

**IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF
THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1976,
AND PURSUANT TO THE AGREEMENT BETWEEN THE GOVERNMENT OF THE
REPUBLIC OF INDIA AND THE REPUBLIC OF MOZAMBIQUE FOR THE
RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENT,
BETWEEN**

PATEL ENGINEERING LTD.,

Claimant,

-and-

REPUBLIC OF MOZAMBIQUE,

Respondent,

**RESPONDENT REPUBLIC OF MOZAMBIQUE'S REJOINDER ON THE MERITS
AND REPLY TO OBJECTIONS ON JURISDICTION**

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I. INTRODUCTION

1. Respondent Republic of Mozambique (“Mozambique”) submits its Rejoinder on the Merits and Reply to Objections to Jurisdiction (“Rejoinder”). Mozambique’s Rejoinder addresses the contentions Claimant Patel Engineering Ltd. (“PEL”) made in its Reply on the Merits and Response to Objections to Jurisdiction (“Reply”).
2. The facts and equities soundly favor Mozambique. As a pragmatic threshold matter, this is a dispute over alleged pre-concession rights to a coal-export project concept that could not be financed in the decade since the “Memorandum of Interest” (“MOI”) and *lacks any positive market value*. The subject “Project” has never been built, and *is not being built because it is not economically feasible*. PEL and its litigation financiers seek a massive windfall even though PEL did not “conceive” of any project, cannot quantify any investment expense, and lacked the necessary experience to finance and execute this proposed rail and port public-private partnership (“PPP”) project. Yet, setting all that aside, PEL’s claim suffers from an equally fundamental flaw: the MOI did not (and could not) provide PEL enforceable concession rights. Mozambique offers the only interpretation of the six-page MOI that harmonizes its plain language, Mozambican PPP and procurement laws, and PPP industry practices. PEL’s six-page MOI did nothing more than provide PEL a conditional *direito de preferência* subject to Mozambican law during the continued process of procurement. Mozambican law expressly defined that *direito de preferência*, consistent with international PPP best practices, as a 15% *direito de preferência* in the public tender required for projects of this type. Likewise, as common in the PPP industry, any exclusivity or confidentiality rights for the proponent of the unsolicited PPP proposal are limited to the term of the prefeasibility study preparation and approval (as specified in the MOI) and do not preclude a competitive tender. Tenders are the expected norm; direct awards are a disfavored “last resort” requiring approvals MTC could not provide. The parties’ conduct both before and after the MOI’s execution supports Mozambique’s reasoned understanding, and there were no significant “*volte faces*.” This much is clear: *a \$3 billion concession of this type cannot be promised or awarded on the basis of a mere MOI and a modest Pre-Feasibility Study that fails to even specify PEL’s bid price* (much less the numerous other items and approvals necessary for a concession award of this type). Internationally, the common, expected, and appropriate practice for

unsolicited PPP proposals is to do precisely what MTC did: provide the proposer a preferential scoring right in the public tender. Rather than contemporaneously litigating any anomalous alleged right to a direct award through available dispute resolution mechanisms, PEL chose to participate in the tender process, as part of the PGS Consortium, and recognized in doing so that the Ministry of Transport and Communications (“MTC”) had no obligation to award it the project. MTC ran the tender appropriately, the PGS Consortium scored in third place after consideration of its *direito de preferência*, and no one appealed. PEL’s claim would be frivolous if not demanding a shocking \$156 million from Mozambique.

3. However, this Tribunal should not even reach the merits. PEL’s claims are *inadmissible*. Under international law, Mozambican law, PPP best practices, and the subject tender documents, PEL was obligated to disclose material information concerning PEL. PEL’s claims are inadmissible because PEL concealed the NHAI’s (India’s transportation agency) blacklisting of PEL, in a project of national importance, and the Judgments of the Delhi High Court and India Supreme Court upholding PEL’s blacklisting and holding PEL is “*not commercially reliable and trustworthy*,” while PEL represented to the MTC that PEL “deserves the trust of a direct award.” The periods when PEL’s blacklisting remained in force and the Judgments were issued *overlap* PEL’s “making” of its alleged “investment.” The Indian courts held PEL reneged on its winning bid after learning another bidder had offered a lower price, PEL “*withdrew at the last minute*” and acted in an “*unbusinessman like*” manner, this was “*the first case*” in India when a winning bidder had reneged, and PEL “*had no qualms in ditching the project at the nth hour*,” causing damages to the NHAI. These facts were material to the MTC’s decision *whether PEL was a suitable PPP partner* that could be relied upon and trusted with a 30-year public transportation infrastructure project to construct a USD \$3 billion port and 500km railway in Mozambique. If PEL had disclosed these facts, the MTC would have ceased further dealings with PEL, even after the MOI was signed. Based on PEL’s violation of the international law principles of good faith and transparency, and its fraudulently concealments, PEL’s claims are inadmissible.
4. The Tribunal also *lacks jurisdiction* over PEL’s claims. Investment treaty precedents have unanimously concluded that *contingent rights* are not an “investment.” The MOI and its attendant rights were contingent on the occurrence of specified conditions. Only after these

conditions were satisfied, did the MOI provide PEL with an alleged right in the nature of an option (that is, a right of preference/*direito de preferência* or, *arguendo*, right of first refusal). But that alleged right alone, even if PEL had exercised its option, does not rise to the level of an investment. Instead, an executed “PPP concession agreement” is critical to the existence of an “investment,” when the contemplated investment is a PPP concession. However, a PPP concession agreement was never executed by PEL and the MTC. Similarly, PEL’s pre-investment activities and expenditures, which did not ultimately come to fruition, are not a covered “investment.” This is also confirmed by the BIT, which specifically requires that, in order to constitute an “investment,” “business concessions” must have been “*established or acquired.*” There also can be no “investment” because there was no exercise of sovereign power by Mozambique, which acted as a commercial actor. The MOI presented only a commercial risk, was a preliminary document, and the parties’ dealings do not satisfy the *Salini* factors. This leaves PEL with a contract claim under the MOI. This dispute is governed by the ICC arbitration agreement in the MOI, which is valid, severable and enforceable, and broad enough to cover both the underlying contract dispute, as well as the treaty dispute. At a minimum, this Tribunal must wait for the ICC tribunal to adjudicate the underlying contract dispute per the ICC arbitration clause, or risk rendering an award that will be vacated under the New York Convention. Without the alleged contract rights, there can be no treaty claims. The parties specifically referred the contract dispute to the ICC, overriding the treaty dispute resolution provisions.

5. PEL has not established any breach of the Treaty. PEL never had the rights it now alleges. Its alleged expectations were neither legitimate nor reasonable in light of the facts, the law applicable to the procurement, and PPP practices locally and internationally. The complained-of actions were all commercial in nature (not an exercise of sovereign power), and in any event PEL received fair and substantial value for a mere MOI and PFS: a 15% *direito de preferência* in the public tender. Mozambique never breached the FET standard; PEL held no definitive concession rights to expropriate; and PEL cannot articulate an umbrella clause breach.
6. Regarding damages, PEL is not entitled to damages for several reasons. Because Mozambique is not liable for the wrongs alleged by PEL, there can be no award of damages. Even as to any alleged damages themselves, PEL is not entitled to the amounts

it seeks. PEL's damages analyses deliberately ignore that its own May 2012 projections demonstrated that the project it proposed was financially non-viable—and that therefore its damages are zero. PEL's DCF-based future profits analyses are both impermissibly speculative under well-settled precedent, and severely flawed. Indeed, the wild swings in valuations based upon PEL's own assumptions and methodologies only serve to demonstrate how unreliable PEL's damages claims are. PEL's so-called "loss of opportunity" alternative does not present a valid alternative damages claim, but rather simply adds more inaccurate speculation on its already speculative DCF analyses. Finally, PEL fails or refuses to even attempt to support a claim for cost-based damages, meaning that (even if damages were otherwise appropriate, and they are not) PEL has not even attempted to provide the Tribunal with a valid, non-speculative basis for any claimed damages. PEL's damages claims should be rejected in their entirety.

II. FACTUAL BACKGROUND

7. The facts demonstrate the following, as detailed subsequently:

7.1. The subject "Project" has never been built, and *is not being built* because *it is not economically feasible*. Recent, public financial statements by the winning bidder ITD confirm that the project currently being pursued for financing and construction is only a modest *general cargo port*, with no immediate plans for a deep sea coal port or a coal export rail corridor as previously contemplated. Thus, there is no viable, "game-changing" Project of the type allegedly conceived by PEL. This arbitration is, fundamentally, a dispute over pre-concession rights to a coal-export project concept that could not be financed in the decade since the MOI and lacks any positive market value—a *fact pragmatically dispositive of this case*.

7.2. In any event, PEL did not "conceive" any Project, much less the substantially different 2017 TML Bankable Feasibility Study Project upon which it bases its damages. As to PEL's alleged project idea, a Macuse port was not PEL's conception. Among other things, *there previously was a commercial port in operation in Macuse*, and the general location for a port was recommended not on the basis of any PEL "know-how," but rather by *MTC specialists* based on MTC's information, studies, and resources. PEL did not conceive any specific location

for this port—PEL initially suggested a port in *Chinde*, and its PFS ambiguously considered two options around Macuse that were *75 km apart*. As to the rail corridor, PEL concedes the idea of a rail line linking this area of the coast to Tete was not novel. Moreover, the location PEL contemplated for the rail terminus was *more than a 100km* away from the location specified in the 2017 TML Project. Nor did PEL make anything “feasible” that was believed by Mozambique to be technically infeasible: first, because a Macuse port was not believed technically infeasible (the Government included a Macuse port in its Transport Strategy two years before PEL’s MOI, demonstrating the Government perceived no technical impediment), and second, because PEL’s modest PFS is admittedly not a feasibility study and did not conduct the technical or financial studies necessary to establish feasibility.

- 7.3. PEL also lacked the necessary experience to finance and execute this approximately \$3 billion project, and thus has no reasoned basis for bringing a claim that presupposes its successful execution of something that could not be financed and built by far more experienced, well-resourced entities (*e.g.*, ITD, Mota-Engil, and Chinese state-owned enterprises). PEL had no active operations in Mozambique, few operations on the African continent, and never executed a project of this type or magnitude *anywhere*. PEL’s experience lies in hydrological, bridge, and other smaller projects, primarily in India, and in relevant part is dwarfed by that of the other entrants in the competitive public tender—as the tender evaluators appropriately observed when giving PEL low scores for experience as an EPC (engineer-procure-construct) Contractor (a significant factor in the PGS Consortium’s un-appealed third-place tender finish). PEL cannot overcome its lack of necessary experience for a greenfield rail/port PPP megaproject by relying on its proposed tender consortium partner Grindrod, because Grindrod was not part PEL’s direct award pursuit (the newly disclosed PEL-Grindrod Side Letter forbade PEL from representing that Grindrod was part of the direct award pursuit), and in the tender Grindrod’s role was for Operations and Maintenance (“O&M”) activities (where the PGS Consortium scored higher, to no avail). PEL’s inexperience further demonstrates the speculative, abusive

nature of this extraordinary procurement dispute—where PEL seeks alleged 30-year lost profit damages on an unbuilt Project, awarded to a winning bidder seven years ago in a competitive international tender with no appeals, and PEL admittedly (1) never received the award, (2) did not negotiate or execute a definitive concession agreement, and (3) did not design, build, finance, operate, or maintain any infrastructure.

- 7.4. Yet—setting all that aside—PEL’s claim suffers from an equally fatal flaw: *the MOI did not (and could not) provide PEL enforceable concession rights*. Mozambique offers the only interpretation of the six-page MOI that harmonizes its plain language, Mozambican PPP and procurement laws, and PPP industry practices. In short, the parties’ materially similar Portuguese MOIs control—both because Mozambique law specifies the primacy of Portuguese documents, and because this sensibly avoids the dispute about the authenticity of the parties’ differing English MOIs. The MOI provided PEL a conditional *direito de preferência* subject to Mozambican law during the continued process of procurement. Mozambican law expressly defined that *direito de preferência* in the precise context of an unsolicited PPP proposal (which is what PEL claims to have offered). That *direito de preferência* is the 15% *direito de preferência* in the public tender required under Mozambican law for PPP projects of this type. This was confirmed by the parties’ conduct both before and after the MOI’s execution: before, when Mozambique rejected any attempt by PEL to have the MOI reference detailed project reports and definitive concession rights, and after, when MTC explained, contemporaneous with PFS approval, that the *direito de preferência* was to be materialized as the 15% preference in the public tender per the PPP Law. As common in the PPP industry, any exclusivity rights for the proponent of the unsolicited PPP proposal are limited to the term of the prefeasibility study preparation and approval, as likewise specified in the MOI.
- 7.5. PEL’s interpretation of the MOI—that a six-page “Memorandum of Interest” promised a blank-check award based only on a PFS—is fundamentally at odds with the parties’ conduct, Mozambican law, and international PPP practice. A \$3 billion concession of this type cannot be promised or awarded on the basis of a

mere MOI and a modest *Pre-Feasibility Study* that fails to even specify PEL's bid price (much less the numerous other items necessary for a concession award of this type). Many other approvals, beyond the authority of a MTC Minister, would have been required for the MOI and PFS had their effect been to grant PEL any binding right to a \$3 billion concession. Internationally, the common, expected, and appropriate practice for unsolicited PPP proposals is to do precisely what MTC did: provide the proposer a preferential scoring right in the public tender.

7.6. The parties' conduct after MOI execution confirms MTC's intent. There were no significant "*volte-faces*" or "U-turns." When the PFS was approved, MTC explained to PEL, in a June 2012 meeting (documented without objection in later correspondence to PEL) that the MOI's *direito de preferência* was the 15% preference at tender. At times in 2012 or 2013, MTC also investigated the possibility of direct negotiations or a direct award should PEL satisfy the necessary conditions—including formation of a project company with CFM and securing offtake agreements with mining entities. The direct award investigation was an alternative under consideration, not an obligation. PEL's own correspondence confirmed that the PPP Law required public tenders and that in a direct award scenario PEL must receive an elective "last resort" exception from the Government. PEL failed to satisfy the conditions for a direct award (formation of joint venture with CFM, receipt of offtake commitments, or others specified in the PPP Law & PPP Regulations), and the project appropriately went to tender. PEL cannot demonstrate that a direct award based on a PFS was an appropriate procurement process for this megaproject (it is not, and given the minimal information in the PFS a direct award would be precluded by law and PPP practice). PEL likewise misstates Mozambican law and PPP financing practices when suggesting that CFM's participation in a joint venture must be limited to 20% equity—no such limitation exists. In the competitive tender, PEL received its 15% *direito de preferência* in recognition of its MOI and the PPP Law, and thus received substantial value for a mere PFS.

7.7. Rather than litigating any alleged right to a direct award through available dispute resolution mechanisms, PEL chose to participate in the tender process, as part of

the PGS Consortium, and recognized in doing so that MTC had no obligation to award it the project. By participating in a tender, it was not appropriate for PEL to then seek a direct award, in its own name, as a fallback if it scored low. Now, the finality of international tenders, strict protest procedures found in public procurement procedures in Mozambique and globally, and rights of third parties (the first and second place finishers, for instance) must be considered and respected.

- 7.8. The tender was not “rigged” and was no “sham,” as PEL stridently speculates (without even seeing the confidential competing proposals) when seeking to avoid the consequences of its un-appealed third-place tender finish. As evidenced by the evaluation reports MTC produced, other bidders had more strong points, and the PGS Consortium received low scores in the areas where one would expect PEL to receive low scores—*e.g.*, PEL’s inexperience, lack of offtakers, and its relatively weak broader strategic vision (beyond the technical matters) relative to other bidders. PEL’s newly alleged structural flaws in the tender were not contemporaneously raised in 2013 (or even in PEL’s SOC in 2020), and are refuted by Mozambique’s technical experts, international PPP experts, and this simple fact: more than twenty entities participated in the tender, multiple proposals were received from better-known and well-resourced international entrants, and no one appealed the outcome.
- 7.9. The rest of PEL’s factual arguments—and PEL litigates much of the case in its fact and procedural background sections—confirm that it is PEL who seeks to distract from the core merits. It is wholly proper for Mozambique to resolve the parties’ dispute arising out of the MOI before the jurisdictionally-unquestioned ICC Tribunal, and the ICC Tribunal has rejected PEL’s rhetoric to the contrary. PEL’s attempts to prejudice this Tribunal against Mozambique, because Mozambique insists on resolving the MOI dispute per the parties’ agreed-upon international arbitral election in the MOI, should be seen for what they are—a distraction from the fact that PEL has no right or legitimate expectation to a direct award of this project (much less its illusory 30-year profits) based on a MOI and PFS. If any adverse inferences are to be raised on the basis of the document

production in this arbitration, they should be made against PEL, who failed to produce a single document going to the cost of the PFS (which PEL variously alleges as its “know-how” or “investment”) or its bid proposal, and failed to provide the blacklisting documents ordered by the Tribunal. Mozambique produced substantial documentation to PEL—both before the initiation of this arbitration, and by page count in the document production—and there is no reason to believe that more should presently exist, given the passage of time, the voluminous record already provided to PEL and exhibited, and because the bulk of the parties’ relevant correspondence went to both parties.

7.10. At bottom, the facts paint a stark picture: PEL and its litigation financiers seek an inequitable, speculative windfall from a developing State. PEL’s attack is premised on a six-page “Memorandum of Interest,” a mere Pre-Feasibility Study, and an un-appealed tender from seven years ago where the PGS Consortium scored in third place. All this relates to the profits of a coal export project that has not been built, and is not economically feasible.

7.11. Thus, if there is any party whose “allegations must be handed with caution and skepticism,” is that that of PEL, which never disclosed its blacklisting or finding of commercial untrustworthiness by the Indian Supreme Court. In this Treaty case, PEL seeks to disrupt the finality of international tenders, make an end-run around procurement and PPP dispute resolution processes and international arbitral elections, and raid the public fisc in unprecedented fashion—all in the hopes of securing \$150MM in illusory profits on an unrealized project in which it never had definitive concession rights and cannot quantify any incurred investment expense. The facts and equities soundly favor Mozambique.

A. The “Project” PEL Allegedly Conceived Has Not Been Built, is Economically Infeasible, and is Not Being Built.

8. The Tribunal should begin by defining what “Project” the parties are fighting about. Here, the ultimate answer is: there is no Project. Whatever coal export transport corridor project idea PEL claims (inaccurately) to have conceived is not economically viable, has never been developed, and *is not being developed at present*. In actuality, *PEL has profited by*

not receiving its sought-after concession and incurring unrecoverable sunk costs in the decade since.

9. This third-party-financed arbitration is about disputed pre-concession rights to the illusory profits of an economically infeasible project, which could not be financed and is not being built by anyone. PEL never received the concession and contributed nothing more than a simplistic “Pre-Feasibility Study” whose cost as a PPP project-pursuit document it did not track and cannot (or will not) quantify. PEL never invested in the financing, design, construction, operation, or maintenance of any Project and has created nothing of tangible value for the Mozambican people. Yet—in the midst of real crises, like COVID-19—PEL seeks a USD \$150MM+ windfall premised on the hypothetical counterfactual that its unvetted, unbuilt, and infeasible project “idea” has been successfully financed, designed, permitted, and constructed and would operate profitably over 30 years. PEL’s novel and aggressive Treaty claim distorts the facts, accepted PPP industry standards, and international public procurement practices; is strikingly inequitable; and cannot be countenanced.
10. PEL claims it “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 transport coal and other minerals from the land to the coast (the ‘Project’).” Reply ¶ 2. PEL alleges, as the basis of its liability theories and damages calculations, that “ITD is now implementing PEL’s Project through the [TML Consortium]” and expects to reap gigantic profits. Reply ¶ 9. The damages PEL seeks in this arbitration are the alleged lost profits of the TML Project, which PEL calculates—inaccurately—from projections in a July 2017 update to a 2015 Feasibility Study prepared by ITD (as discussed in the Damages section, *infra*).
11. PEL’s case is counterfactual and readily disproven:
 - 11.1. First, PEL did not “conceive and develop” *any* Project. As detailed in subsequent sections, the concept of a Macuse-area port (and of a potential additional rail corridor for coal export) existed before PEL’s involvement. Nor did PEL design or establish the feasibility of its so-called “Project”—it simply submitted a modest *Pre-Feasibility Study* that, as Mozambique’s unrebutted technical analysis

demonstrated, “did not define the basic terms and conditions of a concession, or reflect a high degree of project development or mobilized resources.” **RER-1**, Betar Report § 5.1; **RER-6**, Betar Second Expert Report §§ 5.1-5.3; *see* **RER-11**, Ehrhardt Expert Report § 5 (“PEL never established that the project was feasible”). The PFS contained no commercial terms and did not even resolve key technical or conceptual issues, such as the Macuse port location: *e.g.*, the PFS did not resolve between two potential port locations 75 km apart. *Id.* The earlier “Preliminary Study” recommending the region the port would be located appears to have cost less than \$20,000 USD and was conducted by *MTC* specialists on the basis of *MTC*’s data and know-how. PEL did not even bother to retain cost records of its similarly modest PFS, and cannot (or will not) quantify any amount spent on it.

- 11.2. Second, PEL certainly did not “conceive and develop” the 2017 TML Project (or any other potentially profitable enterprise), as it now claims as the basis for damages and its assertions that some “game-changer” of value was appropriated. The 2012 financial data PEL submitted after its PFS reflects, upon expert review, that PEL’s purported concept was not financially viable. SOD ¶¶ 843 *et seq.*; **RER-11**, Ehrhardt Expert Report ¶¶ 165-172. The 2015 TML Project shared some general similarities to PEL’s alleged concept, but was also found infeasible in light of the depressed coal market and other factors. Thus, in 2017, TML made substantial additions and modifications, in an attempt to create a feasible project. The 2017 TML Project was fundamentally different than anything proposed by PEL: it had a materially different haulage capacity, with a different port in a different location, with a railway line along a different route and more than a 100km longer, with a different rail gauge, terminating in a different city, to secure offtake from mines not contemplated in PEL’s PFS. *E.g.*, SOD ¶¶ 626, 850; *infra* § II(M). PEL provides no engineering analysis and offers no expert rebuttal to the conclusion of Mozambique’s technical experts: the 2017 TML Project is fundamentally not the same project as anything suggested by PEL’s PFS. **RER-1**, Betar Expert Report § 5.5; **RER-6**, Second Betar Expert Report § 5.5.

- 11.3. Third, and crucially, the 2017 TML Project whose alleged profits PEL seeks to appropriate is itself *infeasible and is not proceeding*. Contrary to PEL’s fantastic assertion that the TML Consortium has already started construction and expects to “make over USD \$300 million a year,” recent publically available information confirms that project *could not be financed and is not economically viable*. If anything is to be constructed—and even that is not without doubt—it is simply a modest general cargo port with no rail line and no coal capacities. The only potential work that has commenced—seven years after the PEL lost the public tender—is settlement relocation for this modest general cargo port. There is no deep-sea coal terminal or rail corridor as allegedly proposed by PEL. **RWS-3**, Chauque Second Witness Statement ¶¶ 12-14.
12. We begin with the latter point, as it trumps all others. What PEL calls a “game changer” is an unfinanced project that has not been built and is not being built.
13. ITD’s publically available financial statements confirm that in light of the concessions signed on in 2013, and ITD’s project development work, ITD had contemplated the (1) construction of “Heavy Haul Railway Lines” from “Moatize-Chitima” to “Macuse Port” of about 613 kilometers, (2) construction of a “Deep Sea Port at Macuse with a starting port capacity, for exporting coal, of 40 million tons annually to the maximum capacity of 100 million tons annually, and (3) operation of the Heavy Haul Railway Lines and Macuse Deep Sea Port for 30 years. **QE-65**, Italian-Thai Development Public Company Limited and Its Subsidiaries, Notes to Consolidated Financial Statements for the Year Ended 31 December 2020 and 2019, pp. 96-97.
14. As noted above, ITD’s proposed project is substantially different than anything suggested or allegedly “conceived” or “developed” by PEL. Rather than a **40 MTPA+** port served by a **600km+** rail line from **Chitima**, PEL’s contemplated the “development of **25 MTPA** handling capacity Port at Macuse” and a “**516km** standard gauge rail corridor from Macuse to **Moatize**.” *E.g.*, **C-7**, PEL PFS presentation; *see also* **RER-1**, Betar Expert Report § 5.5; **RER-6**, Betar Second Expert Report § 5.5 (discussing numerous other substantial differences between the 2017 TML Project and that proposed by PEL, including axle loads, train formations, port parameters, port capacities, vessel sizes, length and layout of terminal

berths and port, alignment of the rail route, and so forth). Plainly, ITD/the TML Consortium was not planning on “implementing PEL’s Project”—as PEL asserts without any competent technical evidence.

15. In any event, what PEL calls the “Project”—the project TML purported to undertake, and that PEL relies on for damages—*is not feasible, cannot be financed, and is not being built*. Expert analysis of ITD’s financial statements explain:

In 2017 and 2018, the Project did not make any significant progress. In 2019, a presentation by TML’s CEO stated that construction would begin in 2019 and the first train would be operational in 2023. However, between 2020 and 2021, due to “challenges in the coal export business,” ITD drastically revised its plans for the Project and decided to develop it in two phases: “Phase 1” consisting of the development of a general cargo port in Macuse, and “Phase 2” consisting of the construction of a railway from Moatize/Chitima to Macuse and of a deep-water port in Macuse for the transportation of coal. According to ITD, “[t]he advantages from starting the development of Phase 1 first include shorter construction period and lower investment costs,” and the development of Phase 2 will only start “when the economics of the project can be justified.”

As of the second quarter of 2021, according to ITD’s latest “backlog” document, little progress had been made on the Project. The company had only performed US\$ 3.3 million (or 3.5% of the US\$ 94.9 million contract amount) of the “Surveys, Design, ESIA [Environmental and Social Impact Assessment] and financial arrangements” related to the concession and only US\$ 60.9 million (or 1.8% of the US\$ 3.4 billion contract amount) of the concession contract itself.

In the second quarter of 2021, ITD announced that it signed an “initial loan agreement” of US\$ 25 million to fund the development of Phase 1. Notably, this amount represents only 1% of the US\$ 2,173 million debt financing for the Project assumed in Versant’s new *ex post* valuation based on TML’s FS. As reported in a recent news article, “Mozambique’s long-awaited coal boom may never materialise and a planned rail and port project at Macuse seems unlikely to proceed.”¹

In conclusion, the current status of the Project shows that an *ex post* valuation based on TML’s FS is incorrect as it neglects the fact that

¹ QE-70, New African Magazine, “Mozambique: A nation in crisis,” 1 June 2021, p. 10.

the Project, as envisioned by TML in its feasibility study, no longer exists.

RER-9, Flores Second Expert Report ¶¶ 18-21 (citations omitted).

16. Simply stated, the “economics” do not “justify” a “Deep Sea Port at Macuse” for the export of coal or “Heavy Haul Railway Lines” from Moatize to Macuse. Thus, ITD has drastically revised its business plan to construct only a modest “multi-cargo port” in Macuse, with no rail line or deep-sea coal port presently slated for construction. **QE-65**, Italian-Thai Development Public Company Limited and Its Subsidiaries, Notes to Consolidated Financial Statements for the Year Ended 31 December 2020 and 2019, pp. 96-97. Mr. Chauque confirms
17. Thus, this Rejoinder could end here. PEL improperly seeks the illusory profits of a TML Project it never conceived, developed, designed, built, operated, or maintained. Worse still, recent developments have confirmed that the TML Project itself is economically infeasible and is not being built, as explained above. The coal corridor Project “idea” PEL broadly alleges it conceived has no positive value.
18. The inequity of PEL’s tactics cannot be understated. PEL complains of “*red herrings*” and unsavory “tactics” when it is PEL and its litigation financiers that abuse BIT arbitration to seek enormous windfall profits—that, for reference, would exceed the value of the World Bank’s recent funding of Mozambique’s desperately needed COVID-19 vaccination campaign²—on a negative-value, unbuilt Project which *never benefited the Mozambican public*, and which PEL *never had concession rights* and *never invested any quantifiable sums*. It is not hyperbole to observe that the punitive windfall PEL seeks against this developing country truly puts lives at risk to enrich developed-world claim speculators, and would constitute a ridiculous waste of the Mozambican people’s limited fiscal resources. That greed and waste is actually what is at issue in this arbitration—PEL’s over-

² “World Bank Injects \$115 Million to Boost COVID-19 Vaccination in Mozambique,” 4 June 2021 Press Release, *available at* <https://www.worldbank.org/en/news/press-release/2021/06/03/world-bank-injects-115-million-to-boost-covid-19-vaccination-in-mozambique> (“This operation will enable the purchase of approximately seven million doses of COVID-19 vaccines, the single largest contribution for Mozambique’s vaccination efforts so far.”).

lawyered narratives and complaints about the clarity of pre-concession communications a decade ago, on an infeasible and unrealized project whose competitive tender the PGS Consortium did not even appeal, are the true *red herring*.

B. PEL Did Not “Conceive” the Unbuilt Project Whose Illusory Profits It Seeks.

19. As referenced above, PEL did not conceive any project at all—and certainly did not conceive the TML Project whose illusory profits PEL seeks to appropriate.
20. The SOD explained that PEL’s allegations that it conceived the Project are internally inconsistent and inaccurate. PEL had conceded—as it must—that the “idea to create a new port in and around Macuse and a rail line linking the port to a location in Tete *was not novel*.” SOC ¶ 3 (emphasis added). But elsewhere, PEL asked this Tribunal to make an inaccurate, unsupported, and incredible finding: that “[a]t the end of the day . . . it was PEL and PEL alone that saw the potential for developing the Mozambican coal industry,” and that Mozambique somehow “appropriated PEL’s idea.” See SOC ¶ 31. In his witness statement, Mr. Daga likewise repeatedly and wrongly contended that the need for a railway link and location of the port was “PEL’s idea.” See, e.g., SOC, CWS-1, Witness Statement of Kishan Daga ¶¶ 14, 40, 145, 162. Mozambique confirmed that PEL did not conceive (much less own) the “idea” of this Project or the location of the port—or enter into a concession and establish Project feasibility—or finance, design and construct the Project and bring it to realization. SOD ¶¶ 33-41.
21. PEL’s Reply quietly concedes that Mozambique was correct. PEL acknowledges that it did not conceive, and does not own, the “general concept of a transport corridor from Tete to Zambesia province.” Reply ¶ 142. It cannot dispute that many companies had interest in this general project concept early last decade, as evidenced by the involvement of *twenty entities* in the public tender process.³ PEL also concedes that it did not “conduct[] the

³ In the public tender process, more than twenty entities submitted expressions of interest and six were shortlisted (including the PGS Consortium). **C-25**, Tender Information Bulletin. The PGS Consortium did not receive the required threshold score to be shortlisted based upon the stated criteria, nonetheless, MTC advanced the PGS Consortium to the next round, taking into account its right of preference. **R-35** at 3. Four entities submitted technical proposals; three advanced to the financial evaluation; and the PGS Consortium ultimately scored third place after application of the 15% *direito de preferência*. See *id.*; **Exhibit C-234**, Evaluation Report—Technical Proposals; **Exhibit C-240**, Evaluation Report—Financial Proposals.

Preliminary Study” recommending Macuse as a port location (Reply ¶ 159), as PEL had previously alleged (*see* SOC ¶ 257) and Mozambique corrected (SOD ¶ 36).

22. PEL thus changes tack and alleges it established the *feasibility* of the “previously envisaged” concept of “a railway line linking the two regions with a port in Zambesia.” Reply ¶ 142. PEL claims, without any written evidence, that such a project was “thought not to be feasible because of the geological conditions in the area surrounding Macuse, Zambesia.” *Id.* In so arguing, PEL attempts to claim conception of something “specific” notwithstanding its prior acknowledgement that the “idea to create a new port in and around Macuse and a rail line linking the port to a location in Tete was not novel.” SOC ¶ 3.
23. First, it is astounding that PEL’s Reply persists in its assertions that PEL conceived the Macuse port location, and that the Mozambican government thought a port at Macuse technically infeasible prior to PEL’s involvement. Fact is, *there already was a port at Macuse*, prior to the war it had been *in use for “commercial purposes” and “big vessels,”* the Macuse area was already known to be characterized by “better navigability conditions” than other locations on this coast, and the idea of a rail link to that port predated PEL’s involvement *by decades*.
24. Specifically, the Preliminary Study—conducted by MTC personnel on the basis of existing government data and field surveys—confirmed that the river at Macuse *had already been in use for commercial purposes* (since before the 1990s, no less) and was already known to have better navigability conditions than elsewhere. C-4 at 17-18. MTC’s Preliminary Study goes to explain there already was an existing port at Macuse, and “even plans for expansion of the port infrastructure and [to] build a railway link to link this port to Milange.” *Id.*
25. Certainly, PEL did not conceive any “game-changer” with the idea of a Macuse port, when the recommendation for a Macuse location was made *by MTC specialists*, based on MTC’s *knowledge* that there already was a port in Macuse and that Macuse was known to be navigable for large-scale commercial purposes since before the war. *See id.* And with respect to “geological conditions,” it was MTC personnel—not PEL—that observed Macuse had “comparative advantages” to other areas based on existing data, although any option would “require further comprehensive technical, economical and social viabilities”

- (**C-4a** at 27, 29)—which PEL never conducted in the PFS or otherwise. **RER-6**, Betar Second Expert Report §§ 5.1-5.3; **RER-11**, Ehrhardt Expert Report § 5 (“PEL never established that the project was feasible”).
26. In addition to the fact that PEL plainly did not “conceive” the idea of a Macuse port when a Macuse port had already been in existence and commercial operation, Mozambique’s 2009 Resolution on “Strategy for the Integrated Developments of the Transports System” confirmed that Macuse was viewed by Mozambique as a significant port location. As Mozambique’s unrebutted technical experts have explained, Mozambique specified Macuse as a port location for the integrated transport system *two years before PEL’s involvement*, which dispels PEL’s speculation that Mozambique considered Macuse “an unsuitable port location.” **RER-6**, Betar Second Expert Report § 5.4.; **RER-1**, Betar Expert Report § 5.4; **RLA-15**, Resolution n°37/2009 (30 June 2009). PEL’s Reply mistranslates and misunderstands the 2009 Resolution; that Resolution specifies that Line 4 would “complement and enable” a Macuse port (not make one “feasible”) and does not in any way suggest that Mozambique believed the Macuse port infeasible for technical reasons. **RER-6**, Betar Second Expert Report § 5.4.
27. In any event, PEL did not specifically conceive anything regarding the Macuse port location. PEL’s PFS waffled between two port locations *75 km apart*—and thus certainly did not establish any “specific concept.” **RER-6**, Betar Second Expert Report § 5.4; **RER-1**, Betar Expert Report § 5.4 (unrebutted).
28. Accordingly, the facts remain as stated by Mozambique. PEL did not conceive of the general or specific idea of this transport corridor or port location, and was right to concede that the “idea to create a new port in and around Macuse and a rail line linking the port to a location in Tete was not novel.” Nor did Mozambique view the Tete-Macuse corridor as infeasible or impossible prior to PEL’s involvement. *See* **RWS-3**, Chauque Second Witness Statement ¶¶ 3-11; **RWS-4**, Zucula Second Witness Statement ¶ 2.
29. Second, PEL never established the feasibility of this previously envisaged transport corridor concept, as it now tries to suggest. *Id.* This simple observation should not be in dispute—the Tribunal can readily confirm that PEL never provided detailed project report or “feasibility” study, much less a bankable feasibility study.

30. Rather, PEL simply points to a (1) Preliminary Study—conducted *by MTC personnel* (Exhibit C-4) at a cost of approximately USD \$18,748 (C-200 at 5)—and (2) *Pre-Feasibility Study*—whose cost PEL cannot or will not quantify.⁴ Neither of these pre-feasibility documents are feasibility studies, and neither establish feasibility. PEL conceded contemporaneously that the PFS did not even constitute “a complete proposal on the technical, quality and price terms,” *see, e.g., C-28* at 3, and it did not even attempt to marshal a technical expert to rebut MzBetar’s thorough conclusions that “PEL’s PFS did not define the basic terms and conditions of a concession, or reflect a high degree of project development or mobilized resources.” **RER-1**, Betar Expert Report § 5.1. An actual feasibility study, like that later conducted by the winning bidder on the different, specific project of its conception, is far more thorough and details all aspects of the project. *Compare R-42*, TML 2017 Update to the 2015 Feasibility Study.
31. Mozambique’s PPP expert, Mr. Ehrhardt, confirms (**RER-11**, Ehrhardt Expert Report, Executive Summary ¶ 13):
- As the name implies, a prefeasibility study is not intended to demonstrate that a project is feasible, and this prefeasibility study indeed did not so demonstrate. It did not contain essential elements required to demonstrate feasibility, including an environmental study, market demand and revenue study, and economic cost-benefit analyses, among other things.
32. Indeed, the Tribunal will recall that PEL’s own PFS stated the need to conduct a different “Bankable Feasibility Study” and many other “further detail studies” as part of a future “detailed project report.” **R-7** at 115-116. Those future, detailed, bankable studies were necessary to actually demonstrate the “techno commercial viability” of the Project—and only after those studies, negotiation and signature of a concession agreement, and signed off-take letters from miners would it be possible to finance the Project. *Id.* The PGS Consortium’s Technical proposal likewise confirmed that the pre-feasibility study did not

⁴ PEL failed to produce documents responsive to Mozambique’s Requests 10, 38, and 39, seeking records of the costs PEL incurred for the Preliminary Study and PFS, stating it could not identify any responsive documents. *See* Tribunal Decision on Respondent’s DPS. PEL has also refused throughout this proceeding to quantify any alleged costs it incurred relative to the Project or its conception. It is appropriate for the Tribunal to infer that PEL did not incur any significant costs on these studies, as it not bother to even track, document, or quantify the costs. *See* PO1 ¶ 55.

establish the feasibility of any project; that a future “Detailed Project Report comprising of a definitive feasibility study for the Project” was necessary; and that it would take *six months* after award to negotiate and execute a concession agreement. *E.g. C-190D*, PGS Consortium Technical Proposal, at 380. That PEL now claims its PFS conceived of and made something “specific” about the Project “feasible” (or that an alleged “right to a direct award” based on a PFS automatically entitles one to assume a negotiated definitive concession, financial close, and a successful profitable project) is a bold mistruth.

33. Any doubts about whether PEL established the feasibility of any Project are dispelled by the fact that even now, more than a decade after the MOI, *the “Project” still is not feasible*. PEL never created a bankable feasibility study—and, to be clear, even a bankable feasibility study (of the type conducted by the winning bidder, ITD) does not actually establish the feasibility of a major greenfield infrastructure project. In completing the type of actual, bankable feasibility studies that PEL never conducted, ITD modified its project structure and design on multiple occasions, such as in the 2017 update to ITD’s feasibility study that PEL relies upon. **R-42**. Yet as established above, ITD has now confirmed that the concept of a rail line and deep sea port at Macuse is *not* feasible and will *not* be constructed unless economic feasibility (and global coal markets) change significantly in the future.
34. And even if Mozambique was wrong on all the above points—which it is not—it is indisputable that PEL never “conceived” of the *TML Project* whose illusory profits PEL attempts to appropriate, as described above. The TML Project is substantially different than anything specifically suggested by PEL.
35. PEL’s other Reply arguments on project conception also fail. PEL complains that Rio Tinto rebuffed its preliminary overtures in 2011-2012 and speculates that Rio Tinto advanced an unsolicited PPP proposal of its own prior to *February 2012*—but if that were true, it is fatal to PEL’s assertion that its *May 2012* PFS uniquely conceived and made feasible any previously-envisaged project idea or concept. *See* SOD ¶ 40; Reply ¶ 147. As noted, it is apparent that Rio Tinto and many others were knowledgeable and interested in what PEL acknowledges is the “previously envisaged” idea of a Tete-Zambesia corridor, as evidenced by at least twenty expressions of interest in the public tender process. **C-25**

(Tender Informational Bulletin reflecting 21 expressions of interest); *see also* **RWS-2**, Witness Statement of Paulo Zucula ¶ 2 (other companies interested in the idea of this transport corridor, which PEL did not conceive).

