June 2012."<sup>27</sup> Respondent confirmed that it had no documents relating to this request.<sup>28</sup>

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<sup>22</sup> SOD, paras. 75, 273-278.

<sup>23</sup> **Exhibit C-249**, Article "Mozambique: Former minister sentenced to 14 months in prison over undue payments to IACM workers", Club of Mozambique, dated 25 March 2019.

<sup>24</sup> **Exhibit C-264**, Article "Mozambique: Embraer Bribe Comes to Trial", All Africa, dated 28 February 2020.

<sup>25</sup> **Exhibit C-265**, Article "Mozambique: Appeals Court Order Release of Former Transport Minister", All Africa, dated 27 May 2021.

<sup>26</sup> *Id.*

<sup>27</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, pp. 15-16, Document Request No. 6.

<sup>28</sup> *Id.*

58 Fourth, Mr Daga denies ever having offered Minister Zucula a bribe or ever having told Minister Zucula that he would "*help him out*" if he visited India.<sup>29</sup> Mr Daga also explains that he was only sat beside Minister Zucula by chance because there were no more economy class seats together with the rest of the PEL team.<sup>30</sup> Contrary to Ministry Zucula's allegation that he changed his return ticket to avoid Mr Daga, Mr Daga was on the same return flight as Minister Zucula but this time in economy class together with PEL's team.<sup>31</sup>

59 Fifth, such statement could not, in any event, support in and of itself Mozambique's allegation that Mr Daga made an "*indirect or implicit offer of a bribe.*"<sup>32</sup> Accusing someone of bribery is a serious matter. This cannot be done on the subjective understanding by a non-native English speaker that an implicit offer was made, through a vague and general statement in which no money was offered, and no contemporaneous documentary evidence exists that such a (vague and implicit) offer was ever made. That would leave too considerable a room for misunderstandings.

C. *Mozambique's Third Red-herring: PEL's "Suspect" English Version of the MOI*

60 The version of Clause 2(1) in PEL's English language MOI at Exhibit C-5A is clear: it explicitly refers to Mozambique's obligation to "*issue a concession of the project in favour of PEL.*"<sup>33</sup>

61 To avoid the consequences of this language, Mozambique contends that PEL's English language MOI at Exhibit C-5A is "*very suspect*"<sup>34</sup> because its wording of Clause 2(1) does not match the Parties' Portuguese version of the same document.<sup>35</sup> It has in this Arbitration produced *an electronic copy of an alternative English version of the MOI*, in which Clause 2(1) matches the Parties' Portuguese version of the same document. Mozambique's allegations in relation to PEL's English version of the MOI are tantamount to accusing PEL of having forged that document.

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<sup>29</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 175.

<sup>30</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 175.

<sup>31</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 175.

<sup>32</sup> SOD, para. 274; RWS-2, Witness Statement of Mr Paulo Francisco Zucula, para. 26.

<sup>33</sup> Exhibit C-5A, English Version of the MOI.

<sup>34</sup> See e.g. SOD, para. 42.

<sup>35</sup> See e.g. SOD, paras. 77-79; 81-82.

62 Yet, when put in context as set out below, this allegation, like the others  
Mozambique has sought to present in this Arbitration, is weak.

1. The other non-disputed MOI clauses support the fact that PEL was  
granted a right to the direct award of the project concession

63 When Mozambique's forgery allegation is put in context, it becomes clear that  
it has no impact on the fact that PEL was granted a right to the direct award of  
the project concession under the MOI.

64 Clause 2(2) of the MOI, which is common ground and identical in **all** versions  
of the MOI, including Mozambique's English version, just as Clause 2(1) in  
PEL's English language MOI, explicitly refers to Mozambique's obligation to  
issue a concession to PEL. Clause 2(2) provides:

*"After the approval of the prefeasibility study PEL shall have  
the first right of refusal for the implementation of the project  
on basis of the concession which will be given by the  
Government of Mozambique."*<sup>36</sup>

65 As explained further below, the remainder of the MOI, which is also common  
ground, likewise supports PEL's case that Mozambique promised PEL a  
concession in respect of the Project. So too does Mozambique's conduct  
following the MOI's entry into force. The forgery allegation is accordingly just  
yet another distraction.

2. The English version of the MOI relied upon by Mozambique is  
questionable

66 In its SOD, Mozambique has failed to address, let alone rebut, Claimant's  
evidence that PEL's English version of the MOI is authentic.

67 Conversely, Mozambique has also failed to adduce any evidence or to produce  
any document supporting the fact that Mozambique's English version of the  
MOI is authentic. Most tellingly, Respondent has failed to produce its original  
copies of the MOI in this Arbitration. Even more curiously, even though  
Mozambique has provided its computer forensics expert with the two copies of  
the MOI relied upon by Claimant (Exhibits C-5A and C-5B) and the two copies  
of the MOI relied upon by Respondent (Exhibits R-1 and R-2), **Mr Lanterman**

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<sup>36</sup> **Exhibit C-5A**, English Version of the MOI; **Exhibit C-5B**, Portuguese Version of the MOI; **Exhibit R-1**, Portuguese  
Version of the MOI; and **Exhibit R-2**, English Version of the MOI

*does not offer any analysis of the electronic copies of the MOI which Mozambique has adduced in this Arbitration.*

68 Furthermore, the MOI drafts produced by PEL in the document production process of this Arbitration confirm that PEL's original English version of the MOI is authentic while Mozambique has failed to produce a single draft of the MOI.

(a) Mozambique has no response to the fact that it raised no objection to the alleged "*suspect*" language in Clause 2(1) when PEL quoted it in contentious correspondence as early as 2013

69 Respondent has no response or explanation to the fact that the very language that Mozambique now contends has been suspiciously added to Clause 2(1) was quoted in contemporaneous contentious correspondence dating back to **2013**, without prompting any reaction from Mozambique until this Arbitration was commenced, seven years later. Mr Daga confirms that "*Mozambique never argued that the clauses of the MOI referred to in PEL's letters were incorrect*".<sup>37</sup> As will be recalled, on 4 June 2013, PEL wrote to Mozambique summarising Clause 2(1) of the MOI in bold and underlining in the following terms:

*"1. Once the pre feasibility study is submitted by PATEL and approved by MTC, in that case **MTC will sign a concession agreement with PATEL. Refer clause no. 2.1.**"*<sup>38</sup> (Emphasis in original)

70 On 20 December 2013, PEL wrote to Mozambique to complain about the fact that it had not been granted a concession, in spite of having fulfilled its part of the bargain under the MOI. PEL attached a sheet entitled "*Actions with respect to MOI*" presenting its position as to the fact that Mozambique had not abided

<sup>37</sup>

CWS-3, Second Witness Statement of Mr Kishan Daga, para. 45.

<sup>38</sup>

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

by its promises under MOI, quoting Clause 2(1) as it appears in PEL's original English version *verbatim*.<sup>39</sup>

Sr. No	MOI - as agreed upon	PEL	MTC	Submission by PEL
1	Clause 2.1 reads as			
	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 government of Mozambique shall issue a Concession of the Project in favour of PEL.	PEL carried out successfully the prefeasibility study and submitted the report as per the terms agreed in MOI in stipulated time	MTC studied the report and gave approval of the prefeasibility study vide MTC letter dated 15.06.2012 and asked PEL in writing to give acceptance for implementation of the Project. PEL submitted in writing vide letter dated 18.06.2012 that PEL accepts the approval and ready for implementation of the Project.	In spite of the approval of the prefeasibility report and acceptance by PEL for implementation of the Project as agreed in the MOI, MTC did not issue the Concession Agreement in favour of PEL

71 What is more, on 16 April 2013, the High Commissioner of Mozambique in India sent a letter to the Ministry of Foreign Affairs and Cooperation of Mozambique (the "**Ministry of Foreign Affairs**") enclosing, among other things, a copy of the English version of the MOI.<sup>40</sup> A copy submitted to the Ministry of Foreign Affairs in 2013 was the same as the one PEL relies on in this Arbitration, i.e. Exhibit C-5A.

72 Notwithstanding the fact that the Parties were then already in disagreement as to what promises had been made to PEL, Mozambique neither raised any issues with such language contemporaneously, nor for seven years until this Arbitration was commenced.

73 In its SOD, Mozambique advances no explanations as to why it did not dispute the contents of Clause 2(1) contemporaneously.<sup>41</sup>

3. Mozambique has no response to the LaPorte Report which concludes that PEL's original English version of the MOI is authentic

74 As explained in the SOC,<sup>42</sup> Mr LaPorte concluded after inspection of the original English and Portuguese versions of the MOI in PEL's possession, that the versions of the MOI PEL adduced in the Arbitration as Exhibits C-5A and C-5B were authentic (the "**First LaPorte Report**").

<sup>39</sup> **Exhibit C-219**, Letter from Kishan Daga of PEL to Gabriel Muthisse of the MTC regarding Macuse Rail and Port Project, dated 20 December 2013. (Emphasis in original)

<sup>40</sup> **Exhibit C-266**, Letter from Mr Jose Maria Morais, High Commissioner of Mozambique in India, to Ms Maria Gustava of the Ministry of Foreign Affairs and Cooperation of Mozambique with attachments, dated 16 April 2013.

<sup>41</sup> The SOD merely describes the 4 June 2013 letter as "a letter to the MTC requesting that [PEL] be awarded the concession" (SOD, para. 126).

<sup>42</sup> SOC, paras. 129-132.

- 75 His conclusion in respect of the English version of the MOI was based *inter alia* on his findings that PEL's Portuguese and English originals were fully matching in terms of (i) the "wet ink" hand stamp; (ii) the Government of Mozambique seal which had been physically embossed into the documents; (iii) the printing process that was used; (iv) the font of the text; and (v) the three different colours and types of ink used respectively by each of Mr Daga, Mr Patel, and Minister Zucula to initial and sign the MOI.<sup>43</sup> Mr LaPorte did not find any evidence to indicate that PEL's English language MOI had been altered, forged, or otherwise manipulated.<sup>44</sup>
- 76 In its SOD, Respondent failed to address the First LaPorte Report *at all*. Instead, Mozambique adduced the Lanterman Report, which makes it clear that Mozambique cannot disagree with Mr LaPorte's observations<sup>45</sup> and does not otherwise engage with the First LaPorte Report.
- 77 This is unsurprising. Mr Lanterman is not a trained forensic document expert, and it appears that Mozambique was unable to and/or decided not to retain such an appropriately qualified expert<sup>46</sup> to verify the authenticity of the MOI. Instead, it hired an expert in *digital* evidence, presumably to detract from Mr LaPorte's unequivocal confirmation that Exhibit C-5A-Original and Exhibit C-5B-Original are authentic. Mozambique is unable to dispute this with any evidence.<sup>47</sup> Mr Lanterman has not (and presumably could not have) conducted a forensic analysis of Mozambique's original copies of the MOI, responding to Mr LaPorte's analysis of PEL's originals.
- 78 The only criticism that Mr Lanterman levels at the First LaPorte Report is essentially that it is not conclusive of the authenticity of PEL's documents because it does not constitute evidence of the time when PEL's original copies were executed, which, according to Mr Lanterman possibly could have been

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<sup>43</sup> CER-1, Expert Report of Mr Gerald LaPorte, para. 21.

<sup>44</sup> *Id.*

<sup>45</sup> RER-5, Expert Report of Mr Mark Lanterman, p. 9 ("*Mr. LaPorte's report provides a number of observations about PEL's purportedly original copies of the MOI documents. In my opinion, however, these observations, whether standing alone or in the aggregate, do not conclusively establish that the documents are the original executed copies...Indeed, PEL's English-version MOI is the only version to exhibit certain material anomalies, such as the difference language in Clause 2. While I do not disagree with Mr. LaPorte's observations, I disagree that those observations are conclusive as to PEL's MOI documents' authenticity.*")

<sup>46</sup> There is evidence that at one stage, Mozambique contacted document forensic experts but for some reason, abandoned such project. See Exhibit C-331, Email from Khody Detwiler to Nathalie Allen regarding an inquiry from Mozambique, dated 27 January 2021.

<sup>47</sup> RER-5, Expert Report of Mr Mark Lanterman, p. 9.

forged at a later stage.<sup>48</sup> He suggests that the original files representative of what was printed should be provided for forensic analysis.<sup>49</sup>

79 It is, however, common ground that these original documents are under Mozambique's possession and control. As explained by PEL's witnesses, Messrs Daga<sup>50</sup> and Patel,<sup>51</sup> Mozambique printed the copies of the MOI for the signature ceremony. This is not disputed by any of Mozambique's witnesses, or by any contemporaneous documentary evidence. Respondent nonetheless appears to have failed to provide such original documents to its own expert.

80 The remainder of the Lanterman Report focusses on the analysis of the metadata of the PDF files forming Claimant's Exhibits C-5A and C-5B, which apparently have been created in October 2020 and March 2017, respectively, on a Xerox D125 Copier-Printer.<sup>52</sup> Needless to say, given that these Exhibits most likely correspond to the files saved by the law firm representing PEL at the relevant time, this is of very little assistance in ascertaining the authenticity of the documents themselves.

81 What is relevant and critical, however, is the fact that the copies of PEL's original versions of the MOI were scanned into PEL's systems upon Mr Daga's return to India, just three days after the MOI was signed, on 9 May 2011.<sup>53</sup> Those scans are identical to PEL's English and Portuguese MOI, exhibited at Exhibits C-5A and C-5B.

82 As explained in Mr Daga's witness statements, he personally flew with the original signed copies of the MOI back to India and filed them in PEL's office for safe keeping.<sup>54</sup>

83 In the context of the document production exercise in this Arbitration, PEL discovered that the documents were also scanned into PEL's systems. These documents were disclosed to Mozambique in their native format and are produced with this submission as Exhibit C-217 (Email from canon scan to Charan Singh and Kishan Daga of PEL attaching scan of the MOI in English) and Exhibit C-218 (Email from canon scan to Charan Singh and Kishan Daga

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<sup>48</sup> *Id.* at pp. 7-9.

<sup>49</sup> *Id.*

<sup>50</sup> **CWS-1**, Witness Statement of Mr Kishan Daga, para. 44.

<sup>51</sup> **CWS-2**, Witness Statement of Mr Ashish Patel, para. 39.

<sup>52</sup> **RER-5**, Expert Report of Mr Mark Lanterman, p. 4.

<sup>53</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 39.

<sup>54</sup> **CWS-1**, Witness Statement of Mr Kishan Daga, para. 47; **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 38.



of PEL attaching scan of the MOI in Portuguese). An analysis of the metadata of these documents demonstrates that they were indeed scanned on 9 May 2011, that no operation was performed on them other than scanning, and that no indicia exists to suggest these scans were ever tampered with or altered.

84 Apparently aware of the fact that the Lanterman Report does not constitute an appropriate match (or like for like) to the First LaPorte Report, Respondent has also taken it upon itself, without any expert assistance, to seek to analyse the colour of the inks on the electronic copies of the MOI.<sup>55</sup> It goes without saying that this amateur analysis cannot replace or respond to the expert evidence presented by PEL.

85 It follows that the First LaPorte Report and its findings stand uncontradicted.

4. Mr LaPorte's Second Report Confirms the Authenticity of PEL's English and Portuguese versions of the MOI

86 Mr LaPorte confirmed the conclusions he reached in the First LaPorte Report through his subsequent personal physical inspection and chemical testing of the documents.

87 As indicated in the First LaPorte Report, due to the COVID-19 pandemic, Mr LaPorte oversaw the inspection and examination of PEL's originals by video with the assistance of another forensic specialist in India (where PEL's originals were located at the time).<sup>56</sup>

88 Accordingly, since the filing of his first report, Mr LaPorte has been able to physically inspect the documents himself.<sup>57</sup> Based on this additional analysis, Mr LaPorte confirms the conclusions he reached in first report - PEL's English and Portuguese originals of the MOI are authentic. Mr LaPorte's conclusion was further reinforced by additional physical and chemical examinations he conducted on PEL's originals: "*I can conclude that it is highly probable that the hard copy originals identified as Exhibit C-5A – Original and C-5B – Original are authentic*".<sup>58</sup> In particular, Mr LaPorte examined the paper, ink, toner, and counterfeit protection security code of PEL's Portuguese and English originals, which he found to be matching.<sup>59</sup> He also conducted

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<sup>55</sup> SOD, para. 83.

<sup>56</sup> CER-1, Expert Report of Mr Gerald LaPorte, paras. 25-29.

<sup>57</sup> CER-4, Second Expert Report of Mr Gerald LaPorte, paras. 7-8.

<sup>58</sup> *Id.* at para. 11.

<sup>59</sup> *Id.*

chemical, physical, microscopic and optical examinations of the various initials and signatures, wet ink stamps, and seals contained in PEL's Portuguese and English originals. Based on this extensive analysis, Mr LaPorte concludes that all of these aspects were identical in both PEL's English and Portuguese originals. Mr LaPorte finds that:

- (a) *"Exhibits C-5A – Original and C-5B – Original – are **original documents**";*
  - (b) *"it is my opinion that it is **Highly Probable** that Exhibits C-5A-Original and C-5B-Original are **authentic documents**, and there is no evidence to indicate that the documents were not executed contemporaneously with each other based on all the examinations and test which I have undertaken";*
  - (c) *"There is no evidence that Exhibit C-5A – Original (PEL's English MOI) was altered, manipulated, or otherwise fabricated";*
  - (d) *"Exhibits C-5A – Original and C-5B – Original were **executed with writing inks, a 'wet' ink stamp, and franked with a Government of Mozambique seal that has been physically embossed into the paper**";*
  - (e) *"The initials and signatures in the name of Mr. Ashish Patel found on Exhibits C-5A – Original and C-5B – Original were executed with matching black ballpoint inks; the initials and signatures in the name of Mr. Kishan Lal Daga were executed with matching blue ballpoint inks; and the initials and signatures in the name of Mr. Paulo F. Zucula were executed with matching brown fountain pen inks"; and*
  - (f) *"There are **no differences** in the paper, toner, and each of the writing inks used for the initials on page 2 of Exhibit C-5A – Original when compared with the other pages that would indicate that page 2 was edited, re-created, and inserted back into the document (i.e., a suspected page substitution)."<sup>60</sup> (Emphasis added)*
5. Mozambique has failed to submit any evidence supporting the authenticity of the English version of the MOI it adduced in this Arbitration

89 Mozambique has failed to produce its original copies of the MOI (submitted as Exhibits R-1 and R-2), including for inspection by its own expert.

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<sup>60</sup> CER-4, Second Expert Report of Mr Gerald LaPorte, Section E Conclusion.

- 90 Critically, it has not produced its original English version of the MOI, which it says should be preferred to that produced by PEL. It now conveniently alleges that it cannot find its originals of the MOI.
- 91 This is difficult to believe. It appears to be contradicted by Mozambique itself, which refers to "*the Portuguese version...found in the archives of both parties.*"<sup>61</sup> Mozambique has not produced its "*archived*" version of the MOI.
- 92 This is notwithstanding the fact that Mozambique has a legal obligation to preserve such documents, in accordance with its own laws. Decree 36/2007 of 27 August, which regulated the State archive system from 2007 to 2018, and Decree 84/2018 of 26 December, which repealed and replaced the latter, is still in force to date, both explicitly list "*contracts*" as documents which must be *permanently* archived.<sup>62</sup>
- 93 What is more, while Mozambique has asked its expert to opine on the *electronic* versions of the MOI it has adduced at Exhibits R-1 and R-2, including its own purported English version, its expert failed to do so.<sup>63</sup>
- 94 In contrast, PEL has produced its original versions of the MOI for inspection by Mr LaPorte and has also offered several times<sup>64</sup> to tender such documents for inspection by Mozambique's expert, subject to an appropriate protocol that preserves the integrity of the Parties' respective originals.
- 95 Mozambique ignored all of PEL's requests and inquiries to have a thorough examination of the Parties' respective original documents. It was only after being prompted by PEL's reporting to the Tribunal that Mozambique explicitly

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<sup>61</sup> SOD, paras. 9 and 469.

<sup>62</sup> **CLA-271**, Decree 36/2007, of 27 August, Article 3 and Annex III; **CLA-272**, Decree 84/2018 of 26 December, Article 3 and Annex III. See also **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 6, para. 79.3: *While the same only refers specifically to the duty to preserve the tender documents and minutes of the meetings of the Council of Ministers, it undoubtedly sets forth that in Mozambique a duty to preserve all administrative documents stems directly from the Constitution and that when the MOI was entered into Decree 36/2007, of 27 August, applicable to all bodies of the Public Administration, were required to keep any agreements and contracts entered into must be permanently archived.*

<sup>63</sup> **REER-5**, Expert Report of Mr Mark Lanterman, p. 2: Counsel for Respondent, the Republic of Mozambique ('Mozambique'), retained CFS to review and analyse electronic copies (scans) of the English and Portuguese language versions of the Memorandum of Intent ('MOI') documents. Specifically, the four (4) documents provided to CFS represent the Portuguese and English versions of the MOI offered by Mozambique, and the Portuguese and English versions of the MOI offered by Claimant, Patel Engineering Limited.

<sup>64</sup> **Exhibit C-267**, Email from Nathalie Allen of Addleshaw Goddard LLP to Juan Basombrio and Lincoln Loehrke of Dorsey & Whitney LLP regarding Document Inspection Protocol, dated 5 June 2021; **Exhibit C-268**, Email from Nathalie Allen of Addleshaw Goddard LLP to Juan Basombrio and Lincoln Loehrke of Dorsey & Whitney LLP regarding Document Inspection Protocol, dated 16 June 2021.

acknowledged that it could not find its own original copies of the MOI, notwithstanding its legal obligation to permanently archive them.<sup>65</sup>

6. A draft of the Portuguese version of the MOI sent by Mozambique on the morning of the MOI's execution confirms that the Parties agreed on the language of Clause (2)(1), as set out in PEL's original English version

96 Mozambique failed to produce any drafts of the MOI in response to PEL's Document Request No. 4<sup>66</sup> that would show that its alleged English version of the MOI coincides with any earlier drafts. Again, it conveniently alleges that it cannot find any such documents.<sup>67</sup>

97 In contrast, PEL voluntarily produced all of the scanned versions of the executed MOI and drafts of the MOI it could identify, together with the relevant metadata, amounting to 33 documents. These documents confirm that PEL's English version of the MOI is authentic, and do not support the authenticity of the English MOI submitted by Mozambique in this Arbitration.

98 The language of Clause 2(1), which Mozambique now alleges is suspect, was included *by Mozambique* in the last Portuguese draft of the MOI shared with PEL during the morning of 6 May 2011, the day the Parties executed the MOI. Clause 2 of Respondent's Portuguese draft called for the Government to grant the Project concession to PEL, consistent with PEL's English version:

*"A PEL realizara um estudo de pré-viabilidade (EPV), com base no relatório do grupo de trabalho, a fim de avaliar o local adequado para o Porto e concluir a rota para a Linha Férrea, assim que for assegurado que, um vez este seja aprovado nos termos da clausula 7 desde Memorando, será outorgada pelo Governo da Republica de Moçambique a concessão do Projecto a favor da PEL."*<sup>68</sup> (Emphasis added)

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<sup>65</sup> **Exhibit C-269**, Letter from Sarah Vasani of Addleshaw Goddard LLP to the Tribunal regarding the inspection protocol, dated 29 June 2021; **Exhibit C-270**, Letter from Juan Basombrio of Dorsey & Whitney LLP to the Tribunal regarding originals of the MOI, dated 1 July 2021.

<sup>66</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, p. 10. Document Request No. 4 reads as follows: "Any internal MTC and inter-Ministries documents relating to the negotiations of the MOI, including emails attaching drafts and/or the final version thereof, during the period when the MOI was negotiated (i.e. between the finalisation of the Preliminary Study in March 2011 and 6 May 2011)."

<sup>67</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, p. 10.

<sup>68</sup> **Exhibit C-204**, Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Fausto Mabota of Aries copying Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 6 May 2011, Clause 2. Free translation: "PEL shall carry out a prefeasibility study (PFS) on the basis of the report of the working group, for assessing the appropriate location for the Port and to finalise the route of the railway, as soon as it is ensured that, once it is approved under the terms of Clause 7 of this Memorandum, **the Government of Mozambique shall issue a concession of the Project in favour of PEL**". (Emphasis added)

99 In the cover email attaching this last draft, Mozambique indicated that it would "finalize the English version accordingly".<sup>69</sup> This language, emanating **from Mozambique**, is consistent with Clause 2(1) of PEL's original English version of the MOI, exhibited as C-5A, which also requires Mozambique to issue the Project concession to PEL:

*"1. PEL shall carry out a prefeasibility study (PFS) on the basis of the report of the working group for assessing the appropriate site of the port and to finalize the rail route thus ensuring that once the terms under Clause 7 of this memorandum are approved, **the Govt. of Mozambique shall issue a concession of the project in favour of PEL.**"*<sup>70</sup>

100 However, it also appears that further changes were made to the MOI by Mozambique on 6 May 2011.

101 This may have created some confusion in the final Portuguese version of the MOI, where Clause 2(1) (i.e. "[a] PEL realizara um estudo de pré-viabilidade (EPV), dentro de 12 meses que submetera ao Governo para a respectiva aprovação.") and Clause 3(1) (i.e. "A PEL apresentara o seu relatório de pré-viabilidade dentro de doze (12) meses a contra da data de assinatura deste memorando.") appear redundant.<sup>71</sup> It is regrettable that Mozambique, which made these changes, failed to produce a single draft of the MOI that may have shed light on such confusion.

7. PEL could not have discovered the discrepancy between the Portuguese and English versions of the MOI

102 In the SOC, which relies upon the witness testimonies of Messrs Daga and Patel, PEL explained that Mr Prabhu, the only Portuguese speaker in PEL's team who attended the MTC on the day of the signing, arrived in the morning when the MOI was not yet printed on the government's letterhead paper.<sup>72</sup> Mr Prabhu confirmed that the contents of the Portuguese version of the MOI that was at the MTC in the morning corresponded to what the Parties had agreed.<sup>73</sup>

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<sup>69</sup> *Id.* at p. 1.

<sup>70</sup> **Exhibit C-5A**, English Version of the MOI.

<sup>71</sup> **Exhibit C-5B**, Portuguese Version of the MOI.

<sup>72</sup> **CWS-1**, Witness Statement of Mr Kishan Daga, para. 43; **CWS-2**, Witness Statement of Mr Ashish Patel, para. 38.

<sup>73</sup> **CWS-1**, Witness Statement of Mr Kishan Daga, para. 43.

- 103 However, and as further explained in the SOC, PEL was made to wait all day for Mr Zucula's arrival.<sup>74</sup> By the time Minister Zucula finally arrived in the evening to sign the documents, Mr Prabhu – the only Portuguese speaker who attended the signing from PEL's side – had left to attend a different meeting.<sup>75</sup>
- 104 It appears that the printed Portuguese version of the MOI (at Exhibit C-5B – Original) that was brought to the signing in the evening of 6 May 2011, was not the same version as the one Mr Prabhu reviewed in the morning. By that stage, however, there was no longer any member of PEL's team who spoke Portuguese and could have identified the issue at the MTC.<sup>76</sup> Mr Daga accordingly asked for (and received) confirmation that the execution versions of the Portuguese MOI reflected the version that had previously been reviewed and approved by PEL's team.<sup>77</sup> Having received such confirmation by Mr Chaúque, Messrs Daga and Patel proceeded to sign both versions, along with the Minister.
- 105 Mozambique's only response to these facts, which are now further confirmed by a contemporaneous Portuguese draft sent by Mozambique on the morning of signature, is Minister Zucula's general statement that there were Portuguese speakers in PEL's team.<sup>78</sup> That comment misses the mark. Minister Zucula does not dispute that the Portuguese speakers on PEL's team were not present at the signing ceremony. Indeed, photographs taken at the signing ceremony confirm that there were no Portuguese speakers on PEL's side during the ceremony.<sup>79</sup>
- 106 From the time of signature, PEL continued to rely on (and cite to Mozambique) the executed English version of the MOI at Exhibit C-5A.<sup>80</sup> Critically, Mozambique never disputed PEL's citation of the English MOI contemporaneously; it only did so once this Arbitration was commenced.
- 107 As for Mozambique's alleged English version of the MOI (at Exhibit R-2), this too was only seen by PEL for the first time when it was filed as an exhibit to

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<sup>74</sup> SOC, para. 107; **CWS-1**, Witness Statement of Mr Kishan Daga, paras. 43-44; Witness Statement of Mr Ashish Patel, para. 38-39.

<sup>75</sup> **CWS-1**, Witness Statement of Mr Kishan Daga, para. 43.

<sup>76</sup> **CWS-1**, Witness Statement of Mr Kishan Daga, paras. 43-45; **CWS-2**, Witness Statement of Mr Ashish Patel, para. 40; **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 35.

<sup>77</sup> **CWS-1**, Witness Statement of Mr Kishan Daga, para. 45; **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 36.

<sup>78</sup> **RWS-2**, Witness Statement of Mr Paulo Francisco Zucula, para. 16.

<sup>79</sup> **Exhibits C-205 – C-216**, Emails from Rafique Jusob of Mozambique's Investment Promotion Centre to Kishan Daga and Ashish Patel of PEL, attaching photos, dated 7 May 2011; **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 35.

<sup>80</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, paras. 41-44.

Mozambique's Request for Arbitration in the ICC Arbitration. Neither Mr Daga nor Mr Patel had seen that document previously, and neither had ever signed it.

108 It follows from the above that: (1) PEL's evidence that its English version of the MOI is authentic stands undisputed; (2) Mozambique's allegations that PEL has effectively forged or fabricated Exhibit C-5A is not supported by any evidence; and (3) Mozambique has not provided any evidence that its English version of the MOI exhibited as Exhibit R-2 is authentic.

109 In these circumstances, and on the basis of both the evidence adduced by PEL, as well as that which was *not* adduced by Mozambique, the Tribunal is invited to disregard Mozambique's red herring and find that it should rely upon PEL's English version of the MOI rather than the version adduced by Mozambique.

#### IV. FACTUAL BACKGROUND

A. *The Project, which Was Developed on the Basis of PEL's Experience and Know-How, Was PEL's Concept*

110 As explained in the SOC, PEL is a highly experienced infrastructure and construction company, that identified the potential for the Project, convinced Mozambique that it was feasible, and commissioned both the Preliminary Study and the PFS, thereby providing Mozambique with valuable information and know-how concerning the rail-to-port logistics corridor that has the potential to transform Mozambique's prospects of transporting and exporting coal.<sup>81</sup> Contrary to Respondent's contentions, PEL had the requisite experience to manage the Project, having previously and successfully managed and implemented large-scale infrastructure projects including dams, hydroelectric projects, railways, thermal power projects, highways, roads, bridges, tunnels, micro-tunnels, refineries and townships throughout Africa, India, Bhutan, Bepal, Sri Lanka, Qatar, Greece and the United States.<sup>82</sup>

111 These are unhelpful facts for Mozambique, which purports to give the (wrong) impression that PEL was not pivotal in the Project's development. Mozambique attempts to undermine PEL's experience and its central role in the Project's development by asserting that it was Mozambique that conceived of the Project and carried out the Preliminary Study at its own initiative. In support of this argument, Mozambique relies solely upon a passing mention of the Zambesia province's development in a 21-page government resolution, while purporting to give the impression that it conducted the PFS of its own initiative.

112 Mozambique's attempt to rewrite history does not pass muster. PEL's version of the Project's conception is confirmed by contemporaneous documentary evidence. In contrast, there is a dearth of evidence to support Mozambique's allegations.

1. PEL had the relevant experience to undertake the Project

113 In its SOD, Mozambique makes several misguided and incorrect assertions regarding PEL's experience and its capacity to advance the Project. These

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<sup>81</sup> SOC, paras. 50-86.  
<sup>82</sup> **Exhibit C-162**, Patel Engineering, Corporate Brochure, p. 9.



assertions are belied by the evidence on record and ignore the practical reality of developing a large-scale infrastructure project, such as the Project in issue in these proceedings.<sup>83</sup> In particular, Respondent incorrectly or disingenuously alleges that:

- (a) PEL had no relevant experience to bring to bear on the Project, specifically transportation infrastructure experience, or engineering, construction or logistics operations experience in Mozambique.<sup>84</sup> That assertion ignores the wealth of PEL's international project experience, as well as PEL's pleaded case that it had always intended to develop the Project with the benefit of external expertise; and
- (b) PEL was "*forced*" to form a consortium and relied on its consortium partners to advance the Project.<sup>85</sup> That assertion is false and demonstrates a fundamental misunderstanding of how mega infrastructure projects are carried out in practice.

114 The allegations regarding PEL's capacity and competence to execute and deliver the Project are belated and transparent attempts by Respondent to undermine PEL solely for the purposes of advancing another incorrect narrative in these proceedings. As the evidence and documentary record bears out, and as Respondent knows:

- (a) PEL had a track record of highly relevant infrastructure and project management experience which it could, and intended to, bring to the Project;
- (b) It is standard for parties with different expertise and industry experience to form partnerships and consortia to deliver successful large-scale infrastructure projects. That much must be clear to Mozambique, not least because the tender party awarded the Project, ITD, subsequently formed the TML Consortium, which itself entered into further partnerships in 2017 in order to carry out the Project;
- (c) PEL had formed a partnership with one of the leading transport, infrastructure and logistics companies in Africa, Grindrod Limited, South Africa ("**Grindrod**"), which had a wealth of experience in

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<sup>83</sup> SOD, paras. 25-32.

<sup>84</sup> SOD, paras. 25-30 and 32.

<sup>85</sup> SOD, para. 32.

delivering mega infrastructure projects and, as a member of the PGS Consortium (together with PEL and SPI) (the "**PGS Consortium**"), was ideally positioned to deliver the Project; and

- (d) Respondent's criticisms of PEL's capacity to deliver the Project is especially misplaced given that the party which was eventually awarded the tender, the TML Consortium, has failed to make any progress in developing the concession. Mozambique's claim that the TML Consortium had better experience and capacity to carry out the Project is undermined by the evidence available and the current status of the concession.

115 Each of these points is elaborated upon separately in the following sub-sections.

- (a) PEL had a long and successful track record as an experienced project manager of large-scale infrastructure projects

116 As explained in the SOC, PEL has more than 70 years' expertise and experience in large scale infrastructure and construction projects, which includes participation in over 250 projects globally across a variety of industry sectors, including power, civil construction and, crucially, transportation.<sup>86</sup>

117 PEL is a prominent engineering business, with more than 5,000 personnel, designers, planners, technicians and engineers and is listed on the Bombay Stock Exchange and National Stock Exchange of India.<sup>87</sup>

118 In respect of transportation, the SOC set out several examples of PEL's large infrastructure transportation project experience, including the completion of a rail line tunnel at Berdewaai for Konkan Railway in India.<sup>88</sup> In addition to this experience, a cursory review of PEL's portfolio demonstrates its depth of engineering and project-management experience on large-scale and mega infrastructure projects, including tunnel drilling, dam construction, marine works, and road and rail bridge construction. By way of example only, PEL was responsible for: (i) coordinating construction of the Roller Compacted Concrete Dam at the Ghatghar Pumped Storage Scheme in the State of

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<sup>86</sup> SOC, paras. 50-51. **Exhibit C-162**, Patel Engineering, Corporate Brochure.

<sup>87</sup> **Exhibit C-162**, Patel Engineering, Corporate Brochure.

<sup>88</sup> SOC, para. 52.

Maharashtra, which was the first RCC Dam built in India; (ii) carrying out the first Double Lake Tapping in Asia; and (iii) excavating Asia's largest Surge Shaft with a diameter of 38 metres.<sup>89</sup>

- 119 The quality of PEL's work has also been recognised in the array of awards and accolades it has received over a number of years, among these: (i) PEL won the Best Executed Hydro Electric Power Project of the Year 2018 by the Construction Times for its work on the Tuirail Hydro Electric Project in Mizoram;<sup>90</sup> (ii) PEL won the Best Executed Water Management Project of the Year 2017 by the Construction Times for its work on the SAUNI Yojana Link Water Project;<sup>91</sup> (iii) PEL was given several awards for its work on the Ghatghar dam project, including an Outstanding Concrete Structure Award by the Indian Concrete Institute in 2011;<sup>92</sup> and (iv) PEL was awarded a Quality Construction Award for its "*Outstanding Performance and Super Quality Construction*" work on the Konkan Railway in 1994.<sup>93</sup>
- 120 Moreover, Marco Raffinetti, the former Chief Executive of Capital Projects at Grindrod, who was responsible for Grindrod's participation as a member of the PGS Consortium with PEL and SPI, has confirmed that Grindrod "*did not enter into commercial agreements such as the MOU and Side Letter lightly and would only have done so if it was comfortable with PEL and SPI as partners, their ability to successfully implement the Project, the belief in the Project being commercially and economically sound, and with the PGS Consortium having a good prospect of success.*"<sup>94</sup> (Emphasis added)
- 121 Respondent's allegations regarding PEL's purported lack of experience and expertise are flatly contradicted by the documentary record. There is not a single piece of evidence indicating that Mozambique or its relevant ministries harboured any contemporaneous concerns about PEL's alleged lack of experience. Indeed, the fact that Mozambique entered into the MOI, giving PEL a first right of refusal to develop the Project, and that the MTC subsequently approved PEL's PFS, are the strongest indications of

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<sup>89</sup> Exhibit C-162, Patel Engineering, Corporate Brochure.

<sup>90</sup> Exhibit C-277, Construction Times Award 2018.

<sup>91</sup> Exhibit C-278, Construction Times Award 2017.

<sup>92</sup> Exhibit C-279, ICI Outstanding Concrete Structure Award 2011.

<sup>93</sup> Exhibit C-280, Quality Construction Award 1994.

<sup>94</sup> CWS-5, Witness Statement of Mr Marco Raffinetti, para. 24.

Mozambique's confidence in PEL's ability to deliver a successful concession.<sup>95</sup>

(b) As Respondent knows, PEL had always intended to establish a partnership with external experts to develop the Project

122 Respondent has chosen to ignore PEL's experience, instead alleging that it had no "*infrastructure design, construction, or operations in Mozambique*"<sup>96</sup> and that "*PEL's Annual Reports disclose no transportation infrastructure Projects in Mozambique*".<sup>97</sup>

123 However, in advancing that claim, Respondent ignores Claimant's pleaded case. PEL has never claimed either in these proceedings or previously that it would develop the Project without requisite external expertise. Indeed, it would be unthinkable for any responsible international engineering firm to attempt to carry out such a project without the benefit of relevant third-party experience.

124 In that context, Respondent's competence and experience allegations are especially disingenuous.

125 In particular, and as Respondent knows, the MTC specifically asked PEL to meet with potential partners on the Project in June 2012, including Odebrecht,<sup>98</sup> indicating the MTC knew that retaining third party expertise would be necessary to deliver the Project. Tellingly, the MTC failed to attend the meeting organised by PEL with Odebrecht despite the MTC having requested that it take place at the Ministry's offices.<sup>99</sup>

126 PEL had formed the PGS Consortium with Grindrod and SPI specifically with the intention of drawing on the consortium members' respective expertise to deliver the full technical requirements of the Project. As set out in further detail below, Grindrod had unparalleled port and rail project experience on the African continent, including in Mozambique, ensuring that the PGS

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<sup>95</sup> **Exhibit C-5A**, English Version of the MOI; **Exhibit C-5B**, Portuguese Version of the MOI; **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

<sup>96</sup> SOD, para. 27.

<sup>97</sup> *Id.*

<sup>98</sup> **Exhibit C-229**, Email from Arlanda Reis Cuamba of the MTC to Kishan Daga of PEL regarding meeting with Odebrecht, dated 26 June 2012.

<sup>99</sup> **Exhibit C-239**, Email from Kishan Daga of PEL to Arlanda Reis Cuamba of the MTC regarding meeting with Odebrecht, dated 7 August 2012.

Consortium was technically equipped to execute every aspect of the Project successfully.

- 127 Several of the parties that had entered the tender process were also formed of consortia or partnerships, and the TML Consortium, which was ultimately awarded the right to carry out the Project, was itself a consortium. Indeed, Respondent chastises PEL for forming a consortium with Grindrod and SPI to draw on their relevant skills and experience, while simultaneously praising the TML Consortium for doing the very same thing, which partnered with China National Complete Engineering Corporation ("CNCEC") and Mota Engil.<sup>100</sup> The only difference between PEL and the TML Consortium in this regard is that PEL had formed the PGS Consortium at the point of making the tender proposal, which meant the PGS Consortium would have been ready to develop the Project in earnest from day one. By contrast, the TML Consortium did not partner with CNCEC and Mota Engil until June 2017, nearly four years after the tender had been awarded. Despite noting this point in its SOD, Respondent fails to recognise that TML Consortium's lack of preparedness at the point of accepting the concession may actually suggest its lack of competence and suitability.
- 128 Respondent's assertion that PEL's decision to assemble a consortium "*demonstrates PEL's lack of experience and qualifications to receive a direct, stand alone concession for itself*"<sup>101</sup> serves to highlight Respondent's misunderstanding of how large infrastructure projects are carried out in practice. As Mr Daga explains in his statement "*[v]ery few companies, if any, would attempt to execute a Project of this magnitude on their own*".<sup>102</sup> Indeed, Mr Raffinetti confirms that the balance of expertise and experience between PEL, Grindrod and SPI, meant that the PGS Consortium was well equipped to carry out and execute the Project successfully.<sup>103</sup>

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<sup>100</sup> SOD, para. 860.

<sup>101</sup> SOD, para. 856.

<sup>102</sup> CWS-3, Witness Statement of Mr Kishan Daga, para. 127.

<sup>103</sup> CWS-5, Witness Statement of Marco Raffinetti, paras. 24 and 26.

- (c) Grindrod and SPI provided additional technical expertise and local experience to allow PEL to execute and deliver the Project successfully

129 Respondent's allegations as to competence and experience ring especially hollow when the additional expertise of Grindrod and SPI are considered.

130 As set out above, it was always PEL's intention to execute and deliver the Project with the benefit of world-leading, third-party expertise. That led to the formation of the PGS Consortium on 8 March 2013, pursuant to a Memorandum of Understanding between PEL, Grindrod and SPI, which set out the parties' agreement to participate in the tender process which had been imposed by Mozambique, contrary to PEL's rights in the MOI.<sup>104</sup>

131 However, as Mr Raffinetti explains, it was always his understanding that Grindrod would have worked in partnership with PEL and SPI on the Project either through a direct award or following the tender.<sup>105</sup>

- (a) As reflected in the Project Proposal<sup>106</sup> submitted by the PGS Consortium, it was anticipated that PEL would be responsible for the overall management of the Project, in view of its prior project experience and its familiarity with the Project after it had singlehandedly conducted the PFS.<sup>107</sup>

- (b) SPI, which was a Mozambique-registered company, would be able to provide its in-depth knowledge of the local market.

- (c) Grindrod, the leading provider of integrated logistics services in sub-Saharan Africa in both rail and port projects, was the technical partner and would have been responsible for the operation and maintenance of the railway lines and the planned port at Macuse.

132 Contrary to Respondent's complaint about a lack of Mozambique-related experience, Grindrod has some of the deepest and most relevant experience of

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<sup>104</sup> **Exhibit C-60**, Memorandum of Understanding between PEL, Grindrod and SPI, dated 8 March 2013.

<sup>105</sup> **CWS-5**, Witness Statement of Mr Marco Raffinetti, para. 21.

<sup>106</sup> **Exhibit C-190**, Technical Proposal, dated 27 June 2013.

<sup>107</sup> **CWS-5**, Witness Statement of Mr Marco Raffinetti, para. 26.

transport and logistics projects in the country,<sup>108</sup> which it intended to bring to the Project as a partner in the PGS Consortium. By way of example only:

- (a) since 2007, Grindrod, as an investor in the Maputo Port Development Company, has operated and managed the Maputo Port in Mozambique's capital city;<sup>109</sup>
- (b) Grindrod operates the *Terminal de Carvão da Matola* dry-bulk terminal in Mozambique, which has a capacity of 7.5 million tonnes, and exports magnetite and coal;<sup>110</sup> and
- (c) Grindrod operates Grindrod Mozambique Limitada in Maputo's main port, which has a throughput capacity of 4 million tonnes per annum, and exports coal, oxide and magnetite.<sup>111</sup>

133 In addition to this Mozambique-specific experience, Grindrod's depth of expertise is evident from the PGS Consortium's tender proposal, which Respondent has conveniently brushed over in its SOD. By way of example only:<sup>112</sup>

- (a) through Grindrod's Freight Services division, it could offer road transportation, port operations, rail solutions and warehousing services;
- (b) Grindrod currently manages and operates other port terminals in Africa, including Richards Bay terminal north of Durban, which is the largest coal export terminal in Africa and one of the largest in the world;
- (c) through its rail subsidiary, RRL Grindrod Locomotives, Grindrod was able to provide locomotive leasing, inbound and outbound rail cargo logistics and building and maintaining rolling stock, as it had successfully done with leading companies Vale and Rio Tinto; and
- (d) through another subsidiary, the GEAR Group, Grindrod could offer specialist rail infrastructure services, which included signalling,

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<sup>108</sup> CWS-5, Witness Statement of Mr Marco Raffinetti, para. 14.

<sup>109</sup> **Exhibit C-190D**, Technical Proposal, dated 27 June 2013, pp. 385-389; **Exhibit C-281**, Grindrod Website, History Page <http://www.grindrod.co.za/Pages/History>, viewed 5 August 2021.

<sup>110</sup> **Exhibit C-282**, Port Maputo Website, Coal Terminal Page <https://www.portmaputo.com/terminal/coal-terminal/>, viewed 5 August 2021.

<sup>111</sup> **Exhibit C-283**, Grindrod Website, Grindrod Terminals Page <https://grindrod.co.za/Company/39/Grindrod-Terminals>-viewed on 5 August 2021.

<sup>112</sup> CWS-5, Witness Statement of Marco Raffinetti, para. 15.

communications, automation and control technology services for railway systems.

134 In view of this highly relevant experience of transport and logistics projects, especially in Mozambique, Respondent's claim that PEL did not have the expertise to execute the Project is disingenuous and unduly fails to recognise the role of its partners in the PGS Consortium, which would have been involved in the Project either following direct negotiations or following a successful tender.<sup>113</sup>

(d) The consortium chosen by Respondent to progress the Project has shown itself to be wholly unable to complete it

135 Mozambique's uninformed allegations as to the competence and experience of PEL are ironic considering the current status of the Project under the stewardship of the successful tender party, ITD, which immediately formed the TML Consortium with Corredor de Desenvolvimento Integrado do Zambeze S.A. ("**CODIZA**"), a local Mozambican company, and the Directorate of the Ports and Railways in Mozambique ("**CFM**").

136 It is telling that despite succeeding in the tender bid in July 2013, the TML Consortium was subsequently required to seek external help to develop the Project from engineering consultants Mota Engil and CNCEC, in an agreement which was agreed nearly four years after the tender, in June 2017.<sup>114</sup>

137 By contrast, the PGS Consortium had been formed at the tender bid stage and was prepared to carry out both the construction and operational sides of the Project by drawing on the skills and experience of PEL, Grindrod and SPI as soon as the tender was awarded.

2. The Project was PEL's concept, which was previously considered not to be feasible

138 As explained in the SOC, PEL developed the concept for the Project following a visit to Mozambique in late 2008, and it commenced initial research in mid-

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<sup>113</sup> CWS-5, Witness Statement of Marco Raffinetti, para. 21.

<sup>114</sup> Exhibit C-284, China-Lusophone Brief Website, *Chinese-funded Moatize-Macuse Logistics Corridor scheduled to launch in 2019*, dated 10 July 2018 <https://www.clbrief.com/major-infrastructure-project-coming-soon-with-chinese-engineering-and-financing/>



2010 before it reached out to the relevant authorities.<sup>115</sup> Mr Patel sets out in his second witness statement that:

*"By the middle of 2010, PEL had begun to collect data relating to the possibility of developing such a project. As I also explained, given that Mozambique at that time only had one operating port in Beira with limited coal export capacity, a new export corridor and port promised to unlock the significant mineral resource potential in Mozambique and, from an investment angle, would allow for those resources to be monetised."*<sup>116</sup>

139 Mozambique had itself previously considered, and asked the CFM, to investigate whether such a logistics corridor would be feasible. In light of the siltation and swampland along the Macuse coast, the CFM experts concluded Macuse was an unsuitable port location.<sup>117</sup> PEL, however, saw the concept that Mozambique had previously considered a non-starter, and industriously turned it into reality. It convinced Mozambique that the Project, which it previously thought unfeasible, could be a game-changer for the Mozambican coal industry.<sup>118</sup>

140 Mozambique uses inflammatory language stating that PEL is asking the Tribunal *"to make an incredible finding"* when it submits that the Project was PEL's concept and that Mozambique appropriated such concept.<sup>119</sup> It contends that Mozambique originated the concept *"two years before PEL allegedly dreamed up its 'novel' idea."*<sup>120</sup> It further criticises PEL for not adducing any evidence of the initial research it conducted,<sup>121</sup> and denies that Mozambique ever thought the *"Tete-Macuse corridor as infeasible or impossible prior to PEL's involvement"*.<sup>122</sup>

141 These allegations, however, are not founded upon any evidence. Indeed, Mozambique has proffered no evidence whatsoever to demonstrate the Project was its concept.

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<sup>115</sup> SOC, paras. 53-67; CWS-1, Witness Statement of Mr Kishan Daga, paras. 10-16; CWS-3, Second Witness Statement of Mr Kishan Daga, para. 4.

<sup>116</sup> CWS-4, Second Witness Statement of Mr Ashish Patel, para. 5.

<sup>117</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 10; CWS-1, Witness Statement of Mr Kishan Daga, paras. 15.

<sup>118</sup> SOC, paras. 53-67; CWS-1, Witness Statement of Mr Kishan Daga, paras. 10-16; CWS-3, Second Witness Statement of Mr Kishan Daga, para. 10.

<sup>119</sup> SOD, para. 33.

<sup>120</sup> SOD, para. 35.

<sup>121</sup> SOD, para. 37.

<sup>122</sup> SOD, para. 39.

- 142 Rather, Mozambique seeks to distort PEL's case by creating confusion between the *general* concept of a transport corridor from the Tete to the Zambesia province and the *specific* concept suggested by PEL, namely a railway line linking the Tete region to a port in the Zambesia province at Macuse. It is not PEL's case that it was the first actor ever to have thought, in *general* terms, about a transport corridor between the Tete and Zambesia provinces. Instead, PEL's case is that a railway line linking the two regions with a port in Zambesia, to the extent it was previously envisaged, was thought not to be feasible because of the geological conditions in the area surrounding Macuse, Zambesia.
- 143 In this context, it is unsurprising that the single piece of evidence quoted in support of Mozambique's allegation that the Project was its concept does not directly discuss the specific corridor proposed by PEL and is consistent with PEL's case that a port in Macuse, Zambesia was no more than envisaged prior to its involvement.
- 144 Respondent's only evidence is a Resolution, dated 30 June 2009, setting out Mozambique's overall strategy for the integrated development of the transport system (the "**2009 Resolution**").<sup>123</sup> It mentions, in passing (in one paragraph out of the 21 pages), the possibility of an existing railway line departing from Nhamayabue in the district of Mutarara to connect with the railway line of Nacala, in Mutuali (the "**Nacala Corridor**").<sup>124</sup> This, in turn, would *inter alia* increase the capacity to move coal from Moatize that could be exported through the port of Nacala. It appears that Mozambique envisaged that these two railway lines would be connected by "roadways" rather than by rail. Further, a port in Macuse, also referred to in passing, was not described as being part of a transport corridor. The 2009 Resolution refers to making a port of Macuse "*feasible*". As explained by Mr Daga, this suggests that a port was not

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<sup>123</sup> RLA-15, Resolution No. 37/2009, dated 30 June 2009.

<sup>124</sup> See CWS-4, Second Witness Statement of Mr Ashish Patel, paras. 9-10 ("I understand that the 2009 Resolution is a general 21-page document setting out Mozambique's overall strategy for the integrated development of its transport network. I have read a translation of the relevant passages of the 2009 Resolution. It provides no support for the proposition that Mozambique had considered a logistics corridor linking the coal resources in Moatize by rail with a deep-water export terminal in Macuse to be viable, or that it had taken any steps at all to pursue such a project. The 2009 Resolution refers to 'increas[ing] the capacity to move the coal from Moatize that could be exported through the port of Nacala'. This is the only reference to the coal resources in Moatize in the entirety of the 2009 Resolution. The 2009 Resolution also envisages a railway line service between Nhamayabue, in Mutara, and Nacala, in Mutuali, through different routes which would in turn make feasible 'the ports of Quelimane, Macuzi, Pebane and perhaps the future possible ports of Savane and Chinde.' There is no reference to transportation of coal through a railway link from Moatize to a deep-water port in Macuse, as PEL went on to propose and thereafter establish in its PFS.")

considered to be feasible at the time.<sup>125</sup> A translation of the relevant passage of the 2009 Resolution is set out below:

*"Departs from Nhamayabue, in the District of Mutarara, crosses the districts of Morrumbala, Milange, Lugda, Namarroi Gurué to connect with the railway line of Nacala, in Mutuali. This railway line shall have a fundamental influence on the development of Zambezia province (with its undeniable economic importance considering its great agricultural, mining, and tourism potential) and will increase the capacity to move the coal from Moatize that could be exported through the port of Nacala. Line 4 will be served by the following roadways:*

- *Milange - Megaza- Inhangoma;*
- *Mopeia - Morrumbala;*
- *Milange - Nhamanjavira - Nicoadala;*
- *Mocuba - Lugela - Tacuane - Muabanama;*
- *Ile-Namarroi;*
- *Ile - Gurue-Lioma - Mutuali.*

*Line 4, as well as featuring the ports of Beira and Nacala, will be able to complement and make feasible the ports of Quelimane, Macuzi, Pebane and perhaps the future possible ports of Savane and Chinde."<sup>126</sup>*

145 As follows from the MTC's map of Mozambique's rail corridors attached as Exhibit C-197, the Nacala Corridor is different from the Macuse corridor proposed by PEL.<sup>127</sup> Mr Daga clarified that the Macuse corridor was only mapped by the MTC in 2012.<sup>128</sup>



<sup>125</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, paras. 11.  
<sup>126</sup> RLA-15, Resolution No. 37/2009, dated 30 June 2009.  
<sup>127</sup> Exhibit C-197, Map of Mozambique's Rail Corridors, dated 2013.  
<sup>128</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, paras. 12.

- 146 Given it has no evidence that the Project was its concept, Mozambique has sought to argue that other actors conceived of the Project. Again, Mozambique has failed to produce any evidence that companies other than PEL showed interest in the Project during the relevant period between the 2009 Resolution and 2011, despite the fact that it was directed to do so by the Tribunal, pursuant to Claimant's Document Request No. 2.<sup>129</sup> The only reasonable inference from its failure to produce a single document in relation to this request, is that the Project was not of interest to other companies prior to PEL's involvement.
- 147 Mozambique's attempt to save its argument by relying on an irrelevant letter from Rio Tinto to PEL, which post-dates the entry into force of the MOI, also falls flat. It is alleged that others were interested in the Project, such that it was not PEL's concept, by reference to the fact that Rio Tinto declined "*PEL's preliminary investigative discussions...choosing instead to present a proposal of its own*" through a letter dated 21 February 2012.<sup>130</sup>
- 148 Even ignoring the timing of the letter – which is fatal to Mozambique's argument – it does not support the proposition that Rio Tinto had the concept of the Project. To the contrary, it is relied upon by PEL as evidence that after the MOI had entered into force, Mozambique breached its duty of good faith by discussing the Project with other actors.<sup>131</sup>
- 149 In contrast, the document identified by PEL through the document production process confirms that PEL was indeed conducting initial research on the Project in mid-2010. In particular, PEL has identified an excel spreadsheet reflecting initial research and data collected by Mr Daga. The document was given to Dr Vincente, a consultant specialising in business exports from Mozambique.<sup>132</sup> The document covered the potential costs for the construction of the railway line and the port, and the potential revenue that could be generated.<sup>133</sup> It also envisaged different phases for the construction of the Project and discussed the possibility of obtaining funding, the creation of a consortium with the Government, with which the capital could be shared equally.<sup>134</sup>

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<sup>129</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, pp. 6-7.

<sup>130</sup> SOD, para. 40.

<sup>131</sup> SOC, paras. 144-145.

<sup>132</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 6.

<sup>133</sup> **Exhibit C-196**, Mozambique Coal Export Spreadsheet prepared by Kishan Daga.

<sup>134</sup> *Id.*

- 150 Professor Satya Pudukollu, a geologist who had worked in Mozambique for a considerable period of time, also advised PEL when the concept of the Project was initially developed by PEL.<sup>135</sup> However, as explained by Mr Daga, PEL does not have any documents from Professor Pudukollu because more than ten years have passed since the events in question, and most of the discussions were in person meetings.<sup>136</sup>
- 151 Mozambique further fails to dispute in any meaningful way the fact that prior to PEL's involvement, it had considered the possibility of a port in the area of Macuse and concluded that it was not feasible.
- 152 As explained by PEL, Mr Fonseca, the then chairman of the CFM, informed Mr Daga in the CFM's initial meeting with PEL that the CFM had previously considered that it would not be possible to establish a port in the area of Macuse,<sup>137</sup> a fact which was later confirmed by Minister Zucula.<sup>138</sup>
- 153 Mozambique's position is not credible. The entity that had considered the Project's feasibility (and would have documentation of that purported analysis) was the CFM, not Minister Zucula. Moreover, as explained above, any statement by Minister Zucula must be treated with extreme caution, given that he has been convicted of dishonesty offences and was apparently in Mozambique's prisons when he gave his statement in this Arbitration.
- 154 In addition, Mozambique did not dispute contemporaneously that the Project was PEL's concept when PEL wrote about this on 22 January 2013 and on 4 June 2013:

*"It was with the aim to find Techno- Commercial Solution for development of infrastructure to enhance the export potential of Mineral wealth of Mozambique we had conceived the idea of the project from green field stage when no one knew about such project can be developed in this region. We have made initial studies, prefeasibility study at our own cost, developed the project which can be feasible from financial angle and presented to government a techno-commercially viable project with time lines."<sup>139</sup> (Emphasis added)*

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<sup>135</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 7.

<sup>136</sup> *Id.*

<sup>137</sup> CWS-1, Witness Statement of Mr Kishan Daga, para. 15; CWS-3, Second Witness Statement of Mr Kishan Daga, para. 10.

<sup>138</sup> CWS-1, Witness Statement of Mr Kishan Daga, para. 24; CWS-3, Second Witness Statement of Mr Kishan Daga, para. 10.

<sup>139</sup> Exhibit C-20, Letter from Kishan Daga of PEL to Minister Zucula of the MTC disputing the Government's decision to conduct a public tender, dated 22 January 2013.

*"PATEL has identified the project and made all possible studies present to the Government the project".<sup>140</sup>*

155 It follows that PEL's submissions that it conceived of the concept to develop a game-changing rail-to-port logistics corridor (which Mozambique had written off as unfeasible), stands unrebutted. The exaggeration of Mozambique's pretend outrage in this respect is inversely proportional to the dearth of evidence Mozambique adduces in support of its allegation that it originated the concept of the Project and/or considered it to be feasible, prior to PEL's involvement.

3. PEL Convinced Mozambique to Give Serious Consideration to the Project and Commissioned the Preliminary Study

156 In early 2011, PEL started to reach out to the relevant authorities and decision-makers within Mozambique regarding PEL's proposed solution to Mozambique's stranded coal assets.<sup>141</sup> As Mr Patel explains:

*"At those initial meetings, as I explained in my first statement, Minister Zucula made it clear that a port in Macuse had been considered (presumably as part of the general strategy set out in the 2009 Resolution) but had been dismissed as a viable option by the Directorate of Ports and Railways (the 'CFM'). The gist of the representation by Minister Zucula in this respect was that the Project proposed by PEL previously had been deemed to be a non-starter by the CFM. I recall that one objection raised by Minister Zucula was that Macuse could not be used as a deep-water port and, instead, would only be suitable as a shallow water port or jetty. This would make Macuse unsuitable for the export of high volumes of coal, given the limited size of the vessels that would be able to dock. As a result, it took some convincing for the MTC to believe in the Project as we did, and it was for this precise reason that the MTC had suggested to us that PEL should first commission the Preliminary Study, in cooperation with MTC personnel."<sup>142</sup>*

157 The Project was well received such that PEL commissioned the Preliminary Study, which, at Mozambique's request, was conducted by two experts assigned by the MTC.<sup>143</sup> The Preliminary Study confirmed that it was worth taking the Project to the next stage, and preliminarily determined that Macuse

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<sup>140</sup> **Exhibit C-35**, Letter from Kishan Daga of PEL to Minister Zucula of MTC responding to the MTC's change in position regarding direct negotiations, dated 4 June 2013.

<sup>141</sup> SOC, paras. 67-77.

<sup>142</sup> **CWS-4**, Second Witness Statement of Mr Ashish Patel, para. 11.

<sup>143</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 18.

would be the most appropriate location for a future port from which to export Mozambique's natural resources.<sup>144</sup> Thus, PEL's belief in and perseverance of the Project prevailed, notwithstanding the CFM's previous conclusion that the location's siltation and swampland would make Macuse unsuitable.

158 Mozambique alleges that the Project was not PEL's concept because the Preliminary Study was conducted by the MTC's specialists.<sup>145</sup>

159 It is correct that, at the MTC's request, two MTC specialists conducted the Preliminary Study. However, Mozambique fails to mention that it was PEL alone that convinced Mozambique to undertake such study,<sup>146</sup> that Mozambique demanded that PEL bear all of the expenses associated with it, and that the MTC required that its own experts be involved in undertaking the Preliminary Study.<sup>147</sup> In the course of the document production phase, PEL identified further documents demonstrating that it was PEL who proceeded to convince Mozambique to undertake the Project, through meetings with Ministers of Planning and Development and the MTC.<sup>148</sup>

160 What is more, the fact that PEL commissioned the Preliminary Study is acknowledged in the study itself,<sup>149</sup> which also explicitly expresses "*gratitude for their support and contribution to this study, towards: ... The PATEL Engineering Team in the Republic of Mozambique.*"<sup>150</sup> The Preliminary Study explicitly refers to and expresses gratitude for the participation of Mr Daga, Mr Patel and PEL geologists Dr Sudhakar and Mr Malapur.<sup>151</sup>

161 As explained by Mr Daga, other members of the PEL team also participated in the Preliminary Study, including Professor Pudukollu, Mr Bantwal Subraya Prabhu (PEL's representative in Mozambique and accountant) and Sal & Caldeira Advogados (PEL's lawyers in Mozambique).<sup>152</sup>

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<sup>144</sup> SOC, paras. 81-85.

<sup>145</sup> SOD, paras. 36.

<sup>146</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 10.

<sup>147</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 17.

<sup>148</sup> **Exhibit C-199**, Email from Kishan Daga of PEL to Rupen Patel of PEL regarding meeting with the Minister of Planning and Development, dated 15 February 2011, confirming **Exhibit C-3**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding "*Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde*", dated 17 February 2011; and **C-55** Letter from PEL to Ministry of Planning and Development, regarding "*Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde*", dated 17 February 2011.

<sup>149</sup> **Exhibit C-4a**, Preliminary Study to Assess Potential Port Locations in Zambezia, to Connect the Moatize Coal Mines By Rail, March 2011, p. iv.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 21.

162 During the document production phase, PEL also identified a document demonstrating that one of the MTC specialists conducting the study, Mr Muhate, sent a proposal for the Preliminary Study to Mr Daga, further to his conversations with Mr Daga in relation to the logistics corridor. Mr Muhate requested that Mr Daga review and approve his proposal before any fieldwork commenced:

*"Once you give us the green light on this we are redy [sic] to travel to the destinations on the 6th March for about 7 days in the fiel[d]work."<sup>153</sup>*

*B. Mozambique Granted PEL A Right to the Direct Award of the Project Concession, Together with Exclusivity and Confidentiality Rights in Exchange for PEL's PFS*

163 The terms of the bargain between the Parties are so clear on the face of the MOI (whichever version is considered) that Mozambique is reduced to putting forward a strained interpretation of that document, which is not only inconsistent with the MOI itself but also contradicted by Mozambique's own conduct after its entry into force and by the evidence of the Parties' negotiations that PEL retrieved during the document production phase.

1. PEL's Interpretation of the MOI Is Supported by the Plain Language of the MOI (Whichever Version Is Considered)

164 On 6 May 2011, the Parties entered into the MOI, whereby PEL agreed to carry out the PFS at its sole expense<sup>154</sup> in consideration of which Mozambique promised that if it approved the PFS and PEL decided to implement the Project through the exercise of its right of first refusal, Mozambique would grant PEL a concession to implement the Project.<sup>155</sup> This is confirmed by Mr Patel and Mr Daga in their respective witness statements:

*"As I explained in my first statement, it was always clear to me that if PEL undertook to conduct the PFS at its own costs, it needed a guarantee that it would receive a concession to implement the Project. I even insisted that there should be a*

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<sup>153</sup> **Exhibit C-200**, Email from Isaias Muhate of the MTC to Kishan Daga of PEL attaching work plan and fee proposal, dated 26 February 2011.

<sup>154</sup> **Exhibit C-5A**, English Version of the MOI, Clause 1.

<sup>155</sup> *Id.* at Clauses 2(1) and 2(2).



*minimum duration for such a concession, and one which make sense from a financing perspective."*<sup>156</sup>

*"As I explained in my first statement, the most important point for PEL in the MOI was that it be granted a concession for the Project, considering that it was taking on the entire risk of performing at its own costs a prefeasibility study".*<sup>157</sup>

165 As a logical flipside to its commitment to award the concession directly to PEL, Mozambique granted PEL exclusivity rights in relation to the Project (and any substantially similar projects), committed not to grant rights in respect of the Project to any other party,<sup>158</sup> and to keep the information shared in relation to the Project confidential.<sup>159</sup>

166 This is clear on the face of the MOI, whichever version is considered. Other than Clause 2(1), the remainder of the MOI is common ground.

167 Clause 1 contains PEL's obligation to carry out the PFS at its own expense:

***"The objective of the present memorandum is to undertake the prefeasibility study the expense of which will be entirely borne by PEL, of the development of a port infrastructure on the coast of Zambesia province and a railway line of approximately 500 (five hundred) kilometers from the Tete region to the said port under a Public Private Partnership (PPP) ("the Project") defining the basic terms and conditions for the granting of a concession by the Govt. of Mozambique to PEL for the construction and operation of the project."***<sup>160</sup>  
(Emphasis in original and added)

168 Clause 2 contains Mozambique's obligation to grant PEL the concession in respect of the Project, subject to Mozambique's approval of the PFS and PEL's decision to implement the Project through the exercise of its right of refusal:

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

***2. After the approval of the pre-feasibility study PEL shall have the first right of refusal for the implementation of the***

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<sup>156</sup> CWS-4, Second Witness Statement of Mr Ashish Patel, para. 13.

<sup>157</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 48.

<sup>158</sup> Exhibit C-5A, English Version of the MOI, Clause 6.

<sup>159</sup> *Id.* at Clause 11.

<sup>160</sup> Exhibit C-5A, English Version of the MOI.

*project on the basis of the concession which will be given by the Government of Mozambique."*<sup>161</sup> (Emphasis added)

169 Clause 7 essentially provides that the Parties should enter into a new memorandum to undertake another study of a similar project, should the corridor envisaged by the MOI be found techno commercially unviable:

*"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."*<sup>162</sup>

170 Clause 6 grants PEL exclusivity rights in relation to the Project (and substantially similar projects) during the time when PEL conducted the PFS and the Project was being approved, and prevented Mozambique from granting any right or authorisation to any other party for the development or expansion of the Project. While the latter obligation was not limited in time, it logically applied until PEL had exercised its right of first refusal. In other words, if PEL refused to implement the Project, Mozambique was no longer bound by the exclusivity clause in the MOI.

171 Clause 6 reads as follows:

*"During the prefeasibility study and the process of approval for the project, MTC agrees that within the terms of the specific legislation it will not solicit any proposal of study for the objective of the present Memorandum. MTC also agrees not to give any rights/authorization to any other party for the development/expansion of a port between Chinde and Pebane for similar objectives, nor for the development/expansion of any rail corridor from Tete to the province of Zambezia within the area referred under objective of the present memorandum."*<sup>163</sup>

172 The confidentiality Clause of the MOI, Clause 11, provides:

*"The parties have agreed to keep all the data, documents, information, and share between them whether written or otherwise, including this MOI as confidential until the approval of the project."*<sup>164</sup>

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<sup>161</sup>

*Id.*

<sup>162</sup>

*Id.*

<sup>163</sup>

**Exhibit C-5A**, English Version of the MOI.

<sup>164</sup>

*Id.*

2. Mozambique's interpretation of the MOI amounts to attempting to put a square peg into a round hole

173 Faced with the clear wording of the MOI, Mozambique argues that the MOI was a "*contingent, non-binding preliminary document*" intended to memorialise that PEL would undertake the PFS at its own cost, and if the PFS was deemed acceptable by the MTC, PEL would benefit from a 15% margin of preference in the tender in respect of the Project that would be organised by Mozambique.<sup>165</sup> Mozambique likewise erroneously interprets the MOI's exclusivity provision as meaning that PEL alone would be provided with a preferential position at the public tender and other bidders would not.<sup>166</sup>

174 The hopelessness of Mozambique's argument is rendered obvious by the manner upon which it is forced to articulate it: Mozambique only relies upon alleged evidence that is *not* contained in the MOI.

(a) Mozambique's argument that the MOI is not a binding agreement is contradicted by the MOI itself

175 Mozambique tries to ignore the MOI altogether by arguing that it was a non-binding agreement because it was not Mozambique's intention for the MOI to be binding.<sup>167</sup> This is exclusively founded<sup>168</sup> on the testimony of Minister Zucula that the MOI was a "*gentlemen's agreement to try to agree*"<sup>169</sup> and on Mr Chaúque's strange assertion that the "*MOI never intended to make or promise direct compensation for the pre-feasibility study*".<sup>170</sup>

176 However, this is belied by the wording of the MOI itself, which is replete with mandatory language. The word "*shall*" is used throughout the MOI, specifically with regards to the Parties' respective obligations.<sup>171</sup> Mozambique's argument that the MOI is not binding is also inconsistent with its own acknowledgment that PEL had an obligation to carry out the PFS.<sup>172</sup>

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<sup>165</sup> SOD, paras. 54-56.

<sup>166</sup> *Id.* at para. 60.

<sup>167</sup> *Id.* at paras. 44, 47 and 48.

<sup>168</sup> *Id.*

<sup>169</sup> **RWS-2**, Witness Statement of Mr Paulo Francisco Zucula, para. 6.

<sup>170</sup> **RWS-1**, Witness Statement of Mr Luis Amandio Chauque, para. 7.

<sup>171</sup> See e.g. **Exhibit C-5A**, English Version of the MOI, Clause 2(1) ("*PEL shall carry out a prefeasibility study ... the Govt. of Mozambique shall issue a concession of the project in favour of PEL*"); Clause 2(2) ("*After the approval of the prefeasibility study PEL shall have the right of first refusal...*"); Clause 3(1) ("*PEL shall submit the feasibility report within a period of 12 months ...*"); Clause 4 ("*The direct costs necessary to conduct the feasibility study shall be entirely borne by PEL*"); Clause 5(1) ("*MTC shall provide the required assistance to PEL ...*"). (Emphasis added)

<sup>172</sup> SOD, paras. 50-52.

A non-binding agreement would not create any obligation for any of the Parties, including for PEL, or contain a dispute resolution provision. The fact that an official signing ceremony was organised, in which dozens of photos were taken by Mozambique,<sup>173</sup> is also at odds with the idea of a mere agreement to agree.

177 Finally, Mr Baxter, PEL's PPP procurement expert, explains that:

*"in my opinion, based on the terms of the MOI and conduct of Mozambique, PEL could have expected a direct award of the concession agreement. The terms and conditions of the concession agreement could have been negotiated later once the Project was awarded to PEL. That seems to be precisely what the Government intended when it requested PEL to exercise its right of first refusal and to negotiate with the CFM."*<sup>174</sup>

(b) Mozambique's argument that the MOI could not have been a binding agreement under Mozambican law is wrong

178 Apparently realising that its argument that the MOI was non-binding is unlikely to succeed, Mozambique further maintains that the MOI *could* not have been binding because it would have been illegal under Mozambican law to grant a right to a direct award of the concession.<sup>175</sup>

179 Mozambique's argument that if the MOI granted PEL a right to a direct award, it would have been illegal is based upon Mozambique's incorrect assertions that (i) Minister Zucula and the MTC would not have had the authority to promise a direct award of a concession;<sup>176</sup> (ii) the MOI did not contain the material terms of a concession;<sup>177</sup> and (iii) such promise could not be made under Mozambican law.<sup>178</sup>

180 All these allegations are rebutted in Professor Medeiros' first report. As he explains, there is no doubt that the MTC had the power to enter into the MOI and to grant PEL a right to a direct award of a concession subject to the fulfilment of certain conditions, which was permissible under the law applicable at the time when the MOI was entered into, Decree no. 15/2010 of

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<sup>173</sup> **Exhibits C-205 – C-216**, Emails from Rafique Jusob to Kishan Daga, attaching photos of the signing ceremony, dated 7 May 2011.

<sup>174</sup> **CER-7**, Expert Report of Mr David Baxter, para. 155.

<sup>175</sup> SOD, paras. 46, 48, 64 and 472.

<sup>176</sup> SOD, paras. 46, 48, 64 and 472.3.

<sup>177</sup> *Id.* at paras. 48, 64.

<sup>178</sup> *Id.* at 48, 64, 472.2.

24 May 2010 (the "**Public Procurement Rules**")<sup>179</sup> as well as explicitly envisaged by the Law no. 15/2011 of 10 August 2011 (the "**PPP Law**"), which the Parties knew would be the law in force by the time the PFS was approved (in May 2012) and a concession awarded.<sup>180</sup>

181 Professor Medeiros has further addressed these issues in his second report, stating in very clear terms that:

- (a) *"In no way is the MoI a 'non-binding agreement to agree' (SoD para. 18.), as if it were a mere gentlemen's agreement";*<sup>181</sup>
- (b) The MTC did have the power to enter into the MOI;<sup>182</sup> and
- (c) There was no legal impediment – quite the contrary – for the MTC to grant PEL a right to a direct award.<sup>183</sup>

182 As for Mozambique's argument that the material terms of a concession were missing from the MOI, it conflates the right to a direct award of a concession, which was granted by the MOI, with the concession itself, as confirmed by Professor Medeiros in his second report.<sup>184</sup> It is not argued that the MOI itself was a concession agreement but that the MOI granted PEL the right to a direct award of the concession in respect of the Project. As explained by Professor Medeiros, *"The MoI constituted a right to the award of the concession, which is not the same as actually awarding the concession"*,<sup>185</sup> it *"does not breach the Public Procurement Rules because it does not fall under the scope of its application"*<sup>186</sup> and it *"is not contrary to the PPP Law and Regulations... Respondent ... confuses the MoI with the concession contract. The MoI did not award the actual concession, but merely the right to enter into a concession, by means of an administrative procedure for direct award, should the conditions precedent set forth in the MoI be met"*.<sup>187</sup>

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<sup>179</sup> CER-3, Legal Opinion of Professor Rui Medeiros, paras. 31-35 where Professor Medeiros states that the list of cases in which a direct award may be adopted in Decree 15/2010 was not an exhaustive and the administration had discretion to grant such direct award.

<sup>180</sup> *Id.* at paras. 37-49.

<sup>181</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Section 3.8, para. 59.

<sup>182</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Section 3.1.

<sup>183</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Section 2.2. and also paras. 36.1, 37, 28, 29.

<sup>184</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Executive Summary, E, H to L and Section 3.

<sup>185</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Executive Summary, E.

<sup>186</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Executive Summary, H.

<sup>187</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Executive Summary, L.

- (c) Mozambique's argument that the MOI merely granted PEL a 15% scoring advantage is not supported by the MOI (whichever version one relies upon)

183 Yet further undermining its argument that the MOI was a non-binding agreement, Mozambique suggests that the MOI created an obligation for PEL to carry out the PFS against which, if the PFS was deemed acceptable by Mozambique, PEL would receive a 15% scoring advantage in the tender to be organised by Mozambique.<sup>188</sup>

184 There are a number of challenges with this argument, all of which Mozambique fails to overcome.

185 First, the English version of the MOI neither refers to a tender, nor to a right of preference, nor to 15% scoring advantage. Not even Mozambique's English version of the MOI does so.

186 While it is true that, in the Portuguese version of the MOI, the right of first refusal has been translated as "*direito de preferência*", it neither refers to a public tender, nor to a scoring advantage in a public tender.

187 Mozambique's only piece of evidence in this respect is the testimony of Minister Zucula that it was the common understanding of the Parties that PEL would only be granted a scoring advantage in the context of a public tender.<sup>189</sup>

188 As explained above, Minister Zucula is not a credible witness. What is more, his testimony in respect of PEL's alleged "*direito de preferência*" is inconsistent. He argues that PEL's right was to consist only of a scoring advantage in the context of a tender.<sup>190</sup> Yet, later in his testimony, he suggests that PEL had a right of preference to be exercised in the context of the tender *as well as* a right of first refusal by stating: "*PEL would be exclusively provided the preferential position at the public tender...and PEL could exercise its right of first refusal if PEL prevailed at the tender.*"<sup>191</sup>

189 Second, Mozambique's interpretation is not supported by the rest of the MOI.

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<sup>188</sup> SOD, paras. 44-45 and 47.

<sup>189</sup> SOD, paras. 44-45, 54-55.

<sup>190</sup> **RWS-2**, Witness Statement of Mr Paulo Francisco Zucula, para. 10.

<sup>191</sup> *Id.* at para. 17.

190 Clause 2(2) of the MOI, which is identical in all the versions of the MOI, explicitly refers to a concession. It provides PEL with "*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.*"<sup>192</sup> Of note, neither does this language refer to a tender nor to a 15% scoring advantage.

191 The unequivocal exclusivity clause of the MOI, which is identical in all the versions of the MOI, also supports the fact that the MOI granted PEL a right to a direct award of a concession. It is the logical flipside of such right in that it explicitly granted PEL exclusive rights in relation to the Project (and substantially similar projects) during the time when PEL conducted the PFS and the Project was being approved but also, prevented Mozambique from granting any right or authorisation to any other party for the development or expansion of the Project.

192 Mozambique is therefore reduced to putting forward a number of strained arguments.

193 It argues that the exclusivity clause "*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.*"<sup>193</sup>

194 This is incompatible with the wording of Clause 6, which neither mentioned a preferential right, nor a public tender, nor other bidders, nor PEL's right of first refusal. Clause 6, the contents of which are common ground, reads as follows:

*"During the prefeasibility study and the process of approval for the project, MTC agrees that within the terms of the specific legislation it will not solicit any proposal of study for the objective of the present memorandum. MTC also agrees not to give any rights/authorization to any other party for the development/expansion of a port between Chinde and Pebane for similar objectives, nor for the development/expansion of any rail corridor from Tete to the province of Zambezia within the area referred under objective of the present memorandum."*<sup>194</sup>

195 As explained above, Mozambique's argument is also inconsistent with its own submissions, in that it means that PEL had a scoring advantage *as well as* a

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<sup>192</sup> Exhibit C-5A, English Version of the MOI.

<sup>193</sup> SOD, para. 60; RWS-2, Witness Statement of Mr Paulo Francisco Zucula, para. 17.

<sup>194</sup> Exhibit C-5A, English Version of the MOI.

right of first refusal (i.e. the right to elect to execute the Project) when Mozambique elsewhere argues that the right of first refusal was a mere scoring advantage.<sup>195</sup>

196 Mr Daga states that this interpretation of the exclusivity clause "*was never discussed between the parties and was not their understanding*".<sup>196</sup> As explained by Mr Daga, this is confirmed by the fact that the tender procedure was never discussed in the correspondence between the Parties prior to signing and agreeing the MOI: "*Instead, the discussions in all the correspondence and MOI drafts are about binding our counterparty into awarding us the concession upon the completion and acceptance of the PFS*".<sup>197</sup>

197 As confirmed by Professor Medeiros in his second report, "*the text of the MoI supports the reading that PEL's right of first refusal / direito de preferência is a right that may be exercised regardless of a tender procedure and consequent bids of third parties*" and that "*the figure and concept of direito de preferência, as conceived in its origins in the law (see Article 414 et seq. of the Mozambican CC) is perfectly compatible with the negotiation and direct award of the concession*"<sup>198</sup>. Moreover, according to the principles of contract interpretation set forth in Mozambican law, the behaviour of the Parties – which is key to the interpretation of a contract, "*confirms that immediately after the approval of the pre-feasibility study, the MTC and PEL assumed that the contract granted PEL the right to a direct award of the concession contract. In fact, given that the MTC offered PEL the possibility of exercising its right before launching a tender procedure (and as such naturally before any bids of third parties existed), it is obvious that the MTC never considered the right set out in Clause 2 (2) of the MoI to be a right to be exercised within a public tender procedure, i.e. to match the winning bid, as sustained in the TFM, Legal Opinion*".<sup>199</sup>

198 What is more, and as also stated by Professor Medeiros in his second report, "*the right to a bonus, a quantitative advantage, cannot be confused with a right of first refusal or direito de preferência, as **these are two entirely distinct legal concepts***".<sup>200</sup>

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<sup>195</sup> SOD, para. 54.

<sup>196</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 69.

<sup>197</sup> *Id.*

<sup>198</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 18.

<sup>199</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 19.

<sup>200</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 20 to 23, i.e. para. 22 (Emphasis added).



199 Mozambique further argues that Clauses 2(1) and 2(2) are inconsistent because 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 [sic]*".<sup>201</sup>

200 This argument is hard to follow. There is no inconsistency between Clauses 2(1) and 2(2). PEL had a right to refuse to implement the Project, even if its PFS was approved and Mozambique thus had an obligation to issue a concession in its favour. As confirmed by Mr Baxter, the right of first refusal is a contractual right to enter into a business transaction with a government or company before any other party can.<sup>202</sup> Mr Daga explains that:

*"This was particularly important as it ensured that PEL could refuse the Project without being in breach of the agreement, should it no longer wish to participate in the Project. It was important for PEL to have an option to walk away from the Project if further study would have revealed that the economics of the Project were not sufficiently interesting for PEL. It also bound Mozambique to propose the implementation of the Project to PEL, and have PEL's express answer, before it proposed it to any other company. We never considered or discussed any meaning of the right of first refusal under Mozambican law".<sup>203</sup>*

201 The concept of *direito de preferência* has the same meaning under Mozambican law, as confirmed in Professor Medeiros' first report<sup>204</sup> and reiterated in his second report: "*the 'direito de preferência' confers the right upon the beneficiary to decide to enter into the contract (or not). In contrast, under the Bonus System, a bonus or margin (in this case, purportedly 15%) is added to the proponent's score in the context of a public tender; however, this advantage is of no relevance towards conclusion of the contract*".<sup>205</sup>

202 Mozambique also argues that the reference to Clause 7 in Clause 2(1) of the MOI means that if the Project is not viable, "*a concession shall not issue [sic] to PEL, and not the other way around*".<sup>206</sup> It apparently suggests that there were conditions other than the approval of the PFS and the exercise of the first right of refusal to the issuing of a concession. This is a bizarre argument.

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<sup>201</sup> SOD, para. 80.

<sup>202</sup> CER-7, Expert Report of Mr David Baxter, para. 156.

<sup>203</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 57.

<sup>204</sup> CER-3, First Legal Opinion of Professor Rui Medeiros, para. 19.

<sup>205</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, i.e. Executive Summary – D and para. 18.2.

<sup>206</sup> SOD, para. 81.