36. It is surprising that PEL even mentions, much less relies upon, the alleged “initial research” it conducted in 2010. The only evidence PEL can muster of this research is one spreadsheet. That spreadsheet does not demonstrate project conception or establish the feasibility of the any specific project. **C-196**. Far from it: that short, two-page spreadsheet makes no mention of Macuse. It appears to contemplate “*port[s] at four places*” and *5000 km* of rail lines, constructed over a 15 year timeframe, with various costs ranging from *41-133 billion USD*, with a stated payback or “recovery period” of *57 years* (if ever). *Id.* This fantastic, back-of-the-napkin analysis does nothing to demonstrate that PEL uniquely conceived (much less made feasible) any specific concept for a 500-km rail line, Macuse port, and 30-year, \$3 billion concession.
37. If anything, Exhibit C-196 demonstrates that PEL did not have any realistic business plan or detailed understanding of Mozambique, and would have been required, prior to forming any partnership with Mozambique, to submit a “bankable project report” as expressly stated in Sheet 2 of PEL’s spreadsheet. *Id.* PEL never submitted a “bankable project report,” which its own initial documents reference as the first step in the “process to start” a project or reach a JV with the government (*id.*, Sheet 2)—yet implausibly PEL now claims it should be directly awarded the Project based on a pre-feasibility study alone.
38. In short, PEL has no evidence to support its farfetched assertions that “PEL alone” discovered a need and idea of this transport corridor. It is PEL who attempts to confuse the Tribunal as between the “general” and “specific” nature of what it allegedly conceived. The reality is that PEL conceived nothing of real value to the Mozambican people. It did not conceive the general concept of a transportation corridor of this type, nor create any specific, feasible, constructible design. PEL simply submitted (at most) an unsolicited proposal, in the form of a *pre-feasibility* study, for a general infrastructure corridor idea admittedly already in existence; came in third place (after preference) in the public tender necessitated by Mozambique’s PPP Law and industry practices; and now wants to apportion the alleged 30-year profits of someone else’s substantially different, detailed

project—even though the entire, general concept of this coal export corridor has not been built a decade after PEL’s alleged conception of a “game-changer” and is not presently feasible.

C. PEL Lacked, in Any Event, the Necessary Expertise to Execute the Project.

39. Mozambique’s SOD confirmed that, contrary to PEL’s conclusory assertions, PEL is little known and woefully inexperienced as it relates to the subject geography and Project. PEL had *no experience whatsoever* with infrastructure design, construction, or operations in Mozambique, as confirmed by its own annual reports. SOD ¶ 27. It had no substantial experience in Africa more generally. *Id.* It had no experience with railway, port, and PPP projects like this one, as confirmed by its own proposal documents, corporate materials, and annual reports. *Id.*, ¶ 28. PEL’s lead fact witness even acknowledged that this project would have been “*larger than any project PEL had run before.*” See SOC, CWS-1, Witness Statement of Kishan Daga ¶ 17.
40. In Reply, PEL simply repeats unsupported, conclusory assertions that it had experience with large projects, referencing no exhibits save one glossy corporate brochure and a four corporate awards between the years 1994 and 2018. Reply ¶¶ 110 *et seq.*; **C-162, C-277 to C-280.**
41. The documents PEL cites prove Mozambique’s contentions. None of PEL’s documents reference any projects in Mozambique—because PEL conducted no projects in Mozambique. PEL’s undated corporate brochure includes a ten-page tabulated “compendium of works.” This listing of all significant projects PEL can cite *does not even include categories for rail projects, port projects, or PPP projects.* **C-162** at 40-52. Like PEL’s website and the Annual Reports referenced in the SOD, PEL’s brochure confirms that PEL’s “core areas of expertise and specialization” do not include port projects or new rail projects. *Id.*, at 4. PEL’s brochure references zero (0) port projects and zero (0) rail corridors.⁵

⁵ Likewise, the Tribunal is invited to peruse PEL’s website for evidence of PEL’s inexperience in relevant project types. Reviewing PEL’s Project page will show what PEL does not have project categories for “rail” or “port” projects, nor search filters for any country near Mozambique. <https://www.pateleng.com/projects.php#.YXxX6fnMJPY> (accessed 22 November 2021).

42. As Mozambique had previously explained, the bulk of PEL’s experience is in dam/hydropower/water projects outside of Africa. *See also id.* The four awards PEL cites over the past 30 years—of which it simply produces pictures of trophies or certificates—are for irrelevant projects that do not demonstrate the requisite expertise. C-277 is for a “small category . . . hydro electric dam” in India; C-278 is a “water management project” in India; C-279 is a “concrete dam” in India; and C-280 is a 1994 award for a railway tunnel—in India.⁶ PEL has now confirmed that the prior rail project it referenced in its SOC is, in fact, simply a 1994 “rail line *tunnel*” project in Berewaai, India, completed decades ago. *Id.*; Reply ¶ 118. This is not the profile of an entity with the proven expertise or capability to execute any \$3 billion “game changing” rail and deep sea coal port export corridor.
43. The only other evidence PEL offers of its purported capability to do this project is PEL’s new witness statement from a former employee of Grindrod, its consortium partner in the public tender. Reply ¶ 120. That PEL must resort to an attorney-drafted⁷ witness statement from a former employee of an unrealized consortium partner, speaking only in his “personal capacity,”⁸ that does not reference any personal knowledge of PEL’s experience and simply suggests that “as a matter of course” Grindrod did not enter into MOUs or Side Letters “lightly” and therefore must have been “comfortable with PEL and SPI as partners,”⁹ is evidence enough that PEL does not have the experience and expertise to successfully conduct a greenfield \$3 billion rail and port project in Mozambique.
44. Moreover, PEL cannot provide any evidence that it had more or better expertise than the winning bidder and its EPC entities—*because it patently does not*. PEL’s attempt to trumpet 5000 employees globally by reference to an undated corporate brochure (Reply ¶ 117) is inconsistent with its recent Annual Reports (showing only 1,743 employees, about

⁶ It appears C-280 is the Konkan Railway award referenced on PEL’s website, which merely relates to a “single line board [sic] gauge” *railway tunnel*—not any type of new rail corridor as envisaged here. *See* <https://www.pateleng.com/project-inner.php?projects=36#.YXwHSfnMJPY> (accessed 22 November 2021).

⁷ **CWS-5**, Witness Statement of Marco Raffinetti ¶ 4 (“Claimant’s counsel has assisted me in preparing this statement”).

⁸ *Id.*, ¶ 2.

⁹ *Id.*, ¶ 24

70% of which were temporary workers) (SOD ¶ 863), and in any event falls flat when compared to the breadth and scale of ITD and its partners. As the SOD established, ITD has more than 32,000 employees, of which more than 13,000 work on divisions related to rail and port projects. SOD ¶ 862. And the EPC contractors of the TML Consortium—China National Complete Engineering Corporation (“CNCEC”) and Portugal’s Mota Engil—dwarf PEL in relevant experience and capabilities, both globally and locally. SOD ¶¶ 860-861. One searches PEL’s Reply in vain for any rebuttal to these salient facts.

45. Likewise, PEL has no response to Mozambique’s observation that PEL’s finances were “particularly challenging” (as confirmed in its Annual Reports) and that PEL did not demonstrate it had the wherewithal, credibility, or capacity to secure financing for a project of this type and magnitude. SOD ¶ 31.
46. The simple fact is that PEL is not qualified—and certainly is not the *most* qualified interested entity—to finance and execute this (still unbuilt and infeasible) project. PEL’s own documents confirm it no prior experience or demonstrated competency to finance, design, build, operate, and maintain a \$3 billion greenfield rail and coal port project in Mozambique.
47. Switching tactics, PEL contends that Mozambique suffers from a “fundamental misunderstanding of how mega infrastructure projects are carried out in practice” and claims that it had “always intended to develop the Project with the benefit of external expertise.” Reply ¶ 113. It then claims that it formed a partnership with Grindrod and that because Grindrod has certain expertise with port projects, PEL had capacity to deliver the project. *Id.*, ¶ 114 *et seq.*
48. It is PEL who is “disingenuous” and “fundamentally misunderstands” how mega PPP projects (of which is has precious little experience) are procured and carried out.
49. First, that Grindrod is more capable and experienced than PEL has never been in dispute. But Grindrod’s role in PEL’s 2013 tender consortium was limited in scope, involving only *logistics, operations and maintenance*.¹⁰ It was PEL who sought to be the concessionaire

¹⁰ **C-190D**, PGS Consortium Technical Proposal at 423-425; *accord* **CWS-5**, Witness Statement of Marco Raffinetti ¶ 15.3 (“role of Grindrod” in operations); **C-60**, PGS Consortium MOU § 3.1.2 (Grindrod right to provide “locomotives, rolling stock, signaling and safety equipments at mutually

(with financing and management responsibilities), claimed to be “lead member” with a 70% stake in the proposed Consortium, and who sought to act as the “EPC” (engineering-procurement-construction) contractor—meaning it was PEL who sought to construct and develop both the rail line and port.¹¹ Grindrod’s experience and role with respect to operations and maintenance does not correct PEL’s glaring deficiencies as the planned EPC contractor.

50. As confirmed above, PEL woefully lacked the requisite experience to be the EPC contractor and finance, engineer, design, and construct a rail and port project of this type anywhere—much less in Mozambique, where it had no operations and had never completed a project.
51. In such circumstances, it is no surprise that in the competitive public tender, once all the proposals were evaluated, PEL received very low scores on experience. **RWS-3**, Chaque Second Witness Statement ¶ 94; **C-234**, Technical Proposal Evaluation Report. It likewise is no surprise that the PGS Consortium—with Grindrod’s expertise—chose not to contemporaneously appeal that evaluation outcome on the merits. During the document production phase, PEL could provide no written documentation that the PGS Consortium members even *contemplated* appealing the tender through the available judicial mechanisms.
52. Second, and in any event, PEL cannot claim Grindrod’s experience as its own. PEL alleges it had a right to a direct award itself—without Grindrod’s involvement in the Project. The PEL-Grindrod MOU was entered into on 8 March 2013, *nearly two years after the MOI* and only after PEL chose to participate in a public tender where it would actually (and appropriately) have to compete for the concession. **C-60**, PGS Consortium MOU. There

acceptable terms”); **C-233**, PEL-Grindrod Side Letter ¶ 3.2.4 (Grindrod only afforded conditional preferential right to “operation, management, and maintenance of the rail and terminal operations”).

¹¹ **C-60**, PGS Consortium MOU §§ 2.3, 3.1.1 (PEL to act as “main [EPC] contractor for the execution of the entire project); **C-190D**, PGS Consortium Technical Proposal at 423-425 (PEL proposed to be responsible for “construction” and “port concession development and management”); **C-233**, PEL-Grindrod Side letter ¶ 3.2.4 (limiting Grindrod’s potential role to “operation, management and maintenance of the rail and terminal operations”).

is no competent evidence that PEL had any agreement with Grindrod to participate in the project prior to this 2013 MOU.

53. On the basis of the MOI, PEL claimed a direct right to the concession *itself*—and, in fact, now discloses that it later entered into a Side Letter with Grindrod that preserved PEL’s right to receive the project without Grindrod. The Side Letter states that if a direct award was successful, “the Consortium shall terminate and Patel Engineering and SPI *shall be entitled to pursue the Project on their own.*” C-233, PEL-Grindrod Side Letter ¶ 3.2.4.¹²
54. The newly disclosed Side Letter is fatal to PEL’s assertions that Grindrod’s expertise should be taken into account in assessing PEL’s qualifications and considering the appropriateness of a direct award. The Side Letter expressly specified that PEL, if it were to pursue a direct award, *could not represent that Grindrod would be involved in the Project:*

In so pursuing the direct award, Patel Engineering and SPI do not represent to the Government that, if the Direct Award is successful, that Grindrod will have any direct or indirect involvement in the Project.¹³

55. It is legally and logically impermissible for PEL to now attempt to claim it should have received a direct award based on Grindrod’s experience—when as stated above, PEL expressly agreed that it could not make such a representation in pursuing a direct award. *Id.*
56. As to knowledge of how mega infrastructure projects are procured and executed, PEL’s claim that it must be assumed that PEL would need to partner with other entities proves a fundamental point that Mozambique has asserted in this proceeding. The MOI and PFS could not, and did not, promise this concession to PEL. It would be a “fundamental misunderstanding” of PPP practice to give \$3 billion new-build infrastructure concession rights to an inexperienced entity *without even knowing and vetting the other entities with*

¹² As noted above, the conditional “preferential right” afforded to Grindrod in the event of a direct award was limited in scope, to “the operation, management and maintenance of the rail and terminal operations,” and thus does not address PEL’s woeful inexperience as an EPC contractor for this type of rail and port project. *Id.*

¹³ C-233, PEL-Grindrod Side Letter ¶ 3.2.3.1.

whom the purported concessionaire intended to partner. PEL's PFS never identified its partners or any of the many other critical commercial, technical, environmental, and social items that would be necessary to grant a disfavored direct award. **RER-11**, Ehrhardt Expert Report §§ 5-6 ("PEL never established that the project was feasible" and "did not establish it was qualified").

57. PEL's lack of necessary experience is further confirmed by its purported belief that a PPP concession of this type was (or should be) directly awarded to PEL, without a competitive tender, definition of technical and financial terms, or further vetting, all on the basis of a six-page "Memorandum of Interest" and a "Pre-Feasibility Study." See **RER-11**, Ehrhardt Expert Report § 3 ("a sophisticated international entity in PEL's position would not have expected a direct award of a concession"); **RER-1**, Betar Expert Report § 5.6 (further context on industry standard infrastructure PPP procurement practices); see also **R-44**, World Bank PPP Reference Guide. PEL's purported beliefs are contrary to industry and PPP procurement practices globally. *Id.*
58. Finally, PEL's three-paragraph attempt to deflect from its inexperience by asserting that TML was unprepared—and that the failure to build the project is somehow TML's fault—is baseless. **RER-11**, Ehrhardt Expert Report § 6 ("PEL did not establish it was qualified, while other bidders were"). There is no evidence that the fact this project is not being built is due to any inexperience or lack of preparation by ITD, Mota-Engil, and the Chinese state-owned international entities behind that consortium. Far from it: the undisputed evidence is that these entities are far more experienced, and have far greater resources, than PEL or the PGS Consortium. The stated, factual reason the Project has not advanced is that this proposed third corridor for the export of coal from Tete has not been, and is not at present, an economically viable endeavor, as established above. Simply stated, the fact that this project is not being built does not aid PEL's litigation posture—it confirms PEL suffered no damages and seeks a startlingly inequitable windfall from Mozambique.
59. Similarly, no one can reasonably dispute that if *ITD*, in partnership with *Mota-Engil* and *Chinese state-owned enterprises*—all offering far greater relevant expertise, resources, fiscal heft, and reach than PEL—cannot finance the project, it is speculative at best to believe that PEL could. The Tribunal will recall that PEL has no rebuttal to Mozambique's

assertions that PEL's finances were challenged as shown in its own Annual Reports, and can further note that PEL sought third-party financing for this proceeding and alleged it would be challenged financially by the cost of litigating the ICC Arbitration—a *de minimis* sum compared to the capital required to execute a \$3 billion PPP project. PEL certainly does not have the wherewithal to finance a coal export project that ITD, Mota-Engil, and CNCEC could not.

60. PEL, in arguing that TML was “unprepared,” also misstates the facts about when and why TML brought Mota-Engil and CNCEC on board, and misunderstands (or misrepresents) how EPC contracts work in megaproject infrastructure concessions. The involvement of the entities predated 2017. And Mr. Ehrhart observes that PEL's assertions “rest[] on an misunderstanding of PPP practice” and a “lack of knowledge of how large PPP projects are typically implemented.” **RER-11**, Ehrhardt Expert Report ¶¶ 187-193. He explains:

Clearly, selecting the best firm for a \$2.7 billion EPC contract is not something to rush. Moreover, there can be complex links between selecting the EPC contractor and raising finance. Public banks of many countries are likely to finance projects being implemented by their own nationals. Since raising finance and selecting an EPC contractor are complex, intertwined tasks, it is not uncommon for selection of an EPC contractor to be made some years after a PPP contract is awarded. I note that the relationship between the selecting the EPC contractor and arranging financing may have been a factor here. The main EPC contractor is a Chinese company; financing is to be provided “...exclusively by Chinese capital through public banks targeting Africa, and China Export & Credit Insurance Corporation (Sinosure).”

Be that as it might, the fact that an EPC contractor is selected after the PPP contract is awarded sheds no light at all on the qualifications of the firm that won the PPP contract. The fact that EPC contracts were signed at a later date does not mean that those entities were well-qualified EPC contractors were not included in the bid. It would be common to have EPC contractors that are agreed in principle but with whom binding EPC contracts have not yet been signed.

61. Likewise, PEL misrepresents that it was “prepared to carry out” the Project. Mr. Ehrhardt explains that PEL suggests a false equivalence between a mere MOU and definitive EPC and O&M contracts (**RER-11**, Ehrhardt Expert Report ¶ 195):

I do not think the Tribunal should take [PEL's] statement at face value. A consortium MOU, which was the extent of the PGS consortium's arrangement, differs from definitive EPC and operations and management agreements. PGS could not have started construction 'as soon as the tender was awarded'. Before construction could take place, the following things would have had to happen:

Financial close. Since the billions of dollars in construction costs were to be paid for largely with debt, construction would not have started before the financing had been secured. In my experience, securing loans for a project like this is time-consuming.

Conclusion of an EPC contract. Even if the engineering and construction work was to be done by the consortium members, it would still be necessary to conclude a contract between the concession company and the members responsible for engineering and construction. Claimants do not assert that the EPC contract was already in place when the bid was submitted. I would be surprised if it was. If the EPC contract was not already in place, it would have to be negotiated. Negotiations with a consortium member can take as long as selecting an external contractor, since without competition, it can hard to reach agreement on terms.

Possibly, bringing in other companies for engineering design and construction. Constructing the project would require massive amounts of labor, earth-moving equipment, and other specialized equipment. Judging from its website, Grindrod is experienced in operating ports and railways, but it does not hold itself out as a construction company. See **Exhibit R-54**, Grindrod Limited Company Website, About Us. SPI is also not an engineering design firm or construction company. PEL defines SPL as an investment and consulting firm. See Statement of Claim 30 October 2020, at p. 67 footnote 229. In reality, the PGS consortium may well have needed to bring in other firms to assist in implementing the project.

62. We are, again, at the point where this Rejoinder should well stop. PEL has no rebuttal to the fact that the project is not moving forward, because it is not capable of generating profits and being financed. The few paragraphs of narrative misdirection that PEL provides in defending against the powerful evidence of its inexperience—speculating the reason project is not built is that TML didn't do enough over the past decade to advance it—is devoid of supporting evidence or reason, and contrary to the well-established public record.

D. The MOI Did Not Promise or Provide PEL Enforceable Concession Rights.

63. Recognizing that the issue of MOI contractual interpretation under Mozambican law is the crux of its case (and that PEL’s alleged MOI rights are by no means as clear as PEL claimed), PEL devotes a lengthy portion of its fact section to the argument that the MOI should be interpreted to give PEL “a right to the direct award of the project concession.”
64. In reality, the dispositive, plain-language, commonsense interpretation of the MOI is that it merely provided PEL a contingent “*direito de preferência*,” expressly subject to developing Mozambican law—including the forthcoming PPP Law and PPP Regulations. At the time of PFS approval, Mozambique’s PPP Law expressly defined the *direito de preferência* as a 15% scoring advantage in the required competitive public tender, consistent with PPP industry practices globally. The parties’ behavior ultimately confirms Mozambique’s interpretation—because MTC did not anomalously award PEL the project directly based only on a minimal PFS, and instead appropriately chose to conduct a competitive public tender. PEL sought to (and did) participate in that tender, as part of the PGS Consortium, submitting an 896-page proposal (far more robust than the PFS, as necessary to actually establish any arguable basis for awarding a concession) and receiving a 15% *direito de preferência* in recognition that PEL’s MOI and PFS put it in the preferential position of initial proponent of an unsolicited proposal. Only Mozambique’s interpretation is in accordance with Mozambique’s PPP Law, industry standards, and the realities of mega project infrastructure PPP procurement.
65. PEL cannot cogently dispute that a direct award of a project of this type, based only on a PFS, is not in accordance with industry best practices. The best PEL can do is claim that PEL could have expected otherwise based on PEL’s unflattering *intent* in its internal drafts, PEL’s interpretation of the non-controlling English language MOI, and cherry-picked communications after the MOI. But the fact remains—it would be irrational to directly award PEL a \$3 billion PPP project based only on a *Pre-Feasibility* study that did not specify PEL’s partners (which it now admits it needed to execute the project), did not define the basic terms and conditions of the project (including key commercial terms, like the concession fee), did not reflect a high degree of mobilized resources (PEL cannot quantify any sum spent on the PFS), did not satisfy the requirements (or receive the necessary approvals) for PPP projects and the commitment of public funds, and did not satisfy the

extraordinary requirements for disfavored “last resort” direct awards. To the extent PEL claims any expectation otherwise, it is neither reasonable nor legitimate, and is not becoming of a contractor claiming international expertise.

66. Moreover, PEL cannot dispute that, as detailed in the SOD, the MOI could not provide PEL concession rights under Mozambican law. While vestiges of PEL’s old, demonstratively erroneous arguments remain—the Reply introduction still rhetorically asserts the MOI would “grant the project concession directly to PEL,” *e.g.*, Reply ¶ 4—in the merits PEL backtracks. PEL now acknowledges that the MOI could not grant PEL the concession, because the MOI does not satisfy the requirements of Mozambique’s PPP and procurement laws and lacks necessary approvals. Instead, seeking to escape various requirements in Mozambican law, PEL claims the MOI only gave PEL the “right” to “negotiate” a definitive concession agreement.
67. PEL’s current stance is fatal to the jurisdiction of this Tribunal (an alleged “right” to negotiate terms is no “investment”); confirms the six-page MOI could be nothing more than a non-binding preliminary agreement or “agreement to agree” as related to a concession; and impermissibly piles speculation upon speculation as it relates to damages.
68. In the subsections below, Mozambique addresses all eight of PEL’s flawed assertions as it relates to the MOI (*see* Reply ¶¶ 163-249).

1. Mozambique’s Interpretation of the MOI is Consistent with, and Dictated By, the Plain Language of the MOI and Applicable Mozambican PPP Laws.

69. It is odd, indeed, that PEL claims the “plain language” of the MOI (“whichever version is considered”) advances its case—when PEL begins its “plain language” analysis with fact witness testimony and requires a lengthy tome to argue its interpretation. Reply ¶¶ 164 *et seq.* The reality is that PEL asks the Tribunal to ignore the plain language of both parties’ controlling Portuguese-language MOI, and the express definition of the MOI’s *direito de preferência* in Mozambique’s PPP laws.
70. There are four simple, key steps to the dispositive plain language analysis—summarized here and detailed further below (*see also* **RER-3**, Chauque Second Witness Statement ¶ 29):

- 70.1. First, the parties’ substantively identical Portuguese MOI controls, as required by law and industry practice, and to avoid the dispute regarding the authenticity of the parties’ disputed and conflicting English versions;
- 70.2. Second, the MOI provided in relevant part for a “direito de preferência” (Clause 2(2)) subject to the “laws approved by the Govt. of Mozambique” throughout the implementation of the project (Clause 8);
- 70.3. Third, Mozambique’s generally-applicable PPP laws promulgated shortly after the MOI expressly defined the “direito de preferência” in the context of this type of unsolicited PPP proposal. In the PPP Law, *public tenders are required* absent a finding of exceptional, “*last resort*” circumstances (a finding never made in the MOI or PFS), and entities deemed to be the proponent of an unsolicited PPP proposal—what PEL claims to be—are provided a “*direito e margem de preferencia de 15%*” in the public tender. **RLA-6**, Mozambique Law No. 15-2011, Art. 13(1) & (5). PEL received the 15% *direito de preferência*—a preference that is, if anything, a more generous advantage than typically provided to the proponents of unsolicited PPP proposals—in the 2013 public tender. However, the PGS Consortium was not the winning bidder, and did not advance an appeal. Ultimately, the project concept was infeasible even after substantial modifications, could not be financed, and—a decade after the MOI—the rail line and coal port is not being built by anyone.
- 70.4. Fourth, PEL’s references to other MOI provisions, primarily exclusivity (Clause 6) and confidentiality (Clause 11), also do not grant a concession or dictate an unusual, disfavored, and unworkable direct award, because per the MOI they applied only during the prefeasibility study and approval period, and were conditioned upon the “terms of the specific legislation”—*i.e.*, the PPP Laws requiring a public tender.
71. First, as PEL claims it makes “no difference” which version is considered, the Tribunal’s analysis *must be based on the parties’ Portuguese versions*. The parties’ Portuguese MOIs are substantially similar in substance (*see R-2 and C-5B*), and under Mozambican law the

Portuguese version is controlling.¹⁴ Even PEL’s legal expert acknowledges that it “is true that according to Article 5(2) of the Public Procurement Regulations, the Portuguese language ‘prevails’ over the English language,” and that there exists a Mozambican “constitutional safeguard of prevalence of Portuguese language” that “operates when there is a conflict . . . between declarations of the State made simultaneously in Portuguese and in another language.” **CER-6**, Second Legal Opinion of Rui Medeiros, ¶¶ 41.1, 41.4.

72. Likewise, industry practice in Mozambique is that the Portuguese version of contract documents must control, and a contractor seeking to do business in Mozambique on a PPP project would only legitimately expect to operate under the Portuguese documents. **RER-11**, Ehrhardt Expert Report ¶ 92 (“Experienced PPP developers would have read and given attention to the Portuguese version of the MOI.”); **RER-6**, Betar Second Expert Report ¶¶ 19, 21 (construction or development entities wishing to operate in Mozambique know that the Portuguese documents are controlling and are charged with understanding the Portuguese documents); **RWS-3**, Chauque Second Witness Statement ¶ 19 (It is widely understood by those who work with MTC that MTC conducts business in Portuguese and that the Portuguese language documents control (as also specified in law)).
73. Second, the MOI does not provide PEL any concession rights. It specifies that PEL will undertake a PFS at its sole expense, and that PEL would receive a *direito de preferência* if the PFS was approved.
74. The MOI is a six-page, self-described “Memorandum of Interest.” **R-1, R-2, C-5A, C-5B**. Preliminarily, the Tribunal can readily observe that such a short document, entitled a “Memorandum of Interest,” would be a bizarre vehicle for obliging Mozambique “to grant PEL the concession” of a \$3 billion “game-changing” rail and port PPP, as PEL contends. *E.g.* Reply ¶ 168. *Accord* **RER-11**, Ehrhardt Expert Report § 3.3 (PPP development

¹⁴ Under Mozambican law, the Portuguese version (**R-1**) controls over the English version (**R-2**). **RWS-1**, Chauque Witness Statement ¶ 29 (“De qualquer forma, de acordo com a lei moçambicana, a versão legalmente vinculativa do MOI é apenas a versão em português.”); **RER-2**, Muenda Expert Report ¶ 3; *see, e.g.*, **RLA-2** (Constitution of the Republic of Mozambique at Article 10) & **RLA-3** (MZ Decree No. 15/2010 of 24 May – Regulations on Contracting of Public Works Projects, Supply of Goods and Provision of Services to the State – at Article 5(1)). *Accord* **RER-7**, Muenda Second Legal Opinion, Conclusion 11.

entities “would have understood that [the MOI] was non-binding and not a guarantee of an award, definitive concession agreement, or successful project execution”).

75. It is undisputed that the MOI contained PEL’s obligation to carry out the PFS at its own expense. *Accord* Reply ¶ 167. Clause 1 of the MOI specifies that the “objective of the present memorandum is to undertake the prefeasibility study the expense of which will be entirely borne by PEL.” **R-1, R-2, C-5A, C-5B**. Clause 4 confirms the “direct costs necessary to conduct the feasibility study shall be entirely borne by PEL.” *See R-1 & R-2, MOI, Clause 4*. All this is similar to the requirement of Mozambique’s PPP Law, promulgated shortly after the MOI’s execution, that the proponent of an unsolicited proposal (as PEL claims to be) is *not entitled to compensation for the costs incurred in preparing its proposal*. **RLA-6**, Mozambique Law No. 15-2011 at Art. 13(5).
76. PEL can no longer dispute that it is common for contractors to submit PFS documents—and even far more detailed proposals—at their sole expense without expectation of award. In this industry, the PFS is properly understood as a marketing or business document—it is what proponents of unsolicited PPP proposals submit to generate interest and pursue a project, with no legitimate expectation that its submission equates to a grant of a concession or a guarantee of concession profits. *See RER-11*, Ehrhardt Expert Report, Executive Summary ¶¶ 5-6; **RER-6**, Betar Second Expert Report §§ 5.1-5.3. The benefit of such project pursuit efforts, like the PFS, is that they typically provide the USP proponent a preference in the tender, such as automatic shortlisting or a scoring bonus—as was the case here. *E.g.*, **RER-11**, Ehrhardt Expert Report ¶ 49. Likewise, the PGS Consortium—like all of bidders—submitted proposals far more extensive than the PFS in the tender, expressly without any cost recovery or expectation of award. **RER-11**, Ehrhardt Expert Report § 2.3 (“Firms routinely incur project development costs for business development purposes without right of direct award”); **RWS-3**, Chauque Second Witness Statement ¶ 100; SOD ¶ 131. These points were made with vigor in Mozambique’s SOD, and not rebutted by PEL’s new PPP procurement expert.
77. The parties’ debate centers around differing interpretations of MOI Clause 2. Both parties controlling Portuguese MOIs (**R-1, C-5B**) state:

Cláusula 2
(Estudo de pré-viabilidade)

1. A PEL realizará um estudo de pré-viabilidade (EPV), dentro de 12 meses que submeterá ao Governo para a respectiva aprovação.
2. Aprovada a pré-viabilidade do empreendimento, a PEL terá o direito de preferência para a implementação do projecto na base da Concessão a ser outorgada pelo Governo.

78. In English, Clause 2(1) specifies that “PEL shall carry out a pre-feasibility study (PFS) within 12 months and will submit to the government for the respective approval.” **R-2.**
79. Clause 2(2) specifies that after approval of the PFS, PEL shall have a “direito de preferência” for the Project. In the parties’ English translations and subsequent correspondence, this is translated as either a right of refusal or right of preference.
80. Clause 2(2) does not itself define the “direito de preferência para a implementacao do projecto na base da concessao a ser outorgada pelo Governo.” However, Clause 8 of the MOI specifies that “a implementacao do Projecto” shall be done within the laws approved by the Government of Mozambique. This makes the “direito de preferência” subject to Mozambican law existing throughout implementation of the project.
81. Third, Mozambican law expressly defines the applicable “direito de preferência.” The “direito de preferência” is expressly defined in the Mozambican PPP Law, 15/2011, that PEL alleges was known to its attorneys at the time of drafting the MOI. See SOC, CWS-1, Witness Statement of Kishan Daga ¶¶ 35-36. In the PPP Law, *public tenders are required* absent a finding of exceptional, “*last resort*” circumstances (a finding never made in the MOI or PFS), and entities deemed to be the proponent of an unsolicited PPP proposal—what PEL claims to be—are provided a “*direito e margem de preferencia de 15%*” in the public tender. **RLA-6**, Mozambique Law No. 15-2011, Art. 13(1) & (5). The PPP Law further confirms that the proponent of an unsolicited proposal is *not entitled to compensation for the costs incurred in preparing its proposal*. *Id.*, Art. 13(5).
82. In short, the “direito de preferência.” in Clause 2(2) of the MOI is the “direito de preferência” in Article 13(5) of Mozambique law 15/2011—which is the 15% public tender

scoring advantage that MTC provided to PEL. The MOI was intended to outline the process by which PEL may be able to exercise the “*direito de preferência*” in the PPP Law. The MOI also confirmed that, as reflected in the PPP Law, PEL would be performing the PFS at its own cost, as part of its project pursuit marketing that private proposers commonly undertake in the context of unsolicited PPP proposals. *E.g.*, SOD ¶¶ 560-570. All this was the intent of the senior ministry and legal personnel involved at MTC contemporaneously, (**RWS-3**, Chauque Second Witness Statement ¶¶ 16-29; **RWS-4**, Zucula Second Witness Statement ¶¶ 3-12), and the reasoned objective conclusion of experts in Mozambican law and PPP practices (**RER-6**, Betar Second Expert Report §§ 5.3, 5.6, 5.7; **RER-7**, Muenda Second Legal Opinion ¶¶ 13-21; **RER-11**, Ehrhardt Expert Report ¶ 108).

83. Fourth, under their plain language, neither the exclusivity clause nor the confidentiality clause grant PEL a concession or dictate a direct award.
84. The MOI contains a purported exclusivity clause: “During the feasibility study and the process of approval for the project, MTC agrees that *within the terms of the specific legislation* it will not solicit any proposal of study for the objective of the current memorandum. MTC also agrees not to give any rights/authorization to any other party for the development/expansion of a port between Chinde and Pebane for similar objectives, nor for the development/expansion of any rail corridor from Tete to the province of Zambezia within the areas referred under objective of the present memorandum.” *See R-1 & R-2*, MOI, Clause 6 (emphasis added).
85. As evident in the plain language of the clause, the “exclusivity” is contemplated during the process of the development and approval of the PFS, and is expressly conditioned upon Mozambican legislation. **RWS-3**, Chauque Second Witness Statement ¶ 19; **RWS-4**, Zucula Second Witness Statement ¶ 6; **RER-6**, Betar Second Expert Report ¶ 30; **RER-7**, Muenda Second Legal Opinion, Conclusion 4; **RER-11**, Ehrhardt Expert Report ¶ 250. At most, this was intended to mean that MTC would not grant similar preferential rights to others while PEL’s PFS was underway and in the process of approval. *Id.* Indeed, Minister Zucula confirms that the “exclusivity” in Clause 6 was “limited to the term of the PFS study and approval, and subject to the terms of Mozambican laws. There was no impediment to Mozambique putting this project to tender after PFS approval. That is

- typical practice for unsolicited proposals.” **RWS-4**, Zucula Second Witness Statement ¶ 6; *accord* **RER-11**, Ehrhardt Expert Report ¶ 250 (“This is standard practice for a USP”).
86. The MOI’s confidentiality clause is similarly self-limiting: “The parties have agreed to keep all the data, documents, information, and share [sic] between them whether written or otherwise, including this MOI as confidential until the approval of the project.” *See* **R-1 & R-2**, MOI, Clause 11; *e.g.*, **RWS-3**, Chauque Second Witness Statement ¶ 29.4.
87. Accordingly, the simple, plain language analysis is clearly in Mozambique’s favor. PEL’s attempts to argue otherwise are readily disproven.
88. PEL starts its purported “plain language” analysis with block quotes from its fact witness statements. Reply ¶ 164. That alone dispels the notion that PEL is engaging in “plain language” contract interpretation.
89. In any event, Mr. Daga and Mr. Patel’s purported intent or beliefs are (1) irrelevant and (2) incorrect and inconsistent with the record—including PEL’s own legal concessions.
90. As an initial observation, the plain language of the MOI should control, rather than PEL’s fact witness testimony about its intent.
91. But, in any event, PEL does not dispute that it drafted the MOI. Under the legal rule advocated by PEL, it is not the “will of the declarant” (here, PEL) that is most relevant. **CER-6**, Second Legal Opinion of Rui Medeiros, ¶ 19.1. Rather, Professor Medeiros asserts that Mozambican law “embraces the theory of the recipient’s impression, according to which one gives ‘primacy to the point of view of the recipient of the declaration.’” Whatever the merits of Professor Medeiros’ opinion, relative to the understanding of the PEL-drafted MOI, it is *MTC’s* “point of view” that is the primary consideration.
92. Here, testimony from MTC witnesses confirms that Mozambique interpreted the MOI using the controlling Portuguese version, and intended for the MOI to provide a *direito de preferência* that, in accordance with the PPP Law, manifested itself as a 15% *direito e margem de preferencia* in the public tender process. *E.g.*, SOD ¶¶ 47-48 (testimony of former Minister Zucula and MTC attorney Mr. Chauque); **RWS-3**, Chauque Second Witness Statement ¶¶ 16-29; **RWS-4**, Zucula Second Witness Statement ¶¶ 3-12.

93. Thus, under PEL’s rule of contract interpretation, the MOI should be interpreted against the drafter (PEL), and MTC’s understanding of the MOI’s *direito de preferência* is controlling. That is fatal to PEL’s case. A similar outcome results under a “meeting of the minds” analysis, as the testimonial evidence confirms that there was no meeting of the minds to “grant PEL the concession.” *See also RER-7*, Muenda Second Legal Opinion ¶¶ 65 *et seq.*
94. PEL’s referenced witness testimony is also incorrect and inconsistent with PEL’s admissions elsewhere. PEL first quotes Mr. Patel as saying PEL “needed a guarantee that it would receive a concession to implement the Project” and that he “insisted there should be a minimum duration for such a concession” that “made sense from a financing perspective.” Reply ¶ 164. Yet, the MOI never defined or promised any “minimum duration” or other commercial terms of the concession (**R-1**, **R-2**), and PEL itself now admits that “the MOI did not award the actual concession” (*e.g.*, Reply ¶ 182).
95. To be clear, PEL had no “guarantee” of a concession—even in its interpretation, PEL would still have to actually negotiate a mutually-acceptable concession agreement, define “all necessary and material terms of the concession,” and attempt to fulfill all the procedures, requirements, and approvals of the PPP regulations, among other things. *E.g.* **CER-6**, Second Legal Opinion of Rui Medeiros ¶ 15.5; **CER-5**, Second Versant Expert Report, ¶ 210 (“It is Claimant’s affirmative case that . . . Claimant and Respondent should have entered into direct negotiations to agree [sic] the terms of the Concession”); *see RER-11*, Ehrhardt Expert Report §§ 3, 7 (MOI no promise of direct award, and in any event there would be many requirements post-award). It is for all these reasons that in Reply, PEL now submits a new “loss of chance” damages theory that recognizes that PEL did not “negotiate[] key terms for the Concession” and its claimed damages are its alleged “lost opportunity to obtain a Concession agreement for the Project through direct negotiations with Respondent.” **CER-5**, Second Versant Expert Report ¶¶ 22-23, 210.
96. Mr. Daga’s witness statement likewise conflicts with the MOI’s plain language and PEL’s concessions elsewhere. Like Mr. Patel, Mr. Daga testifies that “the most important point for PEL in the MOI was that it be granted a concession for the Project.” Reply ¶ 164. But the MOI did not grant PEL the concession—it merely gave it a *direito de preferência* that

was defined in law as a 15% scoring preference. And as confirmed above, PEL has been forced to concede that even in its interpretation of the MOI, PEL simply had a right to *negotiate*: “the MOI did not award the actual concession.” Reply ¶ 182, quoting **CER-6**, Second Legal Opinion of Rui Medeiros; *see CER-5*, Second Versant Expert Report ¶¶ 22-23, 210.

97. Thus, while Messrs. Patel and Daga may have wanted a MOI and minimal PFS to lock the government into a concession with PEL absent any vetting, definition of terms, or competitive tension, that is not what the MOI did, and it would have been legally (and logically) impermissible for it to do so—as established by Mozambique’s factual, legal, technical, and PPP witnesses.
98. The rest of PEL’s plain language analysis simply quotes the MOI provisions in English with conclusory commentary—all without reference to the controlling Portuguese language terms, the *direito de preferência*, or Mozambican PPP laws.
99. Finally, the Tribunal will note that PEL’s “plain language” analysis relies again on disputed language in Clause 2(1), found only in PEL’s anomalous English-language MOI. Reply ¶ 168. This is contrary to PEL’s assertion only paragraphs earlier that its plain language analysis applies “whichever version is considered.” *Id.* ¶ 163. As noted, PEL cannot dispute that in the event of a conflict, the Portuguese language versions of the MOI control. **CER-5**, Second Legal Opinion of Rui Medeiros, ¶¶ 41.1, 41.3, 41.4 (as a rule for resolving conflicts, “the Portuguese language ‘prevails’ over the English language”). Here, the language PEL relies on in its English Clause 2(1) does not exist in either parties’ Portuguese version (or Mozambique’s English version), and is relied on by PEL for an interpretation of the MOI contrary to that of the plain language in Portuguese. Thus, there is a conflict and the Portuguese versions control. **RER-7**, Muenda Second Legal Opinion, Conclusion 11; *see also RER-11*, Ehrhardt Expert Report ¶ 92 **RER-6**, Betar Second Expert Report ¶¶ 19, 21; **RWS-3**, Chauque Second Witness Statement ¶ 19 (Portuguese contract documents controlling in Mozambique per accepted industry practice and law). The language of PEL’s preferred Clause 2(1) is also internally inconsistent, and would require more detail from the PFS (including finalization of the rail route) that the PFS

admittedly did not provide. *E.g.*, **RER-6**, Betar Second Expert Report ¶ 5(c) (prior conclusion on this point un rebutted).

100. For all these reasons, the dispositive plain language interpretation of the MOI specifies that PEL received a 15% *direito de preferência* in exchange for its modest efforts with the PFS. PEL did, in fact, receive that 15% *direito de preferência* in the public tender. The rest of the discussion—indeed, the rest of the case—is extraneous.

2. It is PEL’s Interpretation of the MOI That “Puts a Square Peg Into a Round Hole” and Is Foreclosed By Mozambican Law and Industry Practice.

101. In the SOD, Mozambique accurately explained that (1) the MOI is a nonbinding, preliminary agreement as to a concession; (2) the MOI could not under Mozambican law be interpreted to provide for concession rights; and (3) at most, the MOI granted PEL the *direito de preferência* specified in Mozambique’s PPP law. *E.g.*, SOD ¶¶ 42-67.
102. PEL’s attempts to dodge these clear conclusions, but cannot.
103. First, the MOI is merely an “agreement to agree.” Other sections of PEL’s own Reply confirm this to be true. As described above, PEL itself now concedes that “the MOI did not award the actual concession” (*e.g.*, Reply ¶ 182). PEL would still have to actually negotiate a mutually-acceptable concession agreement, define “all necessary and material terms of the concession,” and fulfill all the procedures, requirements, and approvals of the PPP regulations, among other things. *E.g.* **CER-6**, Second Legal Opinion of Rui Medeiros ¶ 15.5; **CER-5**, Second Versant Expert Report, ¶ 210 (“It is Claimant’s affirmative case that . . . Claimant and Respondent should have entered into direct negotiations to agree [sic] the terms of the Concession”); *see* **RER-11**, Ehrhardt Expert Report §§ 3, 7 (MOI no promise of direct award, and in any event there would be many requirements post-award). It is for all these reasons that in Reply, PEL now submits a new “loss of chance” damages theory that recognizes that PEL did not “negotiate[] key terms for the Concession” and its claimed damages are its alleged “lost opportunity to obtain a Concession agreement for the Project through direct negotiations with Respondent.” **CER-5**, Second Versant Expert Report ¶¶ 22-23, 210.

104. Thus, even in PEL’s telling, the MOI purportedly gave PEL the right to enter into direct negotiations to agree on a definitive concession agreement. That is, by definition, merely an “agreement to agree,” and a paradigmatic example of a non-binding preliminary agreement. Neither the MOI nor the PFS defined the basic terms and conditions of the concession.
105. PEL contends the MOI is not “preliminary” by noting instances where the MOI uses the word “shall,” but its references fall flat. Reply ¶ 176. That the MOI specifies that PEL “shall” submit a PFS within 12 months or “shall” receive a *direito de preferência* upon PFS approval—or that MTC “shall” provide assistance to PEL with respect to the PFS—does nothing to address the fact that as to the concession itself, the MOI defines no terms and could never be anything more than an “agreement to agree.”
106. PEL’s argument that the fact that pictures were taken of the MOI’s execution—what PEL generously calls a “signing ceremony”—“is at odds with the idea of a mere agreement to agree” is indicative of the weakness of its position and baseless on its face. Non-binding preliminary agreements like memorandums of understanding are celebrated all the time. The Tribunal need only conduct an internet news search for “signing MOU” to see *hundreds of thousands of hits*. What is very unusual is for PEL to claim that a six-page “Memorandum of *Interest*” could ever be anything more than an “agreement to agree” as to a concession.
107. Nor is it odd that an agreement to agree would contain a dispute resolution clause and some potentially binding obligations—such as exclusivity or confidentiality during the term of the study—as PEL asserts without citation. Reply ¶ 176. This experienced Tribunal is well aware that preliminary documents can commonly specify certain binding commitments relative to confidentiality or other items, without binding the parties to any definitive agreement on the subject transaction. *See also RER-11*, Ehrhardt Expert Report ¶ 5 (“It is well understood in the industry that MOIs or MOUs of this sort do not confer legal rights, primarily because they are agreements to agree. As a practical commercial matter, a stated intent to negotiate an agreement in the future cannot be enforced because there is no way to know what the agreement was supposed to be”).

108. Finally, Mr. Baxter’s carefully worded opinion that “PEL could have expected a direct award” is of no help to PEL. Reply ¶ 177. Mr. Baxter never concludes the procurement methodology PEL sought is objectively in accordance with industry best practices, and says in the very next breath that “the terms and conditions could have been negotiated later.” CER-7, Expert Report of David Baxter, ¶ 155. While Mr. Baxter’s belief that a \$3 billion project could be procured on a direct award, unsolicited proposal basis without definition of basic terms and conditions of the concession is erroneous, his statement is a clear acknowledgement that neither the MOI nor the PFS actually specified those terms. The fact that the MOI and PFS did not specify the terms and conditions of this concession, and merely granted PEL a “direito de preferência,” confirms that the MOI is, at best, a preliminary “agreement to agree.”
109. Mr. Ehrhardt rebuts Mr. Baxter’s opinions, and establishes that it is PEL’s interpretation of the MOI that is unreasonable.
110. Because unsolicited proposals entail risks “such as not delivering value for money or enabling corruption,” industry best practice is to subject the unsolicited proposal “to a competitive tender, in which the original proponent may be given some advantage.” RER-11, Ehrhardt Expert Report ¶ 2. It is not objectively reasonable for a PPP developer to expect that a MOI and PFS gave it a right to a direct award, because it is counter to industry practices for competitive tenders in the USP context, and because neither a MOI nor a PFS is adequate for granting a direct award (*id.*, ¶ 5):

I do not believe an experienced PPP developer would have considered that the MOI, combined with submission of the prefeasibility study, gave it a right to direct award of a concession for the project. This is for three main reasons:

It is well understood in the industry that MOIs or MOUs of this sort do not confer legal rights, primarily because they are agreements to agree. As a practical commercial matter, a stated intent to negotiate an agreement in the future cannot be enforced because there is no way to know what the agreement was supposed to be. In this case, neither the MOI nor the PFS said what the concession fee should be, what the tax regime would be (the PFS was internally contradictory on this), or who would bear the costs of land acquisition, to give just a few examples. These are all points on which the parties would be expected to disagree. There was no mechanism to force an

agreement on these or other points. The practical reality is that there was no way to enforce an agreement to agree on the concession terms. PPP developers I work with understand this, and so would understand that the MOI could not confer enforceable rights to a direct award of a concession on approval of a prefeasibility study.

A [PFS] is not expected to establish the feasibility of a project, and this one did not in fact do so. A prefeasibility study is only intended to inform a decision on whether a project is sufficiently promising to make it worth spending the considerable sums required for a full feasibility study. In accordance with both international best practice and Mozambican law, governments should not award a project unless it has been shown to be feasible. Much of the information needed to demonstrate project feasibility was not provided. There was no environmental study, no market demand and revenue study, and none of the standard indicators of financial feasibility had been presented. Moreover, when I calculated these standard indicators from the financial projections PEL provided in a brief printout, they indicated that the project was not financially viable. Since it is necessary to show that a project is feasible before awarding it, and that had not been done, an experienced PPP developer would not have expected, or indeed wanted, a direct award of a potentially loss-making concession.

Mozambican law states that award of USPs must be done through a competitive tender in which the original proponent is given a right of preference. The law prohibits direct award of contracts except in exceptional circumstances—circumstances which experienced PPP developers would not have thought existed here. An experienced PPP developer would have thought that the government could not directly grant a concession, for the simple reason that to do so would be against the law.

111. In actuality, the objective expectation of an entity in PEL's position would be that it held a contingent *direito de preferência* in the competitive tender expects for projects of this type—precisely as stated by Mozambique (*id.*, ¶ 108):

[A]n experienced entity in PEL's position would have thought it had a contingent 'direito de preferência' if a tender should be held on the project. The entity would understand the 'direito de preferência' to be right to a 15 percent preference margin in a tender, as provided in Mozambique's PPP law. This expectation is consistent with the language of the parties' Portuguese-language MOI documents (which in Mozambique are considered controlling), Mozambique's laws on unsolicited proposals, and industry standards in Mozambique and globally. PEL's claimed interpretation—that the

MOI should be interpreted to provide it a right to a direct award based only on a PFS—is inconsistent with industry practices and practicalities, the requirements of PPP procurement in Mozambique, and the language of the MOI.

112. Mr. Baxter’s assertions about the “terms and conditions” being “negotiated later” demonstrates that PEL could have no expectation to a direct award based merely on a MOI and PFS (*Id.*, ¶ 259):

I read Mr. Baxter to be saying that PEL should have been awarded the project at the point the PFS was approved and the terms and conditions ‘could have been negotiated later’. However, it makes no sense to say that a project can be awarded before it is defined, or a concession awarded before it is agreed. In saying that the PFS ‘went a long way toward defining the project’ he acknowledges that the PFS did not go all the way—more was needed before the project was fully defined.

113. Second, it is similarly perplexing that PEL disagrees with Mozambique’s observations that the MOI, if interpreted as PEL claimed, could not be valid and binding under Mozambican law. Reply ¶ 178 *et seq.*
114. Here, too, PEL’s own Reply supports Mozambique’s position. The reason PEL was forced into conceding that “the MOI did not award the actual concession” (e.g., Reply ¶ 182) is that PEL and its legal expert were required to dodge mandatory provisions of Mozambican law that the MOI did not satisfy. Among other things, the MOI did not receive necessary approvals to bind the government and commit public funds, and even in conjunction with the PFS the MOI did not define the terms and conditions of the concession or other requirements of Mozambique’s public procurement and PPP laws and regulations. *E.g.* **RER-7**, Muenda Second Legal Opinion, Conclusion 6; **RER-11**, Ehrhardt Expert Report §§ 3, 5 & ¶ 328; **RER-6**, Betar Second Expert Report §§ 5.2-5.3 (MOI and PFS “did not define the basic terms and conditions of the concession” and are “not a prudent basis” for granting a concession).
115. Third, PEL attempts to dodge Mozambique’s key argument and the plain language interpretation of the MOI—that it only provides a *direito de preferência*—by burying it deep in its fact section and raising a hodgepodge of objections. Reply ¶¶ 183 *et seq.* These are readily dismissed.

116. The first issue PEL raises is that the words *direito de preferência* do not appear in the English version, nor do “tender” or “right of preference.” Reply ¶ 185. True enough—Portuguese is not English. But, as detailed above, and acknowledged by PEL, the Portuguese language controls. It is likewise unnecessary for the MOI to specify that a \$3 billion PPP project would go to public tender, when that is the baseline assumption of the Mozambican procurement regime and PPP procurement the world over. *E.g.*, **RWS-3**, Chaque Second Witness Statement ¶ 20; **RER-11**, Ehrhardt Expert Report §§ 2-3 (tender is best and expected practice here); **RER-6**, Betar Second Expert Report ¶ 26 (“the general (and expected) procurement procedure is the public tender” and if anything, it would a direct award process that must be “explicitly stated in the MOI with justifications). And again, it must be underscored that the Mozambican government speaks Portuguese and operates under the Portuguese documents. Whether PEL in preparing the MOI drafts translated the *direito de preferência* as right of refusal or right of preference in English is non-determinative. The Portuguese version is the controlling version, and MTC was provided with (and signed) a Portuguese MOI that provided PEL a “*direito de preferência*.”
117. PEL’s argument about what words the MOI omitted is readily weaponized against PEL. The English MOI neither references “direct award” nor includes any governmental findings that the extraordinary circumstances necessary for direct award procurement are satisfied in this instance—all of which would have been required if direct award was the agreed-upon procurement process. *Id.* PEL may complain that the MOI did not expressly specify the tender that is the typical expectation in this industry—but it is far more anomalous that the MOI and PFS did not expressly articulate and agree on the extraordinary procurement regime PEL now advocates. *Id.*
118. Nor was it necessary for the MOI to specify that the *direito de preferência* in Clause 2(2) was the 15% *direito de preferência* provided to proponents of unsolicited proposals in the PPP Law. That cross-reference should have been readily made by PEL, who claimed to be the proponent of an unsolicited proposal and claimed knowledge of the forthcoming PPP Law. *E.g.* **RER-11**, Ehrhardt Expert Report ¶ 108; **RER-6**, Betar Second Expert Report § 5.7. And it is no requirement for the government to cross-reference contractual terms in a PEL-drafted, six-page Memorandum of Interest with applicable definitions in law.

119. Next, PEL incredibly asserts that the “only piece of evidence” that Mozambique provides relative to the *direito de preferência* is Minister Zucula’s testimony. Reply ¶ 187. PEL is incorrect—Mozambique’s SOD discussed the proper understanding of the *direito de preferência* at length, with reference to multiple witnesses (including MTC attorney Mr. Chauque), experts, statutory provisions, contemporaneous documents, industry practice, and authoritative PPP procurement references. And, in any event, Minister Zucula’s testimony—as the MTC signatory of the MOI and a key contemporaneous point of contact with PEL—is highly relevant. PEL’s attempt to undermine his credibility and give short shrift to the voluminous evidence presented by Mozambique must be rejected. Minister Zucula’s testimony is consistent with his statements to PEL during the Project, and the clear legal analysis and industry understanding of the *direito de preferência*. MTC did not grant or promise the concession to PEL; rather, in light of the PPP law, PEL was to be provided a 15% *direito de preferência* in the public tender as a result of the MOI and PFS. **RWS-4**, Zucula Second Witness Statement ¶ 11.
120. Contrary to PEL’s contentions, the rest of the MOI is consistent with the plain language interpretation of the *direito de preferência*. *Contra* Reply ¶ 189 *et seq.* PEL’s observation that Clause 2(2) “refers to a concession” is difficult to follow. Clause 2(2) states PEL would receive a *direito de preferência* for the implementation of the Project on the basis of the concession which will be given by the Government of Mozambique. That simply means that the Project will be given on the basis of a concession, and that PEL will have a *direito de preferência* for that concession. Here, that means that PEL would have a 15% *direito de preferência* in the public tender for that concession. Nothing in Clause 2(2) is inconsistent with Mozambique’s understanding or a public tender. Rather, Mozambique’s interpretation is confirmed by the fact that Clause 2(2) used the same phrase—*direito de preferência*—as the language in Mozambique’s PPP Law specifying the scoring advantage given to proponents of an unsolicited proposal in the necessary public tender.
121. The exclusivity clause is readily reconciled with the *direito de preferência*. *Contra* Reply ¶ 191. As explained above, the exclusivity clause is limited in time—to the PFS approval—and expressly subject to the “terms of the specific legislation.” Here, that meant PEL had no exclusivity once the PFS study period was complete and approved, and that PEL was subject to the public tender requirement in the PPP Law (enacted after the MOI). If PEL

sought to exclude itself from the public tender requirement, it should have expressly specified the necessary findings and sought the necessary approvals in the MOI or the PFS—but did not.

122. As to how to interpret the non-controlling, English-language term “right of first refusal,” PEL cannot avoid its own confusion about that term by contending that Minister Zucula is confused as to its meaning. *E.g.* Reply ¶ 195.
123. As Mozambique previously explained, *e.g.* SOD ¶¶ 65-66, 655 *et seq.*, PEL has not consistently and cogently articulated what it believed the “Memorandum of Intent” promised. In paragraph 318 of the Statement of Claim, PEL claimed that “under the MOI, PEL *was awarded* a concession,” subject only to the “contingencies” of approval of the PFS and PEL “*waiv[ing] its right of first refusal upon presentation of the concession document.*” But just six paragraphs later, PEL claimed the opposite, stating the MOI did not already award the Project subject to contingencies—rather, it “*committed to award* PEL the concession once the PFS had been approved and PEL had *exercised* its right of first refusal.” SOC ¶ 324.
124. This incoherent inconsistency in PEL’s position—that the MOI (1) *already awarded the concession* subject to a “*waiver*” of a right of first refusal upon presentation of a concession agreement and (2) *committed to* a future award if PEL “*exercised*” its right of first refusal—is found throughout PEL’s Statement of Claim. *Contrast* SOC ¶¶ 98, 100, 156, 318, 321, 342, 372 (MOI required that PEL “waive” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession) *with* SOC ¶¶ 16, 153, 157, 183, 184, 197, 324, 326, 334, 337, 360 (MOI required that PEL “exercise” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession). It persists in PEL’s Reply notwithstanding PEL’s efforts to recast its argument. *E.g.* Reply ¶ 774 (alleging “the exclusivity right remained extant unless it was waived by PEL”); **CER-5**, Second Versant Report ¶ 4 (“PEL waived its right of first refusal in June 2012”). A MOI cannot both *already award* and *commit to award* a PPP project (in fact, it can do neither). Nor can a right of first refusal be both *waived* and *exercised*. Any alleged confusion by Mozambique as to the meaning of the English-language “right of first refusal” must be excused when PEL itself cannot reasonably articulate its meaning, and any meaning PEL gives that term

is inconsistent with the controlling Portuguese definition: a direito de preferência as defined in the PPP Law.

125. PEL's reliance on Mr. Daga's memories of the parties' communications about exclusivity is unpersuasive. As noted above, it is not his purported understanding or intent that controls—if anything, it is MTC's, and the MOI must be interpreted against its drafter (PEL). In any event, how often a tender was discussed has no bearing. Mozambique and Minister Zucula expressed the tender requirement to PEL at multiple occasions during the project. Indeed, in 2012 and early 2013 Minister Zucula continued to confirm in discussions with PEL that “the required public tender process would be employed and that—consistent with the MOI—PEL could complete with a bidding advantage and be awarded a right of first refusal if it prevailed in the tender.” *See* **RWS-2**, Zucula Witness Statement ¶ 18; **RWS-4**, Zucula Second Witness Statement ¶¶ 8-9; **RWS-3**, Chauque Second Witness Statement ¶ 27; *see* **R-17** (Minister Zucula had told PEL in June 2012 meeting PEL would “benefit from preference (if it participated in the tender) with an advantage in the score right at the start”). Full written records of communications between the parties pre-MOI do not exist, but Mr. Daga's assertions that a tender was not discussed significantly pre-MOI would not aid PEL even if true, because as noted the tender regime was the baseline understanding of the Mozambican procurement regime, and to the extent there was any confusion, it was dispelled by the subsequent promulgation of the PPP law which expressly required public tenders (and would have overruled any contrary understanding in the MOI).
126. It must also be noted that the MOI drafting history Mr. Daga references is predominately internal to PEL—and reflects that PEL had a less-than-flattering intent with the MOI. As discussed more fully in subsequent sections (PEL repeats its arguments on these points several times), PEL's internal drafts demonstrate that PEL sought to “silently block all corridors” and “lock all exits [with] one agreement,” thereby forcing MTC into working with PEL without PEL even defining the corridor in question (*see e.g.*, **C-224**)—all on the basis of a very modest PFS that was not a detailed project report, did not reflect a high degree of resources, and failed to define the basic terms and conditions of the concession. *E.g.* **RER-6**, Betar Second Expert Report §§ 5.1-5.3.

127. PEL also cites Professor Medeiros’ second report to refute the simple, plain language interpretation of the MOI’s *direito de preferência*. *E.g.* Reply ¶ 197. His opinions are rebutted by Ms. Muenda, Mr. Ehrhardt, and the facts described by Messrs. Chauque and Zucula. Professor Medeiros is not licensed in Mozambique; has no stated credentials in PPP practices; and misunderstands both as it relates to the issues in dispute. Professor Medeiros offers little response to the plain language contract interpretation, appears to recognize that there are different meanings that could attach to the right of first refusal; previously acknowledged that at the time of the MOI’s execution a direct award may not even have been permissible; and ultimately relies on his (incorrect) understanding of the parties’ subsequent conduct to reach his conclusions favorable to PEL. Nothing in this analysis overcomes the plain language contract and statutory interpretation. And his conclusions about the parties’ subsequent conduct misunderstands PPP procurement and mischaracterizes MTC’s behavior. It is not uncommon for an agency to investigate the possibility of a direct award; those communications do not mean that the public tender required in all but the most extraordinary circumstances is not, and will not be, required. Here, while MTC investigated the possibility of such an award and assessed PEL’s positions relative to the MOI, it ultimately confirmed—consistent with much of the correspondence at issue—that a public tender was necessary. This conduct does not advance PEL’s position that the *direito de preferência* means something other than what is reflected in the MOI and PPP Law.
128. PEL’s legal expert also inaccurately suggests that a “right to bonus” is an “entirely different legal concept” from a *direito de preferência*. Reply ¶ 197. There is no basis in fact or law for this assertion. As explained at length, the PPP Law expressly defines the *direito de preferência*—making them one and the same. *See RER-7*, Muenda Second Legal Opinion ¶¶ 45-49. Industry practice is in accord: the preferential right given to proponents of unsolicited proposals is most commonly a scoring bonus, not a highly disfavored direct award. *E.g. RER-11*, Ehrhardt Expert Report §§ 2, 10 (rebutting Prof. Medeiros).
129. Even if the *direito de preferência* was interpreted relative to the Mozambican civil code provision Professor Medeiros favors, it is fatal to PEL’s case—because it demonstrates that the *direito de preferência* is a right of acceptance and that MTC could attach what conditions it saw fit. *RER-7*, Muenda Second Legal Opinion ¶¶ 1-12. Here, those

conditions included forming a project company with CFM and securing offtake commitments from miners. Both of these conditions are objectively reasonable in PPP practice (especially for a direct award) and PEL satisfied neither. **RER-11**, Ehrhardt Expert Report § 4. This means PEL’s *direito de preferência* expired and was waived, under even Professor Medeiros’ preferred interpretation of a Mozambican *direito de preferência*. **RER-7**, Muenda Second Legal Opinion ¶¶ 1-12.

130. PEL’s remaining arguments continue its contradictory attempts to define the right of first refusal. Reply ¶¶ 199 *et seq.* At a whim and as it suits it, PEL claims a right of first refusal is either a Swiss challenge mechanism (i.e, right to match other offers), or a right to enter into a business transaction upon its execution, or a right to refuse the project that can be waived. *E.g. id.* This same confusion pervaded PEL’s SOC, as Mozambique observed in the SOD, and demonstrates that PEL cannot itself harmonize its view of what the alleged right of refusal provided. The correct interpretation is simple, and founded on the controlling Portuguese MOI, the controlling statutory definition of *direito de preferência* in this precise context, and the industry standards strongly favoring a scoring preference over a direct award. *Supra* § II(D)(1).
131. Recognizing the fragility of its interpretation of Clause 2(2), PEL attempts again to fall back on the disputed language of Clause 2(1). Reply ¶ 202 *et seq.* As noted, PEL’s favored language does not exist in either party’s controlling Portuguese versions of the MOI, and is internally inconsistent on its face. PEL speculation about why the reference to Clause 7 in Clause 2(1) may have been erroneous due to the drafting history is just this—speculative—and does not save the Clause. *See* Reply ¶ 204. And PEL cannot dispute Mozambique’s prior assertions that if PEL’s version of Clause 2(1) was applicable, the PFS would have been required to finalize the fail route. The PFS indisputably did not finalize the fail route, as it proposed two locations 75 km apart, as demonstrated by Mozambique’s unrebutted technical experts. .
132. Finally, PEL repeats its thoroughly disproven assertion that the “commercial logic” of the MOI supports PEL’s interpretation. Reply ¶¶ 205-207. Notably, PEL’s Reply cannot marshal any favorable testimony from its new PPP expert on this point, ignores the World Bank PPP reports and other references cited by Mozambique, and relies solely on the

testimony of PEL’s Mozambican legal expert with no demonstrated qualifications relative to the commercial logic of PPP procurement. This is for good reason: “is not true . . . that developers would not prepare unsolicited proposals if they did not have a guarantee of award. It is common for firms to prepare unsolicited proposals which they know will then be subject to competitive challenge. These proposals are, generally more fully developed and complete than the prefeasibility study PEL submitted.” **RER-11**, Ehrhardt Expert Report ¶ 4; *see also* **RER-6**, Betar Second Expert Report ¶ 9 (PEL seeks a commercially illogical “blank cheque” for this project).

133. In sum, it is PEL who seeks to put a “square peg in a round hole.” PEL cannot escape the fact that the plain language of both parties’ controlling Portuguese-language MOIs merely provides a *direito de preferência* that was defined in Mozambican law, for the precise context of unsolicited PPP proposals, as a 15% *direito de preferência* in the necessary public tender. PEL wants to ignore the Portuguese version and rely on an undefined English-language “right of first refusal”—a term with several possible meanings—but cannot consistently articulate what that purported right was, and cannot harmonize whether the MOI granted PEL the concession subject to a refusal right or gave PEL some right to try to negotiate a concession (it did neither). What PEL ultimately wants is for the MOI to be interpreted as providing PEL a “blank check” once the PFS is approved, binding the government to give PEL an approximately \$3 billion concession without competitive tension or vetting, and irrespective of commercial terms and technical feasibility, all on the basis of a mere project pursuit PFS. PEL’s confounding interpretation conflicts with industry practices, commercial logic, and the plain language of the *direito de preferência*, and is neither accurate nor reasonable.

3. The Parties’ Conduct Does Not Support PEL’s Unusual Interpretation of the MOI.

134. Looking elsewhere for support of its incongruous interpretation, PEL claims the parties conduct subsequent to MOI execution confirms its understanding. *E.g.* Reply ¶ 208.
135. This is not true. If the parties’ conduct-in-fact supported its position, MTC would have awarded PEL the concession and PEL, like ITD and the TML Consortium, would have spent the last decade spending substantial sums (with no return) on a coal export project

concept that could not be financed or constructed—is not economically feasible—and is not being built.

136. Mozambique’s SOD accurately observed that PEL—even in this arbitration 10 years after the fact—cannot consistently define the “right of first refusal” that PEL claimed it had, on the basis of the non-controlling English language MOI. *E.g.* SOD ¶¶ 12-13, 65-66, PEL’s Statement of Claim exacerbated the confusion. PEL asserted that the purported right of first refusal needed to be “*waived*” by PEL (and was) and needed to be “*exercised*” by PEL (and was). *Contrast* SOC ¶¶ 98, 100, 156, 318, 321, 342, 372 (MOI required that PEL “waive” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession) *with* SOC ¶¶ 16, 153, 157, 183, 184, 197, 324, 326, 334, 337, 360 (MOI required that PEL “exercise” its right of first refusal, and PEL did, thereby allegedly entitling it to a no-bid concession).
137. PEL’s confusion about any right of first refusal is no “play with words,” as PEL contends. Reply ¶ 209. The indisputable fact is that the English-language phrase “right of first refusal” or “right of refusal” has several possible legal meanings—many presupposing competition or a right to match other offers—and the MOI anomalously did not define which was intended or what were the terms by which PEL would execute any alleged right to the concession. This is acknowledged by PEL’s own experts, and is all the more reason that the Portuguese language should control (as specified in law).
138. More sensibly, the MOI and its controlling Portuguese terms lends itself to only one, harmonizing interpretation: the MOI provided (at most) a *direito de preferência* that was shortly thereafter defined in Mozambique’s PPP law for the precise circumstance of the preferential right given to the proponent of an unsolicited PPP proposal (like PEL). Only Mozambique’s interpretation is consistent with industry practices for PPP procurement. PEL incongruously seeks a disfavored direct award on a blank check basis, premised on a mere PFS, which is neither rational nor workable.
139. PEL cannot overcome this logical, straightforward interpretation by reference to what it claims—inaccurately—is an “unequivocal[], 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).” Reply ¶ 210.

140. PEL mischaracterizes and misquotes the *only evidence* it cites in this section of its Reply. Reply ¶¶ 210-213. PEL contends that on 15 June 2012, after approval of the PFS, MTC “asked that PEL ‘expressly exercise its right of first refusal,’ which PEL did three days later, on 18 June 2012.” Reply ¶ 211.
141. This is counterfactual. As PEL’s own exhibits documents confirm, on 15 June 2012 MTC told PEL in Portuguese that its PFS was “approved” and that if PEL wished to “pursue the Project,” it must expressly exercise its “*direito de preferência*.” **Exhibit C-11**. MTC’s communication never indicated PEL had already been granted the concession on the basis of PFS approval, nor did it promise PEL that it would be awarded the concession—it spoke only to next steps in the event PEL wanted to “pursue the Project.” *Id.* PEL’s 18 June 2012 response replied, *in English*, that it “would like to inform that we expressly exercise our *right of preference* for implementation of the project.” **Exhibit C-12** (emphasis added).
142. PEL’s assertions that it exercised a “right of first refusal” are thereby expressly contradicted by the contemporaneous record, in which it recognized that the right it sought to exercise was a “right of preference.” *Id.* This exchange of correspondence certainly is not “fatal to Mozambique’s case” as PEL states—rather, it is consistent with Mozambique’s interpretation of the MOI, in which it provides a right of preference. As earlier established, Mozambican laws defined the *direito de preferência* that the MOI specified. MTC invited PEL to utilize as the 15% *direito de preferência* in the public tender, and allowed MTC to investigate the possibility of a direct award in extraordinary circumstances. *See, e.g., RWS-3*, Chauque Second Witness Statement ¶¶ 16 *et seq.*
143. Crucially, PEL ignores that at or near the same time, in June 2012, Minister Zucula expressly explained to PEL what rights MTC believed the MOI may have conveyed. This is documented in the letter exchange exhibited as **C-19** and **R-17**. Minister Zucula explained, in a letter to PEL:

In June 2012, in a meeting between you and I, I mentioned that your preferential rights stated in the Memorandum of Understanding and provided for in the Law 15/2011 of 10 August could be materialized through a public tender where Patel Engineering would benefit from preference (if it participated in the tender) with an advantage in the score right at the start, or through direct negotiations in case Patel Engineering entered into a strategic partnership with [CFM].

144. The above quotation is PEL’s English translation from **Exhibit C-19** p.2; the letter was written in Portuguese and uses the phrase “direito de preferência.” Minister Zucula likewise has testified that in his discussions with PEL, he confirmed that “the required public tender process would be employed.” **RWS-2**, Zucula Witness Statement ¶ 18; **RWS-4**, Zucula Second Witness Statement ¶¶ 8-9; **RWS-3**, Chauque Second Witness Statement ¶ 27.
145. Thus, as Messrs. Zucula and Chauque explain in their second witness statements, the June 2012 contemporaneous conduct that PEL relies upon is patently contrary to PEL’s present assertions. It demonstrates that MTC believed (accurately) the MOI provided a direito de preferência and that the direito de preferência was defined in the applicable PPP Law as a scoring advantage in the public tender. That MTC also noted the alternative possibility of a direct award—should PEL satisfy certain conditions including a successful partnership with CFM—is consistent with Mozambique’s interpretation of the MOI and industry practice. It is common for public agencies confronted with an unsolicited proposal to investigate various procurement methods, including generally-disfavored direct awards—and it is even more common for them to ultimately decide that a public tender is necessary and in the public interest. *E.g.*, **RER-11**, Ehrhardt Expert Report § 2.
146. Moreover, there is other substantial evidence in the record demonstrating that MTC certainly did not share PEL’s view of that the MOI provided. The record also contains substantial evidence where even PEL or the PGS Consortium recognized that MTC had no obligation to award the project to PEL. PEL ignores all this evidence here, and it will be discussed as chronologically appropriate in later sections of this Rejoinder.

4. PEL Does Not Specify What “Documents Identified During the Document Production Phase” Confirm its Anomalous Interpretation of the MOI.

147. This two-paragraph subsection of PEL’s reply contends that “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.” Reply ¶¶ 214-215.
148. However, PEL cites no evidence in this subsection. *Id.* It appears to be an undeveloped placeholder or abandoned argument. Thus, PEL’s assertions are unsubstantiated on their face and must be rejected.

149. To the extent the purpose of this subsection was to complain that Mozambique did not uncover and produce MOI drafts, it is noted that PEL (not Mozambique) drafted the MOI. No speculative, adverse inference can be drawn from the fact the Mozambique did not find any decade-old drafts of a six-page MOI for an unbuilt project—and PEL does not request one. Indeed, PEL claimed in Mr. Daga’s initial witness statement that it no longer retained MOI drafts. In any event, it is PEL’s burden, as Claimant, to prove its anomalous interpretation of the MOI.

5. The Parties Did Not (and Could Not) Intend “To Grant PEL a Right to the Concession” on The Basis of a MOI and PFS.

150. PEL next attempt to overcome the plain language and commonsense interpretation of the MOI relies on *pre-MOI negotiations*. PEL contends that its internal drafts of the MOI show that it was “PEL’s understanding from the very beginning” that “PEL would be granted the right to a direct award of a concession if the PFS was deemed acceptable to Mozambique.” Reply ¶¶ 216 *et seq.*

151. Conceptually, this is repetitive with arguments made by PEL above. PEL’s attempts to redefine the plain language of the MOI by reference to its purported subjective intent have been rejected elsewhere. PEL’s attempt here to introduce its alleged subjective intent in *drafts not executed by the parties* is even less probative.

152. It is the final, executed language of the parties’ controlling (and substantially identical) Portuguese MOIs that control. To the extent parol evidence of the parties’ intent is relevant, as discussed above the parties’ subsequent conduct did not confirm PEL’s understanding—rather, it confirmed that MTC interpreted the MOI as providing the *direito de preferência* specified in the PPP Law.

153. And, as noted, because PEL drafted the MOI, it would be interpreted against PEL, and MTC—rather than PEL’s—understanding is more relevant.

154. In any event, the internal MOI drafts that PEL references do not reflect favorably on PEL, or advance its propositions in this case, when provided with fuller context.

155. In **C-201**, PEL discussed its initial draft of the MOI. The exhibit reflects that PEL (1) had not conceived anything definite or of value, having not defined a suitable port location and believing it would be in the Chinde area (120 km away from Macuse) (2) had no

understanding of how to do the Project—in fact, it did not even know with whom to contract, (3) anticipated a different structure than what was stated in the MOI, where PEL would enter into joint venture *upon execution of the MOI* and conduct a *full feasibility* study thereafter, and (4) sought to bind Mozambique from assessing its options across a broad swath of the coastline even though PEL had not done or conceived of anything. Specifically:

- 155.1. PEL did not know where the Project port would be located and certainly had not conceived the port location, as it suggests elsewhere. This draft specifies that the project at issue related a rail corridor from Tete to a “suitable port location in and around the Chinde area.” **C-201** at 2. Chinde is far to the south of Macuse—more than 120 km (70 miles) and sits on a different river and transport system.
- 155.2. PEL did not know which Ministry it should work with relative to a MOI or its interest in the project idea. This draft was written with the Ministry of Planning and Development (“MPDM”) in mind, and PEL did “not know today with whom we will sign.” *Id.*, at 1-2.
- 155.3. This MOI draft presupposed a process far different than anything contemplated in the MOI. This draft expressly indicated that PEL and MPDM “will form a JV/Consortium . . . once the [MOI] is signed,” specified a minimum 30-year concession period, and that PEL would submit a full “techno-commercial feasibility report” including a “commercial model” within 12 months. *Id.*, at 2-3.
- 155.4. Internally, PEL was not coy about the less-than-flattering intent behind its MOI: Mr. Daga stated “in my opinion we should not write much in this except to bind them from not going to others.” **C-201** at 1. In furtherance of that goal, Mr. Patel wanted to “keep the area as broad as possible.” *Id.*
156. When PEL claims that a follow-up *internal PEL email* “confirmed that it was PEL’s understanding that it would be granted a concession” (Reply ¶ 218), it misses the point. PEL’s alleged desire with that draft is of no import to this dispute, because, among other things, that draft presupposed a very different concept than the executed MOI. The language in PEL’s initial internal drafts was for an agreement on a “JV/consortium” *at the time of MOI’s execution*, and with agreement at that time on a minimum 30-year concession

term. None of that was agreed upon or memorialized in the executed MOI. The actual MOI, agreed to after negotiation with MTC, merely stated that “PEL has shown keen interest in the development of said Project by forming a JV with the Government of Mozambique on a Built [sic] Operate and Transfer (BOT) basis.” **R-2 & R-1**, MOI Whereas Clause D.

157. Likewise, PEL’s internal emails and drafts reflect that, when it allegedly believed it would be receiving a concession on the basis of the MOI, PEL was to conduct a “full feasibility report” (**C-220**), which PEL also called a “detailed bankable project report (DPR)” (**C-225**). PEL never submitted a DPR for this Project—the PFS indisputably is not a “detailed bankable project report” and PEL has never contended otherwise.
158. Thus, to the extent PEL’s intentions are relevant, they suggest that PEL never expected to receive a concession based only a non-bankable, minimal PFS. The Tribunal will recall that is has been Mozambique’s contention throughout this proceeding that no experienced contractor would expect to receive a guaranteed direct award on the basis of a mere MOI and PFS.
159. PEL’s citation to the alleged “first draft MOI” shared with Mozambique confirms Mozambique’s point. Reply ¶ 219. As PEL notes, that document suggests the parties would sign “definitive agreement(s) (i.e. a concession)”—*but only after a “detailed bankable project report.”* *Id.*
160. Two simple conclusions follow, each fatal to PEL’s position: (1) the parties understood the MOI was not a “definitive agreement” for a concession, and (2) any potential promise to enter into a “definitive agreement” was conditioned on a “detailed bankable project report” (that PEL never provided).
161. In actuality, it is PEL’s anomalous litigation position—that it had a right to be awarded the project and enter into definitive agreement(s) *without submitting a detailed bankable project report*—that finds no support even in PEL’s pre-MOI drafting and negotiation documents. PEL’s own documents confirm that a DPR must precede any obligation to enter into a definitive agreement. **C-225** ¶ 6.

162. It is of further note that PEL's drafts to Mozambique sought "arbitration to be held at Mauritius according to international laws" for "any dispute arising out of this MOI and PFS and any understanding/Agreement between the parties." *Id.* ¶ 9. Mozambique negotiated, and PEL agreed, to a different arbitral election: ICC arbitration in Mozambique. PEL now seeks to unwind that agreement with this proceeding.
163. In short, negotiations saw the PEL-drafted MOI evolve from a two-page term sheet that presupposed an agreed-upon joint venture with a guaranteed minimum 30-year term at the initial execution of the MOI; to a document that only foresaw a definitive concession conditioned upon submittal of a "detailed bankable project report"; to a document that merely provided PEL a "*direito de preferência*" in exchange for a far more modest PFS. It is PEL who disserves the negotiation history when claiming that the MOI should now be interpreted to promise a direct award definitive concession based only on a PFS, without necessary prerequisites like the submittal of a "detailed bankable project report."
164. PEL's citation to certain interim Portuguese drafts is also notable for what PEL does not mention. In those drafts, PEL was required to submit a PFS *and* a financial report. *E.g.* **C-203**, PEL Portuguese 3 May 2011 Draft MOI, Clause 7(1). PEL never submitted any financial report or bankable financial model with its PFS, as noted. Likewise, upon approval of those documents, PEL received merely a "*direito de preferência para realizar o Projecto, dentro dos limites legalmente aceites.*" *Id.* Clause 7(2). In other words, PEL would have been provided a "*direito de preferência*" *within the legally accepted limits*. This is consistent with Mozambique's interpretation that the *direito de preferência* is subject to the definition of the *direito de preferência* in Mozambique's PPP Law.
165. PEL's reliance on **C-204**, the alleged "last draft version of the MOI shared by Mozambique with PEL in Portuguese" is misplaced. Reply ¶ 221. PEL contends Clause 2 of that draft is similar to Clause 2(1) of PEL's English MOI. But what PEL fails to mention is that Exhibit C-204 is substantially different than the executed MOI. Exhibit C-204 does not include a Clause 2(2) and has a substantially different Clause 3, among other things. *Compare C-204 with R-1 & R-2*. It is plain that the parties did not reach agreement on Exhibit C-204, and it is not controlling.