- 203 The reference to Clause 7 in Clause 2(1) simply ensured that (i) if pursuant to Clause 7, a new memorandum was entered into because the PFS determined that the Project was not commercially viable, (ii) the Parties' obligations set out in Clause 2(1) of the MOI would remain the same, namely PEL would still have the obligation to carry out a PFS and the Government would still have an obligation to issue a concession. This is supported by the wording of the relevant clauses.<sup>207</sup>
- 204 To the extent there is any tension between Clause 2(1) and Clause 7 (which is denied), it can be explained by the fact that, in previous drafts of the MOI, Clause 7 contained PEL's obligation to carry out the PFS and the conditions in which it would be approved, in addition the provision regarding the entry into a new memorandum should the Project be found unviable.<sup>208</sup> The cross reference to Clause 7 in Clause 2 appears to have been added in this broader context.<sup>209</sup>
- 205 Third, Mozambique's interpretation is not supported by the commercial logic of the MOI. It argues that the scoring advantage was sufficient to make it worth PEL's effort.<sup>210</sup> In support of this argument, Mozambique quotes the MZBetar Report, which states, in essence, that it is common for parties to conduct preliminary studies without any expectation of winning the tender or receiving the award.<sup>211</sup>
- 206 Again, Mozambique's argument is neither supported by the MOI, nor by any evidence of discussions between the Parties to the MOI. It relies merely upon generalities. The MOI clearly provided that PEL agreed to carry out the PFS at its sole expense in consideration of which Mozambique promised that if it approved the PFS and PEL decided to implement the Project through the exercise of its right of first refusal, Mozambique would grant PEL a concession to implement the Project.

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<sup>207</sup> **Exhibit C-5A**, English Version of the MOI. Clause 7 provided "[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" and Clause 2(1) provided that "1. PEL shall carry out a prefeasibility study (PFS) on the basis of the report of the working group for assessing the appropriate site of the port and to finalize the rail route thus ensuring that once the terms under Clause 7 of this memorandum are approved, the Govt. of Mozambique shall issue a concession of the project in favour of PEL".

<sup>208</sup> **Exhibit C-203**, Email from Judite Mula of Aries to Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 3 May 2011.

<sup>209</sup> **Exhibit C-271**, Email from Jose Manuel Caldeira to Kishan Daga and others attaching MOI, dated 4 May 2011, where the cross reference to Clause 7 is added in Clause 2.

<sup>210</sup> SOD, para. 67.

<sup>211</sup> *Id.*

207 As stated by Professor Medeiros in his second report, the commercial logic of the MOI is in fact the contrary: "*given that PEL agreed to carry out a pre-feasibility study, assuming that 'the direct costs necessary to conduct the feasibility study shall be entirely borne by PEL' (see Clause 4 of the MoI), it cannot be presumed that PEL, as an enlightened and diligent recipient of the declaration, would agree to a consideration for all the investment it agreed to make based on a mere bonus, of a totally undetermined amount to be defined unilaterally by the State of Mozambique*".<sup>212</sup>

3. Mozambique's interpretation of the MOI is contradicted by the Parties' conduct just after the MOI was entered into

208 In addition to being inconsistent with the MOI, Mozambique's interpretation of the MOI is directly contradicted by the Parties' conduct, including its own, after the MOI's signature.<sup>213</sup>

209 Mozambique may well play with words by stating that PEL inconsistently stated that it "*waived*" and "*exercised*" its right of first refusal.<sup>214</sup> As set out below, it is evident that PEL exercised its right of first refusal i.e., it explicitly elected to proceed to implement the Project.

210 Mozambique's conduct also unequivocally demonstrates that the Parties had a shared and consistent understanding of PEL's right of first refusal, essentially that PEL had a right to elect to execute the Project (or not), after its PFS was approved.

211 In keeping with such shared understanding, on 15 June 2012, after it had approved PEL's PFS, Mozambique wrote to PEL and asked that PEL "*[e]xpressly exercise its right of first refusal*,"<sup>215</sup> which PEL did three days later, on 18 June 2012.<sup>216</sup>

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<sup>212</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 23.2.

<sup>213</sup> Conduct which, as mentioned above, is key to contract interpretation under Mozambican law. CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 19.

<sup>214</sup> SOD, paras. 65-66.

<sup>215</sup> Exhibit C-11, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 11 June 2012.

<sup>216</sup> Exhibit C-12, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of the project, dated 18 June 2012.

212 This is fatal to Mozambique's case that PEL's right of first refusal was a scoring preference in the context of a tender.<sup>217</sup>

213 Mozambique does not even seek to address this difficulty. It refers to Mozambique's 15 June 2012 letter but remains silent about the fact that such letter asked PEL to exercise its right of first refusal<sup>218</sup> and then mentions that PEL purported to exercise such right, without any explanation as to why this was not a successful exercise of that right.<sup>219</sup>

4. Contrary to Mozambique's interpretation of the MOI, PEL's interpretation of the MOI is supported by the documents identified during the document production process of this Arbitration

214 As is clear from the above section, Mozambique is asking the Tribunal to ignore the clear contents of the MOI and instead, find that it provides what Mozambique contends (or wishes) it had said. Such a finding would require strong evidence. Mozambique puts forward none.

215 What is more, the documents identified during the document production phase of the Arbitration further confirm that PEL's interpretation of the MOI must be preferred to that of Mozambique.

5. The Parties intended to grant PEL a right to a concession

216 The documents relating to the negotiations of the MOI confirm that it was the Parties' understanding that PEL would be granted the right to a direct award of a concession if the PFS was deemed acceptable by Mozambique.

217 This was PEL's understanding from the very beginning. The first draft of the MOI, which was circulated internally within PEL before the Preliminary Study was concluded on 12 March 2011, already referred to the granting of a concession with only the period of validity being a question to be decided at a later stage:

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<sup>217</sup> CER-3, Legal Opinion of Professor Rui Medeiros, para. 23.4 (where Professor Medeiros draws the following conclusions in relation to the MTC's letter of 15 June 2012, and PEL's response of 18 June 2012 ("*This behaviour of the Parties confirms that, at that time, immediately after the approval of the Pre-Feasibility Study, the MTC and PEL assumed that the contract granted PEL the right of direct award of the concession contract. In fact, if the MTC offered PEL the possibility of exercising its right of preference before considering any bids of third parties and before launching a tender procedure, it is obvious that it never considered the right of preference set out in Clause 2 (2) of the MoI to be a right to be exercised in a public tender procedure....*").

<sup>218</sup> SOD, para. 95.

<sup>219</sup> *Id.* at para. 96.

*"MPDM and PEL both agree that this new JV/Consortium will execute the work on a BOO (Build, Own, Operate) basis and the period of the concession shall be agreed after the feasibility study but will be no less than 30 years from the date of completion of the Project".<sup>220</sup>*

218 In further internal discussions, on 24 March 2011, Mr Patel confirmed that it was PEL's understanding that it would be granted a concession, insisting that there should be a minimum duration for such concession:

*"The primary issue I have is that we don't have particular detail around the final agreement in place. What I mean is what if we spend all the time and money to do a full feasibility report and at the end when it comes to signing the project, we only get a 5 year concession. That is not bankable."<sup>221</sup>*

219 The first draft MOI that PEL appears to have shared with Mozambique clearly referred to an obligation for the Parties to sign "definitive agreement/s" (i.e. a concession) once the PFS was accepted by Mozambique, after submission of a detailed bankable project – a condition that was later abandoned – and if PEL decided to execute the Project:

*"Once the pre feasibility report is submitted and accepted by GOM, then PEL shall prepare a detailed bankable project report (DPR) and submit to GOM. After submission of DPR and if PEL decide to execute the Project, then the Parties shall sign the definitive agreement/s."<sup>222</sup>*

220 The same wording was present in the first Portuguese translation of the MOI<sup>223</sup> and substantially identical language in the second such translation.<sup>224</sup>

221 What is more, the language of Clause 2(1) was included in the last draft version of the MOI shared *by Mozambique* with PEL in Portuguese, on the very morning of the signing of the MOI. Clause 2 of such draft reads as follows:

*"A PEL realizara um estudo de pré-viabilidade (EPV), com base no relatório do grupo de trabalho, a fim de avaliar o local adequado para o Porto e concluir a rota para a Linha Férrea, assim que for assegurado que, um vez este seja aprovado nos termos da clausula 7 desde Memorando, será outorgada pelo*

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<sup>220</sup> **Exhibit C-201**, Email exchange between Kishan Daga of PEL and Ashish Patel of PEL attaching draft of the MOI, dated 13 March 2011.

<sup>221</sup> **Exhibit C-220**, Email from Ashish Patel of PEL to Kishan Daga of PEL regarding the MOI, dated 24 March 2011.

<sup>222</sup> **Exhibit C-225**, Email from Ashish Patel of PEL to Rupen Patel of PEL and Sandeep Shetty with copy to Kishan Daga of PEL attaching draft of the MOI, dated 5 April 2011, Clause 6.

<sup>223</sup> **Exhibit C-202**, Email from Arquimedes Nhacule of Aries to Kishan Daga of PEL attaching Portuguese translation of the MOI, dated 18 April 2011, Clause 6.

<sup>224</sup> **Exhibit C-203**, Email from Judite Mula of Aries to Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 3 May 2011, Clause 7.

***Governo da Republica de Moçambique a concessão do Projecto a favor da PEL.***"<sup>225</sup> (Emphasis added)

222 In the cover email attaching this last draft, Mozambique indicated that it would finalise the English version accordingly.<sup>226</sup> This is consistent with Clause 2(1) of PEL's original English version of the MOI, which provides:

*"1. PEL shall carry out a prefeasibility study (PFS) on the basis of the report of the working group for assessing the appropriate site of the port and to finalize the rail route thus ensuring that once the terms under Clause 7 of this memorandum are approved, the Govt. of Mozambique shall issue a concession of the project in favour of PEL."*<sup>227</sup>  
(Emphasis added)

223 It follows that the documents identified during the documents production phase confirm the Parties' mutual intent to grant PEL a right to the direct award of a concession.

6. The Parties intended to grant PEL a right to refuse to implement the Project

224 Mozambique repeats time and again that PEL's right of first refusal was in fact a "*direito de preferência*" essentially on the basis that such right exists under Mozambican law.<sup>228</sup> Mozambique argues that this right has a different meaning, i.e., that it equates to a scoring advantage and nothing more.<sup>229</sup>

225 It is correct that this right exists under Mozambican law. However, it does not have a different meaning than what the Parties agreed to or intended to agree to in the MOI.<sup>230</sup> This is confirmed by Professor Medeiros, as stated above.<sup>231</sup>

226 The "*right of first refusal*" was a concept proposed by PEL.<sup>232</sup> It was included in the exclusivity clause of all of PEL's early internal drafts of the MOI as well as in the draft that PEL shared with Respondent on 5 April 2011.

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<sup>225</sup> **Exhibit C-204**, Email chain between Rafique Jusob, Kishan Daga and others attaching Portuguese MOI, dated 6 May 2011, Clause 2. Free translation: "*PEL shall carry out a prefeasibility study (PFS) on the basis of the report of the working group, for assessing the appropriate location for the Port and to finalise the route of the railway, as soon as it is ensured that, once it is approved under the terms of Clause 7 of this Memorandum, the Government of Mozambique shall issue a concession of the Project in favour of PEL*". (Emphasis added)

<sup>226</sup> **Exhibit C-204**, Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Fausto Mabota of Aries copying Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 6 May 2011.

<sup>227</sup> **Exhibit C-5A**, English Version of the MOI.

<sup>228</sup> SOD, paras. 54-57.

<sup>229</sup> *Id.*

<sup>230</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 64.

<sup>231</sup> **CER-3**, First Legal Opinion of Professor Rui Medeiros, para. 19; and **CER-6**, Second Legal Opinion of Professor Rui Medeiros, i.e. Executive Summary – D and para. 18.2.

<sup>232</sup> *Id.*

227 The earliest draft MOI identified in the document production process contained the following exclusivity clause:

*"Both parties have agreed that MPDM will not provide any right of way to any other party for developing a similar kind of PROJECT in the same area without the consent of PEL. In the case where MPDM chooses to implement a similar PROJECT in the same area then PEL will have first right of refusal to execute the PROJECT. PEL will also have first right of refusal on any future upgrades to the Project."*<sup>233</sup>  
(Emphasis added)

228 It is included in substantially identical terms in all the subsequent internal drafts of the MOI, dated 21 March 2011<sup>234</sup> and 5 April 2011,<sup>235</sup> respectively, as well as in the draft MOI shared with Respondent during a meeting on 5 April 2011, which contains the following exclusivity clause:

*"GOM has agreed that PEL shall have the right of first refusal to undertake the Project. GOM has also agreed that it will not provide any right/permission whatsoever to any third party for developing / expansion of the port between Beira and Pebane for similar purpose nor for developing / expansion of the Rail corridor between Tete and the proposed port. In case GOM wants to develop new or expand anything similar to the Project, then PEL shall have a right of first refusal to undertake and execute the same. PEL will also have first right of refusal on any future upgrades to the Project."*<sup>236</sup>

229 This, in itself, makes it implausible that "right of refusal" meant "*direito de preferência*", as meaning a mere scoring advantage. The people involved in the above-cited drafts at PEL did not speak Portuguese and at that stage, there was yet to be formal Mozambican law input.<sup>237</sup>

230 After the meeting, the clause was further modified<sup>238</sup> and the following version of the clause was submitted to the translation company commissioned by PEL:

*"Once the DPR is prepared by PEL and approved by GOM then MTC agrees that PEL shall have the right of first refusal to undertake the Project. MTC has also agreed that it*

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<sup>233</sup> **Exhibit C-201**, Email exchange between Kishan Daga of PEL and Ashish Patel of PEL attaching draft of the MOI, dated 13 March 2011, Clause 11.

<sup>234</sup> **Exhibit C-223**, Email from Rahul Mundada of PEL to Kishan Daga of PEL attaching draft of the MOI, dated 21 March 2011, Clause 9.

<sup>235</sup> **Exhibit C-224**, Email from Sandeep Shetty to Kishan Daga of PEL attaching draft of the MOI, dated 5 April 2011, Clause 7 and 8.

<sup>236</sup> **Exhibit C-225**, Email from Ashish Patel of PEL to Rupen Patel of PEL and Sandeep Shetty with copy to Kishan Daga of PEL attaching draft of the MOI, dated 5 April 2011.

<sup>237</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 54.

<sup>238</sup> **Exhibit C-272**, Email from Sandeep Shetty to Kishan Daga of PEL attaching draft of the MOI, dated 12 April 2011, Clauses 6 and 7; and **Exhibit C-222**, Email from Isaias Muhate of the MTC to Kishan Daga of PEL attaching draft of the MOI, dated 14 April 2011, Clauses 6 and 7.

*will neither solicit any proposal to provide any right/permission whatsoever to any other party for developing/expansion of the port between Chine and Pebane for similar purpose nor for developing/expansion of any the Rail corridor out of the Tete region."*<sup>239</sup> (Emphasis added)

- 231 The expression "*direito de preferência*" first appeared in the translation of the MOI done by such translation company, on 18 April 2011. It translated the relevant clause as follows:

*"Uma vez que o RFD é preparado pela PEL e aprovado pelo GOV, em seguida, a MTC considera que o **PEL tem o direito de preferência para realizar o Projecto**. MTC também concordou em não solicitar qualquer proposta para fornecer qualquer direito/permisão, para qualquer outra parte para o desenvolvimento/expansão do porto entre Chinde e Pebane para fins similares, nem para o desenvolvimento/expansão de qualquer corredor ferroviário para fora da região de Tete."* (Emphasis added)

- 232 It is still this same language provided by the translation company that was reflected in the last version of the MOI circulated by Mozambique on the morning of 6 May 2011, which provided at Clause 3(3):

*"Apos aprovação do estudo de pré-viabilidade pelo Governo de Moçambique a PEL terá o direito de preferência para realizar o projecto."*<sup>240</sup>

- 233 Importantly, the 6 May 2011 version of the MOI circulated by Mozambique did not contain the reference to Mozambique domestic law, which Mozambique had tried to add to the relevant clause, in the version of the MOI that was circulated on 3 May 2011.<sup>241</sup>

- 234 In other words, there is no evidence in the negotiation history that through the expression "*right of first refusal*", the Parties intended to grant PEL a 15% scoring advantage in a tender as provided for specifically under Mozambican law. By contrast, the negotiation history demonstrates beyond a doubt that the Parties intended to give PEL the option to confirm whether it wished to implement the Project, even after its PFS had been approved.

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<sup>239</sup> **Exhibit C-202**, Email from Arquimedes Nhacule of Aries to Kishan Daga of PEL attaching Portuguese translation of the MOI, dated 18 April 2011, Clause 7.

<sup>240</sup> **Exhibit C-204**, Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Fausto Mabota of Aries copying Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 6 May 2011, Clause 3(3).

<sup>241</sup> **Exhibit C-203**, Email from Judite Mula of Aries to Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 3 May 2011, Clause 7(2): "*Uma vez preparado o RFD pela PEL e aprovado pelo Governo de Moçambique, a PEL terá o direito de preferência para realizar o Projecto, dentro dos limites legalmente aceites.*"



235 What is more, as clearly stated by Professor Medeiros in his second report, the "direito de preferência" is incompatible with the Bonus System set forth in Article 13(5) of the PPP Law: "22. *The Bonus System is ... entirely incompatible with the concept and typical structure of the right of first refusal / direito de preferência. In other words, **the right to a bonus, a quantitative advantage, cannot be confused with a right of first refusal or direito de preferência, as these are two entirely distinct legal concepts.** 2.2.1 The obligation to give a right of first refusal or direito de preferência, which correlates to the right of preference as this is understood in the Portuguese-speaking legal world and presupposed in Article 414 et seq. of the CC, usually corresponds to a situation in which 'a person (the obligor), if he wishes to conclude a certain transaction (the transaction or contract under preference), must do so with a certain person (the beneficiary or preference holder), provided that that person wishes to follow the conditions of the transaction in question (if he exercises the preference)'. In other words, **this concept relates to the right to either enter into (or not, as the case may be) a particular transaction or contract.** 2.2.2 This is entirely different from the mere award of a bonus in the assessment of proposals to the proponent of an unsolicited proposal".<sup>242</sup>*

7. The exclusivity right was a logical flipside to PEL's right to a concession

236 As explained immediately above, in the context of the interpretation of the "right of first refusal", the exclusivity clause was included in the very first internal drafts of the MOI developed by PEL.

237 It was also highlighted internally at PEL, once negotiations with Mozambique had commenced, as a key right for PEL. For instance, on 18 April 2011, Mr Patel wrote to Mr Daga, in the following terms:

*"The only issue i have is that in point 7, it seems we only get the first right of refusal and exclusivity after we provide a dpr. I think we should have at least exclusivity now as soon as we sign. No one else should get a chance to do this corridor until we either deliver a pre feasibility study in 8 months or we fail.*

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<sup>242</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Section 2.4. (Emphasis added)

*We need to know that no one can come in between us while we are doing the study. Not just after the study.*"<sup>243</sup>

238 It goes without saying that by insisting on such right PEL could not have intended merely to be granted a right exclusively to be provided with a preferential position at a public tender (that was never discussed) when other bidders (who were never mentioned) would not.<sup>244</sup> As confirmed by Mr Patel, the right of first refusal gave PEL the option to implement the Project by signing a concession agreement with the Government, should the PFS be approved:

*"My understanding was that the MOI protected these two key rights – the right of first refusal and the right to exclusivity. I always understood the right of first refusal to mean exactly what it says: if Mozambique was satisfied with and approved our PFS demonstrating the technical viability of the Project, then PEL would have the option – the first right of refusal – to implement the Project by signing a concession with Mozambique. If PEL had chosen not to implement the Project, PEL would then be permitted to walk away from the Project. It would only be in those scenarios (i.e. where either PEL failed to produce a PFS that was acceptable to Mozambique, or where PEL chose not to implement the Project once it was offered), that Mozambique would then be entitled to offer the Project to someone else."*<sup>245</sup>

239 In addition, Mr Daga also confirms that the Parties never understood the right of first refusal to equate to a mere scoring advantage in a public tender process:

*"It was never the Parties' intention that PEL be granted a mere 15% scoring advantage in a tender; there was no mention of a tender at all ... Mozambique never objected to including that clause in the MOI...*

*[T]his concept was explained to and understood by the MTC. Both Parties understood that the right of first refusal (or 'direito de preferência' in Portuguese) was a right for PEL to either accept or refuse to implement the Project, once the PFS was approved."*<sup>246</sup>

240 Nor was this Mozambique's intention. The timeframe of the exclusivity clause was hotly debated between the Parties, such that two different proposals for the clause were put forward in the draft circulated on 3 May 2011. Mozambique made no mention of a public tender let alone of a scoring advantage in such

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<sup>243</sup> **Exhibit C-221**, Email exchange between Kishan Daga of PEL and Ashish Patel of PEL regarding the MOI, dated 18 April 2011.

<sup>244</sup> SOD, para. 60.

<sup>245</sup> **CWS-4**, Second Witness Statement of Mr Ashish Patel, para. 15.

<sup>246</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, paras. 64-65.

tender. The key difference between PEL and Mozambique's proposal was the duration of the exclusivity, which Mozambique sought to limit to eight months:

*"Proposta da PEL*

*O MTC concorda em não solicitar qualquer proposta de estudo e nem conceder qualquer direito/autorização qualquer a qualquer outra parte para o desenvolvimento/expansão do porto entre Chinde e Pebane para fins semelhantes, nem para o desenvolvimento/expansão de qualquer corredor Ferroviário na região de Tete."*

*"Proposta do MTC*

*O MTC concorda em não solicitar qualquer proposta de estudo e nem conceder qualquer direito/autorização qualquer a qualquer outra parte para o desenvolvimento/expansão do porto entre Chinde e Pebane para fins semelhantes, nem para o desenvolvimento/expansão de qualquer **corredor Ferroviário na região de Tete ate 8 (oito) meses a partir da data da assinatura deste Memorando. Esta exclusividade esta sujeita aos limites permitidos por Lei.**"*<sup>247</sup> (Emphasis in original)

241 Crucially, Mozambique never sought to include any language referring to an exclusive scoring advantage in a tender. With good cause: this is not what the Parties intended to achieve through the exclusivity clause.

8. The argument that the Portuguese version of the MOI should prevail is contradicted by the negotiation history

242 Mozambique appears to be concerned that PEL's original English version of the MOI will be preferred by the Tribunal to Mozambique's scanned English copy of which it allegedly has lost the originals. It thus argues that the Portuguese version of the MOI should control over the English version of the MOI, essentially based on the allegation that under Mozambican law the Portuguese version controls.<sup>248</sup>

243 First, and as explained above, this point is moot because both the English and Portuguese versions of the MOI support PEL's interpretation and are inconsistent with Respondent's interpretation.

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<sup>247</sup> **Exhibit C-203**, Email from Judite Mula of Aries to Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 3 May 2011.

<sup>248</sup> SOD, paras; 462-463.

- 244 Second, and in any case, the negotiation history clearly demonstrates that the Portuguese version of the MOI cannot prevail over the English one.
- 245 The last draft version of the MOI shared by Mozambique with PEL in Portuguese, on the very morning of the signing of the MOI, included language mirroring Clause 2(1) of PEL's original English version of the MOI.<sup>249</sup> Yet, the Portuguese version of the MOI printed on MTC letterhead and executed at the signing ceremony does not.
- 246 As is clear from Mozambique's email attaching the last draft version of the MOI,<sup>250</sup> Mozambique undertook to implement the relevant changes into the English version of the MOI during the day. Apparently, further changes were made. However, Mozambique failed to disclose any drafts of the MOI and did not give any explanation as to what happened on the day of the signing.
- 247 On the basis of the available evidence, however, it can only be inferred that the Portuguese version of the MOI, which does not include the wording Mozambique circulated to PEL and called "*final*" on the morning of the signing, does not prevail over PEL's English version of the MOI, which includes such wording.
- 248 Further and in any case, Mozambican law is of limited relevance (if any) to determine what promises the Parties made to one another under international law. Be that as it may, Professor Medeiros also explains that the provisions quoted by Mozambique in support of its proposition that under Mozambican law, the Portuguese version prevails, are inapposite.<sup>251</sup> First and foremost, as he explains, the fact that there are two versions of the MOI does not affect the *existence* of the contract, as incorrectly stated by Ms Muenda, but rather the *interpretation* of the contract. In the context of contract interpretation under Mozambican law, there is no incompatibility between the Portuguese and English versions, which are thus complementary.<sup>252</sup> Secondly, the provisions of the Public Procurement Regulations resorted to by Ms Muenda do not even

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<sup>249</sup> **Exhibit C-204**, Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Fausto Mabota of Aries copying Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 6 May 2011, Clause 2. Free translation: "*PEL shall carry out a prefeasibility study (PFS) on the basis of the report of the working group, for assessing the appropriate location for the Port and to finalise the route of the railway, as soon as it is ensured that, once it is approved under the terms of Clause 7 of this Memorandum, the Government of Mozambique shall issue a concession of the Project in favour of PEL*". (Emphasis added)

<sup>250</sup> *Id.*

<sup>251</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 3.3. and 3.4. (i.e. paras. 36.3, 37 and 41).

<sup>252</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 3.3, para. 35.

apply to the MOI. And even if they did, the Portuguese version of the MOI would only prevail if there were conflicting clauses, which there are not.<sup>253</sup> Finally, given that the Parties agreed to the existence of two different language versions with equal value, Mozambique is prevented from invoking such argument at this point in time as this would amount to an abuse of rights, prohibited by Article 334 of the Mozambican Civil Code.<sup>254</sup>

249 In sum, both the English and Portuguese versions of the MOI support PEL's interpretation. Accordingly, Mozambique's argument that the Portuguese version of the MOI should prevail over the English version of the MOI ultimately is of no consequence. Further, and in any event, Mozambique has failed to substantiate its argument that the Portuguese version of the MOI should prevail over its English counterpart.

*C. Mozambique Approved PEL's PFS and Explicitly Asked PEL to Exercise Its Right of First Refusal*

250 As explained in the SOC, PEL submitted the PFS on 2 May 2012 in keeping with the MOI,<sup>255</sup> presented it to Mozambique on 9 May 2012<sup>256</sup> and addressed a number of follow up queries from Mozambique in the course of May to early June 2012.<sup>257</sup> PEL requested that the MTC approve the PFS so that the Parties could "*enter into the second phase of the project for signing of concession agreement.*"<sup>258</sup>

251 On 17 May 2012, just eleven days after the MOI was signed, Mr Ruby from the MTC, who had been involved in preparation of the Preliminary Study, represented the MTC when he gave a presentation to the CFM regarding the Preliminary Study, the MOI, the PFS, and the MTC's recommendations.<sup>259</sup> The presentation expressly mentioned the MOI and provided that "*PATEL shall benefit from a right of 1st option in the eventual implementation of the project.*"<sup>260</sup>

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<sup>253</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Section 3.4, para. 36.3, 37 and 41.

<sup>254</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Section 3.4, para. 42.

<sup>255</sup> SOC, para. 146.

<sup>256</sup> SOC, para. 147-150.

<sup>257</sup> SOC, para. 151. See also CWS-3, Second Witness Statement of Mr Kishan Daga, paras. 74, 75, 77, 78.

<sup>258</sup> Exhibit C-8, Letter from Kishan Daga of PEL to Minister Zucula of the MTC regarding "*Additional Information to the Prefeasibility Report for Development of Rail Corridor from Moatize to Macuse and Port at Macuse, Statement of fund utilisation and projected/estimated cash flow for the entire project*", dated 15 May 2012.

<sup>259</sup> Exhibit C-227, Email from Jafar Ruby of the MTC to Kishan Daga of PEL attaching the presentation to the CFM, dated 17 May 2012.

<sup>260</sup> *Id.*

252 On 15 June 2012, in unequivocal terms, Mozambique approved the PFS and asked that PEL exercise its right of first refusal i.e. expressly confirm its intention to proceed with the concession and the Project. The wording of this letter leaves no room for doubt:

*"In the context of the Memorandum of Understanding [sic] between the Ministry of Transport and Communications and Patel Engineering Ltd, please be informed that the Pre-Feasibility Study submitted by you was approved. Therefore, in order to pursue the project, Patel Engineering Ltd must:*

*a) Expressly exercise its right of first refusal;*

*b) Negotiate with the CFMs the creation of a company to implement the project."*<sup>261</sup>

253 PEL had great confidence in the Project it had worked so hard on and proposed to Mozambique, and accordingly it exercised its right of first refusal immediately. As Mr Patel explains:

*"In truth, we thought that the Project was a blockbuster. Vale had cornered the coal export market through its almost exclusive use of the Nacala Logistics Corridor. It was clear to me that mining companies would pay a significant premium to have use of a shorter and more efficient rail link from the mines in the Tete province, where there were untold coal resources, to the deep-water port in Macuse. This would also provide a direct link to the Chinese and Indian markets. PEL had shown Mozambique that this rail corridor and the planned deep-water port were viable, and that the best way to monetise Mozambique's coal resources was to use the railroad for export via Macuse."*<sup>262</sup>

254 Professor Medeiros likewise explains that the Parties' behaviour after the MTC approved the PFS confirms their intent that the concession would be awarded directly to PEL: *"19.2 Following this argument, as stated in RM, Legal Opinion, I, the letter that the MTC sent to PEL on 15 June 2012 is relevant, given that the MTC expressly notified PEL therein that 'that the Pre-Feasibility Study (...) was approved. Therefore, in order to pursue the project, PEL must: a) expressly exercise its right of first refusal; b) negotiate with the CFMs the creation of a company to implement the project'. 19.3 And, three days later, PEL replied, saying 'we expressly exercise our right of preference for implementation of the project'. 19.4 This behaviour of the Parties confirms*

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<sup>261</sup> **Exhibit C-11.** Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

<sup>262</sup> **CWS-4.** Second Witness Statement of Mr Ashish Patel, para. 32.

*that immediately after the approval of the pre-feasibility study, the MTC and PEL assumed that the contract granted PEL the right to a direct award of the concession contract ...".*<sup>263</sup>

255 PEL exercised its right of first refusal, three days later, on 18 June 2021,<sup>264</sup> in the following terms:

*"...we would like to thank you for accepting the report.*

*As per clause no. 1 and 2 of the MOI signed on 06.05.2011 we would like to inform you that **we expressly exercise our right of preference for implementation of the project...***

*We would also like to inform you that we will proceed with CFM to incorporate an entity for implementation of the project as directed by you in your letter."*<sup>265</sup> (Emphasis added)

256 These facts, which Mozambique cannot dispute, are fatal to its case. Mozambique nonetheless makes a forlorn attempt at disputing them.<sup>266</sup>

257 The only contemporaneous evidence Respondent has found in support of such attempt is the testimony of Minister Zucula, who now states that the PFS "*was not a study of the quality the MTC expected.*"<sup>267</sup> Needless to say, he provides no documentary evidence in support of this allegation, and no evidence that the MTC ever communicated any concern about the PFS to PEL.

258 In fact, Mozambique represented that it could not find any document relating to the analysis, assessment, and approval of the PFS in the context of the document production process.<sup>268</sup> The only reasonable inference is that there is no evidence to contradict the evidence on the record which demonstrates that Mozambique approved the PFS, precisely because it was satisfied with it. The decision to approve the PFS was entirely within the MTC's discretion. If it had not been satisfied with the PFS, it could have simply rejected it. Instead, it expressly approved the PFS, and requested PEL to exercise its right of first refusal to implement the Project.

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<sup>263</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 19. (Emphasis added)

<sup>264</sup> Exhibit C-12, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of the project, dated 18 June 2012.

<sup>265</sup> Exhibit C-12, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of the project, dated 18 June 2012.

<sup>266</sup> SOD, paras. 85-94.

<sup>267</sup> SOD, para. 90; RWS-2, Witness Statement of Mr Paulo Francisco Zucula, para. 18.

<sup>268</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, pp. 19-20, Document Request No. 8: "*Any documents relating to the analysis, assessment and approval of the PFS, including any documents demonstrating that Mozambique's consideration of the PFS's adequacy (e.g. government checklist), between the presentation of the PFS on 9 May 2012 and its approval by Mozambique on 15 June 2012.*"

- 259 Mozambique also quotes the standard disclaimers in PEL's PowerPoint presentation of the PFS but fails to draw any conclusion in the SOD.<sup>269</sup> It appears from Mr Chaúque's statement that the standard disclaimers are relied upon to argue that such disclaimers in the presentation of the PFS – which he conflates with the Preliminary Study – constituted a comment on the MOI as supportive of Mozambique's interpretation.<sup>270</sup> It is ridiculous to read anything into this specific case from the standard disclaimers which appear in all of PEL's PowerPoint presentations, as this is required by PEL's internal policy.<sup>271</sup>
- 260 The remainder of Mozambique's purported evidence is extraneous to the events and does not assist in the understanding of the factual background of this case.
- 261 Mozambique first relies upon the MZBetar Report essentially to argue that the PFS was only "*preliminary*", was not time consuming, and did not finalise the rail route.<sup>272</sup> The criticisms of the MZBetar report are denied, and belied by the fact that the MTC was satisfied with the PFS, such that it enthusiastically approved it and requested PEL to exercise its right of first refusal. Such after-the-fact criticisms are likewise irrelevant. None of these points were raised by Mozambique contemporaneously when it approved the PFS nor are they relevant even if true.<sup>273</sup>
- 262 In addition, this contradicts the contemporaneous evidence. During the presentation of the PFS, Minister Zucula pointed out that "*the required parameter on Technical side [was] well presented in the report.*"<sup>274</sup> Secretary of the MTC Minister, Ms Arlanda Reis Cuamba, confirmed with PEL after the presentation on 9 May 2012 that Minister Zucula was satisfied with the PFS:

*"By chance I quickly spoke with his Excellency and he also expressed his satisfaction with the presentation, he says it was good and that now it's just a matter of waiting and starting work for the project to be implemented".*<sup>275</sup>

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<sup>269</sup> SOD, para. 87.

<sup>270</sup> **RWS-1**, Witness Statement of Mr Luis Amandio Chauque, para. 30.

<sup>271</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 81.

<sup>272</sup> SOD, paras. 91-93.

<sup>273</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 72.

<sup>274</sup> **Exhibit C-8**, Letter from Kishan Daga of PEL to Minister Zucula of the MTC regarding "*Additional Information to the Prefeasibility Report for Development of Rail Corridor from Moatize to Macuse and Port at Macuse, Statement of fund utilisation and projected/estimated cash flow for the entire project*", dated 15 May 2012.

<sup>275</sup> **Exhibit C-226**, Chat between Kishan Daga of PEL and Arlanda Reis Cuamba of the MTC regarding presentation of the PFS, dated 9 May 2012. I used my personal Gmail account for correspondence with Ms Cuamba.



263 What is more, in its letter dated 18 April 2013,<sup>276</sup> the MTC actually acknowledged that PEL had "*carried out all the feasibility and engineering studies*". Considering that all the necessary elements required for the direct award of the concession were fulfilled, the MTC called for the Parties to proceed with the negotiation of the terms of the concession.<sup>277</sup>

264 Mozambique also contends that the MTC did not have authority to approve the PFS under Mozambican law. This is contradicted by the relevant events, whereupon, after a presentation involving representatives from the MTC, the CFM, Ministry of Planning and Development, Ministry of External Affairs, Ministry of Mining, and Ministry of Finance,<sup>278</sup> Mozambique approved the PFS.

265 In any case, as explained by Professor Medeiros, the MTC clearly had authority to approve the PFS.<sup>279</sup>

266 It follows that it is uncontested that Mozambique approved the PFS and asked PEL to exercise its rights of first of refusal, which PEL did.

*D. Mozambique Asked PEL to Implement the Project Through the CFM, which Was Not Instructed to Negotiate with PEL and Ostensibly Uninterested in the Project*

267 As explained in the SOC, once PEL had exercised its right of first refusal, it attempted to negotiate directly with the CFM between June and August 2012, as directed by the MTC.<sup>280</sup> This was consistent with the intentions of the parties, and the framework they agreed to in the MOI, which provided that PEL would directly be awarded a concession upon the satisfaction of the MOI's two conditions precedent. However, the CFM had initially not been instructed to negotiate with PEL and later, indicated to PEL that it lacked sufficient funds to

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<sup>276</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

<sup>277</sup> As explained by Professor Medeiros in his second report – **CER-6**, para. 55.3.3 – "*Article 9 of the PPP Regulations itself allows the "entity responsible for supervising the sector" — in casu, the MTC — "to dispense with observance of the phases set out in sub-paragraphs a) to c) of the previous paragraph", that is, the phases of conception, definition of the basic guiding principles and production of technical, environmental and economic and financial feasibility studies, whenever "the project proposal for the undertaking contains all the required information"*. There is as such no doubt that through this letter the MTC acknowledged the quality of the PFS, and, upon consent from the Council of Ministers, as required by the PPP Law (Law No. 15/2011, of 10 August – **CLA-25** and **CLA-65**) and Regulations (Decree 16/2012, of 4 June - **RLA-7** and **CLA-64**), proceeded to the next stages required for a direct award as set out in Articles 9 et seq. of the PPP Regulations.

<sup>278</sup> **CWS-1**, Witness Statement of Mr Kishan Daga, para. 65.

<sup>279</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, paras. 27-29.

<sup>280</sup> SOC, paras. 158-168.

invest in the Project.<sup>281</sup> From mid-August 2012, PEL therefore started to insist that it be granted the concession agreement that it was promised under the MOI but to no avail.<sup>282</sup>

268 These are again unhelpful facts for Mozambique. As a result, Mozambique purports to argue that partnering with the CFM was a "*condition precedent of the MOI*", and that PEL admitted the same and later changed course when it asked to be granted the concession without having reached an agreement with the CFM.<sup>283</sup>

269 This is not supported by the MOI, or by the facts of the case. Respondent has failed to provide any documents supporting its version of events.

270 First, the MOI does not mention reaching an agreement with the CFM as a condition precedent to the award of a concession.

271 Nor did PEL explicitly or implicitly admit this was the case. On 18 June 2021, PEL made it clear that it was proceeding as directed by the MTC. It did not refer to the MOI in respect of negotiations with the CFM:

*"We would also like to inform you that we will proceed with CFM to incorporate an entity for implementation of the project as directed by you in your letter."*<sup>284</sup> (Emphasis added)

272 As explained by Mr Daga, PEL always understood that the Project would be implemented on a PPP basis and expected Mozambique to designate the correct entity for the implementation of the Project.<sup>285</sup> The fact that PEL was asked to enter into discussions with the CFM confirmed that it would be directly awarded a concession for the Project.

273 This is also confirmed by the fact that in the course of June 2012, the MTC contacted PEL asking it to meet potential partners for the construction of the Macuse-Tete railway line. This was not a condition precedent to the MOI and confirmed the Parties' intentions that a concession would be directly awarded to PEL. On 26 June 2012, the Secretary to the MTC Minister wrote to PEL in the following terms:

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<sup>281</sup> *Id.* at para. 160-167.

<sup>282</sup> *Id.* at paras. 169-180.

<sup>283</sup> SOD, paras. 95-104.

<sup>284</sup> **Exhibit C-12**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of the project, dated 18 June 2012.

<sup>285</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 95.

*"On behalf of his Excellency the Minister of Transport and Communications would like to promote a meeting between the Odebrescht [sic] and PATEL, a potential partner for the construction of the railway line Macuze-Tete, in order to discuss issue related to the project.*

*It should be noted that the meeting should take place at the Ministry on the date and time to coordinate between the parties."<sup>286</sup>*

274 PEL complied with the Government's request and met with Odebrecht, because it was eager to move forward with the Project.<sup>287</sup> However, as explained by Mr Daga, "[t]his did not mean that PEL accepted there were any 'condition precedents' under the MOI for it to receive its concession apart from the ones listed therein (i.e. the MTC's approval of the PFS, and PEL's exercise of its right of first refusal)".<sup>288</sup>

275 Second, contrary to the impression Mozambique is seeking to create, PEL did not fail to reach an agreement with the CFM. It is **Mozambique** that failed to take any steps towards such agreement.

276 On 22 June 2012, a few days after Mozambique asked that PEL negotiate with the CFM, PEL enquired about a contact person in the CFM and requested official authorisation to form the Project Company with the CFM:

*"we would like to request you to kindly let us know the following:*

*1. Name of contact person in CFM with whom we can contact and discuss about the formation of SPV.*

*2. a communication to authorise us for discussion for formation of SPV with CFM and CFM being nominated by the Govt. of Mozambique as designated partner for this project on PPP model structure."<sup>289</sup>*

277 Mozambique did not provide any name or authorisation. It only responded two months later simply stating "[n]egotiation with CFM is not prohibited".<sup>290</sup>

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<sup>286</sup> **Exhibit C-229**, Email from Arlanda Cuamba of the MTC to Kishan Daga of PEL regarding meeting with Odebrecht, dated 28 June 2012, p. 2.

<sup>287</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, paras. 94-95.  
<sup>288</sup> *Id.* at para. 94.

<sup>289</sup> **Exhibit C-13**, Letter from Kishan Daga of PEL to Minister Zucula of the MTC regarding its contact with the CFM, dated 22 June 2012.

<sup>290</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 97; **Exhibit C-16**, Letter from Minister Zucula of the MTC to Kishan Daga of PEL regarding the CFM's negotiations not being prohibited and providing contact details for the purpose of negotiating the concession, dated 27 August 2012.

- 278 PEL arranged meetings with the CFM without the MTC's assistance through its local partner, SPI.
- 279 In August 2012, PEL had two meetings with the CFM, in which the CFM first insisted that it was not even instructed to negotiate with PEL and had not even received the PFS, which was not true given the presentation of the PFS to the CFM on 17 May 2012, and later, that it had no funds to invest in the Project.<sup>291</sup>
- 280 On 7 August 2012, PEL provided all documents requested by the CFM and asked for its guidance on further steps to implement the Project:

*"We would like to request you to kindly let us know how we can proceed further in regard to the formation of SPV between PATEL and CFM for the above mentioned project.*

*We shall be highly obliged to receive your advice letter for formation of SPV so that we can enter into the second phase of the project for discussion and signing of concession agreement as per MOI without losing any more time."*<sup>292</sup>

- 281 Crucially, Mozambique has failed to disclose any documents in response to Claimant's Document Request No. 10, which was granted by the Tribunal, namely "*Documents evidencing that the MTC instructed the CFM to negotiate with PEL in respect of the Project between 15 June 2012 to 11 January 2013*". The only reasonable inference is that the MTC did not instruct the CFM to negotiate with PEL, or that the MTC specifically instructed the CFM *not* to do so. Either way, it was Mozambique – and not PEL – that created a roadblock to reaching of an agreement between the CFM and PEL.
- 282 Further, the MTC did not attend the meeting with Odebrecht that Mozambique had initially asked take place at the Ministry.<sup>293</sup>
- 283 Given that PEL was eager to take the Project forward, on 15 August 2012, PEL wrote to Mozambique asking that it be granted a template concession agreement, in accordance with the MOI, and insisting that it had complied with all its obligations under the MOI:

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<sup>291</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, paras. 98-101; **Exhibit C-14**, Letter from Kishan Daga of PEL to Rosario Mualeia, President and Chairman of the Board regarding how PEL should proceed with the project, dated 7 August 2012.

<sup>292</sup> **Exhibit C-14**, Letter from Kishan Daga of PEL to Rosario Mualeia President and Chairman of the Board regarding how PEL should proceed with the project, dated 7 August 2012.

<sup>293</sup> **Exhibit C-239**, Email from Kishan Daga of PEL to Arlanda Reis Cuamba of the MTC regarding meeting with Odebrecht, dated 7 August 2012.

*"Having complied with all the requirements of the MOU and recognizing the urgency of providing viable alternatives for the logistic needs of the Tete Province, we would like to request the good offices of your Excellency to have us an access to a template Concession Agreement for Ports and Railways in order to help expediting the process and potential implementation of the project."*<sup>294</sup>

284 PEL reminded the MTC that it still had not responded to its letter of 22 June 2012 asking to be put in contact with the relevant person at the CFM but that PEL had nonetheless initiated talks with the CFM.<sup>295</sup>

285 On 27 August 2012, the MTC responded to PEL that *"negotiation with CFM is not prohibited"* and asked that PEL contact a subordinate office, the Office of Studies and Projects, rather than the Minister.<sup>296</sup> Mozambique does not even address this letter in its submissions, which further demonstrates that it was deliberately ignoring PEL's requests for assistance to implement the Project.

286 On 5 October 2012, PEL reiterated its demand that it be granted a concession agreement.<sup>297</sup> Mozambique tries to create inconsistency in PEL's position by stating that this letter was the first time that PEL argued that *"the concession agreement always comes first"*.<sup>298</sup>

287 There is no such inconsistency. Just as in its 15 August 2012 letter PEL insisted that it had complied with the terms of the MOI.<sup>299</sup> PEL's comment about the concession coming first was simply meant to explain to the MTC that there was no point in investing capital into an SPV if the concession agreement was not signed; an SPV could instead be formed, if required, with notional capital. It undertook to give up to 20% equity to the partner chosen by Mozambique in such SPV.<sup>300</sup> This interpretation of the letter is also confirmed by Mr Daga,<sup>301</sup> and the relevant passage reads as follows:

*"If the SPV formed, equity distributed and the concession agreement is not signed the SPV is not of use. Therefore the*

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<sup>294</sup> **Exhibit C-15**, Letter from Kishan Daga of PEL to Minister Zucula of MTC requesting access to the concession agreement template for the CFM in order to help expedite the process, dated 15 August 2012.

<sup>295</sup> *Id.*

<sup>296</sup> **Exhibit C-16**, Letter from Minister Zucula of MTC to Kishan Daga of PEL regarding the CFM negotiations not being prohibited and providing contact details for the purpose of negotiating the concession, dated 27 August 2012.

<sup>297</sup> **Exhibit C-17**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding PEL's request for a copy of the template Concession Agreement for Ports and Railways, dated 5 October 2012. SOD, para. 102.

<sup>298</sup> **Exhibit C-15**, Letter from Kishan Daga of PEL to Minister Zucula of MTC requesting access to the concession agreement template for the CFM in order to help expedite the process, dated 15 August 2012.

<sup>299</sup> **Exhibit C-17**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding PEL's request for a copy of the template Concession Agreement for Ports and Railways, dated 5 October 2012.

<sup>300</sup> **Exhibit C-17**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding PEL's request for a copy of the template Concession Agreement for Ports and Railways, dated 5 October 2012.

<sup>301</sup>

**CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 109.

*concession agreement always comes first. If required, SPV with the notional capital is formed and once concession agreement is signed, equity is infused by the required partners to start the work.*

*In order to accelerate the project we hereby undertake that up to 20% of equity will be allotted to Govt. of Mozambique or its nominated partner on the terms provided in PPP law."*<sup>302</sup>

288 PEL again requested in that letter "to have ... an access to a template Concession Agreement for Ports and Railways in order to help expediting the process and potential implementation of the project".<sup>303</sup>

289 In November 2012, the Mozambican press reported that Mozambique would launch a public tender for the Project.<sup>304</sup>

290 On 28 November 2012, PEL wrote to Mozambique insisting that it be awarded the concession directly.<sup>305</sup> It maintained that a direct award would comply with Mozambican law,<sup>306</sup> which, as explained by Professor Medeiros, is correct.<sup>307</sup>

291 Mozambique contends that this amounted to PEL admitting that the MOI violated Mozambican law,<sup>308</sup> that it was an attempt at rewriting the MOI, as the MOI did not provide for a direct award, and that this was a change of position by PEL.<sup>309</sup>

292 As is clear from the letter itself, PEL did not admit that the MOI violated Mozambican law. To the contrary, it explained that the direct award of a concession was in keeping with Mozambican law:

*"the legislator provided for and established the possibility of an exception to the public tender rule, whenever there are weighty and justified situations related to the implementation of each specific project, the Government may authorize the direct award for the hiring of the PPP..."*

*the legislator has demonstrated in different legal provisions that, in establishing an exception for the direct award it takes into account that, in certain projects, the complexity and scale*

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<sup>302</sup> **Exhibit C-17**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding PEL's request for a copy of the template Concession Agreement for Ports and Railways, dated 5 October 2012.

<sup>303</sup> *Id.*

<sup>304</sup> **Exhibit C-235**, Article "Mozambique Launches US\$2 billion international tender for railroad project", Macauhub Rail-port News, dated 22 November 2012.

<sup>305</sup> **Exhibit C-18**, Letter from Kishan Daga of PEL to Minister Zucula of MTC citing real examples of authorisations for direct awards, dated 28 November 2012.

<sup>306</sup> *Id.*

<sup>307</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, paras. 37-49; **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 2.

<sup>308</sup> SOD, para. 105.

<sup>309</sup> SOD, para. 106.

*would advise a more selected negotiation for the costs which the competitor would incur, before being contracted, in order to demonstrate its capabilities and the feasibility of the project, for the contracting entity to have an opportunity to determine specific requirements more clearly and precisely, in the interest of the public.*"<sup>310</sup>

- 293 PEL even referred to concessions "*where direct negotiations have been applied for the contracting of concessions under the PPP regime*" between late 2011 and summer 2012.<sup>311</sup> This included a concession directly awarded to ESSAR in December 2011 for the construction, operation and management of a port terminal for coal in the City of Beira to be implemented through a joint venture between ESSAR, the CFM and other interested parties, under the PPP Law.<sup>312</sup> This was also correct as demonstrated by the relevant resolution of the Council of Ministers.<sup>313</sup>
- 294 PEL emphasized in the letter that it "*ha[d] already invested considerable amount and time in its initial phase of doing Initial Study, Prefeasibility study.*"<sup>314</sup>
- 295 This letter neither constituted an attempt at rewriting the MOI nor a change of position. As explained above, the MOI granted PEL a right to the direct award of a concession and it was always PEL's position that it was granted such a right. For PEL to be granted the Project concession, it had to be awarded to PEL directly as opposed to via a public tender. This letter was submitted in the context of rumours that Mozambique would organise a public tender with respect to the Project.<sup>315</sup>
- 296 Mozambique states that PEL's letter was "*scattered and unpersuasive*".<sup>316</sup> However, Mozambique fails to address the letter and instead sets out a litany of arguments it has already made elsewhere, namely that a direct award would

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<sup>310</sup> **Exhibit C-18**, Letter from Kishan Daga of PEL to Minister Zucula of MTC citing real examples of authorisations for direct awards, dated 28 November 2012, p. 3.

<sup>311</sup> *Id.*

<sup>312</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, paras. 37-49.

<sup>313</sup> **CLA-278**, Resolution of the Council of Ministers No. 74/2011 of 30 December 2011, granting a direct award for a concession in relation to the Essar Multi User Coal Terminal at Beira, pursuant to Article 13(3) of Law 15/2022, *i.e.*, the PPP law.

<sup>314</sup> **Exhibit C-18**, Letter from Kishan Daga of PEL to Minister Zucula of MTC citing real examples of authorisations for direct awards, dated 28 November 2012, p. 4.

<sup>315</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 111]

<sup>316</sup> SOD, para. 107.

have been illegal at the time when the MOI was entered into, its strained interpretation of the MOI and its criticisms of the PFS.<sup>317</sup>

297 All these arguments have already been addressed at Section IV.B above and are not repeated here.

298 On 11 January 2013, PEL followed up again asking the MTC for a meeting to discuss *inter alia* "the formation of a JV with CFM" and "how the entire process of signing of concession agreement can be fastened so as the work on project can be speeded up."<sup>318</sup> Again, this was to no avail.

*E. Mozambique Was Planning to Oust PEL of Its Own Project and to Appropriate Its Know-How*

299 During the summer of 2012, while PEL was making efforts to negotiate with the CFM at Mozambique's instruction, Mozambique was already taking steps to deprive PEL of its own Project and to appropriate its know-how.

300 In the course of the summer, the MTC insisted that it be sent copies of PEL's PFS without PEL's signature or logo.<sup>319</sup> While PEL was initially surprised by and questioned this request, it complied in July 2012<sup>320</sup> after Mozambique explained that this was required because the PFS was meant to be circulated internally to different ministries. It now appears that Mozambique's real intention was more sinister.

301 Around September 2012, Mr Daga also obtained a document authored by Mozambique's Ministry of Planning and Development entitled "*Memorandum for the Investment Council under the Framework of the Rio Tinto Project for the Development of Integrated Transportation Corridor*" (the "**Rio Tinto Memorandum**").<sup>321</sup> This document, which describes the Macuze line as being "*of private and strategic interest to the Government*", demonstrates that Mozambique met with Rio Tinto on 24 July 2012, to discuss PEL's Project, in breach of PEL's exclusivity rights:

*"[T]o follow up on the discussions of the Rio Tinto projects, was held on July 24, 2012, a joint meeting between the*

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<sup>317</sup>

*Id.*

<sup>318</sup> **Exhibit C-232**, Letter from Kishan Daga of PEL to Minister Zucula of the MTC regarding the meeting, dated 11 January 2013.

<sup>319</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 86.

<sup>320</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 86; **Exhibit C-228**, Chat between Kishan Daga of PEL and Arlanda Reis Cuamba of the MTC regarding PEL's logo, dated 13 July 2012.

<sup>321</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 105.



*Technical Working Group, composed of the sectors of the economic area and Rio Tinto.*

*2. Rio Tinto submitted a proposal for a Public Private Partnership (PPP) for the development of an integrated transport corridor with a view of addressing the scarcity of transport infrastructures for both coal and other products through development of a new complementary export corridor."*<sup>322</sup>

302 Mr Daga was reluctant to inform Mozambique that PEL has a copy of the Rio Tinto Memorandum at the time and in this Arbitration because he did not want to get the person who had given it to him "*into trouble*."<sup>323</sup>

303 Mr Daga hoped that this document would come out in the course of the document production.<sup>324</sup> However, given that it did not, Mr Daga has decided to exhibit the Rio Tinto Memorandum<sup>325</sup> which demonstrates that at least by the Summer of 2012, Mozambique was covertly shopping PEL's Project to others behind PEL's back.

304 Mozambique failed to disclose Rio Tinto's "*proposal submitted for a Public Private Partnership (PPP) for development of an integrated transport corridor*" explicitly referred to in the Rio Tinto Memorandum.<sup>326</sup> As follows from Rio Tinto's letter addressed to PEL, the proposal had been submitted before 21 February 2021.<sup>327</sup> Therefore, it squarely falls within the scope of Claimant's Document Request No. 5.<sup>328</sup> Considering that this document evidences the Government's double dealing and breach of its promises, the fact that it has elected not to disclose it is telling.

*F. Mozambique Reversed Course by Deciding to Organise a Tender for the Project on the Basis of a Demonstrably False Justification*

305 After it had obstructed the negotiations in respect of the concession agreement for months and spoken to other potential partners behind PEL's back, on 11 January 2013, Mozambique sought to give the *coup de grâce* to PEL's right

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<sup>322</sup> **Exhibit C-230**, Memorandum for the Investment Council under the Framework of the Rio Tinto Project for the Development of an Integrated Transportation Corridor, dated 1 August 2012.

<sup>323</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, 106.

<sup>324</sup> *Id.* at para. 107.

<sup>325</sup> *Id.*

<sup>326</sup> **Exhibit C-230**, Memorandum for the Investment Council under the Framework of the Rio Tinto Project for the Development of an Integrated Transportation Corridor, dated 1 August 2012.

<sup>327</sup> **Exhibit C-59**, Letter from Rio Tinto to PEL, dated 21 February 2021.

<sup>328</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, pp. 13-14, Document Request No. 5: "*Any documents relating to the proposals presented by Rio Tinto to Mozambique between 6 May 2011 and 21 February 2012.*"

to a concession agreement by stating that it would organise a tender in respect of the Project, seeking for the first time, to redefine PEL's right of first refusal (already exercised) as a scoring advantage in a tender process:

*"a decision to go through for public tender was made, and if Patel Engineering participate in it would have the right of preference as per the Memorandum and the Law".<sup>329</sup>*

306 Mozambique purported to justify its decision to organise a tender on the basis of PEL's alleged failure to offer more than 20% participation to the CFM in the joint venture to implement the Project leading the Cabinet to decide that a tender should be organised:

*"Up to the beginning of the last quarter of 2012 Patel Engineering and CFM had not been able to reach an agreement leading to the development of a strategic partnership, because no offer beyond 20% was made. Therefore, the matter was taken to the attention of the Cabinet, and, since time was of major concern, the Government decided to look in the market for a partner who was willing to accept more participation in the Public Company CFM. In this regard, a decision to go through for public tender was made, and if Patel Engineering participate in it would have the right of preference, as per the Memorandum and the Law."<sup>330</sup>*

307 As explained in the SOC, Mozambique's purported justification organising the tender was demonstrably false.<sup>331</sup>

308 This was made clear by PEL's letter of 22 January 2013, whereby PEL explained that it was always open to negotiations but understood that a 20% participation was the maximum that could be offered by law:<sup>332</sup>

*"[T]he PPP act (law No. 15/2011 of 10h August) and its regulation (Decree No, 16/2012o 4th June) establishes that the participation of local Mozambique interests is established up to 20% of the share capital."<sup>333</sup>*

*"Our offer of equity participation was in line with the share participation offered to CFM by VALE in CLIN project which is established fact and agreed by all parties concerned."<sup>334</sup>*

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<sup>329</sup> **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL reneging on MTC's commitment to award the concession to PEL, dated 11 January 2013.

<sup>330</sup>

*Id.*

<sup>331</sup> SOC, paras. 183-190.

<sup>332</sup> **Exhibit C-20**, Letter from Kishan Daga of PEL to Minister Zucula of MTC disputing the Government's decision to conduct a public tender, dated 22 January 2013. **CLA-65**, Law No. 15-2011 of 10 August 2011 (the PPP Law), Article 33; **CLA-64**, Decree No. 16/2012, of 4 June 2012 (the PPP Regulations), Article 34.

<sup>333</sup>

*Id.*

<sup>334</sup>

*Id.*

309 PEL also highlighted that the CFM had not shown any interest in negotiating with PEL, whether for 20% or not, and that the MTC had not offered PEL any assistance in this respect:<sup>335</sup>

*"We have requested your Excellency to let us know that in CFM with whom we should communicate for formation of JV and authorisation letter in our favour for such discussion with CFM..."*

*We did not get any Reply for our above mentioned request ...*<sup>336</sup>

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

*We were and are always interested and willing to enter into a partnership with CFM to develop this project but unfortunately have not received any formal position from neither from CFM nor from your Excellency.*<sup>337</sup> (Emphasis added)

310 PEL emphasized that it had "*done all efforts in line with the recommendations and directions given by [Minister Zucula]*" and that it "*shall not be penalized for eventual lack of response/or reaction from the other potential partner.*"<sup>338</sup>

311 PEL asked for the tender process to be paused and for the negotiations on the concession agreement be started immediately.<sup>339</sup>

312 The falsehood of Mozambique's justification was further confirmed by the CFM's stated position that it had no funds to participate in the venture, which it explained to PEL<sup>340</sup> and publicly confirmed in March 2013:<sup>341</sup>

*"[h]ere I must mention that, in some cases, the participation of Mozambique Ports and Railways [CFM] is minimal. In this case, for example, it will not participate because **the values are large and we have already participated in the project with***

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<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> **Exhibit C-20**, Letter from Kishan Daga of PEL to Minister Zucula of MTC disputing the Government's decision to conduct a public tender, dated 22 January 2013.

<sup>340</sup> **CWS-1**, Witness Statement of Mr Kishan Daga, para. 99.

<sup>341</sup> SOC, para. 198; **Exhibit C-23**, Letter from Kishan Daga of PEL to Minister Zucula of MTC enclosing published newspaper article on 1 March 2013 where the CFM stated publicly that it would not participate in the Project, dated 4 March 2013; and **Exhibit C-194**, Chairman of the CFM Board of Directors Puts His Finger in the Wound "*The Sena Line is Not Adapted to Transport Coal*", published in *O Pais Economico*.

*Vale, in the Nacala Corridor, in the Technobanine project we are part of Bela Vista Holding.*"<sup>342</sup> (Emphasis added)

313 In light of this statement by the CFM, PEL explained to Mozambique that the sole purported reason for holding the tender had been PEL's inability to reach an agreement with the CFM:

*"[t]he single reason for altering the course of the MOU [sic] signed was, expressly, the lack of agreement with CFM on the shareholding. Being however clear that CFM do not intend participating in the project, being the project conceived and developed by PATEL, we believe it is only fair and just to implement the MOU [sic] as signed with GOM and allow Patel to proceed with the development of this project."*<sup>343</sup>

314 It was finally rendered undeniable by the fact that the CFM has now accepted to enter into a joint venture for the implementation of the Project with an equity of exactly 20% with the TML Consortium.<sup>344</sup>

315 As for Mozambique's attempt to redefine PEL's right of first refusal as a scoring advantage in the tender, this was inconsistent with Mozambique having asked PEL just a few months earlier to exercise its right of first refusal, to negotiate with the CFM and to meet Odebrecht as a potential partner for the building of the railway line.

316 Respondent is conscious that these facts are damaging to its case. As a result, in the SOD, it discusses Mozambique's decision to organise a tender without any reference to the justification that was given by Mozambique for doing so, namely that PEL had allegedly failed to offer more than 20% equity to the CFM.<sup>345</sup> Instead, it tries to detract attention from the purported justification of its decision by portraying Mozambique's offer of a scoring advantage in a tender as being "*accommodating to PEL*", "*despite the invalidity of the MOI*".<sup>346</sup>

317 Mozambique's attempt to describe the scoring advantage as a favour done to PEL is nothing more than wishful thinking. The letter neither discusses the

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<sup>342</sup> **Exhibit C-194**, Chairman of the CFM Board of Directors Puts His Finger in the Wound "*The Sena Line is Not Adapted to Transport Coal*", published in *O Pais Economico*.

<sup>343</sup> **Exhibit C-23**, Letter from Kishan Daga of PEL to Minister Zucula of MTC enclosing published newspaper article on 1 March 2013 where the CFM stated publicly that it would not participate in the Project, dated 4 March 2013.

<sup>344</sup> **Exhibit C-125**, Italian-Thai Development Public Company 2016 Annual Report.

<sup>345</sup> SOD, paras. 110-112.

<sup>346</sup> SOD, para. 111.

alleged invalidity of the MOI, nor the fact that Mozambique was being accommodating.

318 The document production process has confirmed that there is no documentary support for the purported justification given by Mozambique in respect of its decision to organise the tender.

319 Mozambique has indicated that it has not found any document "*evidencing that the CFM's requested or preferred a certain level of equity in the venture in relation to the Project between Mozambique's request that PEL negotiate with the CFM on 15 June 2012 and the January 2013 Letter*".<sup>347</sup>

320 Mozambique has also failed to produce any document relating to the alleged Cabinet meeting where the decision to organise the tender was made.<sup>348</sup> Mozambique contends that the reference is already discussed in Exhibits C-19 and C-22 and that it has conducted a reasonable search in this respect and could not identify any responsive document.<sup>349</sup>

321 Exhibits C-19 and C-22, which are both letters from the MTC to PEL, refer to an alleged Cabinet meeting (without even stating its date) and provide no explanation or justification in relation to the decision to hold a tender in respect of the Project. Exhibit C-19 is the 11 January 2013 letter itself and Exhibit C-22 is another letter from the MTC to PEL.

322 Furthermore, a record of a Cabinet meeting must exist as a matter of Mozambican law. At the very least, there must be for each Cabinet meeting:

- (a) documents prepared by the Secretariat of the Council of Ministers, such as an agenda;<sup>350</sup>
- (b) the draft resolution to be adopted by the Council of Ministers;<sup>351</sup>

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<sup>347</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, pp. 27-28, Document Request No. 11.

<sup>348</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, pp. 31-32, Document Request No. 13.

<sup>349</sup> *Id.*

<sup>350</sup> See **CLA-273**, Diploma 1/2005, of 24 June 2005 Article 3(1)(b) which remains in force to date by virtue of **CLA-274**, Diploma 1/2016, of 13 April 2016, which expressly states that Chapter II, Section I, of Diploma 1/2005. Chapter II, Section I includes Article 3(1)(b) of Diploma 1/2005.

<sup>351</sup> See **CLA-273**, Diploma 1/2005, of 24 June 2005 Article 6(2) which remains in force to date by virtue of **CLA-274**, Diploma 1/2016, of 13 April 2016, which expressly states that Chapter II, Section I, of Diploma 1/2005. Chapter II, Section I includes Article 6(2) of Diploma 1/2005.

- (c) opinions including the verification of the compliance with the rules and the legal and economic consistency of the projects;<sup>352</sup> and
- (d) summaries of the sessions containing the decision of the Council of Ministers.<sup>353</sup>

323 There is an obligation under Mozambique domestic law to archive the documents prepared in the context of a Cabinet meeting, and the minutes of such meetings specifically. Decree 36/2007, of 27 August which regulated the State archive system from 2007 to 2018, and Decree 84/2018 of 26 December, which repealed and replaced the latter and is still in force to day, provides that documents related to governance and transparency within the public administration must be kept in the intermediate archive for five years and thereafter permanently kept.<sup>354</sup>

324 Professor Medeiros confirms that Respondent has a legal obligation to maintain this information, which is based on principles of transparency:

*"the Mozambican State was, effectively, under an obligation to keep the documents of the public tender procedure in question, and the minutes of the meetings of the Council of Ministers, in order to guarantee the subsequent potential exercise of the constitutional right to information that belongs to all private parties."*<sup>355</sup> (Emphasis added)

*"[T]ransparency is also an essential condition for the effectiveness of other legal and constitutional principles, e.g., the principle of legality or the principle of impartiality, which are expressly enshrined in the Constitution (see Article 248 (2) of the Constitution). If there is no requirement of transparency of the Public Administration, it is not possible to adequately and effectively monitor the legality of its actions or assess the impartiality and equidistance required of all administrative decisions without exception."*<sup>356</sup> (Emphasis added)

325 The only reasonable inference to be drawn is that Claimant is correct, and that Mozambique's justification in the 11 January 2013 letter for its decision to hold

<sup>352</sup> See **CLA-273**, Diploma 1/2005, of 24 June 2005 Articles 6(1) and 7, which remain in force to date by virtue of **CLA-274**, Diploma 1/2016, of 13 April 2016, which expressly states that Chapter II, Section I, of Diploma 1/2005. Chapter II, Section I includes Articles 6(1) and 7 of Diploma 1/2005.

<sup>353</sup> See **CLA-273**, Diploma 1/2005, of 24 June 2005 Article 5(b), which remains in force to date by virtue of **CLA-274**, Diploma 1/2016, of 13 April 2016, which expressly states that Chapter II, Section I, of Diploma 1/2005. Chapter II, Section I includes Article 5(b) of Diploma 1/2005.

<sup>354</sup> **CLA-271**, Decree 36/2007, of 27 August 2007, Article 3 and Annex III; **CLA-272**, Decree 84/2018 of 26 December 2018, Article 3 and Annex III.

<sup>355</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 80.

<sup>356</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 78.3.2.

a tender in respect of the Project was false and that it had no other justification such that this decision was arbitrary.

*G. Mozambique Pressed Ahead with the Tender Without Any Further Explanations*

326 In the course of January and February 2013, Mozambique pressed ahead with the tender and rejected PEL's pleas to reconsider its position without giving any further explanations to PEL. This is notwithstanding the fact that, in the words of Mr Patel, "*[i]n particular, a tender was never mentioned in any of the interactions I had with PEL or with Mozambique's negotiators. A public tender was not on the cards for this Project when the MOI was being negotiated.*"<sup>357</sup>

327 On 30 January 2013, Mozambique published a notice inviting interested parties to submit the expression of interest.<sup>358</sup>

328 On 14 February 2013, PEL received a letter from the MTC, stating:

*"[It] had already had a meeting with Mister K. L. Daga to whom I again explained the process to be followed.*

***The Minister of Transport and Communications cannot reverse the decision already taken by the Council of Ministers.***

*This letter completely omitted the concept of a strategic partnership that was indicated and agreed upon.*

*The tender follows and Patel may compete with a right of first refusal.*"<sup>359</sup> (Emphasis added)

329 It did not provide any justification or background to the decision of the Council of Ministers. Nor does Respondent, which merely argues in the SOD, that the "*Council of Ministers' decision was entirely consistent with applicable Mozambican law and the MOI.*"<sup>360</sup>

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<sup>357</sup> CWS-4, Second Witness Statement of Mr Ashish Patel, para. 17. (Emphasis added)

<sup>358</sup> SOC, para. 195; and **Exhibit C-236**, MTC's Notice inviting to submit the expression of interest, dated 30 January 2013.

<sup>359</sup> **Exhibit C-22**, Letter from Minister Zucula to PEL regarding the decision of Mozambique to hold a public tender, dated 14 February 2013.

<sup>360</sup> SOD, para. 115.

330 Crucially, as explained above, Mozambique has failed to produce any document relating to the Council of Ministers' decision, in spite of the fact that these documents must exist as a matter of Mozambique domestic law.<sup>361</sup>

331 The only reasonable inference is that Claimant is correct, and that Mozambique's justification in the 11 January 2013 letter for its decision to hold a tender in respect of the Project was false and that it had no other justification such that this decision was arbitrary.

*H. PEL Participated in the Public Tender Under Protest, While Expressly Reserving Its Rights*

332 As explained in the SOC, PEL formed the PGS Consortium alongside companies with unparalleled experience in sub-Saharan Africa to compete in the public tender process.<sup>362</sup>

333 Mozambique wrongly asserts that by forming the PGS Consortium and participating in the public tender, PEL confirmed that it lacked the relevant expertise to be awarded and successfully execute the concession on a stand-alone basis.<sup>363</sup> Not only is this untrue, but it shows a complete lack of understanding by Respondent (or worse, a deliberate intention to mislead the Tribunal) of how large infrastructure projects work.

334 The involvement of additional partners to construct and operate the Project was not a novel idea for PEL.<sup>364</sup> As explained by Mr Daga, "[v]ery few companies, if any, would attempt to execute a Project of this magnitude on their own, and both PEL and Mozambique were always aware of this."<sup>365</sup>

335 Accordingly, PEL had always planned to partner with other reputable companies to bring the Project to fruition. For example, PEL's Mozambican partner SPI was actively involved with the Project from the beginning.<sup>366</sup> Mozambique was undoubtedly aware of SPI's involvement, as SPI assisted

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<sup>361</sup> See paras. 322-325 above.

<sup>362</sup> SOC, paras. 204-206. **CWS- 5**, Witness Statement of Mr Marco Raffinetti, paras. 14-16 ("*To my knowledge, at the time of bid submission and based on Grindrod's credentials ... there was no direct competitor to Grindrod operating in sub-Saharan Africa that had the breadth of services, capabilities or experience in general, and in Mozambique in particular, capable of developing and operating the Project in the areas of responsibility allocated to Grindrod in the PGS Consortium.*"). *Id.* at para. 16.

<sup>363</sup> SOD, para. 128.

<sup>364</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 126.

<sup>365</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 127.

<sup>366</sup> SPI was PEL's local partner, who assisted with contacting the authorities in Quelimane, when the Preliminary Study was prepared. See **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 20.



with the Preliminary Study, and its representatives often attended meetings with the Government alongside PEL.<sup>367</sup> Furthermore, PEL entered into a memorandum of understanding with SPI in August 2012, further underscoring PEL's intention to continue collaborating with SPI as the Project developed.<sup>368</sup>

336 In addition, Mozambique itself instructed PEL to meet with Odebrecht regarding the implementation of the Project,<sup>369</sup> thereby acknowledging that PEL naturally would work with other companies to develop the Project. Accordingly, Mozambique's argument that PEL partnered with SPI and Grindrod because it lacked expertise entirely misses the mark.

337 Besides, given that the Government had reneged on the commitments it had made to PEL in the MOI once before, and because PEL was unsure of what was driving the Government's decision to cut PEL out of the Project, PEL was concerned that the Government might attempt to eliminate PEL altogether at the prequalification stage of the tender process.<sup>370</sup> Therefore, it decided to form the PGS Consortium, both to put forward a winning team of companies with complementary experience and expertise,<sup>371</sup> and also to make it more difficult for the Government to cut out PEL from the Project.<sup>372</sup>

338 The PGS Consortium submitted its expression of interest on 8 March 2013 ("**EOI**") in accordance with the deadlines in the tender notice ("**Tender Notice**").<sup>373</sup>

339 The letter submitting the expression of interest was signed by Mr Daga on behalf of the PGS Consortium. This was consistent with the Tender Notice that required "*[i]nterested parties which form a group must participate through a common representative with sufficient authority to jointly bind all members of the group.*"<sup>374</sup>

340 Mozambique's allegations that by submitting the expression of interest and participating in the public tender "*PEL waived any rights ... under the MOI,*

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<sup>367</sup> **Exhibit C-20**, Letter from Kishan Daga of PEL to Minister Zucula of MTC disputing the Government's decision to conduct a public tender, dated 22 January 2013; **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 20.

<sup>368</sup> **Exhibit C-238**, Memorandum of Understanding between Patel and SPI, dated 3 August 2012.

<sup>369</sup> **Exhibit C-229**, Email from Arlanda Reis Cuamba of the MTC to Kishan Daga of PEL regarding meeting with Odebrecht, dated 26 June 2012.

<sup>370</sup> **CWS-1**, Witness Statement of Mr Kishan Daga, para. 123.

<sup>371</sup> See also **CWS- 5**, Witness Statement of Mr Marco Raffinetti, paras. 14-16.

<sup>372</sup> **CWS-1**, Witness Statement of Mr Kishan Daga, para. 123.

<sup>373</sup> **Exhibit C-26**, Letter from Kishan Daga of PEL to Minister Zucula of MTC submitting an Expression of Interest for the Project, dated 8 March 2013.

<sup>374</sup> **Exhibit C-24**, Tender Notice entitled "*Application of Participants and Fulfilment*", undated.

*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 suspended the MOI"*<sup>375</sup> are baseless and should be disregarded by the Tribunal. Mozambique does not cite a single source supporting these allegations.

341 Respondent conveniently ignores that PEL was forced to participate in the public tender because of the Government's own failure to abide by its obligations under the MOI. If PEL had decided not to participate in the public tender, it would have risked losing the Project altogether, along with all of the know-how, time, and funds it had invested in the Preliminary Study and the PFS, but more importantly its potential to profit from what it believed to be a game-changing infrastructure solution for Mozambique.<sup>376</sup>

342 PEL expressly reserved its rights under the MOI in the correspondence with the MTC. The expression of interest letter submitted by the PGS Consortium on 8 March 2013 unequivocally reserves PEL's rights:

*"... though not obliged to submit our EOI [expression of interest], the same is being submitted as per your letter mentioned above, only as formality, as we automatically stand pre qualified for the Project.*

*... The submission of this EOI is made with no prejudice to the rights Patel vested in as a result of the MOA signed between the Government of Mozambique represented by the Minister of Transport and Communications and Patel Engineering (MOA).*

*Nothing in this letter or the submission package as well as the content of the EOI shall or may construed as a waiver or a variation of any of the rights Patel has in terms of the MOA.*"<sup>377</sup> (Emphasis added)

343 Four days after the PGS Consortium submitted its expression of interest, PEL wrote to Prime Minister Vaquina again imploring the Government to abide by the commitments it undertook in the MOI, and protesting the imposition of the public tender process:

*"Despite the non-conformity of the Expression of Interest (EOI) made by the Ministry of Transport and Communications*

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<sup>375</sup> SOD, para. 118.

<sup>376</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 123.

<sup>377</sup> **Exhibit C-26**, Letter from Kishan Daga of PEL to Minister Zucula of MTC submitting an Expression of Interest for the Project, dated 8 March 2013.

(MTC) with the MOA signed between the Government, represented by the Minister of Transport and Communications, and PATEL we decided to submit our EOI, with a reservation letter stating that **submission is made with no prejudice to our rights**".<sup>378</sup> (Emphasis added)

344 PEL explained in the letter that it had complied with all the requirements under the MOI for granting a concession to implement the Project, i.e. it completed the PFS and exercised its right of first refusal (i.e. confirmed its intention to proceed with the concession and the Project) as requested by the MTC. PEL likewise further reiterated its position that it "*had offered CFM the maximum extent of partnership i.e. 20% as permissible under the PPP Act of Mozambique*".<sup>379</sup>

345 Mozambique relies on cherry-picked statements in PEL's letter of 12 March 2013 to the Prime Minister to misrepresent PEL's arguments as being "*unsound*".<sup>380</sup> In particular, Mozambique alleges that PEL stated that the PPP Law requiring a tender should not apply because "*a tender under the PPP Law is intended to ensure that the proposer submitted appropriate technical, quality, and price terms*".<sup>381</sup>

346 This is incorrect. PEL explained clearly its understanding that Mozambique's PPP law allowed for the direct award of the concession without holding a public tender under circumstances which were present in PEL's case. PEL provided a number of examples where "*direct negotiations have been applied for the contracting of concession under the PPP regime*" by the Government.<sup>382</sup>

347 Mozambique further relies on PEL's statement in that same letter where PEL notes that it had not yet "*submitted its complete proposal on the technical, quality and price terms [as per Article 13(5) of the PPP Act]. Till date, Patel has only submitted the pre feasibility study and exercised its first right of refusal to implement the project*".<sup>383</sup> Mozambique points to this statement to

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<sup>378</sup> **Exhibit C-28**, Letter from Kishan Daga of PEL to Minister Zucula of MTC setting out rationale for a direct award of the concession pursuant to the MOI, dated 12 March 2013.

<sup>379</sup> *Id.*

<sup>380</sup> SOD, para. 122.

<sup>381</sup> *Id.*

<sup>382</sup> **Exhibit C-28**, Letter from Kishan Daga of PEL to Minister Zucula of MTC setting out rationale for a direct award of the concession pursuant to the MOI, dated 12 March 2013.

<sup>383</sup> *Id.*

concoct an argument that PEL somehow had failed "*to conceptualize its own proposal*" by early 2013, and therefore a public tender process was required.<sup>384</sup>

348 In doing so, Respondent ignores both the terms of the MOI (which required PEL to undertake the PFS and not a bankable feasibility study) and its own laws. Article 13(5) of the PPP Law regulates the procurement of a USP project via the public tender process. However, the tender process can only be launched *after* a private proponent presents its complete proposal, including a full feasibility study.<sup>385</sup> Accordingly, PEL was simply pointing out that if Mozambique were to continue with the public tender (over PEL's strenuous objections), it was first required by law to provide PEL with an opportunity to present its full proposal before launching the tender process. This has been confirmed by Mr Baxter who explains that:

*"Once the government has decided to proceed with the project on the basis of the study provided by the private proponent, in the direct award scenario, it would then enter into a negotiation with the private proponent on the award of the concession. This will typically be in the form of a concession agreement. The concession agreement will require the private proponent to undertake a comprehensive feasibility study, and once that is complete to the satisfaction of both parties, to undertake the project itself."*<sup>386</sup>

349 Mozambique further incorrectly asserts that by forming the PGS Consortium and participating in the public tender, PEL "*foreclosed its ability to seek a direct award in good faith to its other Consortium members or the public tender process*" and PEL violated its commitments to the other PGS Consortium members when it sought the direct award of the Project.<sup>387</sup> Once again, these allegations are false and are contradicted by contemporaneous evidence.

350 Contrary to the Government's allegations, SPI and Grindrod were fully aware of PEL's right to a direct award of the Project under the MOI.<sup>388</sup> As Mr Raffinetti explains, "*[f]rom the outset of Grindrod's involvement in the tender process, PEL and SPI informed Grindrod that they had a right to a direct award for the Project concession with the Government of Mozambique.*"<sup>389</sup>

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<sup>384</sup> SOD, paras. 121-122.

<sup>385</sup> CLA-64, Decree No. 16/2012, dated 4 June 2012, Article 9.

<sup>386</sup> CER-7, Expert Report of Mr David Baxter, para. 126.

<sup>387</sup> SOD, paras. 127-128.

<sup>388</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 133.

<sup>389</sup> CWS- 5, Witness Statement of Mr Marco Raffinetti, para. 17.

This is clearly seen in the Side Letter to the Memorandum of Understanding between the PGS Consortium members dated 8 March 2013.<sup>390</sup> In that Side Letter, each of PEL, SPI, and Grindrod specifically acknowledged and agreed that PEL was entitled to insist on the direct award of the concession in tandem with the PGS Consortium's pursuit of the same concession through the public tender process:

*"3.2. It is recorded and agreed that:*

*3.2.1 Patel Engineering Limited and the Government have concluded a written MOI in terms of which Patel Engineering may be awarded the Project directly ("Previous Agreement");*

*3.2.2 Despite the aforesaid Previous Agreement the Government has floated [sic] an EOI for the Project, but Patel Engineering and SPI are seeking to have a direct award based on the Previous Agreement wherein the Project would be directly awarded to Patel Engineering Limited ("Direct Award").*

*3.2.3 Patel Engineering and SPI shall be entitled to pursue such Direct Award..."*<sup>391</sup>

351 PEL never intended to implement the Project alone. Thus, in the event the MTC complied with its commitments in the MOI and granted PEL a direct award, SPI and Grindrod would have continued to have partnered with PEL in the Project's implementation and operation.<sup>392</sup> Thus, by requesting the Government to comply with its obligations under the MOI and award the concession directly, PEL did not violate its obligations towards the SPI or Grindrod.

352 Respondent's allegation that PEL breached the principle of good faith and acted with abuse of rights, when it claimed a direct award of the Project after participating in the public tender, lacks merit under Mozambican law.<sup>393</sup>

353 According to Professor Medeiros, the "*legitimate reliance*" that deserves to be protected is required for the abuse of rights and failure to act in good faith claim

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<sup>390</sup> **Exhibit C-233**, Side Letter between PEL, Grindrod and SPI, dated 8 March 2013.

<sup>391</sup> *Id.*

<sup>392</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 134 ("*In the case that the MTC abided by its commitments in the MOI and granted PEL a direct award, SPI and Grindrod would still have been partners in the Project's implementation and this was understood by every member of the Consortium.*"); **CWS-5**, Witness Statement of Mr Marco Raffinetti, para. 22 ("*It is my recollection, as reflected by the intentions of the parties in the MOU and Side Letter, that PEL and SPI intended to continue their partnership with Grindrod in the Project in the event of the Project being secured through a direct award, and not via the tender process.*") See also, **Exhibit C-238**, Memorandum of Understanding between Patel and SPI, dated 3 August 2012.

<sup>393</sup> **RER-2**, Legal Opinion of Teresa Muenda, para. 16.

to succeed.<sup>394</sup> Here, there were no valid and reasonable grounds for Mozambique to create legitimate expectations "*that PEL, having participated in the public tender process, would not claim its rights to a direct award*".<sup>395</sup> As explained above, PEL always stated that it had the right to a direct award under the MOI.

*I. Mozambique Reversed Course and Its Council of Ministers Decided to Award the Project Concession Directly to PEL*

354 As explained in the SOC, a mere three months after it had forced PEL to participate in the public tender in respect of the Project, on 18 April 2013, Mozambique reversed course.<sup>396</sup> After deliberations, Mozambique's Council of Ministers decided it was in Mozambique's "*national strategic interest*" to award the Project concession directly to PEL.<sup>397</sup> Importantly, the Council of Ministers is Mozambique's highest executive decision-making body<sup>398</sup>; it is comprised of the President, Prime Minister, and all of Mozambique's ministries including the Ministers of Foreign Affairs and Cooperation, Economy and Finance, Justice, National Defence, Industry and Commerce, Mineral Resources and Energy, and the MTC, among others.

355 The MTC informed PEL of the Council of Ministers' decision, which was taken during its 10th Ordinary Session on 16 April 2013, through a letter captioned "*Negotiations of the Terms of the Concession of the Port of Macuse with Capacity [sic] to Handle 25 Million Tons per Year and a 516 km Railway Corridor from Macuse to Moatize*."<sup>399</sup> That communication details the Council of Ministers' findings that PEL's Project concept was of "*national strategic interest*" and a matter of "*urgency*", so much so that it was in the "*national interest that the project be accelerated*"<sup>400</sup> by means of direct negotiations with PEL for the Project concession "*with a view of carrying out those projects*":

*"In the scope of the creation of transport logistics conditions that permit the rapid flow of coal from the Province of Tete to*

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<sup>394</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 73.4.

<sup>395</sup> *Id.*

<sup>396</sup> SOC, paras. 211-215.

<sup>397</sup> Exhibit C-29, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

<sup>398</sup> CLA-48a, Constitution of the Republic of Mozambique, Art. 200.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

*the coast, taking into account the interest of the Company Patel Engineering Ltd., for the realization of this project;*

***The Council of Ministers, in its 10<sup>th</sup> Ordinary Session held on the date of 16 April 2013, considering the urgency of these infrastructures, the national strategic interest, the time available and the fact that the tenderer has carried out all the feasibility and engineering studies, and that it is in the national interest that the project be accelerated decided to invite this company to start the process with a view of carrying out those projects.***

*Therefore, the representatives of Patel Engineering Ltd. are invited to contact the Ministry of Transport and Communications, to begin this process, within seven days.*

***It is also requested that the company prepare for the project, within thirty days, a bank guarantee corresponding to zero point one percent (0.1%) of the volume of the investment foreseen for the respective enterprise and keep it valid until the conclusion of the contract, at which time the same shall be returned to the contracted entity.***

*The company must also present a statement, agreement or take or pay memorandum with mining companies, in order to make the project in question feasible.*<sup>401</sup> (Emphasis added)

356 Importantly, this contemporaneous documentary evidence at Exhibit C-29:

- (a) is unequivocal in demonstrating that the highest executive authority in Mozambique authorized the direct award of the Project concession to PEL, as required by Article 13(3) of the PPP Law. As Professor Medeiros explains: "*[t]here is also no doubt that the Council of Ministers expressly consented to the direct award of the concession in its 10th Ordinary Session, of 16 April 2013, regarding the PPP project set out in the MoI.*"<sup>402</sup>
- (b) recognises PEL's "*interest*" for the "*realization of this Project*";<sup>403</sup>
- (c) sets out the justification for procuring the Project by direct award, while recognizing PEL's contribution to it, namely, "*the urgency of these infrastructures, the national strategic interest, the time available, and the fact that the tenderer [PEL] has carried out all the feasibility and*

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<sup>401</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

<sup>402</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 25.2.

<sup>403</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

*engineering studies, and that it is in the national interest that the project be accelerated.*"<sup>404</sup>

- (d) makes clear that the next step to progress the Project is to commence the "*Negotiations of the Terms of the Concession of the Port of Macuse ... and a 516 km Railway Corridor from Macuse to Moatize*" within seven days.<sup>405</sup>

357 On 23 April 2013, PEL responded to Mozambique's formal decision to proceed with a direct award, conveying its "*sincere appreciation to the Council of Ministers of the Republic of Mozambique and your Excellency for inviting us to the negotiation process leading to the signing of the concession agreement.*"<sup>406</sup> PEL formally acknowledged Mozambique's notification "*to start the negotiation process for the concession of a Port at Macuse and railway Line linking the province of Tete to the referred port (the Project).*"<sup>407</sup> It further agreed to provide a bank guarantee in the amount of 0.1% "*of the volume of the investment foreseen*"<sup>408</sup> and the relevant documents requested by the MTC in due course. PEL also underscored its enthusiasm for the successful implementation of the Project: "*in consideration of the national interest and the need of this project, we would work together with the Government to make the project a great success.*"<sup>409</sup>

358 On 24 April 2013, PEL wrote to Mr Chaúque, Director of the MTC and a witness for Respondent, confirming in writing that it had met with Minister Zucula "*to discuss the modalities of [the] negotiation process*", and that Minister Zucula had undertaken to provide a draft concession agreement to PEL by 24 April 2013 at the latest.<sup>410</sup> PEL noted that "*tentatively our first meeting for negotiations is scheduled on 08th May 2013 at Maputo.*"<sup>411</sup>

359 On the same day, Mr Chaúque responded on behalf of the "*inter-ministerial technical team*" charged with negotiating the concession on Respondent's

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<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> **Exhibit C-30**, Letter from Kishan Daga of PEL to MTC Minister Zucula concerning PEL's acceptance of the MTC's offer to commence negotiations for a concession agreement for the Project, dated 23 April 2013.

<sup>407</sup> *Id.*

<sup>408</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

<sup>409</sup> **Exhibit C-30**, Letter from Kishan Daga of PEL to MTC Minister Zucula concerning PEL's acceptance of the MTC's offer to commence negotiations for a concession agreement for the Project, dated 23 April 2013.

<sup>410</sup> **Exhibit C-31**, Letter from Kishan Daga of PEL to Luis Amandio Chauque of MTC regarding draft concession agreement and negotiation meetings, dated 24 April 2013.

<sup>411</sup> *Id.*



behalf, proposing that the first meeting for negotiating the Project concession be held on 10 May 2013 at 9 am at the MTC.<sup>412</sup>

360 Shortly thereafter, the MTC pushed back the deadline for submitting technical and financial proposals in the public tender process, from 29 May to 28 June.<sup>413</sup> When doing so, the MTC made no mention to any of the bidders about the Council of Ministers' decision to proceed with a direct award to PEL, nor that the concession negotiations were scheduled to commence with PEL in less than a week's time.<sup>414</sup>

361 In anticipation of the negotiations, on 9 May 2013, PEL provided the bank guarantee requested by Mozambique in the amount of USD 3,115,000 million.<sup>415</sup>

362 The foregoing events, which are supported by contemporaneous documentary evidence, make it clear that, subsequent to the conditions precedent being met under the MOI, the Council of Ministers itself - which possesses the discretion to authorise the award of a concession directly to a private proponent under Mozambican law<sup>416</sup> - confirmed PEL's right to the direct award of a concession, consistent with the Parties' agreement in the MOI. As Professor Medeiros explains in his first report, the content of the letter of 18 April 2013 precisely reflects how a direct award in the national strategic interest is usually authorized by the Council of Ministers, pursuant to the PPP Law.<sup>417</sup>

363 This is devastating to Mozambique's case. As a result, Mozambique attempts to discount the critical importance of the 18 April 2013 MTC letter informing PEL of the Council of Ministers' decision to authorise the award of the concession directly to PEL and of the inherent decision to award the concession, inviting PEL to proceed to the next stage of the procedure set out in the Public Procurement Regulations – negotiations of the terms of the concession.<sup>418</sup> It suggests the letter merely "*reflected*" that the "*negotiation process and tentative project*" was conditional upon PEL presenting a

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<sup>412</sup> **Exhibit C-32**, Letter from Luis Amandio Chauque of MTC to PEL providing a date, time and venue for the meeting to negotiate a concession, dated 24 April 2013.

<sup>413</sup> **Exhibit C-61**, Letter from the MTC to tender participants, dated 3 May 2013.

<sup>414</sup> *Id.*

<sup>415</sup> **Exhibit C-33**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding the bank guarantee, dated 9 May 2013.

<sup>416</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 14.4.

<sup>417</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, para. 43.

<sup>418</sup> **CLA-64**, Decree No. 16/2012, dated 4 June 2012, Articles 9 (f) and (g) and 17(3).

statement, agreement or take or pay memorandum with mining companies, in order to make the project in question feasible, which it failed to do.<sup>419</sup> Mozambique also insincerely suggests that the negotiations were merely further discussions.<sup>420</sup>

364 In an attempt to brush the decision to directly award the concession informed through the 18 April 2013 letter under the rug, Mozambique fails to engage with the content or import of that letter as set out in Section IV.C above, or any of the parties' conduct or correspondence thereafter, all of which plainly confirm the decision to approve direct negotiations with PEL for the Project concession.

365 There is no other credible explanation for: (i) PEL conveying its *"sincere appreciation to the Council of Ministers"* for *"inviting us to the negotiation process leading to the signing of the concession agreement"*;<sup>421</sup> (ii) Minister Zucula meeting with PEL *"to discuss the modalities of [the] negotiation process"*,<sup>422</sup> (iii) Minister Zucula undertaking to provide PEL with draft concession agreement by 24 April 2013 to serve as the basis of the parties' negotiations; (iv) Mr Chauque's proposal on behalf of the *"inter-ministerial technical team"* charged with negotiating the concession in a letter captioned *"Negotiations of the Terms of the Concession ..."* proposing to commence negotiations on 10 May,<sup>423</sup> and (v) PEL's provision of a USD 3,115,000 bank guarantee,<sup>424</sup> which the MTC instructed should be kept *"valid until the conclusion of the contract, at which time the same shall be returned to the contracting entity."*<sup>425</sup>

366 Tellingly, Mr Chauque, who personally confirmed that the first negotiation meeting with PEL would take place on 10 May 2013, does not even comment on his own correspondence. Similarly, Minister Zucula's testimony is Mozambique's only *"evidence"* in respect of its allegation that the 18 April 2013 letter informing PEL of the Council of Ministers' decision to allow for a

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<sup>419</sup> SOD, para. 123.

<sup>420</sup> *Id.* at para. 124.

<sup>421</sup> **Exhibit C-30**, Letter from Kishan Daga of PEL to MTC Minister Zucula concerning PEL's acceptance of the MTC's offer to commence negotiations for a concession agreement for the Project, dated 23 April 2013.

<sup>422</sup> **Exhibit C-31**, Letter from Kishan Daga of PEL to Luis Amandio Chauque of MTC regarding draft concession agreement and negotiation meetings, dated 24 April 2013.

<sup>423</sup> **Exhibit C-32**, Letter from Luis Amandio Chauque of MTC to PEL providing a date, time and venue for the meeting to negotiate a concession, dated 24 April 2013.

<sup>424</sup> **Exhibit C-33**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding the bank guarantee, dated 9 May 2013.

<sup>425</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013. (Emphasis added)

direct award of the Project concession to PEL was a mere invitation to negotiate.<sup>426</sup> Minister Zucula's witness evidence is notably vague on this point; he fails to clearly refer to his own 18 April letter or its contents. Further, given that his witness statement was taken from prison where he resided after being charged with crimes of dishonesty, it would be appropriate for the Tribunal to disregard his testimony altogether.

367 Mozambique's dearth of evidence in relation to the decision to proceed with a direct award to PEL is conspicuous. Mozambique has failed to produce *any* document relating to the 10th Ordinary Session of the Council of Ministers held on 16 April 2013, which is referred to in the MTC's letter of 18 April 2013. That is critical evidence that has been withheld from PEL and from this Tribunal because such evidence would set out the Council of Ministers' decision to reverse the public tender that was underway, and to instead to proceed with a direct award to PEL in the "*national strategic interest*".<sup>427</sup>

368 The only piece of evidence that Mozambique "*produced*" in this respect was a letter that already had been exhibited by PEL. In relation to Claimant's document production request No. 15,<sup>428</sup> Mozambique contended that "*the initial decision of the meeting was communicated to PEL in the previously produced exhibits, including R-26*".<sup>429</sup> But Exhibit R-26 is the same as Exhibit C-29, which was adduced first by Claimant and then re-adduced by Respondent (as it has done for most of its exhibits). This is the MTC letter of 18 April 2013 itself. Plainly, it does not contain any minutes or preparatory documents of the Cabinet meeting of 16 April 2013.

369 Mozambique's failure to produce these critical documents is even more alarming given that a record of all Council of Ministers meetings *must exist* as a matter of Mozambican law.<sup>430</sup> As explained above, there likewise is a clear obligation under Mozambican domestic law to archive the documents prepared in the context of Council of Minister meetings and in particular, the minutes of such meetings.<sup>431</sup>

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<sup>426</sup> SOD, para. 124.

<sup>427</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, Document Request No. 15, pp. 36-37.

<sup>428</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, Document Request No. 15, pp. 36-37: "*Minutes and notes of, including any preparatory documents, attendees list, documents shared in advance of, during, or after the Council of Ministers Ordinary Session of 16 April 2013 referred to in the letter between Mozambique and PEL dated 18 April 2013*".

<sup>429</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, Document Request No. 15.

<sup>430</sup> See paras. 322-324; CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 78.

<sup>431</sup> See para. 323.

370 In light of Respondent's failure to produce even a single document from the Council of Minister's 10th Ordinary Session, notwithstanding its legal obligation to maintain such documents, the Tribunal should draw adverse inferences from Respondent's nondisclosure. Respondent's duty to act transparently arises from both its domestic and international law obligations. Here, it is clear that key evidence, including the Council of Ministers' draft resolution allowing for PEL to proceed with the Project by means of a direct award,<sup>432</sup> the Council of Minister's verification that it had complied with own rules, and its views on the legal and economic aspects of the Project,<sup>433</sup> along with a summary of the 10th Ordinary Session containing the Council of Ministers' decision to implement the Project via a direct award to PEL.<sup>434</sup>

371 The only reasonable inference that can be drawn from Respondent's nondisclosure in this context is that either those documents are so injurious to its case that it has failed to produce them in contravention of the Tribunal's order, or Respondent has failed to comply with its own laws, and has failed to meet its transparency obligations such that "*it is not possible to adequately and effectively monitor the legality of its actions or assess the impartiality.*"<sup>435</sup>

*J. Mozambique Had Another Unjustified Change of Heart and Decided to Press Ahead with the Tender Purporting to Offer PEL Mere 15 Scoring Advantage*

372 As explained in the SOC, on 13 May 2013, just four days after PEL sent Mozambique the bank guarantee and three days after a meeting was due to take place at the MTC, Mozambique changed its mind and decided to proceed with a tender in respect of the Project. It informed PEL that:

*"The Council of Ministers, after hearing several stakeholders of the above mentioned Projects and after reviewing the legal and regulatory framework of Public-Private Partnerships, on its 12<sup>th</sup> Ordinary Session held on 30 April 2013, has come [sic] to a conclusion that the current Public Tender represents the correct option, there not being, therefore, space for direct*

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<sup>432</sup> See **CLA-273**, Diploma 1/2005, of 24 June 2005 Article 6(2) which remains in force to date by virtue of **CLA-274**, Diploma 1/2016, of 13 April, which expressly states that Chapter II, Section I, of Diploma 1/2005. Chapter II, Section I includes Article 6(2) of Diploma 1/2005.

<sup>433</sup> See **CLA-273**, Diploma 1/2005, of 24 June 2005 Articles 6(1) and 7, which remain in force to date by virtue of **CLA-274**, Diploma 1/2016, of 13 April, which expressly states that Chapter II, Section I, of Diploma 1/2005. Chapter II, Section I includes Articles 6(1) and 7 of Diploma 1/2005.

<sup>434</sup> See **CLA-273**, Diploma 1/2005, of 24 June 2005 Article 5(b), which remains in force to date by virtue of **CLA-274**, Diploma 1/2016, of 13 April, which expressly states that Chapter II, Section I, of Diploma 1/2005. Chapter II, Section I includes Article 5(b) of Diploma 1/2005.

<sup>435</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 78.3.2.

*negotiations with any of the bidders presented in the pre-selection phase.*

*Thus, and based in this decision, there shall be no place for direct negotiations with Patel Engineering Limitada [sic], and this company is encouraged to continue in the bidding, enjoying from the start of preference right from the 15 percentage points stipulated by Law...."*<sup>436</sup>

373 On 4 June 2013, PEL protested that this was a breach of Mozambique's commitments under the MOI explicitly referring to Clause 2(1) and 2(2) of the MOI, whereby Mozambique had promised to grant PEL a concession, subject to approval of the PFS and PEL's exercise of its right of first refusal.<sup>437</sup> PEL noted that "*both the conditions ... were fulfilled by PEL and MTC*" and "*as per the MOU the next course of action shall be to negotiate and sign concession agreement with PATEL for this project.*"<sup>438</sup>

374 PEL also reiterated that the grant of a concession by direct award was in accordance with Mozambican law.<sup>439</sup> This was correct – as confirmed by Professor Medeiros in his first report<sup>440</sup> and reiterated in his second report.<sup>441</sup>

375 PEL expressly explained in the letter that the Project fell under the situation where the grant of the direct award was justified:

*"Hence this situation comes under article 13 clause 3 where in it is mentioned that in weighty situation and once duly justified and as a last resort measure subject to prior express approval by the government, the contracting of a PPP undertaking may exceptionally take the form of negotiation and direct award.*

*According to this the weighty situation is*

*a. That PATEL has identified the project and made all possible studies to present to the Government the project.*

*b. It is duly justified as MTC has approved the prefeasibility study.*

*c. Prior express approval has already been accorded while agreeing in MOU which was signed by MTC.*

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<sup>436</sup> **Exhibit C-34**, Letter from Luis Amandio Chauque of MTC to Kishan Daga of PEL reversing the MTC's regarding direct negotiations with PEL, dated 13 May 2013.

<sup>437</sup> **Exhibit C-35**, Letter from Kishan Daga of PEL to Minister Zucula of MTC responding to the MTC's change in position regarding direct negotiations, dated 4 June 2013.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, paras. 37-49.

<sup>441</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 2.1.

*Under such circumstances we would once again request you to kindly abide by the agreed condition in MOU ... to start the negotiation of concession agreement on the basis of direct award.*"<sup>442</sup>

- 376 This further *volte-face* is yet another debacle for Respondent's case. As a result, it tries to justify the 30 April 2013 decision of the Council of Ministers by a purported concern to treat all potential "*fairly in accordance with applicable law.*"<sup>443</sup> It was not. As explained by Professor Medeiros, Mozambique's change of course was unlawful under Mozambican law.<sup>444</sup>
- 377 In this context, it is not surprising that Mozambique has not even found a witness to confirm that this was indeed the concern justifying the 30 April 2013 decision. Mr Chaúque merely quotes the text of the 13 May 2013 letter in his testimony but does not explain the sudden change of mind of the Council of Ministers.
- 378 Furthermore, as explained above, under Mozambican law, a record of a Cabinet meeting, including, at the very least, the draft resolution to be adopted by the Council of Ministers<sup>445</sup> and summaries of the sessions contained the decision of the Council of Ministers,<sup>446</sup> must be kept in the intermediate archive for five years and then permanently kept.<sup>447</sup>
- 379 The only reasonable inference is that Claimant is correct, and that on 30 April 2013, Mozambique arbitrarily changed its mind when it reversed its decision to award a concession directly to PEL and decided to proceed with a tender instead. That decision was clearly unlawful under both Mozambican and international law.<sup>448</sup>

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<sup>442</sup> **Exhibit C-35**, Letter from Kishan Daga of PEL to Minister Zucula of MTC responding to the MTC's change in position regarding direct negotiations, dated 4 June 2013.

<sup>443</sup> SOD, para. 125.

<sup>444</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, para. 49.

<sup>445</sup> See **CLA-273**, Diploma 1/2005, of 24 June 2005 Article 6(2) which remains in force to date by virtue of **CLA-274**, Diploma 1/2016, of 13 April, which expressly states that Chapter II, Section I, of Diploma 1/2005. Chapter II, Section I includes Article 6(2) of Diploma 1/2005.

<sup>446</sup> See **CLA-273**, Diploma 1/2005, of 24 June 2005 Article 5(b), which remains in force to date by virtue of **CLA-274**, Diploma 1/2016, of 13 April, which expressly states that Chapter II, Section I, of Diploma 1/2005. Chapter II, Section I includes Article 5(b) of Diploma 1/2005.

<sup>447</sup> **CLA-271**, Decree 36/2007, of 27 August, Article 3 and Annex III. **CLA-272**, Decree 84/2018 of 26 December, Article 3 and Annex III. **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 79.3.

<sup>448</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, paras. 47 to 49. ("*The revocation of the act performed by the Council of Ministers on 18 April 2013 is, therefore, an unlawful revocation of an act establishing rights, such revocation being vitiated by illegality.*"), *Id.* at para. 49.

K. *The Tender Organised by Mozambique Made Unlawful Use of PEL's Concept and Know-How and Was Riddled with Irregularities*

1. Mozambique used PEL's PFS and the know-how PEL developed to organise the tender

380 As explained in the SOC, Mozambique distributed a tender notice to interested parties inviting them to submit the expression of interest by 8 March 2013, to participate in the public tender for the Project.<sup>449</sup> The tender notice was ostensibly based on PEL's PFS.<sup>450</sup> It set out that the tender was for the acquisition of "*the concession right to develop, design, build, maintain, finance, operate, manage, exploit and transfer to the Government of Mozambique a new Railway Line from Moatize to Macuze*".<sup>451</sup> That was exactly the Project which PEL had devised, developed, and presented to the MTC.

381 Mozambique's experts, MZBetar, now allege that "*PEL presents no evidence that the PFS was provided to any bidders*".<sup>452</sup> They further argue that "*PEL's suggestion that the Tender Notice was 'ostensibly based on' the PFS*" is not correct.<sup>453</sup> These statements contradict the facts of the case.

382 As explained above, in July 2012, the MTC requested PEL to remove the logo from the PFS submitted by PEL.<sup>454</sup> That request and further correspondence from the MTC indicate that the MTC needed a clean version of the PFS, without any signs identifying PEL, to use the work product that PEL had created in order to provide this to bidders in the public tender.<sup>455</sup>

383 The details of Mozambique's description of the public tender match with PEL's proposals related to the Project.<sup>456</sup> The press article dated 22 November 2012 announcing the public tender mentioned that:

*"The Mozambican government plans to launch an international public tender for a rail and port project worth US\$2 billion.*

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<sup>449</sup> SOC, para. 202.

<sup>450</sup> SOC, para. 21.

<sup>451</sup> **Exhibit C-24**, Tender Notice entitled "*Application of Participants and Fulfilment*", undated.

<sup>452</sup> **RER-1**, MZBetar Report, para. 65.

<sup>453</sup> *Id.* at para. 66.

<sup>454</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para.158.

<sup>455</sup> *Id.*

<sup>456</sup> *Id.* at para. 159.

*The public tender is to build a 525 kilometre railroad from Tete province to Macuse, in Zambézia province, and a port with capacity to handle 20 million tons of coal per year.*"<sup>457</sup>

384 The article described PEL's Project, as PEL initially considered having a 525-kilometre railroad from the Tete province to Macuse port.<sup>458</sup> That was an approximate rounded calculation.<sup>459</sup> The precise figure of 516 kilometres was included in the PFS.<sup>460</sup>

385 Claimant inadvertently attached to its Notice of Arbitration incorrect document as Exhibit C-21. The request for proposal and bidding documents dated 12 April 2013 (together "**Tender Documents**") were attached both as Exhibits C-21 and C-27. Instead of attaching the Tender Documents Claimant should have attached the MTC's notice inviting the expression of interest from the potential bidders published on 30 January 2013.<sup>461</sup>

386 Respondent likely intentionally did not correct Claimant's mistake as the MTC's notice inviting the expression of interest expressly referred to PEL's Project:

*"The Government of the Republic of Mozambique intends, through the Ministry of Transport and Communications intends [sic] to promote the construction of a **railway line of about 516km from the Moatize Macuzi**, and the construction of a port terminal in Macuzi..."*<sup>462</sup> (Emphasis added)

387 The PFS approved by the Government earlier concerned the "*development of 25 million ton per year handling capacity **Port at Macuze and approximately 516Km standard gauge Rail Corridor from Macuse to Moatize***".<sup>463</sup> It would have been impossible to calculate an exact distance of 516 kilometres without conducting the detailed route study.<sup>464</sup>

388 Later correspondence from the MTC to the bidders also confirms that Mozambique appropriated PEL's PFS to run the public tender. On 3 May 2013, the MTC sent a letter to the bidders, including the PGS Consortium, notifying that the following documents were available for consultation:

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<sup>457</sup> **Exhibit C-235**, Article "*Mozambique Launches US\$2 billion international tender for railroad project*", Macauhub Rail-port News, dated 22 November 2012.

<sup>458</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 160.

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

<sup>461</sup> **Exhibit C-236**, MTC's Notice inviting to submit the expression of interest, dated 30 January 2013.

<sup>462</sup> *Id.*

<sup>463</sup> **Exhibit C-6b**, Prefeasibility Study, dated 2 May 2012. (Emphasis added)

<sup>464</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 162.



*"1. Map of Mozambique on Development Corridors, projected railway lines and Investment Potential;*

*2. Executive Summary of a Study on the Port of Macuse with general data, geodesy, cartography, hydrography and geographic system of Information system; and*

*3. Description of the Geographical Extension of the Zambezia Development Corridor".<sup>465</sup>*

389 The MTC's letter referred to the documents contained in the PFS.<sup>466</sup> As explained by Mr Daga, while the map of Mozambique on development corridors and projected railway lines was prepared by Mozambique, the other documents and data mentioned in the letter were only available in the PFS prepared by PEL.<sup>467</sup>

390 PEL does not have access to the documents mentioned in the letter. To the extent Mozambique wants to argue that these documents were not based on the PFS, it is incumbent on Mozambique to produce these documents.

391 It is clear from the above that the tender concerned PEL's Project and was based on PEL's PFS. It would have been impossible for the Government to run a public tender with respect to such a large project without a completed PFS.<sup>468</sup> The Government would have needed to spend a lot of money and time to conduct a study before organising a public tender.<sup>469</sup>

392 In addition, Mozambican law requires both a PFS and feasibility study to be completed prior to the launch of the tender.<sup>470</sup> The studies can either be prepared by the public agency or by a private party (in the context of an unsolicited proposal).<sup>471</sup> The Tender Documents are then prepared based on the information contained in the feasibility study.<sup>472</sup>

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<sup>465</sup> **Exhibit C-61**, Letter from the MTC to tender participants, dated 3 May 2013.

<sup>466</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 165.

<sup>467</sup> *Id.*

<sup>468</sup> *Id.* at para. 166.

<sup>469</sup> *Id.* at para. 167.

<sup>470</sup> **CLA-64**, Decree No. 16/2012, dated 4 June 2012, Articles 9, 10, and 11. See also **CER-6**, Second Legal Opinion by Professor Rui Medeiros, paras. 13.1, 13.3, and 55.3.3.

<sup>471</sup> *Id.* at Article 11(4).

<sup>472</sup> *Id.* at Article 14(1)(a).

2. The Tender Notice and Request for Proposals issued by the Government were deficient

- 393 As explained in the SOC, Respondent ignored PEL's pleas to reconsider the public tender.<sup>473</sup> In January 2013, Mozambique distributed the Tender Notice to interested parties, inviting them to submit an expression of interest by 8 March 2013, to participate in a public tender for the acquisition of "*the concession rights to develop, design, build, maintain, finance, operate, manage, exploit and transfer to the Government of Mozambique a new Railway Line from Moatize to Macuse and the New Port Terminal in Macuzi.*"<sup>474</sup>
- 394 As explained by Mr Baxter, the Tender Notice was a high-level document that did not contain the information which is usually required for such documents in practice: (a) it lacked details on the rationale, purpose, scope and scale of the project; (b) information about the underlying PPP model was not definite; (c) the Tender Notice did not indicate the concession award period; and (d) the time given for submission of the EOI was very short.<sup>475</sup>
- 395 The Tender Notice also did not comply with Mozambican Law, which requires, *inter alia*, indication of the date, time and place where the tender documents – which should contain such level of detail – could be consulted.<sup>476</sup>
- 396 Later, on 12 April 2013, in violation of the commitments under the MOI, the Government issued the Tender Documents to six pre-qualified companies: ITD, Sumitomo Corporation, Consórcio Mota Engil, Codiza, Edvisa e Manica ("**Codiza Consortium**"), Consórcio CLZ ("**CLZ Consortium**"), Rio Tinto, and the PGS Consortium.<sup>477</sup> The Tender Documents required to submit the financial and technical proposals by 29 May 2013. The deadline was later extended to 28 June 2013.<sup>478</sup>
- 397 According to Mr Baxter, the Tender Documents were very brief and did not provide sufficient information about the Project as required by best practice:
- (a) the Tender Documents did not provide any technical details about the Project, including the starting point of the railway;

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<sup>473</sup> SOC, para. 202.

<sup>474</sup> **Exhibit C-24**, Tender Notice entitled "*Application of Participants and Fulfilment*", undated.

<sup>475</sup> **CER-7**, Expert Report of Mr David Baxter, para. 165.

<sup>476</sup> **CLA-41**, translated at **CLA-67**, Decree No. 15/2010, dated 24 May 2010, Articles 31, 32, 65 and 85(4).

<sup>477</sup> **Exhibit C-27**, Tender Documents issued to six pre-qualified companies on 12 April 2013.

<sup>478</sup> **Exhibit C-61**, Letter from MTC to tender participants, dated 3 May 2013.

- (b) the Tender Documents lacked information about required services and outcomes of the Project;
- (c) the Tender Documents did not contain any references to the pre-feasibility or feasibility studies conducted with respect of the Project;
- (d) the evaluation procedure was ill-defined in the Tender Documents, as the criteria applied for the evaluation of the technical and financial proposals were not developed and allowed for ambiguous interpretation; and
- (e) the deadline for submission of the proposals was inadequate due to the complexity of the Project.<sup>479</sup>

398 In addition, under Mozambican law, the tender documents must contain, among other things, technical specifications of the project and a draft of the concession contract.<sup>480</sup> The Tender Documents issued by the MTC did not provide any information about the technical specifications of the Project. Mozambique also failed to provide a draft of the concession contract with the Tender Documents.

399 Although the deadline for submission of the proposals indicated in the Tender Documents was consistent with Mozambican law, which required at least 21 days for submission of the proposals,<sup>481</sup> in the absence of any studies it would have taken significantly more time for the bidders to prepare their proposals. It usually takes around 6 or 8 months to complete the proposal for a project of this kind even when the basic technical details of the project are provided with the tender documents.<sup>482</sup>

400 Here, Mozambique expected that the bidders should complete all surveys, make the assessment and design of the Project, and prepare all calculations within less than three months. As explained by Mr Daga, "*without pre-existing knowledge of the project's details, it would be impossible to prepare a high-quality, responsive bid for such a large project in less than three months*".<sup>483</sup>

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<sup>479</sup> CER-7, Expert Report of Mr David Baxter, para. 166.

<sup>480</sup> CLA-67, Decree No. 15/2010, dated 24 May 2010, Article 65(1)(p) and 65(1)(o), applicable *ex vi* Article 85(4) and Article 13(1) of Law No. 15/2011, of 10 August – CLA-65.

<sup>481</sup> *Id.* at Article 69(1).

<sup>482</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 152; CER-7, Expert Report of Mr David Baxter, para. 188(e).

<sup>483</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 152.

401 It took PEL almost 9 months to complete the site survey to identify the rail  
route and port location.<sup>484</sup> PEL kept a person on site at Macuse for almost an  
entire year to understand the weather conditions at the potential port location,  
which has a significant impact on port design.<sup>485</sup> It also took around 15 days  
simply to drive along parts of the projected railway route as certain areas were  
not approachable and required considerable amount of walking.<sup>486</sup> If this had  
not been done, it would have been impossible to fully understand the intricacies  
of the route, and how it should be mapped given the topography of the land.<sup>487</sup>

3. Mozambique failed to disclose information about PEL's status to other  
bidders

402 As explained above, after the tender process was announced, on 18 April 2013,  
the MTC informed PEL that the Council of Ministers had after all consented  
to a direct award, and requested PEL to begin negotiating towards the  
execution of the Project as a matter of urgency.<sup>488</sup> Later, on 13 May 2013, the  
MTC informed PEL that it had decided that it would award the concession  
through a tender process, and that PEL would enjoy 15% scoring advantage in  
case it decides to participate in the tender.<sup>489</sup>

403 International best practice requires disclosure of information concerning the  
preferential rights of the bidder, as it may influence decisions of the other  
bidders to participate in the public tender. As explained by Mr Baxter:

*"It is highly irregular that the Government did not declare  
PEL's status as the USP proponent. This would have  
undoubtedly influenced other bidders' strategy for responding  
to the tender, and also calls into question whether the  
preferential bidding was actually fully applied."*<sup>490</sup>

404 In addition, *"[d]irect non-public communications regarding the concession  
between the public agency and the bidder are strictly prohibited. Usually once  
parallel negotiations about a direct award are revealed, a public tender should  
be withdrawn."*<sup>491</sup>

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484 CWS-3, Second Witness Statement of Mr Kishan Daga, para. 153.

485 *Id.*

486 *Id.*

487 *Id.*

488 See Section IV.C above.

489 **Exhibit C-34**, Letter from Luis Amandio Chauque of MTC to Kishan Daga of PEL reversing the MTC's regarding  
direct negotiations with PEL, dated 13 May 2013.4

490 **CER-7**, Expert Report of Mr David Baxter, para. 174.

491 *Id.* at para. 176.

- 405 Mozambique did not disclose to other bidders that PEL, as the private proponent of an unsolicited proposal, enjoyed 15% scoring advantage in the public tender process. It also appears that Mozambique did not inform anyone about its negotiations with PEL regarding the direct award of the Project. This contradicts the transparency of a public tender process.<sup>492</sup>
- 406 Failure to disclose PEL's scoring advantage to the other bidders also contradicted Mozambican law. Under Article 79(1) of the Public Procurement Rules, no advantage that has not been indicated in the tender documents may be considered when the bids are evaluated.<sup>493</sup> As explained by Professor Medeiros, this is essential for bidders to know in advance if any of the bidders have been granted either a right of preference or a 15% margin of preference.<sup>494</sup>
- 407 In addition, Professor Medeiros further explains that under Mozambican law, in the formation of public contracts, the administration must act in good faith that includes protection of legitimate reliance of the bidders.<sup>495</sup>

*"When it launches a tender procedure, the Administration generates in interested bidders a justified situation of reliance that the best tender will receive the award in accordance with the rules initially publicised. And, on the basis of this situation of reliance, the bidders invest their resources in preparing their bids and participating in the tender. Therefore, if the rules of the game are changed in the middle of the procedure, namely through the granting of a right of preference or a bonus in the score to one of the bidders, the legitimate reliance of the other bidders is violated."<sup>496</sup>*

- 408 The Tender Documents issued by the MTC did not refer to PEL's 15% scoring advantage nor to the existence of the MOI. Therefore, Mozambique contradicted its own laws when applying the scoring advantage to the PGS Consortium's bid.

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<sup>492</sup> *Id.* at para. 178.

<sup>493</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 75.7; **CLA-67**, Decree No. 15/2010, dated 24 May 2010, Article 79(1), applicable *ex vi* Article 13(1) of Law 15/2011, of 10 August – **CLA-65**.

<sup>494</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 75.8.

<sup>495</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 76.2.

<sup>496</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 76.4.

4. Mozambique did not properly evaluate the proposals

409 As explained in the SOC, on 27 June 2013, the PGS Consortium submitted to  
the MTC thorough and considered financial and technical proposals reflecting  
its deep understanding of the Project.<sup>497</sup>

410 Again without providing any basis, Mozambique argues that PEL "*waived any  
claims pursuant to the MOI and became estopped from relying upon the MOI*"  
by referring to a 15% scoring advantage ("*points of preference*") in the  
proposal.<sup>498</sup>

411 PEL did not waive its rights under the MOI by submission of the proposals and  
accepting that it is entitled to 15% advantage in the scoring of the public tender.  
As explained above PEL was forced to participate in the public tender, and its  
participation was under protest. Before the PGS Consortium submitted the  
proposal, on 4 June 2013, PEL notified the Government that:

*"... any eventual submission of proposal in the present tender  
process by Patel and their consortium partners is with no  
prejudice to the rights and privileges of Patel".<sup>499</sup>*

412 What is more, PEL would always benefit from the 15% advantage regardless  
of the MOI, as such right stems directly from the law.<sup>500</sup>

413 On 28 June 2013, the evaluation panel conveyed together in Maputo for a  
public opening of the technical proposals. The technical proposals were  
submitted by four bidders: ITD, the Codiza Consortium, the CLZ Consortium,  
and the PGS Consortium.<sup>501</sup>

414 As follows from the documents disclosed by Mozambique in the course of the  
document production, on 15 July 2013, the evaluation committee had already  
completed the evaluation of the technical proposals.<sup>502</sup> It took less than three  
weeks for the MTC to review and score the technical proposals. The technical  
proposal submitted by the PGS Consortium alone contained 896 pages.<sup>503</sup> In

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<sup>497</sup> **Exhibit C-190**, Technical Proposal, dated 27 June 2013; SOC, para. 207.

<sup>498</sup> SOD, para. 130.

<sup>499</sup> **Exhibit C-35**, Letter from Kishan Daga of PEL to Minister Zucula of MTC responding to the MTC's change in position regarding direct negotiations, dated 4 June 2013.

<sup>500</sup> **CLA-65**, Law 15/2011, dated 10 August, Article 13(5) and **CLA-64**, Decree 16/2012, dated 4 July, Article 14(3). **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 29.2.

<sup>501</sup> **Exhibit C-62**, Prequalification Tender for Acquisition of Concession, Rights to Conceive, Design, Draw, Finance, Build, Operate and Transfer the Railway line and the Port of Macuse, dated 28 June 2013.

<sup>502</sup> **Exhibit C-234**, Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 15 July 2013.

<sup>503</sup> **Exhibit C-190**, Technical Proposal, dated 27 June 2013.

practice, complete and thorough evaluation of all proposals would have required significantly more time.<sup>504</sup>

415 On 19 July 2013, the financial proposals submitted by the bidders were opened in the presence of the representatives of the bidders and the MTC announced the scores awarded to the technical proposals of the bidders. The PGS Consortium was awarded the lowest score for its technical proposal – 72.5 points, while ITD and the CLZ Consortium were awarded 95 and 80 points respectively.<sup>505</sup>

416 It is absurd that Mozambique now alleges that by signing the minutes of the opening session PEL accepted the scoring results.<sup>506</sup> The results of the tender had not been communicated yet at that time. The financial proposals were still due to be evaluated.<sup>507</sup> By signing the minutes, the attendees merely confirmed their presence at the opening session. In fact, according to Article 75 of the Public Procurement Rules, participation in the opening session is not even mandatory.<sup>508</sup> Only present bidders must sign the list of the meeting's attendees. But this does not in any way limit their right to challenge the results of the tender.

417 Mozambique ignores the fact that on the same day after the opening session, on 19 July 2013, the PGS Consortium requested clarifications from the MTC about the evaluation of the technical and financial proposals:

*"The Consortium respectfully requests to be provided with a copy of the evaluation summary score sheet for each of the bidders in respect of the Technical Proposal in the interests of transparency on the basis set out in this letter below."<sup>509</sup>*

*"In respect of the Financial Proposal, once evaluated by the MOT, we respectfully request that a copy of the calculation of the Financial Proposal score in respect of each of the Bidders be provided to all the Bidders in the interest of transparency.*

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<sup>504</sup> CER-7, Expert Report of Mr David Baxter, para. 188(f).

<sup>505</sup> Exhibit C-38, Minutes of the Opening Session of Economic Proposals, dated 19 July 2013.

<sup>506</sup> SOD, para. 132.

<sup>507</sup> Exhibit C-38, Minutes of the Opening Session of Economic Proposals, dated 19 July 2013.

<sup>508</sup> CLA-67, Decree No. 15/2010, dated 24 May 2010, Article 75.

<sup>509</sup> Exhibit C-63, Letter from Kishan Daga of PEL to the MTC, dated 19 July 2013.

<sup>510</sup> *Id.*

418 On 26 July 2013, the MTC notified the PGS Consortium of its decision to award the concession to ITD and announced the final score assigned to ITD for the technical and financial proposals, 94 points.<sup>511</sup>

419 As explained in the SOC, PEL was surprised and dismayed by the outcome of the tender process.<sup>512</sup> The PGS Consortium raised concerns on several occasions with the Government regarding the evaluation of the bids and asked to suspend the award of the concession until the bids were re-evaluated. In particular, the following issues were raised by the PGS Consortium in the letters dated 29 July 2013, 1 August 2013, 6 August 2013, 19 August 2013, and 28 August 2013, and 29 August 2013:<sup>513</sup>

- (a) The MTC did not follow the criteria communicated to the bidders for evaluation of the technical proposals.
- (b) The financial proposals scores were not calculated in accordance with the formula specified in the Tender Documents and the MTC's later clarifications.
- (c) Selection of ITD as the highest bidder was not based on the criteria and formula given in the Tender Documents.
- (d) The MTC did not add a 15% scoring advantage to the financial proposal's scores.

420 Although on 29 July 2013 and 12 August 2013<sup>514</sup> the MTC provided further information purportedly explaining how the proposals had been evaluated, it never addressed the PGS Consortium's concerns. Now, eight years after the tender, Mozambique relies on the evaluation "*by engineers experienced in*

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<sup>511</sup> **Exhibit C-39**, Letter from Pedro Augusto Ingles to PEL Consortium regarding proposal evaluation, dated 26 July 2013.

<sup>512</sup> SOC, para. 226.

<sup>513</sup> **Exhibit C-40**, Letter from Kishan Daga of PEL to Minister Zucula expressing concern over the MTC's handling of the tender, dated 29 July 2013; **Exhibit C-241**, Letter from Kishan Daga to MTC expressing concern over handling of tender, dated 29 July 2013; **Exhibit C-64**, Letter from Kishan Daga of the PGS Consortium to Ms Odete of the MTC, dated 1 August 2013; **Exhibit C-41**, Letter Kishan Daga of PEL to the MTC and Ms Odete, President of Jury lodging a guarantee with the MTC to officially contest the award of the concession to ITD, dated 1 August 2013; **Exhibit C-242**, Letter from Kishan Daga to MTC lodging information request on tender process, dated 6 August 2013; **Exhibit C-43**, Letter from Kishan Daga of PEL to the MTC regarding the failure of the MTC to carry out the tender in accordance with Mozambican Law, dated 19 August 2013; **Exhibit C-45**, Letter from Kishan Daga to the MTC contesting the award of the concession to ITD, dated 28 August 2013; **Exhibit C-65**, Letter from the PGS Consortium to the MTC, dated August 29, 2013.

<sup>514</sup> **Exhibit C-39**, Letter from Pedro Augusto Ingles of MTC to PGS Consortium regarding proposal evaluation, dated 26 July 2013; **Exhibit C-42**, Letter from the MTC to PGS Consortium responding to complaint about the tender process, dated 12 August 2013.



*Mozambique and elsewhere*", MZBetar, to support its allegation that "[t]he public tender followed the applicable rules and procedures".<sup>515</sup>

- 421 The explanation of the evaluation procedure offered by MZBetar merely repeats the Government's position as expressed in the earlier correspondence with the PGS Consortium.
- 422 First, MZBetar asserts that "*PEL's concerns about the use of sub-criteria are inconsistent with public tender practices*".<sup>516</sup> According to the MZBetar Report, it is common to break down the criteria for the evaluation of the proposal into the sub-criteria "*that are not detailed in the tender notice.*" Mozambique's experts do not cite a single document to support the existence of the practices they refer to.
- 423 MZBetar further alleges that the formula and the weighting criteria utilised for the evaluation of the financial proposals and the final scores were consistent with the ones communicated to the PGS Consortium. This statement expressly contradicts the documents on the record and MZBetar's own analysis.
- 424 The technical evaluation criteria were not developed and explained in the Tender Documents. The PGS Consortium only became aware of these criteria and their relative weight in the overall score *after* the results of the technical proposals' evaluation.<sup>517</sup> By way of example, strategic vision of the business, a criterion which amounted to 50% of the technical score, was divided into the following sub-criteria: strategic partnership, human capital development, social projects, and schedule.<sup>518</sup> These were not explained or set out for the PGS Consortium.
- 425 The evaluation committee assessed the bids based on criteria that had never been communicated to the PGS Consortium and were materially different from those communicated to the PGS Consortium. PEL raised this issue with the Government contemporaneously:<sup>519</sup>

*"It is important to note that the criteria communicated as being used by the MTC for the evaluation of the technical proposals*

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<sup>515</sup> SOD, para. 133.

<sup>516</sup> **RER-1**, MZBetar Report, para. 81.

<sup>517</sup> **Exhibit C-25**, Translation of MTC Document entitled "*Contest to Acquiring of Rights of Concession to Conceive, Design, Finance, Build, Operate and Transfer the Railway and Macuse Port*", dated 29 July 2013.

<sup>518</sup> **Exhibit C-27**, Tender Documents issued to six pre-qualified companies on 12 April 2013, p. 27.

<sup>519</sup> **Exhibit C-40**, Letter from Kishan Daga to Minister Zucula expressing concern over the MTC's handling of the tender, dated 29 July 2013.

*differs materially from the criteria communicated to the bidders in the RFP for the tender".*<sup>520</sup>

426 Similarly, the financial proposals' formula utilised by Mozambique was not disclosed to the bidders before the scoring. Again, PEL informed the Government about this immediately after the tender results were announced:

*"[T]he formula applied by the MTC in the calculation of the Financial Proposal scores is not mentioned anywhere in the RFP documentation and subsequent clarification ... In fact the RFP and subsequent clarification ... contain [sic] an entirely different formula".*<sup>521</sup>

427 According to the clarifications issued by the MTC on 10 June 2013, the formula for scoring the financial proposals was determined as follows:

*"Sf=100xFm/F, where Sf is the financial score, **FM** is the financial proposal and **F** is the award of the proposal under evaluation [concession premium]."*<sup>522</sup> (Emphasis added)

428 After the scores were announced, on 12 August 2013, the MTC clarified to PEL the formula used for evaluation of the financial proposal as follows:

*"Sf=100xFm / F, where:*

*Sf is the result [financial score];*

***FM** is the score attributed jointly to Concession Premium and Social Responsibility*

***F** is the highest evaluation assigned [highest scoring attributed]".*<sup>523</sup> (Emphasis added)

429 It is evident that the interpretation assigned to the parameters in the formula by the MTC and MZBetar completely contradicts the ones clarified by the MTC on 10 June 2013.<sup>524</sup> The formula applied by the MTC was never mentioned in the Tender Documents or subsequent clarifications.<sup>525</sup>

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<sup>520</sup> **Exhibit C-40**, Letter from Kishan Daga of PEL to Minister Zucula expressing concern over the MTC's handling of the tender, dated 29 July 2013, p. 3.

<sup>521</sup> **Exhibit C-41**, Letter Kishan Daga of PEL to the MTC and Ms Odete, President of Jury lodging a guarantee with the MTC to officially contest the award of the concession to ITD, dated 1 August 2013, p. 3.

<sup>522</sup> **Exhibit C-36**, Letter from the MTC to PEL and the other five tender bidders regarding query clarifications, dated 10 June 2013, clarification No. 34.

<sup>523</sup> **Exhibit C-42**, Letter from the MTC to PEL Consortium responding to PEL's complaint about the tender process, dated 12 August 2013.

<sup>524</sup> **Exhibit C-45**, Letter from Kishan Daga to the MTC contesting the award of the concession to ITD, dated 28 August 2013.

<sup>525</sup> **Exhibit C-41**, Letter Kishan Daga of PEL to the MTC and Ms Odete, President of Jury lodging a guarantee with the MTC to officially contest the award of the concession to ITD, dated 1 August 2013.

430 Mozambique's experts themselves confirm that "*the criteria declared at Bidding Documents for Financial Scoring allows a range of different understanding by each one of the Evaluators.*"<sup>526</sup> It is Mozambique's fault that the scoring criteria were not properly defined in the bidding documents.<sup>527</sup>

431 The winning bidder was chosen based on improper procedure:

*"[I]t is evident that the selection of ITD as the highest bidder by MTC has not been based on the criteria and formula given in the project RFP documentation, including amendments thereto.*

*The Consortium believes that this is contrary to the spirit of an international competitive bid process and contrary to the public procurement policy of the country".*<sup>528</sup>

*"It would appear to the Consortium that the criteria and formulas [sic] applied by the MTC in the calculation of the Technical and Financial Proposal scores are in direct conflict with the calculation of the Technical and Financial Proposal scores as communicated to bidders in the RFP and subsequent clarification".*<sup>529</sup>

432 It was impossible to ensure a competitive and fair public tender without establishing well-defined criteria for assessment of the proposals.<sup>530</sup> As explained by Mr Baxter, "*the bidders could not prepare comprehensive and focused proposals corresponding to Mozambique's Tender Documents*".<sup>531</sup> Even more importantly, "*the evaluation committee would not be able to provide a fair, and objective assessment of the bids in the absence of the clearly defined criteria*".<sup>532</sup>

433 Furthermore, under Mozambican law, the criteria applied for the evaluation of the proposals must be stated in the tender documents.<sup>533</sup>

434 Transparency and publicity are fundamental rules governing the administrative contracting in Mozambique.<sup>534</sup> Professor Medeiros clarifies that "*transparency and publicity apply, in particular, to the award criterion and the*

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<sup>526</sup> **RER-1**, MZBetar Report, para. 88(b).

<sup>527</sup> See in contrast **Exhibit C-301**, Transnet SOC LTD Request for Proposal, dated 15 July 2021.

<sup>528</sup> **Exhibit C-40**, Letter from Kishan Daga of PEL to Minister Zucula expressing concern over the MTC's handing of the tender, dated 29 July 2013, p. 5.

<sup>529</sup> **Exhibit C-64**, Letter from Kishan Daga of the PGS Consortium to Ms Odete of the MTC, dated 1 August 2013, p. 3.

<sup>530</sup> **CER-7**, Expert Report of Mr David Baxter, para. 173.

<sup>531</sup> *Id.*

<sup>532</sup> *Id.*

<sup>533</sup> **CLA-67**, Decree No. 15/2010, dated 24 May 2010, Article 65(1)(m).

<sup>534</sup> **CLA-262**, Pedro Fernández Sánchez, *Direito da Contratação Pública*, I, Lisboa: AAFDL, 2020, pp. 88-89; **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 75.2.

*factors or sub-factors which define it, 'and each of these factors or sub-factors must be set out in full in the contract documents, and the contracting entity is prohibited from evaluating, for the purposes of the award or qualification, any item, information or characteristic of the tender or application which does not correspond to one of those factors or sub-factors'".*<sup>535</sup>

- 435 Second, Mozambique maintains that the PGS Consortium benefited from "15% right of preference (that is the bidding scoring advantage)" applied to its final score.<sup>536</sup> It further alleges, that even if the 15% scoring advantage was only applied to the technical score, application of said scoring advantage to the financial score would not have changed the outcome of the tender.<sup>537</sup>
- 436 Mozambique did not submit any documents confirming that the scoring advantage was properly applied both to the financial and technical proposals of the PGS Consortium.
- 437 The tabulation of individual evaluators reveals that the scoring advantage was applied inconsistently with respect to the technical proposals, i.e., only 3 out of 7 evaluators added 15% to the final technical score of the PGS Consortium.<sup>538</sup> The financial evaluation report does not contain any references to the 15% scoring advantage at all. This contradicted Mozambican law which required application of the 15% scoring advantage to the total score of the technical and financial proposals.<sup>539</sup>
- 438 Apart from the unilateral change of the rules for assessment of the bids, when applying these newly created rules the Government awarded inadequate scores to the PGS Consortium's proposals.
- 439 As explained in the SOC, the PGS Consortium only received a remarkably low score of 3.5 (out of 10) in the category of "*Organic Composition of the bidder*"; even though members of the PGS Consortium had significant experience in the construction industry. What is more, the PGS Consortium only received an inexplicably low score of 10.5 (out of 15) in the category of "*Interpretation*

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<sup>535</sup> **CLA-262**, Pedro Fernández Sánchez, *Direito da Contratação Pública*, Vol. I, p. 90; **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 75.3.

<sup>536</sup> SOD, para. 137.

<sup>537</sup> **RER-1**, MZBetar Report, paras. 82 and 92; SOD, para. 133.

<sup>538</sup> **Exhibit C-234**, Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 15 July 2013; **CER-7**, Expert Report of Mr David Baxter, para. 159.

<sup>539</sup> **CLA-64**, Decree 16/2012, dated 4 July, Article 14(3).

*and Understanding of the Project*" notwithstanding that PEL originated the Project and had spent years for the development of the Project.

440 Mozambique fails to respond to these arguments. The only explanation offered by Mozambique is that *"a large percentage of the score was based on the Technical Proposal"*, and PEL was inexperienced as an EPC contractor and failed *"to articulate a substantiated broader strategic vision for the transportation corridor"*.<sup>540</sup>

441 Not only PEL's allegations that PEL was inexperienced are baseless and contradict the technical proposal submitted by the PGS Consortium, but Mozambique ignores the fact that PEL participated in the tender together with two other highly experienced companies - SPI and Grindrod. Mozambique also does not explain what failure *"to articulate a substantiated broader strategic vision for the transportation corridor"* means.

442 The Evaluation Report of the technical proposals disclosed by Mozambique in the course of the document production confirms the flaws in the scoring of the bids:

(a) The PGS Consortium received the lowest score for the technical proposal. Given PEL's in-depth knowledge of the Project, and the strong consortium it had developed to implement the Project, the reasons for such a low score are hard to explain.<sup>541</sup>

(b) The winning bidder only had one weakness - *"the outline of the topics studied did not follow a logical structure."*<sup>542</sup>

(c) The criterion of *"Strategic Vision of the Business"* was assigned the highest weight in the total score (50%) of the technical proposal.<sup>543</sup>

ITD received the maximum score under this category apparently because it proposed the creation of a special economic zone in Macuse. As explained by Mr Baxter, the creation of a special economic zone

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<sup>540</sup> SOD, para. 133.

<sup>541</sup> CER-7, Expert Report of Mr David Baxter, para. 181; CWS-3, Second Witness Statement of Mr Kishan Daga, para. 148.

<sup>542</sup> Exhibit C-234, Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 15 July 2013. CER-7, Expert Report of Mr David Baxter, para. 182.

<sup>543</sup> Exhibit C-234, Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 15 July 2013.

was not a requirement of the Tender Documents and should not be taken into account in the evaluation of the bids.<sup>544</sup>

- (d) The evaluation panel found that the PGS Consortium's "*organic composition ... does not include the Infrastructure builder*" and that "[t]he consortium does not present a record of having built works similar to the object of the bid".<sup>545</sup> These findings **completely ignored** the technical proposal of the PGS Consortium where detailed information about experience of PEL, Grindrod, and SPI was provided.
- (e) The evaluation committee finding that "*participation by the national private sector is restricted to 5%*"<sup>546</sup> in the technical proposal of the PGS Consortium demonstrates its lack of understanding of the proposal. The technical proposal indicated that up to 30% of the Project would be provided to local Mozambique companies and Government agencies.<sup>547</sup>
- (f) The evaluation panel also found that the timetable for implementation of the Project submitted by the PGS Consortium was "*above expectations*". This finding was inconsistent with PEL's prior work on the Project. Given PEL's prior research, the PGS Consortium would need less time for implementation of the Project.<sup>548</sup> In addition, Mozambique never complained about the timetable in the PFS, approved by Mozambique, that was the same as the one in the PGS Consortium's proposal.<sup>549</sup>
- (g) According to Mr Baxter "*the individual scores of the evaluators are suspiciously consistent.*"<sup>550</sup> For example, under "*Organic Composition of the Bidder*" and "*Interpretation and Understanding of the Project*" all seven evaluators assigned the same low score to the PGS Consortium's technical proposal.<sup>551</sup> At the same time, 5 out of 7 jurors

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<sup>544</sup> CER-7, Expert Report of Mr David Baxter, para. 183.

<sup>545</sup> Exhibit C-234, Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 15 July 2013.

<sup>546</sup> *Id.*

<sup>547</sup> Exhibit C-45, Letter from Kishan Daga to the MTC contesting the award of the concession to ITD, dated 28 August 2013, p. 5.

<sup>548</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 154.

<sup>549</sup> *Id.*

<sup>550</sup> CER-7, Expert Report of Mr David Baxter, para. 184.

<sup>551</sup> Exhibit C-234, Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 15 July 2013.

assigned the maximum score to ITD's technical proposal under these criteria.<sup>552</sup>

5. The PGS Consortium filed a timely complaint against the tender results

443 As explained in the SOC, the PGS Consortium raised concerns on several occasions with the MTC regarding its handling of the tender process and requested the suspension of the award of the concession until the bids were re-evaluated.<sup>553</sup> However, Mozambique never responded to the PGS Consortium's requests and proceeded to confirm its award of the concession to ITD.

444 Now Mozambique argues that the PGS Consortium "*did not pursue the required process to protest or appeal the bid*".<sup>554</sup> In particular, Mozambique alleges that "*the PGS Consortium failed to file a formal appeal by the deadline or using the process specified [in the Tender Documents]*".<sup>555</sup> Respondent again relies on MZBetar's expert report to support its allegation that PEL failed to satisfy the appeal requirements.<sup>556</sup>

445 Although it is true that the PGS Consortium decided not to file a hierarchical (administrative) or judicial appeal, it did, however, file an administrative complaint in a timely manner, as explained below.

446 On 26 July 2013, Mozambique announced the winning bidder.<sup>557</sup> Later, on 29 July 2013, Ms Odete Semião, the Chair of the Evaluation Committee, informed the bidders that "*in case the tenderers are unsatisfied or consider to be injured by the decisions made within the Tender procedure they may submit claims or appeals ... in case no claim is submitted within the tender procedures **until 1 August 2013**, after all formalities are fulfilled MTC will announce the award of the concession to the company that obtained the best score in the tender procedure.*"<sup>558</sup> (Emphasis added)

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<sup>552</sup> CER-7, Expert Report of Mr David Baxter, para. 184.

<sup>553</sup> SOC, paras. 227-232.

<sup>554</sup> SOD, para. 141.

<sup>555</sup> SOD, para. 135.

<sup>556</sup> *Id.*

<sup>557</sup> Exhibit C-39, Letter from Pedro Augusto Ingles of the MTC to the PEL Consortium regarding proposal evaluation, dated 26 July 2013.

<sup>558</sup> Exhibit C-25, Translation of MTC's Document entitled "*Contest to Acquiring of Rights of Concession to Conceive, Design, Finance, Build, Operate and Transfer the Railway and Macuse Port*", dated 29 July 2013.

447 On 29 July 2013, three days after Mozambique announced the winning bidder, the PGS Consortium sent two letters to the MTC raising serious concerns about handling of the tender process, requesting a suspension to the award of the concession until the bids were reevaluated:

*"The Consortium is of the view that proper process has not been followed in the evaluation and scoring of the technical and financial proposals submitted by the Consortium in terms of the rules of the RFP and in terms of Mozambique law."<sup>559</sup>*

*"The Consortium was ... surprised to receive a letter from the MTC dated 26th July stating that ITD has been selected as winner with a final score of 94 points ... it is evident that the selection of ITD as the highest bidder by MTC has not been based on the criteria and formula given in the project RFP documentation, including amendments thereto."<sup>560</sup>*

*"The Consortium ... requests you to kindly put on hold the decision conveyed by the letter ... dated 26 July 2013".<sup>561</sup>*

448 While one of the letters was addressed to Minister Zucula, the other one was addressed to Mr Pedro August Ingles, the Permanent Secretary, as required by the Tender Documents.<sup>562</sup>

449 These letters confirm that, contrary to Respondent's allegations, the PGS Consortium properly submitted the complaint within the deadline, as required by the Tender Documents and Mozambican law in force at the time,<sup>563</sup> as well as within the time-frame indicated by Ms Odete Semião, the Chair of the Evaluation Committee, in her 29 July 2013 letter.<sup>564</sup>

450 On 1 August 2013, the PGS Consortium submitted a guarantee in the amount of MZN 125.000, which corresponded to the amount due for submission of the administrative complaint filed on 29 July 2013 and required by Article 141 of the Public Procurement Rules.<sup>565</sup> In two letters sent on the same day, the PGS

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<sup>559</sup> **Exhibit C-40**, Letter from Kishan Daga to Minister Zucula expressing concern over the MTC's handling of the tender, dated 29 July 2013.

<sup>560</sup> *Id.*

<sup>561</sup> **Exhibit C-241**, Letter from Kishan Daga of the PGS Consortium to the MTC expressing concerns over the MTC's handling of the tender, dated 29 July 2013.

<sup>562</sup> *Id.*

<sup>563</sup> **CLA-41**, Decree 15/2010, dated 24 May 2010, Article 140.

<sup>564</sup> **Exhibit C-25**, Translation of MTC's Document entitled "Contest to Acquiring of Rights of Concession to Conceive, Design, Finance, Build, Operate and Transfer the Railway and Macuse Port", dated 29 July 2013.

<sup>565</sup> **Exhibit C-41**, Letter from Kishan Daga of PEL to the MTC and Ms Odete, President of Jury lodging a guarantee with the MTC to officially contest the award of the concession to ITD, dated 1 August 2013.



Consortium again reiterated its complaints about the public tender and requested the MTC to put on hold award of the concession.<sup>566</sup>

451 Since no response was received by the PGS Consortium, on 6 August 2013, it submitted yet another letter to the MTC setting out the complaints about the tender process, requesting "*to hold the award*".<sup>567</sup>

452 Only on 12 August 2013, Mozambique responded to the PGS Consortium's complaint repeating its position that the proper procedure was followed. Although under Article 140(5) of the Public Procurement Rules the administrative complaint should have been decided within three working days.<sup>568</sup>

453 As explained in the SOC, given the serious irregularities surrounding the evaluation of the tenders, on 19 August 2013, PEL reiterated its request that the award of the concession be placed on hold until the bid committee re-evaluated the bids in accordance with the criteria stipulated in the Tender Documents as clarified by amendment notices.<sup>569</sup>

454 Surprisingly, on 27 August 2013, and fully ignoring the above-mentioned prior correspondence, the MTC informed the PGS Consortium that given that no appeals had been filed, it would proceed to confirm its award of the concession for the development of the railway corridor and port to ITD.<sup>570</sup>

455 Therefore, the PGS Consortium submitted to the MTC a letter referred to as "*Formal Appeal*" in which the PGS Consortium set out the numerous grounds for challenging the award to ITD.<sup>571</sup> The next day, the PGS Consortium submitted an additional letter further reiterating the irregularities of the tender process.<sup>572</sup>

456 Only on 28 October 2013, the MTC sent its response to the PGS Consortium reiterating its earlier position that it complied with the evaluation procedure.<sup>573</sup>

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<sup>566</sup> **Exhibit C-41**, Letter from Kishan Daga of PEL to the MTC and Ms Odete, President of Jury lodging a guarantee with the MTC to officially contest the award of the concession to ITD, dated 1 August 2013; **Exhibit C-64**, Letter from Kishan Daga of PGS Consortium to Ms Odete of the MTC, dated 1 August 2013.

<sup>567</sup> **Exhibit C-242**, Letter from Kishan Daga of the PGS Consortium to Minister Zucula of the MTC lodging information request on tender process, dated 6 August 2013.

<sup>568</sup> **CLA-41**, Decree 15/2010, dated 24 May 2010, Article 140.

<sup>569</sup> **Exhibit C-43**, Letter Kishan Daga of PEL to the MTC regarding the failure of the MTC to carry out the tender in accordance with Mozambican Law, dated 19 August 2013.

<sup>570</sup> **Exhibit C-44**, Letter from the MTC to PEL Consortium confirming its award of the concession to ITD, dated 27 August 2013.

<sup>571</sup> **Exhibit C-45**, Letter from Kishan Daga to the MTC contesting the award of the concession to ITD, dated 28 August 2013.

<sup>572</sup> **Exhibit C-65**, Letter from the PGS Consortium to the MTC, dated 29 August 2013.

<sup>573</sup> **Exhibit C-66**, Letter from the MTC to the PGS Consortium, dated 28 October 2013.

The letter did not mention that the PGS Consortium had improperly filed the complaint.

457 The PGS Consortium did not proceed with the further administrative and judicial appeal of the tender as it would be pointless at that time. It was abundantly clear that Mozambique had decided that PEL should not be awarded the concession to the Project – either on its own or through the PGS Consortium – and that ITD should be awarded the concession.<sup>574</sup>

458 The lack of judicial appeal is, however, irrelevant, as developed by Professor Medeiros in his second report, for the purposes of the alleged expiration of PEL's right to be compensated.<sup>575</sup>

459 It would still be possible, at present, to file a judicial challenge to the decision to award the concession, based on the nullity thereof, pursuant to Articles 35, 37(1) and 228 of Law 7/2014, of 28 February 2014, which allow such challenges to *"be invoked at any time and by any interested party"*.<sup>576</sup>

460 But even if the decision to award the concession to ITD could not be judicially challenged, the illegality of Respondent's actions should still be considered as relevant, from a Mozambican law perspective, *"for the purposes of determining civil liability and the consequent obligation to indemnify"*.<sup>577</sup>

6. Mozambique did not produce documents related to a public tender

461 Mozambique has failed to produce the documents relating to its decision to award the concession in respect of the Project to ITD, including:

- (a) the complete tender file;
- (b) the bidding documents provided by the companies that were pre-qualified on 12 April 2013 other than those provided by the PGS Consortium;
- (c) the scoring tabulation of every individual scorer in respect of the financial proposals;

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<sup>574</sup> CWS-1, Witness Statement of Mr Kishan Daga, para. 161.

<sup>575</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 74.

<sup>576</sup> CLA-50, Law No. 7-2014 of 28 February 2014; CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 74.1.

<sup>577</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 74.2.

- (d) information as to the potential conflict of interest of the scorers;
- (e) minutes and attendee lists of meetings during which the bids were scored; and
- (f) the documents showing that the rules and procedures were complied with.<sup>578</sup>

462 Mozambique has produced only technical and financial evaluation reports, although the complete tender file should exist under Mozambican law. Pursuant to Articles 92 and 93 of Law 14/2011, of 10 August, any decision taken by a public administration should be supported by a complete set of documents reflecting the administrative procedure that led to the decision.<sup>579</sup>

463 Contrary to Mozambique's argument, the tenderers' proposals are not confidential. Articles 33 and 140(3) of the Public Procurement Rules merely provide for confidentiality of the documents related to the evaluation of the proposals, and even such documents may be consulted by the losing bidders, as was the case of PEL.<sup>580</sup> According to Article 23 of the PPP Law, public contracts and the supporting documentation leading to the public tender (which would include the tender file) are only subject to confidentiality when specified for instance in respect of commercial or trade secrets.<sup>581</sup>

464 Mozambique is required to keep the tender file under Mozambican law.

465 First, the principle of administrative transparency envisaged in Mozambican law requires the Government to make its actions visible.<sup>582</sup> This enables private parties to assess the Government's compliance with the applicable rules.<sup>583</sup>

466 Second, Articles 10 and 60 of the Law Governing the Procedures Concerning the Administrative Litigation Procedure provide that documents related to a decision-making process by a public administration (e.g. tender process) should be kept by the public administration and be attached to the proceedings

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<sup>578</sup> Tribunal's Decision on Claimant's Document Production Schedule, pp. 49-54, Document Request No. 21.

<sup>579</sup> **CLA-19**, Law 14/2011, of 10 August, Article 33.

<sup>580</sup> **CLA-67**, Decree No. 15/2010.

<sup>581</sup> **CLA-65**, Decree No. 15/2011.

<sup>582</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 78.2.

<sup>583</sup> *Id.*

in case of dispute.<sup>584</sup> If the administrative file is not submitted by the public administration, the burden of proof regarding facts which are impossible or considerably difficult to prove without the administrative file in question, is shifted to the public administration.<sup>585</sup>

467 Third, Decree 36/2007, of 27 August which regulated the State archive system from 2007 to 2018 and Decree 84/2018 of 26 December, which repealed and replaced the latter and is still in force to date, both list documents related to administrative procedures (as is a tender) as documents which must be kept in the "*intermediate archive*" for a period of five years and then permanently preserved.<sup>586</sup>

468 Furthermore, as explained by Mr Baxter, according to best practice, the government should keep the tender file.<sup>587</sup> Loss or concealment of the documents "*could lead to accusations that the procurement process was manipulated or perceptions that it was poorly run*".<sup>588</sup>

469 The only reasonable inference from the fact that Mozambique did not produce the tender file is that it shows Mozambique's poor handling of the tender process to PEL's detriment.

470 In addition to the above, in order to seek to obtain access to the documents under Respondent's control, Claimant submitted a formal information application on 23 September 2020 to the MTC, in relation to "*Access to Information on the Moatize to Macuse Railway Concession Contract in the Tete and Zambézia Provinces, and the Infrastructure Concession Contract for the Coal Port Terminal at the Port of Macuse, granted by the Government of the Republic of Mozambique to the company Thai Moçambique Logística SA and related documents.*"<sup>589</sup>

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<sup>584</sup> **CLA-276**, Law No. 9/2001, of 7 July 2001, Articles 10 and 60. Article 10 applies to all forms of dispute resolution, including arbitration, in which any body of the administration is involved. This statute was meanwhile repealed by **CLA-277**, Law 7/2014, of 28 February 2014, which contains equivalent provisions, Articles 12 and 67.

<sup>585</sup> *Id.* at Article 60(7).

<sup>586</sup> **CLA-271**, Decree 36/2007, of 27 August, Article 3 and Annex III, Code 010. **CLA-272**, Decree 84/2018 of 26 December, Article 3 and Annex III, Code 010; **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 79.3.

<sup>587</sup> **CER-7**, Expert Report of Mr David Baxter, para. 193.

<sup>588</sup> *Id.*

<sup>589</sup> **Exhibit C-336**, Letter from Antonio Veloso of Pimenta e Associados to the MTC regarding access to information request, dated 23 September 2020; **CLA-271**, Decree 36/2007, of 27 August, Article 3 and Annex III. **CLA-272**, Decree 84/2018 of 26 December, Article 3 and Annex III.

- 471 Claimant requested information in respect of the following contracts and related documents:<sup>590</sup>
- (a) copy of the Concession Contract for the Railway Lines from Moatize to Macuse, in the Provinces of Tete and Zambezia, awarded by Mozambique to the TML Consortium (the "**Concession Contract**");
  - (b) copy of the Addenda to the Concession Contract;
  - (c) copy of the Infrastructure Concession Contract for the Coal Port Terminal at the Port of Macuse, in the Province of Zambézia, and for commercial exploitation of the public port service, awarded by Mozambique to the TML Consortium (the "**Infrastructure Concession Contract**");
  - (d) copy of further Addenda to the Infrastructure Concession Contract; and
  - (e) copy of the Feasibility Study concerning the Concession of the Railway Lines from Moatize to Macuse and Infrastructure of the Coal Port Terminal at the Port of Macuse, concluded by the TML Consortium, on or around 2016, along with any subsequent modifications or changes to the Feasibility Study.
- 472 Claimant also requested information on the current status of the Project, including the envisaged schedule for its completion, as well as copies of:<sup>591</sup>
- (a) the Project's EPC Agreement, along with any modifications or amendments to the Project's EPC Agreement;
  - (b) copy or an update on the status of the offtake, take-or-pay or other agreements that may have been negotiated or that are being negotiated between the TML Consortium and the coal mining companies in the region of Tete for the extraction of coal; and
  - (c) information on the political risk coverage for the Project secured from MIGA in or around 2018.

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<sup>590</sup> **Exhibit C-336**, Letter from Antonio Veloso of Pimenta e Associados to the MTC regarding access to information request, dated 23 September 2020.

<sup>591</sup> **Exhibit C-336**, Letter from Antonio Veloso of Pimenta e Associados to the MTC regarding access to information request, dated 23 September 2020

473 In the course of this application, Claimant specifically referred to the Arbitration.<sup>592</sup>

474 Respondent initially replied that "*It is incumbent upon me by His Excellency Minister of Transport and Communications to inform Your Excellency that this Ministry, in coordination with the Attorney General's Office, is dealing with this dispute on behalf of the Government, is preparing the information it deems necessary.*"<sup>593</sup>

475 Subsequently, Respondent further informed Claimant that "*In addition to Our Note n.º 1224/GM/MTC/020.11/2020, of 2 October, responding to Your application, dated 23 September 2020, requesting written and other information about the contracts and related documents relating to the concession contracts of Thai Mozambique Logistica, **having heard the Attorney General of the Republic**, it is incumbent upon me by His Excellency Minister of Transport and Communications to inform that **only the information published in the Official Gazette is available.***"<sup>594</sup>

Respondent has failed to properly address the application submitted by Claimant, and has no legal or valid justification for this failure.

*L. PEL's Project Is Now Being Implemented inter alia by the CFM*

476 As explained in the SOC, according to public information, the Project is currently being implemented by the TML Consortium.<sup>595</sup>

477 PEL was particularly surprised to learn that the CFM had agreed to a 20% equity participation. The very reason for holding the tender to award a concession for the Project, as explained by the Government, was that PEL did not reach the agreement with the CFM because its 20% offer of the equity participation was too low.<sup>596</sup>

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<sup>592</sup> **Exhibit C-336**, Letter from Antonio Veloso of Pimenta e Associados to the MTC regarding access to information request, dated 23 September 2020. ("*The information being sought is destined to be enclosed to the Arbitration proceedings under the United Nations Commission on International Trade Law ("UNCITRAL") which oppose PATEL to this Ministry, and which are currently pending before the Permanent Court of Arbitration under docket no. PCA 2020-21.*")

<sup>593</sup> **Exhibit C-337**, Letter from Antonio Manuel Mateus of the MTC to Pimenta e Associados regarding access to information request, dated 2 October 2020.

<sup>594</sup> **Exhibit C-338**, Letter from Antonio Manuel Mateus of the MTC to Pimenta e Associados regarding access to information request, dated 14 October 2020 (Emphasis added).

<sup>595</sup> SOC para. 239.

<sup>596</sup> **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL reneging on MTC's commitment to award the concession to PEL, dated 11 January 2013.

478 Mozambique asserts that the Project "*as proposed by PEL or the PGS Consortium would not have been techno, commercially, and/or financially viable or feasible.*"<sup>597</sup> It further argues that fundamental terms of the TML Consortium's project are different: (a) the TML Consortium proposes a different handling capacity of the port; (b) the port located on the other side of the river in the TML Consortium's project; and (c) the railway proposed by the TML Consortium is longer and terminates at Chitima to secure offtake from mines never contemplated in the PFS.<sup>598</sup>

479 This is not correct.

480 First, the MTC approved the PFS and, therefore, confirmed that the Project proposed by PEL was technically and commercially feasible.<sup>599</sup> In addition, the PGS Consortium had been pre-qualified by the Government in the phase of expression of interest to submit the proposal.<sup>600</sup> The PGS Consortium also achieved the minimum score for the technical proposal that was necessary in order to be invited for the opening of the financial proposals.<sup>601</sup> These facts further demonstrate that the Government recognised that the Project as proposed by the PGS Consortium was feasible.

481 Second, differences between the project proposed by PEL and the project implemented by the TML Consortium are minor and not substantial.<sup>602</sup>

482 Third, the TML Consortium conducted a bankable feasibility study after it was awarded the concession, therefore the changes in the Project are not surprising.<sup>603</sup> In fact, it is likely that the rail line was extended to Chitimia after the TML Consortium conducted the detailed study, because the Tender Notice specifically provided for a "*Railway from Moatize to Macuzi*".<sup>604</sup>

483 Although there are minor differences between the projects, it is clear that Mozambique provided the fruits of PEL's labour to the other bidders in

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<sup>597</sup> SOD, para. 142.

<sup>598</sup> SOD, para. 144.

<sup>599</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 168.

<sup>600</sup> Exhibit C-27, Tender Documents issued to six pre-qualified companies on 12 April 2013.

<sup>601</sup> Exhibit C-234, Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 15 July 2013.

<sup>602</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 170.

<sup>603</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 170.

<sup>604</sup> Exhibit C-24, Tender Notice entitled "*Application of Participants and Fulfilment*", undated; CWS-3, Second Witness Statement of Mr Kishan Daga, para. 171.

contravention of the agreement in the MOI, and that it will be Mozambique and the TML Consortium that profit from the Project.<sup>605</sup>

*M. Mozambique's Allegations that PEL Purportedly Breached the MOI by Disclosing its Existence and Making Defamatory Statements Are Fanciful*

484 In the SOD, Mozambique alleges that PEL breached the confidentiality provisions of the MOI by discussing the Project with third parties, including Grindrod, SPI, Rio Tinto, and Jindal, and publicly disclosing information regarding the MOI in the press.<sup>606</sup> Mozambique also contends that it was defamed by PEL when PEL denounced Mozambique's rigged tender in the press.<sup>607</sup>

485 Mozambique does not quote any specific evidence supporting its claim that PEL communicated confidential information to Grindrod, SPI, Rio Tinto, and Jindal and only states one press article dated 15 August 2013 in support of both its breach of confidentiality and defamation claim.<sup>608</sup>

486 This is yet another feeble attempt by Mozambique at detracting attention from its bad case.

487 At the outset, it bears recalling that the confidentiality clause was for PEL's benefit. It was included in PEL's very first internal draft MOI and was suggested by PEL.<sup>609</sup> This was so that its know-how and work product be protected from other actors.<sup>610</sup> Indeed, should Mozambique be able to prove that PEL breached this clause (*arguendo*), it would not be able to demonstrate that it suffered any prejudice.

488 In any event, the confidentiality clause did not prevent PEL from contacting potential partners in respect of the Project.<sup>611</sup> It provided that the data, documents and information shared between the Parties as well as the MOI were to remain confidential until approval of the Project. Mozambique does not

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<sup>605</sup> *Id.* at para. 172.

<sup>606</sup> SOD, paras. 147-150.

<sup>607</sup> SOD, paras. 151-154.

<sup>608</sup> SOD, paras. 149, 151-153.

<sup>609</sup> **Exhibit C-201**, Email exchange between Ashish Patel and Kishan Daga, attaching MOI, dated 13 March 2011; **Exhibit C-225**, Email from Ashish Patel of PEL to Rupen Patel of PEL and Sandeep Shetty with copy of Kishan Daga attaching draft of the MOI, dated 5 April 2011; **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 58.

<sup>610</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 58.

<sup>611</sup> *Id.* at para. 183.



provide any evidence that PEL shared any confidential data, documents and information or the contents of the MOI with third parties.

489 That the confidentiality clause did not prevent PEL from contacting potential partners in respect of the Project is confirmed by Mozambique's own conduct. In fact, Mozambique itself asked PEL to meet with Jindal Steel and Rio Tinto.<sup>612</sup> In June 2012, the MTC asked that PEL liaise with potential partners, including Odebrecht.<sup>613</sup> As explained above, Mozambique was aware of SPI's involvement even before the MOI was entered into and never raised any objections in this respect.<sup>614</sup>

490 In any event, the confidentiality clause was only effective "*until approval of the Project*".<sup>615</sup> The PFS was approved on 15 June 2011.<sup>616</sup> Accordingly, there could not be any breach of the clause after such date. Mozambique does not particularise its claim in respect of the third parties. However, the press article it relies upon is dated 15 August 2013. Even if PEL shared any confidential information (which is denied), it would not have breached the confidentiality clause.

491 As for Mozambique's defamation claim, it is so weak that Mozambique is not even able to identify a provision of the MOI or a law – either domestic or international – that PEL breached. It also does not claim any damages in this respect. It is just another red herring.

492 Having clarified the factual background to this dispute, PEL will now turn to addressing Respondent's legal submissions. It will first demonstrate that this Tribunal has jurisdiction over PEL's treaty claims (**Section V**), before setting out why Respondent's challenges to admissibility fail (**Section VI**). PEL will then demonstrate that it prevails on the merits of this case (**Section VII**), and is entitled to compensation for Mozambique's internationally wrongful conduct (**Section VIII**).

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<sup>612</sup> *Id.*

<sup>613</sup> **Exhibit C-229**, Email from Arlanda Reis Cuamba of the MTC to Kishan Daga of PEL regarding meeting with Odebrecht, dated 28 June 2012.

<sup>614</sup> See para. 335 above.

<sup>615</sup> **Exhibit C-5A**, English Version of the MOI, Clause 11.

<sup>616</sup> **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

## V. THE TRIBUNAL HAS JURISDICTION OVER PEL'S CLAIM

493 The Treaty's jurisdictional and procedural requirements are contained in Article 9 of the Treaty. It requires that to be submitted to arbitration disputes be "*between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former*" and that the parties first attempt to settle such disputes amicably.

494 As explained in the SOC, all these requirements are met in the present case and the Tribunal has jurisdiction over this dispute.

495 Respondent has nonetheless decided to put forward a series of strained arguments, which are neither supported by the text of the Treaty nor by the well-established principles of international investment law. These arguments do not even come close to rebutting Claimant's case. It is therefore regrettable that Mozambique has decided to put forward objections which are barely arguable and has forced Claimant to incur the costs of addressing them.

### A. *This Tribunal Has Jurisdiction Ratione Personae*

496 In the SOC, Claimant explained that the Tribunal has jurisdiction *ratione personae* because PEL is a qualifying investor, pursuant to Article 1(c) of the Treaty, which defines the term "*investor*" as "*any national or company of a Contracting Party*" and Article 1(a) of the Treaty, which defines "*Companies*" as "*Corporation firms and associations incorporated or constituted or established under the laws in force in any part of either of the Contracting Party*". As PEL is a public company incorporated in India,<sup>617</sup> which is a Contracting Party to the Treaty, it meets the requirements of Article 1(c).

497 This is not a controversial proposition. Respondent has nonetheless decided to dispute jurisdiction *ratione personae* through two objections.

498 Respondent's first objection conflates the notion of "*investor*" with that of "*investment*". Such confusion is clear on the very face of Respondent's argument: Respondent contends that Claimant is not an "*investor*" **because**

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<sup>617</sup> **Exhibit C-1**, Certificate of Incorporation No. 7089 dated 2 April 1949, certifying the incorporation of Patel Engineering Company Limited pursuant to the Indian Companies' Act, VII of 1913, dated 2 April 1949; **Exhibit C-2**, Certificate of Incorporation No. 7039 Consequent on Change of Name in the Office of the Registrar of Companies, Maharashtra, Mumbai, dated 9 December 1999.

supposedly, PEL neither made nor registered an *investment* in Mozambique, as required under Mozambican law.<sup>618</sup>

499 In this context, it is unsurprising that neither the Treaty nor the three authorities quoted by Respondent support its argument.

500 All the articles of the Treaty quoted by Mozambique relate to jurisdiction *ratione materiae*, and in particular, to the investment's compliance with Mozambique's national laws and regulations. They do not relate to jurisdiction *ratione personae*. This is clear on the face of the articles of the Treaty, which are set out by Respondent at paragraphs 432 to 434 of the SOD.<sup>619</sup> Respondent's argument that PEL's investment did not comply with Mozambican law requirements, which is incorrect, is accordingly addressed in the section dealing with jurisdiction *ratione materiae* below.

501 The three legal authorities relied upon by Respondent are just as inapposite as its quotes from the Treaty.

- (a) *Cementownia* dealt with the restructuring of the holding of an investment to access investment treaty jurisdiction.<sup>620</sup> In that case, the tribunal noted that it would not go on to consider whether the restructuring was undertaken in good faith because it found that the transaction whereby the restructuring allegedly took place was fabricated, such that there was no investment *ratione materiae*.<sup>621</sup>
- (b) In *ST-AD v Bulgaria*, the passage relied upon by Respondent relates to jurisdiction *ratione temporis*, namely whether the claimant had become

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<sup>618</sup> SOD, paras. 427-438.

<sup>619</sup> **CLA-1**, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 1(b) ("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"); Article 2, ("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, whether made before or after the coming into force of this Agreement. It shall however not be applicable to claims or disputes which occurred prior to its entry into force"); Article 12(1) ("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".)

<sup>620</sup> **RLA-68**, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award (17 September 2009), paras. 153-159.

<sup>621</sup> **RLA-68**, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award (17 September 2009), paras. 156.

an investor and made an investment at the time of the alleged breaches of the investment treaty.<sup>622</sup>

- (c) As for the passages of *Tamimi* relied upon by Respondent, they also relate to the tribunal's jurisdiction *ratione temporis* over the claimant's investment – not jurisdiction *ratione personae*. The question was whether the claimant had made an investment in the form of a lease agreement, *inter alia* the OMCO-SFOH lease agreement, at the time when the US-Oman Free Trade Agreement entered into force.<sup>623</sup> SFOH, which was the UAE company,<sup>624</sup> through which the claimant had invested in the lease agreement<sup>625</sup> had failed to register a company in Oman as required by Omani law.<sup>626</sup> The tribunal found that the lease agreement had thus become null and void before the treaty entered into force and accordingly that it did not have jurisdiction *ratione temporis* over the dispute.<sup>627</sup>

502 Respondent's second objection is also unsound as a matter of fact and law. Respondent argues that PEL assigned its rights under the MOI to the PGS Consortium, such that it cannot bring arbitration proceedings under the Treaty.<sup>628</sup> It further argues that, even if PEL joined the PGS Consortium partners as additional claimants, this would defeat jurisdiction because the PGS Consortium was never incorporated and Grindrod is a company incorporated in Durban whereas SPI is incorporated in Mozambique.<sup>629</sup>

503 This argument is hopeless. PEL never assigned its rights under the MOI - which in any event are not equivalent to PEL's rights under the Treaty - to the PGS Consortium. Quite the opposite. PEL specifically entered into a side letter with SPI and Grindrod, which referred to PEL's rights under the MOI.<sup>630</sup> These rights were not assigned to the PGS Consortium. This is a complete response to Mozambique's objection.