166. Notably, PEL footnotes (but does not substantively discuss) the Portuguese draft of the MOI exchanged with its Mozambican attorneys in the days before execution. That draft, found at **C-271**, demonstrates that MTC rejected proposed Portuguese language from PEL’s attorneys that arguably would have provided for certain of the alleged rights PEL now claims the MOI provided, *and instead required that merely a direito de preferência remain. Id.*; **RWS-3**, Second Witness Statement of Luis Amandio Chauque, ¶ 20.
167. In summary, rather than confirming any “mutual intent to grant PEL a right to the direct award of a concession” (Reply ¶ 223), the negotiation documents confirm that PEL initially sought to impermissibly “silently block all corridors” and “lock all exits [with] one agreement” (**C-224** at 2)—even though PEL did not even know where that corridor or port would go. Notwithstanding this apparent intent to take advantage of Mozambique, even PEL recognized that any promise to a “definitive agreement” would need to be predicated on a “detailed bankable feasibility report.” *See, e.g., C-202, C-222, C-225.* The agreed-upon, executed MOI omitted all mention of detailed bankable feasibility reports or promises of definitive agreements, and instead merely granted PEL a *direito de preferência* if a PFS was approved. There certainly was no mutual and binding intent to promise a concession premised only a PFS—and PEL’s attempts to argue to the contrary through unexecuted internal drafts demonstrates the fallacy of its case.

6. The Parties Did Not (and Could Not) Intend to Automatically Award the Project to PEL Subject Only to “a Right to Refuse.”

168. In this subsection, PEL argues that “the Parties intended to grant PEL a right to refuse to implement the Project.” Reply page 59, subsection 6. PEL acknowledges that a *direito de preferência* is a right that exists under Mozambican law, but claims that it should be interpreted as a “right to refuse to implement the project” rather than the 15% *direito de preferência* specified in the PPP Law. Reply ¶¶ 224 *et seq.*
169. PEL’s arguments repeat those dispelled above. Again, PEL cannot harmonize its own view of what the alleged right of first refusal did. PEL claims, as the title to this entire subsection, that it gave PEL the “right to refuse the project” (*i.e.*, a right to be waived). Elsewhere, PEL claims it was a right that must be exercised to secure the project. As already discussed above, it is neither.

170. And, because a PFS is no “detailed bankable feasibility study” as discussed in earlier drafts of the MOI, it is no basis for promising entry into any definitive concession agreement. PEL cites references to the right of refusal in the exclusivity clauses of early English-language MOI drafts internal to PEL, but ignores that the various drafts contained different requirements relative to a DPR or PFS, and that the final, controlling MOI—the only one that truly matters—provided PEL merely a *direito de preferência* in exchange for a modest PFS.
171. Indeed, C-202 Clause 7, a draft MOI relied upon by PEL at Reply ¶ 230, confirmed that PEL’s internally sought-after right of first refusal arose only after the “*detailed bankable project report* (DPR) was approved.” The final MOI never required a DPR, thus the type of right of refusal that PEL now claims could never arise.
172. Likewise, it must be recalled that Mozambique does business in Portuguese, negotiated the MOI in Portuguese, interpreted the MOI in Portuguese, and that under Mozambican law and industry practice the Portuguese version prevails. Whatever intent PEL claims to have on the basis of English-language terms is not controlling, and was not mutual.
173. Of further note, no conclusions can be reached from the fact that certain of PEL’s drafts of the MOI initially included an English-language right of first refusal in the MOI’s exclusivity clause. In the final MOI, the parties limited exclusivity to a certain period of time and made it subject to the terms of the specific legislation. Moreover, to the extent this un-agreed exclusivity language has any probative value (it does not), it may demonstrate that the right of first refusal presupposed a certain aspect of competition and was intended to operate *as a right to match competing or alternative offers*. For example, PEL contends that one draft of the MOI specified that “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.” Reply ¶ 228. If PEL was already granted a right to a concession by virtue of PFS approval, it would have no need for a right of refusal like that referenced above.
174. In sum, PEL’s contentions that 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” are disproven. (It also confirms Mozambique’s position that this Tribunal has no

jurisdiction because the MOI provided, at best, an “*option*” as PEL concedes here.) The negotiation history confirms there was no mutual intent to grant PEL the type of right of first refusal it now inconsistently alleges (as either a right to be awarded the project or a right to refuse the project), based merely on a PFS rather than a DPR. Rather, after various drafts, the parties agreed to provide PEL only a *direito de preferência* upon approval of a modest PFS. As discussed, that *direito de preferência* was the same as that expressly defined in Mozambique’s PPP law as a 15% *direito de preferência* in the public tender, as confirmed by Mozambique in the same month the PFS was approved. **RWS-3**, Chauque Second Witness Statement ¶¶ 16 *et seq.* 8-9; **RWS-4**, Zucula Second Witness Statement ¶¶ 8-9.

7. PEL’s Alleged Exclusivity Right was Consistent with an Unsolicited Proposal with a Scoring Advantage, Existed Only for the Duration of PFS Review, and Was Not Violated.

175. PEL repeats earlier, incorrect assertions that the “exclusivity right was a logical flipside to PEL’s right to a concession.” Reply ¶ 236 *et seq.*
176. As already described, this is inaccurate. The executed MOI contained a limited exclusivity clause—limited to the duration of PFS development and approval, and limited to the terms of the specific legislation (i.e., the PPP laws, which at time of PFS approval required a public tender in all but the most extraordinary “last resort” circumstances). *E.g.*, **RWS-3**, Chauque Second Witness Statement ¶¶ 19, 77.4-78. The MOI contained no right to a concession, and exclusivity during the PFS study period is no “flipside” to such an illusory right. Properly understood, exclusivity simply meant that no other entities would receive the award while PEL undertook the PFS. *Id.*; **RER-11**, Ehrhardt Expert Report ¶ 250. As a proponent of an unsolicited PPP proposal, it is common for the project propounded by that proponent to be competitively tendered, with a preferential right in the form of a shortlist preference and/or scoring advantage provided to the proponent. *Id.*, § 2. That is precisely what occurred here: no other party received the award during the PFS, and after the PFS was approved, the parties investigated procurement options and sensibly chose a public tender, with PEL receiving significant value for its MOI and PFS, in the form of the 15% *direito de preferência*. **RER-11**, Ehrhardt Expert Report ¶ 250; **RWS-3**, Chauque Second Witness Statement ¶ 19; **RWS-4**, Zucula Second Witness Statement ¶¶ 3, 6.

177. Nothing PEL states in this subsection changes the straightforward legal interpretation or contradicts typical industry practice. PEL again relies upon irrelevant, internal PEL documents discussing unexecuted PEL drafts. These have no bearing even if considered.
178. For example, PEL’s commentary on the April 2011 draft related to an earlier, substantially different MOI structure where PEL intended to provide a DPR (detailed bankable project report), and certain outcomes were discussed in a draft Clause 7 unlike anything in the executed MOI. Reply ¶ 237, citing **C-211**.
179. In any event, what PEL omits to mention from that internal PEL email chain is that *Mr. Daga acknowledged that the MOI is merely a “preliminary document.”* He stated: “In my opinion it is ok as a preliminary document. We can improve upon [sic] when we come to MOU and Agreement stage on this basis.” **C-211**.
180. This confirms another of Mozambique’s longstanding objections to PEL’s theory of the case: the six-page MOI is plainly a non-binding, preliminary agreement—an “agreement to agree” as it relates to the concession. Here, Mr. Daga confirms that the MOI is, in fact, *even more preliminary than a MOU*—a prototypical non-binding “agreement to agree.” *Id.*
181. Likewise, while PEL’s exhibit contains various redactions, it appears to reflect that the “law was not agreeable,” which is why PEL submitted this as a non-binding MOI. **C-211**, at 1 (“Because law was not agreeable as it is we submitted MOI”). All this is further confirmation of Mozambique’s position that the MOI did not, and could not under Mozambican law, grant or promise concession rights to PEL. Indeed, while PEL attempts to sidestep these statements in Reply, its own legal expert previously suggested that a direct award was illegal under Mozambican law at the time of MOI execution. **CER-3**, Medeiros Legal Opinion at 33-34 (reflecting a direct award to PEL would not have been authorized, as the MOI “does not fit within any of the sub-paragraphs in Article 113(2)” of Decree no. 15/2010, of 24 May 2010).
182. PEL’s exhibit also rebuts PEL’s assertions elsewhere that the negotiation history demonstrates that MTC shared the same view as PEL. Mr. Daga’s own email appears to reflect that the Ministry questioned “why you are making so many binding conditions on Ministry.” In Mr. Daga’s telling, the Ministry was conveying to PEL that a definitive

agreement would occur “*once the DPR is accepted*” and that “at that time we can put all these elaborate conditions.” C-211 at 1-2. This similarly confirms that, as stated above, the parties never intended to promise or grant any definitive agreement based only a PFS—any suggestion of a definitive agreement was always conditioned on a detailed bankable project report, which PEL never conducted and never provided.

183. The remainder of PEL’s discussion relies on fact witness testimony about PEL’s intent. Reply ¶ 238 *et seq.* As described above, this is inaccurate and irrelevant, and is refuted by the MOI’s plain language, operation of Mozambican law, the parties’ conduct, and the testimony of MTC witnesses.
184. Finally, PEL’s assertion that Mozambique “never sought to include any language referring to an exclusive scoring advantage in a tender” is misdirection and impermissible burden-shifting. Reply ¶ 241. The evidence discussed above demonstrates that no party—and certainly not MTC—had an intention to award PEL the project based on a mere PFS. The existence of a public tender was the given, baseline expectation of the Mozambican procurement system and PPP procurement the world over, and need not be reiterated. The exclusivity was limited to the PFS study duration, as noted, thus the tender also need not be discussed in that context. And as to the meaning of the parties’ agreed-upon *direito de preferência*, PEL retained Mozambican attorneys aware of the forthcoming PPP law, and who should have known that the PPP law required a tender (in all but substantiated and approved “last resort” circumstances) and defined the *direito de preferência* PEL would be provided as an alleged proponent of an unsolicited PPP proposal. If it was the parties’ intention to escape the commonsense tender requirement and industry-standard preferential scoring right, that intention would have been required to be stated expressly, with supporting rationale, and the appropriate approvals specified. Plainly, it is PEL who fails to find express language in the MOI supporting its counterintuitive interpretation of a Memorandum of Interest—as evidenced by the dozens of pages it spends discussing alleged negotiation intent and history.

8. The Portuguese-Language MOI Must Prevail Under Mozambican Law and Industry Practice.

185. PEL’s last attempt at defending against the clear interpretation of the *direito de preferência* is to argue—contrary to the evidence, law, and industry practice—that due to “negotiation

- history” PEL’s English version of the MOI should control over the parties’ consistent Portuguese version. Reply ¶¶ 242 *et seq.*
186. This contention is also readily dismissed.
187. PEL does not have faith in its position. PEL leads its argument with assertion that “this point is moot” and ends saying this “ultimately is of no consequence.” *Id.* Yet, if the parties’ Portuguese MOIs were consistent with PEL’s English MOI as PEL claims, there would be no need for PEL to attempt to advance its disputed English version over both parties’ Portuguese versions and Mozambique’s English version. The reality is that PEL’s argument collapses when the *direito de preferência* is read and interpreted under the parties’ controlling Portuguese documents.
188. PEL is forced to resort to “negotiation history” because its position is plainly foreclosed by law.
189. As described above, PEL’s own legal expert is forced to acknowledge that under Mozambican law (statutory and constitutional), the Portuguese version “prevails.” **CER-6**, Second Legal Opinion of Rui Medeiros, ¶¶ 41.1, 41.4; *see* **RER-7**, Muenda Second Legal Opinion ¶ 96 (in all cases the Portuguese documents prevail).
190. The prevalence of the Portuguese documents is likewise confirmed by industry practice. **RER-11**, Ehrhardt Expert Report ¶ 92 (“Experienced PPP developers would have read and given attention to the Portuguese version of the MOI.”); **RER-6**, Betar Second Expert Report ¶¶ 19, 21 (construction or development entities wishing to operate in Mozambique know that the Portuguese documents are controlling and are charged with understanding the Portuguese documents); **RWS-3**, Chauque Second Witness Statement ¶ 19 (It is widely understood by those who work with MTC that MTC conducts business in Portuguese and that the Portuguese language documents control (as also specified in law).).
191. In any event, PEL’s negotiation history argument is neither cogent nor accurate. PEL cannot rely on the alleged “last draft version of the MOI” (Reply ¶ 245) because, as explained above, that version has substantial other differences with the parties’ final, executed MOI (beyond the Clause 2(1) issue). It is self-evident that the parties did not agree to that draft and instead made various significant revisions. None of this would

suggest that PEL's disputed English MOI should control over the parties' substantively identical executed MOIs.

192. Likewise, PEL's unadorned assertion that "Mozambican law is of limited relevance (if any) to determine what promises the Parties made to one another under international law" lacks citation for good reason. It is incorrect, as repeatedly noted by Mozambique. Domestic law is relevant—indeed, it controls—as to the existence and scope of the alleged "right" PEL seeks to protect under Treaty standards, as discussed herein.
193. PEL's final attempt to muddle the waters with portions of Professor Medeiros' second opinion are unpersuasive, and rebutted by Ms. Muenda's second opinion (RER-7 ¶¶ 95-103). At best, Professor Medeiros' opinion stands for the unremarkable suggestion that the Portuguese version would not prevail if there were no conflict between the versions. Here, there is a conflict alleged, thus the Portuguese versions control. PEL's attempt to do an end-run around acknowledged law, by suggesting that the documents can be interpreted "complementary" to one another by using its alleged English-language interpretation to redefine and override the Portuguese term *direito de preferência*, would gut the applicable statutory and constitutional provisions requiring that Portuguese versions "prevail." PEL's argument also impermissibly assumes that PEL's preferred interpretation of English terms in its disputed English version should be used to redefine the clear and consistent use of *direito de preferência* in the parties' Portuguese versions—when, if anything, the opposite should occur. PEL's further assertion that reliance on Mozambican procurement, PPP, and constitutional authority requiring that the Portuguese documents prevail (especially in the event of conflict) would constitute an "abuse of rights" is baseless, and in any event PEL cannot articulate how alleged "equality" between the versions would result in PEL's disputed English MOI controlling over the parties' uniform Portuguese MOIs. *Id.*
194. Thus, in sum, the Portuguese versions of the MOI "prevail" over the English versions. And, as stated, no version of the MOI—fairly and properly interpreted—provided PEL the rights it alleges.

E. PEL Never Disclosed its Blacklisting to Mozambique.

195. The SOD confirmed that PEL had been "blacklisted" by the National Highways Authority of India. The Supreme Court of India confirmed PEL's "blacklisting" (using that term,

notwithstanding PEL's preference for "temporary disbarment"), recognized the adverse impacts to PEL's business prospects, and adjudicated PEL to be "not (commercially) reliable and trustworthy." Yet, PEL never disclosed the show-cause order, the blacklisting, the Supreme Court's decision, or the finding of commercial untrustworthiness to MTC and Mozambique at any stage—including PFS discussions/approval or the subsequent public tender. Among other things, these findings make it speculative to believe that PEL would have, or should have, been awarded the project—much less financed and executed it. SOD §§ II(C) & III.

196. PEL ignores the blacklisting issue in its fact section. Mozambique will address PEL's flawed contentions on this topic *infra*. As further described therein, the circumstances of PEL's blacklisting in India also adumbrated what PEL would do here: participate in a tender process and then back out.

F. PEL's Prefeasibility Study was Inadequate for Awarding a Concession, But was Approved for the Purpose of Providing PEL a *Direito de Preferência* To Be Materialized In a Tender.

197. The rest of PEL's fact section falls away with the accurate understanding of the MOI, its *direito de preferência*, and the limited nature and purpose of PEL's PFS.
198. As established in the SOD paragraphs 85 *et seq*, PEL PFS was approved by MTC, but without notice of PEL's blacklisting in India and not for the purpose now suggested by PEL. Rather, the PFS was approved merely for purposes of granting PEL the 15% *direito de preferência* in the public tender, as per the MOI and PPP Law, should PEL chose to pursue the project.
199. On 2 May 2012, PEL submitted its PFS to Minister Zucula at the MTC. **R-7** is the true, correct, and complete copy of PEL's PFS and executed cover letter. (PEL references unsigned or incorrect versions in **C-6a** and **C-6b**.) The PFS was titled "Pre-feasibility report for development of 25 million ton per year handling capacity Port at Macuse and approximately 516 km standard gauge Rail Corridor from Macuse to Moatize, Mozambique." **R-7**.
200. The SOD demonstrated, *on the basis of the only independent technical and engineering expert analysis in this arbitration*, that the PFS was merely a preliminary stage study, with

“limited technical detail,” and “no meaningful analysis of economic, commercial, and environmental feasibility.” SOD ¶¶ 91-93. The PFS “*did not reflect a high degree of design development or either a high degree of resources mobilized.*” The PFS *did not define the “basic terms and conditions”* of a PPP concession for the Project and did not address the significant unresolved technical and commercial questions. *Id.*; **RER-1**, Betar Expert Report at 61-62 (Conclusion A).

201. In the face of these key findings about the inadequacy of the PFS to form the basis of a concession, *PEL could not marshal any technical expert to rebut MzBetar’s conclusions about the PFS.* Thus, they remain substantially unrebutted. MzBetar has nonetheless addressed PEL’s unsubstantiated pleading assertions about its PFS and found that they do not change its technical opinions. **RER-6**, Betar Second Expert Report, §§ 5.1-5.3.
202. Mozambique has likewise engaged Mr. David Ehrhardt, a global PPP expert and chief executive of the Castalia PPP consulting firm, to address PEL’s Reply assertions about PPP practices.
203. Mr. Ehrhardt agrees with MZBetar, explains that the PFS could not serve as a basis for the award of a concession, and demonstrates that Mr. Baxter’s or Professor Medeiros’ assertions to the contrary are incorrect. **RER-11**, Ehrhardt Expert Report *passim*. For example (*id.*, Executive Summary ¶ 5(b)):

A prefeasibility is not expected to establish the feasibility of a project, and this one did not in fact do so. A prefeasibility study is only intended to inform a decision on whether a project is sufficiently promising to make it worth spending the considerable sums required for a full feasibility study. In accordance with both international best practice and Mozambican law, governments should not award a project unless it has been shown to be feasible. Much of the information needed to demonstrate project feasibility was not provided. There was no environmental study, no market demand and revenue study, and none of the standard indicators of financial feasibility had been presented. Moreover, when I calculated these standard indicators from the financial projections PEL provided in a brief printout, they indicated that the project was not financially viable. Since it is necessary to show that a project is feasible before awarding it, and that had not been done, an experienced PPP developer would not have expected, or indeed wanted, a direct award of a potentially loss-making concession.

204. Accordingly, both technical and PPP expert testimony are in accord with common sense and Mozambican law: a mere PFS (that did not even include PEL’s bid price) does not form an adequate basis for the grant of a PPP concession. It was not MTC’s intent (or even within MTC’s power) to grant a direct award concession on the basis of any PFS, much less this very modest PFS.
205. The SOD also established that PEL did not include any purported commercial model with its PFS. After PFS submission, at MTC’s behest, PEL provided some commercial data and represented to MTC that it showed the project was commercially feasible (**R-9**).
206. Expert financial analysis has confirmed that PEL was wrong about even these “preliminary” financial projections (which are no financial/commercial model). Based on the data PEL contemporaneously provided, the Project as suggested by PEL *would not have generated any profits or been financially viable*. SOD ¶¶ 85-94. This observation has been further confirmed by international PPP experts (**RER-11**, Ehrhardt Expert Report, Executive Summary ¶ 5(b)), and is not meaningfully contested by PEL—which declines to calculate its damages based on the contemporaneous financial projections it provided (because none would exist).
207. Nevertheless, the PFS was approved by MTC on 15 June 2012, a short time after submission of the MOI, for the limited purpose described herein. **R-10**.
208. The PFS approval did not—and could not—award the project to PEL, as explained above and in the SOD. In sum, the approval merely meant that PEL could, if it chose to further pursue the project, exercise its 15% *direito de preferência* in the public tender. MTC also investigated the possibility of direct negotiations should PEL successfully negotiate with CFM for the creation of a public company—but those negotiations failed and the MOI’s *direito de preferência* was properly materialized at the 15% *direito de preferência* at tender.
209. Mr. Chauque explained in his first witness statement, and Mozambique’s legal, technical, and PPP experts have confirmed, that the PFS could never grant PEL the concession—because, among many other things, is it not a feasibility study; was not authorized by the Ministry of Finance; and was not authorized by the Administrative Tribunal. *E.g.*, SOD ¶ 94; **RER-7**, Muenda Second Legal Opinion, Conclusion 6; **RER-6**, Betar Second Expert Report § 5.3; **RER-11**, Ehrhardt Expert Report §§ 3, 5, 10.

210. Mr. Chauque further explains in his second witness statement that the PFS could not be, and was not, approved for purposes of granting PEL concession rights. Had that been the intent (it was not), the PFS would have had to be much more detailed—akin to the “detailed bankable feasibility report” referenced in early MOI drafts and communications—and would have had to include the necessary content and approvals specified in Mozambique procurement, PPP, and budgetary laws. Such a review would have taken considerably longer time and revealed the PFS to be sorely wanting in content. Neither the MOI nor the PFS received the approvals necessary for the commitment of funds or granting of concession rights in a PPP project. The fact that the PFS was approved—and so quickly—demonstrates that PEL’s interpretation of the MOI is incorrect. **RWS-3**, Chauque Second Witness Statement ¶ 32.
211. PEL’s Reply rehashes old arguments about why it believes the PFS alone should grant PEL the concession—disproved above—save one new factual assertion. Each will be briefly addressed.
212. PEL newly contends that a note on slide 21 of a presentation in its possession, allegedly given by one person at MTC to CFM, suggested that “Patel shall benefit from a right of 1st option in the eventual implementation of the project.” Reply ¶ 251, citing **C-227**. This statement does not meaningfully aid PEL’s Treaty case—which is presumably why it did not utilize this presentation in its SOC. In the jurisdictional portions of its Reply, PEL attempts to avoid adverse jurisdictional decisions finding that “options” are no “investment” by asserting that Mozambique “mischaracterizes PEL’s investment by referring to it as an ‘option.’” *E.g.* Reply ¶ 599. Yet here, PEL suggests it did, in fact, have an “option.” PEL cannot have it both ways, and it must be noted that a right of first option suggests that others are in the competitive mix. In any event, the one slide in question used the phrase “direito de 1ra opção” that is not found in the MOI or anywhere else in the parties’ correspondence regarding the alleged rights provided for in the MOI, is not legally binding or more probative of the parties’ intent than the other evidence earlier discussed, and in all circumstances, the promulgation of the PPP Law defining the *direito de preferência* expressly specified in the MOI would override any alleged understanding of a single MTC specialist. *Supra* § II(D).

213. PEL's reliance on the C-11 / C-12 letter exchange approving the PFS has been disproven above. This correspondence simply indicates that PEL could exercise its *direito de preferência* if it wished to pursue the project further. MTC did not use the terms "option" or "right of first refusal," and C-11 demonstrates that MTC did not believe that PFS approval alone granted PEL the Project. In responding to C-11, PEL did not indicate that it believed it already had concession rights, or indicate that it was exercising or waiving a "right of first refusal." Rather, it specified, *in English*, that it wished to exercise its "*right of preference*." C-12. The references to negotiation with CFM further confirm that PEL was not already granted concession rights, and are consistent with Mozambique simply investigating the possibility of an extraordinary direct award should PEL be able to create a joint venture, as explained below.
214. Indeed, former Minister Zucula directly rebuts PEL's Reply assertions about the parties' correspondence and conduct (*e.g.* Reply ¶ 252 *et seq.*). He explains that the parties' contemporaneous correspondence and meetings confirmed that PFS approval meant that PEL, if it wished to pursue the project, could exercise its *direito de preferência*, which MTC expressly defined relative to the 15% *direito de preferência* in the PPP Law. RWS-4, Zucula Second Witness Statement ¶¶ 7-9. He explains:

The parties' exchange of correspondence in PEL's Exhibit C-11 and C-12 confirmed that the PFS had been approved and if PEL wished to further *pursue* the Project, it should exercise its *right of preference*. It could also seek to negotiate a project company, or joint venture, with CFM, if it wished to explore a direct award alternative. None of this presupposed that PEL had been granted concession rights automatically upon PFS approval.

In fact, I had this precise conversation with Mr. Daga in June 2012, around the same time as PFS approval. As documented in the Project correspondence that PEL exhibits (Exhibit C-19):

In June 2012, in a meeting between you and I, I mentioned that your preferential rights stated in the Memorandum of Understanding and provided for in the Law 15/2011 of 10 August *could be materialized through a public tender where Patel Engineering would benefit from preference* (if it participated in the tender) with an advantage in the score right at the start, *or through direct negotiations in case Patel Engineering entered into a strategic partnership with [CFM]*.

Therefore, the parties' intent (and conduct) is what I discussed with Mr. Daga in that June 2012 meeting. *PEL's MOI rights were to be materialized as the 15% direito de preferência in the public tender.* PEL never contested this at the time, or in subsequent correspondence—to my recollection PEL's 2012 correspondence confirmed that the PPP Law controlled and that a direct award was only allowed as a *last resort exception* on the government's election, should PEL satisfy all prerequisites for a direct award. MTC investigated, as an alternative *that it was not obligated to proceed with* (indeed, it would require approvals that I could not even give), whether PEL could seek direct negotiations if it entered into a strategic partnership with CFM. PEL did not successfully negotiate and form a project company with CFM. I recall PEL acknowledging that a joint venture, like that it sought with CFM, was one of many prerequisites to a direct award. Because formation of this public-private partnership (and other conditions to a direct award PPP procurement) were not satisfied, MTC ultimately determined that the standard public tender was the only—and most appropriate—procurement method. MTC always intended to (and did) give PEL its 15% *direito de preferência* in the public tender process.

215. Nor can PEL rely on the nonproduction of documents relating to PFS analysis, assessment, and approval as evidence that the PFS was adequate. PEL does not point to any law requiring the creation or retention of such documents for a mere PFS approval, and if any inference is to be made from this, it is that the PFS did not go through a robust analysis, assessment, and approval process—because, consistent with Mozambique's position throughout, the PFS was not a significant document and did not grant PEL any right to a concession. *E.g.*, **RWS-3**, Chauque Second Witness Statement ¶ 32; **RWS-4**, Zucula Second Witness Statement ¶¶ 4, 12; **RER-6**, Betar Second Expert Report §§ 5.1-5.3.
216. It is telling that PEL has no rebuttal to MzBetar's robust analysis of the deficiencies in the PFS, other than to say the "criticisms . . . are denied." Reply ¶ 261. As described above, PEL cannot "deny" the criticisms simply because MTC approved the PTS—because the key issue is that the parties disagree about what PFS approval did. Mozambique's position is that the PFS was technically insufficient and not an adequate basis for the direct award of a concession, which is one of several reasons that the MOI did not—and was not intended to—directly award the concession.
217. PEL's cannot sidestep the un rebutted technical facts with reference to a smattering of alleged "contemporaneous evidence" of MTC's receipt of the documents. While PEL

claims “Minister Zucula pointed out that the required parameter on the Technical side was well prepared in the report,” its citation is from a *PEL letter*, and omits the very next point, which is that MTC believed the economic data was insufficient. Reply ¶ 262, citing **C-8**. Minister Zucula has explained that the PFS was not adequate for granting a direct award, a conclusion buttressed by uncontested technical experts and international PPP experts. **RWS-4**, Zucula Second Witness Statement ¶¶ 4, 12; **RER-6**, Betar Second Expert Report §§ 5.1-5.3; **RER-11**, Ehrhardt Expert Report §§ 3, 5-6, 9.2. The only other evidence PEL can point to are alleged, newly disclosed *chat messages* from a “secretary” to a minister. Reply ¶ 262, citing **C-226**. But to the extent chat messages from an assistant are relevant for the purpose of establishing the techno-commercial adequacy of a PFS in a \$3 billion PPP concession (they are not), the messages suggest that the “presentation” accompanying the PFS report was satisfactory. See **RER-6**, Betar Second Expert Report ¶ 3. They do not convey MTC’s position on the PFS itself, much less demonstrate that the PFS could ever be adequate for the purpose PEL now alleges. See *id.*

218. PEL cannot save its position—which, again, it could not dispute technically—by reference to the year-later communication in which Mozambique, listening to PEL’s complaints, briefly and conditionally invited PEL to start negotiations. Reply ¶ 263, citing **C-29**. As discussed in the SOD, that letter expressly conditioned further discussions on “an agreement or take or pay memorandum with mining companies, in order to make the project in question feasible.” **C-29**. PEL never provided such agreements, and the Council of Ministers shortly after **C-29** confirmed that, following legal advice and stakeholder input, that the required public tender was necessary. **RWS-3**, Chauque Second Witness Statement ¶¶ 81-89; **RWS-4**, Zucula Second Witness Statement ¶ 13; **C-35/R-27**.
219. PEL’s conclusory assertion that the relevant personnel had authority to approve the PFS again ignores that neither Minister Zucula or others had authority to grant concession rights to PEL, which is the effect PEL claims (inaccurately) from PFS approval. *E.g.*, **RWS-3**, Chauque Second Witness Statement ¶ 58; **RWS-4**, Zucula Second Witness Statement ¶ 3, 9, 12; **RER-7**, Muenda Second Legal Opinion, Conclusion 6; *contra* Reply ¶¶ 264-265.
220. In short, Mozambique approved a mere Pre-Feasibility Study. That approval did not, and could not, grant PEL concession rights. It did, however, provide PEL with a 15% *direito*

de preferência, as contemporaneously explained, and as Mozambique reiterated for years thereafter.

G. PEL Failed to Reach an Agreement with CFM, Making Any Investigation of a Direct Award Futile. PEL Also Wrongfully Maintained that CFM Must Be Limited to 20% Equity Participation.

221. PEL mischaracterizes the facts regarding MTC’s investigation of a direct award alternative should PEL satisfy the necessary prerequisites, including negotiation and formation of a project company or joint venture with CFM. Reply ¶¶ 267 *et seq.*
222. The facts are as stated in Mr. Chauque’s second witness statement, summarized in English as follows. *See generally* **RWS-3**, Chauque Second Witness Statement ¶¶ 34-46.
 - 222.1. As described above, when the PFS was approved, MTC explained that PEL could exercise its *direito de preferência* if it wished to pursue the project, and further explained that the *direito de preferência* was a right of preference afforded in the public tender under Mozambique’s PPP law. MTC, in exploring its options relative to this unsolicited proposal regime, further specified that direct negotiations may be possible if PEL entered into a strategic partnership with CFM. PEL indicated it would “exercise out right of preference” and “also . . . will proceed with CFM to incorporate an entity for implementation of the project as directed by you in your letter.” *See* **C-11, C-12, C-19**.
 - 222.2. The parties’ conduct thereafter demonstrates that (1) neither party believed that PFS approval alone had already provided PEL the right to the award, and (2) the direct negotiation alternative failed because PEL was unable to enter into a strategic partnership with CFM.
 - 222.3. PEL appears to contend that MTC somehow is at fault for PEL’s failure to negotiate a partnership with CFM. This is incorrect for several reasons discussed below.
 - 222.4. It was PEL’s obligation to initiate and conduct negotiations, and it was not MTC’s role to facilitate them or ensure their success. While PEL notes that it did write a letter to MTC requesting the name of a contact person at CFM (**C-13**), the fact is that PEL knew the identity of key CFM personnel and commenced direct

negotiations with CFM without an immediate response from MTC. PEL even exhibits, in this arbitration, its direct correspondence with CFM and references its meetings with CFM personnel. *E.g.* **C-14**.

- 222.5. PEL's correspondence further confirms that "formation of SPV" was a prerequisite for PEL to "enter the second phase of the project for discussion and signing of concession agreement." *Id.* This means that PEL (like MTC) contemporaneously understood that had no right to the concession based only on PFS approval.
- 222.6. On 15 August 2012, PEL wrote to the MTC, confirming that it had previously "exercise[d] the right of preference," "agreed to initiate the talks with CFM," and had, in fact, already "initiated talks with CFM." **C-15**. However, this correspondence appeared to complain that MTC had not provided a contact person name at CFM, and requested a "template Concession Agreement" to "help [with] expediting the process and potential implementation of the project." *Id.*
- 222.7. This again confirmed that PEL understood, contemporaneously, that it had no automatic right to the project and that there was only the "potential" for its implementation. *Id.*
- 222.8. Regardless, MTC wished to address PEL's complaint that it did not receive a contact person name. Thus, on 27 August 2012, MTC, through Minister Zucula, wrote back to PEL stating, "negotiation with CFM is not prohibited, and to my knowledge has already begun." MTC further clarified that the contact within MTC was the Office of Studies and Projects. **C-16**.
- 222.9. This correspondence again confirms that it was PEL's obligation to negotiate with CFM if it wished to pursue direct negotiations; those negotiations were not hindered by MTC; and PEL had, in fact, commenced those negotiations. Yet the parties mutually understood that the MOI and PFS approval alone did not provide PEL a right to an award and concession agreement.
- 222.10. Contrary to PEL's speculation, MTC did convey to CFM information pertaining to the project. CFM was also aware of PEL's MOI and PFS, and of its ability to

directly negotiate with CFM if it so wished. **R-65**, for example, produced during the document production phase of this arbitration, is a 20 June 2012 letter where MTC forwarded to CFM PEL's response to a technical meeting (that took place at CFM's offices), for the purpose of keeping CFM informed of the Project and any negotiations.

- 222.11. On October 5, 2012, PEL sent another letter to MTC, stating that “as done in PPP Project of this magnitude normally SPV name is approved and/or SPV is formed with notional capital” prior to negotiation of any concession agreement. **C-17**. This confirmed that a SPV with CFM was a condition precedent to a direct award concession, should that alternative be explored—contrary to PEL's arguments presently. Yet, PEL sought to “accelerate” the process by “undertaking that up to 20% of equity” would be allocated to an unspecified “nominated partner”—on unspecified terms—such that PEL wanted to begin concession agreement negotiations immediately. *Id.* Again, PEL's letter confirmed that “per law” it was a “prerequisite” that a SPV be formed prior to any concession agreement, if a direct award procurement was under consideration. *Id.*
- 222.12. It must be understood that, at this time, it was becoming apparent that CFM was not interested in working with PEL and did not have the funds to do so on the terms suggested by PEL. Mozambique was under no obligation to conduct an extraordinary, last report direct award, and had already explained to PEL that the *direito de preferência* was intended to be materialized as the 15% scoring advantage in the typical public tender.
- 222.13. Thus, as of October 2012, the situation was plain: the MOI and PFS provided PEL with a 15% *direito de preferência* in a public tender. While the parties had investigated, and continued to discuss, the possibility of an alternative direct award, PEL had not satisfied a key, conceded “prerequisite” for a direct award: formation of a SPV with CFM. It is little surprise, therefore, that as 2012 progressed the public tender became the obvious procurement methodology for this project, consistent with typical and best practices for PPP and other projects.

As per the PPP Law and MOI, PEL would receive a 15% *direito de preferência* in recognition of its PFS.

223. PEL’s Reply attempts to confuse the issue, but cannot avoid that formation of a project company with CFM would be a prerequisite to an award (especially a direct award procurement) that PEL did not satisfy.
224. First, the question is not solely whether partnering with CFM was a “condition precedent of the MOI.” Reply ¶ 268. (To be clear, a joint venture with CFM would be a condition precedent, as established in the SOD, and because even PEL recognized that the PPP Law controlling on the procurement required a joint venture formation for an award—as Mr. Chaque explains above. *See also C-17.*) But, even setting that aside, partnering with CFM was a requirement of the direct award procurement exception and *alternative* under consideration. Minister Zucula explains (**RWS-4**, Zucula Second Witness Statement ¶ 9):

[T]o my recollection PEL’s 2012 correspondence confirmed that the PPP Law controlled and that a direct award was only allowed as a *last resort exception* on the government’s election, should PEL satisfy all prerequisites for a direct award. MTC investigated, as an *alternative that it was not obligated to proceed with* (indeed, it would require approvals that I could not even give), whether PEL could seek direct negotiations if it entered into a strategic partnership with CFM. PEL did not successfully negotiate and form a project company with CFM. I recall PEL acknowledging that a joint venture, like that it sought with CFM, was one of many prerequisites to a direct award. Because formation of this public-private partnership (and other conditions to a direct award PPP procurement) were not satisfied, MTC ultimately determined that the standard public tender was the only—and most appropriate—procurement method. MTC always intended to (and did) give PEL its 15% *direito de preferência* in the public tender process.

225. Moreover, under Mozambican law, even if the *direito de preferência* was interpreted as Professor Medeiros desires (under Mozambican Civil Code Article 414 *et seq*), it would mean that PEL simply had a right of acceptance to the terms or offer proposed by Mozambique. Here, the condition precedents to a direct award would have included a partnership with CFM—and when PEL failed to satisfy that condition, PEL’s alleged rights

were waived and extinguished. **RER-7**, Muenda Second Legal Opinion ¶¶ 1-12; *see also* **RER-11**, Ehrhardt Expert Report, Executive Summary ¶¶ 7-12.

226. Second, MTC is not to blame for PEL’s failure to reach agreement with CFM, and MTC had no obligation to “instruct” CFM to negotiate or do business with PEL. *Contra* Reply ¶ 275 *et seq.* This is explained by Mr. Chauque, above. PEL did, in fact, know who to negotiate with at CFM and attempted to so negotiate. *See generally* **RWS-3**, Chauque Second Witness Statement ¶¶ 34-46. Minister Zucula likewise explains (**RWS-4**, Zucula Second Witness Statement ¶ 10):

To be clear, I never hindered any of PEL’s direct negotiations with CFM, nor was I even a participant in them. PEL knew it could negotiate with CFM, and when it asked me for contact information at CFM, I replied saying—accurately—that PEL had already commenced negotiations with CFM. It was not my role to facilitate or “authorize” CFM to negotiate with a prospective private partner, although I understood that CFM was aware that it was able to negotiate with PEL on this topic. I ultimately understood that CFM was not interested in negotiating with PEL or investing in the project as suggested by PEL, which again meant that the standard regime of public tender was appropriate and necessary. While PEL may suggest that one of my letters asked it to give PEL more than 20% equity, and there was some confusion on that point as I was not involved with the details of PEL and CFM’s negotiations or the equity aspects of the new PPP law, my ultimate concern was that PEL was not successful in developing the strategic partnership that would have been necessary in a direct award alternative.

227. As an aside, PEL’s assertion that Mozambique failed to produce any documents in response to request #10 is another of PEL’s inaccurate characterizations of the document production phase. Reply ¶ 281. Mozambique produced the document now marked as **R-65**, as discussed by Mr. Chauque in paragraph 43 of his second witness statement.
228. Finally, PEL’s suggestion, found throughout its Reply, that PEL offered CFM the maximum equity participation allowed by Mozambique’s PPP Law is *demonstratively wrong*.
- 228.1. First, PEL never disclosed on what terms that equity would be sought, and assumed, wrongly, that CFM should have had to pay cash for the equity—which is not the state of the law or PPP practice. **RER-11**, Ehrhardt Expert Report ¶ 134

“It is common for governments and state-owned companies to ask for ‘carried equity interests’ in PPP projects. That is, the government or state-owned company wants to be given shares in the project without putting in any cash equity contribution.”)