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<sup>622</sup> **RLA-69**, *ST-AD GmbH v. Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013), para. 299, which immediately precedes para. 300, which is relied upon by Respondent.

<sup>623</sup> **RLA-70**, *Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015), paras. 283-284.

<sup>624</sup> **RLA-70**, *Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015), p. 5.

<sup>625</sup> **RLA-70**, *Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015), paras. 281; 284.

<sup>626</sup> **RLA-70**, *Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015), paras. 294-312.

<sup>627</sup> **RLA-70**, *Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015), paras. 294-312.

<sup>628</sup> SOD, paras. 442-446.

<sup>629</sup> SOD, paras. 447-450.

<sup>630</sup> **Exhibit C-233**, Side Letter between PEL, SPI, and Grindrod, dated 8 March 2013.

504 Further, and in any event, the authorities which Respondent quotes are irrelevant and do not support its contention that the assignment of rights under a contract (even if true) bars a treaty claim.

505 To start with, Respondent's reliance on the definition of assignment of rights under a contract, pursuant to the UNIDROIT principles, does not establish such a principle.

506 As for Respondent's reliance on *Larsen v the Hawaiian Kingdom*, which in turn quotes the *Monetary Gold* case, it is authority for the principle that an international tribunal cannot decide a dispute between the parties before it if the very subject matter of the decision would be the rights or obligations of a *State* which is not a party to the proceedings.<sup>631</sup> In that case, the tribunal decided that it could not rule on the lawfulness of the conduct of the respondent because it would entail as a necessary foundation for the decision between the parties an evaluation of the lawfulness of the conduct of the United States.<sup>632</sup>

507 This case has nothing to do with assignment of treaty rights. There is no allegation that the subject matter of this proceeding are the rights and obligations of a *State* that is not party to the proceedings.

508 PEL is a company incorporated in India and accordingly the Tribunal has jurisdiction *ratione personae*. As the foregoing demonstrates, neither of Mozambique's two arguments rebut PEL's case that it is a qualifying investor for the purposes of the Treaty.

*B. This Tribunal Has Jurisdiction Ratione Materiae*

509 In the SOC,<sup>633</sup> PEL demonstrated that this Tribunal has jurisdiction *ratione materiae*.

510 Claimant explained that PEL's investment in the Project includes: (i) the right to a direct award of a concession and the rights under the MOI associated with the Project; (ii) the transfer of information, data and know-how to Mozambique; (iii) PEL's input in the Preliminary Study; and (iv) the detailed PFS. This investment not only squarely falls within the scope of Article 1(b) of the Treaty but it is also a lawful investment in the territory of Mozambique.

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<sup>631</sup> **RLA-72**, *Larsen v. The Hawaiian Kingdom*, PCA Case No. 1999-01, Award (5 February 2001), para. 11.8.

<sup>632</sup> **RLA-72**, *Larsen v. The Hawaiian Kingdom*, PCA Case No. 1999-01, Award (5 February 2001), para. 11.23.

<sup>633</sup> SOD, paras. 264-279.

Further, to the extent the *Salini* criteria are relevant outside the ICSID context and are compulsory requirements rather than factors indicative of an investment, they are all met in this case. Finally, a dispute has arisen with respect to such investment.

511 In response, Mozambique contends that the MOI is not an investment falling within the scope of Article 1(b) of the Treaty,<sup>634</sup> the investment was not a lawful<sup>635</sup> one in the territory of Mozambique,<sup>636</sup> the MOI is not an investment applying the *Salini* factors,<sup>637</sup> the MOI is not an investment because it is an option,<sup>638</sup> and that the dispute is a purely contractual dispute not involving the exercise of sovereign power.<sup>639</sup>

512 All these arguments fail to rebut Claimant's case that PEL has made a qualifying investment with respect to which a dispute has arisen such that this Tribunal has jurisdiction *ratione materiae*.

1. Claimant made a qualifying investment

(a) Claimant made an investment that falls within the scope of Article 1(b) of the Treaty

513 There are a number of propositions that appear to be common ground between the Parties. In particular, Respondent does not appear to dispute that (and has not adduced any authority to the contrary):

(a) Article 1(b) of the Treaty expansively defines the term "*investment*" under broad chapeau as "*every kind of asset established or acquired, including changes in the form of such investment in accordance with the national laws of the Contracting Party in whose territory the investment is made.*"<sup>640</sup> It then sets out a non-exhaustive list of assets that fall within the definition of investment, including "*business concessions conferred by law or under contract*" (Article 1(b)(v)), "*rights to money or to any performance under contract having a financial value*" (Article 1(b)(iii)), and "*intellectual property rights, in*

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<sup>634</sup> SOD, paras. 363-399.

<sup>635</sup> SOD, paras. 378-381, 431-438.

<sup>636</sup> SOD, paras. 376-377.

<sup>637</sup> SOD, paras. 400-419.

<sup>638</sup> SOD, paras. 382-399.

<sup>639</sup> SOD, paras. 420-426.

<sup>640</sup> CLA-1, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment.

*accordance with the relevant laws of the respective Contracting Party"*  
(Article 1(b)(iv)).<sup>641</sup>

- (b) A broadly worded chapeau such as the one in the Treaty referring to "every kind of asset" embraces everything of economic value, virtually without limitation<sup>642</sup> and includes know-how, which falls within such a broad definition.<sup>643</sup>
- (c) When considering whether an investment is a qualifying investment under the relevant treaty, tribunals ought to consider the economic operation of the investment as a whole.<sup>644</sup>

514 Respondent also has not disputed the fact that the know-how PEL transferred to Mozambique constitutes an investment under the Treaty.<sup>645</sup> It only mentions PEL's know-how in passing, in the context of disputing this Tribunal's jurisdiction on the basis that PEL's treaty claims are somehow encompassed within the MOI.<sup>646</sup>

515 However, Mozambique disputes Claimant's case that the MOI and PEL's rights under the MOI fall within the broadly worded chapeau of Article 1(b) as well as within its non-exhaustive list of assets.

516 According to Mozambique, the use of the past tense in Article 1(b), which it claims requires that the "*particular asset*" be already "*established or acquired*", and Article 1(b)(v), which requires that concessions be "*conferred*",<sup>647</sup> demonstrate that the Treaty was intended to limit covered investments. Respondent alleges that the effect of such limit is that a "*contingent asset*", which is how Respondent describes PEL's right to a concession, would be

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<sup>641</sup> **CLA-1**, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment.

<sup>642</sup> SOC, para. 256 referring to **CLA-87**, *Mytilneos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, 8 September 2006. para. 106; **CLA-86**, *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017. para. 6.58.

<sup>643</sup> SOC, para. 256 referring to **CLA-88**, *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, paras. 113-114; **CLA-89**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 297; **CLA-92**, *RSM Production Corporation v. Grenada I*, ICSID Case No. ARB/05/14, Award, 13 March 2009, para. 249.

<sup>644</sup> SOC, para. 255 referring to **CLA-80**, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, 24 May 1999 para. 72; **CLA-81**, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, 8 March 2010, para. 92; **CLA-82**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 428, 453; **CLA-83**, *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 27 September 2006, para. 331; **CLA-84**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.44.

<sup>645</sup> SOC, para. 259 which is not discussed in the SOD.

<sup>646</sup> SOD, para. 324.

<sup>647</sup> SOD, paras. 367-368.

excluded.<sup>648</sup> Mozambique contends that this is supported by the overarching expressions used in the US-Mozambique, UK-Mozambique, Japan-Mozambique, and Dutch-Mozambique BITs, which demonstrate that the wording "*established or acquired*" is a "*limitation*" that must be given effect.<sup>649</sup>

517 Respondent is wrong for several reasons. First, it is manifest that the MOI and PEL's rights under the MOI are assets that were acquired or established by PEL, including its right to the direct award of the Project concession.

518 While PEL may not have physically signed a concession agreement (that failing being part and parcel of Respondent's breach of the Treaty), it acquired an immediate and direct right to a concession that became vested in PEL once Respondent approved the PFS and PEL exercised its right of first refusal by agreeing to proceed with the Project.

519 The fact that the MOI provides for the direct award of the Project concession is confirmed by the expert testimony of Mr Baxter:

*"PEL submitted the PFS and the Government approved it. The PFS represents a substantial body of work which went a long way towards defining the Project. In my expert opinion, the PFS would have served as a clear basis for the concession agreement.*

*Therefore, in my opinion, based on the terms of the MOI and conduct of Mozambique, PEL could have expected a direct award of the concession agreement. The terms and conditions of the concession agreement could have been negotiated later once the Project was awarded to PEL. That seems to be precisely what the Government intended when it requested PEL to exercise its right of first refusal and to negotiate with the CFM".*<sup>650</sup> (Emphasis added)

520 The same is confirmed by Professor Medeiros<sup>651</sup>:

*"15.1. The right of first refusal / direito de preferência and, also, the right to be granted a concession contract by direct award are rights that become fully effective and enforceable in law after the various conditions associated with them are confirmed...*

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<sup>648</sup> SOD, para. 369.

<sup>649</sup> SOD, paras. 370-371.

<sup>650</sup> CER-7, Expert Report of Mr David Baxter, paras. 153-154.

<sup>651</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros.



15.3.1. In fact, the right to the concession was, from the outset, subject to: (i) the approval of the pre-feasibility study; and (ii) PEL's exercise of the right of preference...

15.4. All of the conditions listed were met, so that PEL would enjoy a true and effective right to the concession by direct award.

15.6 ... the "legitimate expectation" of PEL to be granted the concession by direct award was not formed only, contrary to that suggested in the Statement of Defense, "on the basis of pre-feasibility studies" or "on the basis of one clause in a six-page document entitled a "Memorandum of Interest"" (see SoD, para. 15. and 17.).

15.6.1. Strictly speaking, this same expectation was progressively established and reinforced by the successive fulfilment of all those conditions on which the right to the concession depended, until the point at which this right was effectively and completely confirmed, which happened at the time of the decision taken by the Council of Ministers of the Republic of Mozambique, in its 10th Ordinary Session of 16 April 2013.

- 521 There was nothing "contingent" about PEL's right to the concession such that Respondent's attempt to differentiate between a physical signed concession agreement and the legal right to a concession agreement is unavailing.
- 522 Claimant's rights fall squarely within the chapeau of Article 1(b) and within the list of examples of investments, specifically Article 1(b)(v) ("*business concessions conferred.... under contract*") and Article 1(b)(iii) ("*rights ...to performance under a contract having a financial value*").<sup>652</sup>
- 523 Second, Mozambique's argument is at odds with the Treaty itself. The terms "*established*", "*acquired*" or "*conferred*" do not seek to limit the scope of the investments covered by Article 1(b) to exclude "*contingent*" assets (even assuming that this is what PEL had).
- 524 Under an interpretation consistent with Article 31(1) of the Vienna Convention on the Law of Treaties, 1969 ("**VCLT**"),<sup>653</sup> the words "*established or acquired*" in the definition of "*investment*" refer to different types of ownership of investments under the relevant domestic law.

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<sup>652</sup> CLA-1, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 1(b).

<sup>653</sup> CLA-5, Vienna Convention on the Law of Treaties No.18232 23 May 1969 Art 31.

- 525 This is manifest from their immediate context: "*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.*"<sup>654</sup> Certain types of investments need to be "*established*" under domestic law, such as for instance, an investment in the form of the setting up of a corporate entity whereas others only require to be "*acquired*", such as for instance shares in a pre-existing company.
- 526 That these words relate to different types of ownership of investments under the relevant domestic law is further confirmed by the use of the word "*established*" in Article 1(a), which defines companies as "*Corporations, firms and associations incorporated or constituted or established under the law in force in any part of either of the Contracting Party.*"<sup>655</sup>
- 527 Respondent's reliance on other BITs to which Mozambique is party does not assist its case further. These BITs are not admissible for the purposes of Treaty interpretation under Article 31 VCLT, since the other Contracting Party, India, has not agreed that these were relevant to the interpretation of the Treaty<sup>656</sup> and is not party to them.<sup>657</sup> In any event, the fact that other BITs use the terms "*owned or controlled*" or do not use any term in relation to the ownership of the investment does not have any impact on the scope of Article 1(b). The terms "*owned or controlled*" are no more permissive than the terms "*acquired or established*".
- 528 As for the term "*conferred*", it is used to introduce the manner in which the concessions may be granted, namely either by law or by contract ("*business concession conferred by law or by contract*"). It does not seek to limit such concession to those that are unconditionally granted.

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<sup>654</sup> **CLA-5**, Vienna Convention on the Law of Treaties No.18232 23 May 1969 Art 31. (Emphasis added)

<sup>655</sup> **CLA-1**, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 1(a). (Emphasis added)

<sup>656</sup> **CLA-5**, Vienna Convention on the Law of Treaties No.18232 23 May 1969, Article 31(2) ("*The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*")

<sup>657</sup> **CLA-5**, Vienna Convention on the Law of Treaties No.18232 23 May 1969, Article 31(3) ("*There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.*")

529 The terms "*acquired or established*" and "*conferred*" thus plainly do not limit the *type* of investments that fall within the scope of Article 1(b) to non-contingent assets.

530 Third and finally, it is also telling that Mozambique says nothing of the other rights acquired by PEL, including its rights to exclusivity and confidentiality.

531 It also fails to recognise the other investments that PEL undertook – such as the expenditure under the PFS, the passing of know-how to Respondent throughout the relationship that culminated in the Project's creation and development, and PEL's rights under the MOI – each of which meet the criteria of investments under the Treaty.

532 Thus, even if, *quod non*, the Tribunal considers that PEL never actually signing a concession document to be separate from its right to acquire a concession, and that such a distinction meant that the concession element of its investment is contingent, and that contingent assets fell outside the scope of the Treaty, then the unity of the investment theory nevertheless requires the Tribunal to view PEL's investment holistically.

533 In other words, the Tribunal should not surgically separate those aspects of the unitary whole that would fall within the Treaty and those that would fall outside. They would and should all be treated together as a matter of international law as coming out the same investment fact pattern, and thus all fall within the Tribunal's jurisdiction *ratione materiae*.<sup>658</sup> This is especially so when Respondent's failure to physically sign the concession with PEL – the stick it now uses to object to jurisdiction – is one of the core aspects of its delict under the Treaty.

534 It follows that the entirety of PEL's investment falls within the definition of the term "*investment*" in Article 1(b) of the Treaty.

(b) Claimant's investment was in the territory of Mozambique

535 Article 1(b) requires that the investment be made in the territory of the host state. In the SOC,<sup>659</sup> Claimant explained its investment was made in the territory of Mozambique. The Project was to be developed in the territory of

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<sup>658</sup> **CLA-80**, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, 24 May 1999; **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).

<sup>659</sup> SOC, paras. 261-263.

Mozambique and the MOI independently constituted an investment in the territory of Mozambique based on the unequivocal investment treaty case law establishing that a contractual relationship with a state or a state entity creating value in the state constitutes an investment in the territory of such state.<sup>660</sup> The MOI was undoubtedly a contractual relationship with Respondent, which created value for the latter *inter alia* through the PFS and PEL's know-how.<sup>661</sup>

536 This is not a controversial proposition. However, Mozambique asserts that PEL's investment was not made in Mozambique's territory because there is no evidence that expenses were incurred in Mozambique rather than India.<sup>662</sup>

537 Respondent's objection is easily dismissed. First, it does not address the relevant test, namely that a contractual relationship with a state or a state entity creating value in the state constitutes an investment in the territory of such state.

538 Second, even Respondent's assertion that there were no expenses in respect of both the Preliminary Study and the PFS incurred in Mozambique - which is not the relevant test - is belied by the evidence on the record. The Preliminary Study was commissioned and paid for by PEL, which also covered expenses in respect of site visits.<sup>663</sup> There were expenses in relation to the PFS in Mozambique. By way of example, PEL posted a person for a year at the location of the potential port to monitor weather conditions.<sup>664</sup> The design of the railway route involved 15 days of driving along some part of it to approach areas which were only then accessible on foot.<sup>665</sup> And ultimately, every penny PEL spent in connection with the Project, no matter where physically expended, was in furtherance of its investment in Mozambique. There is no legal authority for the proposition that every penny spent in furtherance of an investment must be physically in the territory of the host state. Otherwise, investors could never be able to pay foreign contractors outside the territory

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<sup>660</sup> SOC, para. 262 quoting **CLA-93**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela II*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award, 30 April 2014, para. 130 ("A contractual right by its very nature has no fixed abode in the physical sense, for it is intangible. However, a lack of physical presence is not per se fatal to meeting the territoriality requirement; intangible assets, with no accompanying physical in-country activities, have been accepted as investments for the purposes of bilateral investment treaties by many tribunals.") and **CLA-81**, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, 8 March 2010, para. 124 ("an investment may be made in the territory of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself.")

<sup>661</sup> SOC, para. 263.

<sup>662</sup> SOD, para. 377.

<sup>663</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, paras. 17-20, as well as **Exhibit C-200**, Email from Isaias Muhate of the MTC to Kishan Daga attaching work plan and fee proposal, dated 26 February 2011.

<sup>664</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 153.

<sup>665</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 153.

without losing jurisdiction under the relevant treaty. What matters therefore is not the physical location of each cent spent, but the expending of funds in furtherance of an investment in the territory of the host state.

539 It follows that PEL's investment was made in Mozambique's territory, in keeping with Article 1(b).

(c) Claimant's investment was made in accordance with  
Mozambican law

540 In the SOC, Claimant explained that its investment was made in accordance with Mozambican law per Article 1(b) of the Treaty.<sup>666</sup>

541 Respondent, however, argues that Claimant's investment is not a qualifying investment, in that the MOI was induced by fraudulent concealment, constituted an illegal investment and was not registered as an investment in Mozambique under the Mozambique Investment Law (the "MIL").<sup>667</sup>

542 Not only are these three arguments not borne out by the facts of this case or by Mozambican law, but they have also been put forward with no regard to the well-established principles of investment law.

(1) Mozambique's allegation that the investment is illegal because of "*fraudulent concealment*" fails as a matter of law and facts

543 Respondent's first allegation of "*fraudulent concealment*" is merely alluded to in the section of Respondent's SOD regarding jurisdiction *ratione materiae* and instead developed in its section on admissibility.<sup>668</sup> This is unsurprising, as the timing of the contention underlying the purported "*fraudulent concealment*", PEL's temporary debarment by the NHAI in India, is fatal to Mozambique's argument on jurisdiction *ratione materiae*.

544 Mozambique argues that this Tribunal should decline jurisdiction because PEL concealed from Mozambique its alleged temporary debarment in India "*at all*

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<sup>666</sup> SOC, paras. 254-260.

<sup>667</sup> SOD, paras. 378-380.

<sup>668</sup> SOD, paras. 208-244.

*material times*"<sup>669</sup> – without any explanation as to what it means by "*material times*". This argument fails as a matter of law and fact.

545 To the extent relevant, Article 1(b) defines investment as "*every kind of asset established or acquired...in accordance with the national laws of the Contracting Party in whose territory the investment is made...*".<sup>670</sup> This is a traditional formulation requiring the investment's compliance with host state law.

546 Investment treaty tribunals have consistently interpreted such provisions as requiring the determination of compliance with host state laws at the date of admission or establishment of an investment. This is supported by the very authorities relied upon by Respondent, including the seminal case of *Fraport* where the tribunal held that an investment tribunal will not be deprived of jurisdiction if the investor complied with the host state's law at the time of the investment's initiation:

*"Although this contention is not relevant to the analysis of the problem which the Tribunal has before it, namely the entry of the investment and not the way it was subsequently conducted, the Tribunal would note that this part of the Respondent's interpretation appears to be a forced construction of the pertinent provisions in the context of the entire Treaty. The language of both Articles 1 and 2 of the BIT emphasizes the initiation of the investment. Moreover the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction."*<sup>671</sup>

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<sup>669</sup> SOD, para. 208.

<sup>670</sup> **CLA-1**, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 1(b).

<sup>671</sup> **RLA-32**, *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 Aug. 2007, para. 345, quoted in SOD, para. 211. See also **RLA-29**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 127 ("*The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment ("made") and (2) legality during the performance of the investment. Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the **scope of application** of the BIT (and hence this Tribunal's jurisdiction) – albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue. In the Tribunal's view, the broader principle of international law identified in paragraphs 123-124 above does not change this analysis of Article 10, and in particular its distinction between legality at different stages of the investment*" quoted at SOD, para. 212). (Emphasis added)

- 547 As is clear from the above quote, the rationale for this principle, which is supported by numerous other authorities,<sup>672</sup> is that if compliance with the host state's law could be assessed at any time for the purposes of determining the jurisdiction of an arbitral tribunal, changes in the host state's legislation could be used by the latter to deprive arbitral tribunals of their jurisdiction which would, in turn, threaten the effective operation of the BIT regime.
- 548 In the present case, Claimant's investment was made when it commissioned the Preliminary Study in February 2011 and when it entered into the MOI on 6 May 2011.
- 549 This is *before* the NHAI's temporary debarment order. Respondent's "blacklisting" allegation is one of its red herrings, which has been addressed in detail at Section III.A above. In short, on **20 May 2011**, PEL was temporarily debarred from bidding or participating in future projects to be undertaken by the NHAI in India for one year because it had not accepted a letter of award from the NHAI, notwithstanding the fact that it had been declared the successful bidder. The debarment - an administrative bar for further work during a temporary period by a contracting counterparty - was under challenge during almost the entire time when it was in force because such a challenge had no suspensive effect. It expired less than 10 days after the Supreme Court had confirmed the temporary debarment on 11 May 2012. In the interim, PEL was free under Indian law to bid for and accept projects by any other Indian authority except other than the NHAI and from any foreign authority.
- 550 It follows that even if PEL's temporary debarment from further projects by and from a single Indian authority could give rise to an allegation of fraudulent concealment in Mozambique (which is denied), it could not affect the legality of its investment, which was made *before* such debarment. In any case, and for the avoidance of doubt, Professor Medeiros has also confirmed that PEL had no obligation to disclose its debarment from participating in and bidding for projects with the NHAI in India to Mozambique.<sup>673</sup>

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<sup>672</sup> **CLA-279**, *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 119; **CLA-280**, *Quiborax S.A. & Anor. v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 266; **CLA-281**, *Teinver S.A. & Ors. v. Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 318; **RLA-35** *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 193.

<sup>673</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 4.

(2) Mozambique's is estopped from alleging that the investment is illegal because the MOI was contrary to PPP law and regulations and entered into ultra vires, which is, in any case, not supported by Mozambican law

551 Respondent's second general allegation that the investment is illegal is not particularised in the section on illegality of the investment where it is merely alluded to.<sup>674</sup> The section on "*inadmissibility*" based on the allegation that PEL seeks "*to enforce an illegal purported 'investment'*" is also elusive. It contends, without more details, that 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*".<sup>675</sup>

552 Respondent is estopped from making this argument and in any event, it is wrong as a matter of Mozambican law.

553 The tribunal in *Fraport* established that "[p]rinciples of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."<sup>676</sup>

554 This was later endorsed by other tribunals,<sup>677</sup> including by the tribunal in *Railroad Development Corporation v. Republic of Guatemala*, which is of particular relevance here. In that case, the respondent argued that the investment was not a qualifying investment because the relevant contracts were not "*let through public bidding and did not receive Presidential and Congressional approval*."<sup>678</sup> The tribunal found that both parties to the relevant contracts conducted themselves as if they had been in effect,<sup>679</sup> such that even

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<sup>674</sup> SOD, para. 381.

<sup>675</sup> SOD, para. 268.

<sup>676</sup> **RLA-32**, *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 Aug. 2007, para. 346.

<sup>677</sup> See e.g. **CLA-282**, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, paras. 120-121.

<sup>678</sup> **CLA-283**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, para. 139.

<sup>679</sup> **CLA-283**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, para. 144.



if the actions of the relevant state company were contrary to domestic law, the respondent state was prevented from raising this argument.<sup>680</sup>

*"Even if FEGUA's actions with respect to Contract 41/143 and in its allowance to FVG to use the rail equipment were ultra vires (not 'pursuant to domestic law'), 'principles of fairness' should prevent the government from raising 'violations of its own law as a jurisdictional defense when [in this case, operating in the guise of FEGUA, it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law.'" <sup>681</sup>*

555 In the present case, Mozambique organised an official signing ceremony at the MTC for the MOI.<sup>682</sup> It initially abided by its provisions when it approved the PFS and asked PEL to exercise its right of first refusal.<sup>683</sup> Crucially, even when Mozambique decided to no longer abide by the binding commitments it had made to PEL under the MOI, it did not once raise the argument that the MOI was entered into contrary to Mozambican law, nor that the MTC lacked authority to enter into it. These arguments were first raised in this Arbitration.

556 Just as Guatemala in *Railroad Development Corporation*, Mozambique should, on the basis of principles of fairness, be estopped from raising arguments as to the illegality of the MOI by virtue of the alleged violation of the PPP laws and regulations and/or lack of power of the MTC to enter into the MOI.

557 In any event, these arguments fail as a matter of Mozambican law. As explained by Professor Medeiros, there is no doubt that the MTC had the power to enter into the MOI<sup>684</sup> and to grant PEL a right to a direct award of a concession subject to the fulfilment of certain conditions, which was permissible under the law applicable at the time when the MOI was entered into, the Public Procurement Rules,<sup>685</sup> as well as explicitly envisaged by the

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<sup>680</sup> **CLA-283**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, para. 146.

<sup>681</sup> **CLA-283**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, para. 146.

<sup>682</sup> See para.105.

<sup>683</sup> See Section IV.C.

<sup>684</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 3.1.

<sup>685</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, paras. 31-35 where Professor Medeiros states that the list of cases in which a direct award may be adopted in **CLA-41**, Decree no. 15/2010, of 24 May 2010, was not exhaustive and the administration had discretion to grant such direct award.

PPP Law, which the Parties knew would be the law in force by the time the PFS was approved (in May 2012) and a concession awarded.<sup>686</sup>

558 It follows that Respondent is estopped from alleging that PEL's investment was illegal and that, in any case, this allegation is unfounded.<sup>687</sup>

(3) Mozambique's is estopped from alleging that the investment is illegal because the MOI was not registered under the MIL, which, in any case, does not affect the legality of the investment

559 Respondent's third allegation is that PEL's investment is not an investment for the purposes of the Treaty because it was not registered under the MIL. The allegation is not particularised in the section on jurisdiction *ratione materiae* but in that on jurisdiction *ratione personae*.<sup>688</sup> Mozambique claims that Articles 1(b), 2, and 12(1) of the Treaty supposedly required PEL to register its investment under Article 22(1) of the MIL, which PEL failed to do, such that its investment is unlawful.<sup>689</sup>

560 here is no requirement that PEL register its investment as a condition to jurisdiction under the Treaty.

561 None of the Articles of the Treaty relied upon by Respondent expressly (or implicitly) require PEL to register its investment. Article 1(b), which is the only Article relevant to the definition of "*investment*" refers to the fact that an "*investment*" means "*every kind of asset established or acquired...in accordance with the national laws of the Contracting Party in whose territory the investment is made*".<sup>690</sup> It does not refer to the registration of the investment.

562 Article 2, which is entitled "*scope of the agreement*", relates to whether investments made and claims arising before the Treaty's entry into force are covered by the Treaty's protective ambit:

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<sup>686</sup> CER-3, Legal Opinion of Professor Rui Medeiros, paras. 37-49; CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 39.

<sup>687</sup> The same conclusion is reached from a Mozambican law perspective, as stated by Professor Rui Medeiros, CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 42.

<sup>688</sup> SOD, paras. 432-437.

<sup>689</sup> SOD, paras. 432-437.

<sup>690</sup> CLA-1, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 1(b).

*"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, whether made before or after the coming into force of this Agreement. It shall however not be applicable to claims or disputes which occurred prior to its entry into force."*

563 The title, contents and position of Article 2, which is separate from Article 1 ("*Definitions*"), make clear that it was not intended to add any additional requirement to the definition of the term "*investment*". The term "*accepted*" is merely a reference to the fact that an investment must be accepted as a lawful one under the relevant law. It cannot be read to a requirement that the investment be registered, a term which is not used.

564 As for Article 12, it refers to Applicable Laws and provides, to the extent relevant, that "*[e]xcept 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.*"<sup>691</sup> Again, Article 12 does not refer to any requirement that the investment be registered.

565 Tribunals have confirmed that for a registration requirement to be interpreted as a condition for treaty protection, it must be express rather than inferred. For instance, the tribunal in *Beijing Urban Construction Group Co. Ltd* held that a registration requirement could not be inferred absent an express provision:

*"As to BUGG's alleged failure to register its investment under domestic Yemeni law, there is no express provision of the China-Yemen BIT that imposes a requirement to obtain registration for an investment to be protected by the BIT. Some investment treaties do have such a requirement and that requirement has been characterised as a condition precedent for treaty protection. But no such requirement can be inferred in absence of an express provision. The registration requirement under the Yemen investment Law is the gateway to the privileges and protections set out in that law. But it does not serve as the gateway to the privileges and protections maintained by the China-Yemen BIT..."*<sup>692</sup>  
(Emphasis added)

566 The Treaty does not contain an express requirement that an investment be registered. This fact is dispositive of Respondent's objection.

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<sup>691</sup> **CLA-1**, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 12.

<sup>692</sup> **RLA-62**, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, paras. 45-46.

567 In any event, Respondent is estopped from raising the argument that PEL did not register its investment because it failed to raise it during the course of the investment. Indeed, tribunals have rejected the very argument that Mozambique seeks to make here, namely that a non-registered investment was not made in accordance with the law on the basis that the host state never raised this issue during the course of the investment. This was the case in *Desert Line*, where the relevant investment treaty required that the investment be "accepted" and that an investment certificate be issued.<sup>693</sup> That tribunal rejected that an investor's failure to accomplish a formality foreseen by law could serve as a jurisdictional defense:

*"Addressing the precise issue of estoppel, the ICSID tribunal in Fraport wrote (at para. 346): 'Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.' This comment applies a fortiori when the alleged problem is not violation of law, but merely - as here - the failure to accomplish a formality foreseen by law, and not even required by it except as a condition of obtaining benefits unconnected with those of the BIT itself."*<sup>694</sup>

568 In the present case, Respondent explicitly endorsed the MOI. It was signed at an official ceremony organised at the MTC in the presence of the Minister.<sup>695</sup> It was then initially abided by Mozambique, which explicitly approved the PFS and asked PEL to exercise its right of first refusal.<sup>696</sup> Even when Mozambique started to breach the promises it had made under the MOI, it never raised the question of the MOI's registration. Respondent first raised it in this Arbitration. It follows that just as Yemen in *Desert Line*, Mozambique is estopped from raising this issue.

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<sup>693</sup> **CLA-282**, *Desert Line Projects LLC v. The Republic of Yemen*, Award, 6 February 2008, para. 92.

<sup>694</sup> **CLA-282**, *Desert Line Projects LLC v. The Republic of Yemen*, Award, 6 February 2008, paras. 120-121. This analysis was more recently endorsed by the tribunal in **RLA-62**, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, paras. 45-46 ("As to BUGG's alleged failure to register its investment under domestic Yemeni law, there is no express provision of the China-Yemen BIT that imposes a requirement to obtain registration for an investment to be protected by the BIT. Some investment treaties do have such a requirement and that requirement has been characterised as a condition precedent for treaty protection. But no such requirement can be inferred in absence of an express provision. The registration requirement under the Yemen investment Law is the gateway to the privileges and protections set out in that law [b]ut it does not serve as the gateway to the privileges and protections maintained by the China-Yemen BIT...")

<sup>695</sup> See para.105.

<sup>696</sup> Section IV.C.

569 The fact that Mozambican law did not require PEL to register its investment under the MIL (except to the extent it wished to receive the benefits from that law) is fatal to Mozambique's case.

570 Indeed, registering foreign investments under the MIL is not mandatory. As is clear from Article 2(2) of the MIL, which is quoted by Respondent, registration is only required for the purposes of ascertaining the benefits and guarantees contemplated in the MIL:

*"The undertakings which investments are being or have been made without compliance of the provisions of this Law and its Regulations shall not benefit from the guarantees and incentives herein contemplated."*<sup>697</sup> (Emphasis added)

571 In any event, even assuming *quod non* that this were a requirement under Mozambican law, it is a well-established principle of investment treaty law that minor violations of the host state law will not preclude jurisdiction because they do not establish illegality of the investment. This was explained by the tribunal in *Inmaris*. Although it found that registering an investment was mandatory under Ukrainian law, it decided that a failure to register did not establish illegality of the investment under the relevant BIT:

*"Having reviewed carefully Ukraine's Law on Foreign Investments Regime and the Regulation on the Procedure for State Registration of Agreements (Contracts) of Joint Investment Activity with Participation of a Foreign Investor cited by Respondent, the Tribunal understands registration of such contracts to be "mandatory" primarily in the sense that such registration is required if the parties to the contract wish to take advantage of legal protections for foreign investors, as well as certain tax and customs benefits that are conferred on foreign investments, under the laws of Ukraine. While the Law stipulates that contracts with foreign investors for "joint investment activity" should be registered, it also states the consequences of a failure to do so: "[u]nregistered foreign investments shall not provide privileges and guarantees stipulated by this Law. Neither the Law nor the Regulations governing registration suggest that unregistered investments are illegal as such. It is illegality that is the touchstone of our analysis under provisions such as Article 2(2) of the BIT. Accordingly, the Tribunal is not prepared to deem the Claimants' investments to be contrary to Ukrainian law, and thus outside the Treaty's protection, by virtue of the fact that Claimants did not afford themselves of the benefits of Ukraine's foreign investment law through registration of their contracts."*<sup>698</sup> (Emphasis added)

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<sup>697</sup> RLA-8, Mozambique Investment Law, no. 3/93, 24 June 1993.

<sup>698</sup> CLA-81, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 145.

572 Accordingly, if the *Inmaris* tribunal found no breach of the legality provision of a treaty where registration of the investment was mandatory, it is *a fortiori* the case here where registration under the MIL was not required except as a condition to benefit from the MIL.

573 It follows that Respondent's argument that the investment was illegal fails and conversely, that PEL's investment was made in accordance with Mozambican law for the purposes of Article 1(b) of the Treaty.

(d) To the extent such consideration is relevant, Claimant's investment meets the so-called *Salini* factors

574 In the SOC,<sup>699</sup> Claimant explained that some investment tribunals have gone beyond the definition of investment in the relevant investment treaty and considered whether investments possessed hallmarks commonly attributed to investments, namely a contribution that extends over a certain period of time that involves some risk and contributes to the host state's development (the so-called *Salini* factors). Claimant further explained that there had been considerable debate as to whether these were requirements or merely *indicia* that an investment existed and doubts as to their relevance outside the ICSID context. It nonetheless demonstrated that PEL's investment possessed all the relevant hallmarks.

575 Respondent fails to explain the relevance of the *Salini* test outside the ICSID context. Rather, it merely suggests that the *Salini* factors are "*helpful in defining the limits of an investment*"<sup>700</sup> as opposed to mandatory requirements.

576 Claimant reiterates that there are doubts as to whether the *Salini* test is relevant outside the ICSID context.<sup>701</sup> In the event the Tribunal were to consider such factors notwithstanding this, Claimant concurs that such factors are not

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<sup>699</sup> SOC, paras. 274-276.

<sup>700</sup> SOD, para. 400.

<sup>701</sup> SOC, fn. 329: For instance, the tribunal in **CLA-87, Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia** referred to the established practice of ICSID tribunals to assess whether a specific transaction qualified as an investment, independently of the definition in the relevant investment treaty, in order to fulfil the *ratione materiae* prerequisite of Article 25 of the ICSID Convention. It concluded that such concerns were irrelevant outside the ICSID context: "*However this latter ratione materiae test for the existence of an investment in the sense of Article of the (sic) 25 ICSID Convention is one specific to the ICSID Convention and does not apply in the context of ad hoc arbitration provided for in BITs as an alternative to ICSID. In the present ad hoc arbitration under the UNCITRAL Rules one would therefore have to conclude that the only requirements that have to be fulfilled in order to confer ratione materiae jurisdiction on this Tribunal are those under the BIT*". (**CLA-87, Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia**, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, paras. 117-118). See also **CLA-97, RosInvestCo UK Ltd v. The Russian Federation**, SCC Case No. V079/2005, Final Award, 12 September 2010, para. 338 where the tribunal merely decided whether the investment fell within the scope of the definition of investment in the relevant BIT.

mandatory requirements but merely indicative of the presence of an investment. As emphasised by the *Ad Hoc* Committee in the seminal *Malaysian Historical Salvors v. Malaysia* decision, there are major policy concerns arising out of the creation of an objective definition of investment.<sup>702</sup>

577 Respondent goes on to argue incorrectly that PEL's investment does not meet the *Salini* test on the basis of two elements that do not even form part of that test.<sup>703</sup> Respondent relies upon *Phoenix Action* to add to the *Salini* factors whether an investment was made in accordance with the law and in good faith.<sup>704</sup> This is unsupported by *Phoenix Action* itself which summarises the four *Salini* factors as follows:

*"The definition most frequently referred to relies on what has come to be known as the 'Salini test', according to which the notion of investment implies the presence of the following elements: (i) a contribution of money or other assets of economic value, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State's development."*<sup>705</sup>

578 As to the *Salini* factors themselves, they are clearly met in this case.

579 First, there is no doubt that Claimant contributed money and other assets of economic value in the form of financial contribution to the Preliminary Study and to the PFS, know-how, human resources including in the fields of geology,

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<sup>702</sup> **CLA-95**, *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, paras. 72-73 ("72. Does the passage of paragraph 25 that 'consent alone will not suffice to bring a dispute within its jurisdiction. in keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto' indicate that 'investment' as used in Article 25(1) has an objective content that cannot be varied by the consent of the parties? Only to the following limited extent. '[T]he nature of the dispute' appears to refer to the dispute being a legal dispute. The reference to 'the parties thereto' merely means that for a dispute to be within the Centre's jurisdiction, the parties must be a Contracting State and a national of another Contracting State. These fundamentals, and the equally fundamental assumption that the term 'investment' does not mean 'sale', appear to comprise 'the outer limits', the inner content of which is defined by the terms of the consent of the parties to ICSID jurisdiction. 73. While it may not have been foreseen at the time of the adoption of the ICSID Convention, when the number of bilateral investment treaties in force were few, since that date some 2800 bilateral, and three important multilateral, treaties have been concluded, which characteristically define investment in broad, inclusive terms such as those illustrated by the above-quoted Article 1 of the Agreement between Malaysia and the United Kingdom. Some 1700 of those treaties are in force, and the multilateral treaties, particularly the Energy Charter Treaty, which are in force, of themselves endow ICSID with an important jurisdictional reach. It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term 'investment' as found in Article 25(1) of the Convention, risks crippling the institution.") A mandatory application of the *Salini* factors has been the subject of heavy criticism, particularly in that (i) they set out inflexible mandatory characteristics when the term "investment" in Article 25(1) had deliberately been left undefined to preserve the autonomy of the Contracting States (see e.g. **CLA-96**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 312-313; **CLA-95**, *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, para. 79; **CLA-138**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No/ARB/07/16, Award, 8 November 2010, para. 311); and (ii) the automatic application of the mandatory characteristics could lead to the arbitrary exclusion of certain types of transactions from the scope of the ICSID Convention and/or could contradict individual agreements (See, e.g., **CLA-96**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 314; **CLA-95**, *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, para. 79).

<sup>703</sup> SOD, paras. 402-419.

<sup>704</sup> SOD, para. 402.

<sup>705</sup> **RLA-33**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 83.

and engineering<sup>706</sup> PEL identified and developed a concept which the highest government body in Mozambique deemed to be in the "*national strategic interest*", demonstrated that the said concept was feasible (notwithstanding Mozambique's previous write-off of the Project), and then appropriated that know-how and intellectual property to run a public tender for a USD 3.115 billion Project, which continues to move forward today. In light of this, there can be no serious doubt that PEL contributed money or other assets of economic value.

580 In this respect, Respondent's argument that such contribution is a pre-investment activity makes no sense. Claimant's investment consisted of the commission of the Preliminary Study, the MOI, and the rights underlying the MOI. These pre-dated the contributions. When Claimant's investment is viewed holistically, as it must, there is no question of the significant contribution made by PEL to the Mozambican state.

581 Second, it is clear that the investment was envisaged to be a long-term investment. It is well established and has not been disputed by Respondent that when considering whether an investment is a qualifying investment under the relevant treaty, tribunals ought to consider the economic operation of the investment as a whole.

582 It took PEL a year to convince Mozambique to organise and allow PEL to commission the Preliminary Study.<sup>707</sup> The PFS itself took 12 months to complete.<sup>708</sup> The construction of the Project itself was due to take place over 6 years.<sup>709</sup> It was envisaged that the Project concession would have a 30-year term (as indeed does Mozambique's agreement with the TML Consortium).<sup>710</sup>

583 In response, Respondent has argued that the PFS, which PEL was required to provide within 12 months, fell short of the "*minimal length of time upheld by the doctrine, which is from 2 to 5 years.*"<sup>711</sup>

584 Yet, PEL's investment was not limited to the PFS. Furthermore and in any event, it is now well established that the duration for an investment referred to

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<sup>706</sup> CWS-3, Second Witness Statement of Kishan Daga, Section B; Section IV.

<sup>707</sup> See Section IV.A.

<sup>708</sup> See Section IV.C.

<sup>709</sup> SOC, para. 274(b) and footnote 332; **Exhibit C-6**, Patel Engineering Limited, *Pre-feasibility Study and Annexures 1-18*.

<sup>710</sup> **Exhibit C-220**, Email from Ashish Patel of PEL to Kishan Daga of PEL regarding the MOI, dated 24 March 2011.

<sup>711</sup> SOD, para. 405.



in *Salini* ought not to be mechanically applied and that duration depends on the circumstances of each case.<sup>712</sup> *Phoenix Action* is not an authority to the contrary: the passage relied upon by Respondent is a quote from the respondent state's submissions, not the decision of the tribunal.<sup>713</sup>

585 Third, there were risks involved with the Project, including that the PFS would deem the Project infeasible or that the MTC would not approve the PFS.

586 Respondent has argued that this was a mere commercial risk, which does not qualify as an investment risk.<sup>714</sup>

587 Yet, the very decisions relied upon by Respondent demonstrate that PEL's risk was an investment risk. In *Romak*, the tribunal explained the difference between commercial risk and investment risk as the latter being one where the outcome of the transaction cannot be guaranteed:

*"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 non- performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.*

*An 'investment risk' entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is 'risk' of this sort, the investor simply cannot predict the outcome of the transaction."*<sup>715</sup> (Emphasis added)

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<sup>712</sup> **CLA-94**, *Romak S.A.v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 225 ("The Arbitral Tribunal does not consider that, as a matter of principle, there is some fixed minimum duration that determines whether assets qualify as investments. Short-term projects are not deprived of 'investment' status solely by virtue of their limited duration. Duration is to be analyzed in light of all of the circumstances, and of the investor's overall commitment."); **CLA-284**, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, para. 141 ("In order to meet the relevant test, any contribution to the host State must also be of a certain duration. There is a rather sterile debate as to how long is enough to meet the duration requirement. It has been posited as generally accepted that the required duration would be a period of at least two years. However, the application of this requirement should not be excessively rigorous and the relevant duration is to be assessed in all the circumstances. This criterion excludes 'short-term economic activity, or assets used in that context, such as one-time sales transactions that do not face investment-specific risk.'")

<sup>713</sup> **RLA-33**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 124 ("The Respondent does not per se deny the duration of the alleged investment, but argues that since the investment itself is inexistent, it can have no duration. According to it, 'the duration criterion generally requires that the investment project be carried out over a period of at least two years. Phoenix, however, never intended to carry out a business project at all.'")

<sup>714</sup> SOD, paras. 406-409.

<sup>715</sup> **RLA-61**, *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280, Award (26 November 2009), paras. 229-230 which are also relied upon in **RLA-60**, *Poštová Banka, a.s., Istrokapitál SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, (9 April 2015), para. 368. Respondent also relies on *Nova Scotia v. Venezuela* where the tribunal held that there was no risk affecting the contribution and the alleged investment because the only risk was that the

588 In the present case, PEL did not know whether the PFS would find the Project to be feasible or whether it would be approved by the MTC. It could not predict the outcome of the transaction, such that PEL's investment undoubtedly entailed an "*investment risk*."

589 Respondent also relies upon other cases where the construction of the relevant infrastructure had started, to demonstrate that in these projects the relevant investors faced more risks than PEL.<sup>716</sup> These do not support Respondent's case that PEL's investment faced no risk.

590 Fourth, the Project was a quintessential example of a project contributing to the economic development of the host state. As explained in the SOC,<sup>717</sup> this is explicitly supported by recital C of the MOI and also by the website of the company to which Mozambique granted PEL's Project. Respondent's feeble response is to contrast this case with *Salini* where the construction of the infrastructure had started.<sup>718</sup> This is not a response to Claimant's case. Mozambique undoubtedly benefitted from PEL's PFS and know-how, which it *inter alia* used to organise the tender and ultimately pursue the Project, in breach of the MOI.<sup>719</sup>

(e) To the extent such consideration is relevant, Claimant's investment is an investment under Article 25 of the ICSID Convention

591 In the ICSID context, certain tribunals have examined the notion of "*investment*" under Article 25(1) of the Convention in light of ICSID practice.<sup>720</sup> Respondent relies on these decisions to argue that PEL's investment is not a qualifying investment because it is a mere "*option*".<sup>721</sup>

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claimant would have to buy coal at a higher price, which was a risk that any coal buyer would be exposed to in any coal purchase agreement (**RLA-58**, *Nova Scotia Power Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award Excerpts (30 April 2014), paras. 104-108). It goes without saying that the situation in *Nova Scotia* is clearly distinguishable from the case at hand, which is not a mere contract for the supply of coal.

<sup>716</sup> SOD, paras. 410-413.

<sup>717</sup> SOC, para. 276(d) and fns 335-377; **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Recital C ("[s]uch project will enhance the economic prosperity in the entire region."); <https://tml.co.mz/mission-vision-values/> (accessed on 30 October 2020).

<sup>718</sup> SOD, para. 415.

<sup>719</sup> Section IV.K.1.

<sup>720</sup> **RLA-54**, *Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002) para. 58.

<sup>721</sup> SOD, paras. 382-399.

- 592 First, Respondent's argument should be rejected outright because the authorities interpreting the notion of investment under the ICSID Convention are not relevant to this Tribunal's jurisdiction.
- 593 Second, and in any event, the cases quoted by Respondent are distinguishable and do not support its argument. To justify the relevance of the ICSID cases it relies upon, Respondent contends that *Phoenix Action* established that the "definition of 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."<sup>722</sup> Respondent also contends that "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 asset in the developing jurisprudence". It quotes *Joy Mining* in support.<sup>723</sup>
- 594 Neither of these authorities support Respondent's contention that ICSID cases analysing the notion of investment under the Convention are relevant outside the ICSID context.
- 595 The passage of *Phoenix Action* relied upon by Respondent neither refers to the definition of investment, nor to the fact that ICSID cases on the definition of investment are a general principle of law. The general principles of law referred to by the *Phoenix Action* tribunal in the passage cited by Mozambique are the principles of non-retroactivity and good faith, which it notes are referred to in the VCLT.<sup>724</sup>
- 596 The passage of *Joy Mining* relied upon by Respondent is an analysis of the investment under the relevant treaty.<sup>725</sup> The tribunal then moved on to analyse whether the investment was a qualifying investment under Article 25 of the ICSID Convention.<sup>726</sup> It did not state that investment treaty tribunals in

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<sup>722</sup> SOD, para. 382.

<sup>723</sup> SOD, para. 384.

<sup>724</sup> **RLA-33, *Phoenix Action, Ltd. v. Czech Republic***, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 77 (Also, international agreements like the ICSID Convention and the BIT have to be analyzed with due regard to the requirements of the general principles of law, such as the principle of non-retroactivity or the principle of good faith, also referred to by the Vienna Convention. This has been stated for the WTO law stemming from the Marrakech Agreements of 1994: "States in their treaty relations, can contract out of one, more or in theory, all rules of general international law (other than those of jus cogens), but they cannot contract out of the system of international law. As soon as States contract with one another, they do so automatically and necessarily within the system of international law." This has been stated also with force by the Appellate Body of the WTO Dispute Settlement Mechanism in its first rendered decision, where it stated: "The General Agreement is not to be read in clinical isolation from public international law".)

<sup>725</sup> **RLA-53, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt***, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004), paras. 45-47.

<sup>726</sup> **RLA-53, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt***, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004), paras. 48-ff.

general must consider the notion of investment under the developing jurisprudence, as Respondent contends it did.

597 Accordingly, Respondent has failed to establish the relevance of the decisions it relies upon to challenge the Tribunal's jurisdiction.

598 Third, not only do the decisions cited by Respondent not support the propositions it advances, but they in fact support PEL's argument that it made a qualifying investment.

599 At the outset, Claimant notes that Respondent mischaracterises PEL's investment by referring to it as an "*option*" or "*a contingent liability*."<sup>727</sup> Respondent appears to conflate the MOI, which is a binding contract,<sup>728</sup> with its operation, which includes conditions precedent to certain rights and obligations (i.e. the right to the direct award of a concession, which was subject to the PFS being approved and PEL exercising its right of first refusal). This does not render the MOI any less binding.

600 Respondent quotes three cases in support of its argument that PEL's investment is not an investment in keeping with ICSID case law.

601 Respondent refers to *Mihaly v. Sri Lanka* which it says had facts "*virtually identical to those presented here*" in that PEL purportedly claims pre-investment expenditure just as the claimant in *Mihaly*.<sup>729</sup>

602 Yet, *Mihaly* is inapposite. In *Mihaly*, the tribunal found that the claimant's investments did not qualify for protection under the ICSID Convention because the three agreements between the claimant and the government presented by the claimant as investments did not contain any binding obligation.<sup>730</sup> The three agreements consisted of a letter of intent, a letter of agreement, and a letter of extension, which all explicitly stated that they did not constitute a binding obligation on any party.<sup>731</sup> This was clearly the pivotal consideration in the tribunal's conclusion, as illustrated in the award itself:

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<sup>727</sup> SOD, paras. 385-387.

<sup>728</sup> As confirmed by Professor Rui Medeiros – CER-6, para. 59.

<sup>729</sup> SOD, paras. 388-389.

<sup>730</sup> **RLA-54**, *Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002), para. 59.

<sup>731</sup> For the letter of intent, see **RLA-54**, *Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002), para. 41: "*Most importantly it specified that 'this Letter of Intent constitutes a Statement of Intention and does not constitute an obligation binding on any party'*"; for the letter of agreement, see **RLA-54**, *Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15

*"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 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?"*<sup>732</sup> (Emphasis added)

603 The tribunal went on to conclude:

*"The Tribunal concludes in regard to the three Letters of Intent, of Agreement and of Extension successively issued by and on behalf of the Government of Sri Lanka in the course of 1993 and 1994 that **none of these Letters contains any binding obligation either on Sri Lanka or on the Claimant.** As the Tribunal has already stated, in the circumstances of this case, they are not to be treated in any way as signifying acceptance by the host State, Sri Lanka, of such expenditures as constituting an investment within the sense of the Convention. There is no evidence which could contradict the contingent and non-binding character of the three Letters of Intent, of Agreement and of Extension."* (Emphasis added)

604 That explicit lack of intent to create any binding obligation upon the parties was decisive in the *Mihaly* tribunal's conclusion, as has been confirmed by subsequent tribunals considering that decision. For instance, the tribunal in *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia* noted that Sri Lanka's "lack of an intention to create a contractual relationship was decisive in the majority's conclusion":

*"The Tribunal finds Mihaly of limited utility in resolving the current dispute between the Parties. The majority decision in Mihaly was clearly influenced by the great care that Sri Lanka took in ensuring that it did **not** enter into a contractual relationship with Mihaly for the BOT project. The lack of an intention to create a contractual relationship was decisive in the majority's conclusion that the pre-contractual expenditure*

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March 2002), para. 45 ("Once again the Letter specifically recognized that there was no contractual obligation on any party"); and for the letter of extension, see **RLA-54**, *Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002), para. 46 ("...it again concluded 'this Letter of Extension does not constitute an obligation binding on any party.'")

<sup>732</sup>

**RLA-54**, *Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002), para. 48.

was not an "investment" within the meaning of Article 25(1)."<sup>733</sup> (Emphasis in original)

605 The two other decisions relied upon by Respondent establish the same. The tribunal in *Zhinvali v. Georgia* reached the same conclusion as the tribunal in *Mihaly* because it found no express or constructive consent to the treatment of the claimant's development costs as an "investment".<sup>734</sup>

*"It appears under the learning of the Mihaly Case that a different result would only appropriately occur if this Tribunal were to conclude that Georgia, either expressly or implicitly, had consented "to receive or admit" the ZDL development costs in question as an "investment" in Georgia."*<sup>735</sup>

606 As for the tribunal in *PSEG v. Turkey*, it found that there was a qualifying investment in the form of a concession contract. It explicitly distinguished *Mihaly* and *Zhinvali* on the basis that contrary to these cases, a contract had been entered into and become effective:

*"...It is not disputed either that both parties unequivocally believed that the Contract had become effective on the date of the signing by the Ministry. The Contract is couched in proper legal language.*

*81. Numerous documents in the record evidence this understanding of the parties. Letters from the Ministry of March 11, 1999, April 9, 1999 and July 20, 1999, for example, refer to the Contract having become effective. **This in itself is a substantive difference with the facts in Mihaly where, as explained above, the parties never signed a concession contract and expressly disclaimed any legal obligations arising from the preparatory work undertaken.** The same is true of *Zhinvali* where the parties expressly acknowledged that the Claimant did not have an investment.*

...

*103. In reaching its conclusion on this matter the Tribunal is also persuaded by the argument that if the parties did not intend to bind themselves by means of a Contract, why would they then have signed, submitted for approval and executed a Contract? Letters of intention or other instruments would*

<sup>733</sup> **CLA-95**, *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, para. 60; **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), para. 81 ("Numerous documents in the record evidence this understanding of the parties. Letters from the Ministry of March 11, 1999, April 9, 1999 and July 20 1999, for example, refer to the Contract having become effective. This in itself is a substantive difference with the facts in *Mihaly* where, as explained above, the parties never signed a concession contract and expressly disclaimed any legal obligations arising from the preparatory work undertaken.")

<sup>734</sup> **RLA-56**, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003), para. 407.

<sup>735</sup> See also, **RLA-56**, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003), para. 349.

*have sufficed to provide a general framework to continue negotiations until an agreement was reached or not without any legal consequence for either party, as the events in Mihaly show. The view of the Respondent that the Contract was signed as a mere courtesy or sign of good will is not tenable, nor is the view that this is nothing but a framework devoid of legal significance.*"<sup>736</sup> (Emphasis added)

607 Respondent also refers to other cases elsewhere in its submissions,<sup>737</sup> which do not establish any contrary proposition. Those which are of some relevance, just as *Mihali* and *Zhinvali* related to non-binding contracts.<sup>738</sup>

608 One case quoted by Respondent is even of assistance to Claimant's case. In *Nagel* the tribunal found that the investor's right to exclusivity to be granted a licence was an investment under the treaty, which had commercial value:

*"Contract rights are property. Their intangibility does not prevent them from being "assets" within the meaning of the Treaty. Mr Nagel's contract rights had a financial value. This is shown by the fact that CRA paid Mr Nagel USD 550,000 to settle claims based on these rights. The settlement acknowledges that Mr Nagel had incurred costs in good faith reliance on his exclusive rights. In addition, Mr Nagel and Millicom contributed substantial know-how to the project.*

***The fact that Mr Nagel's rights had a value is also shown by the nature of those rights. Mr Nagel held binding rights to participate jointly in any GSM licence involving CRA. Unless and until the Government decided not to grant a licence to a consortium that included CRA, the exclusivity of those rights gave them substantial value. The high likelihood that CRA would be a central part of a consortium to which a licence would be granted...meant that anyone interested in obtaining a licence would also be interested in purchasing Mr Nagel's rights. The very substantial value of GSM licences meant that a large market for Mr Nagel's rights would exist.***

*This is also proved by the Government's bidding process. Although the Government has kept secret the terms of the bids, it is clear that numerous bidders offered the Government substantial sums to acquire the same rights as had been taken from Mr Nagel. Indeed, the Government expropriated Mr*

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<sup>736</sup> **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), paras. 80, 81 and 103.

<sup>737</sup> SOD, paras. 482-487.

<sup>738</sup> In *FW-Oil*, the pivotal point was that the relevant agreements were all drafted "subject to contract" **RLA-74**, *F-W Oil Interests Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 March 2006), paras. 182-183; Likewise, in *Generation Ukraine*, the tribunal found that the Protocol of Intentions was not an investment, in that it did not purport to generate legally enforceable rights and obligation, **RLA-75**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003), para. 18.9. As for *Genin*, it is completely inapposite, in that the investment consisting of a licence agreement, in respect of which Respondent's objection was found not to withstand scrutiny **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), para. 319.

*Nagel's exclusive rights precisely to obtain those financial benefits.*

*Contingency does not exclude value. Options and other commercial rights are routinely contingent on subsequent events, but they nevertheless have value. For example, the American investors in Eurotel agreed to pay USD 10 million in 1990 for a contingent right to obtain a GSM licence, if and when the Government decided to grant one. They obviously saw substantial value in that contingent right. The extent of the uncertainty surrounding that right is shown by the fact that the Government stated in February 1994 that it would award the licence, not on the basis of that contingent right, but instead by a bidding process.*

*Mr Nagel's exclusive rights are therefore an asset within the meaning of Article 1(a) of the Investment Treaty. "Assets" are defined by the Treaty and international law, and not by Czech law. Alternatively, and assuming that the Treaty's broad definition could be reduced to merely Article 1(a)(iii), the rights were "claims to - - - performance under contract having a financial value", Mr Nagel's rights were thus an investment protected by the Treaty, and the Arbitral Tribunal has jurisdiction to grant him relief."<sup>739</sup> (Emphasis added)*

609 In the present case, the MOI was a binding contract<sup>740</sup> signed by the MTC on behalf of the Government,<sup>741</sup> at an official signing ceremony. Further, as explained above, it was initially implemented by Mozambique. Unlike the great care Sri Lanka took over its documentation and conduct in *Mihaly*, Respondent has pointed to no clause in the MOI that suggests it is not binding, nor conduct of the parties that suggest that they never considered themselves contractually bound. This alone sets it apart from *Mihaly* and *Zhinvali* and is fatal to Respondent's case that these are comparable to the case at hand.

610 Even if the ICSID cases relied upon by Mozambique are relevant (which Respondent has not established), Claimant has accordingly made a qualifying investment for the purposes of these cases.

611 It follows from the above that PEL has made a qualifying investment in accordance with Article 1(b) of the Treaty.

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<sup>739</sup> **RLA-77**, *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award (9 September 2003), paras. 78-82.

<sup>740</sup> As confirmed by Professor Rui Medeiros – **CER-6**, para. 59.

<sup>741</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Limited, dated 6 May 2011.



2. A dispute has arisen in relation to PEL's investment

- 612 In its SOC, PEL explained that a dispute existed for the purposes of the Treaty because Respondent's conduct towards PEL and its investment breached the Treaty.<sup>742</sup>
- 613 Mozambique denies this uncontroversial proposition. Instead, it argues that jurisdiction *ratione materiae* is lacking because supposedly, the Parties' dispute is "*a purely contractual dispute; there is no exercise of sovereign power.*"<sup>743</sup>
- 614 Whether Mozambique exercised its sovereign power is not a threshold question for the definition of the dispute for the purposes of this Tribunal's jurisdiction *ratione materiae*.
- 615 Rather, investment tribunals have consistently applied a *prima facie* standard, *i.e.*, whether the facts alleged by the claimant, if established, are capable of constituting a breach of the treaty being invoked. This approach is supported by the very authorities quoted by Respondent.<sup>744</sup> In the case at hand, it is clear that if the facts alleged by PEL are established, they are capable of constituting breaches of the Treaty.
- 616 Further, and in any event, it is clear that PEL's claims in this Arbitration are broader than pure contractual claims, and do in fact involve the sovereign powers of the Mozambican State.
- 617 For example, the protagonists are broader than the contractual counterparties to the MOI. Mozambique, through several of its organs and state-owned

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<sup>742</sup> SOC, para. 278.

<sup>743</sup> SOD, paras. 420-426.

<sup>744</sup> **RLA-64**, *Abaclat and Others. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), para. 303: In this context, it is to be recalled that according to generally accepted practice, the task of the Tribunal at the stage of determining whether it has jurisdiction to hear a claim under an investment treaty merely consists in determining whether the facts alleged by the claimant(s), if established, are capable of constituting a breach of the provisions of the BIT which have been invoked.<sup>108</sup> In performing this task, the Tribunal applies a *prima facie* standard, both to the determination of the meaning and scope of the relevant BIT provisions invoked as well as to the assessment of whether the facts alleged may constitute breaches of these provisions on its face. In the words of the tribunal in *Saipem v. Bangladesh*: — If the result is affirmative, jurisdiction [*ratione materiae*] will be established, but the existence of breaches will remain to be litigated on the merits"; 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), paras. 537-540. The other passages of decisions quoted by Respondent are inapposite **RLA-63**, *Toto Construzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009), paras.103-108 relates with the tribunal's specific jurisdiction to deal with an allegation of delay in respect of expropriation; **RLA-67**, *Consortium RFCC v. The Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award (22 December 2003), para. 48, **RLA-75**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003), para. 404, and **RLA-103**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), deals with the *merits* of the cases. **RLA-66**, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) is a US Supreme Court Decision.

entities, namely the MTC, the CFM and the Council of Ministers, breached PEL's *treaty* rights.

618 Further, the subject matter of this Arbitration is broader than a pure contract claim. PEL alleges that Respondent breached the FET standard by the conduct of the MTC, the CFM and the Council of Ministers, which reneged on the commitments made to PEL to directly award it the Project concession, made inconsistent and non-transparent decisions, conducted themselves arbitrarily, and failed to act in good faith. It involves not only claims relating to the promises made in the MOI, but also claims relating to the conduct of the public tender process, which was riddled with irregularities, lacked transparency, and destined for a pre-determined outcome. The tender process is not even mentioned in the MOI (and hence, axiomatically, cannot be part of a purely contractual dispute).

619 As to PEL's claim that Mozambique breached Article 3(4) of the Mozambique-Netherlands BIT (the "**Umbrella Clause**")<sup>745</sup> by breaching its obligations under the MOI, this too is not a pure contract claim.

620 As explained by the tribunal in *SGS v. Paraguay*, where the investors made claims under an umbrella clause, the source of the obligation or cause of action remains the treaty, even if the alleged breach of the treaty obligation depends upon demonstrating a breach of the underlying contract. This is because the umbrella clause transforms the contract breach into a treaty breach:

*"In anticipation of the analysis of Claimant's claims under Article 11 of the Treaty in Section V.B.3 below, we note that in our view, this rule applies with equal force in the context of an umbrella clause. It has been argued that, if the umbrella clause violation is premised on a failure to observe a contractual commitment, one cannot say (in the Vivendi I annulment committee's words) that the "fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged"—because, for that type of umbrella clause claim, the treaty applies no legal standard that is independent of the contract. But that argument ignores the source in the treaty of the State's claimed obligation to abide by its commitments, contractual or otherwise. **Even if the alleged breach of the treaty obligation depends upon a showing that a contract or other qualifying commitment has been breached, the source of the obligation cited by the***

<sup>745</sup>

CLA-1, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 3(4).

*claimant, and hence the source of the claim, remains the treaty itself.*"<sup>746</sup> (Emphasis added)

621 In light of the foregoing an investment dispute has arisen under the Treaty.

622 It follows from the above that PEL has made a qualifying investment in relation to which a dispute has arisen, such that this Tribunal has jurisdiction *ratione materiae*.

C. *The Tribunal Has Jurisdiction Ratione Temporis*

623 In its SOC, Claimant set out that this Tribunal had jurisdiction *ratione temporis*, in that PEL's investments, which were made in 2011, fell within the scope of investments protected by the "sunset clause" at Article 15(2) of the Treaty.<sup>747</sup>

624 Respondent does not put forward any objection to the Tribunal's jurisdiction *ratione temporis*. Instead, it repeats under this heading that PEL has not "made or acquire[d] an investment", such that the "sunset clause" does not apply.<sup>748</sup> This is an objection to the Tribunal's jurisdiction *ratione materiae*. As explained in the relevant sections of this submission, at Section V.B above, such objection fails.

625 Respondent likewise makes the argument that PEL's claims are "barred by the doctrine of laches."<sup>749</sup> This is not a serious objection. It is founded on a reference to a 1997 article in the Virginia Law Review, which advocates that that this Anglo-American doctrine should be applied by international tribunals while acknowledging that the international tribunals' authority to invoke such doctrine "is hardly a settled issue."<sup>750</sup>

626 The only other authority referred to by Respondent, *Impregilo v. Argentina*, does not contain the passages Respondent quotes. Respondent has conflated *Impregilo v. Argentina*<sup>751</sup> with *Salini Impregilo v. Argentina*.<sup>752</sup> In that case, the tribunal, which dealt with the question of the passage of time as a matter of

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<sup>746</sup> **CLA-106**, *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 142. See also, **CLA-138**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, para. 245; **CLA-189**, *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, para. 420; **CLA-154**, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, paras. 356-359.

<sup>747</sup> SOC, paras. 280-283.

<sup>748</sup> SOD, paras. 439-441.

<sup>749</sup> SOD, paras. 611-622.

<sup>750</sup> **RLA-81**, *The Doctrine of Laches in International Law*, p. 2.

<sup>751</sup> **RLA-82**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011).

<sup>752</sup> **CLA-275**, *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018.

admissibility, held that in the absence of specific provision, a claim will not be held inadmissible on grounds of delay unless the respondent state has been clearly disadvantaged. The decisive factor was not the length of time elapsed but *whether the respondent could have reasonably expected that the claim would no longer be pursued*:

*"[A] case will not be held inadmissible on grounds of delay unless the respondent state has been clearly disadvantaged and tribunals have engaged in a flexible weighing of relevant circumstances, including, for example, the conduct of the respondent state and the importance of the right involved. The decisive factor is not the length of elapsed time in itself, but whether the respondent has suffered prejudice because it could reasonably have expected that the claim would no longer be pursued."*<sup>753</sup>

627 Mozambique has not demonstrated that it held any reasonable expectation that PEL would not pursue this case. Accordingly, this (admissibility) objection fails.

*D. There Is No Requirement that PEL Exhaust Local Remedies*

628 The Treaty does not contain any requirement to exhaust local remedies. Respondent has nonetheless chosen to argue that PEL has failed to exhaust local remedies because it allegedly failed to file a timely appeal in the tender procedure<sup>754</sup> and did not first bring its treaty claims before an ICC tribunal pursuant to the MOI's dispute resolution provision.<sup>755</sup>

629 In the absence of a provision in the Treaty, this objection is not arguable and should not have been put forward by Respondent.

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

1. Respondent's attempt to distinguish Vivendi is fallacious

630 In its SOC, Claimant demonstrated that the arbitration clause in the MOI did not affect the jurisdiction of this Tribunal owing to the well-established principle of investment treaty law that an arbitration clause in a contract does

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<sup>753</sup> **CLA-275**, *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018, para. 88.

<sup>754</sup> As explained in Section IV.K above, the lack of judicial appeal is irrelevant for the purposes of the alleged expiration of PEL's right to be compensated.

<sup>755</sup> SOD, paras. 451-454.

not prevent an investor from commencing a treaty claim, as the causes of action are different.<sup>756</sup> It explained further that this principle first set out by the *Ad Hoc* Committee in the seminal *Vivendi* decision<sup>757</sup> has since been widely adopted, including in very recent awards.<sup>758</sup>

631 Respondent has not adduced a single authority to the contrary. Instead, it has argued that the arbitration clause "*is not a mere local contractual arbitration clause*"<sup>759</sup> and in a footnote, has sought to distinguish *Vivendi* as allegedly "*inapplicable here, because it involved a [sic] 'exclusive jurisdiction clause' for local courts*".<sup>760</sup>

632 This is a fallacious distinction. The reasoning in *Vivendi* was founded on the different causes of action under the contract and treaty, not on the nature of the dispute resolution mechanism contained in the underlying contract. The *Ad Hoc* Committee did not make any distinction between an exclusive jurisdiction clause providing for the jurisdiction of local courts and one providing for the jurisdiction of an arbitral tribunal:

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

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

*The Committee does not understand how, if there had been a breach of the BIT in the present case (a question of international law), the existence of Article 16(4) of the Concession Contract could have prevented its characterisation as such. A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.*<sup>761</sup>  
(Emphasis added)

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<sup>756</sup> SOC, paras. 288-292.

<sup>757</sup> SOC, para. 289 quoting **CLA-102**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 86-116.

<sup>758</sup> SOC, para. 290 quoting **CLA-103**, *SunReserve Luxco Holdings S.À.R.L. SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic*, SCC Case No. V2016/32, Final Award, 25 March 2020, para. 573; **CLA-104**, *Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, para. 163; **CLA-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 479-482; **CLA-106**, *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, paras. 141-142.

<sup>759</sup> SOD, para. 301.

<sup>760</sup> SOD, fn. 14.

<sup>761</sup> **CLA-102**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 98-99 and 103.

633 *Vivendi* therefore plainly applies to the case hand, such that the arbitration clause in the MOI does not affect the jurisdiction of this Tribunal.

2. Respondent’s arguments as to the scope of the arbitration clause in the MOI are far-fetched, contradictory, and at odds with established principles of investment law

634 Respondent argues that the arbitration agreement in the MOI is broad enough to encompass PEL’s treaty claims on the basis (i) that the ICC administers investment treaty arbitrations conducted under the ICC Arbitration Rules;<sup>762</sup> (ii) the arbitration clause in the MOI is akin to those considered by the tribunal in *Cambodia Power*, which found that such clauses were sufficiently broad to include treaty claims;<sup>763</sup> and (iii) the ICC clause in the MOI constitutes an agreement by the Parties to submit their disputes to the host State’s competent arbitral body, pursuant to Article 9(2) of the MOI.<sup>764</sup>

635 First, Respondent conflates the arbitration institution administering the arbitration and the applicable arbitration rules with this Tribunal’s jurisdiction under the Treaty. The fact that the ICC administers investment treaty arbitration conducted under the ICC Arbitration Rules in other cases does not establish the jurisdiction of the ICC tribunal to adjudicate PEL’s treaty claims in this case.

636 Second, Respondent’s reliance upon *Cambodia Power* takes its case no further. Respondent appears to have misunderstood *Cambodia Power*, which refers to the applicability of customary international law – not of a bilateral investment treaty - in a contractual claim governed by English law.<sup>765</sup>

637 In *Cambodia Power*, the tribunal rejected the respondent’s objection that by choosing English law as the applicable law of their agreements, the parties had sought to exclude customary international law.<sup>766</sup> This was based on the tribunal’s findings that (i) customary international law may be applied independently of a choice of law clause;<sup>767</sup> (ii) it forms part of the common

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<sup>762</sup> SOD, paras. 311-316.

<sup>763</sup> SOD, paras. 317-331.

<sup>764</sup> SOD, paras. 332-337.

<sup>765</sup> **RLA-44**, *Cambodia Power Co. v. Kingdom of Cambodia, Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011), paras. 327-338.

<sup>766</sup> **RLA-44**, *Cambodia Power Co. v. Kingdom of Cambodia, Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011), paras. 327-338.

<sup>767</sup> **RLA-44**, *Cambodia Power Co. v. Kingdom of Cambodia, Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011), para. 332.

law;<sup>768</sup> (iii) one cannot find an intention to exclude customary international law from the mere choice of a domestic law as governing law;<sup>769</sup> and (iv) the dispute resolution clauses were sufficiently wide to encompass such claims under customary international law.<sup>770</sup>

638 PEL's claim under the Treaty is not a customary international law claim. The BIT between Mozambique and India does not form part of customary international law; rather it is *lex specialis*. The American Law Institute's Third Restatement of Foreign Law defines customary international law as resulting "*from a general and consistent practice of states followed by them from a sense of legal obligation.*"<sup>771</sup> The State practice must be extensive and virtually uniform to constitute customary international law.<sup>772</sup>

639 Respondent's argument, which is founded on a misunderstanding of the notion of customary international law, therefore fails.

640 Third, Respondent's argument that the ICC Clause in the MOI is an agreement by the Parties to submit their disputes to the host State's competent arbitral body, pursuant to Article 9(2) of the Treaty is also wrong. It not only directly contradicts Respondent's own argument that such clause "*is not a mere local contractual arbitration clause*",<sup>773</sup> but it is also entirely unsupported by the Treaty.

641 Article 9 makes it clear that the submission of a dispute for resolution before the host state's "*competent judicial, arbitral or administrative bodies*" under Article 9(2) may only take place once the dispute has arisen and is subject to the agreement of both parties.<sup>774</sup>

642 This is clear from the succession of events as set out in Article 9 of the Treaty. Article 9(1) provides for amicable settlement of the dispute, Article 9(2) provides that if such dispute has not been settled amicably within 6 months and

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<sup>768</sup> **RLA-44**, *Cambodia Power Co. v. Kingdom of Cambodia, Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011), para. 333.

<sup>769</sup> **RLA-44**, *Cambodia Power Co. v. Kingdom of Cambodia, Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011), paras. 334-335.

<sup>770</sup> **RLA-44**, *Cambodia Power Co. v. Kingdom of Cambodia, Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011), paras. 336-337.

<sup>771</sup> **CLA-295**, the Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, The American Law Institute, para. 102(2). See also **CLA-296**, *Anglo-Norwegian Fisheries case* (UK/Norway) (1951) ICJ Rep 116, para. 115.

<sup>772</sup> **CLA-297**, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark and The Netherlands)* (1969) ICJ Rep 3, 43.

<sup>773</sup> SOD, para. 301.

<sup>774</sup> **CLA-1**, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 9.

both parties agree, the dispute may be submitted to the host state's "*competent judicial, arbitral or administrative bodies*" under Article 9(2)(a) or international conciliation under Article 9(2)(b) and Article 9(3) provides that if the parties' fail to reach an agreement under Article 9(2), arbitration may be commenced by either party:

*"(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.*

*(2) Any such dispute which has not been amicably settled within a period of six months may, if both Parties agree, be submitted:*

*(a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial, arbitral or administrative bodies; or*

*(b) To international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.*

*(3) Should the Parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:*

*(a) If the Contracting Party of the investor and the other Contracting Party are both parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965 and the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes, such a dispute shall be referred to the Centre; or*

*(b) If both parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings; or*

*(c) to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976..."<sup>775</sup>*

643 In the present case, PEL notified Mozambique of the existence of a dispute under the Treaty on 25 June 2018. Following such notification, the Parties

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CLA-1, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 9.



never agreed to submit their dispute "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", under Article 9(2) of the Treaty.<sup>776</sup> Nor is Respondent pointing to any proposal made in that respect or any agreement thereto.

644 Furthermore, the ICC referred to in the arbitration clause of the MOI is not one of the bodies contemplated by Article 9(2) of the Treaty as it is not Mozambique's competent arbitral body. Mozambique's only recognised arbitral body is the Centre for Arbitration Conciliation and Mediation, or CACM, which was established by the *Confederação das Associações Económicas de Moçambique* (i.e., the Confederation of the Economic Associations of Mozambique) in 2002.<sup>777</sup>

645 Respondent's argument that the arbitration agreement in the MOI is broad enough to encompass PEL's treaty claims accordingly fails.

3. Respondent's contention that PEL's waived its rights in this Arbitration is another nonstarter

646 Respondent argues that PEL waived its right to UNCITRAL arbitration and is accordingly estopped from bringing this Arbitration because it elected to arbitrate in accordance with the arbitration clause in the MOI.<sup>778</sup>

647 Respondent itself does not seem to have much confidence in its argument, which it sets out with unusual brevity in a mere two paragraphs, to the effect that estoppel is a general principle of international law.<sup>779</sup>

648 It is common ground that estoppel is a general principle of international law. Of more relevance, however, are cases dealing with the application of this principle in the context of waiver of a right to bring investment treaty claims or dispute the jurisdiction of an investment treaty tribunal.

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<sup>776</sup> CLA-1, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 9(2).

<sup>777</sup> As may be confirmed on its website, at [http://www.cacm.org.mz/?page\\_id=39](http://www.cacm.org.mz/?page_id=39). "The Centre for Arbitration Conciliation and Mediation is a non-profit organisation, created in 2002 with a view to offer alternative mechanisms suitable to prevent and resolve disputed of a commercial nature and to encourage its use in other areas of activity. This is an organisation affiliated to the Confederation of the Economic Associations of Mozambique (CTA).

<sup>778</sup> SOD, paras. 340-341.

<sup>779</sup> SOD, paras. 340-341.

649 Respondent does not refer to any of these cases. With good cause: they lay bare the hopelessness of its argument. They establish that for a waiver to be effective and estoppel to apply, the waiver in question must be clear and unambiguous, voluntary and unconditional.<sup>780</sup>

650 It is manifest, on the facts of this case, that Respondent cannot establish that PEL waived its investment treaty rights. Its argument that PEL is estopped from pursuing this Arbitration therefore fails.

4. Respondent's comments as to the course this Tribunal should take vis à vis the ICC Arbitration are not jurisdictional objections and are at odds with established principles of investment law

651 Respondent argues that this Tribunal should "*yield to the ICC Arbitration*"<sup>781</sup> or at the very least suspend this Arbitration until after the ICC Arbitration is completed.<sup>782</sup>

652 None of these arguments constitute a proper jurisdictional objection or even some sort of interim application. Furthermore, none of the authorities quoted by Respondent support the remedies it seeks.

653 In support of its argument that this Tribunal should "*yield to the ICC Arbitration*", Respondent quotes a mere two authorities, both of which are plainly irrelevant.

654 Respondent first refers to the "*internationally-recognized principle of freedom of contract*" as set out in the UNIDROIT principles.<sup>783</sup> It goes without saying that these do not establish any support for the proposition that this Tribunal should yield to the ICC Arbitration.

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<sup>780</sup> **CLA-285**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, para. 111 ("In international law it has been stated that the essentials of estoppel are (1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorised; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement. That statement is cited without disapproval by Professor Brownlie in *Public International Law* 5th Ed. 646. At the same place Brownlie suggests that the essence of estoppel is the element of conduct which causes the other party in reliance on such conduct detrimentally to change its position or to suffer some prejudice".) See also, **CLA-286**, *Aguas del Tunari SA (AdT) v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, paras. 118-119. Contrast with **RLA-91**, *Cargill, Inc. v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award (29 February 2008), paras. 247 and 250.

<sup>781</sup> SOD, paras. 345-356.

<sup>782</sup> SOD, paras. 357-361.

<sup>783</sup> SOD, para. 347.

- 655 Respondent then refers to the case of *Mobil Cerro v. Venezuela*, where it says the tribunal concluded that the ICC arbitration "*did not put an end*" to the treaty arbitration because the "*State was not party to the ICC arbitration*" and the treaty claims "*were not and (could not) have been resolved by the ICC tribunal, which jurisdiction was limited to the contractual dispute.*"<sup>784</sup> This leads Respondent to conclude that because "*in sharp contrast*", in the present case, Mozambique is party to the ICC Arbitration and the ICC allegedly has jurisdiction over PEL's treaty claims, this Tribunal must dismiss this Arbitration.<sup>785</sup>
- 656 Respondent's "*reasoning*" parts with basic logic to such an extent that its argument borders on the absurd. That the *Cerro* tribunal refused to stay its proceedings in favour of the parallel ICC proceedings cannot constitute support for the *contrary* proposition that this Tribunal should stay its proceedings. This is a manifest example of fallacious reasoning which is tantamount to stating 'a cow is a mammal, therefore all mammals are cows.'
- 657 What is more, Respondent has distorted the passage of *Cerro* it relies upon. That passage does not even relate to stay but to the impact of the parallel ICC proceedings on liability and quantum before the *Cerro* tribunal.<sup>786</sup>
- 658 It is further incorrect that the ICC tribunal has jurisdiction over PEL's investment treaty claims. PEL has not submitted its treaty claims to the ICC tribunal, and it contests the ICC tribunal's jurisdiction over its treaty claims.
- 659 As for Respondent's argument that this Tribunal should suspend these proceedings until after the ICC tribunal has decided jurisdiction, it is exclusively founded on the inapposite case of *SPP v. Egypt*.<sup>787</sup>
- 660 The passages of *SPP* quoted by Respondent relate to the interpretation of the Egyptian investment law under which the claim was brought, namely Law No. 43.<sup>788</sup> In that case, it was common ground between the parties<sup>789</sup> that by virtue

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<sup>784</sup> SOD, para. 354.

<sup>785</sup> SOD, para. 355.

<sup>786</sup> **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), paras. 215-216.

<sup>787</sup> SOD, paras. 357-361.

<sup>788</sup> **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), paras. 48-52.

<sup>789</sup> **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), para. 78.

of Article 8 of Law No. 43,<sup>790</sup> the tribunal would only have jurisdiction if the parties had failed to agree upon another means of dispute resolution. The tribunal thus considered that whether the parties had agreed to another method of dispute resolution was a *question préalable* to a finding of jurisdiction.<sup>791</sup> In light of the fact that the ICC tribunal had found that this was the case but the Paris Court of Appeal had disagreed, the matter was heard by the *Cour de Cassation*,<sup>792</sup> and the SPP tribunal stayed its own proceedings until the French courts had finally resolved the question of the jurisdiction of the ICC tribunal.<sup>793</sup>

- 661 It goes without saying that a case relating to the interpretation of the specific provisions contained in the Egyptian investment law has no relevance to the case at hand, let alone support the grant of a stay of this proceeding.
- 662 Respondent's submissions as to the course this Tribunal should take *vis à vis* the ICC Arbitration therefore have no support in law or in fact.
- 663 It follows from the above that the arbitration clause in the MOI does not affect the jurisdiction of this Tribunal.

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<sup>790</sup> **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), para. 70: Article 8 of the Law No. 43 provided that "[i]nvestment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies."

<sup>791</sup> **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), para. 82.

<sup>792</sup> **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), para. 81.

<sup>793</sup> **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), para. 86.