- 228.2. Second, the 20% limitation PEL cites is incorrect. Notably, PEL neither PEL’s legal expert nor its PPP expert endorse the 20% limitation—they either omit mention of its (Professor Medeiros) or are careful to cite PEL’s own correspondence to suggest the limitation exists in the PPP Law (Mr. Baxter).¹⁵
- 228.3. *PEL’s tactics are meant to mislead the Tribunal.* In actuality, neither the PPP Law nor the PPP Regulations have a 20% equity limitation applicable to the present circumstances. **RER-7**, Muenda Second Legal Opinion ¶¶ 36-44. Mr. Ehrhardt further explains (**RER-11**, Ehrhardt Expert Report ¶¶ 135-136):

Mr. Daga seems to have believed that, whether as a carried interest or otherwise, he could not set up a concession company in which CFM had more than 20 percent of the equity. However, this was not the case. The 20 percent maximum applies to equity ‘reserved for sale via the stock market’. The following paragraph makes it clear that it is ‘financial benefit for the country’, if Mozambican public or private corporate persons participate in the equity of the PPP consortium, under terms to be negotiated between the parties. *See RLA-6*, Mozambique PPP Law No. 15/2011, Art. 33, at para 1 a,b. This participation is not capped. I expect that the Minister was familiar with the law, while Mr. Daga was not. This would explain the Minister’s frustration that PEL had not offered CFM an equity stake greater than 20 percent.

While PEL was disappointed that it could not negotiate a deal with CFM, the actual conduct of the parties is exactly what one would expect under the Minister’s view of the situation. To get a direct award, PEL had to make CFM a generous offer. Perhaps misreading the situation, PEL did not make an offer that even approached ‘generous’ in the sense of ‘better than the government could hope for in a tender’. The conditions for direct award not having been

¹⁵ For example, Mr. Baxter is careful to only mention what *PEL says* about its understanding of the 20% in exhibits. He immediately follows his recitation of PEL’s statements by saying “I am not a lawyer and take no view on the percentage of equity participation permitted under Mozambican law.” **CER-7**, Baxter Expert Report ¶¶ 146-147.

met, the Minister proceeded to prepare for a tender, while assuring PEL that its *direito de preferência* would be respected.

229. Thus, there is no limitation in the PPP Law or PPP Regulation as to the percentage equity PEL could have provided CFM. There was nothing surprising or inappropriate about Minister Zucula arguably seeking greater participation for CFM at the time, and indeed such actions would be consistent with PPP practices and the rationale for investigating an alternative, elective direct award. *Id.*
230. In sum, the substantial correspondence and meetings in the months after June 2012 pragmatically confirm that *neither party believed that PFS approval alone gave PEL a right to the award of the concession*. Rather, as required under the PPP law—which PEL itself cited and relied upon—a disfavored, “last resort” direct award and concession could only be granted upon numerous requirements that the PFS did not satisfy—including *formation of a SPV with an entity like CFM*. PEL admittedly did not reach agreement with CFM on any such SPV, thus it would never receive a direct award. To avoid this fatal fact, PEL attempts to confuse the issue by contending that CFM was not directed to negotiate with PEL and by suggesting—without evidence—that CFM’s privately and publically stated reasons for not reaching an agreement with PEL (*e.g.*, lack of funds and interest) should be ignored. In actuality, the record is clear that PEL was allowed to—and did—negotiate directly with CFM; MTC responded to PEL’s request for contact information by stating—accurately—that its understanding was that PEL had already commenced negotiations with CFM; CFM was not required to enter into a business arrangement with PEL; and there is no evidence that CFM’s stated reasons were improper or inaccurate. PEL could have offered CFM better terms, and wrongly claimed CFM’s participation required significant cash from CFM and would be capped at 20% equity. All this is further evidence of a fundamental point Mozambique has made throughout this arbitration: the MOI did not, and could not, give PEL a blank check to a concession, numerous steps were required before even an award (much less a concession agreement, financing, and execution of the process) could occur, and PEL’s claims on both liability and damages fundamentally ignore the realities (and requirements) of PPP procurement and are impermissibly speculative.

H. PEL’s New Allegations That Mozambique “Was Planning to Oust PEL of its Own Project and to Appropriate its Know-How” are Internally Inconsistent and Preposterous.

231. Among the new arguments in PEL’s Reply is a new section improperly speculating (on the basis of three documents that PEL had in its possession but withheld from its SOC and the document production process) that Mozambique was seeking to “oust PEL of its own project and to appropriate its know-how.” Reply ¶¶ 299 *et seq.*
232. These are bold claims to make on the basis of (1) a chat message string with a “secretary” of a Minister (that does not say what PEL alleges) and (2) an unverified memorandum from a different government entity—the Ministry of Planning and Development—that, if authentic, would underscore Mozambique’s reasoned analysis of the procurement and does not aid PEL’s farfetched positions on its project conception or “know-how.”
233. As a preliminary matter, if these documents carry the significance PEL now attaches to them (they do not), it was inappropriate for PEL to withhold them. They exist only in PEL’s possession—these chat messages and MPD memorandum were not found in Mozambique’s records—and pursuant to PO1 PEL was required to “front-load, and not to withhold its evidence.” PO1 ¶ 11.
234. With respect to the chat messages, they do not state, as PEL contends, that “MTC insisted that it be sent PEL’s PFS without PEL’s signature or logo.” Reply ¶ 300. Rather, **C-226** merely constituted a 9 May 2012 request for a “flash drive” with the PFS. **C-288** is a 13 July 2012 chat string whose full contents are innocent, to say the least, as it only relates to Mr. Daga asking a secretary “why you do not want patel logo on CD” with no response:

14:44 arlanda.reis@gmail.com: Yes offcoure there is charmosalal@gmail.com
14:45 me: ok thanks
14:46 i sent you one check mail on this new id. just reply so i know it is working

14:56 me: why you do not want patel logo on CD. because that is our report so i have put. if you want i can put ministry logo also
14:57 on top

10 minutes

235. Mr. Chauque observes that none of the materials referenced by Mr. Daga make any mention by MTC of any request for logo removal (on the CD or the report materials themselves). Moreover, the exhibit Mr. Daga claims as PEL’s “office copy” of “the PFS without a logo” (*id.* ¶ 876) is **C-6b**, which includes PEL’s logo. The version of the PFS in

MTC's records, submitted with the SOD, likewise *includes PEL's logo*. **R-7**. No party has exhibited a PFS sent to MTC without PEL's logo, and MTC is not aware of any such request. At no time did MTC circulate PEL's PFS without PEL's logo, as Mr. Daga appears to speculate. **RWS-3**, Chauque Second Witness Statement ¶ 33.

236. Yet from the impossibly thin reed of these two May-July 2012 secretarial chat messages, PEL speculates about some "sinister" intent involving a "Rio Tinto Memorandum" that Mr. Daga saw "on a table" during a meeting and asked an unspecified "individual to give [him] a copy of the document as a favour"—with the promise that Mr. Daga "would not get him into trouble." **CWS-3**, Daga Second Witness Statement ¶¶ 105-106.

237. With respect, the only thing arguably "sinister" about the "Rio Tinto Memorandum" is the matter in which PEL allegedly procured the document (and then never disclosed in the nine years since, until its Reply).

238. Mr. Chauque aptly addresses the memorandum in paragraphs 47-54 of his second witness statement, as summarized in English below:

238.1. I understand that Mr. Daga now contends that during this period in late 2012, he "became increasingly concerned that Mozambique was not going to honour its promise to grant a concession to PEL." **CWS-3** ¶ 104. Mr. Daga points to a July 2012 internal memorandum of the Ministry of Planning and Development of a "Rio Tinto Project," which Mr. Daga states he received from "someone he knew at the MTC" around August or September 2012. *Id.* ¶ 105; **C-230** (the "Rio Tinto Memorandum"). PEL and Mr. Daga did not reference this document contemporaneously in 2012, during claim discussions in the years thereafter, in their Statement of Claim, or in prior testimony.

238.2. First, as described above, there was no "promise to grant a concession to PEL." Besides being evident from the MOI, the PPP law, and Mozambican procurement practices, this had been explained to PEL on several occasions—including the same month of PFS approval. PEL itself had understood in its 2012 communications that even in a potential direct award alternative a SPV with CFM was a necessary "pre-requisite" to merely enter into negotiations for a concession agreement and "potential" project implementation.

- 238.3. Second, the Rio Tinto Memorandum does not demonstrate that MTC or Mozambique had “dishonored” any “promise.” This document, which has not been located in MTC’s records and whose authenticity has not been verified, would merely reflect that at some time on or prior to July 2012 Rio Tinto submitted an unsolicited proposal to the Ministry of Planning and Development. **C-230.** PEL does not exhibit any actual proposal and does not establish that the Rio Tinto Project was the same as what PEL sketched in the PFS. *Id.*
- 238.4. Likewise, the document and the July 2012 meetings it references occurred after the PFS approval, and thus after the expiry of any exclusivity provision in the MOI. *Id.*
- 238.5. Third, what the Rio Tinto Memorandum reflects is that there were more than five independent manifestations of interest for construction of railway lines between Moatize and various ports in the Zambezi province. *Id.* The memorandum states that in light of the various different proposals and options, “the award of concessions should be avoided through direct adjustment” and that “we should not respond to the Rio Tinto proposal specifically, but rather we analyze all the manifestations of interest and propose a solution to the logistics of coal in general.” The Ministry was concerned, and appropriately so, about the need to examine “whether the proposed lines are in the national interest and impose conditions for a better use of the resources at a national level,” and the need to comply with the recent PPP Law. *Id.*
- 238.6. Thus, the reasoned conclusion of the Rio Tinto Memorandum—which was similar to MTC’s independent conclusion and what had been specified in the MOI and conveyed to PEL repeatedly as the baseline expectation of the *direito de preferência*, was that upon collection of “pre-feasibility studies,” it was appropriate to “launch[] a public tender, in accordance with the Law of the PPPs.” *Id.*
- 238.7. PEL’s assertions on the Rio Tinto Memorandum are difficult for me to follow. Reply ¶¶ 299-304. PEL suggests that it sent MTC its PFS without a logo in July 2012 and speculates this was part of a “sinister” intent to “deprive PEL of its own

project.” (As discussed above, this assertion is itself incorrect and contradicted by the exhibits.) PEL then leaps to this Rio Tinto Memorandum discussing an unspecified Rio Tinto proposal—a proposal PEL claims was received *before 21 February 2012*—as evidence that PEL’s project and know-how was being “appropriated.” But if MTC received Rio Tinto’s proposal for the subject project *before February 2012* (Reply ¶ 304), that means MTC allegedly had an alternative proposal for the Project from one of the world’s largest integrated mining, rail, and port companies *months before PEL first submitted its PFS to Mozambique in May 2012*. The conclusion is does not appear helpful to PEL: in speculating about “sinister” intentions, PEL’s alleged facts would instead prove Mozambique’s point—that PEL did not uniquely conceive this project and that Mozambique had received other unsolicited proposals for this previously-envisaged concept.

- 238.8. In any event, it is clear that a public tender is expected in the context of an unsolicited proposal for a PPP project, that PEL had no automatic right to receive the project absent the necessary public tender, and that evaluation of other proposals in July 2012 or thereafter (to reach a conclusion that a robust public tender was in the national interest) did not breach the MOI. This course of action is wholly in accord with procurement practices and Mozambican law, and as reflected in the MOI PEL could receive its 15% direito de preferência in the public tender—which it did.
239. Notably, PEL is again incorrect when it suggests that Mozambique failed to disclose the proposal referred to in the Rio Tinto Memorandum. Reply ¶ 304. PEL has not established that such a proposal (for an unpursued project) still does or should exist, or that it related to the same scope of PEL’s project, as noted above. And in any event, PEL’s Document Request 5 was time-limited to the period of “6 May 2011 and 21 February 2012.” The alleged Rio Tinto Memorandum is not signed, and reflects a “July 2012” date. **C-230**.
240. In sum, PEL resorts to two chat messages and a secretly-obtained, previously-undisclosed memorandum confirming that PEL did not uniquely conceive any project idea (if PEL’s speculation is to be believed, Rio Tinto submitted an unsolicited proposal before PEL) is indicative of the desperate measures PEL employs to suggest something “sinister.” The

reality is that MTC sensibly proceeded to a competitive public tender on a proposed \$3 billion PPP project following approval of PEL's PFS (and resulting expiration of the MOI's exclusivity provision), all wholly consistent with the MOI and industry practices for unsolicited PPP proposals.

I. PEL Acknowledged the Applicability of the PPP Law and Standard Public Tender Regime, Sought a Discretionary, Last Resort Exclusion, and Requested an Extraordinary Direct Award Without Satisfying Admitted Prerequisites.

241. As the SOD established, PEL's own correspondence in late 2012 conceded that the PPP Law and PPP Regulations were applicable to the proposed procurement (irrespective of the MOI), and that in seeking a direct award (without satisfying the prerequisites like a joint venture with CFM), PEL requested an elective, disfavored exclusion to the specified public tender regime—one reserved for exemplary, “last resort” circumstances—that MTC itself was neither obligated nor had the power to provide.
242. PEL's Reply contentions (paragraphs 290-297) are inconsistent with the underlying correspondence and addressed by the facts provided by Mr. Chauque. **RWS-3**, Chauque Second Witness Statement ¶¶ 55-58. To summarize in English:
- 242.1. As 2012 progressed, PEL's correspondence acknowledged that the PPP Law and PPP Regulations applied to this procurement notwithstanding the MOI, recognized that the “standard regime for contracting of the PPP undertaking is the public tender,” and sought an “exception” to the public tender. This is evident from PEL's 28 November 2012 letter. **R-16 / C-18**. In this correspondence, PEL sought a discretionary direct award exception to the law, which was reserved for weighty, last resort circumstances never documented or promised in the MOI. Even though PEL had previously recognized that establishing a project company with CFM would have been one (of several) prerequisites under the PPP law in the event of a disfavored direct award, PEL nonetheless sought a direct award without a CFM project company and without establishing the weighty, exceptional circumstances for a direct award. Unsurprisingly, MTC did not grant PEL's request.

- 242.2. Each of the examples of direct awards that PEL provided in **R-16** involved distinguishable circumstances. For example, in each of those, the purported concessionaire had successfully formed a joint venture company with CFM. This is fully consistent with MTC's intent as contemporaneously expressed to PEL in June 2012: the MOI gave PEL a 15% direito de preferência at tender, but PEL could also attempt to pursue a direct award if it could reach a partnership with CFM.
- 242.3. It must also be underscored that PEL's correspondence sought a discretionary decision by the Government, one that MTC itself did not have the authority to make or promise. As noted, what PEL was seeking was a discretionary decision to find exceptional, "last resort" circumstances for a disfavored direct award under the PPP Law enacted after the MOI's execution. The Government was not, and could not be, obligated to make such a discretionary decision. PEL itself understood this, which is why it argued it was "a candidate that deserves the trust of a direct award of the project." **R-16** p.4. As events have made plain, PEL was not deserving of that trust, and it has never demonstrated that this proposed \$3 billion USD project was appropriate for an unusual direct award procurement without competition, vetting of PEL's qualifications, and further development and value analysis of PEL's proposal.
243. Likewise, Mozambique's experts confirm that as a matter of PPP practice, Mozambican law, and the technical insufficiency of the PFS, a direct award should not have been expected and would not have been permissible as demanded by PEL. **RER-11**, Ehrhardt Expert Report; **RER-7**, Muenda Second Legal Opinion; **RER-6**, Betar Second Expert Report.
- J. The MTC Accommodated PEL by Giving PEL a 15% Direito de Preferência in the Necessary and Prudent Public Tender.**
244. Mozambique responded to PEL's request for a discretionary, last resort exception to the PPP public tender regime on 11 January 2013. **R-17 / C-19**.

245. As described earlier, in this letter Minister Zucula explained that PEL's November 28 letter "omits some facts" and "misrepresents what happens." **R-17**. MTC rejected the notion of a disfavored direct tender.
246. Instead, MTC reiterated what it had explained to PEL in June 2012, when the PFS was being approved: the MOI's *direito de preferência* "could be materialized through a public tender where [PEL] would benefit from preference (if it participated in the tender) with an advantage in the score right at the start, or through direct negotiation in case [PEL] entered into a strategic partnership with ... CFM." *Id.* MTC noted that PEL and CFM "had not been able to reach an agreement leading to the development of a strategic partnership" *Id.* The MTC reiterated that if PEL participated in the public tender, it would receive a scoring preference as indicated in the letter. *Id.*
247. Minister Zucula explained that PEL had not secured a strategic partnership with CFM. *Id.* This made the direct award alternative under investigation futile, and confirmed that the proper process was the standard procurement regime for PPP projects of this type: a public tender, with PEL receiving a 15% *direito de preferência* in recognition of its MOI and PFS. **RWS-3**, Chauque Second Witness Statement ¶ 62; **RWS-4**, Zucula Second Witness Statement ¶¶ 8-11.
248. Mr. Daga's assertion that the decision to go to tender was "forced" upon PEL "with no real explanation" is baseless. *See CWS-3* ¶ 114. The explanation was stated in the first numbered paragraph of MTC's 11 January 2013 letter: the *direito de preferência* was to be materialized in the standard public tender process applicable to this project. PEL had not satisfied the requirements for a direct procurement alternative, and project circumstances made a standard public tender appropriate. **RWS-3**, Chauque Second Witness Statement ¶ 63.
249. While PEL takes issue with statements about whether PEL should have offered more than 20% equity to CFM, it must be remembered that Minister Zucula and MTC were not involved in the direct negotiations between CFM and PEL. PEL likewise does not articulate on what specific terms it offered CFM 20% equity, or what project techno-commercial characteristics and business model it described to CFM. *Id.*, ¶ 64.

250. Moreover, as noted earlier, PEL is demonstratively wrong when it asserts in Reply that its failure to offer CFM more than 20% participation was a “demonstrably false . . . justification” offered by Minister Zucula. Reply ¶¶ 307-308 & fn. 332.
251. In actuality, neither the PPP Law nor the PPP Regulations capped CFM’s participation at 20% for a venture of this type. **RER-7**, Muenda Second Legal Opinion ¶¶ 36-44; **RER-11**, Ehrhardt Expert Report ¶¶ 135-136.
252. Rather, it would be consistent with PPP practices for the Minister to expect more participation for CFM than what PEL was suggesting—and at less cost to CFM. Mr. Ehrhardt explains (**RER-11**, Expert Report of David Ehrhardt, ¶¶ 134-136):

Mr. Daga was told by the Chair of CFM that CFM did not have equity to invest in the project. He therefore concluded there could be no negotiation with CFM. However, Mr. Daga may have misunderstood what the Minister had in mind. It is common for governments and state-owned companies to ask for ‘carried equity interests’ in PPP projects. That is, the government or state-owned company wants to be given shares in the project without putting in any cash equity contribution. The PPP developer is asked to put in all the cash, but the public entity gets some of the shares. Clearly negotiation with CFM was possible, but Mr. Daga either did not see the possibility, or considered it uneconomic and chose not to pursue it.

Mr. Daga seems to have believed that, whether as a carried interest or otherwise, he could not set up a concession company in which CFM had more than 20 percent of the equity. However, this was not the case. The 20 percent maximum applies to equity ‘reserved for sale via the stock market’. The following paragraph makes it clear that it is ‘financial benefit for the country’, if Mozambican public or private corporate persons participate in the equity of the PPP consortium, under terms to be negotiated between the parties. *See RLA-6*, Mozambique PPP Law No. 15/2011, Art. 33, at para 1 a,b. This participation is not capped. I expect that the Minister was familiar with the law, while Mr. Daga was not. This would explain the Minister’s frustration that PEL had not offered CFM an equity stake greater than 20 percent.

While PEL was disappointed that it could not negotiate a deal with CFM, the actual conduct of the parties is exactly what one would expect under the Minister’s view of the situation. To get a direct award, PEL had to make CFM a generous offer. Perhaps misreading the situation, PEL did not make an offer that even approached

‘generous’ in the sense of ‘better than the government could hope for in a tender’. The conditions for direct award not having been met, the Minister proceeded to prepare for a tender, while assuring PEL that its *direito de preferência* would be respected.

253. As previously noted, none of PEL’s experts opine that the PPP Law and PPP Regulations actually cap CFM’s participation at 20% in the present circumstances. This is for good reason: the 20% “cap” does not exist.
254. Thus, rather than “reversing course” on the basis of a “false justification,” *the fact is that Mozambique was proceeding precisely as intended and required by the PPP Law and practice*, as described above. PEL was to be afforded a 15% *direito de preferência* at the standard public tender per the MOI and PFS. If the parties’ investigation of an elective, extraordinary direct award procurement alternative—a “last resort” exception conditioned upon (among other things) formation of a project company with CFM on mutually acceptable terms—did not succeed, the tender would issue. *E.g.*, **RER-11**, Ehrhardt Expert Report ¶¶ 7-12.
255. In any event, from MTC’s perspective, the fact was that direct negotiations occurred between CFM and PEL but were not successful. Thus, PEL would not be forming a project company with CFM (which PEL recognized as a pre-requisite for an award under the PPP law) and would not have satisfied the extraordinary requirements for a direct award. PEL itself notes that CFM lacked funds for PEL’s alleged endeavor in 2012 and had invested in other transport corridors. *See CWS-3*, Daga Second Witness Statement ¶ 116. That left the public tender as the standard, expected, and prudent means of procurement, both to satisfy the PPP law and ensure the greatest value to the Mozambican people. **RWS-3**, Chauque Second Witness Statement ¶ 65.
256. It is important to note that while PEL’s subsequent correspondence sought to (inaccurately) specify the PPP Law’s requirements relative to the 20% equity participation, *PEL never refuted or disagreed with Minister Zucula’s description of the parties’ June 2012 meeting*. *E.g.* **R-18** (PEL’s 22 January 2013 Response to MTC’s 11 January 2013 letter). As Mr. Chauque observes, it was MTC’s understanding that the parties’ acknowledged and agreed with the contents of that meeting: the MOI’s *direito de preferência* was to be materialized as a 15% *direito de preferência* in the public tender, although a discretionary, last resort

direct award was open to investigation subject to the conditions in the PPP law that included the formation of a joint venture with CFM. At no time was CFM obligated to form a joint venture with PEL, nor was the Government obligated to utilize the discretionary “last resort” direct award exclusion in the PPP law, nor was MTC’s obligated to proceed with a disfavored direct award procurement. **RWS-3**, Chaque Second Witness Statement ¶ 67.

257. Thus, on 14 February 2013, MTC reiterated that Minister Zucula “already had a meeting with Mister K.L. Daga to whom I again explained the process to be followed,” and that “a tender follows and Patel may compete with its *direito de preferência*.” **R-19 / C-22**. Far from being any surprise or changed decision, it was consistent with the position of MTC leaders throughout this process, including the June 2012 meeting between MTC and PEL. Direct negotiations, while possible as an alternative and if various extraordinary conditions were satisfied, were never promised or required by the MOI—and if there was any doubt, it was resolved by the PPP law defining the applicable *direito de preferência* and specifying the (unmet) requirements for a “last resort” direct award. **RWS-3**, Chaque Second Witness Statement ¶ 68; **RWS-4**, Zucula Second Witness Statement ¶ 9.
258. PEL’s argument that there is “no documentary support for the purported justification given by Mozambique in respect of its decision to organize the tender” (Reply ¶ 318 *et seq*) is disproven by the facts and law above. The “purported justification” is found in the substantial documentary evidence cited by both parties, and *is* the “justification.” As described, the record demonstrates that the MOI and PFS always only gave PEL a *direito de preferência* that was to be materialized in a required public tender, and that although the parties investigated an extraordinary direct award alternative, PEL did not satisfy one of the first necessary prerequisites: consummation of a joint venture with CFM. As PEL itself must concede, the decisions of the relevant Council meetings were communicated to PEL directly in correspondence, and CFM’s alleged lack of interest in working directly with PEL on this project (should it have to inject funds as presupposed by PEL) was even published in newspapers. Reply ¶¶ 312, 320. Council meetings of the type PEL discusses have decisions communicated verbally to the public through spokespersons after the meeting (**RER-7**, Muenda Second Legal Opinion, Conclusion 16), and it is not expected that public written notes or minutes presently exist as asserted by PEL (*id.*; **RWS-3**,

Chauque Second Witness Statement ¶ 101.3). PEL does not like the sensible tender “justifications” evident in the record and obvious from the PPP Law and practice, and cannot salvage its case by imagining facts into existence through baseless adverse inferences.

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

259. As established in the SOD, paragraphs 116 *et seq*, MTC sensibly conducted the public tender that had been contemplated throughout, and PEL chose to participate in that tender as part of the PGS Consortium, thus waiving and extinguishing any rights to an alleged direct award under the MOI.
260. PEL’s Reply raises various objections, all baseless, which are grouped and rebutted in the five categories below.
261. First, PEL attempts to argue that it had “no choice but to participate in the tender.” *E.g.*, **CWS-3**, Second Daga Witness Statement ¶ 123; Reply ¶ 341. This is incorrect. PEL could have chosen not to participate. Or, if PEL believed—contrary to the contemporaneous understanding that the MOI provided a *direito de preferência* that could be materialized in a tender—that the MOI promised a direct award and overruled the procurement regime in the PPP law, there are doubtlessly actions PEL could have taken under Mozambican law or the MOI’s dispute resolution arbitral mechanism. As Mr. Chauque observes, PEL did not take any such action because the parties’ contemporaneous understanding of the MOI, Mozambican law, procurement practices, and impact of the PPP law all confirmed that the MOI’s *direito de preferência* could (and should) be materialized in the standard public tender. *E.g.*, **RWS-3**, Chauque Second Witness Statement ¶ 71.
262. Second, PEL mischaracterizes the facts when arguing that “Mozambique always knew that PEL was going to involve other companies to assist in the Project’s implementation,” and in attempting to refute the observation that PEL’s decision to form the PGS Consortium demonstrates that it alone lacked the resources to competitively and successfully pursue the project. **CWS-3**, Second Daga Witness Statement ¶ 126; Reply ¶ 333. Mozambique did not know, at the time of the MOI or PFS (or anytime before the tender process) that PEL would be partnering with Grindrod for operations and maintenance. The PFS did not

establish that PEL had the proven expertise to finance and execute this Project itself. The fact that the PFS did not identify PEL's partners and the organic composition of any concessionaire is further confirmation that the PFS could not act as a basis of a direct award and concession. **RWS-3**, Chauque Second Witness Statement ¶ 72; **RER-11**, Ehrhardt Expert Report § 6.

263. PEL's assertion that Mozambique suffers from "a complete lack of understanding . . . of how large infrastructure projects work" is flatly wrong, as the reality is that it is PEL that suffers from such inexperience and misunderstanding. Reply ¶ 333 *et seq.* PEL lacked the experience for this project, and there is no evidence it intended to include Grindrod prior to the tender phase, all as detailed *supra* Section II(C). In fact, PEL's newly produced Side Letter with Grindrod during the tender phase *forbade* PEL from representing that Grindrod "will have any direct or indirect involvement in the Project" to the extent PEL "pursued the Direct Award." **C-233**, PEL-Grindrod Side Letter, § 3.2.3.1. That PEL would have needed enormous help to execute this Project is not contested—the fact that the PFS did not identify any of PEL's partners or the organic composition of the concessionaire is one of many fundamental reasons why, as a matter of PPP practice, it could never form the basis of any direct award or concession rights for a \$3 billion rail and port project.
264. Third, PEL incorrectly argues that PEL did not abandon its MOI rights by participating in the tender process. **CWS-3**, Second Daga Witness Statement ¶ 128; Reply ¶ 342. Mr. Chauque explains that, setting aside the legal question of PEL's MOI rights (which are disputed), it must be observed, as a matter of fact and procurement practice, that PEL cannot be active in a tender while also claiming a guaranteed direct award. The finality of tenders and interests of third parties must be considered. It would be insensible for a party to participate in a \$3 billion tender, come in third place, elect not to file any judicial appeal, and then argue years afterwards that it should either receive the concession or the alleged profits of the concession. Such action would either deprive the winning bidder (and the second-place bidder, for that matter) of their rights without due process of law, or result in a state guaranteeing financial success on a 30-year PPP project and paying twice for the same procurement. No procurement systems allow for such an odd and ill-conceived result. *E.g.*, **RWS-3**, Second Witness Statement of Luis Amandio Chauque, ¶ 73; **RER-6**, Betar Second Expert Report §§ 5.8, 6.

265. Similarly, PEL's attempts to argue that it participated in the tender under a reservation of rights have no force. As described above, a party cannot be both a tender participant while maintaining an alleged right to a direct award. *Id.*
266. PEL itself recognized that, once it participated in the tender, MTC had no obligation to award PEL the project. In submitting its Proposal, the PGS Consortium confirmed that "*We are aware that you have no obligation to accept any received Proposal.*" *E.g.*, C-37, at page 7 of the Exhibit.
267. The tender documents confirm that it would be a conflict of interest and impediment for a party to participate in the tender process both for itself and as part of a Consortium. *E.g.* C-27, Item 8.4. The documents also confirm that the bidder shall bear all costs from the proposal submission (including translation into Portuguese) and "the Contracting Entity in no case shall be responsible or debtor of these costs, irrespective of the conduct or the result of the Tender." *Id.*, Item 12.1. PEL agreed to be bound by the Bidding Documents when participating in the tender, and thus waived any contrary alleged rights in the MOI or otherwise.
268. Fourth, PEL's reference to various correspondence around the time of the tender omits important points demonstrating that, even in PEL's view, *the MOI did not grant or promise concession rights to PEL* (especially in light of the PPP Law). For instance, C-28, which is Mr. Daga's 12 March 2013 letter, is notable for the following (*see* RWS-3, Chaque Second Witness Statement ¶ 77):
- 268.1. In describing the MOI, PEL did not reference or rely upon its English-language Clause 2(1) (which is disputed in this arbitration, and inconsistent with MTC's English-language MOI and both parties' controlling Portuguese MOIs). C-28 ¶ 2. Instead, PEL referenced only Clause 2(2), which contains, in Portuguese, the *direito de preferência*. To the extent PEL argues in its submissions that Mozambique did not do enough to refute PEL's version of Clause 2(1), it must be recalled that most of PEL's contemporaneous correspondence was not written in Portuguese and did not reference Clause 2(1).
- 268.2. PEL concedes that "*the Government is allowed to float the Tender*" in the event of the submission of a proposal by an unsolicited PPP proponent, which is what

PEL claimed to be. C-28 page 3 & paragraph 9(d). PEL's contemporaneous complaint and legal position was not that the MOI required MTC to forgo the sensible public tender required under the PPP law. Instead, *PEL was arguing that its PFS was not even PEL's "proposal in terms of technical, quality and price,"* therefore under the PPP Law MTC had to wait until PEL submitted a "complete proposal" before going to tender. *Id.* PEL's position is further confirmation that the PPP Law controls and allowed for a public tender irrespective of PEL's MOI and PFS. PEL's argument that the tender had to be forestalled until PEL submitted a more robust document than the PFS is without legal basis, as nothing in Article 13 of the PPP law requires this; it simply specifies that the proponent of the unsolicited proposal is entitled to the 15% direito de preferência in the public tender.

- 268.3. As the prior paragraph confirmed, *PEL acknowledged that the PFS was an insufficient basis for a direct award.* By confirming that the PFS was not even a "complete proposal," PEL demonstrated that the PFS could never be the basis upon which a \$3 billion concession award would be considered or granted.
- 268.4. In its letter, it appears PEL sought to mislead Mozambique by excerpting only a portion of MOI Clause 6. *Id.*, ¶ 8. The full version of Clause 6 confirmed, as previously discussed, that PEL's alleged exclusivity rights were limited to the period of the PFS study and conditioned upon the specific legislation applicable to the procurement—here, the PPP law requiring public tenders, even for proponents' unsolicited PPP proposals, in all but the most extraordinary "last resort" circumstances.
269. Notably, the Mozambican legal opinion PEL attached to C-28 confirms MTC's understanding that PEL did not exercise a right of first refusal of the type PEL claims in this arbitration. This document from PEL's Mozambican attorneys is C-51, and like C-28, it (1) *failed to mention the disputed language in Clause 2(1)* (paragraph 1.2), (2) confirmed that the MOI's exclusivity provision was conditioned upon the later-enacted PPP Law and that MTC could merely "*request the required express approval by the Government*" for a "*last resort*" direct award (paragraph 2.3), and (3) specified that PEL's PFS and later

correspondence *was not even sufficient to “actually exercise [PEL’s] right”* under Article 13(5) of the PPP Law (paragraph 2.4).

270. That last point must be further stressed. Contrary to PEL’s assertions in this arbitration that it exercised a right of first refusal after PFS approval that granted it the Project award, PEL’s Mozambican attorneys opined that PEL “*has not yet submitted its bid price in order to actually exercise that right as provided for in Article 13(5) of the PPP Law.*” *Id.*
271. As Mr. Chauque describes, it is concerning that PEL now alleges that it exercised a right of first refusal under Mozambican law, when its own attorneys argued contemporaneously that PEL did not actually exercise such a right because the PFS did not even contain a bid price. This confirms what MTC has stated throughout: the PFS did not contain even the basic terms and conditions for a concession (like the bid price), could not form the basis of a direct award, and was never reviewed and approved by MTC for that purpose. The MOI and PFS simply gave PEL the 15% direito de preferência in Article 13(5) of the PPP Law, as PEL’s Mozambican attorneys appeared to confirm at this time in early 2013. **RWS-3**, Chauque Second Witness Statement ¶ 80.
272. Fifth, in seeking to find evidence of inconsistency, PEL points to MTC’s 18 April 2013 letter, issued shortly after the tender documents issued. PEL alleges this letter granted PEL a direct award. *See C-29 / R-26*; Reply ¶ 354.
273. As the SOD established, PEL is incorrect. The 18 April 2013 letter only invited negotiations, and conditioned such negotiations on PEL presenting “a statement, agreement, or take or pay memorandum with the mining companies, in order to make the project in question feasible.” *Id.* An invitation to negotiate, conditioned on offtake agreements PEL never provided, is not the same as a grant of an award, nor is it inconsistent with MTC’s view that it had no obligation to grant an award to PEL. **RWS-3**, Chauque Witness Statement ¶ 82; **RER-7**, Muenda Second Legal Opinion ¶¶ 50 *et seq.*; **RER-11**, Ehrhardt Expert Report § 4.
274. Mr. Chauque was the individual who PEL sought to negotiate a concession agreement after the 18 April correspondence. He explains that the parties never reached the point of discussing commercial terms, and it is speculative to believe that the parties would have reached agreement on a complex concession agreement at all (much less on what terms).

As PEL itself had mentioned in earlier correspondence, the PFS did not provide even a complete proposal, or the basic terms and conditions, of the subject concession, and PEL had not offered a bid price. The PFS therefore could not form the basis of a concession agreement. **RWS-3**, Chauque Second Witness Statement ¶ 83; *accord*, e.g., **RER-11**, Ehrhardt Expert Report §§ 3-5.

275. In any event, to the extent the 18 April 2013 letter caused confusion, clarification was quickly forthcoming. Mr. Chauque also wrote the 13 May 2013 correspondence in **C-35 / R-27**. As he explained, several stakeholders objected to the Council of Ministers' decision to allow negotiations with PEL, and the matter was referred to the MTC's Legal Department. **RWS-3**, Chauque Second Witness Statement ¶ 84. The MTC's Legal Department duly concluded that Mozambican PPP law and regulations required that all potential bidders for the project be treated fairly and that the public tender process be followed. *Id.* Thus, on 13 May 2013, the MTC Legal Department wrote to PEL, explaining:

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

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

See id.; **R-27** (emphasis added). MTC returned the guarantee provided by PEL, with no prejudice to PEL. *Id.*

276. Minister Zucula's testimony confirms that the Council of Ministers never promised a direct award to PEL, and underscores the oddity of PEL's position (**RWS-4**, Zucula Second Witness Statement ¶¶ 13-14):

I reiterate my prior comments that, in reviewing PEL's request for an extraordinary direct award, the Council of Ministers at one point in April 2013 suggested further discussions with PEL—but never directly awarded the concession to PEL. PEL did not provide the offtake or other mining commitments necessary to commence those

negotiations, and any confusion was quickly clarified the next month, when the Council of Ministers confirmed that in light of legal review and stakeholder input that the public tender remained the appropriate procurement method. That was the correct decision, in my view, and consistent with MTC’s position through the parties’ dealings.

I struggle to understand how PEL asserts it can participate in the public tender process, as part of the PGS Consortium, without waiving any alleged right to a direct award under the MOI. Once the PEL responded to the public tender, it became subject to the public tender rules and regulations, which I am believe specify that, among other things, (1) MTC had no obligation to grant any bidder the award and (2) MTC is not liable for costs even in the event of a bid protest. I have never heard of an entity seeking a public procurement at tender, not appealing its third-place finish, and then claiming years afterwards that it is entitled to the alleged 30-year profits had it been awarded the project. Such an outcome would expose the public treasury to dubious claims and duplicative payments on the same project, while undermining the final nature of tenders and compromising the rights of the higher-scoring bidders. Had PEL believed the decision to go to tender was contrary to its rights in the MOI—which, it must again be noted, were expressly subject to Mozambican law throughout project implementation—it presumably could have sought arbitration under the MOI or some other recourse. It never did so, for good reason. The MOI did not override the PPP Law or promise PEL a guaranteed award of this concession.

277. Mr. Ehrhardt explains that, per the PPP Law and as a matter of PPP practice, it was appropriate for the Government to condition direct negotiations on securing offtake agreements or joint ventures. The correct decision—especially with PEL offering no offtake agreements or joint venture with CFM—was to proceed with the tender, providing PEL the 15% *direito de preferência*. See **RER-11**, Ehrhardt Expert Report §§ 2-4, 9.1. This is likewise in accord with Mozambican law. **RER-7**, Muenda Second Legal Opinion ¶¶ 1-35.
278. Notably, PEL is quick to argue (incorrectly) that the Council of Ministers “authorized” or “approved” a direct award in April 2013. Besides (1) misstating that the Council merely authorized *negotiations* (with no guarantee of success) that were conditioned on offtake agreements that were never forthcoming, and (2) omitting that the Council quickly reaffirmed, upon review of the law, that a tender was the correct option, *PEL’s own*

statements reflect that Council approval was necessary for a direct award under the PPP Law. E.g. Reply ¶ 362. If that is true, neither the MOI between MTC and PEL, nor the PFS approved by MTC, could promise or grant PEL a right to a direct award—as that required the approval of the Council. This is consistent with Mozambique’s position throughout the arbitration, that the MOI and PFS could never promise or grant PEL concession rights, because numerous other approvals (from the Council and others) would have been required to do so.

279. As stated before, PEL’s complaint that the only information it received about the Council’s April meetings was the information *contemporaneously sent to it* must fall on deaf ears. *E.g. Reply ¶¶ 367 et seq.* There is no expectation that additional public documents of the type sought by PEL exist—and unlike the public at large, PEL received letters sent precisely to them specifying the relevant information. **Exhibits R-26, R-27; RWS-3, Chaque Second Witness Statement ¶ 101; see RER-7, Muenda Second Legal Opinion ¶¶ 148 et seq.** That PEL does not like the conditions, qualifications, and rationale reflected in these letters does not mean that it can attack Mozambique’s transparency or conjure favorable facts through unsupported production inferences.
280. In sum, to the extent PEL contends Mozambique “changed its mind,” the only arguably errant correspondence is the 18 April 2013 letter inviting PEL to direct negotiations. MTC’s contemporaneous communications to PEL had confirmed throughout the parties’ discussions that the *direito de preferência* that PEL exercised following its PFS was to be materialized as a 15% *direito de preferência* in the public tender. The disfavored, “last resort” direct award procurement was an alternative under consideration if PEL could satisfy the conditions and prerequisites. However, that extraordinary exception to the public tender requirement was never something MTC promised or was obligated to undertake (it would require other approvals in any event), and it was made futile by, among other things, PEL’s failure to create a joint venture with CFM, secure the offtake agreements necessary to establish feasibility, or even define a complete proposal with bid price. *E.g., RWS-3, Chaque Second Witness Statement ¶ 85.*

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

281. The SOD established that the MTC properly conducted a competitive public tender, scored it appropriately, ITD won, and the PGS Consortium failed to timely appeal. SOD ¶¶ 132 *et seq.*
282. In Reply, PEL now includes a 23-page discussion filled with new factual assertions, premised on a new expert report, complaining about issues that PEL (1) did not request clarification on contemporaneously, (2) did not appeal, and (3) did not even raise in its SOC. PEL attacks the scoring of the tender, *even though PEL has never seen the competing proposals* (they are confidential under Mozambican law and not subject to production, as the Tribunal likewise observed) and even though PEL *could not muster a technical expert to rebut the detailed analysis of MzBetar's initial report.*
283. While PEL's tender arguments demonstrate that PEL's case is a belated, thinly disguised bid protest with no place in Treaty arbitration, they can be dispensed with quickly on the merits.