## VI. MOZAMBIQUE'S ARGUMENTS AS TO THE INADMISSIBILITY OF PEL'S CLAIM ARE UNSUBSTANTIATED

- 664 In a section of nearly 40 pages replete with inflammatory language, Mozambique accuses PEL of *inter alia*, "bad faith", a "total lack of corporate ethics" and lying.<sup>794</sup> Respondent seeks to argue that "PEL's claims are inadmissible (or, in the alternative, the Tribunal must decline jurisdiction)" because PEL supposedly "fraudulently concealed"<sup>795</sup> its temporary debarment *vis-a-vis* the NHAI in India<sup>796</sup> and allegedly sought to bribe Minister Zucula by inviting him to India. This is yet another example of Mozambique 'banging on the table' when neither the law nor the facts support its case.
- 665 In an attempt at exploiting confirmation bias, and adhering to the mantra, 'throw enough mud at the wall, and some will stick', Mozambique reiterates these unsubstantiated soundbites over and over throughout nearly every section of its SOD, presumably to detract from the weakness of its case and to attempt to paint PEL in a poor light. It leads with them in its introduction,<sup>797</sup> it dedicates entire sections of its factual background to them,<sup>798</sup> it spends nearly 40 pages discussing them in the context of admissibility,<sup>799</sup> while claiming that they also go to jurisdiction,<sup>800</sup> and then it inserts them haphazardly into its case on liability.<sup>801</sup>
- 666 Mozambique's misleading mantra is most appropriately dealt with here, in the admissibility section, because the legal consequences of such conduct, if proven (*quod non*), could only be the inadmissibility of PEL's claims. This is because the actions complained of by Mozambique took place *after* PEL made its investment in Mozambique. As Respondent's own authorities confirm, a clear distinction exists between illegality *during the course of an investment*, which is a *matter for the merits*, and illegality in the *making of an investment* which is a *matter affecting jurisdiction*.<sup>802</sup> Given that both PEL's temporary

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<sup>794</sup> See e.g. SOD, Section III. See also *id.* at para. 236.

<sup>795</sup> SOD, para. 167.

<sup>796</sup> SOD, paras. 167-263.

<sup>797</sup> SOD, paras. 2, 8.

<sup>798</sup> See e.g. SOD, Section II.C.

<sup>799</sup> SOD, Section III, pp. 47-85.

<sup>800</sup> See e.g. SOD, at Section III Heading ("**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 of the MTC Minister.**") (Emphasis added) See also SOD, paras. 167, 208, 244, 250, 255-256, 260, 269, 273, 278, and 293.

<sup>801</sup> SOD, paras. 455, 477, 478.2, 492-497; 600, 601.1, 601.4, 601.5, 605, 666, 704, 720, 854.

<sup>802</sup> **CLA-291**, Jean Engelmayr Kalicki, Dmitri Evseev, Mallory Silberman, *Chapter 9: Legality of Investment*, in Building International Investment Law: The First 50 Years of ICSID (Kinneer, Fischer, Mínguez Almeida, et al. (eds); Dec 2015), pp. 127-128: "...*fundamental illegality or misconduct in the making of an investment in certain*

debarment *vis-à-vis* the NHAI in India and the alleged attempted bribery of Minister Zucula both post-date Claimant's investment in commissioning the Preliminary Study and signing the MOI, if Mozambique's red herrings are to have any legal consequences at all, it would be in the context of admissibility.

667 For Mozambique's fraudulent concealment argument to succeed (*quod non*), it must demonstrate *inter alia* that: (i) PEL had a **legal duty** to disclose the temporary debarment *vis-à-vis* the NHAI; and (ii) PEL's failure to disclose was **material**, *i.e.* that Respondent would have ceased to deal with PEL had it known of the temporary debarment *vis-à-vis* the NHAI. As demonstrated in sub-section C below, Respondent's case fails on both of these prongs.

668 Before demonstrating that Mozambique's legal case on admissibility fails, PEL: (A) sets out an objective account of the events surrounding its temporary debarment *vis-à-vis* the NHAI in India for a limited one-year period; (B) demonstrates that Mozambique's allegations concerning the NHAI's temporary debarment are either demonstrably false, intentionally misleading, or a combination of the two, and in particular: (1) the Government of India did not "*blacklist*" PEL; (2) nor did the Indian Supreme Court "*convict*" PEL; (3) the legal and business effects of the NHAI's temporary debarment were not "*substantial and devastating*" as Respondent claims; and (4) Respondent's assertion that PEL's temporary debarment constitutes "*a very serious pattern of fraudulent conduct by PEL*" is false. PEL likewise will demonstrate that: (C) the temporary debarment is irrelevant to this case.

A. *Respondent Mischaracterises the Facts of PEL's Temporary Debarment by the NHAI in India*

669 The facts involving PEL's temporary debarment *vis-à-vis* the NHAI in India are far less sinister than misleadingly portrayed by Respondent.

670 PEL responded to a bid from the NHAI for the construction of a six-lane highway on 10 January 2011.<sup>803</sup> On 17 January 2011, the NHAI issued a letter of award ("**LOA**") declaring PEL the winning bidder, and requesting it to accept the LOA within seven days.<sup>804</sup> On 24 January 2011, PEL declined the

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*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 the result of illegality or misconduct.*" (Emphasis added) **RLA-20, Patel Engineering Limited v. Union of India and Another**, SCC Online Del 3193 (2011), para. 1.

<sup>803</sup>  
<sup>804</sup>

*Id.*

LOA, noting it had made certain errors which had impacted the value of its bid significantly.<sup>805</sup> PEL noted this was in part due to "*several amendments [which] were communicated on [the] web site of NHAI in the late evening hours of Friday, 7th Jan 2011, while the bid submission was still kept the very next working day, i.e. on Monday, 10th Jan 2011 at 11.00hrs.*"<sup>806</sup>

671 All bidders, including PEL, submitted 13.97 crores (approximately USD 3 million) in bid security.<sup>807</sup> Under Clause 2.20.07(d) of the RFP, in the event the winning bidder failed to accept the LOA, its bid security was to be "*forfeited and appropriated by the [NHAI] as mutually agreed genuine pre-estimated compensation and damages payable to the [NHAI] for, inter alia, time, cost and effort of [NHAI] within [sic] prejudice to any other right or remedy that may be available to the [NHAI] hereunder or otherwise.*"<sup>808</sup>

672 On 1 February 2011, PEL undertook to pay (and subsequently did pay in full) the bid security amount to the NHAI.<sup>809</sup> Notwithstanding PEL's payment, however, and on the sole basis that PEL did not accept the LOA, the NHAI issued a "*show cause notice*" on 24 February 2011, whereby it proposed to temporarily "*debar*" PEL "*from pre-qualification, participating or bidding for future projects of /or to be undertaken by the NHAI*" for a five-year period.<sup>810</sup>

673 The following day, on 25 February 2011, the NHAI awarded the contract to a separate bidder for a premium of 126.06 crores, exceeding the premium it had originally expected, but coming in below PEL's bid of 190.53 crores by 64.47 crores (approximately USD 14 million).

674 PEL responded to the show cause notice (the "**SCN**") on 1 March 2011.<sup>811</sup> It noted it was "*astonished to receive*" the SCN, the contents of which it described as "*harsh*" and "*incorrect*," especially given its relationship with the NHAI, which spanned over a decade and comprised numerous successful projects.<sup>812</sup> PEL reiterated that "*certain anomalies crept up in [the] bid submission*" on

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<sup>805</sup> **RLA-20**, *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011), para. 2.  
<sup>806</sup> **Exhibit C-326**, Letter from PEL to the NHAI regarding Letter of Award, dated 24 January 2011. In subsequent correspondence, NHAI disputed whether these late amendments could have resulted in the calculation errors.

<sup>807</sup> **RLA-20**, *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011), para. 4.

<sup>808</sup> **RLA-20**, *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011), para. 5 (citing to clause 2.20.7 of the RFP). (Emphasis added)

<sup>809</sup> **Exhibit C-327**, Letter from PEL to the NHAI regarding bid security, dated 1 February 2011; *see also* **Exhibit C-328**, Letter from PEL to the NHAI regarding Non-acceptance of Letter of Award, dated 3 February 2011.

<sup>810</sup> **Exhibit C-329**, Show Cause Notice issued by NHAI dated 24 February 2011, at p. 2. This proposed debarment period was subsequently reduced to one year by the NHAI.

<sup>811</sup> **Exhibit C-330**, Letter from PEL to the NHAI regarding Reply to Show Cause Notice, dated 1 March 2011.

<sup>812</sup> **Exhibit C-330**, Letter from PEL to the NHAI regarding Reply to Show Cause Notice, dated 1 March 2011, at p. 1.

account of the last-minute amendments and queries communicated by the NHAI on the eve of the submission.<sup>813</sup> Given that the NHAI immediately completed the bidding process after PEL declined the LOA, PEL likewise took issue with the NHAI's assertion that PEL's actions caused any significant delay in the project's implementation.<sup>814</sup> Finally, PEL noted that in the event of a party's non-acceptance of a LOA, "*the penalty provided in the tender is the forfeiture of bid security,*"<sup>815</sup> a penalty with which PEL had complied voluntarily. The bid documents only referred to debarment in the context of "*fraud and corrupt practices*" of which PEL was not accused. Accordingly, PEL requested the NHAI to withdraw the SCN, failing which, PEL would "*approach the appropriate forum of seeking justice.*"<sup>816</sup>

675 On 20 May 2011, the NHAI communicated its decision to debar PEL temporarily. Despite Respondent's prolific use of the pejorative word "*blacklisting*", the NHAI itself never used this term. Rather, the NHAI informed PEL that for a one-year period (*i.e.* until 20 May 2012), PEL would not be permitted to pre-qualify, participate or bid for future projects undertaken **by the NHAI**.<sup>817</sup> PEL could, of course, continue to contract with any and all other government entities apart from the NHAI and indeed, it did so. The term "*blacklisting*" was employed by PEL, not the NHAI – in the context of asserting that the temporary debarment of PEL for not accepting the LOA "*was in the nature of ... being blacklisted.*"<sup>818</sup>

676 PEL's position was that the NHAI's decision to temporarily debar it from participating in NHAI projects for a one-year period was unwarranted and unjust, and was not provided for in the bid documents. It was for this reason that PEL challenged the NHAI's decision in court. It further appears from the SCN and from the decision of the High Court, that the decision to temporarily debar PEL for a period of one year was intended to make an example of PEL, and to prevent other contractors from refusing to accept LOAs in the future:

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<sup>813</sup> *Id.* at p. 2.

<sup>814</sup> *Id.*

<sup>815</sup> *Id.*

<sup>816</sup> *Id.*

<sup>817</sup> **RLA-20**, *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011), para. 15 (reproducing relevant excerpts of the NHAI's letter of debarment dated 20 May 2011).

<sup>818</sup> **RLA-20**, *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011), para. 10.



"[T]his is the first case where a bidder has not accepted the LOA, and warrants an exemplary action to curb any practice of 'pooling' and 'malafide' in the future."<sup>819</sup>

677 According to the NHAI's counsel, all it did was "take a decision not to deal with [PEL] for a period of one year on account of the petitioner having backed out at the last minute from entering into the contract . . . it is a first case where a bidder has not executed LOA, and [NHAI] . . . is entitled to discourage such practice in the future ..."<sup>820</sup>

678 The High Court found that it was "not the function of this Court to interfere with such a decision" which was a "first instance of its kind."<sup>821</sup> It likewise found that the NHAI "is only stating a fact that [the NHAI] 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.**"<sup>822</sup>

679 PEL appealed this decision. Although the Supreme Court agreed with PEL that the bid documents: (a) stipulated the forfeiture of the bid security as a "mutually agreed genuine pre-estimate compensation and damages payable to [NHAI]";<sup>823</sup> and (b) did not include debarment as a potential penalty for the non-acceptance of a LOA, it found that the bid documents were not determinative.<sup>824</sup> Rather, it held the NHAI was empowered not to enter into contracts pursuant to statute,<sup>825</sup> and the NHAI's temporary debarment of PEL was not illegal, irrational or perverse.<sup>826</sup> Accordingly, it dismissed PEL's appeal.

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<sup>819</sup> **RLA-20**, *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011), para. 15 (quoting the NHAI's letter of debarment dated 20 May 2011).

<sup>820</sup> *Id.* at para. 18.

<sup>821</sup> *Id.* at para. 20.

<sup>822</sup> *Id.* at para. 24. (Emphasis added)

<sup>823</sup> **RLA-21**, *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059 (11 May 2011), para. 13.

<sup>824</sup> **RLA-21**, *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059 (11 May 2011), para. 16.

<sup>825</sup> **RLA-21**, *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059 (11 May 2011), para. 17 ("*The authority of the [NHAI] to enter into a contract with all the incidental and concomitant powers flow from Section 3(1) and (2) of the National Highways Authority Act. The nature of the said power is similar to the nature of the power flowing from Article 298 of the Constitution, though it is not identical ... the very authority to enter into contracts conferred under Section 3 of the NHA Act, by necessary implication, confers the authority not to enter into a contract ...*").

<sup>826</sup> **RLA-21**, *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059 (11 May 2011), para. 24.

B. *Mozambique's Allegations About PEL's Temporary Debarment Vis-à-vis the NHAI Are Either Demonstrably False, Intentionally Misleading, or Both.*

680 Respondent alleges that PEL intentionally and fraudulently concealed that it had been "*blacklisted*" by the "*Government of India*".<sup>827</sup> The words "*blacklist*", "*blacklisting*", and "*blacklisted*" are used no less than 177 times in its SOD and the words "*fraud*", "*fraudulent*", "*fraudulently*", "*fraudster*", and "*defrauded*" 124 times, even though PEL was never accused of fraudulent conduct by the NHAI. On the basis of the alleged "*blacklisting*" (a term not used by the NHAI in its relevant show cause notice), Respondent argues that PEL made "*serious and intentional misrepresentations*"<sup>828</sup> and displayed "*a very serious pattern of fraudulent conduct*",<sup>829</sup> repeating the phrase "*not commerciality reliable and trustworthy*" nearly 30 times.

681 Just because Respondent repeats itself over and over again, does not make its allegations true; rather, it serves to highlight the weakness of Respondent's defence and the desperation with which it is presented. Accordingly, it is critical to set the record straight in relation to demonstrably false or intentionally misleading assertions by Respondent.

1. The "*Government of India*" did not "*Blacklist*" PEL

682 The Government of India did not "*blacklist*" PEL. The NHAI alone – and not the entire "*Government of India*" as Mozambique asserts<sup>830</sup> – temporarily debarred PEL for a limited, one-year period for not accepting a letter of award. That temporary debarment was only effective *vis-à-vis* the NHAI; it did not affect PEL's ability to enter into government contracts with other public authorities or private entities in India or abroad. As the Delhi High Court explained, the NHAI's order "*is not a debarment qua any third party*."<sup>831</sup> Accordingly, PEL was free to enter into —and did enter into — contracts with other public authorities and private entities during the one-year debarment period with the NHAI. In fact, PEL was awarded a number of public infrastructure projects by various departments within the Indian Government

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<sup>827</sup> See e.g. SOD, para. 68.

<sup>828</sup> SOD, para. 232.

<sup>829</sup> SOD, para. 233.

<sup>830</sup> See, e.g. SOD, para. 167 ("*PEL had been blacklisted by the Indian Government in connection with a public infrastructure project*").

<sup>831</sup> **RLA-20**, *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011), para. 24. (Emphasis added)

during the limited temporary debarment term (i.e., from 20 May 2011 to 20 May 2012), as set out in the chart below.

<b>Sampling of Projects Awarded to PEL by Indian Public Authorities</b> <b>During the NHAI Temporary Debarment Period</b> <b>(i.e. from 20 May 2011 to 20 May 2012)</b>				
<b>Project Description</b>	<b>Public Authority</b>	<b>Bid submission date</b>	<b>Bid opening date</b>	<b>Award amount (Millions of USD)</b>
Upgrading of Roads for Sikadi - Chandi - Sandesh - Sahar - Bihata - Danvara - Nasirgunj State Highway – 81, with a length of 86.80 km	Bihar State Road Development Corporation Ltd.	03.08.2011	21.10.2011	51.96
Construction of tunnels from Powai to Veravali and Powai to Ghatkopar HLR & LLR (high lift rotary and low lift rotary shafts and allied work) – Contract PVPG	Municipal Corporation of Brihan Mumbai	12.09.2011	16.12.2011	36.39
Construction of Four Lane Highway with paved shoulder from Varanasi to Shaktinagar of State Highway – 5A from km 0.00 to km117.75 in the state of Uttar Pradesh (Design, Build, Finance, Operate and Transfer)	Uttar Pradesh State Highways Authority	13.10.2011	15.11.2011	390.53
Work of Design & Construction of Renovation & Rehabilitation of existing Storm Water Drain including investigation & desilting, survey, enlarged access manholes, reinforced cement concrete lining and epoxy coating, followed by seven years	Municipal Corporation of Greater Mumbai	25.11.2011	03.01.2012	T-4: 22.06  T-5: 21.18

comprehensive maintenance.				
Construction of New Hospital and Fire Brigade Station Building in S.No.240 (P) + 241 (P), Deolali Shiwar at Nashik Road, Nashik.	Nashik Municipal Corporation	29.11.2011	31.12.2011	11.91

683 The fact that PEL was awarded over half a billion dollars' worth of infrastructure contracts by Indian public authorities during the one-year period in which it was temporarily debarred by the NHAI, belies Respondent's allegation that PEL was "*blacklisted*" by the "*Government of India*" and that PEL's limited debarment somehow equated to "*civil death*."<sup>832</sup> It likewise demonstrates the lack of materiality and limited importance placed upon PEL's temporary debarment, such that other Indian governmental bodies did not hesitate to continue to contract with PEL, even during the limited NHAI temporary debarment period. Again, it should be reiterated that the temporary debarment was for not accepting a LOA; it had nothing to do with *mala fides* conduct such as fraud or corruption.

## 2. The Indian Courts Did Not "*Convict*" PEL

684 The Indian Supreme Court did not "*convict*" PEL as Respondent claims.<sup>833</sup> An order of debarment has limited, short-term *civil* consequences, and its applicability is limited to the concerned public authority passing the order (here, the NHAI) for the specified period of time (here, one year). Accordingly, Respondent's characterisation of the NHAI's temporary debarment as a "*conviction of the Supreme Court of India*" is deliberately false and inflammatory.

685 The Indian Supreme Court's judgement addressed the limited question of whether the Delhi High Court's decision not to quash the debarment order should stand.<sup>834</sup> That is a matter of civil law.<sup>835</sup> In contrast, a "*conviction*" under Indian law is a penal consequence for crimes as defined by law.

<sup>832</sup> See, e.g. SOD, para. 854 ("*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.*")

<sup>833</sup> SOD, Headings III, III.A, paras. 256.

<sup>834</sup> **RLA-21**, *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059 (11 May 2011).

<sup>835</sup> Indeed, the matter was heard before the Delhi High Court *Civil Jurisdiction* and the Supreme Court of India, *Civil Appellate Jurisdiction*. The designations "*Writ Petition (C)*" and "*Special Leave Petition (C)*" denote that such matters were civil and not penal.

Accordingly, the NHAI's temporary debarment order is not tantamount to a "*conviction*" by the Supreme Court of India as Respondent claims.<sup>836</sup> Yet, Respondent uses such inflammatory (not to mention erroneous) language in an attempt to manipulate and exaggerate the consequences of PEL's temporary debarment, and to detract from Mozambique's internationally wrongful conduct under the Treaty.

3. The NHAI's Temporary Debarment Was Not Tantamount to a "*Civil Death*," Nor Were Its Legal and Business Effects "*Substantial and Devastating*".

686 Respondent baldly asserts that "*PEL's blacklisting was effectively a 'civil death.'*"<sup>837</sup> Once again, Respondent's allegation is false and appears intended both to overstate the consequences of PEL's temporary debarment in order to muster up a defence, and to detract from Respondent's own wrongdoing in this case.

687 As set forth above, PEL continued to contract with other Indian government entities even during the temporary debarment period to the tune of awards exceeding half a billion USD. Once that period ended, PEL continued to win projects for other Indian public authorities, including the Ministry of Road, Transport and Highways ("**MoRTH**"), of which the NHAI is a part. For example, the MoRTH awarded PEL a project to construct a four-lane national highway on 13 November 2014, in the amount of approximately USD 45 million. A sampling of projects awarded to PEL by Indian public authorities is set out in the chart below and demonstrates an award of Indian governmental contracts to PEL in the amount of approximately USD 270 million from the period between March 2013 and July 2015:

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<sup>836</sup> The Supreme Court found that "*it [did] not see any reason to interfere with the Judgement under Appeal.*" See **RLA-21**, *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059 (11 May 2011), para. 27.

<sup>837</sup> SOD, para. 854.

<b>Sampling of Projects Awarded to PEL by Indian Public Authorities</b> <b>After Temporarily Debarment Vis a Vis the NHAI</b> <b>(i.e. from March 2013 to July 2015)</b>			
<b>Project Description</b>	<b>Public Authority</b>	<b>Date of contract award</b>	<b>Award amount (Millions of USD)</b>
Engineering, Procurement & Construction for execution of 37.5 MW Parnai Hydro Electric Project (3x12.5 MW) for the Government of Jammu and Kashmir Undertaking	Jammu and Kashmir State Power Development Corporation	23.03.2013	68.65
Restoration of Saran Main Canal and its Small Distribution System, Bishanpur Distributary and Sidhwallia Distributary and its Distribution System, Pithauri Distributary and its Distribution System, Under " <i>Restoration Work of Western Gandak Canal System, Bihar</i> " (Saran Main Canal and its Distribution System), Bihar	Water Resource Department, Bihar	21.11.2014	40.93
Balance Civil Works of Koteshwar Hydro Electric Project (4x100 MW)	Tehri Hydro Development Corporation Ltd.	18.10.2014	23.63
Four Laning of Sangrur-Punjab/Haryana Border Section of National Highway-71 from km 181.805 (Sangrur) to km 211.390 in the State of Punjab (PHASE 1)	MoRTH	13.11.2014	44.94
Upgradation of the Road from Shimoga (Ch. 0.00) – Shikaripura-Anandapuram (Ch. 92.04) part of State Highway-1 and State Highway-57	Karnataka State Highway Improvement Project	26.03.2015	42.02
Strengthening and widening of existing road to two lane with paved shoulder from km 40.00 to km 64 of National Highway 28B	Road Construction Department, Bihar	16.06.2015	13.62
Parallel Lower Ganga Canal (PLGC) Cement Concrete Lining from Kheria Bridge (km 36.3) to Bhagwantpur Bridge (km 45.6) - Lot No. 05	Irrigation & Water Resources Department, Government	14.07.2015	18.63

	of Uttar Pradesh		
Parallel Lower Ganga Canal (PLGC) Cement Concrete Lining from Bhagwantpur Bridge (km 45.6) to Nadrai Aqueduct (km 3.113) - Lot No. 06	Irrigation & Water Resources Department, Government of Uttar Pradesh	14.07.2015	15.63

688 Perhaps the best evidence of the unimportance and immaterial nature of PEL's temporary debarment is the fact that *the NHAI and the MoRTH themselves* continued to qualify PEL to bid for a number of their own projects after the temporary debarment had expired. For example, during the period between September 2014 and April 2015 alone, PEL successfully qualified to bid for 14 projects sponsored by the NHAI or the MoRTH, as set out in the chart below.

689 It goes without saying that, if the NHAI and/or the MoRTH truly considered PEL to be "*not commercially reliable and trustworthy*" as Mozambique now insists, they would have chosen not to qualify PEL for so many of their future projects. Again, this demonstrates the irrelevance of the NHAI's temporary debarment to the present case. It bears repeating that the temporary debarment was for not accepting a LOA; it had nothing to do with *mala fides* conduct such as fraud or corruption, as Mozambique would have the Tribunal believe.

<b>List of Projects for the NHAI/ MoRTH where PEL successfully qualified to bid during the period between September 2014 and April 2015</b>			
<b>Project Description</b>	<b>Public Authority</b>	<b>Bid submission date</b>	<b>Award amount (millions of USD)</b>
Request for Annual Pre-Qualification (RAFQ) - 2014 for the works to be taken up on Engineering, Construction and Procurement mode during 2014-15	MoRTH	23.09.2014	109.49
Application for Qualification: 4-lane Varanasi bypass from km 0.000 (starting point at km 271.300 of National Highway-56) to km 15.250 (end point at km 11.170 of National Highway-29) including 4-laning of National Highway-29 from km 10.700 to km 12.000 in the State of Uttar Pradesh under	NHAI	16.10.2014	45.00

National Highway Development Project (Phase-IV)			
Four Laning of Sangrur-Punjab/Haryana Border Section of National Highway-71 From km 181.805 (Sangrur) to km 211.390 in the State of Punjab (PHASE -1).	MoRTH	21.10.2014	44.94
Application for Qualification: Four laning of Hisar to Dabwali section from km 170.000 to km 227.000 with paved shoulder in the State of Haryana on Engineering, Construction and Procurement basis.	NHAI	30.10.2014	95.77
Application for Qualification for Four-laning of Ambala - Kaithal Section of National Highway-65 from km 0.000 to km 50.860 (length 50.860 km) in the state of Haryana on Engineering, Construction and Procurement basis.	NHAI	17.11.2014	79.02
Application for pre-qualification for Four-laning of Ambala - Kaithal Section of National Highway-65 from km 50.860 to km 95.360 (length 44.500 km) in the state of Haryana on Engineering, Construction and Procurement basis.	NHAI	17.11.2014	76.69
Rehabilitation and up-gradation of National Highway-221 (New National Highway-30) from km 71.200 to km.121.000 (AP/Telangana Border to Rudrampur Section) in the State of Telangana to two Lane with paved shoulder under National Highway Development Project (IV Phase) on Engineering, Construction and Procurement basis.	NHAI	20.11.2014	29.24
RFP for widening & Strengthening of Jodhpur-Pokaran section of National Highway-114 (km 11.000 to km 176.040) to 2-lane with paved shoulder under National Highway Development Project (Phase-IV) in the state of Rajasthan on Engineering, Construction and Procurement basis.	NHAI	16.12.2014	51.14
Request for Annual Pre-Qualification for the year 2015 (Design, Build, Finance, Operate and Transfer).	NHAI	12.01.2015	317.46
Strengthening work of Road from km 31.00 to km 61.5 (Purkaji – Laksar – Haridwar) of	MoRTH	31.01.2015	5.61



National Highway-334a in the state of Uttarakhand under annual plan 2014-15.			
Rehabilitation and augmentation of National Highway-222 from Ahmednagar Bypass to Kharwandi Kasar (Pathardi) section from km 232.00 to 284.00 in Maharashtra to two-lane with paved shoulders on Engineering, Construction and Procurement basis	MoRTH	04.02.2015	25.81
Strengthening and widening with paved shoulder from km 153.00 to km 193.350 of Bijapur-Hubli section of National Highway-218 in the State of Karnataka.	MoRTH	23.02.2015	13.88
Four Laning of Patiala Bypass (Patiala-Bathinda Section of National Highway-64) From km 50.0 to km 64.570 in the State of Punjab on Engineering Procurement and Construction basis.	MoRTH	02.03.2015	35.56
Application for Annual Pre-Qualification 2015 for Highway Projects on Operate, Maintain, Transfer basis.	NHAI	17.04.2015	317.46

4. Respondent's statement that PEL's temporary debarment constitutes "a very serious pattern of fraudulent conduct by PEL" is false

690 Mozambique's allegation that PEL's temporary debarment constitutes "a very serious pattern of fraudulent conduct by PEL" is false. As set out in more detail below, the NHAI temporarily excluded PEL from participating in NHAI bids for a year on the sole basis that PEL did not accept a letter or award where it was selected as the winning bidder. To be clear, ***no allegations of fraud or corruption were ever raised in relation to PEL's actions***. Rather, PEL simply made a calculation error when submitting its bid and once it realised that error, it informed the NHAI within seven days and refused to accept the LOA, voluntarily forfeiting its bid security. This clearly does not justify the serious allegations of fraud made by Respondent, or the incendiary language that is being directed towards PEL.

C. *The Temporary Debarment Is Irrelevant to this Case*

691 As previously explained, PEL's temporary debarment by the NHAI in India is a red herring that Respondent has employed to both detract from its lack of defence on liability, and to attempt to prejudice the Tribunal against PEL.

692 Respondent contends, *inter alia*, that without the alleged fraudulent misrepresentation / concealment by PEL concerning the NHAI's temporary debarment, the MTC would never have entered into the MOI, or had any dealing with PEL whatsoever.<sup>838</sup>

693 As explained at the outset of this section, for Mozambique's fraudulent concealment case to succeed (*quod non*), it must demonstrate *inter alia* that (1) PEL had a **legal duty** to disclose the temporary debarment by the NHAI; and (2) PEL's failure to disclose was material, i.e. that Respondent would have ceased to deal with PEL had it known of the temporary debarment by the NHAI. Respondent's case fails on each of these prongs.

1. Mozambique Has Not Demonstrated a Duty of Disclosure

694 Mozambique's attempt to concoct a legal duty by PEL to disclose the NHAI's temporary debarment is haphazard and confused. It grasps at straws, citing to a mixture of international, Mozambican, and even Indian law, in search of a legal hook. It finds none.

695 In terms of international law, Mozambique cites to *Hamester v. Ghana* to argue that "*fraudulent concealment ... will render a claim admissible*".<sup>839</sup> It likewise invokes *Inceysa v. El Salvador* for the proposition 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 circumstance where the concealed or non-disclosed fact should have been disclosed.*"<sup>840</sup>

696 Yet, Mozambique's reliance on these international law sources is inapposite. First, neither case goes to admissibility.<sup>841</sup> Rather, both cases deal with illegality during the making or inception of an investment. Second, these authorities do not assist Mozambique because the NHAI communicated its

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<sup>838</sup> SOD, para. 217; *see also* **RWS-2**, Witness Statement of Paulo Zucula para. 24.

<sup>839</sup> SOD, para. 169.

<sup>840</sup> SOD, para. 170.

<sup>841</sup> See sub-section E below.

temporary debarment to PEL on 20 May 2011 — *i.e. after the MOI was executed*. As such, at the time of the inception of PEL's investment, the NHAI's temporary debarment was not in place, and thus there was no — and could have been no — fraudulent action to conceal this decision to induce Mozambique to enter into the MOI. Obviously, PEL could not have concealed what did not exist. The timeline simply does not work.<sup>842</sup>

697 In terms of Mozambican law, Mozambique's legal expert, Ms Muenda, makes the same error. She incorrectly claims that PEL breached a duty of information under Article 227 of the Mozambican Civil Code ("**MCC**"),<sup>843</sup> — which applies exclusively to *pre-contractual liability*. She similarly presumptively states that had PEL "*provided the information on the said blacklisting, the MTC most certainly would never have entered into the MoI with [PEL]*."<sup>844</sup> But this is entirely irrelevant, since the NHAI's temporary debarment did not exist at the time the Parties executed the MOI.

698 As Professor Medeiros explains in his second report, PEL did not have a duty to disclose the NHAI's temporary debarment.<sup>845</sup> Under Mozambican law, a duty to inform is the exception, and not the rule.<sup>846</sup> For starters, the provision resorted to by Ms Muenda only arises in the context of pre-contractual liability; accordingly, the fact that the temporary debarment did not exist at the time the Parties executed the MOI is a full answer to Mozambique's case. Furthermore, a duty of information only arises if certain conditions are met, including "*(i) compliance with the obligation of self-information incumbent on the party claiming a right to information, and (ii) the existence of a lack of symmetry in negotiations*."<sup>847</sup> Neither condition is met in this case.

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<sup>842</sup> Further, the debarment of PEL from contracting with one Indian agency does not come anywhere near any of the circumstances in which investment tribunals made findings of illegality such as to affect the illegality of investors' claims. In *Plama*, the investor deliberately misrepresented its credential to be permitted to invest in the refinery by pretending that it was associated with a consortium of more financially robust and experienced companies. As for *Churchill Mining*, it related to an entire system of forgery of mining licences. The international law authorities cited by Respondent do not further its case.

<sup>843</sup> **RER-2**, Expert Report of Teresa Muenda, paras. 7-10.

<sup>844</sup> *Id.* at para. 10.

<sup>845</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Executive Summary at N) – U), and at Section 4.

<sup>846</sup> *Id.* at para. 70.1 ("*The duty of information is not a general rule that requires all doubts, flaws in interpretation or mistakes of the counterparty to be clarified*"). See *id.* at para. 70.1.2 ("*the [duty of information] rule is one of a prima facie lack of any duty of information*").

<sup>847</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 70.2. See also *id.* at Executive Summary, Q) ("*The duty of information considered by authors and case law as comprised by Article 227 does not require full and absolute disclosure of any and all information. It is limited to information that may impact on consent but even then, such duty only arises only if the party claiming such right fulfilled its obligation of self-information, and in cases where there is lack of symmetry between the parties*").

699 First, Mozambique did not comply with its duty to self-inform, which it has the burden of proving.<sup>848</sup> Mozambique appears not to have made any inquiries whatsoever with either the Indian public authorities, or more devastatingly to its case, with PEL directly. To be clear, the information regarding PEL's temporary debarment by the NHAI was publicly available, posted on the NHAI's website for all to see, and readily accessible had Mozambique bothered to inquire. As Mr Daga confirms, Mozambique never made any such inquiries at any period in time to PEL:

*"The Government never asked me for any such information during the negotiation of the MOI, nor did it request any warranty or other contractual term requiring PEL to confirm such matters. Had it done so, I would have provided the information, along with an explanation of the issues and the limited scope of the temporary debarment."*<sup>849</sup> (Emphasis added)

700 Second, there was no lack of symmetry between the contracting parties as required under Mozambican law to impose a duty to inform.<sup>850</sup> As Professor Medeiros explains, *"it is a hallmark characteristic of administrative contracts that the public party is in a superior bargaining position."*<sup>851</sup>

701 Third and most importantly, the duty of information arising out of Article 227 of the MCC only arises in the context of pre-contractual negotiations.<sup>852</sup> Given the temporary debarment occurred after the MOI's conclusion, there is no

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<sup>848</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 70.2.2, 70.2.2.1, and 70.2.2.2. (*"the declarant who claims a right to information 'is culpably mistaken when he has not taken all the care required of him so that he could, on his own, have gathered all the knowledge necessary for the proper formation of his will to contract'. Only when it has not been possible to obtain the information, after having observed its duty to self-inform — acting with relative diligence to obtain, for itself, the relevant information, is the lack of knowledge legitimate and does ignorance deserve protection. In this specific case, the Republic of Mozambique was expected to comply with its duty to self-inform, being required to inform itself as to the characteristics and integrity of the counterparty. The duty of information would only appear after that obligation had been met and it was not possible, with ordinary diligence, for the Republic to discover the missing information. The Republic would always have the burden of proving such self-information, pursuant to Article 342 (1) of the CC, and it is a fact that, according to what I have been instructed by counsel to PEL, that the Mozambican State did not make any enquiries either with PEL – Mozambique didn't even ask to PEL - or with any other entities that might have been in possession of relevant information regarding PEL within the scope of public tender (namely, Indian public authorities)"*).

<sup>849</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 178.

<sup>850</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. ("70.2.3.1 *The duty to inform arises in contract relations between two subjects with unequal bargaining power, with legal and business experience that is so different that it determines imbalance in the contract or, even, a negotiating dependence of the weaker party, leading to the need for protection. It is in these circumstances – and only in these circumstances – that the duty of good faith requires the experienced party to disclose to the counterparty information the disclosure of which becomes necessary due to the unequal positions of the parties.*

70.2.3.1. *One cannot consider a sovereign State, which performs public functions, an economically weak subject, suffering from a lack of symmetry in the contract and needing protection. Quite the contrary, it is a hallmark characteristic of administrative contracts that the public party is in a superior bargaining position. And even if that were not so, the State would always have the burden of proving its bargaining inferiority pursuant to Article 342 (1) of the CC."*)

<sup>851</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 70.2.3.2.

<sup>852</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 70.3, 70.3.1, and 70.3.2.

question in this case that PEL had no duty to inform Respondent of its temporary debarment by the NHAI prior to the MOI's signature.

702 In an attempt to evade this factual nail in Mozambique's duty to disclose coffin, it attempts to argue that PEL's "*fraud was continuing in nature*" because PEL did not disclose the temporary debarment "*while working on or submitting the PFS, or in subsequent discussions with MTC ... when seeking prequalification to participate in the public tender.*"<sup>853</sup> This concocted argument also fails because at no time did Mozambique ever request disclosure of information that included the NHAI's temporary debarment during the limited period between 20 May 2011 and 20 May 2012. As Mr Daga explains:

*"The Government also says that according to the Tender Documents PEL was precluded from participating in the tender process because of the alleged 'blacklisting' that PEL did not disclose to the Government. This is not correct. **The Tender Documents only required disclosure of existing disqualifications.** The impediment that Mozambique relies on only precluded participation of the bidders that 'ha[d] been disciplinary punished for reasons of gross negligence in professional matters, **while the sanctions lasts.**' The Tender Notice simply required that the bidders '[h]ave not been declared bankrupt or disqualified from conducting commercial activity'.*

***At the time of submission of the PGS Consortium's proposal, the temporary debarment had already lapsed, and accordingly, PEL was not required to disclose this information and was not precluded from participating in the bidding.***"<sup>854</sup> (Emphasis added)

703 Having come up empty-handed on international and Mozambican law, Respondent, rather bizarrely, attempts to find an obligation under *Indian* law, on the basis that PEL is incorporated in India. It relies on its Expert, Mr Banerji, to claim that that it is "*implicit*" in the Indian cases Mozambique relies upon that the temporary debarment must have been required to be disclosed under Indian law.<sup>855</sup> This argument is nonsense; this Tribunal is not being called upon to apply "*implicit*" disclosure obligations arising under Indian law. As such, this argument warrants no further response as it is utterly irrelevant.

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<sup>853</sup> SOD, para. 496.

<sup>854</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, paras. 179-180.

<sup>855</sup> SOD, para. 205 (citing **RER-3**, Expert Report of Gourab Banerji, para. 26).

2. Mozambique has not demonstrated the materiality of the disclosure

704 Mozambique claims that if it had known about the temporary debarment by the NHAI, it never would have had any further dealings with PEL.<sup>856</sup> This made-for-arbitration argument is not credible, and is undercut by the fact that at all relevant times, *Mozambique made no enquiries at all* that would have required the disclosure of the NHAI's temporary debarment. There were no warranties in the MOI. There was no requirement to disclose the NHAI debarment during the tender process because it did not constitute an impediment under the Public Procurement Regulations, given that (i) the debarment period had already expired before the tender process was launched; (ii) it was not a decision of the Mozambican State; and (iii) it was most certainly not an illegal act. It was simply not an issue in relation to which Mozambique had any interest. Had it been important, then Mozambique would have sought an answer at the relevant time or required PEL to warrant to such issues in the MOI or to have a continuing obligation to disclose any such issues on an ongoing basis. Even then, it is doubtful that this temporary issue with one agency, *inter partes*, would rise to the level of a material or meaningful issue to disclose, especially considering it was already public and PEL was fighting the issue before the courts to vindicate its position.

705 Indeed, despite Mozambique's attempt to make a mountain out of a mole hill in relation to the temporary debarment, when viewed objectively, it is clear that this matter was not relevant to the Project. It did not involve any *indicia* of fraud or corruption, it did not prevent PEL from contracting with any other public authorities in India (or elsewhere), it did not amount to "*civil death*" as Respondent alleges, it only lasted one year and was *vis-à-vis* NHAI projects only, and it did not even prevent the NHAI and the MoRTH themselves from contracting with PEL once the temporary debarment expired. As Mr Daga explains, the temporary debarment simply was not relevant to the Project, did not concern any bad acts like fraud or corruption, and, in any event, was publicly available had Mozambique bothered to enquire at the relevant time:

*"Mozambique repeats several times in its submission that I concealed PEL's 'blacklisting' from Mozambique and MTC, and now continue to conceal it from the Tribunal. This is not true. The information concerning PEL's temporary debarring is not relevant for this Arbitration. The*

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<sup>856</sup>

SOD, para. 217; see also RWS-2, Witness Statement of Paulo Zucula, para. 24.

*information concerning the temporary debarment was publicly available. Further, given the temporary debarment did not concern any bad acts like fraud or corruption, but rather was based on PEL's refusal to accept a letter of award for a six-lane highway, I seriously doubt that Mozambique would have found this information relevant or done anything in relation to it, had it known.*"<sup>857</sup> (Emphasis added)

706 When the immateriality and unimportance of the temporary debarment is viewed alongside Mozambique's enthusiasm for the Project, it is not credible to assert that Mozambique would have found this information relevant or done anything in relation to it, had it bothered to comply with its own duty of self-information. PEL envisaged a game-changing infrastructure Project, Mozambique enthusiastically approved the PFS and requested PEL to exercise its right of first refusal to carry out the Project. Its Council of Ministers deemed the Project of "*national strategic interest*".<sup>858</sup> Given that PEL was the only party with the know-how necessary to develop the Project through the work it had completed on the PFS, it is simply not believable that Mozambique would have put the brakes on a Project of such importance because PEL, in 2011, did not accept a LOA to build a six-lane highway in India and was therefore not able to bid for further highway projects in India with a single entity for a single year. That would have been an incredibly bizarre basis on which to stop a game-changing mega project in Mozambique and simply defies logic.

*D. Mozambique's Unsubstantiated Bribery Claim Does Not Render PEL's Claims Inadmissible.*

707 PEL does not repeat here its rebuttal to Respondent's unsubstantiated bribery allegations. That is addressed above in Section III. It is sufficient to say for present purposes that Mozambique's unfounded bribery claim provides no basis for this Tribunal to render PEL's treaty claims inadmissible.

*E. The Authorities Relied upon by Respondent Are Largely Irrelevant*

708 PEL has already demonstrated that Mozambique's allegations as to the inadmissibility of PEL's claims are unsubstantiated. For completeness, PEL demonstrates in this sub-section that, in addition, the vast majority of the authorities quoted by Respondent in its 40-page section on inadmissibility are

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<sup>857</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 177.

<sup>858</sup> Exhibit C-29, Letter Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013

inapposite. While Respondent has correctly set out the difference between admissibility and jurisdiction,<sup>859</sup> six of the authorities relied upon by Respondent relate to the illegality in the *making* of the investment which affected the *jurisdiction* of the tribunal, as opposed to the admissibility of the claims, whereas in this case, the facts do not support any illegality at the time of the inception of PEL's investment:

- (a) Respondent first refers to a passage from a book chapter by Jean Kalicki, Dmitri Evseev and Mallory Silberman.<sup>860</sup> Respondent's own quote makes it clear that there is a distinction between illegality *during the course of an investment*, which is a *matter for the merits*, and illegality in the making of an investment which is a matter affecting jurisdiction.<sup>861</sup>
- (b) Respondent's reference to *Hamester v. Ghana*<sup>862</sup> also makes it clear that a distinction must be drawn between illegality at the *inception* of the investment, which goes to the tribunal's jurisdiction and the legality of the investor's conduct during the life of the investment, which is a matter for the merits. Paragraphs 123 and 124, which are quoted by Respondent, are explicitly qualified by the following paragraph:

*"The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment ("made") and (2) legality during the performance of the investment. Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the scope of application of the BIT (and hence this Tribunal's jurisdiction) – albeit that it may well be relevant in the context of the substantive merits*

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<sup>859</sup> SOD, para. 166 referring to **RLA-112**, *Achmea B.V. v. Slovak Republic II*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014), para. 115 ("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.")

<sup>860</sup> SOD, para. 168.

<sup>861</sup> Respondent has not adduced it as an exhibit, nor has it quoted a specific page number for the passage it relies upon, which adduced as Claimant's exhibit for ease of reference: **CLA-291**, Jean Engelmayr Kalicki, Dmitri Evseev, Mallory Silberman, Chapter 9: Legality of Investment, in *Building International Investment Law: The First 50 Years of ICSID* (Kinneer, Fischer, Mínguez Almeida, et al. (eds); Dec 2015), pp. 127-128 ("...the investor's conduct also can be integral to a tribunal's evaluation of jurisdiction, merits, and damages. **This is especially true with respect to allegations of serious illegality or 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 the result of illegality or misconduct.**") (Emphasis added)

<sup>862</sup> SOD, para. 169 referring to **RLA-29**, *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010).



*of a claim brought under the BIT. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue. In the Tribunal's view, the broader principle of international law identified in paragraphs 123-124 above does not change this analysis of Article 10, and in particular its distinction between legality at different stages of the investment."*<sup>863</sup>  
(Emphasis added)

- (c) The case of *Inceysa v. El Salvador*<sup>864</sup> is likewise a case that dealt with illegality in the making of the investment and its impact on the tribunal's jurisdiction. The tribunal found that Inceysa's investment in the form of a contract between itself and the Ecuadorian Ministry of the Environment and Natural Resource<sup>865</sup> was *obtained* through violations of the fundamental rules of the bidding process, consisting of the provision by Inceysa of false financial information<sup>866</sup> and false representations as to strategic partner,<sup>867</sup> experience<sup>868</sup> and connections with another bidder.<sup>869</sup> This, in turn, constituted a breach of the principle of good faith,<sup>870</sup> the principle of *nemo auditur*,<sup>871</sup> international public policy,<sup>872</sup> the principle prohibiting unlawful enrichment,<sup>873</sup> and Salvadorian law,<sup>874</sup> such that the tribunal did not have jurisdiction.<sup>875</sup> There was no question as to the admissibility of Inceysa's claims.
- (d) As explained above, *Fraport* related to allegations of illegality in the *making* of the investment, which affected that tribunal's jurisdiction. It held it lacked jurisdiction because Fraport had deliberately circumvented the law<sup>876</sup> when investing in a Philippine company,

<sup>863</sup> **RLA-29**, *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), para. 127.

<sup>864</sup> SOD, paras. 170-173, 209, 213, 238, 245-249, 252-254, 261-262.

<sup>865</sup> **RLA-30**, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), paras. 3 and 31.

<sup>866</sup> *Id.* at paras. 103-110.

<sup>867</sup> *Id.* at paras. 111-118.

<sup>868</sup> *Id.* at paras. 119-122.

<sup>869</sup> *Id.* at paras. 123-127.

<sup>870</sup> *Id.* at paras. 234-239.

<sup>871</sup> *Id.* at paras. 240-244.

<sup>872</sup> *Id.* at paras. 245-252.

<sup>873</sup> *Id.* at paras. 253-257.

<sup>874</sup> **RLA-30**, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), paras. 3 and 31, paras. 258-264.

<sup>875</sup> *Id.* at para. 337.

<sup>876</sup> **RLA-32**, *Fraport AG Frankfurt Airports Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007), para. 355.

which had concession rights for the construction and operation of a new international passenger airport terminal in Manila.<sup>877</sup>

(e) *Metal-Tech* related to the question of the legality of the investment *at the time when it was established*.<sup>878</sup> The tribunal found that it had no *jurisdiction* because there was corruption in connection with the establishment of the claimant's investment<sup>879</sup> in the form of the promise to pay several individuals to obtain or influence of the government's approval of claimant's investment.<sup>880</sup>

(f) In *Mamidoil*, the tribunal explicitly noted that the decisive moment for the appreciation of the investment's substantive legality is when the investment is planned and made,<sup>881</sup> and held that it had jurisdiction.<sup>882</sup>

709 As for *World Duty Free*, it is not relevant to either the jurisdiction or admissibility of an investment treaty tribunal. That case was commenced under an arbitration clause *in a contract* that was procured by bribing the Kenyan president. This led the tribunal to dismiss the claimant's claim.<sup>883</sup>

710 *Phoenix Action* and *Gremicitel* are of even less relevance. They concern the abusive restructuring of investments (so-called treaty shopping) after the disputes in question had arisen.<sup>884</sup> This is not alleged in this case.

711 The only two authorities that may purport to carry some relevance, *Plama* and *Churchill Mining*, are fully distinguishable from the present case:

(a) While the *Plama* tribunal dealt with the illegality of the investment as a matter of admissibility rather than jurisdiction,<sup>885</sup> the illegality pertained to the manner in which the investment had been *obtained*.<sup>886</sup> The investment comprised the purchase of shares in Nova Plama, a Bulgarian company which owned an oil refinery.<sup>887</sup> The tribunal

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<sup>877</sup> **RLA-33**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 2.

<sup>878</sup> **RLA-35**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/01/3, Award (4 October 2013), para. 194.

<sup>879</sup> *Id.* at paras. 372-374.

<sup>880</sup> *Id.* at para. 195.

<sup>881</sup> **RLA-37**, *Mamidoil Jetoil Greek Petroleum Products Soci  t   Anonyme SA v. Republic of Albania*, ICSID Case No. ARB/11/24, Award (30 March 2015), para. 375.

<sup>882</sup> *Id.* at para. 495.

<sup>883</sup> **RLA-36**, *World Duty Free Ltd. v. Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006), para. 188.

<sup>884</sup> **RLA-33**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), paras. 142-144; **RLA-39**, paras. 180-195.

<sup>885</sup> **RLA-31**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 143.

<sup>886</sup> *Id.* at paras. 143-145.

<sup>887</sup> **CLA-292**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 19.

considered that the investment had been obtained in breach of Bulgarian and international law, because the investor had fraudulently been presented as a consortium of companies having substantive financial assets when it was a mere corporate cover for an individual with limited financial resources.<sup>888</sup> The tribunal found that the Bulgarian authorities would not have authorised the transfer of shares to such a company, had they known about its real composition.<sup>889</sup>

- (b) The *Churchill Mining* tribunal found the claimant's claim to be inadmissible on the basis that the claims were based on documents forged to implement a fraud aimed at obtaining mining rights.<sup>890</sup> It found that the seriousness, sophistication and scope of the scheme were such that the fraud tainted the entirety of the claimant's investment in a mining project.<sup>891</sup>

*F. There is No Illegality Affecting the Admissibility of PEL's Claims*

712 Finally, and as touched upon above, to the extent Respondent's argument is that Claimant's investment was illegal at the time when it was made, it cannot be made out on the basis of Respondent's allegations. PEL's temporary debarment by the NHAI in India and the alleged attempted bribery of Minister Zucula post-date Claimant's investment in the Preliminary Study and PEL's entry into the MOI. This is an unsurmountable hurdle for Respondent.

713 Furthermore, and in any event, Respondent has failed to prove any illegality under Mozambican law let alone under public international law, which is also fatal to its case.

714 The bribery allegation is one of Respondent's unsubstantiated red herrings, which should not have been argued. Even if the alleged facts relied upon by Respondent were established, PEL offering Minister Zucula to "help him out" if he came to India on a flight, this would not even qualify as attempted bribery.

715 What is more, Respondent's bribery allegation is exclusively founded on the testimony of Minister Zucula, who raised the issue for the first time in this

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<sup>888</sup> **RLA-31**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 133.

<sup>889</sup> *Id.* at para. 135.

<sup>890</sup> **RLA-40**, *Churchill Mining & Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/1, ARB/12/40 (6 December 2016), paras. 528-529.

<sup>891</sup> *Id.*

Arbitration while detained in Mozambique's prisons pending the conclusion of a criminal investigation. For the reasons set out in Section III.B, Minister Zucula's testimony is inherently suspect for several reasons. In any event, Minister Zucula's testimony is squarely contradicted by Mr Daga, who confirms that Minister Zucula's allegations are entirely manufactured for the purposes of this Arbitration: "*I never offered him a bribe. I also never said that I would 'help him out' if he came to India. This is all completely made up.*"<sup>892</sup>

716 Respondent's temporary debarment allegation is another of Respondent's red herrings, which has been addressed extensively earlier in this section.

717 It follows that Respondent's argument that PEL's claims are inadmissible by reason of their alleged illegality is unfounded.

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<sup>892</sup>

CWS-3, Second Witness Statement of Mr Kishan Daga, para. 175.

## VII. MOZAMBIQUE BREACHED THE TREATY THROUGH ITS WRONGFUL CONDUCT

718 Respondent is well aware of the weakness of its defence to Claimant's case that it breached the Treaty. It spends a mere 46 pages of its 269-page SOD addressing such breaches.<sup>893</sup> The remainder of Respondent's merits section essentially consists of a 53-page discussion of Mozambican law, which it has argued is relevant "*in defining the scope of the investment allegedly protected*".<sup>894</sup>

719 Respondent has dispensed with the text of the Treaty and with all well-established principles of investment law to suit its case and to obscure the weakness of its own defence. Domestic law is not the law applicable to the question of whether or not Mozambique breached its obligations under the Treaty.

720 Furthermore, it is clear that Respondent has not defeated Claimant's merits claims that Mozambique breached the Fair and Equitable treatment ("**FET**") standard, the prohibition against indirect expropriation without compensation, and the Umbrella Clause.

### A. *Respondent Has Not Established the Relevance of Domestic Law to the Determination of Whether It Breached the Treaty*

721 Respondent argues that Claimant has the burden of proving its claims.<sup>895</sup> This is common ground.

722 However, Respondent argues that domestic law is relevant to the scope of the investment protected under international law, which it in turn suggests is relevant to whether "*any rights were violated*", i.e., the merits of Claimant's case.<sup>896</sup>

723 This argument is directly contradicted by the text of the Treaty, which Respondent ignores. Article 12 of the Treaty, entitled Applicable Laws, clearly establishes that domestic law is applicable to investments only where the Treaty does not provide otherwise:

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<sup>893</sup> SOD, paras. 628-818.

<sup>894</sup> SOD, paras. 455-628.

<sup>895</sup> SOD, paras. 457-458.

<sup>896</sup> SOD, paras. 459-460.

*"(1) 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.*

*(2) Notwithstanding paragraph (1) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non discriminatory basis."*<sup>897</sup> (Emphasis added)

724 The Treaty contains specific provisions relating to investments *in all the standards invoked by Claimant.*

725 Article 3, which contains the FET standard, provides (to the extent relevant) that *"[i]nvestments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment..."*<sup>898</sup> Article 5, which contains the prohibition of indirect expropriation without compensation provides (to the extent relevant) that *"[i]nvestments of investors of either Contracting Party shall not be nationalized..."*<sup>899</sup> Article 4, which contains the Treaty's MFN clause, provides (to the extent relevant) that *"[e]ach Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable..."*<sup>900</sup>

726 What is more, Respondent's argument is contradicted by well-established principles of investment treaty law developed in the precise context of investors relying upon a contract governed by domestic law as forming of part of their investments. According to these principles, a breach of a treaty under international law may occur where there is no breach of an underlying contract in domestic law and *vice-versa*, and each of these claims is governed by its own proper law. These principles, which were unequivocally set out by the Ad Hoc Committee in *Vivendi*, defeat Respondent's argument. The relevant passage of *Vivendi* reads as follows:

*"A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT. The point is made clear in Article 3 of the ILC Articles,*

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<sup>897</sup> CLA-1, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 12.

<sup>898</sup> CLA-1, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 3. (Emphasis added)

<sup>899</sup> CLA-1, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 5. (Emphasis added)

<sup>900</sup> CLA-1, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Article 4. (Emphasis added)

which is entitled ‘Characterization of an act of a State as internationally wrongful’:

***The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.***

***In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law — in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucuman. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provisional authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucuman, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.”<sup>901</sup> (Emphasis added)***

727 The only case quoted by Respondent in support of its argument, *Emmis v. Hungary*, is not an authority to the contrary. The *Emmis* tribunal considered that domestic law was relevant to the definition of investment for the purposes of its *jurisdiction ratione materiae* to adjudicate claims related to the expropriation of the claimants’ investments.<sup>902</sup> It did not deal with the merits of the claimants’ claims.

728 It follows that Respondent has failed to establish that Mozambican domestic law applies to the legal determination of whether or not it breached the Treaty.

#### ***B. Respondent Has Breached the FET Standard of the Treaty***

729 Mozambique’s conduct is a textbook example of a breach of the FET standard. Not only did Mozambique breach its written promises to PEL, it also did so through several *volte faces*, whereby it successively offered to abide by its commitments to PEL and then refused to honour them.

730 After it had appropriated PEL’s know-how by providing information from PEL’s PFS to the other bidders without informing PEL that it would do so,

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<sup>901</sup> **CLA-102**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 95-96.

<sup>902</sup> **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).

Mozambique eventually granted the concession to ITD, through a tender process which itself fell short of the relevant standards of transparency, consistency, and reasonableness.

731 It is therefore unsurprising that Mozambique's response fails to refute Claimant's case. Mozambique repeats its strained interpretation of the MOI, which is directly contradicted by the MOI itself, attempts to artificially distinguish cases that cannot be distinguished and resorts to relying on its favourite red herrings, in the hope this will detract the Tribunal's attention from its manifest breaches of the FET standard.

1. The legal standard

732 Claimant presented Mozambique's general obligation to treat Claimant's investments in accordance with the FET standard contained at Article 3(2) of the Treaty at paragraphs 294 to 297 of the SOC. This presentation appears to be broadly common ground and Respondent does not dispute that:

- (a) It is a broad requirement that is flexible in its protection of investments.<sup>903</sup>
- (b) It must be appreciated in *concreto* taking into account the circumstances of each case.<sup>904</sup>
- (c) The standard includes obligations to refrain from frustrating the investor's legitimate expectations, to act transparently and consistently, to act in good faith, as well as to refrain from taking arbitrary or discriminatory measures and from exercising coercion.<sup>905</sup>

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<sup>903</sup> SOC, para. 295 and fn 351, See **CLA-107**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 450.

<sup>904</sup> SOC, para. 296 and fn 352, See **CLA-108**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 185. See also **CLA-109**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2021, para. 221.

<sup>905</sup> SOC, para. 297 and fns 354 to 357: See e.g. **CLA-116**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 76; **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 54; **CLA-118**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 277; **CLA-119**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, paras. 183-185; **CLA-120**, *Murphy Exploration and Production Company International v. Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, para. 206; **CLA-121**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras.166-167; **CLA-122**, *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award, 12 November 2010, para. 297 ("*Good faith is a broad principle that is one of the foundations of international law and has been confirmed as being inherent in fair and equitable treatment.*") See also, **CLA-123**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 308; **CLA-124**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 242; **CLA-125**, *Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 367; **CLA-6**, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L.*



733 Claimant further agrees with Respondent that the standard set out in *Tecmed* is a comprehensive definition of the FET standard.<sup>906</sup> It is also correct that *SD Myers* stated that the treatment must be read with a high measure of deference – a deference which international law generally extends to the right of domestic authorities to regulate their own borders.<sup>907</sup> However, that decision was rendered in the specific context of the interpretation of the Minimum Treatment clause in Article 1105 of NAFTA.

734 The two other passages of decisions quoted by Respondent, *Parkerings* and *Toto Construzioni*, relate to discrimination<sup>908</sup> and legitimate expectations,<sup>909</sup> respectively. As discrimination is not pleaded in this case, the quoted passage from *Parkerings* is irrelevant. *Toto Construzioni* is addressed in the below subsection specifically dealing with legitimate expectations.

- (a) The obligation not to frustrate an investor’s legitimate expectations

735 Claimant sets out the contents of the obligation not to frustrate an investor’s legitimate expectations at paragraphs 298 to 303 of the SOC. A number of the propositions set out by Claimant appear to be common ground:

- (a) The FET standard protects legitimate expectations at the inception of the investment.<sup>910</sup>
- (b) A host state’s duty not to frustrate an investor’s legitimate expectations is engaged where: (i) the host state made a promise; (ii) the investor relied upon that promise when making an investment;<sup>911</sup> and (iii) such

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

<sup>906</sup> SOD, para. 629 quoting **RLA-85**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003).

<sup>907</sup> SOD, para. 630 quoting **RLA-86**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award (13 November 2000).

<sup>908</sup> SOD, para. 632 quoting **RLA-87**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007). It is clear that the passage relates to the test in respect of unfair and discriminatory treatment (see **RLA-87**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), paras. 287-292).

<sup>909</sup> SOD, para. 631 quoting **RLA-63**, *Toto Construzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009).

<sup>910</sup> SOC, para. 298 and fns 358-361; SOD, paras. 633, 645.

<sup>911</sup> SOD, para. 681 referring to the requirement that the promise must have been relied upon.

reliance was reasonable,<sup>912</sup> i.e. determined objectively and not by reference to the investor's subjective expectations.<sup>913</sup>

(c) Tribunals have been particularly inclined to find that an investor's legitimate expectations have been breached where the host state's promise was contained in a contract, reflecting specific assurances.<sup>914</sup>

(d) Not every breach of a contractual promise is a breach of the investor's legitimate expectations for the purposes of the FET standard. Tribunals generally consider that for a contractual breach to be raised to the level of breach of the FET standard, the host state must have acted in its sovereign capacity or the breach must constitute an outright and unjustified repudiation of the transaction.<sup>915</sup>

736 However, Respondent also seeks to add some elements to the standard, which are either not supported by the very authorities it quotes or not relevant to the case at hand.

737 First, Respondent suggests that the investor's due diligence about the conditions of the investment is "*a pre-requisite for reasonable and legitimate expectations*".<sup>916</sup> This is founded on a quote from *Jan Oostergetel v. Slovak Republic*, which is in fact a summary of the Slovak Republic's submissions in the case – not a finding of the tribunal,<sup>917</sup> and a reference to *AES v. Hungary*, *which does not even refer to due diligence*.<sup>918</sup>

738 Claimant, however, concurs that an investor's due diligence may be relevant to the assessment of whether the expectation is reasonable in the context of an investor's claim relating to the stability of the regulatory framework,<sup>919</sup> which is not the case here.

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<sup>912</sup> SOD, paras. 692-697.

<sup>913</sup> SOD, paras. 634; 636; 641 referring to the objective nature of the standard. See also SOD, para. 637 quoting **RLA-84**, *El Paso Energy Int'l Co. v. Argentina*, ICSID ARB/03/15, Award (31 October 2011), para. 358: Respondent has truncated the paragraph, but the full quote refers to the fact that expectations must be objection – not some sort of further test. SOD, para. 681 referring to the requirement that the promise must have been relied upon.

<sup>914</sup> SOC, paras. 300-302 and fns 366 to 373; SOD, para. 642 referring to the need for specific assurances.

<sup>915</sup> SOD, para. 303 and fns 374-375; SOD, para. 640.

<sup>916</sup> SOD, para. 633.

<sup>917</sup> SOD, para. 633 quoting **RLA-88**, *Jan Oostergetel & Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award (23 April 2021), para. 220

<sup>918</sup> SOD, para. 633 quoting **RLA-89**, *AES Summit Generation Ltd. et al v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 September 2010), paras. 9.3.8-9.3.9.

<sup>919</sup> See e.g. **RLA-87**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 335 ("*In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the*

739 Second, Respondent further suggests that there is some principle whereby in a situation in which the investor has access to domestic courts, the threshold for a fair and equitable protection may be higher. This is founded on a passage of *Toto Construzioni*, which when quoted in full, refers to circumstances in which the treaty requires recourse to domestic courts.<sup>920</sup> This is also not the case here.

740 Finally, Respondent attempts to create the impression that cases, such as *Merrill and Ring Forestry v. Canada*<sup>921</sup> and *F-W OIL*<sup>922</sup> where the host state had *not* entered into a binding contract with the investor, are relevant to this case and, conversely, that cases where the host state had binding contractual obligations towards the investor, such as *MTD v. Chile* and *Tethyan v. Pakistan*, are distinguishable.<sup>923</sup>

741 Respondent's attempt to distinguish these cases on this basis is hopeless where there is no doubt that the MOI was a binding agreement. As explained in the SOC,<sup>924</sup> *MTD v. Chile* and *Tethyan v. Pakistan* are plainly relevant:

- (a) In *MTD v. Chile*, the tribunal held that the investor's investment contract with Chile's foreign investment commission for the construction of an urban development project gave rise to the expectation that the project could be carried out successfully. The necessary permits were then denied by the Chilean authorities because granting them would have been in breach of zoning regulations. The tribunal found that the host state, by entering into the investment contract and later denying the relevant permits, frustrated the investor's legitimate expectations and accordingly breached the FET standard.<sup>925</sup>

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*conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate.*") See also cases quoted by Respondent at SOD, paras. 692-697, which all relate to changes in the regulatory regime.

<sup>920</sup> See **RLA-63**, *Toto Construzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009), para. 163 ("*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. If the treaty requires recourse to domestic courts, it is not the existence of the contractual breach as such, but the 'treatment' that the alleged breach of contract has received in the domestic context that may determine whether the treaty obligation of fair and equitable treatment has been breached.*") The passage omitted by Respondent at SOD, para. 631 is emphasised.

<sup>921</sup> SOD, para. 635 quoting **RLA-92**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID), Award (31 March 2010).

<sup>922</sup> SOD, para. 680 quoting *FW-Oil* where the relevant agreements were all drafted "*subject to contract*" **RLA-74**, *F-W Oil Interests Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 March 2006), paras. 182-183.

<sup>923</sup> SOD, paras. 643-644; 647.

<sup>924</sup> SOC, paras. 301-302.

<sup>925</sup> **CLA-121**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 166-167.

(b) The *Tethyan* case concerned a claimant which undertook extensive exploration and feasibility work concerning the potential development of a gold and copper mine in Balochistan. The tribunal found that Pakistan had frustrated the claimant's legitimate expectations and thus violated the FET standard by failing to abide by its promise to grant a mining lease to the claimant contained *inter alia* in a joint venture contract between the investor and Balochistan for the development of the mine,<sup>926</sup> a promise which had been reinforced by state conduct.<sup>927</sup> The tribunal reached this conclusion notwithstanding the fact that the joint venture contract had been declared null and void *ab initio* by the Supreme Court of Pakistan.<sup>928</sup>

742 Respondent's further attempt at distinguishing *Tethyan v. Pakistan* on other bases is artificial and merely consists of giving importance to case-specific details:

- (a) Respondent insists that in *Tethyan*, Pakistan had an obligation to provide at its own expense appropriate administrative support for the obtaining of all authorisations necessary to conduct the relevant joint venture activities<sup>929</sup> and that it would only be subject to routine regulatory requirements.<sup>930</sup> This related to the specific expectations in that case. In the present case, Mozambique had an obligation to grant PEL a concession subject to two conditions, which PEL fulfilled.<sup>931</sup>
- (b) Respondent further insists that in *Tethyan* there was a joint venture agreement by reference to the fact section of the award.<sup>932</sup> It is clear that this was not a pivotal concern in the tribunal's decision.
- (c) Respondent also inaccurately maintains that a noteworthy aspect of *Tethyan* is the tribunal's finding that the state sought to give investors

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<sup>926</sup> **CLA-134**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, para. 899.

<sup>927</sup> **CLA-134**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, paras. 899-905.

<sup>928</sup> **CLA-134**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, para. 905.

<sup>929</sup> SOD, para. 647 referring to **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).

<sup>930</sup> SOD, para. 648 referring to **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).

<sup>931</sup> This is so even as a matter of Mozambican law, as set forth in **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Executive Summary – A and Sections 2.1 and 2.2 (i.e. para.15).

<sup>932</sup> SOD, para. 647 referring to **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), para. 217. See also, SOD, para. 679.

comfort in securing "*their right to an ultimate benefit based on their investment efforts put towards exploration.*"<sup>933</sup> This is an inaccurate quote. The actual quote analysed a specific regulation, the objective of which was said not to prevent agreements giving investors comfort that they would obtain the licence if they invested considerable money in exploration:

*"In the Tribunal's view, such an interpretation is not in conflict with the mandatory character of the 2002 BM Rules as prescribed in rules 9(5) and (6). Apart from the above quoted provisions in Article 8.12 of the 1995 NMP and in the very same rule 9 of the 2002 BM Rules, the Foreword of the 2002 BM Rules states that the rules were enacted with the aim 'to put in place a set of rules internationally competitive' and to 'attract the interest of the investors on such matters as ... criteria for dealing with applications and the grant of Licences and Leases, ... security of tenure, and to equitably meet the objectives of the investors as well as aspirations of the Government.' Therefore, it was apparently not the aim of the legislator to prevent agreements that would give investors the comfort they required in order to invest considerable amounts of money in exploration before being granted the mining lease that would secure their right to ultimately benefit from the findings they had made through their expenditures."*<sup>934</sup>

(b) The obligation to act consistently and transparently

743 Claimant has presented the obligation to act consistently and transparently at paragraphs 304 to 310 of the SOC. Respondent does not appear to dispute any of Claimant's propositions, namely that:

- (a) The obligations to act consistently and transparently are closely linked.<sup>935</sup>
- (b) The contents of these obligations have been aptly summarised by the tribunal in *Al-Bahoul v. Tajikistan* where the tribunal held:

*"The notion of transparency as an element of fair and equitable treatment has been expounded upon in a number of investment treaty arbitration decisions. Interpreting transparency in the context of the NAFTA treaty, the tribunal in *Metalclad v. Mexico* considered it 'to include the idea that all relevant legal requirements for the purpose of initiating,*

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<sup>933</sup> SOD, para. 649 referring to **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), para. 930.

<sup>934</sup> **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), para. 930.

<sup>935</sup> SOC, para. 304 and fn. 376: **CLA-66**, C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles*, OUP, 2017, paras. 7.201.

*completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.'*

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

*Neither of these criteria is intended however to go so far as to require the State to freeze its legal framework, but rather to act in an open manner and consistent with commitments it has undertaken. As noted by the Tribunal in CMS v Argentina: 'It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made'".<sup>936</sup> (Emphasis added)*

- (c) Breaches of the duty to act consistently have been found where: (i) two arms of the same government acted inconsistently *vis à vis* the same investor;<sup>937</sup> (ii) the host state made contradictory statements *vis à vis* an investor and its investment and left a channel of communication formally open but refused to meet the investor's representatives;<sup>938</sup> (iii) the host state failed to communicate openly and frankly with the investor leaving it to wait for an agreement or to be told what to do;<sup>939</sup> and (iv) the host state failed to communicate with the investor for nearly a year when the investor had satisfied all the conditions for the signature of an "Initiation Act" to commence its mining operations.<sup>940</sup>

<sup>936</sup> **CLA-119**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, paras. 183-185 quoting **CLA-116**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 76; **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154; **CLA-118**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 277. See also **CLA-137**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020, para. 489.

<sup>937</sup> **CLA-121**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 166-67 endorsed in **CLA-138**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, para. 381.

<sup>938</sup> **CLA-112**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 417-419.

<sup>939</sup> **CLA-139**, *Nordzucker AG v. The Republic of Poland*, Ad Hoc, Second Partial Award, 28 Jan. 2009, para. 84.

<sup>940</sup> **CLA-140**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB(AF)/09/1, 22 September 2014, paras. 583-91.

(d) Breaches of the duty to act transparently have been found where: (i) the host state did not disclose its decision not to renew a permit while simultaneously engaging in lengthy discussions with the investor on the possible relocation of the landfill;<sup>941</sup> and (ii) the host state had not implemented any clear rules as to the requirement for obtaining a municipal construction permit and there existed no established practice or procedure as to the manner of handling applications for such permits.<sup>942</sup>

(c) The obligation to refrain from acting in an arbitrary manner

744 Claimant has presented the relevant standard at paragraphs 311 and 312 of the SOC, which appears to be common ground.

745 In summary, the FET standard prohibits states from treating investors in a manner that is unreasonable, disproportionate, or arbitrary.<sup>943</sup> It is founded upon the fundamental requirement that governments operate "*within the confines of reasonableness*",<sup>944</sup> such that state actions "*depend[ing] on individual discretion . . . founded on prejudice or preference rather than on reason or fact*,"<sup>945</sup> or behaviour that is "*done capriciously or at pleasure*" and "*without cause based upon the law*,"<sup>946</sup> violate this standard.

746 Administrative authorities have been known to act arbitrarily. For instance, in *Lemire v. Ukraine*, the tribunal found that the executive branch of the

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<sup>941</sup> **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras. 164-166.

<sup>942</sup> **CLA-116**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 88.

<sup>943</sup> **CLA-141**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/5, Award, 31 Oct. 2011, para. 373 ("*F]air and equitable treatment is a standard entailing reasonableness and proportionality. It ensures basically that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances. FET is a means to guarantee justice to foreign investors.*"); **CLA-142**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 Jan. 2003, para. 188 (noting that a state violates the FET standard with "*idiosyncratic or aberrant and arbitrary*" conduct.); **CLA-110**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 Apr. 2004, para. 98 (holding that FET "*is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.*"); **CLA-96**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008, para. 602 ("*[T]he conduct of the State must be . . . consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary.*"); **CLA-111**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award dated 3 September 2001, paras. 292-293; **CLA-96**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, dated 24 July 2008, para. 602; **CLA-143**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, para. 609; **CLA-66**, C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles*, OUP, 2017, pp. 322-323.

<sup>944</sup> **CLA-144**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, Award, 31 Mar. 2010, paras. 187, 213.

<sup>945</sup> **CLA-111**, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 221 (quoting BLACK'S LAW DICTIONARY 100 (7th ed., 1999)).

<sup>946</sup> **CLA-123**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 318 (internal quotation marks omitted).

government acted arbitrarily by facilitating the secret awarding of licences without transparency, with total disregard of the process and law and no possibility of judicial review.<sup>947</sup>

(d) The obligation to act in good faith

747 Respondent does not dispute Claimant's following propositions as to the contents of the obligation to act in good faith:

- (a) There is broad recognition of the fact that there exists a principle of good faith underlying fair and equitable treatment.<sup>948</sup>
- (b) Tribunals have found breaches of this principle where host states made commitments to the investor and then invoked their internal structure to avoid these commitments.<sup>949</sup>
- (c) A host state's failure to negotiate with an investor in good faith in order to resolve issues relating to its investment have also been found in breach of the FET standard.<sup>950</sup>

748 However, Respondent has sought to add to the standard certain principles that find no support in the very decisions it relies upon.

749 First, Respondent argues that "*good faith*' means not acting in a manner that is intended to 'destroy or frustrate the investment by improper means'",<sup>951</sup> thereby suggesting that this is somehow the exclusive scope of the standard. This is not supported by Respondent's own authority, which refers to such conduct as *one* of the possible manners in which the duty of good faith may be breached:

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<sup>947</sup> **CLA-145**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010.

<sup>948</sup> See e.g. **CLA-122**, *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award, 12 November 2010, para. 297 ("*Good faith is a broad principle that is one of the foundations of international law and has been confirmed as being inherent in fair and equitable treatment.*") See also **CLA-123**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 308; **CLA-124**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 242; **CLA-125**, *Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 367; **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 153.

<sup>949</sup> **CLA-123**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 308. See also **CLA-122**, *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award, 12 November 2010, para. 300 ("*Reliance by a government on its internal structures to excuse non-compliance with contractual obligations would also be contrary to good faith.*")

<sup>950</sup> **CLA-112**, *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 363, 407-456.

<sup>951</sup> SOD, para. 717.



*"The Tribunal has no doubt that a deliberate conspiracy—that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement—would constitute a breach of Article 1105(1). A basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."*<sup>952</sup>

750 Second, Respondent maintains that "*the standard does not turn on whether the State acted with subjective bad faith intent.*"<sup>953</sup>

751 While it is true that bad faith intent is not necessary for there to be a breach of the FET standard, a showing of bad faith intent would undoubtedly be a breach of the obligation to act in good faith.

752 The authorities quoted by Respondent are consistent with this proposition. The passage of *Jan de Nul v. Egypt* quoted by Respondent merely states that it is accepted that a breach of the FET standard does not presuppose bad faith on the part of the state.<sup>954</sup> It does not invalidate Claimant's argument that bad faith on the part of Mozambique must be a breach of its obligation to act in good faith.

753 The passage of *El Paso* relied upon by Respondent relates to whether subjective bad faith is necessary to breach an investor's legitimate expectations and is accordingly inapposite.<sup>955</sup> Again, it does not invalidate Claimant's argument that bad faith on the part of Mozambique must be a breach of its obligation to act in good faith.

754 Third, Respondent seeks to draw a general principle as to the duty of host states to negotiate with investors in good faith by relying on a passage in *Saluka*,

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<sup>952</sup> **RLA-103**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 138.

<sup>953</sup> SOD, para. 717.

<sup>954</sup> **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), para. 185 ("Fair and equitable treatment is flexible and somewhat vague concept, which must be appreciated in concreto taking into account the specific circumstances of each case. It is accepted today that a breach of fair and equitable treatment does not presuppose bad faith on the part of the State".)

<sup>955</sup> **RLA-84**, *El Paso Energy Int'l Co. v. Argentina*, ICSID ARB/03/15, Award (31 October 2011), para. 357 ("This means, firstly, that the Tribunal considers that a violation can be found even if there is a mere objective disregard of the rights enjoyed by the investor under the FET standard, and that such a violation does not require subjective bad faith on the part of the State. This approach of the Tribunal has been followed in several earlier arbitral awards. In *Loewen*, the tribunal clearly explained this point: "Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the interpretation according to its terms." Likewise, in *CMS*, tribunal said that: "[it] believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard." This analysis was also followed in *LG&E*, where the tribunal declared that it was "not convinced that bad faith or something comparable would ever be necessary to find a violation of fair and equitable treatment.")

which is clearly only relevant to the specific circumstances of that case, namely the assessment of the Czech Republic's conduct in its effort to resolve the bank crisis.<sup>956</sup> Accordingly, it is not responsive to PEL's arguments.

2. Mozambique breached the Treaty's FET standard

- (a) Mozambique's conduct frustrated Claimant's legitimate expectations by renegeing on the specific assurances contained in the MOI

755 As explained above, a host state frustrates an investor's legitimate expectations where it reneges on a promise that the investor reasonably relied upon to make its investment. All these requirements are met in the present case.

- (1) Mozambique made specific promises to PEL in the MOI

756 As explained in the SOC,<sup>957</sup> Mozambique made specific promises to PEL in the MOI.

757 On 6 May 2011, the Parties entered into the MOI, whereby PEL agreed to carry out the PFS at its sole expense<sup>958</sup> in consideration of which Mozambique promised that if it approved the PFS and if PEL decided to implement the Project through the exercise of its right of first refusal, Mozambique would grant PEL a concession to implement the Project.<sup>959</sup>

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<sup>956</sup> **RLA-78**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para. 363 ("The Tribunal's assessment starts from the proposition that the Czech Republic's conduct was unfair and inequitable if it unreasonably frustrated IPB's and its shareholders' good faith efforts to resolve the bank's crisis. A host State's government is not under an obligation to accept whatever proposal an investor makes in order to overcome a critical financial situation like that faced by IPB. 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.")

<sup>957</sup> SOC, paras. 316-324.

<sup>958</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 1; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 1; **Exhibit R-1**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 1; and **Exhibit R-2**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 1.

<sup>959</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clauses 2(1) and 2(2); **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 2(2); **Exhibit R-1**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 2(2); and **Exhibit R-2**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 2(2).

758 As explained at Section IV.B above, this is clear on the face of the MOI, including:

- (a) Clause 1, which contained PEL's obligation to carry out the PFS at its own expense and explicitly highlighted that the purpose of the PFS was to set out "*the basic terms and conditions for the granting of a concession by the Govt. of Mozambique*" (this is consistent in both PEL's English language MOI and in Mozambique's English language MOI).<sup>960</sup>
- (b) Clause 2, which contained Mozambique's obligation to grant PEL the concession in respect of the Project, subject to Mozambique's approval of the PFS and PEL's decision to implement the Project through the exercise of its right of refusal. (This is also consistent in both PEL's English language MOI and in Mozambique's English language MOI.) Clause 2 read as follows (crucially, the contents of Clause 2(2) are not disputed by Mozambique):

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

*2. After the approval of the pre-feasibility 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."*<sup>961</sup>

759 As further explained at Section IV.B above, the fact that Mozambique made the above promises is also supported by the negotiation history of the MOI:

- (a) It was the Parties' understanding that PEL would be granted a concession if the PFS was deemed acceptable by Mozambique, and if PEL exercised its right of first refusal. This was unquestionably PEL's understanding from the very beginning. It was also unquestionably

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<sup>960</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 1; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 1; **Exhibit R-1**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 1; and **Exhibit R-2**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 1.

<sup>961</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011; **Exhibit R-2**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011.

Mozambique's understanding, as evidenced in the last draft version of the MOI in Portuguese it shared with PEL, on the very morning of the signing of the MOI.

- (b) It also confirms that the right of first refusal was intended to give PEL the option to decide whether it wished to implement the Project, after its PFS had been approved by Mozambique.

760 As a logical flipside to its commitment to award the concession directly to PEL, Mozambique granted PEL exclusivity rights in relation to the Project (and any substantially similar projects), committed not to grant rights in respect of the Project to any other party<sup>962</sup> and to keep the information shared in relation to the Project confidential.<sup>963</sup> This is also clear on the face of the MOI:

- (a) Clause 6 granted PEL exclusivity rights in relation to the Project (and substantially similar projects) during the time when PEL conducted the PFS and the project was being approved. It also prevented Mozambique from granting any right or authorisation to any other party for the development or expansion of the Project. Clause 6 read as follows (this is consistent in both PEL's English language MOI and in Mozambique's English language MOI):

*"During the prefeasibility study and the process of approval for the project, MTC agrees that within the terms of the specific legislation it will not solicit any proposal of study for the objective of the present Memorandum. MTC also agrees not to give any rights/authorization to any other party for the development/expansion of a port between Chinde and Pebane for similar objectives, nor for the development/expansion of any rail corridor from Tete for the province of Zambezia within the area referred to under objective of the present memorandum."*<sup>964</sup>

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<sup>962</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 6; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 6; **Exhibit R-1**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 6; and **Exhibit R-2**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 6.

<sup>963</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 11; **Exhibit C-5B**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 11; **Exhibit R-1**, Portuguese Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 11; and **Exhibit R-2**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 11.

<sup>964</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 6; **Exhibit R-2**, English Version of the

(b) Clause 11 of the MOI contained an obligation to keep the information shared confidential.<sup>965</sup> (This is consistent in both PEL's English language MOI and in Mozambique's English language MOI.) It was essentially a clause for the benefit of PEL, which was concerned that its know-how be protected. The obligation only lasted until approval of the PFS. This made sense in that the MOI envisaged that once the PFS had been approved, a concession would be granted to PEL, subject to the exercise of PEL's right of first refusal. In other words, there was no need for PEL to protect the confidentiality of the information once the PFS had been approved because PEL would then have the right to a concession, only subject to its decision as to whether or not to implement the Project, through its right of first refusal.

761 It is therefore manifest that Respondent made the above promises to PEL and that PEL relied upon these promises.

762 In response, Mozambique has nonetheless decided to deny the obvious by making a number of arguments that the MOI does not support and are tellingly founded on anything but the MOI.

763 First, without any reference to the MOI itself, Respondent repeats time and again that the MOI is not binding.<sup>966</sup>

764 However, this is belied by: (i) the MOI itself, which is replete with mandatory language; (ii) Mozambique's own acknowledgment that PEL had an obligation to carry out the PFS;<sup>967</sup> (iii) Mozambique's organisation of an official signing ceremony;<sup>968</sup> and (iv) Mozambique's subsequent conduct in initially abiding by the provisions of the MOI. This is also contradicted by Mozambique's own argument that the MOI created an obligation for PEL to carry out the PFS.<sup>969</sup>

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Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 6.

<sup>965</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 11; **Exhibit R-2**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 11.

<sup>966</sup> SOD, paras. 650, 657.

<sup>967</sup> SOD, paras. 50-52.

<sup>968</sup> **Exhibits C-205 – C-216**, Emails from Rafique Jusob of Mozambique's Investment Promotion Centre to Kishan Daga and Ashish Patel of PEL, attaching photos of the signing ceremony, dated 7 May 2011.

<sup>969</sup> SOD, para. 47.

It is further belied by Professor Medeiros in his second report, where he confirms that *"in no way a is the MoI a 'non-binding agreement to agree'"*.<sup>970</sup>

765 Second, Mozambique insists that the MOI did not grant PEL a right to a concession but a mere 15% scoring advantage in the tender to be organised by Mozambique. This is allegedly supported by the forthcoming PPP law, that the Parties knew would enter into force,<sup>971</sup> and Mozambique's fraud allegations in relation to Clause 2(1).<sup>972</sup>

766 The argument that the MOI granted a 15% scoring advantage in the tender to be organised by Mozambique fails to overcome a number of fatal challenges:

- (a) It is not supported by the MOI because: (i) neither English version of the MOI refers either to a public tender, or to a 15% scoring advantage; (ii) even the Portuguese version of the MOI does not refer to either a public tender, or a 15% scoring advantage; and (iii) the rest of the MOI as well as its commercial logic are inconsistent with Respondent's interpretation.
- (b) It is contradicted by Mozambique's conduct after the MOI was entered into, which by approving the PFS and requesting PEL to exercise its right of first refusal unequivocally demonstrated that the Parties had a shared and consistent understanding of PEL's right of first refusal, which was a right for PEL to elect to implement the Project, after its PFS was approved. As Professor Medeiros further explains, the Parties' behaviour is key to the interpretation of a contract under Mozambican law and in this case, their behaviour confirms that *"it is obvious that the MTC never considered the right set out in Clause 2 (2) of the MoI to be a right to be exercised within a public tender procedure, i.e. to match the winning bid, as sustained in the TFM, Legal Opinion"*.<sup>973</sup>
- (c) It is contradicted by the negotiation history of the MOI.<sup>974</sup> As Mr Daga confirms, PEL's right of first refusal, which PEL incorporated into the

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<sup>970</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 59.