1. PEL Does Not Demonstrate that Mozambique Used Alleged PEL "Know-How" To Develop The Tender—Yet It Would Fine If It Did.

284. PEL claims "the tender notice was ostensibly based on PEL's PFS," and now attaches what it claims to be the tender notice that it wanted to reference earlier. Reply ¶¶ 380, 385. PEL contends that this new tender notice document, **C-236** (which actually solicited expressions of interest for the shortlist phase) says the project for which MTC was seeking proposals was "about 516 km," which matches the length suggested in PEL's PFS. Reply ¶ 387.
285. This line of argument spills ink with no import. A common practice for unsolicited PPP proposals is to run a competitive tender upon receipt of prefeasibility studies, and to use the initial proponent's prefeasibility studies in defining the project to go to tender. Mr. Ehrhart explains (**RER-11**, Ehrhardt Expert Report ¶¶ 231-237 (emphasis added)):

[I]t is best practice for an unsolicited proposal to be subject to competitive pressure. That is, the government should invite other firms to bid on the project proposed by the original proponent.

It is also best practice that USPs only be allowed for innovative projects that the government had not already identified.

If the project concept was developed by the original proponent, the only way the government can invite competing bids is by sharing information on the project developed by the original proponent. Without that, government could not describe the project the other firms are to bid on.

Clearly there are choices needed on how much information to share. Information about the original proponent's experience and financial capacity would not need to be disclosed. Proprietary techniques developed by the original proponent could arguably be protected from disclosure.

The World Bank USP Guidelines state that information "disclosure is even more important for USPs" because of concerns about fairness, corruption, and accountability. . . .

However, it is reasonable for matters such the location of the project, the route of the line, the proposed throughput, expected demand, required capacity, and the like to be disclosed. After all, the idea is that, by giving a direito de preferência, the government is allowing the proponent a profit above what other bidders could make.^[1] That additional profit essentially pays the proponent for the information in its offer. The government is paying for it so that it can disclose the information to other bidders, to enable them to compete.

In practice, many governments require disclosure of essential elements of any PPP project even if it is a USP. . . .

286. PEL's suggestions of impropriety are even belied by its own PPP expert. Mr. Baxter recognizes that upon receipt of an unsolicited proposal ("USP"), the procurement may be conducted using a "competitive procedure" (i.e. a public tender), and that "in a competitive procurement scenario, *the USP studies should form the basis of the concept for the project*" that is put out to tender. CER-7, Baxter Expert Report ¶¶ 131-133. Mr. Baxter wisely never adopts PEL's rancor about the fact that the tender notice referenced the same rail length as the PFS or otherwise may have been based in some part on a common project definition (e.g. *id.*, ¶ 161 *et seq*). He recognizes that the "competitive advantage" the USP

^[1] To see this, consider several identical bidders. Each bidder would get the same technical score, and bid the same cost, *except* the original proponent, which could bid a 14.9% higher price and still win. This additional 14.9% would be additional profit for the proponent.

- proponent receives in the tender (i.e. the scoring preference) is the *quid pro quo* for use of the USP studies in the tender process (*id.*, ¶ 133).
287. Thus, even if Mozambique did specify some basic aspects of the project, such as approximate rail length, following the PFS, that does not indicate a breach of the MOI or anything untoward, unusual, or unfair. In the context of unsolicited proposals for PPP projects, it is *common and expected* that the materials provided by the proponent will be utilized in some extent in defining the project for a tender. That is why the PPP Law specifies that a project will go to tender following an unsolicited proposal, with the proponent receiving a 15% direito de preferência. **RWS-3**, Chauque Second Witness Statement ¶ 98.
288. None of this is a breach of the MOI, either. As earlier detailed, the MOI's exclusivity and confidentiality clauses are limited to the period of PFS study and approval, and is subject to the laws of Mozambique at the time of procurement, including the PPP Law specifying the tender regime. *Id.*
289. In any event, there remains no evidence that the PFS as a whole or in substantial part was provided to other bidders. **RER-6**, Betar Second Expert Report ¶ 37(c); **RWS-3**, Chauque Second Witness Statement ¶ 99. PEL was aware of what was stated in the tender documents and what documents were available in hard copy from MTC, yet never complained about the content of either. *Id.*. Mr. Daga's assertions about whether a version of PEL's PFS without its "logo" was requested were likewise rebutted earlier. *Id.*, ¶ 97. And as established *supra* Sections II(B)&(F), PEL never uniquely developed the Project concept, and the PFS was a modest document that did not reflect a high degree of mobilized resources or know-how (or any protected intellectual property).
290. Notably, PEL complains later in this section that the tender was flawed because the notice did not provide sufficient information to bidders. That assertion is in significant tension with PEL's speculation here, that some valuable "know-how" was appropriated and used by Mozambique in the tender notice or otherwise.
291. The reality, as reflected above, is mundane: PEL's work might have aided Mozambique in writing the brief description of the project for which it was seeking expressions of interest.

That is no MOI breach, much less a Treaty violation. Rather, it would be common, sensible practice for a PPP procurement based on an unsolicited PPP proposal.

2. The Tender Notice and Tender Documents Were Not Deficient—They Garnered Substantial Industry Interest and PEL Did Not Complain or Request Clarification Contemporaneously.

292. Here, PEL and its new PPP expert, Mr. Baxter, complain that the Tender Notice was “high level,” did not contain information usually required, and gave a short time for submission of an expression of interest (EOI). Reply ¶¶ 394 *et seq.* PEL likewise newly complains that the Tender Documents (issued to shortlisted entities after the Tender Notice) were also “very brief and did not provide sufficient information about the Project as required by best practice.” Reply ¶¶ 397 *et seq.* PEL concedes that the “deadline for submissions of the proposals . . . was consistent with Mozambican law,” but nonetheless complains that the time provided was still too short. Reply ¶¶ 399 *et seq.*

293. PEL’s—and Mr. Baxter’s—structural complaints about the tender documents are belied by the competitive reality, and addressed by Mr. Chauque and Mozambique’s technical and international PPP experts. **RWS-3**, Chauque Second Witness Statement ¶ 96; **RER-6**, Betar Second Expert Report; **RER-11**, Ehrhardt Expert Report. To summarize:

293.1. As to the detail in the Tender Notice or Tender Documents, these complaints are dismissed by the commercial reality that the documents were sufficiently detailed to generate expressions of interest from twenty companies. PEL also fails to note the length and substance of the Tender Clarifications, and never mentions the length of materials available in the data room or the allowance for site visits as specified in the Tender Documents. **RWS-3**, Chauque Second Witness Statement ¶ 96.3.

293.2. As to the length of time available, other bidders were able to prepare their expressions of interest and proposals in the time allotted, and that is not surprising. PEL omits that the tender deadline was extended, and no bidding party—including PEL—further complained about the length of time available. PEL also fails to note this in section that the PGS Consortium was able to submit a nearly 900-page Technical Proposal in the time allotted to it—even though the PFS itself was much shorter and dealt with fewer topics. *Id.*, ¶ 96.2. Mr. Daga (admittedly

no specialist on tenders in Mozambique or elsewhere) speculates that “no sensible construction company would agree to submit the tender for such a large project in less than three months.” **CWS-3** ¶ 152. Again, Mr. Daga ignores that the time allotted was consistent with Mozambican law (which PEL conceded above), and further ignores the commercial reality that the PGS Consortium and other, more experienced entities did submit their tenders in time. *See* **RWS-3**, Chauque Second Witness Statement ¶ 96.4.

293.3. Mr. Ehrhart confirms that these time and tender information issues, even if assumed to be true, “may have been disadvantageous to other bidders, but would have advantaged PEL, since it was more prepared and had more information.” **RER-11**, Ehrhardt Expert Report ¶ 23. In other words, greater information and time “might have elicited stronger competition,” but it cannot be said that what was provided to all bidders was unfair to PEL, because PEL claims to have the informational knowledge advantage of the USP proponent. *Id.* ¶¶ 264-267.

293.4. Likewise, PEL is incorrect and misunderstands the various classifications of PPP concessions when suggesting that the government had not made an evaluation of which PPP model to apply. *Id.*, ¶¶ 268-270.

293.5. MZBetar likewise observes that “PEL never sought the additional detail that Mr. Baxter now claims” that by “going to tender without the additional details. . . PEL accepted the proceeding with the available details at the time.” **RER-6**, Betar Second Expert Report ¶ 35.

293.6. Experts appropriately observe the “irony in Mr. Baxter attempting to point out imperfections in a competitive tender while appearing to support award of a \$3 billion project without competition at all.” *E.g.*, **RER-11**, Ehrhardt Expert Report ¶ 25.

3. PEL Has No Standing to Complain About When Other Bidders Were Told of PEL’s MOI-Derived *Direito De Preferência*.

294. PEL next complains that other bidders were not notified of PEL’s *direito de preferência*. Reply ¶ 405. Paradoxically, PEL even asserts that Mozambique “contradicted its own laws when applying the scoring advantage to the PGS Consortium’s bid.” *Id.* ¶ 408.

295. If PEL wishes that Mozambique remove the 15% *direito de preferência* from the PGS Consortium’s evaluation, that of course could be considered—but it plainly would not improve PEL’s litigation posture as it would cause the PGS Consortium to score even lower. Like so much of PEL’s tender argument, PEL’s complaints go to issues that gave *PEL* the advantage the tender and, if accepted as true, would only disadvantage *other* bidders. They are of no helpful import to PEL in belatedly contesting the PGS Consortium’s third place finish or claiming any inequitable treatment.
296. Throughout this section, PEL unabashedly admits that the *direito de preferência* specified in the PPP Law controlling on the subject procurement is a “15% scoring advantage in the public tender process” (*e.g.*, Reply ¶ 405). Elsewhere, of course, PEL contends that the use of the same term in the MOI should *not* mean what is stated in statute for the precise context before the Tribunal.
297. Nevertheless, PEL’s new concern does not aid its case or demonstrate that the process was “rigged” against PEL:
- 297.1. Mr. Ehrhardt explains that the alleged nondisclosure of PGS’s competitive advantage to other bidders did not treat PEL unfairly, because if true it would result in other competitors bidding less aggressively and thus would increase the PGS Consortium’s possibility of success. **RER-11**, Expert Report of David Ehrhardt, ¶¶ 271-272.
- 297.2. MZBetar likewise confirms that this would not adversely affect PEL’s position at the tender; it would, if anything, be something to be claimed by other bidders; and PEL neither sought a clarification to the tender documents (to tell the other bidders that it had a *direito de preferência*) or appealed on this basis. **RER-6**, Betar Second Expert Report ¶ 35(b).
- 297.3. PEL’s *direito de preferência* was explained to bidders in the tender information bulletin, and no entrant protested the outcome. *E.g.* **C-25**, Tender Informational Bulletin (“The consortium Patel, Grindrod, and SPI was awarded 15 points in relation to its right of preference in the context of the [MOI]”).

4. Mozambique Properly Evaluated the Proposals.

298. The SOD (e.g., ¶¶ 132 *et seq.*) and the first expert report of MZBetar addressed the tender scoring at length. As MZBetar established, the “public tender followed the applicable rules and procedures, there was no material error or mistake in scoring, and there was no identified evidence of ‘serious irregularities.’” **RER-1**, Betar Expert Report § 5.3 & ¶ 100.
299. MZBetar examined the scoring in detail, explaining how the sub-criteria applied on the technical proposal were appropriate and consistent with the bidding documents, and how the financial scoring formula now championed by PEL would yield nonsensical results (e.g., bidders with lower concession premium would receive much larger scores—in PEL’s case, it would receive a score more than 1900x larger by waiting until the end of the concession to make payment rather than the beginning). *Id.* ¶¶ 75 *et seq.*
300. PEL offers no expert rebuttal to MZBetar’s technical conclusions. It instead relies on lengthy attorney argument and speculation from its witnesses, who did not review the other bidders’ confidential proposals and demonstrate no qualifications for a technical or comparative analysis of the scoring.
301. Mr. Chauque summarizes the tender scoring process as follows (**RWS-3**, Chauque Second Witness Statement ¶ 87 *et seq.*).
302. The rules for the tender were detailed in, among other things, the Tender Documents (**R-23**) and Clarifications sent to all bidders (**R-29**). At no time did PEL or the PGS Consortium contemporaneously complain about the period provided for the tender, or other structural aspects of the tender process.
303. Mozambique explained the outcome of the tender in its information bulletin sent to all bidders, as per the Tender Documents. That bulletin is **C-25**. As explained therein, 21 entities expressed interest in the project; six entities were shortlisted; four proposals were received; and three entities reached the financial scoring stage. The PGS Consortium “was awarded 15 points in relation to its right of preference in the context of a Memorandum of Understanding entered into between this company and the MTC.” *Id.* MTC explained the main and sub-criteria employed on both the technical and financial evaluation, and specified that in the final composite scoring, ITD scored 94 points; CLZ scored 89; and the Patel/PGS Consortium scored 76. *Id.*

304. All companies were informed of their bid protest and appeal rights, which required a claim and guarantee within 3 days; followed by a hierarchical appeal within another three days; followed by a judicial appeal within 10 days. *E.g., id.* Strict compliance with the appeal procedures and timelines are necessary in the tender context, due to the reliance interests of the winning bidder, the strong need for finality of tenders, and the public interest in cost-efficient procurement. It is for similar reasons that strict limits are placed on what types of damages, if any, are awarded in bid protests.
305. While PEL wrote various letters complaining about the tender outcome, the appeal procedures were not followed, and PEL never submitted a judicial appeal at all. Lacking any formal, judicial appeal, MTC appropriately issued the award to the winning bidder.
306. Nevertheless, MTC did refute PEL's contemporaneous assertions about the tender. In **R-35**, for instance, MTC explained (among other things):
- 306.1. PEL's assertions about undisclosed criteria and incorrect formulas were incorrect. For example, the primary criteria were precisely the same as those specified in the Tender Documents. To minimize the subjectivity of each evaluator, the evaluators employed sub-criteria within the primary criteria, and came together to issue joint marks. These sub-category guides did "not represent a change in the criteria but a means to grant more precision to the criteria set forth and listed in the Public Tender Documents." This is not unusual, as Mr. Chauque observes. Indeed, the PGS Consortium and other bidders chose to participate in the tender, which listed only the five primary criteria, *without even requesting clarification*. The PGS Consortium likewise did not request clarification on the scoring formulas about which it belatedly complained.
- 306.2. The 15% direito de preferência was applied in PEL's favor. MTC explained how it assigned the 15%, and further noted that even if the calculation of the 15% was in error as to the financial evaluation (which it disputed), it would not have changed the PGS Consortium's third-place score.
307. In the document production phase of this arbitration, Mozambique likewise provided PEL with the Technical and Financial Evaluation Reports for this tender (**C-234 & C-240**).

- These documents explained the scoring process and breakdown, and included comments from evaluators on the strong and weak points of each proposal.
308. The Evaluation Reports confirm that, rather than being “rigged,” the scores have a reasoned basis. The largest component of the score related to the Technical Proposal. Thus, two key examples from the Technical Proposal are provided below.
309. First, the Evaluation Reports confirm that the PGS Consortium received low scores from evaluators as it related to the organic composition of the concessionaire. *See C-234*. Specifically, the PGS Consortium received low scores for experience as builders of railways and port terminals, and for endorsements/off takers. It received high scores for experience in railway and port operation.
- 309.1. This is wholly consistent with the facts. As noted, the PGS Consortium sought to have PEL be the “EPC Contractor” with presumed responsibility over the construction. PEL has no experience with such projects in Mozambique, and had little experience with this type or magnitude of rail and port construction anywhere. Evaluators noted the lack of information on the infrastructure builder and that it “does not present a record of having built works similar to the object of the bid.” Conversely, at the tender stage, PEL partnered with Grindrod for operational expertise, and in light of Grindrod’s greater experience the PGS Consortium received higher scores in those areas.
- 309.2. Likewise, evaluators noted that the PGS Consortium did not include offtakers. Accordingly, the PGS Consortium received appropriately low scores in that subcategory. As PEL itself noted elsewhere, the existence of firm offtake agreements is fundamental to the feasibility of this endeavor.
310. Second, the PGS Consortium received high scores for its understanding of the technical aspects of the project, but low scores relative to its understanding beyond the object, i.e., of the broader developmental aspects important to this concession. It likewise received low scores on strategic vision, which was disclosed in the Tender Documents as 50% of the score. The PGS Consortium had lower scores than competitors ITD and CLZ on strategic partnership, human capital development, social projects, and project schedule. *Id.*

- 310.1. While the other bidders' proposals are not available (their production was not ordered by the Tribunal, due to their confidentiality under Mozambican laws and procurement practices, and the incorporation of confidential third-party information throughout the submissions),¹⁶ this scoring is also supported by the Evaluation Report. The evaluators noted that, relative to others, PEL's "interpretation and understanding of the project [was] restricted only to the object of the bid," PEL proposed to bring a "huge list of foreign workers to be brought from India, including unskilled workers," and even though PEL "previously carried out the pre-feasibility study, which gave it a certain advantage over other bidders, it presented a timetable for implementing the project above expectations." *Id.*
- 310.2. Mr. Chauque reiterates that for this concession, it was known that the government's objective extended beyond simple placement of rail or construction of port. The idea of a transport corridor of this type, if it could be made feasible, was to usher in social development and economic prosperity throughout the region. As demonstrated by the Evaluation Reports, other bidders' provided significantly more compelling strategic visions in this regard. **RWS-3**, Chauque Second Witness Statement ¶ 95.
311. Expert analysis confirms that the tender certainly was not "rigged," and dispels PEL's various attacks. For example, Mr. Ehrhardt explains:

¹⁶ See Tribunal 31 May 2021 Decision on Claimant's DPS, Request No. 21, O4 ("The Tribunal accepts that the bidding documents provided by the companies that were pre-qualified on 12 April 2013 other than PGS Consortium are confidential . . . Mozambique may disclose the existence and characteristics of the responsive documents in a Privilege Log.) Mozambique so disclosed the documents in the Privilege Log, further explaining the third-party confidentiality considerations pervasive in the documents and how they could not be alleviated by redaction or a confidentiality undertaking. **R-67**, Mozambique's Privilege Log. PEL never objected to Mozambique's Privilege Log. PPP experts further confirm that it is common industry practice for other bidders' tender proposals to be deemed confidential, and no adverse inference can be sustained by their nondisclosure. **RER-11**, Ehrhardt Expert Report ¶¶ 286-87.

- 311.1. Evaluators are not typically required to sign a “declaration of independence” as PEL contends, and the lack of such documents is neither surprising nor evidence of impropriety. **RER-11**, Ehrhardt Expert Report ¶ 277.
- 311.2. It is not typical that the tender file includes the additional notes, attendee lists, etc., that PEL speculatively alleges it should include. *Id.*, ¶ 278.
- 311.3. The disclosed criteria were appropriate, and even if they did allow for a certain amount of “subjective interpretation” by evaluators, that is common and proper for a PPP project of this type. *Id.*, ¶ 279.
- 311.4. It is common ground that the main criteria were disclosed to bidders. PEL’s complaints that sub-criteria were also not disclosed misunderstands industry practices; this is not standard practice and disclosure of evaluators’ sub-criteria could allow bidders to “game the system.” *Id.*, ¶ 280.
- 311.5. The nature and weight of the “strategic vision” criterion was entirely appropriate and expected for a PPP project of this type. *Id.*, ¶ 281.
- 311.6. The evaluators’ scores were not “suspiciously consistent” as PEL asserts. *Id.*, ¶ 282. Rather, consistent scoring is just as likely to be a sign of a robust and credible evaluation. *Id.*; accord **RER-6**, Betar Second Expert Report ¶ 37(d).
- 311.7. In any event, PEL’s expert Mr. Baxter never assigned a motive as to why MTC would not seek to select the bidder that provided the best offer, and could not opine that the PGS consortium objectively was the best bidder. **RER-11**, Ehrhardt Expert Report ¶¶ 283-85.
312. Mr. Ehrhart also adroitly observes the irony of PEL complaining about the rigor of the competitive international tender with numerous entrants and no appeals—when PEL advocates for an anomalous direct award procurement with no competitive tension at all, premised on short review of a mere PFS (*id.*):

At the conclusion of Mr. Baxter’s testimony, he must find himself in an incongruous position. He argues that the government should have awarded the contract following nothing more than a brief review of a modest pre-feasibility study. At the same time, he demands minutely detailed sub-criteria and recording of minutes for

a competitive award. It strikes me as strange to support lower levels of rigor and scrutiny in a direct award than in a competitive tender. Most experts would take the opposite position.

313. The experienced engineers at MZBetar are similarly critical of PEL's speculation about the tender evaluation, explaining, among other things, that:
- 313.1. The sub-criteria were appropriate and consistent with the disclosed main criteria. PEL never requested clarification (on this or other matters) if it believed there was too much ambiguity or room for subjective evaluation in the disclosed criteria. **RER-6**, Betar Second Expert Report ¶ 35. PEL also never appealed per the established and typical protest procedures if it felt the evaluation was in error. *Id.*
 - 313.2. PEL is incorrect about the scoring, including the relative scoring of ITD and the PGS Consortium on key criteria. For example, as to strategic vision, PEL incorrectly asserts that ITD was given the maximum score and incorrectly suggests that the innovative special economic zone proposed by ITD was not a requirement of the tender documents. In reality, the Bidding or Tender Documents disclosed to PEL and other bidders the need for strategic vision beyond the construction and operation of the railway line and port, and thus ITD was satisfying a key disclosed objective of the tender better than the PGS Consortium. *Id.*, ¶ 37(a).
 - 313.3. Similarly, PEL is wrong when it asserts that it received the lowest score on the technical proposal. PEL offers no expert with the relevant knowledge and experience to assess the comparative advantages and disadvantages of the tender submittals. *Id.*, ¶ 37(b).
 - 313.4. PEL may complain that the financial scoring process was "obscure," but it was explained in MZBetar's first report, and in any event there were established procedures for submitting requests for clarification pre-bid and for submitting appeals post-scoring. PEL did not utilize either, thus it cannot complain eight years later that the financial scoring process lacked clarity. *Id.*, ¶ 37(e).

- 313.5. PEL is incorrect when it contends that only certain of the evaluators applied PEL's 15% direito de preferência to the technical proposal. Analysis of the full scoring tables demonstrates that the 15% was applied as stated by MTC. *Id.*, ¶ 38.
- 313.6. In all circumstances, even after consideration of PEL's belated complaints, the tender outcome would not change: ITD would still receive the highest score. *Id.*, ¶ 39.
314. Accordingly, PEL's argument by counsel and after-the-fact complaints do not demonstrate the tender was "rigged," and cannot demonstrate that the PGS Consortium offered the best proposal. In actuality, the PGS Consortium placed in third place because other bidders offered stronger proposals, as confirmed in the evaluation reports and described above.
- 5. The PGS Consortium Admittedly Did Not Pursue an Appeal.**
315. The SOD described the parties' correspondence following the tender outcome and confirmed that PEL did not pursue an appeal. SOD ¶¶ 134 *et seq.* Treaty litigation was never intended as a supra-national bid protest procedure, unmoored from State procurement procedures and appeal requirements, and blind to the rights of other bidders and maintenance of the public fisc.
316. While PEL's Reply attempts to assert it filed a "timely complaint," (Reply ¶¶ 443 *et seq.*), its own concessions prove Mozambique's assertions. PEL *admits* in this litigation that the PGS Consortium did not pursue the required process to protest or appeal the bid. *See, e.g.*, SOC, CWS-1, Witness Statement of Kishan Daga ¶ 161 ("we thought that it would be pointless to lodge a court appeal"). Expert analysis confirms that PEL failed to satisfy the appeal requirements in this fashion and others. **RER-1**, Betar Expert Report § 5.3.5; **RER-2**, Muenda Expert Report ¶ 24; **RER-6**, Betar Second Expert Report § 5.8; **RER-7**, Muenda Second Legal Opinion.
317. PEL's assertions about the PGS Consortium's failure to appeal allegedly not extinguishing any rights under Mozambican law are counterintuitive and disproven by Ms. Muenda. **RER-7**, Muenda Second Legal Opinion ¶¶ 117-147. Strict compliance with the appeal procedures and timelines are necessary in the tender context, due to the reliance interests of the winning bidder, the strong need for finality of tenders, and the public interest in cost-efficient procurement. It is for similar reasons that strict limits are placed on what types of

damages, if any, are awarded in bid protests. **RWS-3**, Chauque Second Witness Statement ¶ 89; *see also* **RWS-4**, Zucula Second Witness Statement ¶ 14 (PEL’s position herein “would expose the public treasury to dubious claims and duplicative payments on the same project, while undermining the final nature of tenders and compromising the rights of the higher-scoring bidders.”).

318. Indeed, the recourse (and legitimate expectation) in the event of a successful bid protest—in Mozambique and globally—is *not* lost profits of a construction project or concession. Instead, the proper remedy would be to cancel or redo the tender—a point previously stated and not rebutted by PEL. *See id.*; **RWS-1**, Chauque Witness Statement ¶ 81; **RWS-3**, Chauque Second Witness Statement ¶ 89. Had the PGS Consortium timely and appropriately appealed and been successful with any objections to the tender, MTC could have had the opportunity to correct any errors found through the judicial process. *See RWS-1* ¶ 82.
319. In sum, PEL’s tender complaints are disproven by the facts, and demonstrate that PEL’s preferred procurement process—direct award based only on a brief review of a mere PFS, with no competitive tension—would be much worse than even an imperfect tender. MZBetar concludes (**RER-6**, Betar Second Expert Report § 6):

Finally, as shown, some of the comments made by Mr. Baxter to support its claim about purported “irregularities” on the tender lack context and/or are misleading. None of the Mr. Baxter purported irregularities show that PEL had the best technical or financial proposal, and Mr. Baxter failed prove that this tender was a sham – the best evidence of this, is that this tender had significant industry involvement (as can be seen by the number of bids received) and none of the other bidders appealed. Should the tender have so many “irregularities”, as described by Mr. Baxter, one would expect that other bidders would challenge the tender.

Mr. Baxter suggests that the level of sophistication in PPP practices in Mozambique was different from elsewhere. It is noted that at the time in question, the PPP Law was very recent. These issues, however, actually weaken PEL’s attack that the tender was a “sham” and instead make it more likely that the tender was imperfect but reached the correct result, with no appeals. In any event, the evidence demonstrates that the tender was more in accordance with industry procurement practices than the anomalous blank cheque that results from the direct award PEL seeks. Indeed, if the MOI and

the PFS - with all limitations in terms of content as already discussed - were the only basis to grant a concession (as claimed by PEL), practically, PEL will be provided a “blank cheque” to implement the concession at its own description, and will set precedent establishing that the Mozambique Government has no tools to impose conditions during negotiations of all “terms and conditions” (that were not defined in neither the PFS, or the MOI). . . our opinion [is] that this is not only improbable, but also incomprehensible because [it] implies that a sovereign government gives a “blank cheque” for a private foreign company develop a \$3 billion USD Project without requiring defined “terms and conditions” and only in exchange of a “study” without significant investment.

6. PEL Misleads the Tribunal in Asserting That Mozambique Did Not Produce Tender Documents or Documents Related to the ITD Concession—Because the Tribunal Did Not Order Their Production.

320. Perhaps recognizing that the Evaluation Reports, Tender Documents, Tender Clarifications, and the PGS Consortium Proposal do not provide adequate grounds for criticizing the tender outcome, PEL attempts to mislead the Panel by asserting that Mozambique failed to produce various documents pertaining to the tender. Reply ¶ 461.
321. These assertions are disproven and contrary to the Tribunal’s prior decisions on the relevant document requests.
322. First, Mozambique produced the tender file, as noted, and PEL has not indicated what else must be in the file and retained that is not already in PEL’s possession. The voluminous documents Mozambique produced—or that were already in PEL’s possession—included the number and identity of jury members, their individual scores (where separately tabulated), the evaluation team’s written impressions of the proposals, evaluation reports for the shortlist, technical proposal, and financial proposal phases, and substantial other information. *See* Tribunal’s 31 May 2021 Decision on Claimant’s DPS, Request No. 21, R1; *see also, e.g., C-234, C-240* (detailed evaluation reports).
323. Likewise, PEL already has the Tender Documentation, lengthy Clarifications, and correspondence, as they were sent to all bidders. As Mr. Chauque explains, Mozambique produced its tender file as it relates to any non-confidential documents not in PEL’s possession. Other bidders’ proposals are confidential in Mozambique and were not ordered to be produced. PEL’s suggestion that other documents from the tender remain unproduced

is difficult to understand, because the tender communications were transmitted or made available to all bidders, including PEL. These documents are in PEL's possession, and many are already exhibited in this arbitration, such as the tender documents and clarifications. **RWS-3**, Chaque Second Witness Statement ¶ 101.1.

324. Second, PEL misleadingly asserts that Mozambique did not produce the other bidders' proposals. Reply ¶ 461(b). Mozambique did not produce them—*because the Tribunal agreed that Mozambique need not produce them*.

325. Specifically, PEL's contention that the "tenders' proposals are not confidential" (Reply ¶ 463) is wrong and *expressly contrary to the Tribunal's decision on Claimant's Document Request 21*. In the DPS, PEL had previously asserted its argument that the confidentiality applied only to certain documents related to the evaluation of the proposals. Mozambique properly observed that the statute, as written, applies also to "the proposals of the competitors." Tribunal 31 May 2021 Decision on Claimant's DPS, Request No. 21, R1, O4.

326. The Tribunal agreed with Mozambique, stating:

The Tribunal accepts that the bidding documents provided by the companies that were pre-qualified on 12 April 2013 other than PGS Consortium are confidential . . . Mozambique may disclose the existence and characteristics of the responsive documents in a Privilege Log

327. This is documented in the Tribunal Decision on Claimant's DPS, Request No. 21, O4 (emphasis added).

328. In accordance with the Tribunal's decision, Mozambique disclosed the other bidders' tender documents in its Privilege Log but did not (and could not) produce them. Mozambique explained the third-party confidentiality considerations pervasive in the documents, and how they could not be alleviated by redaction or a confidentiality undertaking. **Exhibit R-67**, Mozambique's Privilege Log, 14 June 2021.

329. PPP experts further confirm that it is *international best practice* for other bidders' tender proposals to be deemed confidential. As Mr. Ehrhart explains, far from drawing adverse inference from Mozambique not having shared the other bids, this is best practice. Bids are

meant to be confidential, and absent an order from the Tribunal to disclose them, it is right for the government to respect that confidentiality. **RER-11**, Ehrhardt Expert Report ¶ 25.

330. In short, PEL is wrong on the law and practice, and never objected to the Tribunal’s DPS decision or Mozambique’s Privilege Log. PEL’s request for adverse inferences (on the basis of the nonproduction of documents whose production was not ordered) is abusive and misleading.
331. Third, PEL’s other categories of purportedly unproduced tender documents are similarly frivolous. PEL already has possession of bid opening meeting minutes or attendee lists (e.g., **C-38**, “Minutes of the Opening Session of Economic Proposals”), and does not specify anything further that should exist. There is no evidence that further documentation should exist of “documents showing that the rules and procedures were complied with,” beyond the voluminous correspondence and information already in the record.
332. PEL’s assertions about the ITD documents are similarly abuse and frivolous. PEL suggests it was improper that Mozambique did not produce various ITD or TML Consortium documents, or nonpublic documents concerning project status. Reply ¶¶ 471-472.
333. PEL again misleads the Tribunal. The Tribunal has already ruled on these matters in Claimant’s DPS, and *denied PEL’s requests for the documents it now complains about*. For example, as documented in the Tribunal’s 31 May 2021 Decision on Claimant’s DPS:
- 333.1. The Tribunal appropriately denied PEL’s Document Requests 22-23, relating to various ITD/TML Consortium Concession Agreement documents, noting that the principal terms had already been made public (and produced by Mozambique) per the law.
- 333.2. The Tribunal appropriately denied PEL’s Document Requests 25 and 29, relating to TML’s EPC or O&M Contracts with third parties, noting among other things that they “they relate to a different project than the one that would have been implemented by PEL.”
- 333.3. The Tribunal appropriately denied PEL’s Document Request 26, relating to the TML Consortium’s offtake agreements with mining companies, noting that PEL had not established their relevance or materiality.

- 333.4. The Tribunal appropriately denied PEL’s Document Request 27 for alleged 2018 political risk guarantee documents, noting that PEL had not established their relevance or materiality.
- 333.5. The Tribunal appropriately denied PEL’s Document Request 31, relating to “documents relating to the current status of the Project,” for failure to meet Requirements R1 through R3.
- 333.6. The Tribunal appropriately noted that Mozambique had already produced the most recent TML Feasibility Study (**R-42**), as requested in PEL Document Request 30.
334. Accordingly, it certainly is not the case that any “adverse inferences” are warranted against Mozambique. Rather, PEL’s misleading assertions regarding these documents—that are either already in PEL’s possession or whose production was not ordered by the Tribunal—is further cause for the costs of this proceeding to be assessed against PEL.
- M. The Project as Proposed by PEL Would Not Have Been Viable. The TML Project Differs Substantially from PEL’s Proposal.**
335. The SOD established that the project as proposed by PEL or the PGS Consortium would not have been technically, commercially, and financially viable and feasible. It further explained that notwithstanding ITD’s superior proposal, and further modifications made to improve feasibility, the project has not reach financial closure or come to fruition in the many years since the tender. SOD ¶¶ 142 *et seq.*
336. Technical analysis of the ITD/TML project—as reflected in its 2017 update to its bankable feasibility study—confirmed that the TML project under consideration was substantially different than anything proposed by PEL. As explained, the PFS contemplated the “development of 25 MTPA handling capacity Port at Macuse” and a “516km standard gauge rail corridor from Macuse to Moatize.” *Every fundamental term is different in the TML Project.* TML proposed a 33 MTPA handling capacity port, located on the other side of the river in Macuse, connecting to a cape gauge railway, that is 639 km long—terminating not in Macuse, but rather at in Chitima, to secure offtake from mines never contemplated in the PFS. *See RER-1*, Betar Expert Report § 5.5. Numerous other significant differences existed. *Id.* (discussing differing axle loads, train formations, port

parameters, port capacities, vessel sizes, length and layout of terminal berths and port, alignment of the rail route, and so forth). SOD ¶ 144.

337. PEL offers no technical rebuttal to any of these points. Rather, it claims—incorrectly—that (1) “the Project is currently being implemented by the TML Consortium”; (2) mere approval of the PFS “confirmed that the Project proposed by PEL was technically and commercially feasible”; and (3) the differences between the Projects are “minor and not substantial.”
338. All these points are debunked earlier, *supra* Section II(A).
- 338.1. First, PEL should not be so hasty to claim equivalence between the TML Project and what PEL allegedly proposed, *because ITD and the TML Consortium have concluded that the project is not economically feasible and are not building it*. The current project plan, which still has not been financed, is for a mere general cargo port with no rail line or deep-sea coal port. *Id.*
- 338.2. Second, a PFS certainly does not establish project feasibility. PEL concedes elsewhere that its PFS was not a feasibility study or even a complete proposal on technical, quality, and price terms. *E.g.* Reply ¶ 347. PPP and technical experts confirm that the PFS certainly did not establish project feasibility, and *in fact the materials PEL provided demonstrated that the project was not feasible*. **RER-11**, Ehrhardt Expert Report ¶¶ 13-14; **RER-6**, Betar Second Expert Report §§ 5.1-5.3.
- 338.3. Third, the differences between the projects are extensive, fundamental, and substantial, as confirmed by the only technical experts in this arbitration. **RER-6**, Betar Second Expert Report § 5.5.
339. In short, as stated in the SOD, PEL greedily seeks to collect the forecasted lost profits of a still-unbuilt project, designed and studied by a different entity that is different in every key metric from what PEL simply reviewed in a modest PFS.
340. Because, among other things, the Project has not been built, has not generated revenue or expenses, and would not have been viable, PEL’s claim for lost profits and damages under

the MOI fails and is futile. PEL's purported damages are also speculative, illusory, and unfounded.

N. PEL Violated the Confidentiality Clause in the MOI, and Made False & Defamatory Public Statements About Mozambique.

341. The SOD established that if anyone breached the MOI's confidentiality clause, it is PEL, who disclosed the existence and terms of the MOI to various third parties as reflected in the arbitral record. SOD ¶¶ 147 *et seq.* PEL likewise made defamatory comments in the press. SOD ¶¶ 151-154.
342. PEL's limited response is that the confidentiality clause was "for PEL's benefit" (Reply ¶ 487), but that one-sided qualification is not found anywhere in the MOI—and it makes no difference who allegedly proposed the clause in the drafting process. **R-1 & R-2**, MOI, Clause 11.
343. PEL contends that its communications about the nature of the project would not violate the confidentiality clause so long as PEL did not share any confidential data. Reply ¶ 488. Such logic, if accepted, undermines PEL's assertions elsewhere that it was somehow improper for Mozambique to describe the project under consideration as one with a similar rail length as presumed in the PFS.
344. PEL never disputes that it made the inaccurate and defamatory comments in the press—it just notes Mozambique does not claim any damages in this proceeding. Reply ¶ 491. Irrespective of whether Mozambique is pursuing such damages here or elsewhere, the fact remains uncontested that PEL's statements were false and defamatory. What PEL told the press—that it "had earlier emerged as a successful bidder" and a "change in Mozambique government's stance came despite the company 'emerging as the most successful bidder for the project purely on its merits and in-depth knowledge of the project'"—is patently false. SOD ¶¶ 151-153.

O. Mozambique is Properly Resolving the Parties' Dispute Arising Out of the MOI Before the Jurisdictionally-Unquestioned ICC Tribunal, and PEL's Bombast Has Been Rejected Time and Again.

345. The SOD described events leading to the commencement of this arbitration and established that Mozambique properly and reasonably commenced the ICC Arbitration to resolve the

dispute arising out of the MOI before the parties' chosen, jurisdictionally-unquestioned ICC Tribunal. SOD ¶¶ 155-165.

346. PEL does not respond to these points in its fact discussion, but rather leads its Reply with a “procedural background” section that in four paragraphs seeks to impugn Mozambique for insisting upon the parties' chosen ICC arbitral clause. Reply § II(A).
347. PEL's baseless rhetoric about the ICC Arbitration has been rejected by the ICC Tribunal—which denied PEL's Stay Application in that proceeding—and discussed at length relative to Mozambique's Stay Application in this proceeding. The Tribunal's PO4 denied Mozambique's Stay Application, but did not suggest anything improper about Mozambique commencing the ICC Arbitration, and noted the Tribunal's belief that “the respective causes of action appear to be quite different.” PO4, Decision on Respondent's Stay Application, ¶ 57. The Tribunal is invited to refer to Mozambique's Stay Application submissions to the extent these matters require any further attention.

P. If Any Adverse Inferences Are to be Made on the Basis of the Parties' Productions, They Should be Made Against PEL.

348. PEL has exhibited more than 330 fact exhibits—many of them project correspondence and documents that PEL received from Mozambique contemporaneously or through the parties' claim discussions and submissions. Nonetheless, PEL attempts to suggest that Mozambique's alleged “guerrilla tactics” extend to the document production phase, where PEL claims that Mozambique has not given PEL enough information about this unrealized project and its production is inadequate. Reply ¶¶ 31 *et seq.*
349. PEL's assertions relative to unproduced documents have been addressed with specificity where contextually appropriate above. In no significant circumstances has Mozambique failed to produce documents that presently exist or would be expected to exist, and whose production was ordered.
350. Rather, if any adverse inferences are warranted, they should be levied against PEL, who produced few or no documents related to, *inter alia*: (1) its alleged project conception; (2) PEL's efforts in developing the Preliminary Study; (3) the cost of the PFS; (4) the cost of the proposal, (5) notes from meetings with CFM, (6) any communications with crucial offtake miners beyond a couple short exploratory letters, (7) project cost estimate

documentation, or (8) communications among the PGS Consortium members about whether to appeal the tender. Each of these categories were documents the Tribunal ordered produced, and that should exist if PEL made the significant investment that it attempts to allege. *E.g.* Tribunal’s 31 May 2021 Decision on Respondent’s DPS, Requests Nos. 3, 5, 7, 8, 10, 11, 38, 39, 42, 44, 45, 46.

351. For example, the fact that PEL allegedly does not have any documents indicating the “time and costs actually incurred by PEL in preparing the PFS,” or invoices from the consultants who allegedly worked on the PFS, leads to one sensible inference: PEL did not incur any significant costs on what it claims as its “investment.” *See* Tribunal’s 31 May 2021 Decision on Respondent’s DPS, Requests Nos. 38-39.
352. Likewise, PEL did not even request the blacklisting pleadings ordered by the Tribunal on 31 May 2021 until Mozambique had to bring the matter to the Tribunal’s attention. To date, PEL still has not produced these documents. *See id.*, Request No. 53. It is notable that PEL claims that the “passage of time” excuses the fact that PEL and its attorneys allegedly retained no pleadings from PEL’s year-long, home-country blacklisting that it contested all the way to the Indian Supreme Court—yet PEL inconsistently attacks Mozambique for allegedly not retaining various decade-old, pre-concession documents on an unrealized project.
353. Mozambique further notes various inaccuracies in PEL’s assertions about its document production, beyond those discussed above. For example, PEL contends that it produced more than Mozambique by number of documents, but ignores the length and substance of the documents at issue. As previously discussed in the document production phase, Mozambique’s voluntary production was similar in size to PEL’s production—Mozambique produced more than 75 pages of documents, while PEL produced 158 bates-numbered pages in response to a greater number of requests. *See* Tribunal’s 31 May 2021 Decision on Claimant’s DPS, Request No. 21, Rebuttal Discussion. Mozambique’s productions involved substantial previously-undisclosed documents of length, such as the Evaluation Reports, while PEL’s production related primarily to drafts and duplicative versions of the MOI, and its document count was inflated by email chains, blank forwards, and meaningless attachments (*e.g.* files saying “from my iphone”). *Id.* PEL failed to

produce documents for the majority of topics requested by Mozambique—and has often cited the “passage of time” as a reason. *Id.*¹⁷

354. PEL further omits mention that the bulk of the potentially relevant documents are already exhibited and were not subject to production (as they were sent by or to both parties), and that a significant portion of the documents in PEL’s possession were provided to PEL contemporaneously or in the claim negotiation phase.
355. As described earlier, PEL is wrong when it asserts that the Tribunal “should not be convinced” by Mozambique’s reasonable searches and corresponding affidavit. Reply ¶¶ 35-36. The documents PEL claims “must” exist and “must” be produced, in fact, either do not exist (for good reason) or need not be produced. For example:
- 355.1. As to the executed originals of the MOI, MTC retained electronic/scanned copies. PEL has not identified any obligation for MTC to retain original copies of a decade-old “Memorandum of Interest” for an unrealized project, from a third-place tender finisher. *E.g.* **RWS-3**, Second Witness Statement of Luis Amandio Chauque, ¶ 101.2; *see* **RER-7**, Muenda Second Legal Opinion ¶¶ 148 *et seq.* Of further note, the hard copies have not been located due to rehabilitation work in the relevant buildings or the “passage of time” (*id.*)—the same reason given by PEL for its non-retention and nonproduction of everything from blacklisting pleadings to a full set of MOI drafts and correspondence.
- 355.2. As to MTC or Ministry meeting minutes, these are addressed earlier—it is not expected that public notes or minutes exist as asserted by PEL. **RWS-3**, Chauque Second Witness Statement ¶ 101.3. Ms. Muenda further observes that Council of Ministry summaries are provided verbally to the public via a spokesperson, and to the extent written documents did exist, they would cover various issues beyond the present matter and be deemed secret under Mozambican law. **RER-7**, Muenda Second Legal Opinion ¶¶ 148 *et seq.* & Conclusion 16.

¹⁷ PEL also inaccurately claims Mozambique did not produce any “contested” documents. This is inaccurate. *See* **R-65**.

- 355.3. The tender documents have been thoroughly addressed *supra* § II(L)(6). PEL cannot point to any documents in the “tender file” that were not produced or in PEL’s possession, save the confidential proposals of other bidders—for which the Tribunal appropriately did not require production. *See also* **RWS-3**, Chaque Second Witness Statement ¶ 101.1.
356. Accordingly, if the Tribunal were to draw any adverse inferences premised on the document production, they must be levied against PEL. For example, an adverse inference is warranted to demonstrate that PEL cannot quantify a single dollar of expense incurred in its very modest PFS, and thus cannot establish any significant alleged “investment” or “know-how.”
- Q. The Dispute Over the Authenticity of the English-Language MOIs is Sensibly Addressed by Relying Upon the Controlling Portuguese MOI.**
357. As explained in the SOD (*e.g.*, ¶¶ 77 *et seq.*), and analyzed *supra* § II(D), Mozambique submits that the parties’ Portuguese MOIs are controlling. This is likewise required as a matter of Mozambican law and industry practice. *Id.* The controlling Portuguese MOI documents are **R-1** (Mozambique) and **C-5B** (PEL). While the parties’ Portuguese MOI exhibits differ in scan quality, it is common ground that they do not differ materially in substance. Reliance upon the parties’ common and controlling Portuguese-language document avoids the dispute regarding the authenticity of the Parties’ divergent English-language MOIs, discussed below.
358. Relative to MOI authenticity, the parties’ dispute relates to the English-language MOIs. These documents are **R-2** (Mozambique) and **C-5A** (PEL). The English-language documents are subordinate to the Portuguese versions as a matter of Mozambican law and practice. *Supra* § II(D)(8). Here, the parties English MOIs differ from each other in substance, particularly as to the dispute Clause 2(1).¹⁸
359. The SOD explained that *PEL’s English version of the MOI differs from all other versions of the MOI in the record*. Specifically, the English version of the MOI submitted by PEL (**C-5A/R-6B**) has language added to Clause 2(1) that, according to PEL, purports to

¹⁸ PEL’s purported versions of the MOI are also referenced as Respondent exhibits **R-6A** and **R-6B**.

obligate the MTC to automatically grant a concession to PEL. This language is inconsistent with all other versions of the MOI and the intent of the parties.

- Clause 2(1) of the MOI, in both the Portuguese and English versions, submitted by Mozambique provides: “PEL shall carry out a prefeasibility study (PFS) within 12 months and will submit to the government for the respective approval.” *See R-1 & R-2.*
- Clause 2(1) of the MOI in the Portuguese version of the MOI submitted by PEL in the UNCITRAL Arbitration has identical language. “A PEL realizará um estudo de pré-viabilidade (EPV), dentro de 12 meses que submeterá ao Governo para a respectiva aprovação.” *See C-5B/R-6A.*
- However, the English version submitted by PEL has the highlighted language added to Clause 2(1): “PEL shall carry out a prefeasibility study (PFS) *on the basis of the report of the working group for assessing the appropriate site of the port and to finalize the rail route thus ensuring that once the terms under Clause 7 of this memorandum are approved, the Gov’t of Mozambique shall issue a concession of the project to PEL.*” *See C-5A/R-6B* (emphasis added). PEL’s English version therefore deletes the following language, as found in the Portuguese versions and MTC’s English version: “within 12 months and will submit to the government for the respective approval.” *Compare R-6B with R-1, R-2 & R-6A.*

360. Without waiving its position that the MOI is void and unenforceable, Mozambique contends that the correct Portuguese and English signed versions of the MOI are those submitted herein as **R-1** and **R-2**, which are consistent with the Portuguese version of the MOI submitted by PEL (**C-5B / R-6A**).

361. Both former Minister Zucula, who executed the MOI, and Mr. Chauque, involved in the MOI execution process, confirm that **R-1** and **R-2** are the MOI versions executed and retained by MTC. **RWS-4**, Zucula Second Witness Statement ¶ 12; **RWS-3**, Chauque Second Witness Statement ¶ 20.

362. No experts in the arbitration have opined, with any degree of scientific certainty, that Mozambique’s English MOI is inauthentic.

362.1. While PEL’s expert Mr. LaPorte attempts to identify certain allegedly “inconsistent” features of Mozambique’s English MOI, he concedes that based on the PDF versions “it is not scientifically reliable or possible to render a conclusion.” *E.g.*, **CER-4**, LaPorte Second Expert Report ¶ 70.

- 362.2. Mozambique has retained experts in forensic review of both electronic and hard copy documents. Messrs. Lanterman and Songer have both concluded that there is no basis to conclude that Mozambique’s versions of the MOI are inauthentic. **RER-10**, Lanterman Second Expert Report at 9-10; **RER-12**, Songer Expert Report ¶ 6.
363. As explained in the Lanterman and Songer reports, the parties dispute whether PEL’s English version of the MOI is authentic.
- 363.1. Mr. LaPorte seeks to demonstrate that PEL’s MOI it is an original document, referencing his review of PEL’s hard copy MOI and various tests he conducted on that hard copy. PEL also notes certain communications, internal to PEL, shortly after the MOI’s execution, purporting to attach is scanned version of the MOI.
- 363.2. Mozambique’s experts have not been provided access to the hard copy of PEL’s MOI, and as noted Mozambique’s hard copies have not been located due to the passage of time.
- 363.3. Accordingly, Mozambique’s experts, as a matter of forensic document review, do not presently disagree with Mr. LaPorte’s conclusion as to whether PEL’s English MOI is an “original” document—in the sense that it exists, in hard copy, with wet-ink signatures and embossing.
- 363.4. However, whether PEL has in its possession an “original” English-language MOI does not mean that it is an “authentic” document. As described above, Mozambique also has a uniquely executed English-language MOI, and its authenticity cannot be disputed with any scientific degree of certainty.
364. Thus, as to the English MOIs, the Tribunal is presented with two executed documents. Even if the Tribunal were to give PEL the benefit of the doubt, that would result in a conclusion that neither version has been proven to be inauthentic as a matter of forensic document review.
365. If the Tribunal were to address the issue of which English version should control—and as explained above, the point is moot because the Parties’ Portuguese versions control—it

must observe that PEL's English MOI is (1) inconsistent with all other versions of the MOI (explained above) and (2) internally inconstant as well.

366. Indeed, the additional language in Clause 2(1) of PEL's English version is inconsistent with the language in Clause 2(2) of that document—and if interpreted to provide for a right to a direct award contingent only PFS approval, would yield nonsensical results because (among other things):

366.1. PEL's hoped-for language is found only in its English version of the MOI that is contrary to the testimony of MTC witnesses, and is different from all other executed versions of the MOI—including PEL's own Portuguese-language MOI, as explained above;

366.2. a direct award right for a PPP project of this type would be illegal and void under the Mozambican procurement laws and practices (including the law then in force, 15/2010),¹⁹ as even PEL's legal expert all but concedes;²⁰

366.3. a direct award right for a PPP project of this type would be beyond the authority of the MTC to promise or grant;²¹

366.4. the language PEL offers is inconsistent with the rest of the "Memorandum of Interest," including the immediately subsequent Clause 2(2), which provides for

¹⁹ **RWS-1**, Chauque Witness Statement ¶ 14 (explaining that in the legal regime, an award by direct agreement for a project of this nature does not meet the requirements and would not be allowed); **RER-2**, Muenda Expert Report ¶¶ 3, 11 (any MOI direct award right contrary to, among other things, Article 113 of Decree 15/2010); *see* **RER-1**, Betar Expert Report ¶¶ 119-126 (direct award of this project contrary to Mozambican and international procurement practices and preferences, and Mozambican procurement laws known to industry). *Supra* § II(D) (further Rejoinder analysis).

²⁰ **CER-3**, Medeiros Expert Report ¶ 34 ("The case at the base of the MoI does not fit within any of the sub-paragraphs in Article 113(2)" of Decree 15/2010, which list the "cases in which direct award may be adopted").

²¹ **RWS-2**, Zucula Witness Statement ¶ 5 ("A direct award also would have required approvals not present here. I would not have had the actual authority to grant a direct award to PEL through the MOI, and did not do so."); **RWS-1**, Chauque Witness Statement ¶¶ 32, 50; **RER-2**, Muenda Expert Report ¶ 11 (necessary authorizations for a concession award lacking from MOI). *Supra* § II(D).

a “first right of refusal” or, more accurately in Portuguese, a “*direito de preferência*” that presumed competition and not a direct award;²²

- 366.5. the language PEL offers for Clause 2(1) is internally unintelligible, requiring that MTC “approve” the “terms under Clause 7 of this memorandum,” which plainly would not be done in the event of a direct award, since Clause 7 applies to when the project is *not* techno-commercially feasible; and, in any event, MTC never found that the Project was techno-commercially feasible;²³
- 366.6. PEL’s purported Clause 2(1) includes conditions precedent that were not met, such as that the PFS “finalize the rail route.” **R-6B**, PEL Clause 2(1). The PFS plainly did not “finalize the rail route,” or even purport to do so: the PFS was an early-stage pre-feasibility study, conducted prior to significant site studies, evincing minimal design development or detail, that did not define the basic terms and conditions of a concession, and failed to even finalize the *port* location to which the rail line would connect (offering two options 75 km apart);²⁴
- 366.7. it would be contrary to industry practices (and expectations legitimately held by unsolicited bidders on a PPP Project) for an agency to promise a direct award of a PPP infrastructure concession based only on approval of a *Pre-Feasibility study*, with no definition of even the most basic terms of a concession, and no vetting or benchmarking of the technical, price, or quality terms offered by the project proponent.²⁵

²² **RWS-2**, Zucula Witness Statement ¶¶ 5-15; **RWS-1**, Chauque Witness Statement ¶¶ 13-14, 28-29. *Supra* § II(D).

²³ **RWS-2**, Zucula Witness Statement ¶ 14; *see* **R-6B** (PEL’s purported English MOI, including Clause 7: “in the event that the above mentioned corridor is found techno commercially unviable for any reason whatsoever, both parties agree to sign a new memorandum to undertake another study of a similar project”). *Supra* § II(D).

²⁴ **RER-1**, Betar Expert Report ¶¶ 13, 47-48, 58-59. *Supra* § II(D).

²⁵ SOD § V(B)(5)(e) (unrebutted by PEL); **RER-1**, Betar Expert Report at 57-60, 66; **RER-11**, Ehrhardt Expert Report § 3. *See also supra* § II(D).

367. Further, PEL’s suggestion that it could not be expected to understand what the Portuguese documents it signed meant is baseless and contrary to industry practice. PEL’s attempt to blame the MTC is implausible because PEL also signed *the English version* submitted by Mozambique that *does not contain the additional language*, see **R-2**, and which is consistent with the Portuguese version submitted by PEL and the MTC, see **R-2 & R-6A**. Moreover, industry practice would require that PEL be aware of the contents of the Portuguese MOI, which is controlling in Mozambique generally and in the specific instance of PPP procurement. *Supra* § II(D)(8).
368. At the very least, there was not a meeting of the minds with respect to the additional language found in the English version submitted by PEL and, therefore, the version of the MOI that is proposed by PEL as correct is void *ab initio* and unenforceable, as established in the SOD.
369. Nothing PEL says in Reply, where it devotes significant space to the alleged “red-herring” of whether its English MOI is “suspect,” changes these salient facts. Reply ¶¶ 60 *et seq.* As noted, PEL’s expert report goes to the originality of hard copy documents, not their authenticity, and cannot contest Mozambique’s versions of the MOI. PEL points to instances where MTC allegedly did not dispute PEL’s alleged excerpts of its English-language MOI, but omits mention of the language barrier and fails to reference the significant instances, discussed chronologically in preceding sections, where PEL did not reference its preferred version of Clause 2(1).
370. At bottom, PEL cannot distance itself from the controlling Portuguese MOI, and its own version of that MOI is fatal to its case. *Supra* § II(D).

III. PEL’S CLAIMS ARE INADMISSIBLE, BECAUSE PEL FAILED TO DISCLOSE TO OR CONCEALED FROM MOZAMBIQUE AND THE MTC: (1) PEL’S BLACKLISTING BY THE NHAI IN INDIA, AND (2) THE JUDGMENTS OF THE DELHI HIGH COURT AND INDIA SUPREME COURT UPHOLDING PEL’S BLACKLISTING AND HOLDING PEL IS “NOT COMMERCIALY RELIABLE AND TRUSTWORTHY.”

371. “The protection of international investment arbitration *cannot be granted* if such protection would run contrary to the general principles of international law, among which the principle of *good faith is of utmost importance*.” **RLA-33**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), ¶ 106 (emphasis added).

“The principle of good faith has long been recognized in public international law, as it is also in all national legal systems.” *Id.*, ¶ 107.

372. As an alleged “investor,” PEL had an obligation to disclose to Mozambique relevant and material information concerning PEL. As unequivocally stated by the tribunal in *Plama Consortium*, the principle of good faith imposes on investors a disclosure obligation “to provide to the host State” “relevant and material” information “concerning the investor”:

The principle of good faith encompasses, inter alia, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State’s approval of the investment.

RLA-31, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), ¶ 144 (emphasis added).

373. PEL’s treaty claims are *inadmissible* because PEL failed to provide to, and/or intentionally concealed from, Mozambique (and, specifically, its government transportation agency, the MTC) the following relevant and material information *concerning PEL*:

- a. PEL’s blacklisting/debarment (regardless of whether it was temporary) in India (where PEL is formed and based), in a public transportation infrastructure project (similar to the MTC national transportation project in Mozambique), by the NHAI, the transportation agency of the Indian Government; and
- b. the Judgments of the Delhi High Court and India Supreme Court upholding PEL’s blacklisting/debarment by the NHAI in India, and holding that PEL is “not (commercially) reliable and trustworthy,” while PEL instead represented to the MTC that PEL “deserves the trust of a direct award.”

374. By engaging in such conduct, PEL violated the following principles of international law: the principle of good faith, the principle that no one should be permitted to profit from their own fraud, international public policy, and the prohibition against unlawful enrichment. PEL also violated the tender documents and Mozambican procurement law.

375. PEL’s lead argument that there is a distinction between “blacklisting” and “debarment” is much to do about nothing. In India, the terms are used *interchangeably*. In its Judgment, the *India Supreme Court* referred to the NHAI’s sanction against PEL as “blacklisting.” If the India Supreme Court refers to it as “blacklisting,” that is the proper legal term in India. PEL’s other argument that the blacklisting was *temporary* makes no semantical difference,

because the Supreme Court also stated that a “blacklisting” can be temporary. Thus, it is entirely appropriate for Mozambique to use the term “blacklisting.”

376. Despite PEL’s arguments, there is also no temporal impediment to holding that PEL’s nondisclosures render its treaty claims inadmissible because the time periods when PEL’s blacklisting remained in force and when the Indian Judgments were issued *overlap* the time period of PEL’s “making” of its alleged “investment,” according to PEL’s own allegations in its memorials and the opinion of PEL’s legal expert.
377. What matters is that PEL’s blacklisting by the NHAI (an agency of the Indian Government) and the resulting Judgments of the Delhi High Court and India Supreme Court, in a public transportation infrastructure project – in which PEL was the winning bidder and as the Delhi High Court concluded, PEL “*had no qualms in ditching the project at the nth hour*” – were relevant and material facts to the MTC’s evaluation of *whether PEL was a suitable PPP partner* that could be relied upon and trusted with a 30-year public transportation infrastructure project to construct a US\$3 billion port and 500km railway in Mozambique.
378. If PEL had disclosed its blacklisting and the Judgments, the MTC and Mozambique would have been justified in ceasing further dealings with PEL, even after the MOI was signed. In its Judgment, the Delhi High Court held that, “*any prudent businessman placed in a similar situation would naturally have taken*” the decision by the NHAI to decline PEL as a PPP partner. In its Judgment, the India Supreme Court observed that blacklisting “brings the *person’s character* into question.” Here, while PEL was seeking a direct award of this infrastructure project in Mozambique, representing to the MTC that PEL “*deserves the trust of a direct award,*” PEL withheld from the MTC and Mozambique that the India Supreme Court, no less, had held that because PEL reneged on a bid in a public project of “*national importance*” in India, PEL is “*not (commercially) reliable and trustworthy.*”
379. Despite PEL’s arguments that the blacklisting was a “minor” matter, there was nothing “minor” about the India Supreme Court holding that PEL is “*not (commercially) reliable and trustworthy.*” PEL reneged on its bid in an Indian government transportation project of national importance, and did so, only “after realizing that the next bidder quoted a much lower amount.” The Delhi High Court held that PEL withdrew “*at the last minute*” and that PEL’s conduct was, “*to say the least, unbusinessman like.*” The India Supreme Court

warned that PEL's "dereliction," "if not handled firmly, is likely to result in recurrence of such activity not only on the part of [PEL], but others also, who deal with public bodies, such as [the NHAI] giving scope for *unwholesome practices*." The NHAI even stated, in its blacklisting order, that PEL had "caused huge financial loss to the NHAI," "apart from the cost of the time and effort, to the NHIA," and "this is *the first case where a bidder has not accepted the [NHAI letter of acceptance]*, and warrants exemplary action, to curb" "malafide" in the future." These facts – clearly – were "relevant and material information concerning the investor," PEL. Therefore, PEL had an obligation to disclose them to the MTC, which was evaluating PEL's suitability as a PPP partner on a substantial public project of national importance in Mozambique, yet PEL intentionally concealed these facts. Had PEL disclosed these facts, the MTC would have ceased all further dealings with PEL.

380. But this was not the end of PEL's deceitful conduct. Also, within the time period when, according to PEL, it was "making" its "investment," PEL sent a letter to the MTC, seeking to induce the MTC to negotiate a direct award with PEL, and represented to the MTC that PEL "deserves the trust of a direct award," concealing again that the India Supreme Court had held (just a few months earlier) *the exact opposite*, that PEL is "not commercially reliable and trustworthy," in connection with a project of national importance.

381. Then, still while PEL was "making" its "investment," and as part of the initial step of the public bidding contest for this project, the MTC issued a tender notice which required the bidder to certify it has "*not been disqualified* from conducting commercial activities." The NHAI's blacklisting of PEL and Judgments are evidence that PEL had "been disqualified from conducting commercial activities" with the NHAI. In response to the tender notice, PEL submitted an expression of interest, as part of the PGS Consortium, again concealing the NHAI blacklisting and Judgments. In addition, *PEL also concealed that it had signed a secret "side letter" with its consortium partners*, that PEL would assert claims against the MTC based on the MOI, if the PGS Consortium did not win the public contest. PEL agreed to participate in a public tender contest, and even before the contest began, PEL had decided and conspired with its partners, that PEL *would not honor the results* of the contest if the consortium lost. PEL then concealed the side letter and its intent to fraudulently induce the MTC to allow PEL to participate in the contest with a scoring advantage.

382. During the course of this proceeding, PEL has apparently misrepresented to this Tribunal that its “debarment” by the NHAI “*did not affect PEL’s ability to enter into government contracts with other public authorities or private entities in India or abroad*” and that PEL could continue “to contract with any and all other government entities apart from the NHAI and, indeed, it did so.” However, in 2015, the Water Resources Department, of the State of Jharkhand in India, decided that PEL was ineligible to participate in a public procurement contest precisely on the basis of the previous, then-elapsed blacklisting by the NHAI. PEL also failed to disclose that the Jharkhand High Court rejected PEL’s argument that the NHAI’s blacklisting did not have to be revealed to other public authorities in other bidding contests.
383. Based on PEL’s serious violations of the aforementioned principles of international law, including PEL’s lack of good faith and nondisclosures and concealments of relevant and material information regarding PEL’s suitability as a PPP partner on a transportation project of national importance, PEL’s claims are rendered *inadmissible*.
- A. The Record Establishes that PEL was Blacklisted in India, and the Delhi High Court and India Supreme Court Issued Judgments Upholding the Blacklisting and Ruling that PEL is “Not Commercially Reliable and Trustworthy.”**
384. The record establishes PEL was blacklisted/debarred (even if temporarily) in India (where PEL is based) in an infrastructure project similar to this project in Mozambique, and the resulting Judgments of the Delhi High Court and India Supreme Court upheld PEL’s blacklisting/debarment and held that PEL is “not commercially reliable and trustworthy.”
385. Mozambique has submitted the **RER-3**, Expert Report of Gourab Banerji (“Banerji Expert Report”), an Indian law expert. Mr. Banerji is a former Additional Solicitor General of the Government of India. *Id.*, ¶ 1. His opinions are based on the rulings of the Delhi High Court and India Supreme Court. Together with this memorial, Mr. Banerji submits also a Second Expert Report (“**RER-9**, Banerji Second Expert Report”).
386. Notably, Mr. Banerji was the Additional Solicitor General that was acting on behalf of the National Highways Authority of India (“NHAI”) in the judicial proceedings described below involving PEL. **RER-9**, Banerji Second Expert Report, ¶¶ 12.

1. PEL Was Blacklisted In India. The Delhi High Court and India Supreme Court Upheld PEL’s Blacklisting, and Held That PEL Is “Not Commercially Reliable and Trustworthy.”

387. As Mr. Banerji states, the NHAI “invited bids for development and operation/maintenance of National highway 6 (NH 6) PEL was the successful bidder. NHAI accepted the bid by its letter dated 17 January 2011. *See* Delhi High Court’s Judgment in *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011).” **RER-3**, Banerji Expert Report, ¶¶ 13, citing **RLA-20**, *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011) ¶ 1.
388. The nature of the NHAI project is material, because it involved a government infrastructure project related to transportation, like the MTC’s subject transportation project. The fact that PEL was declared the winning bidder, and then *renege*d on its bid, is also material because it goes to whether PEL is commercially reliable and trustworthy.
389. As Mr. Banerji explains, despite being declared the winner, “on 24 January 2011, PEL expressed its inability to confirm its acceptance on the ground that *its bid was found not commercially viable, on a second look*. NHAI, after issuing a Show Cause Notice to PEL, debarred/blacklisted it from participating/bidding from future projects to be undertaken by NHAI for a period of one year from the date of issue of the letter dated 20 May 2011.^{26 27} PEL challenged the blacklisting before the Delhi High Court which upheld NHAI’s

²⁶ Despite PEL’s rhetoric, Mozambique has made no misstatement about the events in India. Mr. Banerji states that PEL was “debarred/blacklisted” because, as shown below, these terms are used interchangeably by the India Supreme Court. Mr. Banerji was transparent and noted the debarment/blacklisting was for one year. Rather, although the blacklisting overlapped the “making” of PEL’s alleged “investment,” PEL still concealed its blacklisting from Mozambique.

²⁷ In its 20 May 2011 correspondence, the NHAI notified PEL of its blacklisting. *See R-83*, PEL Bates No. 0000314-0000316. The NHAI informed PEL that “your act of nonacceptance has resulted in *huge financial loss* . . . apart from the cost of the time and effort, to the NHAI,” and “this is *the first case where a bidder has not accepted the LOA*, and warrants exemplary action, to curb any practice of ‘pooling,’ and ‘*malafide*’ in the future.” *Id.* (Emphasis added). “NHAI is of the *considered view* that no justifiable grounds have been made out in support of your action of nonacceptance of the LOA. Keeping in view the conduct of [PEL], NHAI finds that they are *not reliable and trustworthy* and *have caused huge financial loss to the NHAI.*” *Id.* (Emphasis added).

blacklisting order.” **RER-3**, Banerji Expert Report, ¶¶ 13, citing **RLA-20**, ¶ 2 (emphasis added).

390. In ¶¶ 670-675 of its Reply, PEL admits it reneged on its bid (“[o]n 24 January 2011, PEL declined [the NHAI letter of acceptance]”) (*id.*, ¶¶ 670), but attempts to belittle the actions taken by the NHAI against PEL. PEL argues it made “errors which had impacted the value of its bid significantly” (*id.*, ¶¶ 670); paid “the bid security amount to the NHAI” (*id.*, ¶¶ 670 and 671); “on the sole basis that PEL did not accept the LOA, the NHAI issued order to show cause on 24 February 2011” (*id.*, ¶¶ 672); and despite PEL’s protestations (*id.*, ¶¶ 673 and 674), “[o]n 20 May 2011, the NHAI communicated its decision to debar PEL temporarily” (*id.*, ¶¶ 675). PEL’s questioning of the NHAI sanction imposed fails, because PEL tendered a fundamentally flawed bid. PEL admitted its bid was “commercially not viable.” PEL’s Reply simply repeats arguments of PEL’s rejected by the Indian courts.
391. In its Judgment, of 2 August 2011, in *Patel Engineering Ltd. v. Union of India etc.*, SCC Online Del 3193 (2011), **RLA-20**, the Delhi High Court, held the NHAI’s sanction was

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

In our considered view, such an action by [the NHAI], in the given facts and circumstances of the case, is a decision which *any prudent businessman* placed in a similar situation would naturally have taken to deter such like entities from conducting themselves *in a manner, to say the least, which is*

unbusinessman like. In such circumstances, it would be both unfair and unreasonable for the court to issue a direction requiring [the NHAI] to deal with a person (i.e., [PEL]) who had no qualms in ditching the project at the nth hour.

RER-3, Banerji Expert Report, ¶ 14 (citing Delhi High Court Judgment, Exhibit 6 to the report, ¶¶ 20-21 (emphasis added)).

392. PEL's protestations that this is a "minor" matter, and that the NHAI's actions were "unwarranted and unjust" and improperly designed by the NHAI to make "an example" of PEL, Reply ¶¶ 676-677, ignore that the Delhi High Court held that the NHAI's blacklisting and debarment of PEL was "*completely justified and in accordance with law.*" **RER-3**, Banerji Expert Report, ¶ 14 (citing Judgment, Exhibit 6, ¶¶ 20-21 (emphasis added)).
393. The Delhi High Court made the factual determination that, *after* PEL found out that the next bid offered a lower price, PEL "had a second thought and under the garb of ostensibly re-visiting a business decision withdrew from the tender." **RLA-20**, ¶ 20. That PEL had to "forfeit" its security, since it was obligated to "[bear] the financial consequences of the bid security," does not change that PEL reneged on its bid. Precisely because PEL proved to be unreliable and untrustworthy, the High Court rejected PEL's petition "to continue to participate in the tenders ... [of the NHAI] in the near future despite the aforesaid conduct." *Id.* The High Court noted that public transportation infrastructure projects "are of critical national importance both in terms of their economics and logistical relevance." *Id.* The High Court stated that, nonetheless, PEL "withdr[ew] at the last minute." Based on the facts, the High Court held that PEL acted in an "unbusinessman" like manner by ditching the project. In strongly worded language, the High Court concluded that, "[i]n such circumstances, it would be both unfair and unreasonable for the court to issue a direction requiring ... [the NHAI] to deal with a person (i.e., [PEL]) who had no qualms in ditching the project at the nth hour."
394. The Delhi High Court's Judgment is highly critical of PEL's conduct, as a bidder, in an important government transportation project in its home country. The Judgment is relevant and material to the MTC's decision whether PEL would be a suitable PPP partner that could be relied upon and trusted with a substantial infrastructure project in Mozambique.

395. Mr. Banerji next discusses the proceedings before the India Supreme Court. On 11 May 2012, the Supreme Court entered a Judgment in *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059 (2011), **RLA-21. RER-3**, Banerji Expert Report, ¶ 19.
396. The India Supreme Court Judgment first elaborates on the facts, further establishing the similarity between the NHAI project and the MTC project, and thus shows the materiality of that Judgment to the MTC’s evaluation of PEL as a PPP partner. The NHAI decided to undertake development and operation of a highway in India “on [a] design, build, finance, operate and transfer” “toll basis project through [a] public private partnership.” **RER-3**, Banerji Expert Report, ¶ 20 (citing India Supreme Court Judgment, Exhibit 7 thereto, ¶ 1). This is similar to the infrastructure project at issue in this arbitration. Like in this arbitration, a public tender bidding process was conducted by the NHAI. *Id.*, ¶ 2. The NHAI informed PEL “that its bid had been accepted and [PEL] was called upon to confirm its acceptance within 7 days.” *Id.* The India Supreme Court also affirmed that, in response, on 24 January 2011, PEL “expressed its inability to confirm its acceptance on the ground that its bid was found *not commercially viable on a second look.*” *Id.* (emphasis added).
397. According to the Supreme Court, the NHAI “issued a show-cause notice on 24-02-2011 calling upon [PEL] to explain as to why action *debaring (blacklisting)*²⁸ the company for a period of 5 years from participating or bidding for future projects to be undertaken by [the NHAI] should not be taken. On 01-03-2011, [PEL] replied to the show cause notice. ... [The NHAI] through its letter dated 20-05-2011 communicated the order that barred [PEL] from prequalification, participating or bidding for future projects to be undertaken by [the NHAI] for a period of one year from the date of issue of the letter.” **RER-3**, Banerji Expert Report, ¶ 20 (citing Judgment, Exhibit 7, ¶ 4 (emphasis added)).
398. Importantly, the India Supreme Court rejected PEL’s petition and agreed with the NHAI, holding that there was no illegality or irrationality in the conclusion reached by the NHAI that PEL is “not (commercially) reliable and trustworthy.” Specifically, the Court held:

²⁸ The Supreme Court uses the terms “blacklisting” and “debarment” interchangeably (“action *debaring (blacklisting)* the company for a period of 5 years”; **RER-3**, Banerji Expert Report, ¶ 21 (citing Judgment, Exhibit 7, ¶ 6)), although in the same sentence the Supreme Court also states that the sanction is temporary (“for a period of 5 years”).

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

RER-3, Banerji Expert Report, ¶ 23 (citing Judgment, Exhibit 7, ¶ 24 (emphasis added)).

399. It does not happen every day that the supreme judicial authority in a country concludes that a local company is “not commercially reliable and trustworthy” and this was the first time in India that a winning bidder had reneged on its bid. Despite PEL’s rhetoric, this is no “red herring” or “minor” matter. This is not Mozambique trying to “divert attention” from the merits. A reasonable business executive would be horrified if the supreme court of his/her home country said this about his/her company. It impugns PEL’s business practices.
400. The India Supreme Court, like the Delhi High Court, concluded that PEL “chose to go back on its offer” after PEL realized that “the next bidder quoted a much lower amount.” It is because PEL reneged on its bid, that the Supreme Court found PEL is “not commercially reliable and trustworthy.” The Supreme Court’s Judgment is a substantial and negative adjudication about the *characteristics* of PEL as a bidder on a government transportation infrastructure project. The Supreme Court’s ruling, like the Delhi High Court Judgment, also was material to the MTC’s decision whether PEL would be a suitable PPP partner.
401. Further, in stern language, the India Supreme Court stated that PEL was “*derelict*”:

The dereliction, such as the one indulged in by [PEL], if not handled firmly, is likely to result in recurrence of such activity not only on the part of [PEL], but others also, who deal with public bodies, such as [the NHAI] giving scope for unwholesome practices. No doubt, the fact that [PEL] is blacklisted (for some period)²⁹ by [the NHAI] is likely to have some adverse effect on its business prospects...

RLA-21, ¶ 25 (emphasis added)).

²⁹ The Supreme Court states that “[PEL] is blacklisted (for some period).” **RER-3**, Banerji Expert Report, ¶ 24 (citing Judgment, Exhibit 7, ¶ 25 (emphasis added)). The temporary nature of the blacklisting (“for some period”) did not deter the Supreme Court from calling it “blacklisting.”

402. The India Supreme Court, like the Delhi High Court, acknowledged that PEL's blacklisting would "likely have" adverse consequences on PEL's "business prospects," but this was a result of PEL's "dereliction" and the resulting "blacklisting" by the NHAI. Considering these effects, the Supreme Court nonetheless upheld PEL's blacklisting, affirming that PEL "is not (commercially) reliable and trustworthy." **RER-3**, Banerji Expert Report, ¶ 25.
403. In the sole paragraph (Reply ¶¶ 679) that PEL devotes to the substance of the Supreme Court's Judgment, PEL ignores this critical ruling that goes precisely to PEL's character as a bidder and contractor in a government project. PEL argues that the India Supreme Court merely held that "NHAI's temporary debarment of PEL was not illegal, irrational or perverse," citing ¶¶ 24 of the Judgment (Reply ¶¶ 679, note 826). However, PEL cites only a portion of the sentence in the Judgment. The entire sentence reads: "We do not find any illegality or irrationality *in the conclusion reached by [the NHAI] that [PEL] is not (commercially) reliable and trustworthy* in the light of its conduct in the context of the transaction in question." **RER-3**, Banerji Expert Report, ¶ 23 (citing Judgment, Exhibit 7, ¶ 24 (emphasis added)). PEL's Reply omits the language that impugns PEL's character.
404. Thus, PEL's Reply ignores this most relevant and material part of the India Supreme Court Judgment that PEL "*is not commercially reliable and trustworthy.*" PEL cannot deny that the Supreme Court held that PEL is commercially unreliable and trustworthy. PEL shows no remorse. In its Reply, PEL instead demonstrates general defiance of the Judgment.
- 2. PEL's Distinction That It was "Debarred," and Not "Blacklisted," is Inconsequential Because the Terms are Used Interchangeably, and the India Supreme Court Indicated That PEL was "Blacklisted."**
405. PEL then engages in more rhetoric, accusing Mozambique of making assertions that are "demonstrably false, intentionally misleading, or both," and that "just because Respondent repeats itself over and over again, [it] does not make its allegations true." Reply ¶¶ 680-681. PEL's accusations are based on PEL's flawed view that PEL was not "blacklisted." As should be obvious by now, this is much to do about nothing.
406. The terms "blacklisting" and "debarment" are used interchangeably in many jurisdictions:

Debarment is a measure through which government contractors are prevented from accessing or obtaining public contracts for committing various infringements/offences. In the literature and in legislative

provisions on debarment, *such measures are variously referred to as disqualification, debarment, exclusion, suspension, rejection or blacklisting. These terms may be used interchangeably*, as they are used in very similar contexts, with small nuanced differences depending on jurisdiction. . . .

R-78, Public Procurement Law Review, “*Debarment in Africa: a cross-jurisdictional evaluation*,” P.P.L.R. 2016, 3, 71-90, *71 (2016) (emphasis added). The importance of blacklisting or debarment (or, for that matter, “disqualification,” “exclusion,” “suspension” or “rejection”) is not the word used, but its purpose, which is that it “serves to protect the *legitimacy* of government” and “maintain the *integrity* of the procurement process.” *Id.*

407. In India, the terms “blacklisting” and “debarment” are used interchangeably, and this was true as used in the judicial proceedings involving PEL, including by the parties’ counsel, in the cited case law, and by the India Supreme Court, the highest legal authority in the land (which certainly is more credible than PEL on what is the correct legal term):

- The India Supreme Court itself used the terms “blacklisting” and “debarment” interchangeably: the NHAI issued an order “calling upon [PEL] to explain as to why action *debarring (blacklisting)* the company for a period of 5 years” was not warranted. **RER-3**, Banerji Expert Report, ¶ 21 (citing Judgment, Exhibit 7 thereto, ¶ 6).
- The India Supreme Court referred to the NHAI’s subsequent sanction issued against PEL as “blacklisting”: “*the fact that [PEL] is blacklisted (for some period) . . .*” *Id.* (citing Judgment, ¶ 25 (emphasis added)). *Again, the Supreme Court wrote that PEL “is blacklisted” – the Supreme Court is the supreme authority on legal terms in India.*
- The India Supreme Court explained that “the decision of State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into contractual relationship with such persons *is called blacklisting.*” *Id.* (citing Judgment, ¶ 12 (emphasis added)).
- The India Supreme Court concluded that PEL must suffer the consequences of “*the fact that [PEL] is blacklisted*”: “The dereliction, such as that indulged by [PEL], if not handled firmly, is likely to result in recurrence of such activity not only on the part of [PEL], but others also, who deal with public bodies, such as [the NHAI] giving scope for unwholesome practices. *No doubt, the fact that [PEL] is blacklisted (for some period) by [the NHAI] is likely to have some adverse effect on its business prospects.*” *Id.* (citing Judgment, ¶ 25 (emphasis added)).
- PEL’s counsel in the Supreme Court also argued that the NHAI’s decision to “blacklist” was “without any authority of law” because “refusal to enter into a contract can never be classified as an act of fraud or a corrupt practice *warranting the blacklisting of such defaulting bidder.*” *Id.* (citing Judgment, ¶ 6 (emphasis added)).
- NHAI’s counsel also cited a Supreme Court precedent holding that: “*Blacklisting has the effect of preventing a person from the privilege and advantage of entering into*

- lawful relationship with the Government for purposes of gains.” *Id.* (citing Judgment, ¶ 11 (emphasis added)).
- In his March 12, 2021 expert report, Mr. Banerji refers to “blacklisting” over 50 times. At page 2, he refers to “Patel Engineering Limited’s Blacklisting in India.” At ¶ 13, he discusses the “circumstances of PEL’s blacklisting.” At ¶ 13(ii), Mr. Banerji states: “NHAI, after issuing a Show Cause Notice to PEL, debarred/blacklisted it.” At ¶ 20, he refers to the Supreme Court’s description of PEL’s “debarment (blacklisting).” At ¶ 21, he notes PEL’s counsel challenged the “NHAI’s decision to ‘blacklist’ PEL” in the Supreme Court. At ¶ 22, he notes: “Counsel for the NHAI argued, before the Supreme Court of India, that the NHAI was legally justified in blacklisting PEL.” At ¶ 24, he notes “the Supreme Court of India further held that PEL must be punished and suffer the consequences of being blacklisted.” At ¶ 25, he notes “the Supreme Court of India upheld *the blacklisting* of PEL, holding that PEL ‘is not (commercially) reliable and trustworthy.’” (Emphasis added). “PEL had an obligation to disclose the fact of *its blacklisting* when seeking to participate in other government projects.” *Id.*, ¶ 26 (emphasis added). Finally, Mr. Banerji observes that PEL was disqualified in a subsequent project “based on its blacklisting.” *Id.*, ¶¶ 27-32.
408. In his Second Expert Report, Mr. Banerji confirms the foregoing: “Debarment is an act of precluding someone from doing something. It is a consequence of blacklisting.” *Id.*, ¶¶ 32.
409. Mr. Banerji explains: “Though PEL seeks to draw a distinction between ‘temporary debarment’ and ‘blacklisting’, NHAI’s order dated 20th May 2011 has been understood by it as an order of *blacklisting*.” *Id.*, ¶¶ 16. “This is clear from the arguments by PEL’s own counsel before the Supreme Court.” *Id.*, ¶¶ 17. PEL’s counsel, Mukul Rohatg, referred to the NHAI’s “decision to blacklist” PEL, and to PEL’s “punishment of blacklisting (for a period of one year).” *Id.* As Mr. Banerji notes:

Indeed, the Supreme Court has *used the terms “blacklisting” and “debarment” interchangeably*, and *understood the order of debarment issued by NHAI to be one of blacklisting*.