<sup>971</sup> SOD, paras. 658-664.

<sup>972</sup> SOD, para. 665.

<sup>973</sup> *Id.*

<sup>974</sup> Exhibit C-201, Email exchange between Ashish Patel of PEL and Kishan Daga of PEL attaching draft of the MOI, dated 13 March 2011. The right of first refusal was similarly formulated in the draft shared by Dr Muhate, senior adviser at the MTC, on 14 April 2011. Exhibit C-222, Email from Isaias Muhate of the MTC to Kishan Daga of PEL attaching draft of the MOI, dated 14 April 2011. Exhibit C-223, Email from Rahul Mundada of PEL to Kishan Daga of PEL attaching draft of the MOI, dated 21 March 2011, Clause 9; Exhibit C-224, Email from Sandeep Shetty to

MOI from the inception, was never understood by either party as a 15% scoring advantage, and an advantage that would be realised in the context of a public tender:

*"It was never the Parties' intention that PEL be granted a mere 15% scoring advantage in a tender; there was no mention of a tender at all. The right of first refusal was a concept that PEL – not Mozambique – included in the early drafts of the MOI ...*

*I have no doubt in my mind that this concept was explained to and understood by the MTC. Both Parties understood that the right of first refusal (or "direito de preferência" in Portuguese) was a right for PEL to either accept or refuse to implement the Project, once the PFS was approved."*<sup>975</sup>

767 What is more, Respondent's argument is contradicted by Mozambican law itself. As explained by Professor Medeiros, the bonus system under the PPP law – i.e. the 15% scoring advantage in a future tender – is *"incompatible with the concept and typical structure of the right of first refusal / direito de preferência. In other words, a quantitative advantage, cannot be confused with a right of first refusal or direito de preferência, as these are two entirely distinct legal concepts"*.<sup>976</sup>

768 As for Respondent's allegations in relation to Clause 2(1), it is a mere rehashing of one of its red herrings, which is wholly unsupported.

769 Respondent also repeats its arguments that Clause 2(1) is inconsistent with Clauses 2(2) and 7 of the MOI, which are weak and far-fetched.

770 Third, while Mozambique concedes that the MOI granted PEL exclusivity rights, it maintains that the exclusivity clause was limited in duration.<sup>977</sup>

771 It is correct that Clause 6 granted PEL exclusivity rights in relation to the Project (and substantially similar projects) during the time when the Project was being approved.

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Kishan Daga of PEL attaching draft of the MOI, dated 5 April 2011, Clauses 7 and 8. **Exhibit C-225**, Email from Ashish Patel of PEL to Rupen Patel of PEL and Sandeep Shetty with copy to Kishan Daga of PEL attaching draft of the MOI, dated 5 April 2011; **Exhibit C-202**, Email from Arquimedes Nhacule of Aries to Kishan Daga of PEL attaching Portuguese translation of the MOI, dated 18 April 2011. **CWS-4**, Second Witness Statement of Ashish Patel, paras. 16-17 (*"I understand that Mozambique now argues that PEL was only ever granted a 15% scoring advantage in the tender process for the Project, and that the exclusivity clause agreed in the MOI only guaranteed that PEL was exclusively granted this scoring advantage in those circumstances. This makes no sense to me, and it is contrary to the conversations I was involved in with the MTC. In particular, a tender was never mentioned in any of the interactions I had with PEL or with Mozambique's negotiators. A public tender was not on the cards for this Project when the MOI was being negotiated."*) (Emphasis added). **CWS-3**, Second Witness Statement of Kishan Daga, paras. 54-57.

<sup>975</sup> **CWS-3**, Second Witness Statement of Kishan Daga, paras. 64-65.

<sup>976</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 2.4., i.e. para. 22.

<sup>977</sup> SOD, para. 667.

772 However, Clause 6 also prevented Mozambique from granting any right or authorisation to any other party for the development or expansion of the Project. While the latter obligation was not limited in time, it logically applied until PEL had exercised its right of first refusal. In other words, if PEL refused to implement the Project, Mozambique was no longer bound by the exclusivity clause in the MOI.

773 This is supported by the negotiation history of the exclusivity clause, which was developed together with PEL's right of first refusal.

774 PEL's first internal drafts make it clear that the exclusivity right remained extant unless it was waived by PEL through the exercise of its right of first refusal:

*"Both parties have agreed that MPDM will not provide any right of way to any other party for developing a similar kind of PROJECT in the same area without the consent of PEL. In the case where MPDM chooses to implement a similar PROJECT in the same area then PEL will have first right of refusal to execute the PROJECT. PEL will also have first right of refusal on any future upgrades to the Project."*<sup>978</sup>

775 The same is true of the draft MOI as modified after the meeting of 5 April 2011, where the Parties discussed the MOI. It contained, in the same clause, the right of first refusal and PEL's exclusivity right, which was not limited in time:

*"Once the DPR is prepared by PEL and approved by GOM then MTC agrees that PEL shall have the right of first refusal to undertake the Project. MTC has also agreed that it will neither solicit any proposal to provide any right/permission whatsoever to any other party for developing/expansion of the port between Chine and Pebane for similar purpose nor for developing/expansion of any the Rail corridor out of the Tete region."*<sup>979</sup>

776 Mozambique has therefore failed to rebut PEL's case that Respondent made specific promises to PEL in the MOI. That such promises were made, even

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<sup>978</sup> **Exhibit C-201**, Email exchange between Ashish Patel of PEL and Kishan Daga of PEL, attaching draft of the MOI, dated 13 March 2011, Clause 11.

<sup>979</sup> **Exhibit C-202**, Email from Arquimedes Nhacule of Arise to Kishan Daga of PEL attaching Portuguese translation of the MOI, dated 18 April 2011, Clause 7.



under a Mozambican law perspective, is confirmed by Professor Medeiros in his second report.<sup>980</sup>

(2) PEL reasonably relied upon these specific promises to invest in Mozambique

777 As explained in the SOC, PEL relied upon promises made in a contract, which tribunals have consistently found to be reasonable.<sup>981</sup>

778 Furthermore, the reasonableness of PEL's reliance was confirmed by the MTC's conduct which, before it abruptly and arbitrarily reneged on its promises, initially appeared to abide by them.<sup>982</sup> This included the fact that: (i) the presentation of the PFS took place before 20 to 30 individuals from at least six ministries; (ii) the MTC asked for further information as a follow-up to PEL's presentation of the PFS; (iii) the MTC approved the PFS and asked PEL to exercise its right of first refusal in writing; and (iv) the MTC asked PEL to negotiate directly with the CFM, which would only make sense in the context of a direct award.<sup>983</sup>

779 In June 2012, the MTC also asked that PEL liaise with potential partners, including Odebrecht.<sup>984</sup>

780 PEL's reliance was further confirmed when Mozambique informed PEL of its decision to proceed with the direct award of the project concession to PEL, on 18 April 2013, as allowed by the PPP Law.<sup>985</sup>

781 Professor Medeiros explains that such behaviour is key to the interpretation of the MOI which, according to the principles of contract interpretation under Mozambican law, are intended to "*safeguard the (legitimate) reliance that the latter places on the declaration and on the conduct of the declarant.*"<sup>986</sup>

782 Mozambique's response is twofold. First, it has essentially repeated its argument that the MOI did not award PEL a right to concession but instead a

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<sup>980</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 29.4, 37.4 ("*The MoI is, in fact, a contract by which a promise is made to enter into a concession contract in the future, provided that, once again, all the conditions that the MoI itself sets out are met*"), 40.6, 46, 50.4.3 and 59.

<sup>981</sup> SOD, para. 325.

<sup>982</sup> SOD, para. 326.

<sup>983</sup> SOD, para. 326.

<sup>984</sup> Exhibit C-229, Email from Arlanda Reis Cuamba of the MTC to Kishan Daga of PEL regarding meeting with Odebrecht, dated 28 June 2012.

<sup>985</sup> Exhibit C-29, Letter dated 18 April 2013 from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project.

<sup>986</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 19.

15% scoring advantage, such that PEL could not rely upon the promises made by Mozambique.<sup>987</sup> This argument is circular. It is premised upon Mozambique's interpretation of the MOI being correct which, as explained immediately above, it is not.

783 Second, Mozambique argues that PEL's reliance on the specific promises made in the MOI was unreasonable: (i) because the direct award of a concession was contrary to industry practice; (ii) in light of the PPP law, which PEL knew and envisaged would come into force when it signed the MOI; and (iii) because PEL itself breached the law by failing to disclose the fact that it had been debarred for a year from participating in NHAI projects.<sup>988</sup> These arguments do not withstand scrutiny.

784 The direct award of a concession is not uncommon in PPP projects. As Mr Baxter explains, unsolicited proposals, like the one PEL made for the Project, are commonly employed by governments around the globe:

*"Although the USP is less frequently employed than where infrastructure projects are initiated by the public sector (simply because the public sector would or at least should be aware of the needs of the country better than anyone else), it is nevertheless commonly employed by governments around the world. According to the latest survey of 140 economies by the World Bank, 98 percent of governments allow for USPs; they are explicitly prohibited in only 2 percent of the economies covered worldwide: Croatia, Lebanon, and India."*<sup>989</sup>

785 Professor Medeiros highlights the numerous advantages of USPs via direct awards including alerting governments to unrealised opportunities for innovative projects, and savings in terms of costs and time:

*"According to the ASIAN DEVELOPMENT BANK, "[e]ntering into a sole-source process can save government time and money and may alert government to an unrealized opportunity for PPP". In fact, in accordance with ZIN ZAWANI et al, "common arguments for direct negotiations are: (...) cost efficiency in organising a competitive bidding exercise, and urgency of a proposal."*<sup>990</sup>

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<sup>987</sup> SOD, paras. 681-690.

<sup>988</sup> SOD, paras. 700-704 and 691.

<sup>989</sup> CER-7, Expert Report of David Baxter, para. 105.

<sup>990</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 14.1. (citing to the ASIAN DEVELOPMENT BANK, *Public-Private Partnership Handbook*, 2008, p. 72 – **Exhibit C-274**; See ZIN ZAWANI et al., 'Malaysian experience with Public Private Partnerships (PPP) – managing unsolicited proposals', in *Built Environment Project and Asset Management*, 2016, p. 6 – **Exhibit C-275**).

- 786 Respondent's argument that PEL's reliance on Mozambique's promises was unreasonable because it was contrary to industry practice is therefore unfounded and misleading.
- 787 As for Respondent's argument that the direct award was contrary to the PPP Law, which PEL knew would come into force when it signed the MOI, this is contradicted by Respondent's own submissions.
- 788 It is common ground<sup>991</sup> that the Parties contemplated that the law which would govern the award of the concession was the PPP law, in that it would be in force by the time the PFS was finalised and approved.
- 789 Respondent itself explains that a direct award of a concession was permitted in exceptional circumstances, under the PPP law.<sup>992</sup>
- 790 The case in hand fits precisely those exceptional circumstances. As Professor Medeiros explains, the direct award of PPP projects is explicitly contemplated by Article 13 (3) of the PPP Law in exceptional circumstances in respect of which there is administrative discretion.<sup>993</sup> Mozambique exercised such administrative discretion when the Council of Ministers decided, in line with the promise it had made to PEL, to grant a concession to PEL through a direct award noting:

*"Subject: Negotiations of the Terms of the Concession of the Port of Macuse (...) and a 516 km Railway Corridor from Macuse to Moatize"*

*In the scope of the creation of transport logistics conditions that permit the rapid flow of coal from the Province of Tete to the coast, taking into account the interest of the Company Patel Engineering Ltd., for the realization of this project;*

***The Council of Ministers, in its 10<sup>th</sup> Ordinary Session held on the date of 16 April 2013, considering the urgency of these infrastructures, the national strategic interest, the time available and the fact that the tenderer has carried out all the feasibility and engineering studies, and that it is in the national interest that the project be accelerated decided to invite this company to start the process with a view of carrying out those projects.***

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<sup>991</sup> See also SOD, paras. 473-476.

<sup>992</sup> SOD, para. 702.

<sup>993</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 13-14.

*Therefore, the representatives of Patel Engineering Ltd. are invited to contact the Ministry of Transport and Communications, to begin this process, within seven days.*

*It is also requested that the company prepare for the project, within thirty days, a bank guarantee corresponding to zero point one percent (0.1%) of the volume of the investment foreseen for the respective enterprise and keep it valid until the conclusion of the contract, at which time the same shall be returned to the contracted entity.*

*The company must also present a statement, agreement or take or pay memorandum with mining companies, in order to make the project in question feasible.*"<sup>994</sup> (Emphasis added)

791 There is accordingly no doubt that in light of the PPP law, it was reasonable for PEL to rely upon Mozambique's promise that it would be granted a concession agreement, should the PFS be approved and PEL desire to implement the Project in accordance with its right of first refusal.

792 Respondent's final argument that PEL's alleged failure to disclose its debarment in relation to NHAI projects would make PEL's reliance upon Respondent's promises unreasonable is yet another strained rehashing of one Mozambique's red herrings, the substance of which has been addressed elsewhere in this Statement of Reply.

793 In the specific context of the reasonableness of PEL's reliance upon Mozambique's promises, Claimant merely notes that Mozambique's argument is solely founded on the inapposite case of *International Thunderbird*. In that case, the investor had failed to disclose critical elements of its gaming machines, which involved some degree of luck and winning tickets that could be redeemed against cash, when it obtained an official opinion that they were lawful notwithstanding the fact that gambling was an illegal activity under Mexican law.<sup>995</sup> It was therefore found that the investor could not rely upon such official opinion. Plainly, this bears no resemblance to the case at hand.

794 It follows that Mozambique has failed to rebut PEL's case that its reliance upon Mozambique's assurances was reasonable.

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<sup>994</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

<sup>995</sup> **RLA-101**, *Int'l Thunderbird Gaming Corporation. v. The United Mexican States*, UNCITRAL (NAFTA), Award (26 January 2006), paras. 163-164.

(3) Mozambique reneged on its promises

795 As explained at paragraphs 327 to 345 of the SOC, in spite of the fact that the PFS was approved and that PEL's exercised its right of first refusal, Mozambique reneged on its promises to grant PEL a concession agreement in respect of the Project, not to grant the concession to another, and to keep the data shared by PEL confidential. Mozambique's conduct was so erratic that even its renegeing on its promises consisted of several *volte faces*.

796 As demonstrated below, these facts have been further reinforced by the document production process during which PEL identified further documents supporting its case and *Mozambique failed to disclose a single document undermining PEL's case or supporting its own*.

797 First, Mozambique reneged on its promise to grant PEL a concession.

798 Mozambique initially appeared to abide by its promise to grant PEL a concession. In June 2012, the MTC asked that PEL negotiate directly with the CFM,<sup>996</sup> and even contacted PEL asking it to meet potential partners for the construction of the railway line Macuse-Tete.<sup>997</sup> This was in keeping with Mozambique commitment directly to award a concession to PEL.

799 However, the CFM had initially not been instructed to negotiate with PEL, to such an extent that PEL had to arrange meetings with the CFM through its own local partner, SPI,<sup>998</sup> and *inter alia* provide the PFS to the CFM, which the latter contended had not been communicated to it.<sup>999</sup> Later, the CFM indicated to PEL that the CFM did not have sufficient funds to invest in the Project. This was demonstrably false, given that it has now invested in the Project with ITD.

800 From mid-August 2012 until January 2013, PEL repeatedly wrote to the MTC insisting that it be granted the concession agreement that it was promised under the MOI.<sup>1000</sup> This was to no avail.<sup>1001</sup>

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<sup>996</sup> SOC, paras. 158-168.

<sup>997</sup> **Exhibit C-229**, Email chain with Kishan Daga, Fernando Soares and Arlanda Cuamba regarding construction of the railway Tete Macuze, dated 28 June 2012, p. 2.

<sup>998</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, paras. 88-101.

<sup>999</sup> **Exhibit C-14**, Letter from Kishan Daga of PEL to Rosario Mualeia President and Chairman of the Board regarding how PEL should proceed with the project, dated 7 August 2012; **Exhibit C-6b**, Prefeasibility Study submitted by PEL, dated 2 May 2012; **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012; **Exhibit C-12**, Letter from Kishan Daga of PEL to Minister Zucula of the MTC regarding implementation of the project, dated 18 June 2012.

<sup>1000</sup> SOC, paras. 169-180.

<sup>1001</sup> SOC, paras. 169-180.

- 801 On 11 January 2013, Mozambique had its first unjustified change of heart. It wrote to PEL stating that it would organise a tender in respect of the Project and sought for the first time to redefine PEL's right of first refusal as a scoring advantage in a tender.<sup>1002</sup>
- 802 The two justifications Mozambique put forward for this decision were demonstrably false. It first contended that PEL had failed to offer more than 20% equity to the CFM.<sup>1003</sup> This was not only contrary to the law, which provided that 20% was the maximum equity the Government could take in such ventures,<sup>1004</sup> but it was also contrary to the CFM's stated position that it had no funds to participate in the Project, which it publicly confirmed in March 2013. The dishonesty of this position has been exposed now that the CFM has accepted to enter into a joint venture for the implementation of the Project with an equity of exactly 20% with the TML Consortium.<sup>1005</sup>
- 803 Mozambique further contended that PEL's right of first refusal was a scoring advantage in the context of a public tender, as per the MOI and "*the Law*".<sup>1006</sup>
- 804 This was in direct contradiction with the MOI and with Mozambique's conduct, namely its having asked PEL just a few months earlier to exercise its right of first refusal, to negotiate with the CFM, and to meet Odebrecht as a potential partner for the building of the railway line.
- 805 This was further not in keeping with Mozambican law. As mentioned above and explained by Professor Medeiros, a scoring advantage exercised in the context of a future tender is a different reality from a right of first refusal as understood under Mozambican law.<sup>1007</sup> While a right of first refusal "*relates to the right to either enter into (or not, as the case may be) a particular transaction or contract*"<sup>1008</sup>, "*[in] a Bonus System, as is laid down in Article 13 (5) of the PPP Law, the holder of the competitive advantage does not have the right to conclude the transaction, rectius to enter into the contract, with the entity that is obliged to guarantee the bonus. Rather, it only has the right to an*

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<sup>1002</sup> **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL reneging on MTC's commitment to **award** the concession to PEL, dated 11 January 2013.

<sup>1003</sup> **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL reneging on MTC's commitment to **award** the concession to PEL, dated 11 January 2013.

<sup>1004</sup> **CLA-65**, Law No. 15-2011 of 10 August 2011 (the PPP Law), Article 33; **CLA-64**, Decree No. 16/2012, of 4 June 2012 (the PPP Regulations), Article 34.

<sup>1005</sup> **Exhibit C-125**, Italian-Thai Development Public Company 2016 Annual Report.

<sup>1006</sup> **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL reneging on MTC's commitment to **award** the concession to PEL, dated 11 January 2013.

<sup>1007</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 2.3 and 2.4.

<sup>1008</sup> *Id.* at para. 22.1.

*increase in assessment of its proposal, which may or may not allow it to subsequently enter into the contract.*"<sup>1009</sup>

806 That this justification was fabricated is also the only reasonable inference that can be drawn from the document production process. Mozambique has indicated that it has not found any document "*evidencing that the CFM's requested or preferred a certain level of equity in the venture in relation to the Project between Mozambique's request that PEL negotiate with the CFM on 15 June 2012 and the January 2013 Letter.*"<sup>1010</sup> It has also failed to produce any document relating to the alleged Cabinet meeting where the decision to organise the tender was allegedly made,<sup>1011</sup> despite the fact that a record of such meeting must exist as a matter of Mozambican law.<sup>1012</sup>

807 Mozambique's second change of heart took place on 16 April 2013, when the Council of Ministers decided, in line with what Respondent had promised, that it was in Mozambique's "*national strategic interest*" to award the Project concession directly to PEL.<sup>1013</sup> The letter from Respondent that followed on 18 April took note of the fact that PEL had carried out all of the necessary feasibility and engineering studies, and invited PEL to proceed with the negotiations of the terms of the concession agreement. Mozambique further required PEL to provide a bank guarantee in the amount of 0.1% "*of the volume of the investment foreseen*".<sup>1014</sup>

808 As Professor Medeiros explains in his first report, the content of the letter of 18 April 2013 precisely reflects how a direct award in the national strategic interest is usually granted by the Council of Ministers, pursuant to the PPP Law.<sup>1015</sup>

809 Mozambique cannot dispute that it validly awarded the concession to PEL through such decision. In spite of its disclosure obligations and the fact that a

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<sup>1009</sup> *Id.* at para. 22.2.1.

<sup>1010</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, pp. 27-28, Document **Request** No. 11.

<sup>1011</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, pp. 31-32, Document **Request** No. 13.

<sup>1012</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 6.

<sup>1013</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

<sup>1014</sup> *Id.* This request was in line with the PPP Regulations, *see* **CLA-64** – which set forth, in Article 33, that a guarantee in the amount equivalent to 0,1% of the volume of the investment to be made must be presented by the contracting entity together with its proposal.

<sup>1015</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, para. 43.

record of Council of Ministers meetings must exist as a matter of Mozambican law, it has failed to disclose such record.

- 810 Further to the 16 April 2013 decision, PEL met in person with Minister Zucula who undertook to provide a draft concession by 24 April 2013 at the latest,<sup>1016</sup> and the MTC invited PEL for in person negotiations on 10 May 2013 at 9 am at the MTC.<sup>1017</sup> PEL provided the bank guarantee on 9 May 2013 in advance of the negotiations.<sup>1018</sup>
- 811 Yet, at the same time, the MTC wrote to the participants in the public tender process to inform them of an extension of the deadline for the submissions of proposals.<sup>1019</sup> It failed to mention the decision of the Council of Ministers to award the concession directly to PEL.<sup>1020</sup>
- 812 Just four days after PEL sent Mozambique the bank guarantee and three days after a meeting was due to take place at the MTC, Mozambique had its third change of heart, which gave the *coup de grâce* to PEL's legitimate expectation that it would be granted a concession agreement in respect of the Project. On 13 May 2013, Mozambique indicated that, during the Council of Ministers' 12<sup>th</sup> Ordinary Session held on 30 April 2013, after it had heard from undefined "stakeholders" and "reviewed the legal and regulatory framework of Public-Private Partnerships", Mozambique had come to the conclusion that a public tender was the correct option and accordingly that there was no space for direct negotiations with PEL.<sup>1021</sup>
- 813 The justification for Mozambique's third change of heart is, at best, suspect. As explained by Professor Medeiros, such reversal was not in accordance with "the legal and regulatory framework of Public-Private Partnerships". To the contrary, it was unlawful under Mozambican law.<sup>1022</sup> The only remaining explanation for this decision thus appears to be that the "stakeholders" pressured the government to change its mind for reasons that can only be speculated by Claimant and the Tribunal.

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<sup>1016</sup> **Exhibit C-31**, Letter from Kishan Daga of PEL to Luis Amandio Chauque of MTC regarding draft concession agreement and negotiation meetings, dated 24 April 2013.

<sup>1017</sup> **Exhibit C-32**, Letter from Luis Amandio Chauque of MTC to PEL providing a date, time and venue for the meeting to negotiate a concession, dated 24 April 2013.

<sup>1018</sup> **Exhibit C-33**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding the bank guarantee, dated 9 May 2013.

<sup>1019</sup> **Exhibit C-61**, Letter from the MTC to tender participants, dated 3 May 2013.

<sup>1020</sup> **Exhibit C-61**, Letter from the MTC to tender participants, dated 3 May 2013.

<sup>1021</sup> **Exhibit C-34**, Letter from Luis Amandio Chauque of MTC to Kishan Daga of PEL reversing the MTC's regarding direct negotiations with PEL, dated 13 May 2013.

<sup>1022</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, para. 49.



- 814 Again, Mozambique cannot dispute these facts when it has failed to produce any document that could shed light on its erratic decision making. It has failed to produce any record of the Council of Ministers 12<sup>th</sup> Ordinary Session held on 30 April 2013, in spite of the fact that such record must exist as a matter of Mozambican law, as explained above.
- 815 Mozambique then proceeded with the public tender merely granting (or more accurately, purporting to grant) PEL a 15% scoring advantage, which plainly was not what PEL had been promised when it agreed to conduct the PFS at its own expense.
- 816 Second, Mozambique reneged on its promise not to grant the concession to another.
- 817 Through the tender, which as further explained below was pervaded with irregularities, Mozambique granted the concession for the Project to ITD.
- 818 By doing so, Mozambique reneged on its promise that it would not grant any right or authorisation to any other party for the development or expansion of the Project, if PEL indicated that it wished to implement the Project through the exercise of its right of first refusal.
- 819 Third, Mozambique reneged on its promise to keep PEL's PFS and know-how confidential.
- 820 Respondent went so far as to ask PEL to provide its PFS without watermark and signature which it used to organise the tender and effectively communicated to other tender participants.
- 821 While the promise of keeping data confidential was meant to last only until approval of the PFS, Mozambique effectively reneged on this promise by emptying it of its substance. The promise was limited in time because once the PFS had been approved, there was no longer any risk in respect of PEL's confidential data. At that stage, PEL had a right to a concession only subject to *its own decision* as to whether or not to implement the Project.
- 822 By approving the PFS and asking PEL to exercise its right of first refusal but then refusing to grant the concession in respect of the Project to PEL but yet disclosing PEL's confidential data and know-how, Mozambique accordingly also reneged on its promise to keep PEL's data confidential.

823 These facts are so damaging to Respondent's case that it has buried the passage of its submissions dealing with Mozambique's reneging on its promises within the sub-section dealing with the promises made by Mozambique.<sup>1023</sup> None of the four core arguments it makes in that sub-section come close to undermining PEL's case:

- (a) Respondent repeats that PEL failed to reach an agreement with the CFM, thereby suggesting that PEL was somehow responsible for Respondent's failure to abide by its promises.<sup>1024</sup> As explained immediately above, this is belied by the evidence in the case. What is more, the document production process has further confirmed the falsehood of this justification. Mozambique has failed to disclose any documents in response to Claimant's Document Request No. 10, which was granted by the Tribunal, namely "*Documents evidencing that the MTC instructed the CFM to negotiate with PEL in respect of the Project between 15 June 2012 to 11 January 2013*".<sup>1025</sup> The only reasonable inference is that the CFM was not instructed to negotiate with PEL (or the CFM was instructed *not* to negotiate with PEL), and it is Mozambique – not PEL – that was hindering the reaching of an agreement between the CFM and PEL.
- (b) Respondent further contends that the MOI only granted PEL a 15% scoring advantage in a public tender, such that the 11 January 2013 letter and the ultimate decision to hold a tender were in keeping with such rights.<sup>1026</sup> This is plainly unsupported by the MOI and Mozambican law, and Respondent has also failed to provide any justification for its decisions.
- (c) Respondent also seeks to underplay the 18 April 2013 decision to award PEL a concession directly as a mere invitation to negotiate.<sup>1027</sup> This is unsupported by any evidence and constitutes a failure to engage with the decision itself and with Mozambican law, as well as with all the events following such decision, namely: (i) PEL conveying its "*sincere appreciation to the Council of Ministers*" for "*inviting us to the*

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<sup>1023</sup> SOD, paras. 670-680.

<sup>1024</sup> SOD, para. 671.

<sup>1025</sup> Tribunal's Decision on Claimant's Document Production Schedule, pp. 25-26, Document Request No. 10.

<sup>1026</sup> SOD, paras. 670; 672; 674-676.

<sup>1027</sup> SOD, para. 674.

negotiation process leading to the signing of the concession agreement";<sup>1028</sup> (ii) Minister Zucula meeting with PEL "to discuss the modalities of [the] negotiation process";<sup>1029</sup> (iii) Minister Zucula undertaking to provide PEL with a draft concession agreement by 24 April 2013 to serve as the basis of the Parties' negotiations; (iv) Mr Chaúque's proposal on behalf of the "inter-ministerial technical team" charged with negotiating the concession in a letter captioned "Negotiations of the Terms of the Concession ..." proposing to commence negotiations on 10 May;<sup>1030</sup> and (v) PEL's provision of a USD 3,115,000 bank guarantee,<sup>1031</sup> which the MTC instructed should be kept "*valid until the conclusion of the contract, at which time the same shall be returned to the contracting entity.*"<sup>1032</sup>

- (d) Respondent further complains that PEL commenced this Arbitration instead of an ICC arbitration and did not file an appeal in the tender process.<sup>1033</sup> *This is irrelevant to the question of whether Mozambique reneged on its promises.*

824 Finally, Claimant has explained that the repudiation of Mozambique's promises by the MTC and the Council of Ministers were not purely contractual breaches but involved the exercise of Respondent's sovereign power, and in any event, that it constituted an outright and unjustified repudiation of the transaction, which annihilated PEL's core right to a concession.<sup>1034</sup>

825 Respondent does not dispute this statement in its submissions on the renegeing of its promises to PEL. Elsewhere in the SOD, Respondent argues that the MTC did not exercise any 'sovereign power' to change the equilibrium of MOI and that a private party can implement a tender process in the form of a tender contest.<sup>1035</sup>

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<sup>1028</sup> **Exhibit C-30**, Letter from Kishan Daga of PEL to MTC Minister Zucula concerning PEL's acceptance of the MTC's offer to commence negotiations for a concession agreement for the Project, dated 23 April 2013.

<sup>1029</sup> **Exhibit C-31**, Letter from Kishan Daga of PEL to Luis Amandio Chauque of MTC regarding draft concession agreement and negotiation meetings, dated 24 April 2013.

<sup>1030</sup> **Exhibit C-32**, Letter from Luis Amandio Chauque of MTC to PEL providing a date, time and venue for the meeting to negotiate a concession, dated 24 April 2013.

<sup>1031</sup> **Exhibit C-33**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding the bank guarantee, dated 9 May 2013.

<sup>1032</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013. (Emphasis added)

<sup>1033</sup> SOD, paras. 677-678.

<sup>1034</sup> SOC, para. 339.

<sup>1035</sup> SOD, para. 423.

826 This argument ignores the fact that the core decisions constituting Mozambique's reneging of its promises were quintessential sovereign decisions made by the Council of Ministers, i.e., the Mozambican Government,<sup>1036</sup> which is Mozambique's highest executive decision-making body and is comprised of the President, Prime Minister, and all of Mozambique's ministries including the Ministers of Foreign Affairs and Cooperation, Economy and Finance, Justice, National Defence, Industry and Commerce, Mineral Resources and Energy, and the MTC, among others.<sup>1037</sup> They were relayed to PEL by the MTC, which accordingly, did not act as a mere private contractual partner.

827 It also ignores that the justifications for such decisions, as they appear in the documents contemporaneously issued by Mozambique, clearly demonstrate the exercise of a sovereign power. To take only one example, the 18 April 2013 letter refers to the grant of the concession to PEL by direct award in the "*national strategic interest*". It goes without saying that a private contractor does not have the discretion to make decision in the "*national strategic interest*".

828 As for PEL's argument that Mozambique's conduct annihilated, without justification, PEL's core right to a concession, it is manifest on the facts of this case.

829 It follows from the above that Mozambique breached PEL's legitimate expectations by reneging on the promises it had made to PEL.

(b) Mozambique failed to act consistently and transparently in respect of PEL's investment

830 Claimant demonstrated in the SOC that Mozambique's conduct in this case was characterised by a complete lack of consistency and transparency, including through its contradictory decision making and failure to communicate consistently with PEL.<sup>1038</sup> This demonstration has now been reinforced by further evidence.

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<sup>1036</sup> **CLA-48a**, Constitution of the Republic of Mozambique, as amended by Law 1/2018, of 12 June 2018, Article 200.  
<sup>1037</sup> *Id.* at Article 201.  
<sup>1038</sup> SOC, paras. 346-365.

- 831 First, the conduct of the MTC, the Council of Ministers and the CFM in respect of the direct award of the concession was erratic and unreasonable.<sup>1039</sup>
- 832 Mozambique had no less than three changes of heart in a five-month period regarding whether it would grant the concession in respect of the Project directly to PEL pursuant to the MOI or organise a public tender in breach of the same.
- 833 At one stage, Mozambique even pursued both courses in parallel. On 18 April 2013, Mozambique announced to PEL that it would grant it a concession for the Project by direct award.<sup>1040</sup> Yet, during the very period when it was organising meetings with PEL to proceed with the direct award,<sup>1041</sup> Mozambique was extending the deadline for submission of proposals in the public tender, without informing the participants of its decision to award the concession directly to PEL.<sup>1042</sup>
- 834 As for the CFM, it allegedly could not participate in a joint venture in respect of the Project because it wanted more than 20% equity (which was prohibited by law, as evidenced above) and had no funds to invest in the Project. Yet, it is now participating in a joint venture with ITD precisely holding a 20% equity.
- 835 Second, the conduct of the MTC and the Council of Ministers in respect of PEL's right of first refusal was inconsistent and irrational.<sup>1043</sup>
- 836 Mozambique asked PEL to exercise its right of first refusal on 18 June 2012. Mozambique had several exchanges with PEL during the summer of 2012 when it never raised any issue with the Parties' mutual understanding of such right.
- 837 Yet, on 11 January 2013, Mozambique sought to redefine such right as a scoring advantage in a future tender. This is contradicted by the MOI, Mozambique's previous conduct, and is not even supported by Mozambican law.

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<sup>1039</sup> SOC, paras. 348-353.

<sup>1040</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

<sup>1041</sup> **Exhibit C-32**, Letter from Luis Amandio Chauque of MTC to PEL providing a date, time and venue for the meeting to negotiate a concession, dated 24 April 2013.

<sup>1042</sup> **Exhibit C-61**, Letter from the MTC to tender participants, dated 3 May 2013.

<sup>1043</sup> SOC, paras. 354-357.

838 Third, the MTC's communication with PEL was inconsistent.<sup>1044</sup> After it had directed PEL to negotiate with the CFM,<sup>1045</sup> it did not provide any assistance to PEL with the same.

839 At first, the MTC had not even instructed the CFM to negotiate with PEL<sup>1046</sup> and PEL was obliged to use its own local partner to organise the meeting. The MTC then repeatedly ignored PEL's pleas for assistance<sup>1047</sup> only responding once to state that negotiations with the CFM were not prohibited<sup>1048</sup> and to ask that PEL deal with a subaltern department at the Ministry rather than with the MTC Minister.<sup>1049</sup> The MTC eventually decided in January 2013 to award the Project through public tender, in breach of the MOI.

840 Fourth, the tender process organised by Mozambique lacked transparency and consistency throughout, as set out in greater detail in Section IV.K above.

841 As, from the very beginning, the documents issued by Mozambique to organise the tender lacked the relevant information to allow for an objective, fair, and transparent tender process. The Tender Notice and Tender Documents failed to contain critical information, that would be essential for engaging in a like-for-like evaluation of the bidders' proposals.<sup>1050</sup> The tender fell far short of international best standards, and also did not comply with Mozambican Law.<sup>1051</sup>

<sup>1044</sup> SOC, paras. 358-363.

<sup>1045</sup> SOC, paras. 158-168.

<sup>1046</sup> **Exhibit C-14**, Letter from Kishan Daga of PEL to Rosario Mualeia President and Chairman of the Board regarding how PEL should proceed with the project, dated 7 August 2012; **Exhibit C-6b**, Prefeasibility Study submitted by PEL, dated 2 May 2012; **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012; **Exhibit C-12**, Letter from Kishan Daga of PEL to Minister Zucula of the MTC regarding implementation of the project, dated 18 June 2012.

<sup>1047</sup> **Exhibit C-13**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding its contact with the CFM, dated 22 June 2012; **Exhibit C-14**, Letter from Kishan Daga of PEL to Rosario Mualeia, President and Chairman of the Board regarding how PEL should proceed with the project, dated 7 August 2012; and **C-15**, Letter from Kishan Daga of PEL to Minister Zucula of MTC requesting access to the concession agreement template for the CFM in order to help expedite the process, dated 15 August 2012.

<sup>1048</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 97. **Exhibit C-16**, Letter from Minister Zucula of the MTC to Kishan Daga of PEL regarding the CFM's negotiations not being prohibited and providing contact details for the purpose of negotiating the concession, dated 27 August 2012.

<sup>1049</sup> **Exhibit C-16**, Letter from Minister Zucula of the MTC to Kishan Daga of PEL regarding the CFM's negotiations not being prohibited and providing contact details for the purpose of negotiating the concession, dated 27 August 2012.

<sup>1050</sup> **CER-7**, Expert Report of Mr David Baxter, para. 165 referring to the facts that the Tender Notice (a) lacked details on the rationale, purpose, scope and scale of the project; (b) information about the underlying PPP model was not definite; (c) the Tender Notice did not indicate the concession award period; and (d) the time given for submission of the EOI was very short. *See also id.* at para. 166, referring to the facts that a) the Tender Documents did not provide any technical details about the Project, including the starting point of the railway; (b) the Tender Documents lacked information about required services and outcomes of the Project; (c) the Tender Documents did not contain any references to the pre-feasibility or feasibility studies conducted with respect of the Project; (d) the evaluation procedure was ill-defined in the Tender Documents, as the criteria applied for the evaluation of the technical and financial proposals were not developed and allowed for ambiguous interpretation; and (e) the deadline for submission of the proposals was inadequate due to the complexity of the Project.

<sup>1051</sup> **CLA-41**, translated at **CLA-67**, Decree No. 15/2010, dated 24 May 2010, Articles 31, 32, 65 and 85(4), Article 65(1)(p) and 65(1)(o), applicable *ex vi* Article 85(4).

- 842 As set out in greater detail in Section IV.K, Mozambique failed to disclose that it had decided to award the Project directly to PEL, or that it had engaged in contradictory parallel processes for awarding the concession. Mozambique likewise failed to disclose to all the bidders that PEL enjoyed a 15% scoring advantage.
- 843 On 3 May 2013, Mozambique wrote to the tender participants to extend the deadline for submission of proposals in the public tender, without informing the participants of its 18 April 2013 decision to award the concession directly to PEL and the fact that negotiations were ongoing.<sup>1052</sup> This was an improper way of running the process and clearly contrary to international best practice.
- 844 Further to its last change of heart *vis-à-vis* PEL, on 13 May 2013, the MTC informed PEL that it had decided that it would award the concession through a tender process, and that PEL would merely enjoy a 15% scoring advantage.
- 845 However, it did not inform the other tender participants of PEL's preferential rights. Such failure to inform was contrary to international best practice,<sup>1053</sup> and in breach of Mozambican law.<sup>1054</sup> As explained by Professor Medeiros, it is essential for bidders to know in advance if any of the bidders have been granted either a right of preference or a 15% scoring advantage.<sup>1055</sup>
- 846 The evaluation of the proposals itself was a quintessential example of lack of transparency and consistency.
- 847 Not only were the technical evaluation criteria not developed and explained in the tender documents, but they were also only announced *after* the results of the technical proposals' evaluation.<sup>1056</sup> As explained by Mr Baxter, "*the bidders could not prepare comprehensive and focused proposals corresponding to Mozambique's Tender Documents*".<sup>1057</sup> Even more importantly, "*the evaluation committee would not be able to provide a fair, and objective assessment of the bids in the absence of the clearly defined criteria*".<sup>1058</sup> Under Mozambican law the criteria applied for the evaluation of

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<sup>1052</sup> **Exhibit C-61**, Letter from the MTC to tender participants, dated 3 May 2013.

<sup>1053</sup> **CER-7**, Expert Report of Mr David Baxter, paras. 174-175.

<sup>1054</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 75.6; **CLA-67**, Decree No. 15/2010, dated 24 May 2010, Article 79(1).

<sup>1055</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 75.7.

<sup>1056</sup> **Exhibit C-25**, Translation of MTC Document entitled "*Contest to Acquiring of Rights of Concession to Conceive, Design, Finance, Build, Operate and Transfer the Railway and Macuse Port*", dated 29 July 2013.

<sup>1057</sup> **CER-7**, Expert Report of Mr David Baxter, para. 173.

<sup>1058</sup> **CER-7**, Expert Report of Mr David Baxter, para. 173.

the proposals must also be stated in the tender documents.<sup>1059</sup> Transparency and publicity are fundamental rules governing the administrative contracting in Mozambique.<sup>1060</sup>

848 There were numerous flaws in the scoring of the bids which, in the absence of any cogent explanation, further contribute to the process' lack of transparency and consistency, including that:

- (a) the PGS Consortium received the lowest score for the technical proposal, *when PEL had developed the entire Project*,<sup>1061</sup>
- (b) the winning bidder only had one weakness – *"the outline of the topics studied did not follow a logical structure"*,<sup>1062</sup>
- (c) ITD received the maximum score under the criterion of the *"Strategic Vision of the Business"*, which was assigned the highest weight in the total score (50%) of the technical proposal,<sup>1063</sup> apparently because ITD proposed the creation of a special economic zone in Macuse, when the creation of a special economic zone was not a requirement of the Tender Documents and should not have been taken into account in the evaluation of the bids;<sup>1064</sup>
- (d) the evaluation panel found that the PGS Consortium's *"organic composition ... does not include the Infrastructure builder"* and that *"[t]he consortium does not present a record of having built works similar to the object of the bid"*,<sup>1065</sup> when the technical proposal of the PGS Consortium provided detailed information about experience of PEL, Grindrod, and SPI;
- (e) the evaluation committee found that *"participation by the national private sector is restricted to 5%"*<sup>1066</sup> in the technical proposal of the PGS Consortium demonstrates its lack of understanding of the

<sup>1059</sup> CLA-67, Decree No. 15/2010, dated 24 May 2010, Article 65(1)(m).

<sup>1060</sup> CLA-262, Pedro Fernández Sánchez, *Direito da Contratação Pública*, I, Lisboa: AAFDL, 2020, pp. 88-89; CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 75.2.

<sup>1061</sup> CER-7, Expert Report of Mr David Baxter, para. 23; CWS-3, Second Witness Statement of Mr Kishan Daga, para. 148.

<sup>1062</sup> CER-7, Expert Report of Mr David Baxter, para. 182.

<sup>1063</sup> Exhibit C-234, Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 15 July 2013.

<sup>1064</sup> CER-7, Expert Report of Mr David Baxter, para. 183.

<sup>1065</sup> Exhibit C-234, Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 15 July 2013.

<sup>1066</sup> *Id.*



proposal, when it indicated that up to 30% of the Project would be provided to local Mozambique companies and Government agencies;<sup>1067</sup>

(f) the evaluation panel also found that the timetable for implementation of the Project submitted by the PGS Consortium was "*above expectations*", which was inconsistent with PEL's prior work on the Project<sup>1068</sup> and the fact that Mozambique never complained about the timetable in the PFS, that was the same as the one in the PGS Consortium's proposal; and

(g) the individual scores of the evaluators are suspiciously consistent.<sup>1069</sup>

849 What is more, the evaluation panel did not even apply the scoring advantage consistently with respect to the technical proposals, i.e. only 3 out of 7 evaluators added 15% to the final technical score of the PGS Consortium.<sup>1070</sup> The financial evaluation report does not contain any references to the 15% scoring advantage at all. This contradicted Mozambican law which required application of the 15% scoring advantage to the total score of the technical and financial proposals.<sup>1071</sup>

850 Mozambique has failed to produce the documents that could shed light on its conduct.<sup>1072</sup> Mozambique has produced only technical and financial evaluation reports but not the complete tender file, albeit there is no doubt that it should exist under Mozambican law and should be permanently archived.<sup>1073</sup>

851 The only reasonable inference from the fact that Mozambique did not produce the tender file is that it would reinforce PEL's case that the tender was not conducted consistently and transparently.

852 Mozambique does not meaningfully respond to Claimant's case that Mozambique breached its duty to act consistently and transparently.

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<sup>1067</sup> **Exhibit C-45**, Letter from Kishan Daga to the MTC contesting the award of the concession to ITD, dated 28 August 2013, p. 5.

<sup>1068</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 154.

<sup>1069</sup> **CER-7**, Expert Report of Mr David Baxter, para. 184.

<sup>1070</sup> **Exhibit C-234**, Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 15 July 2013; **CER-7**, Expert Report of Mr David Baxter, para. 159.

<sup>1071</sup> **CLA-64**, Decree 16/2012, dated 4 July, Article 14(3).

<sup>1072</sup> Tribunal's Decision on Claimant's Document Production Schedule, pp. 49-54, Document Request No. 21.

<sup>1073</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 6.

- 853 It merely states that there was no inconsistency in its conduct, repeating its argument that it was consistent with its understanding that the MOI only granted PEL a 15% scoring advantage in a tender.<sup>1074</sup>
- 854 The hopelessness of this argument, which does not provide any explanation for Mozambique's successive *volte faces*, has already been addressed at Section IV.B above and is not repeated herein.
- 855 However, in the section on Mozambique's lack of transparency, Respondent has also added a new argument to downplay the importance of Mozambique's April 2013 decision to grant PEL the concession by direct award. It has argued that the draft concession that was to be discussed with PEL further to that decision "*was not a confirmation of a direct award.*"<sup>1075</sup> This is an extraordinary submission. It would make no sense for Mozambique to offer to provide such a draft to PEL, if it did not intend to grant PEL a concession. What is more, such argument is in blatant contradiction with Law No. 16/2012 (the "**PPP Regulations**"), which set forth that the negotiation of the terms of the concession (i.e. in a direct award) only takes place after the award of the same.<sup>1076</sup>
- 856 It is also telling that Respondent makes no response to Claimant's case that the MTC's communication with PEL was inconsistent.
- 857 Finally, Respondent fails to address the similarities between this case and *Tecmed*. As explained in the SOC, in *Tecmed*, refusal to renew a permit while engaging in lengthy discussions with the investor on the possible relocation of the landfill resulting in the claimant's inability to know in which condition it could renew the permit, was found to breach the host state duty to act transparently.
- 858 If the conduct of the authorities lacked transparency in *Tecmed*, it is *a fortiori* the case in the present circumstances where not only did Mozambique leave PEL in a state of uncertainty for months as to what it ought to do to finalise the concession agreement, but also attempted to justify its decision to hold a public tender on the basis of demonstrably untrue statements.

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<sup>1074</sup> SOD, paras. 708-712.

<sup>1075</sup> SOD, para. 710.

<sup>1076</sup> **CLA-64**, Decree 16/2012, dated 4 July, Articles 9(1)(f) and (g) and 17(3).

- 859 It follows from the above that Mozambique failed to act consistently and transparently in respect of PEL's investment.
- (c) Mozambique breached its obligation to refrain from acting in an arbitrary manner
- 860 Claimant demonstrated in the SOC that Mozambique's conduct was inconsistent, irrational, lacked transparency and was characterised by a misrepresentation of Mozambique's own law.<sup>1077</sup> Claimant's case in this respect is now supported by further evidence as well as by the inferences that must be drawn from Mozambique's failure to produce any document that could reasonably explain its conduct.
- 861 Not only are Respondent's several *volte faces* strong evidence of arbitrary conduct *per se* but the fact that they have no justification in fact or in law leaves no doubt that these *volte faces* were arbitrary.
- 862 Mozambique's 11 January 2013 U-Turn when it decided to award the concession in respect of the Project to PEL was contrary to the MOI, and to Mozambique's previous conduct whereby it asked PEL to exercise its right of first refusal, to negotiate with the CFM and to contact other potential project partners.
- 863 What is more, the facts that Mozambique sought to rely upon to justify the U-Turn were demonstrably false.
- 864 The allegation that the CFM wished to obtain more than 20% equity in the Project, was contrary to Mozambican law, which provided that 20% was the *maximum* equity the government could take on in such ventures.<sup>1078</sup> It was contrary to the CFM's own stated position that it had insufficient funds to participate in the Project, which it publicly confirmed in March 2013. And it is contrary to the fact that it has now accepted to enter into a joint venture for the implementation of the Project with an equity of exactly 20% with the TML Consortium.<sup>1079</sup>

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<sup>1077</sup> SOC, paras. 366-373.

<sup>1078</sup> **CLA-65**, Law No. 15-2011 of 10 August 2011 (the PPP Law), Article 33; **CLA-64**, Decree No. 16/2012, of 4 June 2012 (the PPP Regulations), Article 34.

<sup>1079</sup> **Exhibit C-125**, Italian-Thai Development Public Company 2016 Annual Report.

- 865 Mozambique has also now indicated that it has not found any document "*evidencing that the CFM's requested or preferred a certain level of equity in the venture in relation to the Project between Mozambique's request that PEL negotiate with the CFM on 15 June 2012 and the January 2013 Letter*".<sup>1080</sup> This further confirms that the justification for the 11 January 2013 decision was false.
- 866 As for the allegation that PEL was granted a mere 15% scoring advantage under the MOI, it was contrary to Mozambique having asked PEL to exercise its right of first refusal six months earlier, which PEL did. Mozambique never stated that PEL had done so improperly and only sought to redefine PEL's right as a scoring advantage in its 11 January 2013 letter.
- 867 Mozambique has also failed to produce any document relating to the alleged Cabinet meeting where the decision to organise the tender was made,<sup>1081</sup> albeit a record of such meeting must exist as a matter of Mozambican law, as evidenced above. The only reasonable inference to be drawn is that Claimant is correct, and that Mozambique's justification in the 11 January 2013 letter for its decision to hold a tender in respect of the Project was false and that it had no other justification such that this decision was arbitrary.
- 868 Mozambique also failed to provide any explanation for its May 2013 U-Turn. The letter itself did not explain how it could have come to the conclusion that a public tender should be organised when a month earlier Mozambique had considered it to be in the national interest to grant the concession directly to PEL. Mozambique's U-turn beggars belief.
- 869 As for Mozambique's reliance upon the "*the legal and regulatory framework of Public-Private Partnerships*", it cannot be a reasonable justification. As explained by Professor Medeiros, after the decision had been made to award the concession directly to PEL in April 2013, it was unlawful under Mozambican law to reverse such decision.<sup>1082</sup>
- 870 Mozambique has also failed to produce any document relating to the Council of Ministers 12<sup>th</sup> Ordinary Session held on 30 April 2013, which is referred to

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<sup>1080</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, pp. 27-28, Document **Request No. 11**.

<sup>1081</sup> Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, pp. 31-32, Document **Request No. 13**.

<sup>1082</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, para. 49.

in the MTC's letter of 13 May 2013,<sup>1083</sup> *in spite of the fact that as matter of Mozambican law such record must exist.*<sup>1084</sup>

871 The only reasonable inference is that Claimant is correct, such that the May 2013 U-Turn was arbitrary.

872 Even during the brief period when Mozambique appeared to be abiding by its promise to grant the concession directly in April 2013,<sup>1085</sup> it was acting in complete contradiction with its stated intention by writing to the tender participants to extend the deadline for submission of proposals in the public tender.<sup>1086</sup>

873 Furthermore, the tender process had all the hallmarks of an arbitrary process.

874 First, the criteria for evaluation of the proposals were not clear for the tender participants themselves, such that they could not prepare focussed proposals. This was both in breach of international best practice and Mozambican law.

875 Second, the criteria according to which the evaluation assessed were only announced *after* the results of the technical proposals' evaluation,<sup>1087</sup> such that "*the evaluation committee would not be able to provide a fair, and objective assessment of the bids in the absence of clearly defined criteria*".<sup>1088</sup> This was contrary to international best practice and Mozambican law where the criteria applied for the evaluation of the proposals must be stated in the tender documents<sup>1089</sup> and transparency and publicity are fundamental rules governing the administrative contracting in Mozambique.<sup>1090</sup>

876 Third, the scoring of the bids, which was riddled with suspicious and unexplained flaws, confirms that the entire process was arbitrary. These flaws, which have been presented in detail at Section IV.K above, included the unexplained low score of PEL and conversely the unexplained high one of ITD. They further included the fact that the individual scores of the evaluators were

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<sup>1083</sup> **Exhibit C-34**, Letter from Luis Amandio Chauque of MTC to Kishan Daga of PEL reversing the MTC's regarding direct negotiations with PEL, dated 13 May 2013.

<sup>1084</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 6.

<sup>1085</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

<sup>1086</sup> **Exhibit C-61**, Letter from the MTC to tender participants, dated 3 May 2013.

<sup>1087</sup> **Exhibit C-25**, Translation of MTC Document entitled "*Contest to Acquiring of Rights of Concession to Conceive, Design, Finance, Build, Operate and Transfer the Railway and Macuse Port*", dated 29 July 2013.

<sup>1088</sup> **CER-7**, Expert Report of David Baxter, para. 173.

<sup>1089</sup> **CLA-67**, Decree No. 15/2010, dated 24 May 2010, Article 65(1)(m).

<sup>1090</sup> **CLA-262**, Pedro Fernández Sánchez, *Direito da Contratação Pública*, I, Lisboa: AAFDL, 2020, pp. 88-89; **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 75.2.

suspiciously consistent<sup>1091</sup> and the fact that PEL was not even consistently granted its 15% scoring advantage.

877 Mozambique does not meaningfully respond to the above facts, which are devastating for its defence.

878 It merely repeats that there was no U-Turn by Mozambique because it was always envisaged that PEL would have a mere 15% scoring advantage.<sup>1092</sup> As already explained, this does not withstand even superficial scrutiny.

879 Mozambique also contends that its expert report by MZBetar confirms that the tender was scored and conducted appropriately.<sup>1093</sup> Yet, as explained above and confirmed by Mr Baxter, the decision making in the tender process bore all the hallmarks of arbitrariness.<sup>1094</sup>

880 It follows from the above that Mozambique did not comply with its obligation to refrain from acting in an arbitrary manner.

(d) Mozambique breached its obligation to act in good faith

881 Claimant explained at paragraphs 374 to 379 of the SOC that Mozambique breached its obligation to act in good faith through all the steps it took to avoid complying with its commitment to grant a concession to PEL. Further evidence has now emerged which leaves no doubt as to the fact that Mozambique breached its obligation to act in good faith.

882 First, the MTC instructed PEL to negotiate with the CFM while knowing that it had not instructed the CFM to do so. It then ignored PEL's repeated pleas for assistance in these negotiations and then used the purported failure of such negotiations as the purported justification for its January 2013 U-Turn. As already explained above, such justification was demonstrably false and thus could not have been given in good faith.

883 Second, the further justification given for the January 2013 U-Turn, namely that PEL had a mere 15% scoring advantage was also demonstrably false and

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<sup>1091</sup> CER-7, Expert Report of Mr David Baxter, para. 184.

<sup>1092</sup> SOD, para. 715.

<sup>1093</sup> SOD, para. 716.

<sup>1094</sup> CER-7, Expert Report of Mr David Baxter, paras. 179-186.

in direct contradiction with the MOI, Mozambican law, and Mozambique's previous conduct. It was accordingly a further display of bad faith.

884 Third, Mozambique's justification of its May 2013 was also given in bad faith. Mozambique's reliance upon the "*the legal and regulatory framework of Public-Private Partnerships*" is not supported by Mozambican law. As explained by Professor Medeiros, after the decision had been made directly to award the concession to PEL in April 2013, it was unlawful under Mozambican law to reverse such decision.<sup>1095</sup> Application of the legal and regulatory framework cannot accordingly have been a good faith justification of Mozambique's conduct.

885 Fourth, even during the brief period between late April and mid-May 2013 when Mozambique appeared to have decided to abide by its commitment to grant the concession to PEL, it appears not to have done so in good faith. During that very period, it was writing to the tender participants to extend the deadline for submission of proposals in the public tender.<sup>1096</sup>

886 Fifth, the CFM acted in bad faith in telling PEL that it was not interested in the Project and had no funds to invest but then entered into a joint venture in respect of the very same Project with ITD a few months later.

887 Sixth, it has now become clear that Mozambique appropriated PEL's PFS and communicated it to the other tender participants as well as that it used it to organise the tender itself. This was done without ever seeking PEL's consent or informing it of the same. To the contrary, Mozambique proceeded covertly with the sinister design to appropriate PEL's work.

888 In the summer of 2012, the MTC insisted that it be sent copies of the PEL's PFS without PEL's signature or logo.<sup>1097</sup> While PEL was initially surprised by and questioned this request, it complied in July 2012<sup>1098</sup> after Mozambique explained that this required because the PFS was meant to be circulated to different ministries. This was untrue.

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<sup>1095</sup> CER-3, Legal Opinion of Professor Rui Medeiros, para. 49.

<sup>1096</sup> Exhibit C-61, Letter from the MTC to tender participants, dated 3 May 2013.

<sup>1097</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 86.

<sup>1098</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 86; Exhibit C-228, Chat between Kishan Daga of PEL and Arlanda Reis Cuamba of the MTC regarding PEL's logo, dated 13 July 2012.

889 As explained in Section IV.K.1 above, Mozambique wanted an unmarked copy of PEL's PFS, so it could use it as Mozambique saw fit without giving PEL any credit (or concession agreement as it had promised to do), and it did so.

890 Indeed, it would not have been possible for Mozambique to organise a public tender with respect to such a large project without a completed PFS, not least because Mozambican law requires both a PFS and feasibility study to be completed prior to the launch of the tender.<sup>1099</sup>

891 Seventh, it has also become clear that during the very summer of 2012, when it had asked PEL to negotiate with the CFM and with other actors, Mozambique was meeting with Rio Tinto to discuss PEL's Project.<sup>1100</sup> This was a further display of Mozambique's bad faith towards PEL. PEL only discovered this by chance when Mr Daga saw a document in this respect at the MTC office, and managed to convince an individual working at the MTC to send it to him.

892 Again, Respondent's response to Claimant's submissions that Mozambique acted in breach of its obligation to act in good faith fails to refute it in any meaningful way. Respondent merely repeats yet again its argument that PEL's right was a mere 15% scoring advantage in a tender and then rehashes all of its red herrings, which it says suggests that it is PEL, not Mozambique, which acted in bad faith.<sup>1101</sup>

893 Mozambique therefore breached its obligation to act in good faith.

*C. Mozambique Indirectly Expropriated PEL's Investment*

894 Mozambique indirectly expropriated PEL's investment by completely neutralising the entire investment project through its decisions: (i) not to grant PEL a concession in respect of the Project; (ii) to award the concession to ITD; and (iii) to appropriate PEL's know-how from the PFS to organise the tender, which it communicated to the tender participants.

895 Mozambique does not address PEL's case. Instead, its response essentially consists of circular reasoning whereby Mozambique repeats its mantra that PEL made no investment and accordingly that there was nothing to expropriate.

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<sup>1099</sup> CLA-64, Decree No. 16/2012, dated 4 June 2012, Articles 9, 10 and 11.  
<sup>1100</sup> CWS-3, Second Witness Statement of Mr Kishan Daga, para. 105.  
<sup>1101</sup> SOD, paras. 719-720.



As explained in the section of this submission dealing with the Tribunal's jurisdiction *ratione materiae*, this argument cannot succeed.

896 Mozambique also makes the bizarre argument that it was entitled to enact the PPP Law and accordingly did not expropriate PEL. PEL does not take any issue with the enactment of the PPP Law, which allowed for the direct award of the project concession to PEL.

1. The applicable legal standard

897 In the SOC,<sup>1102</sup> Claimant put forward the following propositions, which do not appear to be disputed by Respondent:

(a) Article 5 of the Treaty deals with expropriation, and provides in relevant part:

*"Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a fair and equitable rate until the date of payment, shall be made without unreasonable delay, be effectively realizable and be freely transferable...."*

(b) Article 5 protects against both direct and indirect expropriation, as confirmed by the Annexure to the Treaty entitled "*Interpretation of 'Expropriation' in Article 5 (Expropriation)*" (the "**Annexure**"),<sup>1103</sup> and investment law jurisprudence interpreting wording similar to Article 5.<sup>1104</sup>

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<sup>1102</sup> SOC, paras. 408-418.

<sup>1103</sup> **CLA-1**, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment (the "*Treaty*"), Annexure: A measure of expropriation includes, apart from direct expropriation or nationalization through formal transfer of title or outright seizure, a measure or series of measures taken intentionally by a Party to create a situation whereby the investment of an investor may be rendered substantially unproductive and incapable of yielding a return without a formal transfer of title or outright seizure.

<sup>1104</sup> See e.g. **CLA-157**, *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award, 29 March 2005, paragraph VIII.8.23. See also **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 114; **CLA-158**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 101; **CLA-159**, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, para. 6. 22; **CLA-73**, J. M. Cox, *Expropriation in Investment Treaty Arbitration*, OUP, 2019, p. 43.

- (c) Indirect expropriation occurs where a state's action or series of actions result in the investor being substantially deprived of the enjoyment, use, or benefit of its investment, although title to the property or the rights remains with the original owner.<sup>1105</sup>
- (d) The Annexure further lists factors to be considered when determining whether an expropriation has occurred:

*"The determination of whether a measure or a series of measures of a Party in a specific situation, constitutes measures as outlined in paragraph 1 above requires a case by case, fact based inquiry that considers, among other factors:*

*(i) the economic impact of the measure or a series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that expropriation or nationalization, has occurred;*

*(ii) the extent to which the measures are discriminatory either in scope or in application with respect to a Party or an investor or an enterprise;*

*(iii) the extent to which the measures or series of measures interfere with distinct, reasonable, investment-backed expectations; and*

*(iv) the character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate."* (Emphasis added)

Respondent erroneously presents these factors as "*specific conditions*" for there to be an expropriation.<sup>1106</sup> As the above quote from the Annexure makes it clear, these factors are not exhaustive and must merely be considered to determine whether there has been an expropriation.

- (e) A consistent body of jurisprudence, which goes back the *Chorzow Factory Case*,<sup>1107</sup> confirms that contractual rights are susceptible of

<sup>1105</sup> **CLA-116**, *Metalclad Corporation v. The United Mexican States*, Award, 30 August 2000, ICSID Case No. ARB(AF)/97/1, para. 103. See also **CLA-117**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Award, 29 May 2003, ICSID Case No ARB(AF)/00/2, para. 114.

<sup>1106</sup> SOD, para. 804.

<sup>1107</sup> **CLA-160**, *Case concerning Certain German Interests in Polish Upper Silesia (The Merits)*, Judgment of 25 May 1926, p. 44 in which the Permanent Court of International Justice held that by taking possession of the Chorzow nitrate factory on 3 July 1922 and by operating it and making use of the experiments, patents, and licences, Poland had unlawfully expropriated the contract rights of the Bayerische, a German company which had concluded a contract on 5 March 1915 with the German Reich to manage the exploitation of the factory on its behalf.

being expropriated, including *Vivendi v. Argentina (II)*<sup>1108</sup> and *Eureko v. Poland*.<sup>1109</sup> Measures amounting to indirect expropriation have been found to include the refusal by the host state to grant construction permits to investors.<sup>1110</sup>

- (f) Expropriation, whether direct or indirect is not in and of itself an illegitimate act.<sup>1111</sup>
- (g) However, for a host state to establish that an expropriation is lawful, it must demonstrate that it has complied with the conditions set out in the relevant treaty, that is to say in Article 5 of the Mozambique-India BIT. Consistent with international standards, Article 5 provides that any expropriation must be: (i) carried out for a public purpose (which is understood as a genuine interest of the public which the State is able to prove);<sup>1112</sup> (ii) in accordance with the law, which means in accordance with due process of law; (iii) on a non-discriminatory basis, which means that the expropriatory measures must apply to all investments of all investors equally, rather than singling out a particular investor;<sup>1113</sup> and (iv) against fair and equitable compensation to be paid without unreasonable delay, with such compensation being effectively realizable and be freely transferable.

898 In response, Mozambique has made three core submissions, which are addressed in turn below:

- (a) Respondent argues that for there to be an expropriation, there must have been a property right under the relevant host state law.<sup>1114</sup> While it is correct that some tribunals have found it necessary to determine

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<sup>1108</sup> **CLA-161**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.5.4.

<sup>1109</sup> **CLA-128**, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, paras. 238-243.

<sup>1110</sup> **CLA-116**, *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 104-108 (finding the non-issuance of a permit to be a measure tantamount to expropriation in violation of NAFTA Article 1110(1)); **CLA-117**, *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 117 (holding the Mexican government's failure to renew the hazardous waste landfill permit held by the investor's subsidiary to be expropriatory).

<sup>1111</sup> **CLA-66**, C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2017) (excerpt), p. 388; **CLA-107**, *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, para. 428.

<sup>1112</sup> **CLA-83**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (Award, 2 October 2006) ICSID Case No ARB/03/16, para. 432. See also, **CLA-162**, *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, paras. 90-91; **CLA-107**, *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt* (Award, 1 June 2009) ICSID Case No ARB/05/15, para. 432.

<sup>1113</sup> **CLA-83**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (Award, 2 October 2006) ICSID Case No ARB/03/16, para. 442.

<sup>1114</sup> SOD, para. 773 quoting **RLA-121**, *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN 3481, Award (3 February 2006), para. 184.

whether there was an asset capable of expropriation under domestic law, other tribunals have considered it sufficient to determine whether a qualifying investment existed under the relevant treaty.<sup>1115</sup>

- (b) Respondent maintains that in the context of the expropriation of a contract, the right would have to be an actual and demonstrable entitlement to a certain benefit.<sup>1116</sup> This is common ground.
- (c) Respondent contends that for a breach of contract to amount to expropriation, it must involve the exercise of sovereign power by the host state,<sup>1117</sup> and there must be a complete neutralisation of the investment, not a mere loss of value.<sup>1118</sup> This is also common ground. In the latter respect, the commentary on the *Metaclad* award by the *El Paso* tribunal quoted by Respondent is particularly apt:

*"the tribunal in Metalclad did not hold that there was an expropriation because the benefits of the 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 landfill, 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 neutralisation of the investment project that an expropriation was found."*<sup>1119</sup>

899 Respondent has also referred (inaccurately) to authorities related to general regulations, which are not at stake here:

- (a) Respondent states that as a matter of principle, general regulations do not amount to indirect expropriation.<sup>1120</sup> No general regulation is in question in the present case. What is more, Respondent omits to

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<sup>1115</sup> See e.g. **RLA-92**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID), Award (31 March 2010), paras. 139-141. **CLA-128**; *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, para. 240, referring to paras. 144-146 and **CLA-89**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 521, none of which referred to domestic law to determine whether there was an asset capable of expropriation.

<sup>1116</sup> SOD, paras. 775-776 quoting **RLA-92**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID), Award (31 March 2010), para. 142 and **RLA-102**, para. 450.

<sup>1117</sup> SOD, paras. 766-769, 770 quoting **RLA-102**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) para. 458; **RLA-82**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011), para. 281; **RLA-82**; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011), para. 281; **RLA-103**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 175, and **RLA-119**, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award (16 January 2013) para. 209.

<sup>1118</sup> SOD, paras. 783-786.

<sup>1119</sup> SOD, para. 786 quoting **RLA-84**, *El Paso Energy Int'l Co. v. Argentina*, ICSID ARB/03/15, Award (31 October 2011), para. 252.

<sup>1120</sup> SOD, paras. 772; 791-794.

mention that this principle is qualified by an exception, namely that by exception, unreasonable general regulations can amount to indirect expropriation.<sup>1121</sup>

(b) In the context of the specific factors identified in the Annexure, Respondent contends that the assessment of whether the expropriatory measure is *bona fide* involves the determination of whether there is a reasonable relationship of proportionality between the weight to the foreign investor and the aim sought to be realised by the host state.<sup>1122</sup> However, the passage of *El Paso* quoted by Respondent refers to the effect of general regulations on an investor and its investments<sup>1123</sup> and is accordingly inapposite.

900 Finally, Respondent fabricates a principle that does not exist. Respondent contends that there is a "*well-established principle of international law that an investor cannot seek compensation from a State because of its performance and weak business planning*", purportedly based on *Biwater Gauff v. Tanzania*.<sup>1124</sup> This is a quote from the respondent state's submission in the case, not a finding by the tribunal.<sup>1125</sup>

## 2. Mozambique breached the applicable legal standard

901 Mozambique expropriated Claimant's rights under the MOI, including its right to a concession as well as its underlying rights to exclusivity and confidentiality, and PEL's know-how.<sup>1126</sup>

902 First, PEL undoubtedly made a qualifying "*investment*", under Article 1(b) of the Treaty, capable of being expropriated, pursuant to Article 5 the Treaty. This has been demonstrated above at Section V.B, which deal with this Tribunal's jurisdiction *ratione materiae*. PEL's investment includes its know-how and work product (including its conception and development of the

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<sup>1121</sup> This apparent in one of the very passages of *El Paso* relied upon by Respondent, which when quoted in its entirety provides: "*1. Some general regulations can amount to indirect expropriation a. As a matter of principle, general regulations do not amount to indirect expropriation. b. By exception, unreasonable general regulations can amount to indirect expropriation.*" **RLA-44**, *Cambodia Power Co. v. Kingdom of Cambodia, Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011) para. 233. In the same vein, the quote from *MTD v. Chile* at SOD, para. 772 is taken from the summary of the respondent's state submissions, not the tribunal's reasoning. SOD, para. 814.

<sup>1122</sup> **RLA-84**, *El Paso Energy Int'l Co. v. Argentina*, ICSID ARB/03/15, Award (31 October 2011), para. 243.

<sup>1124</sup> SOD, para. 774.

<sup>1125</sup> **RLA-102**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 440. Respondent's further quotes paragraph 442 of *Biwater Gauff*, which is yet another passage of the summary of the respondent's state submissions in the case (SOD, 774 quoting **RLA-102**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 442).

<sup>1126</sup> As noted by Professor Medeiros in his second report, there is no doubt that under Mozambican law all rights were enshrined in the MOI – **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Sections 2.2 and 3.8.

Project concept), the MOI, as well as PEL's rights to a concession, to exclusivity in respect of the Project, and to confidentiality of the data and information shared.

903 To the extent this is deemed relevant, PEL's investment is also a valid right as a matter of Mozambican law. This has been demonstrated at Section V.B.1, which deal with the legality of PEL's investment under Mozambican law.

904 In response, Mozambique repeats its arguments that the MOI was not a binding agreement,<sup>1127</sup> that PEL's PFS did not satisfy the conditions to be granted a concession,<sup>1128</sup> that the right of first refusal presupposed competition effectively because another competitor would have to submit a bid, which PEL would match,<sup>1129</sup> and the right of exclusivity was limited by the PPP law which only allowed the direct award of a concession in certain circumstances.<sup>1130</sup>

905 These incorrect arguments have all already been addressed elsewhere in this submission. In summary:

(a) The fact that the MOI is a binding agreement is obvious on its face and from the conduct of the Parties, including that of Mozambique, at the time of the official signing of the MOI and after the MOI was entered into, when both Parties initially abided by its terms. Professor Medeiros also confirms that the MOI is a binding contract under Mozambican law.<sup>1131</sup>

(b) Mozambique was satisfied with PEL's PFS, to such extent that it approved it and asked PEL to exercise its right of first refusal.<sup>1132</sup> Mozambique never raised any issues as to the alleged inadequacy of the PFS; to the contrary, it expressed its appreciation after it was presented. In fact, it considered that the PFS was sufficient to allow for the direct award of the concession, as clearly evidenced in its 18 April 2013 letter.<sup>1133</sup>

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<sup>1127</sup> SOD, paras. 778-779.

<sup>1128</sup> SOD, para. 780.

<sup>1129</sup> SOD, para. 781.

<sup>1130</sup> SOD, para. 782.

<sup>1131</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 59.

<sup>1132</sup> Exhibit C-11, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

<sup>1133</sup> Exhibit C-29, Letter dated 18 April 2013 from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project.

- (c) The right of first refusal was not a scoring advantage to be exercised in a public tender. It was a right for PEL to refuse to implement the Project.<sup>1134</sup> This is unequivocally supported by the MOI,<sup>1135</sup> its negotiation history,<sup>1136</sup> its commercial logic and the conduct of the Parties. By contrast, there is no evidence of any intention to grant PEL a mere scoring preference in the context of a public tender. Such an intention is unsupported by the manner in which the scoring advantage operates as a matter of Mozambican law.<sup>1137</sup>
- (d) The PPP Law allowed for the direct award of a concession to PEL.<sup>1138</sup> That fact is confirmed by the fact that the Council of Ministers made an official decision to grant PEL a concession by direct award on 16 April 2013 before it U-turned in May 2013.<sup>1139</sup>

906 Second, the measures taken by Mozambique neutralised PEL's investment, such that they constituted an indirect expropriation of PEL's investment.

907 In May 2013, through its third U-Turn, Mozambique decided to organise a public tender in respect of the Project, which it then granted to ITD. There is no doubt that, in the words of the *El Paso* tribunal, this was "a complete neutralisation of the investment project".

908 By neutralising PEL'S right to a direct award and instead organising an irregular and suspect tender process, PEL's investment became worthless, and the Project was impossible to pursue. This is comparable to the situation in

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<sup>1134</sup> **CWS-4**, Second Witness Statement of Mr Ashish Patel, para. 15; **CER-7**, Expert Report of Mr David Baxter, para. 19(c) (explaining that the right of first refusal "results in Mozambique being unable to award the Project to any other party or commence any public tender process, unless and until PEL declines to pursue the direct award."); **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 54.

<sup>1135</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 2(2).

<sup>1136</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 54. **Exhibit C-201**, Email exchange between Ashish Patel of PEL and Kishan Daga of PEL attaching draft of the MOI, dated 13 March 2011. The right of first refusal was similarly formulated in the draft shared by Dr Muhate, senior adviser at the MTC, on 14 April 2011. **Exhibit C-222**, Email from Isaias Muhate of the MTC to Kishan Daga of PEL attaching draft of the MOI, dated 14 April 2011.

<sup>1137</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Sections 2.3 and 2.4.

<sup>1138</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 2.2.

<sup>1139</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin negotiations for a concession agreement for the Project, dated 18 April 2013; **Exhibit C-30**, Letter from Kishan Daga of PEL to MTC Minister Zucula concerning PEL's acceptance of the MTC's offer to commence negotiations for a concession agreement for the Project, dated 23 April 2013; **Exhibit C-31**, Letter from Kishan Daga of PEL to Luis Amandio Chauque of MTC regarding draft concession agreement and negotiation meetings, dated 24 April 2013; **Exhibit C-32**, Letter from Luis Amandio Chauque of MTC to PEL providing a date, time and venue for the meeting to negotiate a concession, dated 24 April 2013; **Exhibit C-33**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding the bank guarantee, dated 9 May 2013; **Exhibit C-34**, Letter from Luis Amandio Chauque of MTC to Kishan Daga of PEL reversing the MTC's position regarding direct negotiations with PEL, dated 13 May 2013; **Exhibit C-35**, Letter from Kishan Daga of PEL to Minister Zucula of MTC responding to the MTC's change in position regarding direct negotiations, dated 4 June 2013.

*Metaclad* where Mexico's refusal to grant the investor a federal permit to exploit the landfill rendered the entire investment project impossible.

- 909 Similarly, PEL's right to exclusivity was completely neutralised by the very fact that Mozambique granted the concession to a third party.
- 910 Likewise, PEL's confidentiality right and know-how were completely neutralised by the fact that Mozambique appropriated PEL's PFS to organise the tender and communicated the information contained in the PFS to other tender participants.
- 911 Once Mozambique disclosed the very information that the confidentiality clause was meant to protect and used PEL's know-how, there is no doubt that these assets were neutralised.
- 912 Mozambique's response does not address these submissions. It merely repeats its allegation that there was no investment or property right in this case and then makes the circular argument that because there was no investment or property right, no expropriation could result.<sup>1140</sup> As explained immediately above, this is plainly incorrect.
- 913 Third, Mozambique exercised its sovereign power when it expropriated PEL's investment.
- 914 The May 2013 decision to organise a public tender was made by the Council of Ministers, the highest government body in Mozambique.<sup>1141</sup> It reversed its own previous decision — taken less than a month earlier — to award the concession directly to PEL in the "*national strategic interest*".<sup>1142</sup> This is obviously a decision that can only be made through an exercise of sovereign power. As explained by Professor Rui Medeiros in his first report, this decision was unlawful under Mozambican law.<sup>1143</sup>
- 915 As for the award of the concession to ITD, it also involved Mozambique's exercise of its sovereign power. It goes without saying that a mere private contractor would not have had the power to organise a public tender process

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<sup>1140</sup> SOD, paras. 788-790.

<sup>1141</sup> **Exhibit C-34**, Letter from Luis Amandio Chauque of MTC to Kishan Daga of PEL reversing the MTC's position regarding direct negotiations with PEL, dated 13 May 2013.

<sup>1142</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin negotiations for a concession agreement for the Project, dated 18 April 2013.

<sup>1143</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, Executive Summary, E10, and paras. 44 to 49.



and grant a concession for a major infrastructure structure project in Mozambique.

916 Likewise, Mozambique's communication of PEL's know-how and PFS to other tender participants to organise the tender and add critical content to the tender documentation, involved Mozambique's exercise of sovereign power. A government mandate is obviously necessary to organise a public tender for a major infrastructure project, to prepare the documentation in this respect, and to decide the information that ought to be communicated to tender participants.

917 Again, Respondent's submissions fail to address these facts. Instead, Mozambique argues that it acted in accordance with the PPP Law and that PEL was asking for a singular treatment, to which it was not entitled.<sup>1144</sup> This is a strange argument, which does not refute the fact that Mozambique exercised its sovereign power when it expropriated PEL's investment.

918 Mozambique also denies that it expropriated PEL's know-how and confidential information.<sup>1145</sup> As explained above, this is incorrect as a matter of fact. This also does not constitute a refutation of the fact that Mozambique exercised its sovereign power when disclosing PEL's know-how and confidential information in the government-initiated public tender process.

919 Fourth, three of the factors specifically identified in the Annexure as relevant to the determination of whether or not there has been an expropriation are clearly at play in this case.

920 As to the first factor, the economic impact of the measures described above is that PEL's investment has become worthless. The MOI no longer has any value without the right to a concession. Likewise, the right to exclusivity has no value where the concession has been granted to a third party. Similarly, the right to confidentiality and PEL's know-how no longer have any value now that the relevant information has been disclosed.

921 Respondent has no answer to this submission and thus repeats its circular argument that because PEL allegedly owned no right, there was nothing of value to be expropriated.<sup>1146</sup>

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<sup>1144</sup> SOD, paras. 795-799.

<sup>1145</sup> SOD, paras. 800-802.

<sup>1146</sup> SOD, para. 806.

- 922 As to the second factor, Mozambique's expropriatory measures undoubtedly interfered with PEL's reasonable expectations.
- 923 As explained in the section of this submission dealing with legitimate expectations in the context of the FET standard, Mozambique reneged on its promises to grant PEL a concession agreement in respect of the Project, not to grant the concession to another, and to keep the data shared by PEL confidential.
- 924 Yet again, Mozambique's only response is to argue that the MOI was not a binding agreement and that it only granted PEL a 15% scoring advantage in the context of a public tender.<sup>1147</sup> As explained elsewhere in this submission, this argument, which is contradictory on its face (the MOI cannot, at the same time, not have been binding and grant PEL a scoring preference) must fail.<sup>1148</sup>
- 925 As to the third factor, Mozambique's measures were not for *bona fide* public interest purposes. Indeed, Mozambique's May 2013 U-Turn could not have been for *bona fide* public interest purposes. As explained above, the letter in which the U-Turn was announced did not explain how Mozambique could have come to the conclusion that a public tender should be organised when less than a month earlier Mozambique had considered it to be in the "*national strategic interest*" to grant the concession directly to PEL.<sup>1149</sup>
- 926 The letter referred to "*the legal and regulatory framework of Public-Private Partnerships*"<sup>1150</sup> but this could not have been a *bona fide* public interest purpose because, after the decision had been made to award the concession directly to PEL in April 2013, it was unlawful under Mozambican law to reverse such decision.<sup>1151</sup>

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<sup>1147</sup> SOD, paras. 811-813.

<sup>1148</sup> As noted by Professor Rui Medeiros in his second report – **CER-6** – not only is the MOI a binding contract which created legitimate expectations (para.59), the right of first refusal contemplated in the MOI could never be equated to a scoring advantage, (Sections 2.3 and 2.4).

<sup>1149</sup> **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin negotiations for a concession agreement for the Project, dated 18 April 2013.

<sup>1150</sup> **Exhibit C-34**, Letter from Luis Amandio Chauque of MTC to Kishan Daga of PEL reversing the MTC's position regarding direct negotiations with PEL, dated 13 May 2013; *see also* **Exhibit C-35**, Letter from Kishan Daga of PEL to Minister Zucula of MTC responding to the MTC's change in position regarding direct negotiations, dated 4 June 2013.

<sup>1151</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, paras. 44 - 49. "45. *The act performed by the Council of Ministers undeniably constitutes an act establishing rights. ... with the Council of Ministers' decision, the right to the award of the concession by direct award established by the MoI acquired full legal effect.* 46. *Acts establishing rights may not be freely revoked, as expressly set out in Article 136 (1) (b) of Law no. 14/2011, of 10 August 2011.* 47. *It is known that PEL complied with the directions it received from the MTC on 18 April 2013102, notably by providing the requested bank guarantee. However, on 13 May 2013104, the MTC informed it of the following: ... That act revoked the act of 18 April 2013.* 48. *The truth, however, as has been shown above, is that the grounds for the invoked illegality were not confirmed, given that recourse to direct award to enter into the contract underlying the MoI was, as has been*

- 927 What is more, Mozambique has failed to produce a single document relating to the Council of Minister's May 2013 U-Turn, despite the fact that as matter of Mozambican law, the records of those meetings must exist. Given this, the conclusion that this measure was not a *bona fide* measure for public interest purposes is unescapable.
- 928 Turning to the decision to award the concession to ITD, there is compelling evidence that it was not a *bona fide* measure for public interest purposes.
- 929 As explained above,<sup>1152</sup> the tender process was conducted with complete disregard of principles of fairness, transparency and consistency. Not only were the general criteria for evaluating the proposals not clear for the tender participants themselves and the tender evaluators, but the more detailed criteria for assessing the tender was only announced *after* the results of the technical proposals' evaluation were finalised.<sup>1153</sup> Such an arbitrary approach is both contrary to international best practice for PPPs<sup>1154</sup> and an express breach of Mozambican law. Further, the scoring of the bids itself was riddled with suspicious and unexplained flaws.<sup>1155</sup>
- 930 Mozambique has further failed to disclose the tender file – which it is required to keep and archive under Mozambican law – that could shed light on the rationale for granting the concession in respect of the Project to ITD.
- 931 The award of the concession to ITD was therefore not a *bona fide* measure for public purpose.

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*seen, admissible, under Article 13 (3) of Law no. 15/2011 ... 49. The revocation of the act performed by the Council of Ministers on 18 April 2013 is, therefore, an unlawful revocation of an act establishing rights, such revocation being vitiated by illegality ...."*

<sup>1152</sup> See Section IV.K.

<sup>1153</sup> **Exhibit C-25**, Translation of MTC Document entitled "*Contest to Acquiring of Rights of Concession to Conceive, Design, Finance, Build, Operate and Transfer the Railway and Macuse Port*", dated 29 July 2013.

<sup>1154</sup> **CER-7**, Expert Report of Mr David Baxter, paras. 172-173 ("*I understand that the evaluation committee divided each of the criteria applied for assessment of the technical proposals to the separate sub-categories that were scored individually. These sub-categories and the maximum scores allocated to each sub-category were only communicated to the bidders after the announcement of the tender results. This clearly violated the principles of transparency and due process that should govern the public tender process. Based on my experience, I believe that it would be impossible to ensure a competitive and fair public tender without establishing well-defined criteria for the assessment of the bidders' proposals. Without knowing the full criteria against which the proposal would be assessed, the bidders could not prepare comprehensive and focused proposals corresponding to Mozambique's Tender Documents. Even more critically, the evaluation committee would not be able to provide a fair, and objective assessment of the bids in the absence of clearly defined criteria. When the criteria for assessment are poorly defined, objectivity necessarily suffers.*") (Emphasis in original)

<sup>1155</sup> **Exhibit C-25**, Translation of MTC Document entitled "*Contest to Acquiring of Rights of Concession to Conceive, Design, Finance, Build, Operate and Transfer the Railway and Macuse Port*", dated 29 July 2013.

- 932 The decision to organise the tender on the basis of PEL's PFS and know-how and to disclose PEL's know-how and PFS to other tender participants is also not a *bona fide* measure for public interest purposes.
- 933 In this respect, it is telling that Mozambique proceeded covertly, without ever seeking PEL's consent or informing it of the same.
- 934 Mozambique's only response to the above is to insist that it was entitled to enact the PPP Law.<sup>1156</sup> PEL takes no issue with the enactment of the PPP Law. Indeed, the PPP law permits the direct award of a concession in respect of the Project to PEL.
- 935 Mozambique also makes the irrelevant point that it has not discriminated against PEL by reference to case law which relates to the application of general regulations to specific investors.<sup>1157</sup> There is no general regulation at stake in the present case.
- 936 Fifth, Mozambique does not dispute that it failed to compensate Claimant after it indirectly expropriated its investment.
- 937 It follows that Respondent has indirectly expropriated Claimant's investment in breach of Article 5 of the Treaty.

*D. Respondent Has Breached the Umbrella Clause Contained in the Mozambique-Netherlands BIT, Which Is Incorporated into the Treaty through the MFN Clause*

- 938 It is manifest that Mozambique breached the obligations it entered into with regards to PEL's investment in the MOI, including PEL's right to the project concession, and its right to have Respondent abide by the MOI's exclusivity and confidentiality clauses. Mozambique's violation of these obligations constitutes a breach of the umbrella clause at Article 3(4) of the Mozambique-Netherlands BIT (the "**Umbrella Clause**"), which is incorporated into the Treaty through the MFN clause.
- 939 In response to PEL's Umbrella Clause claim,<sup>1158</sup> Respondent spends less than a paragraph defending its conduct in respect of this claim, other than asserting

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<sup>1156</sup> SOD, paras. 814-818.

<sup>1157</sup> SOD, paras. 807-810.

<sup>1158</sup> SOC, Section V.B.

that "*there was no right to which PEL was entitled that Mozambique could have breached...*"<sup>1159</sup> Rather, and contrary to well established principles of investment treaty law, Respondent disputes that the Treaty's MFN clause allows PEL to rely upon the Umbrella Clause. Instead, it insists on the relevance of Mozambican law to Claimant's umbrella clause claim and has incorporated by reference its 53-page discussion of Mozambican law, including far-fetched arguments which are not remotely supported by Mozambican law.

940 In reality, the breaches of the MOI are so clear that they require little, if any, consideration of Mozambican law. To the extent that they do, Mozambican law confirms that Respondent breached the obligations it entered into with regards to PEL's investment, and therefore violated the Umbrella Clause.

1. The applicable legal standard

(a) The Treaty's MFN Clause Incorporates the Umbrella Clause

941 In its SOC, Claimant demonstrated that the Treaty's MFN clause incorporates the Umbrella Clause from the Mozambique-Netherlands BIT in light of the following core propositions:

(a) Articles 4 (1) and (2) of the Treaty contain a most-favoured nation or MFN clause requiring Mozambique to accord to Indian investors and their investments in Mozambique treatment no less favourable than that which it accords to investors of any third state and their investments. It provides that:

*"(1) Each Contracting Party shall accord to investment of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investment of its own or investor of investments of investors of any third State.*

*(2) In addition, each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third State."*<sup>1160</sup>

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<sup>1159</sup> SOD, para. 764.

<sup>1160</sup> CLA-1, Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment, Arts 4(1) and (2).

- (b) Traditionally, states have inserted MFN clauses into investment treaties "to ensure that they obtain any advantages, privileges and concessions that the granting state has accorded or accords in the future to third states."<sup>1161</sup>
- (c) A MFN clause will be triggered "where any third state investment or investor is entitled to more favorable treaty protections" from the respondent state.<sup>1162</sup> It is well established, as a matter of general public international law, that a treaty obligation towards a third state constitutes "treatment" for the purposes of the MFN clause.<sup>1163</sup>
- (d) Although there has been some disagreement among arbitral tribunals about whether MFN clauses allow investors to import more favourable *procedural* rights from third-party treaties, it is widely accepted that MFN clauses allow investors to import *substantive* rights from other BITs.<sup>1164</sup>
- (e) One such substantive right is the obligation for the host state to fulfil commitments *vis-à-vis* investors, that is to say an umbrella clause. MFN clauses phrased in an essentially identical manner as Article 4 of the Treaty have been found to allow the importation of a more favourable treatment contained in another treaty.<sup>1165</sup>
- (f) In the cases of *MTD v. Chile*,<sup>1166</sup> *EDF International v. Argentina*,<sup>1167</sup> and *Arif v. Moldova*,<sup>1168</sup> the MFN clause was used to import umbrella clauses from other treaties.

<sup>1161</sup> **CLA-70**, A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International B.V. 2009) (excerpt), para. 5.5.

<sup>1162</sup> **CLA-70**, A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International B.V. 2009) (excerpt), para. 5.20.

<sup>1163</sup> **CLA-77**, ILC, "Draft Articles on Most-Favoured-Nations Clauses with Commentaries 1978" in *Yearbook of the International Law Commission*, Vol. II, 1978, Part Two, p. 23 ("...the fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State.")

<sup>1164</sup> See e.g. **CLA-146**, *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, paras. 11.2.1-11.2.9; **CLA-121**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras.103-104; **CLA-8**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 157-160; **CLA-147**, *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, paras. 541-555.

<sup>1165</sup> See e.g. **CLA-8**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 156-160.

<sup>1166</sup> **CLA-121**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras.100-104.

<sup>1167</sup> **CLA-148**, *EDF International*, paras. 921-936.

<sup>1168</sup> **CLA-149**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 396.

- (g) Article 3(4) of the Mozambique-Netherlands BIT contains an umbrella clause, which reads as follows: "*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.*"<sup>1169</sup> This constitutes a treatment more favourable than that accorded to Indian investors and their investments, under the Treaty.
- (h) By virtue of the MFN clause, Mozambique must accord the benefit of the Umbrella Clause in the Mozambique-Netherlands BIT to PEL.

942 In response to the above, Mozambique's presentation of the legal principles is out of sync with established principles of investment law and is mostly founded on inapposite authorities.

943 First, Respondent makes the preliminary point that to establish a breach of the MFN clause, an investor must demonstrate that it is an investor and has made an investment.<sup>1170</sup> It then repeats its argument that PEL has not made an investment.

944 In doing so, Respondent conflates the jurisdiction of the Tribunal and the merits of this case. The question of whether or not there is a qualifying investment in this case has already been addressed at Section V.B.1 above and is not repeated herein.

945 Second, Respondent disputes the fact that the MFN clause is triggered where the host state has granted investors and investments a more favourable treatment in a BIT with a third state. It contends that there must be an identified similarly situated investor for the clause to be triggered.<sup>1171</sup>

946 This heterodox position is put forward by reference to a single authority, *İçkale İnşaat Limited Şirketi v. Turkmenistan*, which is inapposite. In that case, the tribunal considered a narrowly tailored MFN clause that specifically used the expression "*in similar situations*"<sup>1172</sup> and found that the impact of this specific wording was that it required a comparison of the factual situation of the investments of the investor of the home state with that of the investment of the

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<sup>1169</sup> **CLA-9**, Mozambique-Netherlands BIT.

<sup>1170</sup> SOD, paras. 721, 740-744.

<sup>1171</sup> SOD, para. 722-724, 729, and 734 ("*PEL has not shown there is any similarly situated investor, period*"). (Emphasis in original)

<sup>1172</sup> **RLA-59**, *İçkale Insaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016), para. 326.

investors of third States.<sup>1173</sup> By contrast, the MFN provision in Article 4 of the Treaty is worded broadly and does not contain the limiting language "*in similar situations*".

947 Third, Respondent disputes that it is widely accepted that MFN clauses allow investors to import substantive rights from other BITs. It contends that international law is "*unsettled on whether importation is even appropriate*".<sup>1174</sup> This incorrect statement is based on: (i) an inapposite passage of an article in the American Journal of International Law, dealing with MFN clauses in recent investment treaties;<sup>1175</sup> and (ii) a passage of the summary of the respondent state's submissions in *Bear Creek v. Peru*, where the tribunal did not decide the issue.<sup>1176</sup>

948 Respondent also quotes Claimant's submission that the *SGS v. Paraguay* decision should be preferred to that in *SGS v. Pakistan*,<sup>1177</sup> which relates to the scope of umbrella clauses, not to that of MFN clauses.

949 Fourth, Respondent contends that the importation of substantive standards contained in other treaties is only permitted where the base treaty expressly references the subject matter sought to be imported.<sup>1178</sup>

950 Respondent puts this proposition forward on the basis of the decisions in *Teinver v. Argentina* and *Paushok v. Mongolia*, both of which are inapposite.

951 The *Teinver* tribunal found that the scope of the MFN clause was limited by the fact that it included the limiting expression "[i]n all matters governed by this Agreement."<sup>1179</sup> This language was pivotal in the tribunal's distinction of cases where the import of treatment not referred upon in the base treaty was permitted.<sup>1180</sup> This is not the case here, as the Umbrella Clause relied upon by PEL contains no such limiting language.

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<sup>1173</sup> **RLA-59**, *Içkale Insaat Ltd. Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016), para. 329. SOD, para. 725.

<sup>1174</sup> **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, (2018).

<sup>1175</sup> **RLA-113**, *Bear Creek Mining Corp. v. Peru*, ICSID Case No. ARB/14/21, Award (30 November 2017), para. 532. SOD, fn. 69.

<sup>1176</sup> SOD, paras. 728-733; 735-737.

<sup>1177</sup> **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), paras. 884-892.

<sup>1178</sup> **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), para. 890 referring to the different language in *MTD v. Chile and Bayindir v. Pakistan*.



952 The *Paushok* tribunal's decision to limit the scope of the MFN clause was founded on the fact that the relevant treaty contained no self-standing MFN clause. However, the first paragraph of the FET clause contained the definition of the FET standard and the second paragraph of the FET clause contained an MFN clause, cross-referring to the first paragraph of the FET clause.<sup>1181</sup> The tribunal thus found that the scope of the MFN clause was limited to the first paragraph of the FET clause.<sup>1182</sup> Again, this is not the case here where the Treaty contains a self-standing, broadly-worded MFN clause.

953 Finally, Respondent attempts to distinguish the cases, which PEL relies upon to demonstrate that tribunals routinely import umbrella clauses from other treaties, through the MFN clause:

- (a) Respondent contends that the *MTD v. Chile* tribunal "*considered whether the existing **combined** FET/MFN provisions in the operative BIT could be expanded via MFN importation – not whether an umbrella clause could be imported wholesale.*"<sup>1183</sup> This is an artificial distinction. The fact that the umbrella clause in the Denmark-Chile BIT was imported as part of the FET treatment was not considered as being of any particular relevance by the tribunal.<sup>1184</sup> It was simply the manner in which the case had been argued by the parties.
- (b) Respondent maintains that *Arif v. Moldova* can be distinguished on the basis that it contained a clause entitled "*specific commitment*," which was akin to an umbrella clause, such that the clause was already referenced in the base treaty.<sup>1185</sup> Respondent misunderstands the decision. The tribunal did not consider the question of whether the existence of a specific commitment clause allowed the import of an umbrella clause into the base treaty via the MFN clause.<sup>1186</sup> The argument that an umbrella clause could be imported via the MFN clause was a self-standing argument put forward by the claimant, should its

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<sup>1181</sup> **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), paras. 562-573.

<sup>1182</sup> **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), paras. 562-573.

<sup>1183</sup> SOD, para. 730. (Emphasis in original)

<sup>1184</sup> **CLA-121**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 100-104.

<sup>1185</sup> SOD, para. 731.

<sup>1186</sup> **CLA-149**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paras. 393-396.

argument that the "*specific commitment*" clause was an umbrella clause fail.<sup>1187</sup>

- (c) Respondent is unable to distinguish the importation of the umbrella clause via the MFN clause by the tribunal in *EDF v. Argentina*, such that it seeks to distinguish it on the unrelated basis that the tribunal did not have to consider "*the effect of [a] forum selection clause*" and of "*using MFN importation of an umbrella clause to invoke only portions of the contract.*"<sup>1188</sup> This is not relevant to the fact that the *EDF v. Argentina* tribunal held that an umbrella clause could be imported via the MFN clause in the base treaty,<sup>1189</sup> which is precisely the argument PEL makes here.
- (d) Respondent even seeks to distinguish *Eureko v. Poland*, a decision that PEL invokes in relation to the *scope* of the umbrella clause, on the basis that the BIT in question in that case contained an umbrella clause.<sup>1190</sup> Respondent's attempted distinction is off point; PEL did not involve *Eureko* in relation to the importation of umbrella clauses via an MFN clause but rather the scope of umbrella clauses. Again, Mozambique misses the mark entirely.

954 Accordingly, Respondent has failed to refute Claimant's case that by virtue of the broadly-worded MFN clause in Article 4 of the Treaty, Mozambique must accord PEL the benefit of the Umbrella Clause at Article 3(4) of the Mozambique-Netherlands BIT.

- (b) The Parties agree that umbrella clauses impose an international law requirement that states comply with obligations entered into with regard to investments, and elevate contractual breaches to treaty breaches

955 In the SOC, Claimant demonstrated that the effect of umbrella clauses was to bring obligations undertaken by the host state under the umbrella of the relevant treaty.<sup>1191</sup> It further demonstrated that that it was well established that

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<sup>1187</sup> **CLA-149**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paras. 393-396.

<sup>1188</sup> SOD, para. 732.

<sup>1189</sup> SOC, para. 386 and **CLA-148**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, 11 June 2012, paras. 921-936.

<sup>1190</sup> SOD, para. 733.

<sup>1191</sup> SOC, paras. 390-397.

broadly phrased clauses, such as Article 3(4) of the Mozambique-Netherlands BIT, had the effect of transforming contractual obligations into international obligations.<sup>1192</sup>

956 This is common ground between the Parties. In particular, Mozambique describes umbrella clauses as establishing "*an international obligation for the parties to the BIT to observe contractual obligation[s] with respect to investors*"<sup>1193</sup>; declares "[t]he 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";<sup>1194</sup> and notes that the "*case law has consistently upheld that the effect of umbrella clauses is to elevate a breach of contract into a breach of treaty.*"<sup>1195</sup>

(c) The forum selection clause does not prevent a tribunal from deciding an umbrella clause claim

957 Respondent argues that "*because there was no 'investment' the Mozambique forum selection clause governs*".<sup>1196</sup> It again conflates the jurisdiction of this Tribunal and the merits of the claim. The question of whether or not there is a qualifying investment and an investment dispute (rather than a mere contractual dispute) has already been addressed at Section V.B.1 above and is not repeated herein.

958 Respondent further contends that where the contract considered under the umbrella clause contains a forum selection clause, that clause must prevail, and the tribunal should not consider the umbrella clause claim.<sup>1197</sup> Mozambique's argument is based on the approach of the tribunal in *SGS v. Philippines*,<sup>1198</sup> where it found jurisdiction to determine the umbrella clause claim but stayed such claim until the contract claim was decided pursuant to the forum selection clause. It also relies upon *Bureau Veritas v. Paraguay*<sup>1199</sup> where the tribunal

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<sup>1192</sup> SOC, paras. 390-397.

<sup>1193</sup> SOD, para. 727 (citing **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 2012) para. 141).

<sup>1194</sup> SOD, para. 727 (citing **RLA-95**, *Micula*, ICSID Case No. ARB/05/20 at para. 417).

<sup>1195</sup> SOD, para. 727 (citing **RLA-107**, *Bureau Veritas*, ICSID Case No. ARB/07/9 at para. 129).

<sup>1196</sup> SOD, Title C, p. 216 and para. 759.

<sup>1197</sup> SOD, paras. 760-762.

<sup>1198</sup> **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).

<sup>1199</sup> **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 2012).

followed *SGS v. Philippines*, and dismissed an umbrella clause claim on the basis of a forum selection clause.

959 The approach taken by the *SGS v. Philippines* tribunal seventeen years ago has since been heavily criticised. The majority of recent decisions have rejected its approach.

960 The criticisms of *SGS v. Philippines* are manifold, and were aptly summarised by Professor Jarrod Wong as follows:

- (a) First, by finding that it had jurisdiction over the contractual dispute but deferring to the forum selection clause in the contract, the *SGS v. Philippines* tribunal effectively gave the umbrella clause no effect at all thereby proclaiming jurisdiction over an empty shell.<sup>1200</sup>
- (b) Second, the *SGS v. Philippines* decision was conceptually wrong in that it misunderstood the nature of a BIT breach under an umbrella clause and its relation to a breach of contract. When it sought to distinguish the contract breaches from the treaty breach, the *SGS v. Philippines* decision overlooked the fact that the umbrella clause, specifically characterised the contract breaches as *treaty breaches*.<sup>1201</sup> It thus failed to understand the effect of the umbrella clause, namely to define a BIT violation as *any* breach of contract.<sup>1202</sup>
- (c) Third, the *SGS v. Philippines* tribunal's decision that the forum selection clause should take precedence over the broad framework treaty failed to take into account the fact that it is entirely open to host states to introduce language in their BITs limiting the effect of umbrella

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<sup>1200</sup> **CLA-288**, J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 Geo, Mason L. Rev., p. 169 See also **Exhibit CLA-289**, E. Gaillard, *Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered*, International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, 325-346, p. 334 (“*The Tribunal’s attempt ‘to give effect to the parties’ contracts while respecting the general language of BIT dispute settlement provisions, results in practice in an impossible situation to the extent that it attempts to render compatible two contradictory intentions: the parties to the investment contract seek an exclusive forum, whereas the intention of the contracting Parties to the BIT is to accord to the investors a choice of forum. Furthermore, to the extent this solution recognises, ‘in principle’, an investor’s right to choose an international arbitral tribunal for the settlement of its investment disputes and, in the same breath, requires that the selected tribunal stay the proceedings on the basis of an exclusive forum selection clause contained in the investment contract, it results in the BIT tribunal having jurisdiction over an empty shell and depriving the BIT dispute resolution provision of any meaning. As such, the SGS v. Philippines decision is hardly satisfactory.*”)

<sup>1201</sup> **CLA-288**, J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 Geo, Mason L. Rev., p. 172.

<sup>1202</sup> **CLA-288**, J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 Geo, Mason L. Rev., p. 172.

clauses and/or that of BIT forum selection clauses on contracts containing forum selection clauses.<sup>1203</sup>

- (d) Fourth, the *SGS v. Philippines* decision was wrong when it found that a party should not be allowed to claim under a contract without itself complying with it. This reasoning ignored the effect of the umbrella clause, which is to turn a breach of contract into a breach of treaty.<sup>1204</sup>

961 These criticisms have been endorsed in a majority of more recent awards where tribunals have followed the approach of the *SGS v. Paraguay* tribunal instead.

962 In *SGS v. Paraguay*, the tribunal found that a forum selection in the underlying contract did not prevent the tribunal from considering the claimant's umbrella clause claim because the *source of the obligation remained the treaty*, even if the alleged breach of the treaty obligation depended on a showing a breach of the underlying contract:

*"In anticipation of the analysis of Claimant's claims under Article 11 of the Treaty in Section V.B.3 below, we note that in our view, this rule applies with equal force in the context of an umbrella clause. It has been argued that, if the umbrella clause violation is premised on a failure to observe a contractual commitment, one cannot say (in the Vivendi I annulment committee's words) that the "fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged"—because, for that type of umbrella clause claim, the treaty applies no legal standard that is independent of the contract. But that argument ignores the source in the treaty of the State's claimed obligation to abide by its commitments, contractual or otherwise. Even if the alleged breach of the treaty obligation depends upon a showing that a contract or other qualifying commitment has been breached, the source of the obligation cited by the claimant, and hence the source of the claim, remains the treaty itself."*<sup>1205</sup> (Emphasis added)

963 This approach was followed inter alia by the tribunals in *Garanti Koza LLP v. Turkmenistan*,<sup>1206</sup> *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*,<sup>1207</sup>

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<sup>1203</sup> CLA-288, J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 Geo, Mason L. Rev., p. 173.

<sup>1204</sup> CLA-288, J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 Geo, Mason L. Rev., p. 174.

<sup>1205</sup> CLA-106, *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 142.

<sup>1206</sup> CLA-138, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, para. 245.

<sup>1207</sup> CLA-189, *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, para. 420.

*Belenergia S.A. v. Italian Republic*<sup>1208</sup> and *Nissan Motor Co., Ltd. v. Republic of India*.<sup>1209</sup>

964 The tribunal in *Nissan v. India* rejected the proposition that a forum selection clause in a contract would prevent a tribunal from adjudicating the umbrella clause claim on the basis of its analysis of the intention of the parties to the relevant investment treaty. It reasoned that parties to such treaties (who were undoubtedly aware that most host state contracts contain their own forum selection clause), could exclude them from the scope of the umbrella clause if they wished to, but chose not to.<sup>1210</sup> It concluded that:

*"The proposition would limit arbitrability of umbrella clause claims to circumstances where the investor complains about non-observance of commitments made outside a contractual setting, or in a contract with no mandatory designation of a dispute resolution forum. This would be a significant limitation on the reach of the umbrella clause, and one for which the Contracting Parties have not indicated any such intent, either in surrounding provisions of the CEPA or in instruments appropriate to signal their contemporaneous expectations of the clause's object and purpose."*<sup>1211</sup>  
(Emphasis added)

965 PEL submits that the approach followed in the more recent awards is the correct one. Accordingly, this Tribunal should find that the forum selection clause in the MOI does not prevent this Tribunal from considering PEL's umbrella clause claim.

(d) The law applicable to the question of whether or not an umbrella clause has been breached

966 Respondent contends that the question of whether or not an umbrella clause has been breached is governed by the law of the host state.<sup>1212</sup>

967 It is correct that some tribunals have considered this question to be governed by domestic law, including in cases where the umbrella clause had been breached by virtue of a breach of contractual obligations. While Respondent

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<sup>1208</sup> **CLA-154**, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, paras. 356-359.

<sup>1209</sup> **CLA-290**, *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, paras. 274-281.

<sup>1210</sup> **CLA-290**, *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, para. 277.

<sup>1211</sup> **CLA-290**, *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, para. 279.

<sup>1212</sup> SOD, paras. 746-752.

quotes a number of cases in support of this principle, only one of those cases<sup>1213</sup> relates to breaches of contractual obligations, *SGS v. Philippines*, where the tribunal did not go on to consider whether the underlying contract had been breached.

968 In practice, where the breaches of the underlying contractual obligations were obvious, tribunals have found breaches of the umbrella clauses without finding it necessary to refer to the domestic law of the contract.

969 For instance, in *SGS v. Paraguay*, the tribunal interpreted the contract between SGS and Paraguay without reference to domestic law. It thus held that Paraguay had breached the umbrella clause *inter alia* by failing to make payment under the relevant contract.<sup>1214</sup> It also rejected Paraguay's defence that it was allowed to withhold payment because SGS had breached its own obligations under the contract. It found that SGS had not breached its obligations and, in any case, that the contractual mechanism did not allow Paraguay to terminate the contract in such circumstances.<sup>1215</sup>

970 As explained below, Mozambique's breaches of the MOI are manifest on their face. As a result, this Tribunal does not need to refer to Mozambican law to determine PEL's Umbrella Clause claims. In any case, and as demonstrated below, Mozambique has breached the MOI under Mozambican law.

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<sup>1213</sup> The passage of *Baywa v. Spain* relied upon by Respondent did not consider whether there was any breach of treaty arising out breaches of contract. It was an *obiter* comment on the law that would be applicable to a promise made under general law should such promise fall within the scope of the umbrella clause (**RLA-115**, *Baywa R.E. Renewable Energy GmbH et al v. Kingdom of Spain*, ICSID Case No. ARB/15/16 (2 December 2019), para. 443), which it had just found did not (**RLA-115**, *Baywa R.E. Renewable Energy GmbH et al v. Kingdom of Spain*, ICSID Case No. ARB/15/16 (2 December 2019), para. 442). In *Micula*, the tribunal considered whether Romania had breached its obligation under an Emergency Government Ordinance and Permanent Investor Certificates issues pursuant to such ordinance (**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), para. 418). The passage of *Oxus Gold* relied upon by Respondent does not deal with the law applicable to the determination of an umbrella clause claim and is a summary of the respondent's state submissions in the case (**RLA-117**, *Oxus Gold PLC v. Republic of Uzbekistan et al*, Ad Hoc Arb., Final Award (17 December 2015), paras. 366-367).

<sup>1214</sup> **CLA-106**, *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 121.

<sup>1215</sup> **CLA-106**, *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 121.

2. Mozambique has breached its obligations under the Umbrella Clause

- (a) Mozambique's breaches of the MOI, and thus of the Umbrella Clause, are manifest

971 As explained in the SOC<sup>1216</sup> and further developed in this submission, Mozambique entered into a number of clear obligations *vis à vis* PEL and its investment through the MOI.

972 Mozambique's core obligation under the MOI was to grant PEL a concession to implement the Project, if it approved the PFS and PEL decided to implement the Project through the exercise of its right of first refusal, in consideration of PEL's agreement to carry out the PFS at its sole expense.<sup>1217</sup> This is clear on the face of the MOI:

- (a) Clause 1, which contained PEL's obligation to carry out the PFS at its own expense and explicitly highlighted that the purpose of the PFS was to set out "*the basic terms and conditions for the granting of a concession by the Govt. of Mozambique*".<sup>1218</sup>
- (b) Clause 2, which contained Mozambique's obligation to grant PEL the concession in respect of the Project, subject to Mozambique's approval of the PFS and PEL's decision to implement the Project through the exercise of its right of refusal. Clause 2 read as follows – and, crucially, the contents of Clause 2.2 are not disputed by Mozambique:

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

*2. After the approval of the pre-feasibility 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."*<sup>1219</sup> (Emphasis added)

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<sup>1216</sup> SOC, paras. 398-403.  
<sup>1217</sup> **Exhibit C-5A**, English Version of the MOI, Clause 1.  
<sup>1218</sup> *Id.*  
<sup>1219</sup> **Exhibit C-5A**, English Version of the MOI, Clause 2.



973 As Mr Baxter explains, the right of first refusal in Clause 2(2) "*results in Mozambique being unable to award the Project to any other party or commence any public tender process, unless and until PEL declines to pursue the direct award.*"<sup>1220</sup>

974 This interpretation is further confirmed by Professor Rui Medeiros from a Mozambican law perspective.<sup>1221</sup>

975 As a logical flipside to its obligation to award the concession directly to PEL, Mozambique gave PEL exclusivity and confidentiality rights.

976 Through the exclusivity clause, Mozambique committed not to solicit any proposal or study for the Project during PEL's undertaking of the PFS and its approval. It further committed not to give any rights or authorisation for the development or expansion of a port between Chinde and Pebane or any rail corridor from Tete for the province of Zambezia.

977 The latter commitment was not limited in time. However, it logically applied until PEL had exercised its right of first refusal. In other words, it is only if PEL refused to implement the Project that Mozambique was no longer bound by the exclusivity clause in the MOI. The relevant clause, Clause 6, read as follows:

*"During the prefeasibility study and the process of approval for the project, MTC agrees that within the terms of the specific legislation it will not solicit any proposal of study for the objective of the present Memorandum. MTC also agrees not to give any rights/authorization to any other party for the development/expansion of a port between Chinde and Pebane for similar objectives, nor for the development/expansion of any rail corridor from Tete for the province of Zambezia within the area referred to under objective of the present memorandum."*<sup>1222</sup>

978 Mr Baxter explains the importance of this undertaking to PEL, as the party undertaking the Project at its sole risk and expense:

*"the exclusivity provision in clause 6 contains two components which protect PEL, as the private proponent of the USP. The first sentence requires that during PEL's undertaking of the PFS and the process of the Project's approval, the MTC, as the interested public entity, agrees not to solicit any proposal*

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<sup>1220</sup> CER-7, Expert Report of Mr David Baxter, para. 19(c).

<sup>1221</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Section 2.2., para.15, and Section 2.3., paras.18 and 19.

<sup>1222</sup> Exhibit C-5A, English Version of the MOI, Clause 6.

*of study with the objective of the MOI. In the second sentence of clause 6, the MTC further agrees as an additional protection to PEL 'not to give any rights/authorizations to any other party for the development/expansion of a port between Chende and Pebane for similar objectives, for the development/expansion of any rail corridor from Tete to the province of Zambezia within the area referred to under the present memorandum.'*

***Clause 6 would have ensured that PEL would be fully invested in progressing the project to the point of direct award, safe in the knowledge that, if the PFS was acceptable to the government, it will carry out the project to the exclusion of competitors. This would provide significant comfort to PEL, as the entity bearing all of the costs and risks associated with the USP, and ensure PEL would be fully vested in delivering on the Project.***"<sup>1223</sup> (Emphasis added)

- 979 Professor Medeiros also explains, from a Mozambican law perspective, that there is no doubt that the MOI, and notably the exclusivity clause, was binding,<sup>1224</sup> and that *"the exclusivity right contained in the MoI arises as a fundamental consideration given by the MTC in light of the fact that PEL agreed to produce a pre-feasibility study entirely at its own expense and risk"*<sup>1225</sup>, adding that *"the exclusivity right is a normal and typical corollary of a basic obligation of the Administration in the context of administrative contracts: the obligation to protect the counterparty. Indeed, 'the protection of counterparties is guaranteed against third parties and against the Administration itself. In the first case, the aim is to prevent any third parties from harming the performance of the contract (...), either by carrying on an activity of the same type, entering into competition with that which is guaranteed by the counterparty, or (...) in the light of conduct which, although not exactly competition, harms the counterparty or hinders its task ...But protection of the counterparty must also be guaranteed against the Administration itself, either with regard to its relations with third parties, in which case it shall not favour activities that are harmful to the counterparty, or regarding its own activity, which (...) shall not compete with that of the counterparty'"*<sup>1226</sup> (Emphasis in the original)

- 980 The confidentiality clause, Clause 11 of the MOI, contained an obligation to keep confidential the information shared, which lasted until approval of the

<sup>1223</sup> CER-7, Expert Report of Mr David Baxter, para. 139(e).

<sup>1224</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Section 3.8, paras. 57-60.

<sup>1225</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Section 3.8, para. 62.2.

<sup>1226</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Section 3.8, para. 62.3; CLA-238, André Aubadère/Franck Moderne/Pierre Delvolvé, *Traité des contrats administratifs*, Tomo II, Paris, 1984, p. 191.

PFS. This made sense in that the MOI envisaged that once the PFS had been approved, a concession would be granted to PEL, subject to the exercise of its right of first refusal. In other words, there was no need for PEL to protect the confidentiality of the information once the PFS had been approved because PEL would then have right to a concession, only subject to its decision as to whether or not to implement the Project. Clause 11 provided:

*"The parties have agreed to keep all the data, documents, information, and share between them whether written or otherwise, including this MOI as confidential until the approval of the project."*<sup>1227</sup>

981 As Mr Baxter explains, confidentiality provisions like Clause 11 are critical to ensuring that the unique and innovative information developed by a private USP proponent is protected until the project's approval:

*"it is typical in the USP scenario that studies like the PFS should be kept confidential while the private proponent is further elaborating on the USP, as the studies typically will contain unique innovative information. In clause 11, the Parties have agreed to a framework that ensures the confidentiality of PEL's work product and the Parties' agreement until the project is approved, thereby protecting the USP proponent's intellectual property and invested efforts."*<sup>1228</sup> (Emphasis added)

982 The same is confirmed by Professor Rui Medeiros from a Mozambican law perspective:

*"(...) in certain circumstances, confidentiality clauses may be fully justified. This is the case when the confidentiality clause (i) seeks to protect any of PEL's important trade or industrial secrets that it has to reveal during the process of producing the pre-feasibility study or when negotiating the project, or (ii) aims to prevent the Administration from supplying the pre-feasibility study, paid for exclusively by PEL, to third parties, thereby allowing them to benefit from PEL's efforts to the detriment of the latter (in this last case, the confidentiality obligation arises as a means of protecting PEL against potential claims for breach of the exclusivity rights conferred by Clause 6)".*<sup>1229</sup>

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<sup>1227</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 11; **Exhibit R-2**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 11.

<sup>1228</sup> **CER-7**, Expert Report of Mr David Baxter, para. 139(d).

<sup>1229</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 3.8, para. 63.2.

- 983 There is no doubt that Mozambique breached the undertakings it entered into with regards to PEL's investment.
- 984 First, Mozambique breached its obligation under Clause 2 by failing to "*issue a concession of the project in favour of PEL*"<sup>1230</sup> notwithstanding the fact that PEL produced the PFS at its own expense, Mozambique approved it and thereafter asked PEL to exercise its right of first refusal, which PEL did. As Mr Daga explains, this was a total betrayal by Mozambique of its undertakings in the MOI:

*"it was Mozambique and not PEL who completely reneged on its promise to grant PEL a concession in the event the MTC approved the PFS and PEL exercised its right of first refusal. Even though both of those requirements were met, Mozambique then betrayed the trust we had placed in the Government, and the years of hard work and resources we had put into the Project, and denied us of our right to implement the Project and to profit from it."*<sup>1231</sup> (Emphasis added)

- 985 The details of Mozambique's failure to observe its undertaking to "*issue a concession of the project in favour of PEL*"<sup>1232</sup> are dealt with in greater detail in the factual background section.
- 986 Second, Mozambique breached its obligation under MOI Clause 2(2) to honour PEL's "*first right of refusal for the implementation of the project on basis of the concession which will be given by the Government of Mozambique.*"<sup>1233</sup> As Mr Daga explains, PEL included the right of first refusal from the very beginning, in PEL's internal drafts,<sup>1234</sup> and understood that it "*bound Mozambique to propose the implementation of the Project to PEL, and have PEL's express answer, before it proposed it to any other company.*"<sup>1235</sup> Mr Patel testifies to the importance and meaning of PEL's right of first refusal, which he describes as a "*key right*" under the MOI:

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<sup>1230</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 2; **Exhibit R-2**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 2. (Emphasis added)

<sup>1231</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 186. See also, **CWS-2**, Witness Statement of Ashish Patel, para. 25; **CWS-4**, Second Witness Statement of Mr Ashish Patel, para. 15.

<sup>1232</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 2(1).

<sup>1233</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 2(2).

<sup>1234</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 54; **Exhibit C-201**, Email exchange between Ashish Patel of PEL and Kishan Daga of PEL attaching draft of the MOI, dated 13 March 2011. The right of first refusal was similarly formulated in the draft shared by Dr Muhate, senior adviser at the MTC, on 14 April 2011; **Exhibit C-222**, Email from Isaias Muhate of the MTC to Kishan Daga of PEL attaching draft of the MOI, dated 14 April 2011.

<sup>1235</sup> **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 54.

*"I always understood the right of first refusal to mean exactly what it says: if Mozambique was satisfied with and approved our PFS demonstrating the technical viability of the Project, then PEL would have the option – the first right of refusal – to implement the Project by signing a concession with Mozambique. If PEL had chosen not to implement the Project, PEL would then be permitted to walk away from the Project. It would only be in those scenarios (i.e. where either PEL failed to produce a PFS that was acceptable to Mozambique, or where PEL chose not to implement the Project once it was offered), that Mozambique would then be entitled to offer the Project to someone else."*<sup>1236</sup> (Emphasis added)

987 Contemporaneous documentary evidence makes clear that at the same time it approved the PFS on 15 June 2012, the MTC requested PEL to exercise its right of first refusal.<sup>1237</sup> Three days later, PEL did so expressly, stating unequivocally stating that PEL "*hereby confirm[s] that we will proceed with implementation of the project.*"<sup>1238</sup> Notwithstanding this, the Government, instead of following through with its commitment to award the project concession directly to PEL, took PEL down a path of U-turns and broken promises, which deprived PEL of the right of first refusal on which it had placed so much importance from the outset. This was not only a breach of PEL's right of first refusal in Clause 2(2) of the MOI, but it also contravened industry standards, and demonstrated a lack of "*transparency, clarity and fail[ure] to respect the proponent's expectations*", as confirmed by Mr Baxter:

*"In my view, Mozambique was not following any industry standard in excluding PEL from a direct award in the way that it did. The unilateral decision of the MTC to procure the Project via a public tender, contrary to the MOI provisions, is contrary to any normal standard of conduct in the PPP industry. Mozambique did not communicate any intention to procure PEL's USP through a competitive tender process prior to signing the MOI, and the MOI makes no mention of a public tender option. Instead, the Government executed the MOI which provides for procuring PEL's USP through a direct award. The Government's actions subsequent to the MOI's signing are likewise consistent with a direct award scenario, including Mozambique's approval of the PFS, and its request that PEL exercise its right of first refusal and negotiate a concession agreement with the CFM. International best practices for PPP are focused on building trust between public and private sector partners. Reversals of*

<sup>1236</sup> CWS-4, Second Witness Statement of Mr Ashish Patel, para. 15.

<sup>1237</sup> Exhibit C-11, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

<sup>1238</sup> Exhibit C-12, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of project, dated 18 June 2012.

*this nature, which lack transparency, clarity and fail to respect the proponent's expectations, lead to damaging perceptions that governments do not honor their agreements.*"<sup>1239</sup> (Emphasis added)

- 988 Third, Mozambique breached its obligation under the MOI's exclusivity provision in Clause 6. Mozambique could only have been relieved of its obligation "*not to give any rights/authorizations to any other party for the development/expansion of*" <sup>1240</sup> the Project, if PEL had decided not to implement the Project.<sup>1241</sup> Yet, in this case, PEL had explicitly confirmed that it would "*proceed with implementation of the project.*"<sup>1242</sup>
- 989 Notwithstanding this, Mozambique breached the exclusivity provision of the MOI by reneging on its commitment to PEL to allow it to implement the Project, and engaging in simultaneous and contradictory paths for the Project's procurement before imposing a public tender process on PEL riddled with irregularities and the evaluation of which was opaque and irregular.<sup>1243</sup> This suspect tender resulted in Mozambique announcing ITD as the winning bidder for the Project, and then ultimately awarding the project concession to the ITD-led TML Consortium in December 2013. This conduct unquestionably violated the exclusivity provision in Clause 6 of the MOI.<sup>1244</sup>
- 990 Fourth, Mozambique breached the MOI's confidentiality provision in Clause 11 by misappropriating PEL's know-how and work product. In particular, Respondent instructed PEL to provide its PFS without any proprietary information such as watermarks and signatures.<sup>1245</sup> After doing so, Respondent then employed PEL's know-how to organise the public tender in

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<sup>1239</sup> CER-7, Expert Report of Mr David Baxter, para. 150.

<sup>1240</sup> Exhibit C-5A, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 6.

<sup>1241</sup> Exhibit C-201, Email exchange between Ashish Patel of PEL and Kishan Daga of PEL attaching draft of the MOI, dated 13 March 2011. CER-7, Expert Report of Mr David Baxter, para. 139(e); CWS-4, Second Witness Statement of Mr Ashish Patel, para. 15.

<sup>1242</sup> Exhibit C-12, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of project, dated 18 June 2012.

<sup>1243</sup> Exhibit C-240, Financial Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 26 July 2013; CER-7, Expert Report of Mr David Baxter, para. 23 ("*It is also my expert opinion that Mozambique failed to score the public tender in a fair and transparent way.*").

<sup>1244</sup> Exhibit C-240, Financial Evaluation Report issued by the MTC Acquisition Management and Execution Office, dated 26 July 2013.

<sup>1245</sup> Exhibit C-226, Chat between Kishan Daga of PEL and Arlanda Reis Cuamba of the MTC regarding presentation of the PFS, dated 9 May 2012; Exhibit C-228, Chat between Kishan Daga of PEL and Arlanda Reis Cuamba of the MTC regarding PEL's logo, dated 13 July 2012. see also CWS-3, Second Witness Statement of Mr Kishan Daga, para. 86 ("*the MTC still insisted on having it without PEL's logo. Again, PEL complied with that request in good faith. I did not think at that time that the PFS would be misused by the Government. I just thought as I was told that this was so that the PFS could be shared with other ministries.*").

respect of the Project and effectively communicated it to the other tender participants.<sup>1246</sup>

991 While Clause 11 of the MOI was meant to be extant only until the approval of the PFS, Mozambique effectively breached this clause by emptying it of all its substance. In particular, Clause 11 was limited in time because once the PFS had been approved, there was no longer any risk in respect of PEL's confidential data. At that stage, PEL had a right to a concession only subject to *its own decision* as to whether or not to implement the Project.

992 As set forth above, not only did Respondent deprive PEL of its right to the project concession, its right of first refusal and its right to exclusivity, it also misappropriated PEL's confidential work product and know-how along the way, by using it as the basis for the rigged tender process that would result in the loss of PEL's investment. Accordingly, Mozambique breached the confidentiality provision in Clause 11 of the MOI.

993 In light of the foregoing, it is beyond dispute that Mozambique breached its obligations under the MOI, which constitutes a breach of the Umbrella Clause.

(b) Respondent's reliance on Mozambican domestic law does not assist its case

994 The above breaches are so manifest, that no input of Mozambican domestic law is necessary to establish them.

995 Respondent has nonetheless put forward a miscellany of arguments, in the hope that one of them will stick or may distract the Tribunal from its obvious breaches.

996 Respondent's hodgepodge of arguments cannot defeat the obvious fact that Mozambique breached the MOI, a point that it tellingly addresses in only three paragraphs at the very end of its 53-page discourse.

997 Contrary to Respondent's assertions, Mozambican law *confirms* the MOI is valid and that Respondent has breached its obligations under it.

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<sup>1246</sup> **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

998 At the outset, Claimant notes that a number of points put forward by Respondent are plainly unarguable; others are not even argued by reference to Mozambican law.<sup>1247</sup> Although Claimant does not address all of these points in this submission, that does not mean that they are accepted.

999 First, Respondent argues that the MOI is not binding as a matter of Mozambican law because the MOI lacked prior authorisation by the Ministry of Finance in accordance with Article 16 of Law No. 9/2002<sup>1248</sup> as well as authorisation by the Administrative Court.<sup>1249</sup>

1000 Respondent is wrong:

- (a) As Professor Medeiros explains,<sup>1250</sup> Article 16 of Law No. 9/2002 of 13 February, only requires prior authorisation by the Ministry of Finance in relation to contracts whereby the state commits to incurring public expenditure or those involving fiscal matters or taxation. Such public expenditures do not arise from the MOI, pursuant to which "[t]he direct costs necessary to conduct the feasibility study shall be entirely borne by PEL."<sup>1251</sup> Respondent's argument that the MOI required such authorisations conflates the MOI, which granted PEL a right to a concession agreement subject to the PFS being approved and PEL exercising its right of first refusal, with the concession agreement itself.
- (b) In respect of the alleged obligation to obtain an authorisation of the administrative court in respect of the MOI, as Professor Medeiros explains, Mozambique's expert has pointed to the incorrect legal statute<sup>1252</sup> and in any event, the relevant regulation, Law No. 26/2009, of 29 September, does not apply to the MOI because the MOI does not

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<sup>1247</sup> Claimant has not addressed the arguments put forward by Respondent under Indian, US and UK law - - which is not recognised as a separate legal jurisdiction - the laws of the United Kingdom are divided between the Laws of England and Wales, Scots law and Northern Irish law (SOD, paras. 534-542). Claimant has also not addressed Respondent's comments on PPP Practice (SOD, paras. 542-548), the contents of which are refuted by Mr Baxter at **CER-7**, Expert Report of Mr David Baxter. Likewise, Claimant has not addressed Respondent's argument that the MOI is contrary to the MIL (SOD, paras. 532-533), which is already discussed in the context of this Tribunal's jurisdiction *ratione materiae*. Finally, Claimant has not addressed Respondent's argument that "*PEL's claims are implausible, moot and futile*" (SOD, paras. 623-627) in respect of which Respondent has not quoted a single authority and which amounts to no more than a vociferation by Respondent.

<sup>1248</sup> SOD, paras. 503-508.

<sup>1249</sup> SOD, paras. 509-510.

<sup>1250</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, paras. 43-46.

<sup>1251</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 6.

<sup>1252</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, paras. 47-48.



give rise in and of itself to public expenditure.<sup>1253</sup> Once again, Respondent conflates the MOI with the concession agreement itself.

1001 Second, Respondent argues that the MOI was void and non-binding or that the award of a concession was precluded because PEL did not communicate to Mozambique the fact that it had been temporarily debarred *vis-à-vis* the NHAI for a limited period of one year. Accordingly to Mozambique, this supposedly constitutes fraudulent inducement and/or a continuing fraud.<sup>1254</sup>

1002 These arguments are without merit under Mozambican law:

(a) As explained by Professor Medeiros, the Public Procurement Rules, which is relied upon by Mozambique's expert, Ms Muenda, to argue that PEL had an obligation to disclose the NHAI debarment, do not even apply to the MOI, and in any event, they only refer to sanctions by bodies of the State of Mozambique.<sup>1255</sup>

(b) As further explained by Professor Medeiros,<sup>1256</sup> contrary to the contention of Mozambique's expert, PEL had no duty of information under Article 227 of the Civil Code. This Article relates to a pre-contractual duty to inform, and the temporary debarment only took effect *after* the MOI entered into force. In any case, the pre-conditions for the duty to inform are not met in this case, as set out in full in Section VI.C.1. In any case, the remedy would be a right to compensation as opposed to nullity (a right which, would, in any case, be time-barred at this point in time).

(c) As for Respondent's argument regarding continuing fraud, it has not even taken the trouble to articulate this under Mozambican law. PEL's response is simple. There was no fraud and accordingly, there could not have been any continuing fraud.

1003 Third, Respondent contends that the MOI is unenforceable because it is a preliminary document, which lacks clauses that are normally found in

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<sup>1253</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 49-51.

<sup>1254</sup> SOD, paras. 492-497.

<sup>1255</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 67.

<sup>1256</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 69-70.

concession agreements and does not constitute a meeting of the minds because there are divergent interpretations and versions of such document.<sup>1257</sup>

1004 This is incorrect as a matter of Mozambican law. As explained by Professor Medeiros, the argument of Mozambique's expert that the existence of two versions of the MOI, in different languages and with conflicting meanings, implies an inexistence of the contract, since there has been no meeting of minds, pursuant to Article 232 of the Civil Code, stems from a misunderstanding of the scope of that provision.<sup>1258</sup> The issue arising from the fact that there are different versions of the MOI, which allegedly contradict each other, is a matter of *interpretation* of contractual provisions under Articles 236 to 238 of the Civil Code, and not an issue of *existence* of the contract under Article 232 of the Civil Code.<sup>1259</sup> What is more, the Portuguese and English versions of the MOI are not in conflict but are complementary.<sup>1260</sup>

1005 Fourth, Respondent argues that the MOI could not grant the right to a direct award to a concession because this would be contrary to the PPP Law,<sup>1261</sup> the Public Procurement Rules,<sup>1262</sup> and the PPP Regulations.<sup>1263</sup>

1006 This too is not supported by Mozambican law and once again, results from Mozambique conflating the MOI and the concession contract:

(a) In respect of Mozambique's allegation that the PPP Law (which was not in force when the MOI was entered into, having come into force three months later) did not allow the grant of a concession by direct award in the case of unsolicited proposals, Professor Medeiros explains that this is in fact explicitly contemplated by Article 13(3) of the PPP Law in exceptional circumstances and subject to administrative discretion.<sup>1264</sup> This is precisely what happened during the Council of Ministers' 10<sup>th</sup> Ordinary Session of 16 April 2013 when the decision

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<sup>1257</sup> SOD, paras. 498-502.

<sup>1258</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 33-34.

<sup>1259</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 33-34.

<sup>1260</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 35.

<sup>1261</sup> SOD, paras. 511-522 and 549-554.

<sup>1262</sup> SOD, paras. 523-527.

<sup>1263</sup> SOD, paras. 528-531.

<sup>1264</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 13-14.

was made to award a concession agreement directly to PEL, as a matter of "*national strategic interest*".<sup>1265</sup>

- (b) Professor Medeiros explains that the Public Procurement Rules did not apply to the MOI because it is not a concession *per se* but a contract promising a concession in the future subject to the fulfilment of certain conditions<sup>1266</sup> and at the time when the concession was to be granted the relevant law was the PPP Law.<sup>1267</sup> In any event, even if such rules did apply, the public contracting entity had discretion to grant a concession through a direct award, under Article 113 the Public Procurement Rules.<sup>1268</sup>
- (c) Turning to Respondent's contention that the MOI did not comply with various requirements of the PPP Regulations and that the argument is without merit.<sup>1269</sup> He explains that the argument is based on a confusion between the MOI and a concession agreement *per se*, such that the PPP Regulations did not apply to the MOI, which it cannot contravene. Professor Medeiros demonstrates that this is the case for each of the provisions invoked by Respondent.<sup>1270</sup>

1007 Fifth, Respondent repeats its interpretation of the MOI as only granting PEL a 15% scoring advantage in a future tender and contends that this was supported by Mozambican law.<sup>1271</sup>

1008 This is incorrect. As explained by Professor Medeiros, the MOI interpreted pursuant to Article 236 (and following) of the Civil Code confirms that the right of first refusal was not a right to be exercised in public tender. He notes that the conduct of the Parties is relevant to such interpretation and that the conduct of the Parties here, whereby Mozambique asked PEL to exercise its right of first refusal and PEL did so, confirms that the Parties did not intend for such right to be exercised in the context of public tender.<sup>1272</sup>

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<sup>1265</sup> **Exhibit C-29**, Letter from Minister Zucula of the MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013; **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 15.

<sup>1266</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 37.

<sup>1267</sup> **CER-3**, Legal Opinion of Professor Rui Medeiros, para. 15.3.2.

<sup>1268</sup> **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 39.

<sup>1269</sup> SOD, paras. 53-55.

<sup>1270</sup> SOD, para. 55.

<sup>1271</sup> SOD, paras. 560-573.

<sup>1272</sup> SOD, para. 19.

1009 What is more, Professor Medeiros explains that the 15% scoring advantage in a future tender contemplated by the PPP Law is entirely incompatible with a right of first refusal or *direito de preferência*, as understood under Mozambican law. The right to a bonus foreseen in the PPP Law is a different concept from the right of first refusal. The right of first refusal or "*direito de preferência*" as understood in the Portuguese speaking world relates to the right for a party to decide whether or not to pursue a particular transaction or to enter into a contract.<sup>1273</sup> By contrast, the bonus system contemplated by Article 13(5) of the PPP Law does not contemplate any right to enter into the contract<sup>1274</sup> and is incompatible with the specific circumstances of this case, including the Parties' conduct.<sup>1275</sup>

1010 Mr Baxter confirms this conclusion from an industry perspective:

*"In my opinion, if Mozambique had intended to procure PEL's USP through a competitive tender process, to be consistent with international practices, it would have been necessary to communicate this to PEL from the very beginning of the Project and to clearly articulate this option in the MOI. This would have allowed PEL to manage its risks associated with the Project, and to evaluate whether it wished to incur the time and costs associated with undertaking the pre-feasibility study.*

*In addition, it is also my view that the Government's subsequent approval of the PFS confirmed Mozambique's intent to proceed with the Project by a direct award of the concession to PEL, especially given that no other option was discussed at that time or included in the agreement. When the PFS was approved, the Government requested PEL to exercise its right of first refusal, thus confirming its intention to award the Project directly to PEL. It also instructed PEL to negotiate with the CFM to create a project company to implement the project. These requests by the Government could only make sense in the context of a sole source contract (i.e. direct award).*

*Similarly, PEL's conduct confirmed its expectation that the project concession would be awarded directly to it, following the MTC's acceptance of the PFS. In particular, after confirming on June 18, 2012 that it wished to proceed to implement the Project by exercising its right of first refusal, PEL further confirmed that it would proceed to incorporate a project company with CFM in order to do so, and sought authorisation to form an SPV in relation to the Project. The fact that both Parties envisaged direct negotiations with the*

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<sup>1273</sup> SOD, para. 22.

<sup>1274</sup> SOD, para. 23.

<sup>1275</sup> SOD, para. 24.

*state-owned CFM, and the formation of a project company to implement the Project, is consistent with a direct award scenario, and equally, inconsistent with a competitive public tender option.*"<sup>1276</sup> (Emphasis added)

- 1011 Sixth, Respondent maintains that PEL did not comply with the condition precedent in the MOI in that the PFS did not satisfy the requirements for a concession.<sup>1277</sup>
- 1012 This is not supported by any reference to Mozambican law (or any law) but founded on generalities extracted from the MZBetar report and the testimony of Minister Zucula that he was not satisfied with the PFS. As already explained above, the PFS was approved by Mozambique and no issues were raised as to its adequacy. Further, and as Mr Baxter explains, "[t]he PFS represents a substantial body of work which went a long way towards defining the Project. In my expert opinion, the PFS would have served as a clear basis for the concession agreement."<sup>1278</sup>
- 1013 In any event, as explained by Professor Rui Medeiros, the MOI did not have to satisfy the requirements for a concession because the Parties *"never intended the MoI to be a legal act by which the ultimate concession was approved, but only the legal act by which the conditions were agreed so that, in the future, PEL might exercise a right of first refusal / direito de preferência, negotiate the concession, and subsequently enter into the concession contract"*.<sup>1279</sup> As he further adds, (i) *"the MoI embodies, in itself, the "conception" phase of the project, resulting from an unsolicited proposal, in which the underlying idea is immediately indicated in general terms - and even if this were not the case, the pre-feasibility study certainly "conceives" the characteristics of the project"*<sup>1280</sup> and (ii) *"the production of the feasibility studies considered in Article 11 of the PPP Regulations could be dispensed with under the aforementioned Article 9 (2) of the same regulatory statute"*<sup>1281</sup>. In the present case, through its 18 April 2013 letter<sup>1282</sup> Respondent made it clear that all the necessary feasibility and engineering studies carried out by PEL were

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<sup>1276</sup> CER-7, Expert Report of Mr David Baxter, paras. 140-142.

<sup>1277</sup> SOD, paras. 574-578.

<sup>1278</sup> CER-7, Expert Report of Mr David Baxter, para. 154.

<sup>1279</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 54.

<sup>1280</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 55.

<sup>1281</sup> *Id.*

<sup>1282</sup> Exhibit C-29, Letter dated 18 April 2013 from Minister Zucula of MTC to PEL.

sufficient to justify the direct award of the concession allowing the negotiation stage foreseen in Article 9 of the PPP Regulations to proceed.

1014 Seventh, Respondent contends that the doctrine of estoppel,<sup>1283</sup> release and waiver,<sup>1284</sup> and accord satisfaction<sup>1285</sup> preclude PEL from seeking relief under the MOI, essentially because PEL did not formally appeal the tender process and did not pursue its claim under the forum selection clause in the MOI.

1015 These unconvincing and disordered arguments fail. As explained elsewhere in this pleading, this point is irrelevant under Mozambican law. Only the argument on estoppel contains a reference to international law and this too has been addressed elsewhere in PEL's submissions.

1016 Eighth, Respondent contends that all remaining obligations under the MOI were excused and/or released,<sup>1286</sup> and that Mozambique's actions were legally justified<sup>1287</sup> essentially by reason of: (i) the alleged illegality of PEL's failure to disclose the temporary debarment *vis-à-vis* the NHAI; (ii) the contention that it would be contrary to PPP law to grant a concession by direct award; (iii) PEL not formally filing an appeal against the tender process; and (iv) the PFS — which Mozambique approved — being allegedly unsatisfactory.

1017 These disjointed arguments are plainly circular in that they merely repeat Respondent's previous arguments but this time, without the support of any specific provision of Mozambican law. They accordingly fail.

1018 Ninth, Respondent contends that PEL repudiated and breached the MOI.<sup>1288</sup> The argument that PEL repudiated the MOI is put forward without any reference to Mozambican law (or any other law) and accordingly fails.

1019 As for the argument that PEL breached the MOI, there is no explanation in law as to why and how such breaches would exonerate Mozambique from complying with its own obligations. This alone is fatal to Respondent's argument.

1020 In any case, the alleged breaches are themselves improbable. Mozambique argues that PEL breached the confidentiality clause of the MOI, which as

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<sup>1283</sup> SOD, paras. 578-587.

<sup>1284</sup> SOD, paras. 588-589.

<sup>1285</sup> SOD, paras. 590-592.

<sup>1286</sup> SOD, paras. 593-594.

<sup>1287</sup> SOD, paras. 595-596.

<sup>1288</sup> SOD, paras. 600-601.

explained at Section IV.M above, is not only incorrect but makes little sense where the clause was for PEL's benefit.

1021 The remainder of the alleged breaches are a rehashing of Respondent's arguments regarding PEL's alleged failure to disclose the temporary debarment *vis-à-vis* the NHAI in India, alleged breaches of Mozambican law<sup>1289</sup> and of the forum selection clause, which have been addressed elsewhere.

1022 Tenth, Respondent puts forward what it calls "*additional defences*" in the form of an allegation that the approval of the PFS breached Mozambican law because it did not define the basic terms of a concession<sup>1290</sup> and that PEL's participation in the tender was induced by fraud and conflict of interest.<sup>1291</sup>

1023 Again, Respondent has not even troubled itself with articulating how the purported "*defences*" excuse its breaches of the MOI, under Mozambican law (or any law). This alone is dispositive of these arguments.

1024 In any event, and as explained above, the alleged facts underlying Respondent's argument are wholly unsubstantiated. Mozambique was satisfied with the PFS.<sup>1292</sup> The allegations of fraud based on the NHAI temporary debarment are baseless and there was no conflict of interest when PEL participated in the tender process.

1025 Eleventh, Respondent argues that PEL's claims are time-barred by virtue of Mozambican law.<sup>1293</sup>

1026 Mozambique has not even particularised its argument regarding the time bar applying to PEL's claim. It has merely quoted three statute of limitation provisions without further comment. None of these provisions apply in the present case:

- (a) Article 104 of Law No. 9/2001 refers to situations where a preliminary rejection of an administrative complaint has occurred with no judicial appeal having been filed to challenge the said rejection, and where it is foreseeable that the filing of a claim may cause damages to third

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<sup>1289</sup> Respondent adds the argument that PEL breached Law 6/2004, which is an attempt to revive its bribery allegation against PEL.

<sup>1290</sup> SOD, paras. 603-604.

<sup>1291</sup> SOD, paras. 605-606.

<sup>1292</sup> **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

<sup>1293</sup> SOD, paras. 607-610.

parties.<sup>1294</sup> In this case, the right to bring an action will elapse within one year as from the date of the decision being served to the interested party. It is not applicable in the present case. The general rule that would apply to PEL's claims under Mozambican law would be that contained in Article 99, which states that "*Except for what is set forth in Article 104 and what may be set forth in special legislation, a claim may be brought at any time*". This rule applies to claims being brought to discuss the performance of administrative contracts, State liability and the recognition of rights or legitimate interests, as per Article 98.

- (b) The statute of limitation contemplated by Article 317 of the Mozambican Civil Code<sup>1295</sup> (known as presumptive prescription) only applies to three specific types of claims/credits. The first relates to claims arising out of the provision of housing/shelter services to students and education, assistance and treatment services. The second applies to claims related to the sale of objects and the provision of work by those exercising an industrial profession. The third applies to claims related to services provided in the context of self-employed professions. It is not applicable in the present case.
- (c) Articles 227(2) and 498(1) of the Mozambican Civil Code<sup>1296</sup> deal with the statute of limitations applicable to pre-contractual liability. It is not applicable in the present case.

1027 The general statute of limitations applicable to contractual claims is 20 years, as per Article 309 of the Mozambique Civil Code.

1028 In sum, most of the mix of arguments put forward by Respondent are far-fetched and irrelevant.

1029 By contrast, the most relevant passage of Respondent's submissions, which addresses Mozambique's breaches of the MOI, is tellingly terse. In a mere three paragraphs, Respondent contends that it has not breached the MOI because Mozambique followed domestic law and PEL violated domestic law.<sup>1297</sup> Mozambique has failed to prove either of these two contentions.

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<sup>1294</sup> **CLA-276**, Law No. 9/2001, of 7 July 2001.

<sup>1295</sup> **RLA-11**, Mozambique Civil Code Article 317 and **RLA-132**, Mozambique Civil Code (1966).

<sup>1296</sup> **RLA-12**, Mozambique Civil Code Article 227; **RLA-13** Mozambique Civil Code Article 498; and **RLA-132**, Mozambique Civil Code (1966).

<sup>1297</sup> SOD, paras. 597-599.



1030 In light of the foregoing, it is clear that Mozambique breached its obligations under the MOI, and thereby the Umbrella Clause.

## VIII. PEL IS ENTITLED TO FULL REPARATION FOR THE DAMAGES CAUSED TO IT BY MOZAMBIQUE

1031 The quantification of PEL's loss is set out in the first and second expert quantum reports prepared by Versant Partners, dated 30 October 2020<sup>1298</sup> and 9 August 2021,<sup>1299</sup> respectively. The legal basis for PEL's case on quantum is set out in SOC<sup>1300</sup> and is elaborated upon further in this section. Consistent with its claim in the SOC, PEL's principal claim in these proceedings is for damages according to an *ex post* DCF valuation.

1032 Following the disclosure of the Bankable Feasibility Study prepared by the TML Consortium in September 2015 and updated in July 2017 (the "**TML Feasibility Study**"), Versant has prepared an updated quantum analysis. This analysis relies on the detailed financial evaluation contained in the TML Feasibility Study, and adopts its specific inputs to provide a more accurate *ex post* DCF valuation. Those inputs are a reliable source of information given that they are based on a detailed bankable feasibility study that is specific to the Project. Contrary to Respondent's misguided and unsupported assertions to the contrary, the TML Feasibility Study provides an accurate proxy for the concession that PEL would have carried out but-for Mozambique's breaches of its international obligations.

1033 On the basis of that updated valuation, PEL's claim in damages is **USD 156 million**.

1034 While Respondent's quantum expert Dr Flores has criticised the lack of an *ex ante* valuation prepared by PEL,<sup>1301</sup> the dearth of contemporaneous information and documentation, which could have facilitated a more accurate assessment of PEL's damages on an *ex ante* basis, has made that task more challenging.<sup>1302</sup> Nevertheless, and without prejudice to PEL's primary case, PEL has prepared an *ex ante* valuation, which once more demonstrates PEL's entitlement to a substantial award in damages. That *ex ante* valuation is based on the present value of the cash flows that PEL would have generated had it been awarded the concession, which is quantified using the DCF method,

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<sup>1298</sup> CER-2, Versant Expert Report.

<sup>1299</sup> CER-5, Second Versant Expert Report.

<sup>1300</sup> SOC, paras. 424 to 442.

<sup>1301</sup> RER-4, Quadrant Economics Expert Report. Although it is notable that Dr Flores also alleges that any *ex ante* valuation that is based on information other than PEL's May 2012 cash flow projection would be unreliable and speculative, paras. 28-33.

<sup>1302</sup> CER-2, Versant Expert Report, paras. 119-123.

which gives an equity value of respectively USD 49.3 million which, accounting for pre-award interest, would entitle PEL to damages in the amount of **USD 78.2 million**. To provide a reasonable comparator for this calculation, Versant have assessed the present value of the Project's concept, based on the concession premium agreed between the TML Consortium and the MTC, at USD 45.9 million.

1035 As Versant explain in their second report,<sup>1303</sup> they have been able to prepare this *ex ante* valuation at this stage having reassessed the information available to them, including information about TML's bid (which was known as at 26 July 2013), and by making reasoned assumptions about information which could have been obtained by a reasonable hypothetical buyer at the time of Mozambique's breach. That *ex ante* valuation was not prepared in their first report, as they anticipated disclosure of further documents during the document production phase of proceedings that would assist that calculation. As explained elsewhere in this Statement of Reply, those documents were not forthcoming from Mozambique, despite its legal obligation to retain the relevant information requested. Therefore, any difficulty in preparing a comprehensive *ex ante* valuation is a consequence of Mozambique's failure to disclose relevant documentation that would assist in that task, and the Tribunal is invited to take into account that prejudice to PEL as its starting point.

1036 PEL advances a further alternative claim that takes into account PEL's lost chance to negotiate the direct award with the MTC and deliver the Project pursuant to its rights under the MOI. In its alternative claim for profits assessed on a loss of a chance basis, PEL assesses conservatively a 90% loss of chance in obtaining the profits projected in Versant's quantum analysis. By that probability, PEL would be entitled to damages in the amount of **USD 140.4 million** on the basis of the *ex post* DCF valuation, or USD 44.4 million on the basis of the *ex ante* DCF valuation which, adjusted to account for pre-award interest, amounts to **USD 70.4 million**. Alternatively, based on the present value of the Project's concept, PEL would be entitled to USD 41.3 million on a 90% loss of chance basis, which accounting for pre-award interest, should be adjusted to **USD 65.4 million**.

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<sup>1303</sup> CER-5, Second Versant Expert Report, paras. 196-202.

1037 Finally, PEL addresses the varied, but ultimately unavailing, criticisms directed at its approach to quantifying its damages entitlement. As the Tribunal will have noted, many of these alleged criticisms of PEL's quantum analysis are in fact a rehash of Mozambique's spurious and evidentially unsupported claims, including repeated and *unfounded* fraud allegations, as well as incorrect submissions as to the illegality of direct awards under Mozambican law. These repackaged arguments are extensively addressed and rebutted elsewhere in this Statement of Reply, and are rebuffed in the relevant sub-sections below. Suffice it to say that these red herring submissions lack any substance and should be easily dismissed.

1038 A partial approach to assessing PEL's quantum entitlement has also infiltrated the expert report prepared by Dr Flores. Other than the specific criticisms he raises in respect of Versant's quantum calculations, which are readily and comprehensively rebutted in Versant's second report,<sup>1304</sup> several of Dr Flores' opinions see him stray far beyond his remit as a quantum expert, accepting factual and legal premises presented to him by Mozambique that are issues in dispute in these proceedings. In adopting that approach, his evidence is necessarily partial and the Tribunal should be cautious as to its reliability. PEL's criticisms of Dr Flores' approach are explained in further detail below.

1039 Accordingly, this section of the Statement of Reply is organized according to the following sub-sections:

- (a) First, PEL reiterates its claim for damages on the basis of *ex post* DCF valuation and sets out the basis for Versant's updated quantification of damages.
- (b) Second, PEL sets out its *ex ante* DCF valuation, which also shows PEL's entitlement to recover a significant award in damages.
- (c) Third, PEL sets out an alternative claim for damages based on its loss of a chance to conclude the concession agreement and to carry out the Project, pursuant to its rights in the MOI.

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<sup>1304</sup>

CER-5, Second Versant Expert Report: see variously in sections III, IV, V and VI.

(d) Fourth, PEL addresses the misguided criticisms levelled at it by Respondent and Dr Flores in respect of PEL's approach to assessing its entitlement to damages.

1040 PEL makes three preliminary observations before setting out its claims for damages and responding to Respondent's arguments that PEL is not entitled to recover anything beyond its sunk costs.<sup>1305</sup>

1041 First, it appears Respondent (reluctantly<sup>1306</sup>) accepts that any damages awarded by the Tribunal must "*as far as possible, wipe out the consequences of the illegal act and re-establish the situation which would in all probability, have existed if that act had not been committed*".<sup>1307</sup> This is the well-known statement from *Chorzów Factory* that Respondent appears to accept is a "*general statement of international law*".<sup>1308</sup>

1042 Second, and consistent with the flexibility of that well-established general principle in *Chorzów Factory*, there is no uniform approach that the Tribunal **must** adopt when establishing the correct approach to valuing PEL's investment. In that spirit, the tribunal in *Crystalex v. Venezuela* determined that tribunals may apply different valuation methods and technics depending on the circumstances of each particular case:

*"Tribunals may consider any techniques or methods of valuation that are generally acceptable in the financial community, and whether a particular method is appropriate to utilize is based on the circumstances of each individual case. A tribunal will thus select the appropriate method basing its decision on the circumstances of each case, mainly because a value is less an actual fact than the expression of an opinion based on the set of facts before the expert, the appraiser or the tribunal."*<sup>1309</sup>

1043 That principle of flexibility in adjudging an appropriate method of valuation is significant in this case. It provides a firm foundation upon which PEL's primary case on quantum, an *ex post* DCF valuation, fully articulated by Versant in their two reports, is a suitable and appropriate basis upon which to quantify the significant loss PEL has suffered as a consequence of

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<sup>1305</sup> SOD, paras. 928-934.

<sup>1306</sup> Respondent's wavering commitment to this firmly-established principle in its SOD at para. 821 is noted: "*While MTC does not disagree with Chorzów Factory and the principle of "full reparation" as a general statement of international law...*" (Emphasis added)

<sup>1307</sup> **CLA-10**, *Factory at Chorzów*, Judgment No. 13, 13 September 1928, Series A, No. 17

<sup>1308</sup> SOD, para. 821.

<sup>1309</sup> **CLA-105**, *Crystalex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 886.

Mozambique's wrongful acts. This principle also provides a firm basis for PEL's alternative quantum analyses, which advance two damages calculations based on (i) an *ex ante* DCF analysis, and (ii) PEL's loss of a chance to negotiate for the concession and subsequently to execute and deliver the Project.

1044 Third, the ILC Articles support the adoption of valuation methodologies which properly account for *all* the damage suffered by a claimant, recognising that the principle of full reparation requires compensation of "*any financially assessable damage including loss of profits insofar as it is established*".<sup>1310</sup> The ILC Articles, together with the established principle in *Chorzów Factory* (that damages should "*wipe out the consequences of the illegal act*"), should steer the Tribunal away from accepting Mozambique's Costs Approach to valuation, which seeks to limit PEL's recovery to its sunk costs. That approach is wrong. It does not accord with the principle of full reparation, nor the approach in *Chorzów Factory*, which even Respondent begrudgingly acknowledges to be a "*general statement of international law*".<sup>1311</sup>

A. *PEL Is Entitled to Damages in the Amount of USD 156 Million According to Versant's Updated Ex Post DCF Calculation*

1045 As set out in the SOC<sup>1312</sup> and Versant's first report,<sup>1313</sup> PEL's primary quantum claim is predicated on an *ex post* DCF valuation. That calculation establishes a conservative basis for PEL's lost profits following Respondent's unlawful conduct.

1046 With the benefit of the TML Feasibility Study, Versant have been able to prepare an updated *ex post* DCF valuation, which takes into account more accurate inputs based on the actual terms of TML's concession. Contrary to Respondent's flawed assertions to the contrary, it is reasonable to assume that but for Mozambique's breach, PEL would have advanced the concession on essentially the same terms as those contained in the TML Feasibility Study. Accordingly, and as articulated fully by Versant in their second report,<sup>1314</sup>

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<sup>1310</sup> CLA-177, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in Yearbook of the International Law Commission 2001 (Vol. II, Part Two). (Emphasis added)

<sup>1311</sup> SOD, para. 821.

<sup>1312</sup> SOC, paras. 443-479.

<sup>1313</sup> CER-2, Versant Expert Report, Section VI.

<sup>1314</sup> CER-5, Second Versant Expert Report, Section V.

PEL's primary case on quantum is for compensation in the amount of **USD 156 million** on the basis of an *ex post* DCF valuation.

1047 As PEL explained in its SOC,<sup>1315</sup> the principle of "*full reparation*" requires the assessment of three heads of damage (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) compensation for incidental expenses.<sup>1316</sup>

1048 The following sub-sections address the first two of these inputs, both of which are in issue in these proceedings.

1. Compensation for Capital Value Is Judged According to the Fair Market Value

1049 In relation to capital value, the fair market value ("**FMV**") of the investment should be ascertained, which is best defined as "*the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.*"<sup>1317</sup> The FMV is a commonly accepted standard for capital valuation across different treaty breaches, including breaches of the FET standard and umbrella clauses.<sup>1318</sup>

1050 Respondent does not deny the application of the FMV standard although, it rejects that a willing buyer would have paid more than a "*nominal*" amount for PEL's rights in the MOI. That assertion is founded on Respondent's mischaracterisation of Mozambican law and should be readily dismissed by the Tribunal.

2. Compensation for Loss of Profits Is Best Assessed on the Income-Based Approach According to a DCF model

1051 The Parties dispute the proper approach to adopt when assessing the compensation due to PEL for its loss of profits on the Project. For its part,

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<sup>1315</sup> SOC, para. 429.

<sup>1316</sup> **CLA-177**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in Yearbook of the International Law Commission 2001 (Vol. II, Part Two), Article 36, Comment 21.

<sup>1317</sup> **Exhibit C-134**, American Society of Appraisers, Business Valuation Standards, 2008, p. 27; **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, at 183-85.

<sup>1318</sup> **CLA-75**, S. Ripinsky and K Williams, *Damages in International Investment*, (BIICL 2008) (excerpt), 92; **CLA-167**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, 14 July 2006, para. 424.

Mozambique and its expert, Dr Flores, contend that a cost approach should apply at best, the effect of which would cap PEL's recovery to the maximum amount of its sunk costs in its participation in the Project.<sup>1319</sup>

1052 Versant explain the fallacy of the cost approach in their second report:

*"we did not consider the Cost Approach to be appropriate in the context of a damages analysis because it puts Claimant in a position as if the investment had never occurred, which is different from putting Claimant in the position as if the breaches had not occurred (the latter approach being properly aligned with the principle of full reparation that applies in international investment law)."*<sup>1320</sup>

1053 By contrast, the income approach, which determines the future cash flows of a project to determine that project's profitability, is a suitable measure of lost profits, particularly in circumstances where PEL has been deprived of its right to realise the Project, and where the Costs Approach does not take into considerations of lost future profits at all.

1054 Within the income approach, a DCF valuation is the most appropriate model for the facts in the present case. As Versant explain in their second report:<sup>1321</sup>

*"The DCF method (i.e., the Income Approach) is the valuation method that is almost universally applied by real-world investors and project owners to value assets or projects that are expected to generate income, particularly projects associated with a concession (such as the Project). This is because the DCF method enables the valuation practitioner to model the specific/unique economics of the project/concession."*

1055 One important feature of Versant's approach is that a DCF analysis was also used to assess the economic projections of the Project in the TML Feasibility Study. That study is relied upon by Versant to examine key technical and economic parameters, the inputs for which have been included in Versant's own DCF model. The TML Feasibility Study also includes a detailed techno-economic evaluation of the Project which has been updated by Versant to assess PEL's damages as of a current valuation date.

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<sup>1319</sup> SOD, paras. 928-934; **RER-4**, Quadrant Economics Expert Report, Section III.

<sup>1320</sup> **CER-5**, Second Versant Expert Report, para. 47. Similarly, as explained in their first report (**CER-2**, Versant Expert Report, paras. 140-141), Versant discounted the potential application of a market approach to valuation, given the value of the concession is directly influenced by its specific terms, which would in all likelihood differ substantially from the terms under which publicly traded companies build and/or operate ports and railway.

<sup>1321</sup> **CER-5**, Second Versant Expert Report, para. 15(d).



1056 Despite the ubiquity of the DCF methodology in investment arbitrations, Respondent has criticised its deployment in these proceedings. Those criticisms are addressed and rebuffed separately below.

3. An Ex Post Valuation Is the Most Suitable Valuation Date for the Purposes of Accurately Quantifying PEL's Damages Entitlement

1057 Respondent's contention that a "*standard damages analysis... requires a damages calculation as at the date of the alleged expropriation*"<sup>1322</sup> betrays a misunderstanding of investment law jurisprudence. As the tribunal in *Crystallex* found, "*whether a particular method is appropriate to utilize is based on the circumstances of each individual case*".<sup>1323</sup>

1058 Therefore, as a matter of valuation theory and international investment law, it is simply not correct that the valuation date must be tied to the date of breach; that is overly-simplistic and incorrect. As one of the leading texts on compensation in international arbitration makes plain, it is appropriate to consider developments subsequent to the unlawful act to achieve full reparation:

*"The choice of the valuation date represents one of the most significant distinctions between the subjective–concrete and the objective–abstract valuation approach. While compensation for expropriation has to reflect the objective value at the time of expropriation, **the concrete valuation inherent in the principle of full reparation requires also considering developments after the unlawful act.** This is necessary in order to come as closely as possible to restitutio in integrum. The valuation date, therefore, should in principle be the date of the award in cases of state responsibility and in cases of breaches of international investment contracts."*<sup>1324</sup> (Emphasis added)

1059 This is self-evident from the established practice of tribunals selecting the date of the award as the valuation date, so as to ensure the true value of the claimant's loss has been properly accounted for in accordance with the principle of full reparation.<sup>1325</sup> In so doing these tribunals demonstrate that the

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<sup>1322</sup> SOD, para. 888.

<sup>1323</sup> **CLA-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 886.

<sup>1324</sup> **CLA-287**, I. Marboe, *Calculation and Compensation of Damages in International Arbitration* (2017, 2nd ed.), Second edition, 2017, at 3-342.

<sup>1325</sup> **CLA-287**, I. Marboe, *Calculation and Compensation of Damages in International Arbitration* (2017, 2nd ed.), at 3-323 *et seq.* See, e.g., **CLA-298**, *Amco Asia v. Indonesia*, Award of 5 June 1990 (Amco II) (1993) 1 ICSID Reports 569, para. 186; **CLA-162**, *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986.

date of valuation is not invariably linked to, and must not necessarily coincide with, the date of breach.

1060 As Versant explain in their second report,<sup>1326</sup> the circumstances of the case and the information available to the Parties indicate that an *ex post* valuation, rather than an *ex ante* valuation, provides the most accurate basis for assessing PEL's damages, and it does so for the following reasons:

- (a) The key terms of PEL's proposed concession were unknown as at the date of breach, which was 26 July 2013. Those terms are crucial to informing an accurate valuation of PEL's anticipated lost profits on the Project.
- (b) The information available to implement the *ex-post* approach (which is premised on a current valuation date) is more specific, and therefore more reliable, than the comparable information available for an *ex-ante* approach (where the valuation date is the date of breach).
- (c) The TML Feasibility Study provides directly relevant inputs for the purposes of preparing an *ex post* DCF model for the same Project that PEL would have developed.

4. Versant's Adjusted DCF Valuation Shows that PEL Is Entitled to USD 156.0 million as Full Reparation for Mozambique's Unlawful Conduct

1061 As explained above, Versant's DCF valuation has been adjusted with the benefit of additional material not available at the time of preparing their first report, notably the TML Feasibility Study.<sup>1327</sup> That study has allowed Versant to prepare a more accurate projection of PEL's future profits, based on the reasonable assumptions that PEL would have been awarded a concession on terms no less favourable than those awarded to TML. That assessment is supported by the fact that PEL was the entity most familiar with the Project, having conducted the PFS at its own expense. It is also supported by the independent evidence of Mr Raffinetti, who confirms that PEL was well-placed to deliver the Project:

<sup>1326</sup>  
<sup>1327</sup>

CER-5, Second Versant Expert Report, para. 15 and Section V *passim*.  
Exhibit R-42, Update of the TML 2015 Feasibility Study for the Moatize-Macuse Railway and Port Project, July 2017, p. 5.

*"I can state that, as a matter of course, Grindrod, as a company listed on the Johannesburg Stock Exchange with strict corporate governance requirements and a strong regard for its reputation, did not enter into commercial agreements such as the MOU and Side Letter lightly and would only have done so if it was comfortable with PEL and SPI as partners, their ability to successfully implement the Project, the belief in the Project being commercially and economically sound, and with the PGS Consortium having a good prospect of success."*<sup>1328</sup>

1062 Versant makes certain minor adjustments to the assumptions applicable to its *ex post* DCF model, compared with the prior model<sup>1329</sup> submitted with PEL's SOC as set out in Versant's first report:<sup>1330</sup>

- (a) The construction start date has been pushed back to early 2022 to accommodate delays that have beset the actual Project.
- (b) The construction period has been extended from 3.5 to 4.5 years.
- (c) To account for changes in the progression of the actual Project, Free Cash Flow to Equity ("**FCFE**") is now assessed over the pre-construction period (prior to 2022), the 4.5-year construction period (2022-2026), and the operational period (2026-2051).<sup>1331</sup>

1063 Consistent with its prior analysis, Versant relies on FCFE as the cash flow measure to assess the value of PEL's ownership interest in the Project. FCFE measures the amount of cash flow available for distribution to equity shareholders after all costs of running the business are accounted for, and debt obligations are paid.<sup>1332</sup>

1064 In its SOC, PEL set out the key inputs and parameters that went into Versant's *ex post* DCF calculation.<sup>1333</sup> Based on the updated information provided, particularly in the TML Feasibility Study, the following inputs and parameters have been amended to account for a more accurate valuation:

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<sup>1328</sup> **CWS-5**, Witness Statement of Mr Marco Raffinetti, para. 24.

<sup>1329</sup> **CER-2**, Versant Expert Report, Section VI.

<sup>1330</sup> **CER-5**, Second Versant Expert Report, Section V.

<sup>1331</sup> This is compared with **CER-2** Versant Expert Report, which assessed FCFE over a pre-construction period (prior to 2019), the four-year construction period (2019-2022), and the operational period (2023-2048): **CER-2**, Versant Expert Report, para. 149.

<sup>1332</sup> **CER-5**, Second Versant Expert Report, paras. 108-109.

<sup>1333</sup> SOC, paras. 458-475.

- (a) **Revenue (during the operational period) – throughput:**<sup>1334</sup> Versant have updated throughput assumptions based on specific projections in the TML Feasibility Study. A 15 Mtpa throughput is anticipated in the first year of production, increasing to 30 Mtpa by the fifth year.<sup>1335</sup> Despite the TML Feasibility Study applying a throughput of 33 Mtpa starting in the sixth year of production, Versant's *ex post* DCF model assumes a more conservative, lower throughput of 30 Mtpa. Versant forecast thermal and coking coal on an 80:20 ratio, as is assumed in the TML Feasibility Study,<sup>1336</sup> and also apply the TML Feasibility Study's estimates of capacity reservation fees.<sup>1337</sup>
- (b) **Revenue (during the operational period) - tariffs:**<sup>1338</sup> Based on updated parameters in the TML Feasibility Study, Versant has updated its tariff inputs, adopting a split coal transportation tariff, which applies separate tariffs for thermal and coking coal, and which is inclusive of both rail and port fees. This assumes thermal and coking coal tariffs of USD 25 per tonne and USD 35 per tonne, respectively, as of 2018, increasing by 2% each year to account for inflation.<sup>1339</sup>
- (c) **Operating and maintenance costs:**<sup>1340</sup> Versant have adjusted the operating and maintenance costs to account for the specific and detailed parameters set out in the TML Feasibility Study. That study provides a breakdown of fixed and variable operating and maintenance costs for the Project. These estimates have been adopted by Versant because they reflect the most relevant and accurate data points for the Project. The TML Feasibility Study results in an average EBITDA margin for the Project of 71%, which is higher than Versant's first calculation of 47%, which attests to the conservative nature of Versant's analysis in its first report. Nevertheless, Versant considers an increase of 20-40% in variable and fixed costs to account for any higher than expected costs, thereby reducing the EBITDA margin to 61-66%, a level closer

<sup>1334</sup> CER-5, Second Versant Expert Report, paras. 110-118.

<sup>1335</sup> Exhibit R-42, TML, Update to the 2015 Feasibility Study for the Moatize-Macuse Railway and Port Project, July 2017.

<sup>1336</sup> Exhibit R-42, TML, Feasibility Study for the Moatize-Macuse Railway and Port Project, September 2015, p. 215.

<sup>1337</sup> Exhibit R-42, TML, Update to the 2015 Feasibility Study for the Moatize-Macuse Railway and Port Project, July 2017, p. 13-15.

<sup>1338</sup> CER-5, Second Versant Expert Report, paras. 119-124.

<sup>1339</sup> Exhibit R-42, TML, Update to the 2015 Feasibility Study for the Moatize-Macuse Railway and Port Project, July 2017, p. 5.

<sup>1340</sup> CER-5, Second Versant Expert Report, paras. 125-129.

to Versant’s benchmarking analysis. Versant has applied a 30% increase to costs, the mid-point of the above range, which provides a further conservative safeguard against cash flow uncertainties.

- (d) **Fees and royalties:**<sup>1341</sup> Versant applies the specific estimates of the applicable government fees and royalties contained in the TML Feasibility Study, which appear to have been revised from TML’s bid. The TML Feasibility Study includes a concession premium of 2-5% of rail revenues, a CSR Reserve of 0.5% of rail revenues, and PPP Law recovery payments of USD 152 million in the tenth operational year. Each of these assumptions has been adopted in Versant’s updated DCF valuation.
- (e) **Depreciation and amortization:**<sup>1342</sup> Versant adopted the TML Feasibility Study’s depreciation calculation, which depreciates the assets over the operating period of the Concession, and assumes no replacement of those assets over the life of the concession.
- (f) **Taxes:**<sup>1343</sup> Without the benefit of the TML Feasibility Study in their first report, Versant relied on the prevailing Mozambican income tax rate of 32% for pre-tax income with adjustments for (i) carry-forward losses for a period of five consecutive years, and (ii) an investment tax credit applied to capital expenditures of 20% of the Project’s investment amount. However, to mirror the analysis in the TML Feasibility Study, which applies a reduced corporate income tax rate over the life of the Project, Versant has adopted the applicable tax rates as set out in the figure below.

Operational Years	Tax Rate
1 - 5	6.40%
6 - 10	12.80%
11 - 15	24.00%
16+	32.00%

- (g) **Capital expenditure:**<sup>1344</sup> Versant has amended its capital expenditure projections based on the detailed capital expenditure figures prepared

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<sup>1341</sup> CER-5, Second Versant Expert Report, paras. 130-132.  
<sup>1342</sup> CER-5, Second Versant Expert Report, paras. 133-134.  
<sup>1343</sup> CER-5, Second Versant Expert Report, paras. 135-137.  
<sup>1344</sup> CER-5, Second Versant Expert Report, paras. 138-148.

in the TML Feasibility Study, given that these figures were determined on the basis of a detailed bankable feasibility study, which PEL would also have undertaken but for Mozambique's breach, and using the same, if not very similar, parameters, given that they relate to the same concession. Versant has therefore adopted the capital expenditure assumptions in the TML Feasibility Study subject to three necessary and reasonable adjustments:

- (i) Versant has assumed that construction for the Project would commence on 1 January 2022.
  - (ii) Versant has extended the planned construction period from 3.5 years to 4.5 years to take into account potential risks from construction delays.
  - (iii) Versant has adjusted the TML Feasibility Study capital cost estimates, which are calculated in 2018 USD to account for cost inflation, which results in an 8% cost increase between 2018 and 2021. This increases the total upfront capital expenditure to USD 3,208 million as of 2022.
- (h) **Net working capital:**<sup>1345</sup> Versant has adopted the net working capital projection from the TML Feasibility Study, based on an estimate of the Project's current assets and liabilities, which allow for an estimation of the changes in net working capital.
- (i) **Debt financing:**<sup>1346</sup> Versant has adjusted its debt financing projection to accord with the position in the TML Feasibility Study. This assumes a lower proportion of debt financing at 70% of the Project's capital expenditures, a higher interest rate at 8%, and a shorter repayment period of 10 years after the end of construction.
- (j) **Discount rate:**<sup>1347</sup> As set out in their second report, Versant have made minor alterations to their discount rate calculations to take into account the views expressed by Dr Flores, and with the intention of narrowing unnecessary areas of dispute between the parties. Based on the risk-free

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<sup>1345</sup> CER-5, Second Versant Expert Report, paras. 149-150.

<sup>1346</sup> CER-5, Second Versant Expert Report, paras. 151-153.

<sup>1347</sup> CER-5, Second Versant Expert Report, paras. 156-183.

rate, beta, ERP, CRP, and an additional premium, Versant has calculated a levered cost of equity of 18.08% and an unlevered cost of equity of 10.32% as of 1 July 2021, as follows:<sup>1348</sup>

Calc.	Component	Levered (70%)	Unlevered
[A]	Risk Free Rate	2.01%	2.01%
[B]	Unlevered Beta	0.523	0.523
[C]	D/E Ratio	233%	0%
[D]	Tax Rate	6.4%	32.0%
[E] = B*(1+(1-D)*C)	Re-levered Beta	1.664	0.523
[F]	Equity Risk Premium	5.04%	5.04%
<b>[G] = E*F</b>	<b>Adjusted ERP</b>	<b>8.39%</b>	<b>2.63%</b>
[H]	Country Risk Premium	5.68%	5.68%
[I]	Pre-Operational Premium	2.00%	0.00%
<b>[J] = A+G+H+I</b>	<b>Cost of Equity</b>	<b>18.08%</b>	<b>10.32%</b>

1065 Taking into account the above, Versant has calculated the equity value of the Project at USD 448.4 million, which is higher than Versant’s projection in their first report, but well supported by the directly relevant inputs taken from the TML Feasibility Study.

1066 Assuming that PEL would have had retained a 47.22% ownership interest in the Project, Versant estimate the share of the Project’s equity cash flows that would accrue to PEL (net of 7.5% withholding taxes, pursuant to the tax treaty between Mozambique and India<sup>1349</sup>). Based on PEL’s 47.22% ownership, PEL’s equity value would be **USD 156 million** as of 1 July 2021, based on an *ex post* DCF valuation.

1067 The criticisms raised by Mozambique and Dr Flores in respect of Versant’s use of a DCF model and the specific inputs which have been applied in that model are carefully and comprehensively rebutted by Versant in their second report,<sup>1350</sup> and are addressed in summary in Section VIII.B below.

<sup>1348</sup>

CER-5, Second Versant Expert Report, Table 12.

<sup>1349</sup>

Exhibit C-143, PwC, Worldwide Tax Summary 2018-2019, p. 1773.

<sup>1350</sup>

CER-5, Second Versant Expert Report, Sections IV and V *passim*.

- B. *An Ex Ante Analysis Still Shows that PEL Is Entitled to Recover Substantial Damages for Mozambique's Breaches of International Law*
1. PEL's ex ante analysis is robust despite Mozambique's various breaches of its document production obligations

1068 In their first report, Versant explained that:<sup>1351</sup>

*"our ex-ante valuation will be facilitated by Respondent's production of the Concession agreement that was executed with TML. In this regard, we are informed by Counsel that Respondent has refused to produce this document (and other related documents) despite repeated requests made by Claimant. If Respondent continues to resist production, we understand that Claimant intend to request production of these documents at the appropriate stage in this proceeding, since such information would facilitate the determination of a monetary amount that would make Claimant whole.*

*Accordingly, we have not undertaken an ex-ante valuation of the Project in this report, but we reserve the right to undertake such an ex-ante valuation in our second report, pending the production of the TML Concession agreement (and other relevant documents) by Respondent during the document production phase of this proceeding. In the event Respondent fails to produce these documents, we nonetheless reserve the right to undertake an ex-ante valuation of the Project using best available information in the public domain."*

1069 Ultimately, Mozambique failed to disclose documents either voluntarily or through the document production process. PEL also had previously made an access to information request to the MTC, requesting various documents that would have assisted an *ex ante* valuation, and that are required by Mozambican law to be publicly available upon request.<sup>1352</sup> In response, the MTC informed PEL that "[the] Ministry ... is preparing the information it deems necessary" and that "*in respect of everything that is already published in the Boletim da Republica, namely the terms of the contracts and its annexes, we suggest that this information is obtained from the sources already published*".<sup>1353</sup> In a subsequent letter the MTC simply reiterated that the only information that would be made available was information which had been published in the Official Journal of Mozambique.<sup>1354</sup> PEL's lawful requests for documents,

<sup>1351</sup> CER-2, Versant Expert Report, para. 122.

<sup>1352</sup> Exhibit C-336, Letter from Antonio Veloso of Pimenta e Associados to the MTC regarding access to information request, dated 23 September 2020.

<sup>1353</sup> Exhibit C-337, Letter from Antonio Manuel Mateus of the MTC to Pimenta e Associados regarding access to information request, dated 2 October 2020;

<sup>1354</sup> Exhibit C-338, Letter from Antonio Manuel Mateus of the MTC to Pimenta e Associados regarding access to information request, dated 14 October 2020.



which Mozambique was legally obliged to hold, was therefore denied without proper consideration or on any justifiable basis. In that context, Mozambique's failure to produce the relevant documents, and its unjustified denial of PEL's access to information request, has necessarily impeded Versant in its preparation of an *ex ante* analysis. That analysis would have benefited from consideration of the most relevant and detailed inputs available from contemporaneous sources, including documents related to the terms of the TML concession agreement, which defined the future scope of the Project.

1070 In those circumstances, the Tribunal is invited to treat Mozambique's criticisms of PEL's *ex ante* valuation with justified scepticism, given that Mozambique's refusal to produce those documents within its possession has necessarily stifled PEL's access to relevant information. Mozambique cannot withhold the information necessary to build an *ex ante* model and subsequently criticise PEL for not using the very information and inputs Mozambique is withholding.

1071 Despite this, and as explained in the following paragraphs, Versant has been able to prepare a robust *ex ante* valuation based on inputs and parameters that are based on publicly-available information that would have been reasonably available to a hypothetical and informed buyer of the concession on 26 July 2013 (being the date of breach).<sup>1355</sup> Versant was also able reasonably to rely on inputs specific to the TML Consortium's concession (such as the concession premium), and TML Consortium's bid.<sup>1356</sup>

1072 In his report, Dr Flores criticises PEL's failure to prepare an *ex ante* analysis when appraising PEL's calculation for damages, while maintaining that such an analysis would in most cases be too speculative.<sup>1357</sup> That criticism is centred on an insistence that an *ex ante* analysis should be based on the preliminary cash flow projection prepared by PEL in May 2012 after the submission of the PFS.<sup>1358</sup> That misplaced criticism is addressed separately below and is comprehensively rebuffed in the evidence of Mr Patel.<sup>1359</sup> In summary, however, PEL's preliminary financial projection from May 2012 is not a suitable basis to prepare an *ex-ante* value for the Project. As Mr Patel explains

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<sup>1355</sup> CER-5, Second Versant Expert Report, Section VI.

<sup>1356</sup> *Id.* at Section VI.

<sup>1357</sup> RER-4, Quadrant Economics Expert Report, Section VI A-B.

<sup>1358</sup> *Id.* at para. 34.

<sup>1359</sup> CWS-4, Second Statement of Mr Ashish Patel, Section D.

in his evidence,<sup>1360</sup> the primary purpose of PEL's cash flow projection was to evaluate the Project's capacity to repay its financing on the basis of a worst-case scenario; it was not intended to provide a DCF valuation (or other income-based assessment) of the Project.

1073 As evidence for this fact, PEL's cash flow projection includes inputs that are significantly more conservative than those stated in the PFS, or indeed in the TML feasibility study.<sup>1361</sup> Three such examples are set out below.

1074 A further, crucial, detail ignored by Dr Flores is that PEL's May 2012 cash flow projection was prepared before a concession agreement had come to fruition, so the actual terms of any concession were unknown. It would be presumptuous in those circumstances to conclude, as Dr Flores does, that PEL's financial evaluation showed that the Project was not financially viable. A detailed bankability study, much like the TML Feasibility Study (on which Versant reasonably rely in their report) would have included a thorough financial evaluation of the Project, including detailed costs and revenue estimates.<sup>1362</sup>

1075 While Dr Flores appears content for an *ex ante* valuation to be carried out *solely* on the basis of the May 2012 cash flow projection, he considers that an *ex ante* analysis is otherwise too speculative. While Versant consider the *ex post* valuation to be a more robust and reliable basis model for projecting PEL's future profits on the Project, they do not agree with Dr Flores that the only acceptable *ex ante* valuation is one which relies on the May 2012 cash flow projection. For example, it is possible to make reasonable assumptions for certain inputs based on information that could have been ascertained by a hypothetical, informed buyer as at the date of breach.<sup>1363</sup> While the lack of specific inputs related to the concession make the preparation of an *ex ante* analysis more challenging than an *ex post* analysis, Dr Flores is incorrect that an *ex ante* analysis would in all circumstances be too speculative.

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<sup>1360</sup> CWS-4, Second Statement of Mr Ashish Patel, para. 20.

<sup>1361</sup> CER-5, Second Versant Expert Report, para. 38.

<sup>1362</sup> *Id.* at para. 38.

<sup>1363</sup> *Id.* at para. 35.

2. PEL is entitled to compensation in the amount of or USD 78.2 million, inclusive of interest, on the basis of its ex ante DCF valuation

1076 As to that, without prejudice to PEL's principal claim that it is entitled to damages on the basis of an *ex post* DCF valuation, and keeping in mind PEL's justified criticisms of Mozambique's document disclosure failings, Versant has prepared an *ex ante* valuation based on information in the PFS, information in the public domain, information from TML's bid, and other reasonable assumptions that an informed buyer would have made at the time of Mozambique's breach on 26 July 2013. Versant has reasonably assumed that the Project had a positive value on an *ex ante* basis, in view of the interest that existed from multiple bidders, and TML's decision to implement the concession after its award.<sup>1364</sup>

1077 The inputs and assumptions made by Versant in modelling their *ex ante* valuation are comprehensively set out and rationalized in their second expert report.<sup>1365</sup> It follows from their analysis that PEL is entitled to USD 49.3 million applying an *ex ante* DCF valuation excluding interest.

1078 Versant has also prepared a second *ex ante* valuation to provide a reasonableness check on its primary *ex ante* valuation. This calculation reflects the present value of the Project's concept. That Project concept was brought by PEL to Mozambique, and was independently pursued by PEL, leading to completion of the PFS and approval of the PFS by Respondent. The valuation of PEL's Project concept is based on its fair market value, which is the price that a willing buyer and seller would agree to acquire the rights to develop and operate the Project (as represented by PEL's Project concept).

1079 There is a precise proxy for that fair market value in the concession premium offered by the TML Consortium and agreed by Respondent. This concession premium, of USD 5 million (payable upon signature of the contract) and a premium based on a percentage of gross revenues (2% of revenues for operating years 1-15, and 5% thereafter), is set out in the TML Feasibility Study,<sup>1366</sup> and it represents the Project concept's fair market value precisely because it was the actual price agreed between the TML Consortium and

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<sup>1364</sup> CER-5, Second Versant Expert Report, para. 36.

<sup>1365</sup> CER-5, Second Versant Expert Report, Section VI.

<sup>1366</sup> Exhibit R-42, TML, Update to the 2015 Feasibility Study for the Moatize-Macuse Railway and Port Project, July 2017

Mozambique. The agreed concession premium therefore represents an accurate and objective indicator of the *ex ante* value of the Concession. Accordingly, the Project concept, valued on the basis of the agreed concession premium, provides an *ex ante* valuation of USD 45.9 million. That amount is consistent with PEL's equity value based on the cash flows to PEL of USD 49.3 million,<sup>1367</sup> and demonstrates the reasonableness of PEL's primary *ex ante* valuation.

1080 In respect of the interest that should apply to that valuation, the Treaty provides that compensation for investors "*shall include interest at a fair and equitable rate until the date of payment*,"<sup>1368</sup> which is best understood as a reasonable commercial rate. Versant has applied US Prime plus a premium of 2% as a reasonable commercial rate,<sup>1369</sup> entitling PEL to interest in the amount of USD 29 million on its *ex ante* DCF valuation analysis, thereby entitling PEL to damages in the amount of **USD 78.2 million**. On the basis of the Project concept valuation, PEL would be entitled to **USD 72.7 million**, inclusive of interest.

C. *Alternatively, PEL Is Entitled to Damages on a Loss of a Chance Basis*

1081 In addition to PEL's *ex post* DCF valuation, PEL advances in the alternative a claim for damages based on its lost chance to make a profit on the Project, which would have followed the award of the concession by the MTC.

1082 The understanding between the parties, as reflected in the MOI expressly, was that PEL would carry out the PFS at its own cost, and that the PFS would define "*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*".<sup>1370</sup>

1083 Respondent's characterisation that there "*were substantial negotiations yet to be undertaken between PEL and MTC before any concession could have been awarded*"<sup>1371</sup> is incorrect and belies the evidential record and the commercial reality reflected in the MOI. As expressly set out in the MOI, it was anticipated

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<sup>1367</sup> CER-5, Second Versant Expert Report, para. 202.

<sup>1368</sup> CLA-1, Agreement Between the Government of the Republic of Mozambique and the Republic of India, 19 February 2009, Article 5.

<sup>1369</sup> CER-5, Second Versant Expert Report, para. 215.

<sup>1370</sup> Exhibit C-5A, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 1(1); Exhibit R-2, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 1(1).

<sup>1371</sup> SOD, para. 827.

that concession terms *would* be agreed between the MTC and PEL following approval of the PFS. While the precise terms of the concession agreement were not certain, the fact that there would be a concession agreement between PEL and the MTC clearly was certain, and the MOI expressly states that the content of the PFS would form the basis of that concession.<sup>1372</sup>

1084 To that end, it is evident from the terms of the MOI itself that the purpose of future negotiations between PEL and the MTC was to finalise details of the concession and *not* to decide whether PEL should receive the right to develop the concession at all. That much is clear from clause 2 of the MOI which provides that "*once the terms under Clause 7 of this memorandum are approved, the Govt. of Mozambique shall issue a concession of the project in favour of PEL*".<sup>1373</sup> The unambiguous nature of PEL's rights is also reflected in clause 2, paragraph 2, which provides that "[a]fter 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...*".<sup>1374</sup> This provision reflects the agreement between the parties, namely that the concession terms were a formality which would be agreed between the MTC and PEL following the approval of the PFS. On 15 June 2012, the MTC approved the PFS unambiguously.<sup>1375</sup> It further instructed PEL to exercise its right of first refusal and to "[n]egotiate with the CFM the creation of a company to implement the Project."<sup>1376</sup> Three days later, PEL expressly exercised its right of first refusal and confirmed it "*will proceed with the implementation of the project*."<sup>1377</sup> Notwithstanding the fact that both conditions precedent in the MOI for the direct award of the concession to PEL had been met, Respondent subsequently failed to comply with its obligation to award the concession to PEL.

1085 The negotiations to conclude the concession agreement should also be understood in their broader context; in particular, the fact that both PEL and the MTC had a shared goal of completing the concession agreement, which was to deliver the Project. Therefore, neither party would have anticipated, or

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<sup>1372</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, clause 1.

<sup>1373</sup> *Id.* at clause 2. (Emphasis added)

<sup>1374</sup> *Id.* at clause 2. (Emphasis added)

<sup>1375</sup> **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

<sup>1376</sup> *Id.*

<sup>1377</sup> **Exhibit C-12**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of the project, dated 18 June 2012.

would have wanted, the other party to walk away from those negotiations without a concession agreement being finalised. That view is also consistent with the fact that the PFS had already been accepted by the MTC. To that point, Mr Baxter comments in his expert opinion that "[t]he PFS represents a substantial body of work which went a long way towards defining the Project. In my expert opinion, the PFS would have served as a clear basis for the concession agreement."<sup>1378</sup> It is even less likely in those circumstances that a concession agreement would not have been concluded between PEL and the MTC.

1086 In that light, Respondent's reliance on several authorities to rebut PEL's right to recover damages, on the basis that the concession agreement between the MTC and PEL had not been concluded, is misguided.

1087 First, Respondent's reliance on *Luigiterzo Bosca v. the Republic of Lithuania*<sup>1379</sup> in this regard is inapt. In that case, an Italian national, Mr Bosca, succeeded in a public tender to buy a state-owned sparkling wine company which was in the process of being privatised. The share purchase agreement for the purchase of the Lithuanian company's shares had to be negotiated following the tender process and several critical issues were left to be agreed upon between the parties. Ultimately, the Lithuanian agency responsible for the negotiations was unwilling to reduce a provision related to contractual fines. As a result of that disagreement, negotiations collapsed. Mr Bosca was awarded "*direct damages*" in the Lithuanian national courts but was unsuccessful in his claim against Lithuania before the PCA for lost profits that he would have recouped had he purchased the sparkling wine company.

1088 There are material distinctions between *Bosca* and the present case:

- (a) In particular, the rights on which PEL seeks to rely in this Arbitration are not "*pre-contractual*", as they were in Mr Bosca's case. PEL already had enforceable contractual rights under the MOI, whereas Mr Bosca's rights were subject to negotiating a share purchase agreement, which was deemed to be uncertain.
- (b) In respect of those negotiations, the tribunal in *Bosca* found as a matter of fact that there were disputes between the parties in negotiation which

<sup>1378</sup>  
<sup>1379</sup>

**CER-7**, Expert Report of Mr David Baxter, para. 154.  
**RLA-83**, *Luigiterzo Bosca v. Republic of Lithuania*, UNCITRAL, PCA Case No. 2011-05, Award (17 May 2013).

were likely to have been insurmountable (as in fact transpired), as well as potential restrictions imposed as a matter of European competition law, which might have deterred Mr Bosca from proceeding with the transaction. By contrast, and as reflected in the terms of the MOI itself, the stated intention of the MTC was to award the concession to PEL following the approval of the PFS by the MTC and PEL's exercise of its first right of refusal. That approval was in fact given by the MTC, and PEL exercised its right of refusal three days later. Those were the only two conditions precedent in the MOI before PEL's right to the direct award of the project concession vested.

- (c) The tribunal in *Bosca* concluded that the outcome of the process was by no means certain given its early, pre-contractual, stage. In contrast, PEL had engaged with the MTC for a significant period of time, even before the MOI was concluded. The MOI formalised the Parties' agreement that a concession *would* be agreed subject to the approval of the PFS. PEL's rights under the MOI provided an appreciable degree of legal certainty that the concession would in fact be awarded in the event the MTC was satisfied with the PFS. That was not the case for Mr Bosca. Respondent's assertion that the MOI does not propose or describe the terms of the concession and that the outcome of the negotiations are "*pure conjecture*" conveniently ignores, and is belied by, the core obligation in the MOI, by which it was agreed that "*Mozambique shall issue a concession of the project in favour of PEL*".<sup>1380</sup>

1089 Second, Respondent's reliance on *Metalclad*<sup>1381</sup> is similarly unavailing. The quotation relied on by Respondent – 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 speculative*" – is actually a reference in *Metalclad* to a different case, *Phelps Dodge Corp. v. Iran*.<sup>1382</sup> In any event, this reasoning does not apply to the present case and cannot assist Mozambique. As is clear from the MOI, far from being "*unobtained*", the preferential treatment to which PEL was entitled was clearly defined in the

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<sup>1380</sup> **Exhibit C-5A**, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, Clause 2(1). (Emphasis added)

<sup>1381</sup> **RLA-28**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000)

<sup>1382</sup> **RLA-38**, *Phelps Dodge v. Islamic Republic of Iran*, IUSCT Case No. 99, Award No. 217-99-2 (19 March 1986)

MOI: it was an exclusive right to the direct award of a concession to develop the Project upon the approval of the PFS by the MTC, and PEL's exercise of its right of first refusal. There is no reasonable basis upon which it can be said that PEL's rights under the MOI were speculative. Rather, they were valid and legally binding.<sup>1383</sup>

1090 Mozambique's binary approach proceeds on the false basis that if PEL is not entitled to the entirety of its claim for lost profits, then it is entitled to nothing at all. That too is incorrect.

1091 It is well-established in international investment law that where it is difficult to determine long-term profits, tribunals may award damages on a basis that recognises the claimant's loss of a chance to make those profits.<sup>1384</sup>

1092 As the tribunal held in *Himpurnia*, limiting a claimant's recovery to sunk costs may not allow for full reparation and could incentivise the counter-party to breach in the context of valuable agreement.<sup>1385</sup>

*"Here the claimant seeks the benefit of its bargain. This is a fundamental aspect of the law of contracts; if recovery were limited to what a claimant has spent in reliance on a contract which has been breached, an incentive would be created which is contrary to contractual morality: obligors would generally find it in their interest to breach contracts which turn out to be valuable to their co-contractant. Parties do not enter into contracts involving risk in order to be repaid their costs. To limit the recovery of the victim of a breach to its actual expenditures is to transform it into a lender, which is commercially intolerable when that party was at full risk for the amount of investments made on the strength of the contract." (Emphasis added)*

1093 Similarly, PEL did not assume the costs and risks of commissioning the Preliminary Study, undertaking the PFS, and entering into the MOI, only to be repaid its sunk costs. Rather, it wished to benefit from the game-changing concept it had envisaged and developed, and to share in the profits arising from that concept. Rather than being allowed to do so, as required by the MOI, Respondent instead appropriated PEL's know-how, provided it to other bidders

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<sup>1383</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros.

<sup>1384</sup> CLA-294, *Sapphire International Petroleum v. National Iranian Oil Co.*, 35 ILR, 15 March 1963; CLA-287, *Marboe*, para. 3.225.

<sup>1385</sup> CLA-277, *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listrik Negara*, Final Award, 4 May 1999, referred to in *Gavazzi v. Romania*.



in the context of a sham public tender, and left PEL with nothing to show for an idea that would enrich Mozambique and its hand-picked contractor ITD.

1094 Accordingly, the principles articulated in *Himpurnia* resonates in the present case and are consistent with the principle in *Chorzow Factory*, which provides that "*reparation must... wipe out all the consequences of the illegal act*".<sup>1386</sup> Similarly, Article 36(2) of the ILC Articles provide that "*compensation shall cover any financially assessable damage including loss of profits insofar as it is established*".<sup>1387</sup> In short, an award of sunk costs to PEL for the commissioning of the Preliminary Study and the preparation of the PFS cannot do justice to the "*full reparation*" standard *required* under international law.

1095 Without prejudice to PEL's primary case that it is entitled to its full loss of profits on the basis of the *ex post* DCF valuation, if those profits are considered not to be sufficiently certain, PEL's loss of a chance to make those profits, which is certain, justifies an award in damages which exceeds PEL's sunk costs. As to that, in Ripinsky and Williams, the authors note:

***"Where a tribunal cannot accept a claim for lost profits as not sufficiently certain, it may choose to award, instead, a compensation for the loss of business (commercial) opportunity, or for the loss of a chance. This head of damage appears to be a subspecies of lost profits, which is resorted to when the available data does not allow making a more precise calculation of lost profits. The concept of the loss of opportunity, or the loss of a chance, is recognised in a number of national legal systems, as well as in the UNIDROIT Principles of International Commercial Contracts. The latter provide in Article 7.4.3(2) that '[c]ompensation may be due for the loss of a chance in proportion to the probability of its occurrence'. It is suggested that a chance of making a profit is an asset with a value of its own, and that compensation for the loss of a chance is an alternative to the award of lost profits proper in cases where the claimant has failed to prove the amount of the alleged loss of profit with the required degree of certainty, but where the tribunal was satisfied that the loss in fact occurred. Loss of a chance can thus be used as a tool allowing the injured party to receive some form of compensation for the loss of a chance to make a profit. In theory, the loss of a chance is assessed by reference to the degree of probability of the chance turning out in the***

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<sup>1386</sup> **CLA-160**, *Case concerning Certain German Interests in Polish Upper Silesia (The Merits)*, Judgment of 25 May 1926  
**CLA-10**, *Factory at Chorzów*, Judgment No. 13, 13 September 1928, Series A, No. 17.

<sup>1387</sup> **CLA-177**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in Yearbook of the International Law Commission 2001 (Vol II, Part Two).

*plaintiff's favour, although in practice the amount awarded on this account is often discretionary.*"<sup>1388</sup> (Emphasis added)

1096 In *Lemire v. Ukraine*, the tribunal adopted the test suggested in the UNIDROIT Principles:

*"The Tribunal agrees that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss. While the existence of damage is certain, calculating the precise amount of the compensation is fraught with much more difficulty, inherent in the very nature of the 'but for' hypothesis. Valuation is not an exact science. The Tribunal has no crystal ball and cannot claim to know what would have happened under a hypothesis of no breach; the best any tribunal can do is to make an informed and conscientious evaluation, taking into account all the relevant circumstances of the case, not unlike that made by anyone who assesses the value of a business on the basis of its likely future earnings.*

[...]

*Compensation for a lost chance is admissible, and is normally calculated as the **hypothetical maximum loss, multiplied by the probability of the chance coming to fruition**. To take the example given in the Official Comment to the UNIDROIT Principles: '[T]he owner of a horse which arrives too late to run in a race as a result of delay in transport cannot recover the whole prize money, even though the horse was the favourite'. In this example, the owner must be satisfied with compensation proportionate to the probability of the win."*<sup>1389</sup> (Emphasis added)

1097 In *Gavazzi v. Romania*, the tribunal noted the following "special factor" which would render an award of sunk costs unsuitable in circumstances where the inherent uncertainty in a calculation for future profits was itself brought about by the respondent state:<sup>1390</sup>

<sup>1388</sup> CLA-75, S. Ripinsky and K Williams, *Damages in International Investment*, BIICL, 2008, p. 291.

<sup>1389</sup> CLA-145, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, paras. 246-251

<sup>1390</sup> CLA-299 *Gavazzi v. Romania* ICSID Case No. ARB1225, Excerpts of the Award of 18 April 2017 and Decision on Rectification of 13 July 2017, para. 224.

*"In assessing compensation for loss of opportunity, the Tribunal notes, potentially, a special factor. The reason why such compensation is so difficult in this case, subject to causation (addressed separately below), lies with the Respondent's own wrongdoing in violation of the BIT. Where a claimant as the innocent party has difficulty in proving its compensation, particularly as regards future events, because of the wrongdoer's acts or omissions, the wrongdoer should not be permitted to escape liability for compensation as a direct result of the difficulty or resulting uncertainty for which that wrongdoer is responsible. At that point, the evidential burden regarding uncertainty shifts from the innocent party to the guilty party. Otherwise, the guilty party would profit unfairly from its own wrong."* (Emphasis added)

1098 One criticism levelled at PEL by Respondent is that the compensation PEL seeks for lost profits is speculative because no concession was guaranteed to PEL, despite the rights granted to PEL in the MOI. For the reasons explained in the preceding paragraphs, while the concession had not been granted, the terms of the MOI made it a practical certainty that it would be following approval of the PFS and the exercise of PEL's right of first refusal. Further, and consistent with the approach in *Gavazzi*, Mozambique's wrongful conduct in depriving PEL of its rights to negotiate the concession, and to develop the Project thereafter, has given rise to the uncertainty on which Mozambique now attempts to capitalise in its opposition to PEL's claim for lost profits. Mozambique is not entitled to do so.

1099 Applying the approach adopted in *Lemire*,<sup>1391</sup> even accepting that there existed a probability that the concession agreement between PEL and the MTC would not have come to fruition, given the nature of the negotiations (which anticipated a concession agreement *would* be granted) and the obligations placed on the MTC that it *shall* award the concession to PEL, that probability was minute. Even on a relatively conservative analysis, PEL submits, and the evidence supports the fact, that it was a virtual certainty that a concession agreement would have been agreed between Mozambique and PEL, but for Mozambique's breaches of international law.

1100 The subsequent question is whether PEL *would* have made a profit on the Project had Mozambique not breached its international obligations. This gives rise to a number of valuation questions which are addressed comprehensively

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<sup>1391</sup> CLA-145, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, paras. 246-251

in the Second Versant Expert Report and are accounted for in their valuation of PEL's damages.<sup>1392</sup> The criticisms levelled at Versant's analysis by Dr Flores are answered below.

- 1101 On the basis of the conservative assumptions adopted by Versant, in view of the robustness of their assessment of the loss of profits which would have been due to PEL, particularly on the strength of the precise and accurate information contained in the TML Feasibility Study, and considering the certainty that PEL would have entered into a concession agreement with the MTC, PEL considers that the appropriate loss of chance percentage should be assessed at 90%. That headline figure takes into account the marginal risk that a concession agreement might not have been concluded with the MTC.
- 1102 On that basis, Versant quantifies PEL's recovery on a loss of chance basis at 90% of its *ex post* DCF valuation at **USD 140.4 million**. Alternatively, PEL's recovery on a loss of chance basis at 90% of its *ex ante* valuation entitles PEL to recover **USD 44.4 million**.

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CER-5, Second Versant Expert Report, Sections IV, V and VI *passim*.

D. *Mozambique's Criticisms of PEL's Quantum Analysis Are Unavailing and Betray the Weakness of Its Own Case*

1104 In its submissions on quantum, and in the report prepared by Dr Flores, Respondent advances a multitude of unsubstantiated and unsound submissions which unsuccessfully attempt to undermine the damages analysis prepared by PEL.<sup>1393</sup> In truth, that exercise only serves to highlight the desperation of Mozambique's defence. It is telling that many of the purported criticisms made by Mozambique of PEL's approach to quantifying damages are in fact evidentially unsupported allegations that seek to rehash their spurious arguments on liability.

1105 As a preliminary matter, it is also unfortunate that several of these arguments, unsubstantiated as they are, have been adopted in Dr Flores' Expert Report as accepted facts and working assumptions. In so doing, Dr Flores has undermined the credibility of his own evidence and has strayed beyond his competence, limit and purpose of his expert evidence. As an example, three of Dr Flores' core assumptions in dismissing Versant's valuation are based on highly contentious and contestable matters of fact and law:

- (a) First, Dr Flores adopts without reservation Respondent's position that the MOI is void and unenforceable, and therefore has no value from an economic perspective.<sup>1394</sup> That allegation is wrong but, crucially for Dr Flores' purposes, it is also a disputed matter that goes to Mozambique's liability. Dr Flores' task is to assess the value of the Project on the but for assumption that Mozambique might be liable, including on the basis proposed in PEL's claim. He is then fully entitled to challenge PEL's valuation assessment based on that counterfactual. It is not within Dr Flores' competence, nor should it be in his instructions, to assume that Mozambique is not liable *ab initio*.
- (b) Second, Dr Flores accepts the contentious position that PEL was not compelled to participate in the public tender, but rather was invited by the MTC and subsequently accepted that invitation.<sup>1395</sup> This assumption overrides, without any explanation from Dr Flores, PEL's

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<sup>1393</sup> SOD, paras. 822 to 927; **RER-4**, Quadrant Economics Expert Report, Sections II-VI *passim*.  
<sup>1394</sup> **RER-4**, Quadrant Economics Expert Report, para. 15.  
<sup>1395</sup> **RER-4**, Quadrant Economics Expert Report, para. 16.

case that it was compelled under protest to participate in the tender *without waiving its rights under the MOI*.<sup>1396</sup> Dr Flores' decision to ignore that point indicates a partial approach, which severely undermines the credibility of his evidence.

- (c) Third, Dr Flores assumes, again without any reservation, that the right of first refusal under the MOI only gave PEL a 15% margin of preference in a public tender process and did not guarantee any other benefit.<sup>1397</sup> This is another assumption that is contested and which serves to undermine the approach adopted by Dr Flores in his valuation assessment.

1106 By accepting Mozambique's submissions as accepted facts, Dr Flores' fails to undertake the task required of him in his evidence: an assessment of PEL's entitlement to damages on the basis of its affirmative case, which assumes Mozambique might be liable. It is in that context that the Tribunal is invited to treat his evidence with necessary and justifiable caution.

1107 As to Mozambique's particular criticisms of PEL's quantum analysis, in summary it is alleged that:

- (a) First, Mozambican law required a public tender for the award of the Project, with the result that the exclusive rights purportedly granted to PEL to advance the Project through direct negotiation were unlawful. Accordingly, those rights which PEL now relies upon in these proceedings are worthless.<sup>1398</sup>
- (b) Second, PEL enjoyed no concession rights under the MOI, given that this right only permitted PEL to enter into negotiations with the MTC before any concession could be awarded. The right to negotiate for a concession does not constitute a valuable right that justifies any award in damages under international law.<sup>1399</sup>
- (c) Third, the MOI rights were obtained by PEL through fraud. Had the MTC been aware of PEL's prior temporary debarment by the NHA in

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<sup>1396</sup> CER-3, Expert Legal Opinion of Professor Rui Medeiros, paras. 23.4 and 27; See SOC, paras. 191-210.  
<sup>1397</sup> RER-4, Quadrant Economics Expert Report, para. 17.  
<sup>1398</sup> SOD, paras. 822-826.  
<sup>1399</sup> SOD, paras. 827-831.

India, it would never entered into the MOI, nor would it have entertained awarding the concession following direct negotiation.<sup>1400</sup>

- (d) Fourth, on PEL's own cash flow analysis, the Project would not have been profitable. PEL has fraudulently alleged that the Project was economically viable.<sup>1401</sup>
- (e) Fifth, a fair market value analysis of the TML Consortium's project is an inapt comparator to determine PEL's alleged damages entitlement.<sup>1402</sup> PEL did not have the capacity to complete the project as envisaged by the TML Consortium in any event.<sup>1403</sup>
- (f) Sixth, the economic uncertainty of coal demand and pricing would have rendered the PEL Project unprofitable.<sup>1404</sup>
- (g) Seventh, the use of a DCF analysis is inappropriate for valuing PEL's damages.<sup>1405</sup>
- (h) Eighth, the DCF analysis carried out by Versant is in any event flawed.<sup>1406</sup>

1108 PEL responds to each of these unfounded allegations in the following subsections, all of which the Tribunal is respectfully invited to reject.

1. PEL's exclusive rights under the MOI were lawful

1109 As the Tribunal will have seen, Respondent's defence that a direct award of a concession was illegal under Mozambican law, thereby rendering the MOI invalid, has nothing to commend it. The correct position has been set out fully in Professor Medeiros' first report,<sup>1407</sup> and reiterated in his second report,<sup>1408</sup> and do not require detailed rehearsal here. The only points for the Tribunal to recall are that:

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<sup>1400</sup> SOD, para. 832.

<sup>1401</sup> SOD, paras. 833-848.

<sup>1402</sup> SOD, paras. 849-852.

<sup>1403</sup> SOD, paras. 853-865.

<sup>1404</sup> SOD, paras. 866-877.

<sup>1405</sup> SOD, paras. 878-887.

<sup>1406</sup> SOD, paras. 888-927.

<sup>1407</sup> CER-3, Legal Opinion of Professor Rui Medeiros, paras. 31-49.

<sup>1408</sup> CER-6, Second Legal Opinion of Professor Rui Medeiros, Sections 2 and 3.

- (a) It is beyond any doubt that MTC had the authority to enter into the MOI and to grant PEL a right to a direct concession award subject to the fulfilment of certain conditions.
- (b) That award was permissible pursuant to the Public Procurement Rules of 24 May 2010,<sup>1409</sup> the law which was in force at the time the MOI was entered into by PEL and the MTC.
- (c) The right to a direct concession was explicitly anticipated by the PPP Law, which the Parties knew would be the law in force by the time the PFS was approved (in May 2012) and a concession awarded.

1110 Mozambique's attempts to avoid lawful obligations which it undertook to PEL are unavailing. The Tribunal should be especially wary of Respondent's attempt to rely on the acts of its *own agents*, in this instance Minister Zucula in his capacity as Minister of the MTC, to avoid obligations and liabilities freely entered into with a foreign investor. As it is, there is nothing to Mozambique's claim: the MOI is valid and PEL has been deprived of the valuable rights contained therein by Mozambique's internationally wrongful actions.

2. Mozambique's deprivation of PEL's valuable rights under the MOI justify a substantial award in damages

1111 Respondent's characterisation of PEL's rights in the MOI as uncertain, or its comment that there "*were substantial negotiations yet to be undertaken between PEL and MTC before any concession could have been awarded*"<sup>1410</sup> is contradicted by the terms of the MOI, itself, which make plain that:

- (a) Clause 2 of the MOI provides that "*once the terms under Clause 7 of this memorandum are approved, the Govt. of Mozambique shall issue a concession of the project in favour of PEL*".<sup>1411</sup>

<sup>1409</sup> CER-3, Legal Opinion of Professor Rui Medeiros, paras 31-35.

<sup>1410</sup> SOD, para. 827.

<sup>1411</sup> Exhibit C-5A, English Version of the Memorandum of Interest between the Ministry of Transport and Communications and Patel Engineering Ltd, dated 6 May 2011, clause 2(1). (Emphasis added)



(b) Clause 2, paragraph 2 similarly provides that "[a]fter 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...".<sup>1412</sup>

1112 The obligation on the MTC to award the concession and PEL's desire to advance the Project is also consistent with the MTC's unqualified approval of the PFS<sup>1413</sup> and its instruction to PEL. It further instructed PEL to exercise its right of first refusal in respect of the Project.<sup>1414</sup> Given that both MTC and PEL wanted to build the Project, the context for the negotiations was not the same as an at arm's length commercial negotiation. The parties were both expressly incentivised to agree a concession agreement, and conversely it would have suited neither party not to reach an agreement, given the stage that had been reached in establishing the Project's viability and spending a significant amount of time and money preparing and assessing the PFS.

1113 As set out above, David Baxter's expert evidence confirms that the PFS would have served as a clear basis for the concession agreement which, given its prior approval, meant the likelihood of PEL and the MTC concluding a concession agreement a virtual certainty.<sup>1415</sup>

1114 In any case, even if it were correct that PEL's rights to the concession were uncertain, that uncertainty can readily be reflected in a damages calculation which takes into account PEL's loss of a chance to make a profit. To that end, Section VIII.C is repeated. In fact, a calculation which takes into account a 90% loss of chance, exaggerates the uncertainty of PEL's rights to carry forward the concession which, in view of the obligations in the MOI itself and in the context of the terms to be agreed in the concession agreement, was virtually certain to be advanced by the MTC.

### 3. PEL's rights under the MOI were not obtained through fraud

1115 Despite the comprehensive rebuttal provided in PEL's SOC,<sup>1416</sup> which should have put a stop to Respondent's unsubstantiated allegations of fraud, Mozambique, apparently undeterred by the expectation that *serious* allegations

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<sup>1412</sup> *Id.* at clause 2. (Emphasis added)

<sup>1413</sup> **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

<sup>1414</sup> **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

<sup>1415</sup> **CER-7**, Expert Report of Mr David Baxter, paras 154-155.

<sup>1416</sup> SOC, para. 266.

require *serious* evidence, continues to push those same allegations. As the Tribunal will have seen, those allegations are legally and factually unfounded.

1116 Mozambique now redeploys those baseless allegations in the context of its quantum analysis, as a pretext to avoid liability entirely. It reasons that "*no damages can be awarded*" to PEL because supposedly "*the alleged MOI rights were procured by fraud*."<sup>1417</sup> Respondent's allegations are hopeless and should be rejected by the Tribunal for the reasons set out in Sections VI and III.B:

- (a) First, Respondent claims that had it known about PEL's temporary debarment vis-à-vis the NHAI, it never would have entered into the MOI.<sup>1418</sup> Mozambique has decided to ignore, consciously it seems, the fact that PEL's temporary debarment vis-à-vis the NHAI was not in existence at the time the parties entered into the MOI, on 6 May 2011. Rather, the NHAI's decision temporarily to debar PEL was not made until 20 May 2011, *after* the MOI was executed. Yet notwithstanding this undisputed timeline, Respondent states, incredibly, that "*PEL hid from, and or did not disclose to, MTC that PEL had been blacklisted at the time of the MOI*".<sup>1419</sup> Obviously, PEL could not hide what did not exist. Accordingly, this allegation is patently absurd and should be readily dismissed by the Tribunal. It can only be hoped that it will not be resurrected in Mozambique's next round of pleading.
- (b) Second, and equally asinine, is Respondent's assertion that PEL's provision of its cash flow projections constituted a fraud on the MTC because, it is said, that cash flow projection indicated that the Project was not economically viable. Had the MTC been aware of that at the time PEL submitted the PFS, claims Respondent, it never would have approved it. This claim is both wrong as a matter of fact and unattractive as a legal submission. As Mr Patel makes clear in his evidence, the cash flow projection was prepared to show that PEL would be able to repay its financing in a worst-case scenario.<sup>1420</sup> That point is expressly made in the letter enclosing the projection, which was

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<sup>1417</sup> SOD, Section IX.A.3.

<sup>1418</sup> SOD, para. 832; see also **RER-2**, Expert Report of Teresa Muenda, paras. 7-10

<sup>1419</sup> SOD, para. 832; see also **RER-2**, Expert Report of Teresa Muenda, paras. 7-10

<sup>1420</sup> **CWS-4**, Second Statement of Mr Ashish Patel, paras. 20, 25 and 27.

provided to the MTC, and which Respondent seemingly ignored.<sup>1421</sup> In their second expert report, Versant attest to the conservative nature of the projection, which supports Mr Patel's evidence.<sup>1422</sup> Versant has also shown in its analysis that on both an *ex post* basis **and** an *ex ante* basis, the Project would have been profitable under PEL's stewardship. Mozambique's claim also rests on its incorrect assertion that PEL had an obligation to provide the cash flow projection as part of the process of submitting its PFS. Besides the fact that PEL did provide all of the information requested, and that the MTC did not raise any issue with that information provided, there was no obligation for it do so as part of the PFS.<sup>1423</sup> It follows that the approval of the PFS by the MTC was not consequent on that cash flow projection at all, as Mozambique disingenuously suggests<sup>1424</sup> and even assuming it was (*quod non*), PEL provided all of the information requested by the MTC and there is no basis upon which to assert fraud of any sort.

1117 Both of these allegations of fraud are equally repugnant and ought not to have been made. The Tribunal is respectfully invited to dismiss them.

4. PEL's cash flow analysis was only ever intended to be a preliminary projection to show that in a worst-case scenario, the Project would cover its costs

1118 The cash flow projection prepared by PEL is not the smoking gun document that Respondent would have the Tribunal believe and it certainly cannot carry the burden of the case Respondent seeks to advance.

1119 As Mr Patel makes plain in his evidence,<sup>1425</sup> the purpose of the cash flow projection which he prepared was to establish whether the Project would be able to repay its financing in a worst-case scenario. This cash flow projection was not intended to reflect an estimate of anticipated profits from the Project. Indeed, the letter sent to MTC by PEL enclosing this cash flow projection makes clear its purpose:

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<sup>1421</sup> **Exhibit C-8**, Letter dated 15 May 2012 from Kishan Daga of PEL to Minister Zucula of MTC, regarding "*Additional information to the Prefeasibility Report for Development of Rail Corridor from Moatize to macuse and Port at Macuse, Statement of fund utilisation and projected/estimated cash flow for the entire project.*" (Emphasis added)

<sup>1422</sup> **CWS-4**, Second Statement of Mr Ashish Patel, para. 27.

<sup>1423</sup> **CWS-4**, Second Statement of Mr Ashish Patel, para. 19.

<sup>1424</sup> SOD, para. 833.

<sup>1425</sup> **CWS-4**, Second Statement of Mr Ashish Patel, paras. 20, 25 and 27.

*"This model is based on certain assumptions and considering these assumptions it gives a clear idea that **even in worst case scenario also it is financially viable** even without considering the multiple growths."<sup>1426</sup> (Emphasis added)*

1120 As explained in Mr Patel's evidence,<sup>1427</sup> also corroborated by Versant,<sup>1428</sup> the cash flow projection submitted by PEL assumes a number of evidently conservative inputs, which are consistent with an analysis predicated on a worst-case scenario. By way of example:<sup>1429</sup>

- (a) PEL's cash flow projection assumes a construction period of 6 years,<sup>1430</sup> 2 years longer than the PFS<sup>1431</sup> submitted to and approved by the MTC. Both of these projections are longer than the 3.5 years assumed in the TML Feasibility Study.<sup>1432</sup>
- (b) PEL's projections assumed a higher level of debt financing, at 80% of total capital expenditures.<sup>1433</sup> The PFS applied a debt financing projection of 75% of total capital expenditures,<sup>1434</sup> compared with 70% in the TML Feasibility Study.<sup>1435</sup>
- (c) PEL's projection assumes annual throughput starting at 5 Mt per year, reaching 25 Mt by the fifth year, with no subsequent growth in volume thereafter.<sup>1436</sup> This is significantly lower than the TML Feasibility Study which sets a starting throughput of 15 Mt per year (with capacity payments for an additional 7 Mt), and higher long-term throughput of 33 Mt per year.<sup>1437</sup>

1121 From the perspective of a valuation exercise, PEL's cash flow statement cannot be relied upon as an accurate assessment of future profits, as Dr Flores attempts to do, thereby undermining the Project's value. Given that there was no concession agreement available at the time this preliminary projection was

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<sup>1426</sup> **Exhibit C-8**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding "*Additional information to the Prefeasibility Report for Development of Rail Corridor from Moatize to Macuse and Port at Macuse, Statement of fund utilisation and projected/estimated cash flow for the entire project*", dated 15 May 2012.

<sup>1427</sup> *Id.* at para. 27.

<sup>1428</sup> **CER-5**, Second Versant Expert Report, paras. 15b and 38-39.

<sup>1429</sup> **CER-5**, Second Versant Expert Report, para. 40.

<sup>1430</sup> **Exhibit C-8**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated May 2012, p. 5.

<sup>1431</sup> **Exhibit C-8**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated May 2012, p. 2.

<sup>1432</sup> **Exhibit R-42**, Update of the TML 2015 Feasibility Study for the Moatize-Macuse Railway and Port Project, July 2017, p. 5.

<sup>1433</sup> **Exhibit C-8**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated May 2012, p. 4.

<sup>1434</sup> **Exhibit C-6b**, Pre-Feasibility Study.

<sup>1435</sup> **Exhibit R-42**, Update of the TML 2015 Feasibility Study for the Moatize-Macuse Railway and Port Project, July 2017, p. 217, 219

<sup>1436</sup> **Exhibit C-8**, Letter from PEL to MTC, dated 15 May 2012.

<sup>1437</sup> **Exhibit R-42**, TML, Update to the 2015 Feasibility Study for the Moatize-Macuse Railway and Port Project, July 2017, p. 3.

prepared, the terms of the concession were also unknown. A detailed financial evaluation would be required, as part of a bankable feasibility study, to demonstrate the Project's potential economic viability. By contrast, PEL's cash flow projection are provisional assumptions, relying on conservative inputs and estimates to show that the Project could, even in a worst-case scenario, cover its financing costs. It is unrealistic and disingenuous to interpret this projection as anything more.

5. The TML Consortium is an apt and realistic comparator for the purposes of preparing a quantum analysis

1122 Respondent makes much of PEL's alleged inexperience to complete the Project and its reliance on a potential concession partner. As to the first point, Respondent's denigration of PEL's experience, as with a number of the claims dotted about the SOD, is without foundation and contradicted by the evidential record. PEL had 70 years of experience in developing large scale infrastructure projects, including in the transport sector. The various examples of PEL's experience, together with its awards recognition, are set out in Section IV.A.1.

1123 Respondent's criticism of PEL's competence carries with it a degree of specificity that boils down to PEL not being suitable because it did not have transportation infrastructure experience in Mozambique. Besides the obvious point that PEL *did* have directly applicable experience on large scale transport and infrastructure projects, which it had carried out globally, this criticism is fallacious for at least the following reasons:

- (a) Grindrod's involvement is inconvenience for Mozambique's partial and unstable narrative. If specific transport infrastructure experience in Mozambique was a desirable qualification for a concessionaire, then Grindrod's experience in the country, which included the ownership, development and operation of the Maputo Port Development Company,<sup>1438</sup> would have put the PGS Consortium in an enviable position to deliver the Project. It is telling that in the SOD which is nearly twice the length of PEL's SOC, Respondent spends almost no time considering the qualities and expertise that the PGS Consortium would have brought to bear on the Project, reluctantly admitting (and

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<sup>1438</sup> CWS-5, Witness Statement of Mr Marco Raffinetti, para. 14.1.

grossly understating) Grindrod's "*more relevant experience*".<sup>1439</sup> Given the amount of ink dedicated to wayward and uncorroborated criticisms of PEL's competence, that omission should provide some insight into Respondent's view of the PGS Consortium and the fact that it certainly *did* have the competence and expertise to deliver the Project.

- (b) This account is also consistent with Mr Raffinetti's evidence. Somewhat inconveniently for Respondent, Mr Raffinetti, a former Executive at Grindrod who was its representative in the PGS Consortium, confirms that Grindrod would not have participated in the tender process or become a member of the PGS Consortium if it did not believe the Project to be "*commercially and economically sound, and with the PGS Consortium having a good prospect of success*".<sup>1440</sup> Reflecting on the capabilities of the other concession partners, Mr Raffinetti also notes that Grindrod "*did not enter into commercial agreements such as the MOU and Side Letter lightly and would only have done so if it was comfortable with PEL and SPI as partners, their ability to successfully implement the Project*".<sup>1441</sup> It is clear that the PGS Consortium and its members were confident in their ability to deliver the Project.
- (c) The relevant expertise and experience of Grindrod. It is important to note that Grindrod itself was well placed to deliver.

1124 Respondent also suggests tacitly that TML's failure to develop the concession is a reflection of the inherent difficulties of a project which is economically precarious amid turbulent market conditions.<sup>1442</sup> However, TML's inability to develop the Project is perhaps better interpreted as an admission that Mozambique awarded the concession to the wrong consortium and that, for all Respondent's focus on TML's expertise and experience, it has not delivered the concession it promised. Indeed, Respondent admits as much in its SOD, noting that the TML Consortium is running significantly behind schedule, with completion on the Project estimated to be "*nine years after the concession*",<sup>1443</sup>

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<sup>1439</sup> SOD, para. 857.  
<sup>1440</sup> CWS-5, Witness Statement of Mr Marco Raffinetti, para. 24.  
<sup>1441</sup> *Id.*  
<sup>1442</sup> SOD, para. 850.  
<sup>1443</sup> *Id.* at para. 850(i).

with construction only beginning this year, and no expected revenues until "*at least 2024*".<sup>1444</sup> Respondent also makes the astonishing claim that completion of the Project in 2024 "*is by no means certain*" and that only USD 400 million of Project's USD 3.2 billion cost were "*currently available*" to TML.

1125 These are all points raised by Mozambique to suggest that the same fate would have awaited PEL had it been awarded the concession, as was its legal right in the MOI. That is not the case for at least the following reasons:

- (a) These problems that have beset TML's development of the concession primarily follow from a lack of preparedness on TML's part once it had been awarded the Project. In particular, TML's partnership with Mota Engil and CNCEC, which is lauded by Respondent,<sup>1445</sup> did not come about until June 2017, nearly four years after the concession had been awarded. That shows a lack of preparedness on TML's part, having taken on the Project without the requisite technical and commercial partners to deliver it. Alternatively, it demonstrates TML's lack of competence to deliver the Project itself, which it attempted to remedy only *four years later*. In either case, this does little to prove Respondent's central claim that the concession as envisaged in TML's Feasibility Study would have failed to turn a profit.
- (b) Indeed, by contrast with TML, PEL had formed a consortium with the leading technical logistics partner in Africa, Grindrod. As a result, PEL would have been ready to develop the Project as soon as the concession was granted, together with its concession partners, SPI and Grindrod. The Tribunal will note the evidence of Mr Raffinetti who confirms that Grindrod would not have participated in the PGS Consortium if it had not been sure that the Project was economically, technically and commercially viable, or if it had any misgivings about PEL's competence.<sup>1446</sup>
- (c) Another important factor favouring PEL's ability to deliver the concession, by contrast with TML's failure, is the fact of PEL's

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<sup>1444</sup> *Id.* at para. 850(j).

<sup>1445</sup> Somewhat inconsistently, Respondent criticises PEL's partnership with Grindrod, which it claims shows "*a lack of experience and qualifications to receive a direct, stand-alone concession for itself*", SOD, para. 856. That submission ignores the fact that the party which was actually awarded the tender was formed of a consortium and subsequently had to retain CNCEC and Mota Engil to gather the respective expertise to develop the Project.

<sup>1446</sup> CWS-5, Witness Statement of Mr Marco Raffinetti, para. 24.

unrivalled familiarity with the Project. The Tribunal will recall that it was PEL that approached the Government to suggest the concept of linking the mineral-rich Tete province with a deep-sea port in Macuse. It was PEL that carried out the PFS and did so at its own cost. That was the same PFS that Mozambique approved, putting lie to Respondent's retrospective and self-serving claim, again unsupported by a single contemporaneous document, that the PFS was "*thoroughly inadequate*".<sup>1447</sup>

6. There was sufficient coal demand to make a success of the Project

1126 Dr Flores contends that Versant have overestimated revenues on the Project by 100%. That stems from his view that there would be insufficient demand to export 30 Mtpa of coal annually because (i) the export market in India will diminish in the short term, and (ii) there are already rail routes in place in the Tete Province, which are struggling to reach the export capacity predicted by Versant, and which will in any event provide competition to the Project's operations in the future. Versant has carefully rebutted these points as follows:

- (a) First, while India's dependence on thermal coal imports is expected to decrease in the long-term, thermal coal imports are anticipated to continue being an important source for meeting India's domestic thermal coal demand.
- (b) Second, contrary to Dr Flores' understanding, Indian demand for metallurgical coal imports (which the mineral sources in the Tete Province contain) is expected to increase.
- (c) Third, while India was anticipated as the primary foreign market for coal exports on the Project, Dr Flores has neglected all other potential markets where the 30 Mtpa of coal could be exported, including significant coal importer China, as well as neighbouring African states, and the domestic consumption market within Mozambique, itself.
- (d) Fourth, the 30 Mtpa coal export estimate is consistent with the anticipated export amount in the TML Feasibility Study.

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<sup>1447</sup>

SOD, para. 864.



- (e) Fifth, the current transportation infrastructure in Mozambique is too expensive to allow for a profitable coal export operation from the Tete region. For example, the tariffs that apply on the Nacala Logistics Corridor (the "NLC") are between two and three times higher than the anticipated tariffs on the Project, while tariffs on the Sena-Beira Corridor are between one and two times higher.
- (f) Sixth, as a result of the expensive transportation options along the NLC and the Sena-Beira Corridor, mining operations in the Tete Province have adopted a wait and see approach regarding their mine production and expansion operations, and will continue to do so until a cheaper and more cost-effective alternative becomes available. The Project would have provided that much cheaper transportation option, which would have facilitated a ramp up in mining production to reach 30 Mtpa, considering the lower market prices of coal.

#### 7. The Use of a DCF Analysis Is Appropriate in the Circumstances

1127 Contrary to Mozambique's contention, the use of a DCF valuation is appropriate in the circumstances of PEL's case. It is no longer the case, if it ever was, that such a valuation methodology is *only* appropriate for businesses that are operational, that have income producing assets and/or have historical financial data on which to rely.

1128 While a DCF methodology is most often used to value businesses with a record of operations, that is not the only situation where a DCF can or indeed should be used. There are numerous authorities where a DCF has been used to value a non-operating asset, provided there is sufficient information to forecast with reasonable certainty the lost future profits that would have been earned but for the state's unlawful acts.<sup>1448</sup>

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<sup>1448</sup> **CLA-140**, *Gold Reserve Inc v. Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award dated 22 September 2014, para. 830; **CLA-280**, *Quiborax SA v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award dated 16 September 2015, para. 347; **CLA-300**, *Phillips Petroleum Company Iran v. Islamic Republic of Iran and the National Iranian Oil Company*, (1989-Volume 21) Iran-US Claims Tribunal Report, Award, dated 29 June 1989, para. 111; **CLA-161**, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No ARB/97/3, Award dated 20 August 2007, paras. 8.3.3-8.3.4; **CLA-143**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008, paras. 809-811; **RLA-113**, *Bear Creek v. Peru*, ICSID Case No ARB/14/21, Award dated 30 November 2017, para. 581.

1129 Also relevant to the certainty of the projection in a DCF valuation is the type of commodity involved. As the tribunal in *Crystallex* explained:<sup>1449</sup>

*"Furthermore, gold, unlike most consumer products or even other commodities, is less subject to ordinary supply-demand dynamics or market fluctuations, and, especially in the case of open pit gold mining as in Las Cristinas, is an asset whose costs and future profits can be estimated with greater certainty. The Tribunal thus accepts that predicting future income from ascertained reserves to be extracted by the use of traditional mining techniques—as is the case of Las Cristinas—can be done with a significant degree of certainty, even without a record of past production."* (Emphasis added)

1130 By parity of reasoning, the projections for coal production and transportation from the Tete Province based on anticipated demand, as set out in Versant's analysis,<sup>1450</sup> are well-defined, and are subject to strong export demand, especially metallurgical coal. The Project's economic viability is keenly reflected in the TML Feasibility Study. For example, the fact that offtake arrangements with the coal miners were anticipated helps to provide a level of certainty needed to progress the Project.

1131 The restriction on the use of a DCF methodology is based on the need, in the particular circumstances of a case, to avoid uncertainty and speculation in projecting future profits. However, in this case, there is no basis to approach a DCF valuation with similar caution. The TML Feasibility Study is the bankability study for the **very same** Project which PEL had a right to carry out pursuant to its agreement with the MTC under the MOI. TML's Feasibility Study includes its own DCF valuation, from which Versant has carefully adapted relevant inputs and assumptions to build a highly sophisticated and accurate model. Unlike the handful of cases relied upon by Mozambique to downplay the application of a DCF model, there is no undue uncertainty or speculation in PEL's valuation analysis and accordingly, the Tribunal should adopt it.

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<sup>1449</sup> **CLA-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 879.

<sup>1450</sup> **CER-5**, Second Versant Expert Report, Section IV.

8. The DCF Analysis Prepared by Versant Is Robust and Each of the Criticisms Made by Mozambique and Dr Flores Are Misguided

1132 In his report, Dr Flores makes various criticisms of Versant's approach in adopting particular assumptions, parameters and inputs in its quantum analysis. The criticisms Dr Flores advances are that:

- (a) First, Versant overstates revenues by 100%;
- (b) Second, Versant understates operations and maintenance costs;
- (c) Third, Versant understates capital expenditures;
- (d) Fourth, Versant adopts tax rates and concession premiums that are unsupported;
- (e) Fifth, Versant's assumptions as to available debt financing overstate PEL's damages by 22.8%;
- (f) Sixth, Versant applies a disproportionately low discount rate; and
- (g) Seventh, Versant's "*reasonableness check*" refutes its DCF analysis.

1133 These arguments are rebutted fully in Versant's second report,<sup>1451</sup> but the position in respect of each of these points is set out in summary as follows:

1134 ***Revenue (during the operational period) – throughput:***<sup>1452</sup> Paragraph 1112 above, addressing Dr Flores' criticism of Versant's anticipated throughput of coal based on diminishing demand is repeated here *mutatis mutandis*. In particular, it is noted that:

- (a) Dr Flores' claim that a 30Mtpa throughput would require a drastic increase in output from various Mozambican coal projects is incorrect.<sup>1453</sup> Coal production in Mozambique has been severely constrained by a lack of reliable and cost-effective inland transportation links for exporting coal. Mining companies in the Tete Province will only increase production and mine expansions when a cost-efficient

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<sup>1451</sup> CER-5, Second Versant Expert Report, Sections IV and V *passim*.

<sup>1452</sup> CER-5, Second Versant Expert Report, paras. 111-118.

<sup>1453</sup> RER-4, Quadrant Economics Expert Report, Section V.D.

and reliable transportation alternative, such as the Project, became available.

- (b) Dr Flores criticizes Versant's 91% utilization rate as too high, making an inapt comparison with NLC, where utilization was at 65% in 2018.<sup>1454</sup> That date is important because 2018 was the first year of operations for the updated NLC, and so would likely have been the *beginning* of a production ramp-up period.<sup>1455</sup> A comparison between NLC's first year of operation utilization rate with the Project's sixth year/long-term utilization rate is invalid. In any event, NLC is not an apt comparator generally because it is used predominantly to transport coal from its owner, Vale, and is *entirely* dependent on the Moatize mine for mineral transportation.<sup>1456</sup>
- (c) Dr Flores also claims that relying on the 25 Mtpa capacity from PEL's May 2012 preliminary cash flow evaluation eliminates damages entirely.<sup>1457</sup> As set out above, that cash flow analysis was intended as a conservative model, prepared to show that PEL would be able to repay its financing in a worst-case scenario. It was not prepared as an assessment of PEL's anticipated returns on the Project. The TML Feasibility Study is the more accurate, and applicable, basis upon which to prepare a throughput projection. On that basis, PEL reasonably relies on the throughput assumptions in the TML Feasibility Study.

1135 **Revenue (during the operational period) - tariffs:**<sup>1458</sup> In view of Versant's adoption of the TML Feasibility Study's inputs for tariffs, only two of Dr Flores' criticisms remain, but both are invalid:

- (a) Dr Flores claims that downward pressure on transportation tariffs due to competition with existing logistics corridors may "*lead to a short-term reduction in tariffs.*" However, this statement ignores the fact that the rail tariffs for the Project are already 47% lower than the rail tariffs for the Sena-Beira corridor and an astonishing and 49-72% lower than NLC. As a result, there is very limited risk of downward pressure on tariffs from other corridors in this case. As Versant explain, the

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<sup>1454</sup> *Id.* at para. 104.

<sup>1455</sup> *Id.* at para. 94.

<sup>1456</sup> CER-5, Second Versant Expert Report, para. 116.

<sup>1457</sup> RER-4, Quadrant Economics Expert Report, para. 110.

<sup>1458</sup> CER-5, Second Versant Expert Report, paras. 119-124.

opposite conclusion is more reasonable, with the Project potentially being able to charge higher tariffs depending on prevailing coal prices.

- (b) Dr Flores misinterprets risk allocation between the TML Consortium and coal miners involved in take or pay contracts in the event of a decline in coal values.<sup>1459</sup> Take-or-pay contracts transfer price risks to the coal miners *in exchange* for a tariff that is appropriate to long-term price expectations. To safeguard against that eventuality, the Project already applies a much lower tariff that will have the effect of limiting the risk that coal prices would fall below levels where mining would become unprofitable in the long-term.

1136 ***Operating and maintenance costs:***<sup>1460</sup> In view of Versant's adoption of the TML Feasibility Study's operating and maintenance costs assumptions, Dr Flores' criticisms of specific points in Versant's original analysis of operating and maintenance costs are longer applicable, but it is denied in any event that those criticisms were valid.

1137 ***Taxes:***<sup>1461</sup> Given that Versant adopts the tax structure presented in the TML Feasibility Study (replacing its prior analysis using carry forward losses and tax credits), Dr Flores' criticism, which is limited to the claim that the tax assumptions used by Versant were not based on the concession agreement, will no longer have any force. That is because, while Versant have not been able to review the TML concession agreement, itself, it is reasonable to assume that the TML Feasibility Study incorporates the agreed tax structure in that concession agreement.

1138 ***Capital expenditure:***<sup>1462</sup> According to Dr Flores, it is common for "*mega projects*" to incur significant cost overruns.<sup>1463</sup> However, the approach in his evidence is inconsistent: on the one hand, he considers the Project to be a "*mega project*" in the context of cash flow analyses, while on the other, he applies a small company risk premium when assessing discount rates, which gives rise to potential double counting of risks. Versant considers that it is questionable whether the Project would indeed constitute a "*mega project*" but, even if it did, the sample of projects relied upon by Dr Flores are not

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<sup>1459</sup> RER-4, Quadrant Economics Expert Report, para. 117.

<sup>1460</sup> CER-5, Second Versant Expert Report, paras. 125-129.

<sup>1461</sup> CER-5, Second Versant Expert Report, paras. 135-137.

<sup>1462</sup> CER-5, Second Versant Expert Report, paras. 138-148.

<sup>1463</sup> RER-4, Quadrant Economics Expert Report, para. 124.

comparable to the Project either in time or geography. For example, among the comparators relied upon by Dr Flores in the study are the Channel Tunnel, the Sydney Opera House and the International Space Station,<sup>1464</sup> none of which are comparable to a freight railway project.

1139 In addition, Dr Flores does not take into account the fact that the Project is being built through a fixed price EPC Contract, which transfers any risks from cost overruns to the EPC contractor.<sup>1465</sup> Further, the TML Feasibility Study includes a lenders contingency of USD 239 million that can be used to cover higher than expected costs.<sup>1466</sup>

1140 Dr Flores' claim that Versant has ignored risks related to the duration of the construction period is also misplaced.<sup>1467</sup> Versant has delayed the operation period by one year, assuming a start date of 1 January 2022, and has extended the construction period by one year to account for potential delays.

1141 Dr Flores disagrees with Versant's estimate of the timing of capital expenditures in the First Versant Report.<sup>1468</sup> However, Versant's approach has now been modified in light of the TML Feasibility Study, splitting expenditures to 32% in years 1-2 and 68% in years 3-4. For all the reasons we consider the TML Feasibility Study to be an accurate source upon which to assess Project costs, we consider the timing of capital expenditures to be reasonable.

1142 **Debt financing:**<sup>1469</sup> Dr Flores' debt financing projection (of 70% debt ratio at an interest rate of 8.5%) is broadly consistent with the projection adopted by Versant from the TML Feasibility Study. Accordingly, Dr Flores should not have any disagreement in principle with Versant's approach.<sup>1470</sup>

1143 **Discount rate:**<sup>1471</sup> Dr Flores disagrees with Versant's (i) risk-free rate, (ii) equity risk premium ("**ERP**"), and (iii) country risk premium ("**CRP**"). As to each of those:

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<sup>1464</sup> **Exhibit C-295**, Bent Flyvbjerg, What You Should Know About Megaprojects and Why, December 2009, pp. 5, 9.

<sup>1465</sup> **Exhibit R-42**, TML, Feasibility Study for the Moatize-Macuse Railway and Port Project, September 2015, p. 224.

<sup>1466</sup> *Id.* at p. 11.

<sup>1467</sup> **RER-4**, Quadrant Economics Expert Report, para. 122.

<sup>1468</sup> *Id.* at para. 122.

<sup>1469</sup> **CER-5**, Second Versant Expert Report, paras. 151-153.

<sup>1470</sup> **RER-4**, Quadrant Economics Expert Report, Figure 5.

<sup>1471</sup> **CER-5**, Second Versant Expert Report, paras. 156-183.

- (a) Versant had previously used the 10-year US Treasury bond yield as a basis for their risk-free rate estimate. For his part, Dr Flores considers the 20-year US Treasury bond yield to be more appropriate.<sup>1472</sup> Although Versant consider the use of 10-year US Treasury bonds to be reasonable, their model adopts the proposed risk-free rate based on the prevailing 20-year US Treasury bond yields to reduce areas of unnecessary disagreement between the parties.
- (b) Dr Flores' proposed reliance on long-term historical averages to estimate ERP is inappropriate, as Versant have explained in their second report.<sup>1473</sup> In particular, Dr Flores' own data source recommends using a 5.5% ERP as of December 2020.<sup>1474</sup> Similarly, Professor Damodaran indicates that historical average premiums "*are very poor predictors.*"<sup>1475</sup> Based on updated ERP recommendations by Professor Damodaran, Professor Pablo Fernandez, and Duff & Phelps, adjusted for the use of the 20-year US Treasury bond in the risk-free rate, Versant calculates an average ERP of 5.04% as of 1 July 2021.
- (c) Dr Flores disputes Versant's reliance on the estimate provided by Professor Pablo Fernandez for the CRP because his survey was based on only seven participants. Instead, Dr Flores relies on the estimate provided by Duff & Phelps. While Versant accepts the inclusion of the Duff & Phelps estimate as a further CRP data source, they reject Dr Flores' dismissal of Professor Fernandez's survey, which is a relevant indicator regularly relied upon by valuation practitioners. Further, as at June 2021, ten responses have now been provided to Professor Fernandez's survey, which should allay Dr Flores' unwarranted concerns about the survey's accuracy.

1144 Dr Flores also suggests that a pre-operational risk premium and illiquidity/size premium should be included. As to these additional premiums:

- (a) Dr Flores incorrectly assumes that both the pre-operational risk premium and illiquidity/size premium should apply for the entire life

<sup>1472</sup> *Id.* at para. 155.

<sup>1473</sup> **CER-5**, Second Versant Expert Report, paras. 162-165.

<sup>1474</sup> **Exhibit C-297**, Duff & Phelps, Duff & Phelps Recommended U.S. Equity Risk Premium Decreased from 6.0 to 5.0, 10 December 2020; We note that Duff & Phelps recommended using the 5.5% ERP in conjunction with a 2.5% risk-free rate, or a "base" COE estimate of 8.0% (2.5% + 5.5%). As noted above, we apply a 2.04% risk-free rate in our analysis, which would imply an ERP of close to 6.0% to maintain Duff & Phelps recommended base COE.

<sup>1475</sup> **Exhibit C-298**, Damodaran, Equity Risk Premiums (ERP): Determinants, Estimation and Implications - The 2017 Edition, Stern School of Business, updated March 2017, p. 124.

of the concession, but both risks are only a potential issue before the Project reaches commercial operation.

- (b) There is justifiable scepticism within the expert valuation community about the application of project-specific risk premiums (such as those proposed by Dr Flores), as they are subjective and can be often be used simply for the purpose of reducing damages without any credible basis.
- (c) The study used by Dr Flores to justify the pre-operational risk premium of 2% was determined by its authors to be specific to the wind farm and energy transportation sectors, and less representative of such risk premiums generally, because "*the construction risk of wind farms is not necessarily comparable to the construction of another infrastructure in another sector.*"<sup>1476</sup> Accordingly, this study does not appear relevant to a transport logistics infrastructure project, and does not therefore provide a justifiable basis to apply a pre-operational risk premium.
- (d) Versant does not accept Dr Flores' analysis regarding the application of the size premium on a number of grounds. On a theoretical level, there is no sound basis for the assertion that smaller, more profitable companies are riskier than larger, less profitable companies. In fact, historical return data shows that this premium has disappeared in the last three decades.<sup>1477</sup> That historical small company premium disappears entirely if stocks with a market capitalization of less than USD 5 million are removed.<sup>1478</sup> Any small company premium could only apply to the smallest of companies. It would therefore not be suitable for a concession which has capital costs of USD 3.2 billion. There is also scepticism in the valuation community that this discount rate applies *at all* in developing markets, such as Mozambique.<sup>1479</sup>
- (e) Dr Flores' introduction of additional risk premiums also appears to double-count certain risks. In addition, Versant has made particular, conservative assumptions that should reduce the need for tailored risk

<sup>1476</sup>

QE-55, Vernimmen.com, The Cost of Capital of Greenfield Projects, September 2009, p. 2.

<sup>1477</sup>

Exhibit C-302, Damodaran, Aswath, The Small Cap Premium: Where is the Beef? 11 April 2015; In fact, some studies have found that the supposed size premium not only disappeared in recent years but appears to have reversed in recent years. See Dimson E., Marsh P., Staunton M., Triumph of the Optimists, 2009, p. 138.

<sup>1478</sup>

Exhibit C-304, Crain, Michael A., A Literature Review of the Size Effect, 29 October 2011, p. 4.

<sup>1479</sup>

Exhibit C-305, Advisory Research, The Value and Size Effects in Emerging Markets, Advisory Research, June 2014, p. 9; Exhibit C-306, Bryan, Alex, Does the Small-Cap Premium Exist?, Morningstar, 22 January 2014, p. 1.



premiums, including a lender's contingency of 10% of EPC costs and an increase in annual operating and maintenance costs by 30%.

- (f) However, to take account of any *further* risks of the pre-operational concession, such as additional delays in the construction start date, Versant has included a premium of 2.0% during the construction period.

1145 **Reasonableness check:**<sup>1480</sup> Mitsui's purchase of 35% of the NLC and 15% of the Moatize mine from Vale provides a suitable "*reasonableness check*" against which to compare PEL's *ex post* DCF valuation. As a starting point, Dr Flores recognises that the Mitsui purchase is a comparable transaction, but highlights Mitsui's announcement in 2021 to sell its 35% equity stake in the NLC back to Vale for a nominal amount of USD 1. Relying on the latter transaction, Dr Flores concludes that "*Versant's ex post equity value of the Project is grossly overstated and should be essentially zero*".<sup>1481</sup>

1146 The 2021 transaction cannot be used as a reasonableness check as it is not comparable to the Project, not least because it was influenced by decisions specific to Vale's company-wide strategy, as well as economics specific to the NLC and the Moatize mine. In particular, Vale recently announced their intention to become carbon neutral as a corporation by 2050. Unlike the Project, the NLC is a captive concession that is *only* viable because of Vale's involvement. The decision by Vale to exit the coal market will have a peculiar and direct impact on the value of the concession. Given the length of the NLC and its cost to operate, only commercial parties that own *both* the mine and NLC would realistically be interested in operating a concession. That is particularly the case where the more cost-efficient and shorter rail route linking Tete Province and Moatize Province is planned.

1147 In addition, the exclusive link between the NLC and the Moatize mine means that the value of NLC is directly and disproportionately impacted by the performance of the Moatize mine. The impairment in 2019 was the result of an over estimation of the amount of metallurgical coal, which was specific to the Moatize mine. Considering the tariff rates for the NLC are between two and three times higher than the proposed tariffs for the Project, that unexpected

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<sup>1480</sup> CER-5, Second Versant Expert Report, paras. 189-195.  
<sup>1481</sup> RER-4, Quadrant Economics Expert Report, para. 51.

shortage of metallurgical coal challenged the economic viability of the Moatize Mine and the NLC operations. Those very specific and peculiar issues to the NLC and Moatize mine explain the depressed value of the 2021 transaction between Vale and Mitsui, and it is therefore not representative for the purposes of a reasonableness check.

1148 By contrast, that later transaction does not undermine the economic integrity of Versant's analysis of the initial purchase by Mitsui of Vale's 35% stake in NLC and 15% stake in the Moatize mine, which offers a robust reasonableness check for PEL's *ex post* DCF valuation, and on which PEL continues to rely.

## **IX. MOZAMBIQUE'S SUBMISSIONS AS TO COSTS ARE PREMATURE AND HAVE NO SUPPORT UNDER INTERNATIONAL LAW**

1149 Separate to its quantum analysis, Respondent makes the bizarre and legally ill-informed claim that PEL's litigation funders should be ordered to pay Mozambique's arbitration fees and costs.<sup>1482</sup> While it is not clear from Respondent's SOD, it appears that Mozambique is making its request for "*arbitration fees and costs*" before the close of the proceedings and, in any event, before the Tribunal has had the opportunity to determine the substantive dispute at hand.

1150 This bewildering claim, which the Tribunal should readily dismiss, is premised on the purported application of "*UK law*", which is said to apply because "*PEL's counsel is a UK-based law firm and thus the matter is governed by UK law*".<sup>1483</sup> Besides the preliminary point that the UK is not recognised as a separate legal jurisdiction – the laws of the United Kingdom are divided between the Laws of England and Wales, Scots law and Northern Irish law – this is a hopeless submission and one of many that Respondent ought not to have made. The following points should guide the Tribunal in rejecting Mozambique's request:

- (a) Assuming Respondent intends to rely on the laws of England and Wales, the basis for the application of those laws is not understood and no attempt to articulate the position has been properly or reasonably made in the SOD. The proposition that the laws of England and Wales should apply *because* the law firm retained by PEL is based in the UK has no support in international law. Indeed, Respondent does not even suggest any basis exists for that claim, instead arriving at that conclusion based on a bald assertion. Respondent does not attempt to explain why the nationality of PEL's legal representative, which may be entirely unrelated to the nationalities of the parties in the dispute, should have any impact at all on the laws applicable to it. For the avoidance of any doubt, there is no basis on which the laws of England and Wales should apply to the matter of costs in these proceedings, and

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<sup>1482</sup> SOD, paras. 935-939.  
<sup>1483</sup> SOD, para. 935.

no legally recognised or coherent argument has been made by Respondent as to why it should.

- (b) The correct position is that, in accordance with Article 9(3)(c) of the Treaty, the parties have agreed to resolve their dispute in arbitration under the UNCITRAL Rules 1976. Articles 38 and 40 of those rules, which set out the costs provisions that apply in arbitrations conducted under those rules, state in relevant part that:<sup>1484</sup>

**"Article 38**

*The arbitral tribunal shall fix the costs of arbitration **in its award**. The term "costs" includes only:*

[...]

*(e) The costs for legal representation and assistance **of the successful party** if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;*

[...]

**Article 40**

*1. Except as provided in paragraph 2, **the costs of arbitration shall in principle be borne by the unsuccessful party**. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*

*2. With respect to the **costs of legal representation and assistance** referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be **free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable**.*

*3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or **makes an award on agreed terms**, it shall **fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award**." (Emphasis added)*

- (c) It follows from these articles that (i) a costs award will be made at the conclusion of proceedings; (ii) the unsuccessful party will in principle be liable for the costs of the arbitration; and (iii) the Tribunal enjoys a relatively broad discretion to determine liability for costs of legal

representation taking into account the circumstances of the case. Contrary to Respondent's request, there is no indication that an interim award ordering its costs would be appropriate in the circumstances, much less on the legally inexplicable basis that third party funding is the catalyst for such an award. The ordinary course, as set out under the UNCITRAL Rules 1976, is for an award as to costs to be issued by the Tribunal at the close of proceedings.

- (d) Respondent's reliance on *Arkin*, an English Court of Appeal authority, is similarly inapt even if English and Welsh law did apply (which, for the avoidance of doubt, it does not).<sup>1485</sup> The facts of that case related to a claim brought by an English claimant against multiple defendants in an English-law breach of duty claim. The reported decision relied upon by Respondent is a costs decision following the claimant's loss of its substantive claim. The ordinary rule in English proceedings is that the unsuccessful party pays the successful party's costs. The question before the Court of Appeal was whether a third party which had funded the losing claimant's litigation should be required to pay the defendants' costs, in circumstances where the claimant was impecunious and therefore presumably unable to meet that costs liability. This case provides no authority for the proposition, seemingly advanced by Mozambique, that a third-party funder should pay Mozambique's costs regardless of the outcome of these proceedings and, at least ostensibly, before their conclusion.
- (e) Finally, Respondent relies on an Irish Supreme Court decision, *Moorview Development Ltd. & Others v. First Active PLC & Others*.<sup>1486</sup> Consistent with its haphazard approach to applying the laws of unrelated jurisdictions, Respondent appears not to have recognised that the Irish Supreme Court, being the highest court of the Republic of Ireland, an independent sovereign state, is not subject to and does not apply "UK law", but instead Irish law. Respondent provides no justification at all for why Irish law should apply in an international arbitration subject to a bilateral investment treaty between India and Mozambique. Indeed, no such justification exists. Respondent's claim

<sup>1485</sup>  
<sup>1486</sup>

**RLA-124**, *Arkin v. Borchard Lines Ltd. and Others*, [2005] EWCA Civ 655; [2005] 4 Costs L.R. 643.  
**RLA-125**, *Moorview Development Ltd. & Others v. First Active PLC & Others*, IESC 33 (27 July 2018).

that "*under these precedents, PEL's litigation funder also should reimburse Mozambique for its fees and costs*"<sup>1487</sup> betrays a lack of thought about the proper application of precedent under international law, English law and, apparently, Irish law.

1151 This spurious request should be dismissed by the Tribunal.

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<sup>1487</sup> SOD, para. 939.

**X. PRAYER FOR RELIEF**

1152 For the reasons set out above, Claimant respectfully requests that the Tribunal:

- (a) **DECLARE** that it has jurisdiction over all the claims presented by Claimant in this Arbitration;
- (b) **DECLARE** that all the claims presented by Claimant in this Arbitration are admissible;
- (c) **DECLARE** that Respondent has breached Article 3(2) and/or Article 5 of the Treaty and/or Article 3(4) of the Mozambique-Netherlands BIT;
- (d) **ORDER** that Respondent pay compensation to Claimant in the sum of *USD 156 million*, or such other amount that is just;
- (e) **ORDER** that Respondent pay all the costs incurred by Claimant in connection with this Arbitration proceeding, including the costs of the arbitrators and of the Permanent Court of Arbitration, legal costs and other expenses (including but not limited to those of counsel, experts, consultants, and fees associated with third party funding);
- (f) **ORDER** that Respondent pay pre- and post- award interest at a rate to be determined by the Tribunal on any compensation and/or arbitration costs ex and/or legal costs awarded to Claimant; and
- (g) **ORDER** such further relief as the Tribunal considers appropriate.

**Respectfully submitted on 9 August 2021 by**

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