410. *Id.*, ¶¶ 19 (emphasis added) (citing the Supreme Court’s reference to the NHAI sanction against PEL as “debarment (blacklisting)”). Mr. Banerji notes that “the Supreme Court concluded that PEL must suffer the blacklisting order, which was a consequence of *its dereliction and unwholesome practices*.” *Id.*, ¶¶ 20 (emphasis added). Mr. Banerji states:

It is therefore abundantly clear that the Supreme Court *understood the term “blacklisting” and “debarment” to be interchangeable*. PEL never attempted to distinguish between “blacklisting” and “debarment” at any stage in its litigation against NHAI’s order dated 20th May 2011. In fact,

PEL presented its case before the Indian Courts on the premise that NHAI's order was one of blacklisting.

Id., ¶ 21 (emphasis added).

411. The temporary nature of the NHAI's action against PEL also makes no difference to the terminology. As the Supreme Court said, *blacklisting* (like debarment) *can be temporary*.
- The India Supreme Court of India refers to PEL as being “blacklisted,” regardless of whether the sanction is temporary: “*the fact that [PEL] is blacklisted (for some period) ...*” *Id.* (citing Judgment, ¶ 25 (emphasis added)).
 - The India Supreme Court also uses the terms “blacklisting” and “debarment” interchangeably, regardless of whether the sanction is permanent or temporary, referring to the: “action *debaring (blacklisting) the company for a period of 5 years ...*” *Id.* (citing Judgment, ¶ 6 (emphasis added)).
412. As Mr. Banerji states, “an order of blacklisting can be (and normally must be) temporary.” **RER-9**, Banerji Second Expert Report, ¶¶ 30-35. “[I]n PEL's appeal before the Supreme Court, the Court also referred to the NHAI's sanction against PEL as ‘blacklisting,’ regardless of the fact that it was temporary.” *Id.*, ¶¶ 33. “[A] decision to blacklist or debar can never be permanent, as it should satisfy the test of proportionality.” *Id.*, ¶¶ 34. “Thus, an order of blacklisting can never be permanent. In other words, a party who is blacklisted will be temporarily debarred from claiming their rights and privileges.” *Id.*, ¶¶ 35.
413. PEL mistakenly argues that “[i]t is abundantly clear from the Indian Supreme Court Judgment that the NHAI decision *does not relate to dealings with any governments* but only to PEL's specific *dealings with the NHAI*.” SOD ¶¶ 270 (emphasis added). The Government of India (the sovereign) must act through its organs and agencies. The NHAI is the agency of the Indian Government responsible for national transportation projects. See <https://nhai.gov.in/#/about-nhai>. “[T]he State is always the counterparty in any Government contracts.” **RER-9**, Banerji Second Expert Report, ¶¶ 27. “The authority of State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc.” *Id.*, ¶¶ 18 (citing *M/s. Erusian Equipment & Chemicals Ltd. v. Union of India*, (1975) 1 SCC 70, ¶¶ 12).
414. PEL also argues that the blacklisting “was only effective *vis-à-vis* the NHAI; *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.’” Reply ¶¶ 682 (emphasis added). Although the NHAI blacklisted PEL from contracting with the NHAI for one year, the NHAI’s blacklisting is relevant and material to other public authorities making an informed decision whether to deal with PEL. PEL forgets that, before the High Court, PEL argued it was aggrieved by the NHAI website displaying PEL “has been debarred by NHAI.” PEL complained this may have an effect on tenders by other authorities, in which PEL may participate. **RER-3**, Banerji Expert Report, ¶ 16. However, the Delhi High Court held that, “[i]nsofar as the display on website is concerned, ... [i]t is for the *third parties to take an informed decision whether they would like to deal with [PEL] keeping in mind the conduct of [PEL] qua [the NHAI].*” *Id.*, ¶ 17 (citing Delhi High Court Judgment, Exhibit 6 thereto, ¶ 24 (emphasis added)).

415. As the Delhi High Court held, based on the blacklisting, “third parties” may decide “not to deal” with PEL.³⁰ In its Reply ¶¶ 682, 687 and 689, PEL presents charts of alleged projects involving PEL after the blacklisting.³¹ PEL presents no evidence whether those third parties knew PEL had been blacklisted and held “not commercially reliable and trustworthy” by the Supreme Court. PEL does not state it disclosed that to them. At ¶¶ 689, PEL argues “[i]t goes without saying that, if the NHAI ... truly considered PEL to be ‘not commercially reliable and trustworthy’ *as Mozambique now insists*, they would not have chosen to qualify PEL for so many future projects.” (Emphasis added). It was the India Supreme Court (not Mozambique) that held that PEL is “not commercially reliable and trustworthy.”

416. Because the India Supreme Court characterized the action taken by the NHAI against PEL as “blacklisting,” Mozambique will refer to the NHAI’s action as blacklisting and so should

³⁰ “PEL pleaded before the Supreme Court that the blacklisting order would adversely affect their business. However, the Supreme Court rejected the plea of PEL, and upheld NHAI’s conclusion that PEL is not commercially reliable and trustworthy. Accordingly, it is clear that the legal effect of blacklisting has negative consequences.” **RER-9**, Banerji Second Expert Report, ¶ 35.

³¹ The Tribunal should disregard PEL’s charts because PEL has produced no records of said projects. PEL did not produce records to Mozambique’s counsel, and cannot belatedly produce them in its rejoinder, because Mozambique would not have an opportunity to investigate.

this Tribunal. **RER-9**, Banerji Second Expert Report, ¶ 22 (“The Supreme Court, being the highest legal authority, having characterized NHAI’s action as blacklisting, it would be the correct legal term to be used to refer to NHAI’s action, whether or not it was temporary in nature.”).

417. Importantly, in its Reply and its charts, PEL did not disclose to this Tribunal whether there were authorities that refused to deal with PEL based on the NHAI’s blacklisting, or whether there were other relevant judicial proceedings. There were, as discussed below.

3. PEL Has Misrepresented to This Tribunal That the NHAI Blacklisting Did Not Affect PEL’s Ability to Enter into Contracts with Other Public Authorities. A Jharkhand State Authority Rejected PEL as A Bidder Based on the Prior/Expired NHAI Blacklisting and the Jharkhand High Court Upheld the Authority’s Exclusion of PEL.

418. PEL has apparently misrepresented to this Tribunal the effects of the NHAI’s blacklisting of PEL. PEL represented that the NHAI’s “temporary debarment” “*did not affect PEL’s ability to enter into government contracts with other public authorities or private entities in India or abroad*” (Reply ¶¶ 682; emphasis added); despite the NHAI’s “temporary debarment”, “PEL could, of course, continue to contract with *any and all other government entities* apart from the NHAI *and, indeed, it did so*” (*id.*, ¶¶ 675; emphasis added); and the NHAI blacklisting “*did not prevent PEL from contracting with any other public authorities in India (or elsewhere)*” (*id.*, ¶¶705; emphasis added). PEL’s representations are false.

419. As Mr. Banerji states,

Although an order of blacklisting may be issued by one government authority, *an entity can be precluded from participating in the tender process of other government entities, even after the order of backlisting has lapsed*, on account of the entity’s failure to meet the eligibility conditions of the NIT floated by another government instrumentality or PSU. Therefore, an entity, notwithstanding other negative consequences of blacklisting, cannot assert that the effect of a blacklisting order is restricted to the authority issuing such order.

RER-9, Banerji Second Expert Report, ¶¶ 46 (emphasis added).

420. For example, in 2015, the Water Resources Department, of the State of Jharkhand, decided PEL was ineligible to participate in a public contest, precisely, on account of the previous, then-elapsed blacklisting of PEL by the NHAI. **RLA-22**, *M/s Patel Engineering Ltd. v.*

The State of Jharkhand and Others, SCC Online Jhar 974 (2016) (“*PEL v. Jharkhand*” Judgment). The Jharkhand High Court rejected PEL’s argument that the bid document required only disclosure of a blacklisting by the Jharkhand State. This ruling establishes the falsity of PEL’s representations that its “debarment” “did not affect PEL’s ability to enter into government contracts with other public authorities or private entities in India or abroad” and that PEL could continue “to contract with *any and all other government entities* apart from the NHAI *and, indeed, it did so.*” *Id.*

421. PEL cannot claim ignorance of the Jharkhand events, because PEL was involved, and the events are recounted in the Banerji Expert Report, which PEL had in hand before its Reply. PEL does not dispute Mr. Banerji’s discussion of the events or related court proceedings, and does not claim the High Court decision was reversed (and Mr. Banerji found no reversal).
422. Specifically, in 2015, PEL participated in a tender issued by the Jharkhand Water Resources Department. The tender had been floated for Construction of a Canal Tunnel from 12.22 to 13.95 Km. of Kharkai Right Main Canal on a turnkey basis. **RER-3**, Banerji Expert Report, ¶ 27 (**RLA-22**, ¶ 2).
423. It came to the attention of the Jharkhand Tender Committee that the NHAI had blacklisted PEL and PEL’s bid was disqualified for not confirming to the Notice Inviting Tender (“NIT”), which required bidders should not have been blacklisted in five years. PEL only disclosed it was not debarred by the Jharkhand State, and *concealed it had been blacklisted by the NHAI*, although the NHAI’s blacklisting (2011-2012) *was within the five-year window*. A fresh tender was floated, but the Tender Committee nonetheless found PEL was ineligible to participate based on the previous and separate blacklisting by the NHAI which, incidentally, PEL was forced to disclose. **RER-3**, Banerji Expert Report, ¶ 28 (*Jharkhand* Judgment, ¶ 2); **RER-9**, Banerji Second Expert Report, ¶¶ 39.
424. Seeking to challenge the Jharkhand State’s decision in the High Court, PEL argued that the NIT could not operate across orders of blacklisting passed by other States or government agencies, and was confined to a blacklisting order of the Jharkhand State. **RER-3**, Banerji Expert Report ¶ 29 (citing *Jharkhand* Judgment, ¶ 4). The Jharkhand High Court rejected PEL’s argument. **RER-3**, Banerji Expert Report, ¶ 30. The High Court dismissed PEL’s

challenge to the Water Resources Department's decision, holding that PEL was required to disclose its NHAI blacklisting when dealing with government entities, not only the particular one that had issued the blacklisting. *Id.*, ¶ 31; **RER-9**, Banerji Second Expert Report, ¶¶ 40.

425. Mr. Banerji explains that

it is clear from the above that backlisting by NHAI was not limited in its impact to NHAI alone, as is now being asserted. The Delhi High Court did not restrict the backlisting order. Instead, the Delhi High Court held that State instrumentalities had the discretion to disqualify PEL on the basis of the NHAI blacklisting order, as happened with the Water Resources Department of the State of Jharkhand. Such decision was upheld by the Jharkhand High Court. There is no record of any appeal by PEL against the Jharkhand High Court's judgment.

RER-9, Banerji Second Expert Report, ¶ 41.

426. Based on the Jharkhand Water Resources Department's decision not to deal with PEL, the Jharkhand High Court Judgment, and PEL's misrepresentations to this Tribunal that the NHAI "temporary debarment" "did not affect PEL's ability to enter into government contracts with other public authorities in India," (*id.* ¶ 8) and PEL could continue "to contract *with any and all* other government entities *apart from the NHAI and, indeed, it did so*," this Tribunal should draw the following inference adverse to PEL, that: other government authorities in India, like the Jharkhand Water Resources Department, refused to permit PEL to participate in government projects based on the NHAI's prior blacklisting of PEL.

427. This inference is appropriate because in its Reply, PEL misleadingly provided "charts" of projects involving third parties that allegedly contracted with PEL despite the NHAI's blacklisting. However, PEL has not been transparent with this Tribunal, and has not provided a list of those entities that reached a different decision not to deal with PEL.³²

³² Mozambique served Request for Production No. 50 on PEL: "Provide all internal memoranda *and correspondence at PEL* regarding the fact that it was blacklisted or otherwise precluded or disqualified from submitting bids by the National Highways Authority of India" See Mozambique Redfern Schedule. This request was broad enough to include the Jharkhand matter, because it related to the PEL blacklisting. To stonewall, PEL generally objected that "[t]he categories of documents requested are overly broad," "there are likely to be thousands of

Even if no inference is drawn, the Jharkhand case speaks for itself and establishes that the NHAI blacklisting did preclude PEL from entering into other government contracts. PEL's concealment of its NHAI blacklisting in the Jharkhand case further speaks – negatively – of PEL's character and lack of transparency as a bidder.³³

B. The “Admissibility” Analysis May Be Guided by International Law Principles, Including Whether the Investor Violated the Principle of Good Faith, Acted Fraudulently, Violated Public Policy and/or Would be Unjustly Enriched.

428. It is appropriate for this Tribunal to consider general principles of international law in determining whether PEL's conduct rendered its claims inadmissible.
429. PEL does not dispute that “[t]he 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.” **RLA-112**, *Achmea B.V. v. Slovak Republic II*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014), ¶ 115 (emphasis added). The analysis of admissibility may be guided by general international law principles. *Id.* (a challenge to admissibility “is a plead that the tribunal should rule the claim inadmissible on some ground other than its ultimate merits”).
430. When a tribunal decides that it will not adjudicate a claim because the investor violated the principle of good faith, acted fraudulently, violated public policy, etc., it is ruling that, despite having jurisdiction, the claim is inadmissible based on such principles.
431. *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana* provides an example of principles of international law that may apply to the jurisdictional and admissibility

communications ... which are responsive to the request,” and “[i]t would thus be overly burdensome for PEL to be ordered to produce such documents.” PEL never produced thousands of communications (basically almost none on this subject) and concealed the Jharkhand case.

³³ In addition, in 2013, “Brinhanmumbai Municipal Corporation (BMC) authorities decided to *blacklist* Jogeshwari-based Patel Engineering.” **R-87**, “Octroi Evader Patel Engineering *Blacklisted*,” www.dnaindia.com, 19 November 2013 (emphasis added). “Patel Engineering in connivance with a few corrupt octroi department officials had manipulated documents pertaining to goods imported with intentions to evade octroi” tax. This went back to 2006, when BMC said PEL “evaded octroi by making false declaration.” *Id.* PEL did not disclose this to the MTC, although the events cover 2006-2013, overlapping its dealings with the MTC.

analysis because these principles exist *independently* of the language of the applicable treaty:

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

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

432. “[T]ribunals have treated arguments based on fraud, etc., as going to jurisdiction or *admissibility*.” **RLA-145**, *David Minnotte; Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, 16 May 2014 (Award), ¶ 131 (emphasis added); **RLA-40**, *Churchill Mining & Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/1, ARB/12/40 (6 December 2016), ¶¶ 498 (“tribunals deal[] with fraudulent conduct as a matter of *admissibility*”) (emphasis added); **RLA-35**, *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, 4 October 2013 (Award), ¶¶ 374 (“objections based on the violation of international public policy and transnational principles as well as on fraud” go to “jurisdiction and *admissibility*.”) (Emphasis added).
433. For example, in **RLA-30**, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, 2 August 2006 (Award) (“*Inceysa*”), the tribunal treated fraud as going to jurisdiction (States cannot be supposed to have intended to give investments made fraudulently the benefit of BIT protection) and *admissibility* (no claimant can benefit from his fraud). The tribunal considered that claims based on fraudulent investments, are barred by international public policy and the principle of unjust enrichment. *Id.*, ¶¶ 230-244.
434. Citing *Inceysa*, *Minnotte* observed that “it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State’s law.” *Minnotte*, ¶¶ 131, note 191.
435. Similarly, “the principle of good faith has long been recognized in public international law, as is also in all national legal systems” **RLA-33**, *Phoenix Action*, ¶¶ 106-107. “The

protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which *the principle of good faith is of utmost importance.*” *Id.*, ¶ 106 (emphasis added).

436. “[T]he *question of good faith* ... is a matter to be considered by the Tribunal when exercising its jurisdiction and *to be applied in the context of admissibility* and/or the application of the substantive protections of the Treaty at the merits phase.” **RLA-146**, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, 16 January 2013 (Award), ¶ 113 (Emphasis added).³⁴
437. Indeed, the “investor’s conduct” “can be an integral part of a tribunal’s evaluation of jurisdiction, merits, and damages.” **RLA-127**, J. Kalici, D. Evseev & M. Silberman, *Building Int’l Investment Law: The First 50 Years of ICSID*, Wolters Kluwer (2016), 127.
438. This part of this memorial addresses the effects of PEL’s conduct on the “admissibility” of PEL’s claims. The effects of PEL’s conduct on jurisdiction and the merits are discussed below. We discuss admissibility first, because if this Tribunal determines that PEL’s claims are inadmissible, it renders all other issues, like jurisdiction and the merits, moot.

C. The Relevant Time Period for the Admissibility Analysis Should Focus on the Making of the Investment and Maintain Flexibility to Consider the Spectrum of the Investor’s Conduct.

439. PEL’s argument, that for purposes of admissibility, the focus strictly on the making of the investment (Reply ¶ 666), is too limiting on the application of these general principles.
440. For example, *Minnotte* noted: “*There may be circumstances* where fraud is so manifest, and so closely connected to facts (*such as the making of an investment*) which form the basis of a tribunal’s jurisdiction as to warrant a dismissal of claims *in limine* for want of jurisdiction.” *Id.*, ¶ 132 (emphasis added). The tribunal noted that fraud “in the making of an investment” is *an example* (*i.e.*, “such as”) of such situations, but the tribunal did not

³⁴ PEL admits that, if PEL violated these international law principles by its nondisclosures or concealments, the legal consequence would be that its treaty claims are rendered “inadmissible.” PEL states these issues are “*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*” (Reply ¶ 666) (emphasis added). Although these issues go to admissibility, they also go to jurisdiction and the merits, as cited above.

hold that this is the only situation where the investor's conduct may block its access to treaty arbitration. The contrary view, urged by PEL, deprives tribunals of the flexibility required for application of these general principles of international law.

441. Thus, for example, although the good faith analysis may focus on the acquisition of the investment when considering the treaty-based issue of "jurisdiction," it is applied in a more relaxed manner when considering issues related to "admissibility," in order to encompass and consider the totality of the investor's conduct.³⁵

442. Accordingly, the admissibility analysis focuses on the making of the investment, but maintains flexibility to consider the full spectrum and interconnectedness of the investor's conduct in applying these international law principles, which are not meant to be guided by rigid lines, but meant to be applied in a manner that fosters their public policies.

D. PEL's Concealment of Its Blacklisting and the Judgments of the Delhi High Court and India Supreme Court Fall Squarely Within The Time Period When the NHAI Blacklisting Was in Force and PEL Made its Alleged Investment.

443. Mozambique has established that the time period encompassing when PEL's blacklisting was in force, as well as the issuance of the Indian Judgments *overlaps* the time period when PEL "made" its alleged "investment," according to PEL's own allegations. As a result, there is no temporal impediment to holding PEL's claims to be inadmissible.

1. According to PEL's Own Allegations, the Time Period Involving PEL's "Making" of its "Investment" Extends from the Beginning of April, 2011 Through, at A Minimum, 15 June 2012.

444. In order to determine what is the relevant time period for the admissibility analysis, the Tribunal must first determine what is the alleged "investment." In its Statement of Claim,

³⁵ **RLA-146**, *Vannessa Ventures*, ICSID Case No. ARB(AF)/04/6, ¶ 113 ("good faith has an important role in the analysis but ..., in the absence of a treaty provision ascribing some different effect to the principle of good faith, it is only in circumstances where the application of good faith as a principle of national law invalidates the acquisition of the investment that a lack of good faith means that there is no 'investment' for jurisdictional purposes. In other circumstances, the question of good faith does not go to jurisdiction but is a matter to be considered by the Tribunal when exercising its jurisdiction and to be applied in the context of admissibility and/or the application of the substantive protections of the Treaty at the merits phase.") (Emphasis added).

PEL alleges a broader version of what is its “investment,” than the limited picture PEL seeks to paint for purposes of its opposition to Mozambique’s admissibility objection.

445. In its Statement of Claim, PEL identified its “investment” as including not only the signing of the MOI, but its alleged “rights under the MOI,” its alleged transfer of “information and data,” its “Preliminary Study” and its “PFS” (Preliminary Feasibility Study”):

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

a. The direct award of a concession to implement the Project, as well as all of *the rights under the MOI associated with the Project*, including (i) PEL’s right that “the Govt. of Mozambique shall issue a concession of the project in favour of PEL,” (ii) PEL’s exclusive right to develop the Project, and (iii) PEL’s “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”.

b. *PEL transferred information and data to the MTC and the CFM, including PEL’s know-how regarding its conception and development of the Project, previously deemed impossible by Respondent. ...;*

c. *the Preliminary Study* PEL conducted in early 2011; and

d. *the detailed PFS* PEL carried out during the course of 2011 and 2012.

Statement of Claim, ¶ 257 (emphasis added).

446. Similarly, in its Reply, PEL alleges a broad version of its alleged “investment”:

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*.

Reply ¶ 510 (emphasis added).

447. Turning to each of the events that PEL alleges, together,³⁶ consist its subject “investment,” the following time periods emerge:

³⁶ PEL argues for a holistic approach to defining its “investment.” Reply ¶ 532 (“the unity of the investment theory ... requires the Tribunal to view PEL’s investment holistically.”) and ¶ 580 (“When Claimant’s investment is viewed holistically, as it must, there is no question of the

- PEL submitted the Preliminary Study to the MTC in the beginning of April 2011. The Preliminary Study (Exhibit C-4a) is dated “March 2011.” PEL presented it to the MTC “in the beginning of April 2011.” **CWS-3**, Second Witness Statement Kishian Daga of Kishian Daga, ¶ 22 (“The Preliminary Study was completed approximately within a month. This time was sufficient to prepare a preliminary assessment concerning the technical feasibility of the Project. *We presented the Preliminary Study to Minister Zucula in the beginning of April 2011.*”) (Emphasis added).
- The MOI was executed on 6 May 2011. **R-1 & R-2** (attaching the MOI); Statement of Claim, ¶ 10 (“On 6 May 2011, the Parties entered into the MOI.”).
- PEL submitted the PFS to the MTC on 2 May 2012. Reply ¶ 250 (“PEL submitted the PFS *on 2 May 2012* in keeping with the MOI, presented it to Mozambique on 9 May 2012, and addressed a number of follow up queries from Mozambique in the course of May to early June 2012.”) (Emphasis added).
- PEL allegedly transferred information, data and know-how up when the MTC allegedly approved the PFS: 15 June 2012. “Based on the assurances contained in the MOI, PEL proceeded to expend significant investment in terms of money, time, and effort in conducting the PFS and developing the Project concept.” Statement of Claim, ¶ 11. “PEL assembled a team of experts to undertake the necessary research and studies to compile the PFS, who worked fastidiously over the next year so that the PFS would be submitted on schedule to the MTC on 2 May 2012.” *Id.*, ¶ 13. “PEL presented the results of the PFS ... to ... personnel from at least six of Respondent’s organs.” *Id.*, ¶ 13. “[T]he know-how PEL transferred to Mozambique regarding the conception and development of the Project falls within [the treaty].” *Id.*, ¶ 259.
- The MTC allegedly approved the PFS on 15 June 2012. Statement of Claim, ¶ 15 (“After carefully considering the PFS and its implications, the MTC informed PEL on 15 June 2012, ‘that the Pre-Feasibility Study submitted by [PEL] was approved.’”). PEL alleges that “PEL received, upon approval of the PFS by the MTC, a right to implement the Project through a concession with the Government” *Id.*, ¶ 12.³⁷

significant contribution made by PEL to the Mozambican state.”). PEL cited the “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.” *Id.*, ¶ 531. PEL’s position is “that the entirety of PEL’s investment falls within the definition of the term ‘investment’ in Article 1(b) of the Treaty.” *Id.*, ¶ 534. (Mozambique does not admit PEL’s contentions but they frame the alleged “investment” for purposes of the admissibility analysis).

³⁷ That the time period extends through June 2012 is based on PEL’s legal expert assertion that “the right to the concession” was subject to “approval of the pre-feasibility study” and “PEL’s exercise of the right of preference.” Second Medeiros Legal Opinion, ¶ 15.3.1. PEL claims it “exercised its right of first refusal” “on 18 June 2012.” Statement of Claim, ¶ 16.

448. According to PEL’s allegations, the time period of PEL’s “making” of its “investment” extends from the beginning of April, 2011 through, at a minimum, 15 June 2012.

2. According to PEL’s Legal Expert, the Time Period Involving PEL’s “Making” of its “Investment” Extends Further to 16 April 2013.

449. Professor Medeiros, PEL’s legal expert, argues that PEL’s “legitimate expectation” to receive a “concession by direct award was not formed only ... ‘on the basis of pre-feasibility studies’ or ‘on the basis of one clause in a six-page document entitled a ‘Memorandum of Interest.’” CER-6, Second Medeiros Legal Opinion, ¶ 15.6. Professor Medeiros asserts PEL’s “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.*” *Id.*, ¶ 15.6.1 (emphasis added).

450. For its part, PEL alleges that its “investment” includes its alleged “*right to a direct award of a concession,*” and that “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.*” Reply ¶¶ 510 and 517 (emphasis added). However, Professor Medeiros states that “*this right was effectively and completely confirmed*” at the time of “the decision taken by the Council of Ministers ... [on] *16 April 2013.*” Second Medeiros Legal Opinion, ¶ 15.6.1 (emphasis added). Thus, according to Professor Medeiros, the “making” of PEL’s “investment” took longer and comprises the time period extending up to 16 April 2013.

451. In addition, on 5 October 2012, PEL sent a letter to the MTC requesting the direct award, on the basis that PEL “deserves the trust of a direct award,” R-15, without disclosing that the India Supreme Court had already held that PEL is “not commercially reliable and trustworthy.” This also was a continuation of PEL’s wrongful conduct.

3. The Time Period of The NHAI’s Notification of PEL, The Length of PEL’s Blacklisting, and Issuances of the Delhi High Court and India Supreme Court Judgments, Comprises 20 May 2011 to 19 May 2012.

452. The following are the undisputed dates pertaining to the NHAI blacklisting of PEL:

- PEL was notified of its blacklisting by the NHAI on 20 May 2011. Statement of Claim, ¶ 266(a) (“*on 20 May 2011 ... the NHAI communicated a decision barring PEL ‘from prequalification, participating or bidding for future projects to be undertaken by [the NHAI] for a period of one year from the date of issue of the letter’ (the ‘NHA decision’) ...*”) (Emphasis added); Reply ¶ 675 (“*On 20 May 2011, the NHAI communicated its decision to debar PEL temporarily.*”) (Emphasis added).
- The Delhi High Court issued its Judgment on 2 August 2011. RER-3, **RER-3**, Banerji Expert Report, ¶ 14 (and Exhibit 6, Judgment, in *Patel Engineering Limited v. Union of India and Another*, Delhi High Court, SCC Online Del 3193 (dated, 2 August 2011)).
- The India Supreme Court issued its Judgment on 11 May 2012. **RER-3**, Banerji Expert Report, ¶ 19 (and Exhibit 7, Judgment, in *Patel Engineering Ltd. v. Union of India & Anr.*, Supreme Court of India, No. 23059 (dated, 11 May 2012)).
- The NHAI’s blacklisting of PEL remained in effect from 20 May 2011 to 19 May 2012. Statement of Claim, ¶ 266(d) (“[T]he NHAI’s decision, which *was in place for one year only, expired* a few days after the Indian Supreme Court Judgment, *on 19 May 2012.*” (Emphasis added); Reply ¶ 675 (“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.”) (Emphasis added).

453. Thus, the time period of the NHAI’s notification of the blacklisting of PEL, of the length of PEL’s blacklisting by the NHAI, and of the issuances of the Judgments of the Delhi High Court and India Supreme Court, extends from 20 May 2011 to 19 May 2012.

4. There is No Temporal Impediment to Admissibility Because The Time Periods of The NHAI Blacklisting of PEL and The Issuances of the India Judgments Overlap PEL’s Making of its Alleged Investment.

454. Based on the foregoing, the following timeline establishes that the NHAI’s blacklisting of PEL and issuances of the India Judgments overlap PEL’s making of its alleged investment:

- PEL submitted the Preliminary Study to the MTC in the beginning of April 2011.
- The MOI was executed on 6 May 2011.
- PEL was notified of its blacklisting by the NHAI on 20 May 2011.
- The NHAI’s blacklisting of PEL was in effect from 20 May 2011 to 19 May 2012.
- The Delhi High Court issued its Judgment on 2 August 2011.
- PEL submitted the PFS to the MTC on 2 May 2012.
- The India Supreme Court issued its Judgment on 11 May 2012.
- PEL allegedly transferred information, data and know-how to the MTC from the beginning of April, 2011 through 15 June 2012.

- The MTC allegedly approved the PFS on 15 June 2012.
- PEL sent its letter to the MTC representing it was trustworthy on 5 October 2012.
- The Mozambique Counsel of Ministers issued its communication on 16 April 2013.

455. PEL’s arguments (repeated often by PEL, its factual witnesses and legal expert) that “the actions complained of by Mozambique took place after PEL made its investment in Mozambique” (Reply ¶ 666), and “the NHAI communicated its temporary debarment to PEL on 20 May 2011 – i.e., after the MOI was executed” (*id.*) are misleading and inconsequential, because the time periods when the *blacklisting was in force*, and the Judgments *were issued*, overlap the time period when PEL made its alleged investment. Also, for this reason, PEL’s arguments that “the NHAI temporary debarment was not in place” (*id.*), and that “PEL could not have concealed what did not exist” (*id.*), are wrong, because the blacklisting was in force when PEL was “making” its alleged “investment.”³⁸

E. It Is Undisputed that PEL Did Not Disclose to The MTC or Mozambique: (1) the NHAI’s Blacklisting of PEL, (2) the Resulting Judgment of the Delhi High Court, and (3) the Resulting Judgment of the India Supreme Court.

456. Minister Zucula, the former MTC Minister who engaged in the negotiations with PEL, confirms that PEL never disclosed PEL’s blacklisting and related judicial proceedings:

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

RWS-2, Zucula Witness Statement, ¶ 24 (emphasis added).

457. Mr. Chauque, the MTC legal counsel engaged in the negotiations with PEL, confirms:

³⁸ In its Reply ¶ 708, PEL argues there is a distinction between the initiation and performance of an investment. Here, the NHAI’s blacklisting remained in force, and the Judgments were issued, when PEL’s alleged investment was “made.” *Plama Consortium*, ¶ 125 (“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.”) (emphasis added). Moreover, while “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” also is relevant, because it “is a merits issue.” *Id.*

After this arbitration proceeding was initiated by the PEL, the MTC and the Republic of Mozambique became aware for the first time that the *PEL*, *during all relevant times, had concealed fraudulently, and intentionally did not reveal* to the MTC or the Republic of Mozambique the following material facts: That the PEL had actually been ‘blacklisted’ by the Government of India in connection with a road infrastructure project located in India, and also; That, apparently on May 11, 2012, the Supreme Court of India had actually judged and ruled that the PEL “is not (commercially) reliable and credible.”

During all relevant times, the *PEL has hidden* from the MTC and Mozambique this blacklist by the Indian Government and the decision of the Indian Supreme Court. It is shown, therefore, that *PEL misrepresented* that it was an Indian company in a good position and in accordance with industry practices, in order to fraudulently induce, and did induce, MTC and Mozambique, to have relations with PEL, sign and execute the MOI in good faith, approve the PEL pre-feasibility study, pre-qualify the PEL and/or the PEL consortium for the credible and transparent public tender process, allow the PEL or the PEL consortium to participate of the public tender process, and not immediately cancel the MOI or stop having negotiations with the PEL and the PEL consortium.

If the MTC knew that PEL was making these concealments and misrepresentations, the MTC would never have dealt with the PEL or signed the MOI, it would never have provided any approval for any study (including any pre-feasibility study) or other proposal submitted by PEL, it would never have pre-qualified PEL or the PEL consortium for the public tender and would have immediately disqualified. *The MTC would not have allowed PEL or the PEL consortium to participate in the public tender.* Likewise, the Mozambican Council of Ministers would have rejected any request from the PEL and would have instructed the MTC not to have any further relations with the PEL, as is the practice.

RWS-1, Chauque Witness Statement, ¶¶ 25-27 (emphasis added).

458. Mr. Chauque elaborates: “I discussed earlier how PEL did not disclose it blacklisting, and how proper disclosure of that fact would have resulted in MTC not approving the PFS or working further with PEL on a project of this type and magnitude. Further, if PEL had told MTC in 2012 that (1) it had been blacklisted, (2) that the reason for its blacklisting was presenting a bid it later retracted as nonviable, and (3) that its financials in support of its PFS were not actually sufficient to demonstrate the financial viability of the project, MTC would have ended any prospect of working with PEL right then, without any of the present dispute.” **RWS-3**, Chauque Second Witness Statement, ¶ 30.

459. PEL does not dispute that it did not make these disclosures to the MTC and Mozambique.

F. The NHAI's Blacklisting of PEL, The Judgment of the Delhi High Court, and The Judgment of the India Supreme Court Were Relevant and Material to The MTC's Decision of Whether PEL Could be Relied Upon and Trusted as a PPP Partner on The Subject Public Infrastructure Project in Mozambique.

460. Mozambique has established that the NHAI's blacklisting of PEL (regardless of its temporary nature because the time period when the blacklisting was in force overlapped the time period when PEL was "making" its "investment"), as well as the Judgments of the Delhi High Court and India Supreme Court upholding the blacklisting and holding PEL is "not (commercially) reliable and trustworthy," were relevant and material to Mozambique's decision of whether PEL would be a suitable PPP partner to be relied upon and trusted with a 30-year transportation infrastructure project to construct a USD \$3 billion port and 500km railway, particularly where PEL was representing to the MTC that PEL "deserves the trust of a direct award." The reasons detailed in this memorial are summarized, as follows:

461. First, the NHAI's blacklisting of PEL was relevant and material to the MTC's decision whether PEL was a suitable PPP partner because the NHAI project in India also involved a public transportation project (the development, operation and maintenance of a national highway), and PEL was declared the winning bidder, but PEL reneged on its bid. This was the first time that a bidder had reneged on its winning bid. The NHAI found (and the Indian Courts upheld) PEL was "not reliable and trustworthy" and "caused huge financial loss to the NHAI." There is no doubt that such facts would have been relevant and material to the MTC's decision whether PEL is commercially reliable and trustworthy and this is so, in particular, considering the temporal overlap between the NHAI blacklisting and PEL's "making" of its alleged "investment" in Mozambique, according to PEL's own allegations.

462. Second, the Delhi High Court Judgment was relevant and material to the MTC's decision whether PEL was a suitable PPP partner. The Court held the blacklisting was "*completely justified and in accordance with law.*" **RLA-20**, at ¶ 20. The Court spoke to PEL's lack of trustworthiness and reliability. "PEL knew the nature of bid it was making." After it learned of a lower bid, PEL had "*a second thought* and under the garb of ostensibly re-visiting a business decision withdrew from the tender." *Id.* PEL acted in this manner in

connection with a project “of critical *national importance* both in terms of their economics and logistical relevance.” *Id.* The High Court held that, “[i]n such a situation for [PEL] *to have withdrawn at the last minute,*” showed that PEL “conduct[ed] themselves in a manner, to say the least, which is *unbusinessman like.*” *Id.*, ¶¶ 18, 21. According to the High Court, based on PEL’s conduct, the NHAI sanction was “a decision which *any prudent businessman* placed in a similar situation would naturally have taken.” *Id.* ¶ 21. PEL had “*no qualms in ditching the project at the nth hour.*” *Id.*

463. The materiality of the Delhi High Court Judgment is evident since its findings go to the character of PEL as a bidder. As Mr. Banerji explains, the High Court made “categorical observations *on the conduct of PEL.*” **RER-9**, Banerji Second Expert Report, ¶ 11 (emphasis added).
464. Third, the India Supreme Court Judgment also was relevant and material to the MTC’s decision whether PEL was a suitable PPP partner. The Supreme Court’s Judgment shows the similarities of the NHAI public transportation and the MTC projects. The Supreme Court underscored that a public tender bidding process was conducted by the NHAI. The Court found that after the NHAI informed PEL “that its bid had been accepted and [PEL] was called upon to confirm its acceptance,” and PEL learned another bidder offered a lower price, PEL “expressed its inability to confirm its acceptance on the ground that its bid was found *not commercially viable on a second look.*” **RLA-21**, at ¶ 3. Based on PEL’s unwillingness to adhere to its winning bid, the Supreme Court held: “We do not find any illegality or irrationality in the conclusion reached by [the NHAI] that [PEL] *is not (commercially) reliable and trustworthy* in the light of its conduct in the context of the transaction in question. We cannot find fault with [the NHAI’s] conclusion because [PEL] *chose to go back on its offer ... after realizing that the next bidder quoted a much lower amount.*” *Id.*, ¶ 24. The Supreme Court, like the Delhi High Court, found PEL “chose to go back on its offer” *after* PEL realized “the next bidder quoted a much lower amount.” *Id.* Because PEL *renege*d on its bid, the Supreme Court held PEL “not (commercially) reliable and trustworthy.” *Id.* In stern language, Court held PEL engaged in “*derelict*” conduct: “*The dereliction, such as the one indulged in by [PEL], if not handled firmly, is likely to result in recurrence of such activity not only on the part of [PEL], but others also, who deal with public bodies, such as [the NHAI] giving scope for unwholesome practices.*”

No doubt, *the fact that [PEL] is blacklisted (for some period) by [the NHAI] is likely to have some adverse effect on its business prospects.*” *Id.*, 25. The Court even expressed concern that PEL’s misconduct *may recur* in the future with other public or government authorities. The critical ruling is that the Supreme Court, the highest authority in PEL’s home country held that “[PEL] is not (commercially) reliable and trustworthy in the light of its conduct in the context of the transaction in question,” which also was a public transportation project, like the subject MTC project.

465. The materiality of the Supreme Court Judgment is evident since it impugns PEL’s character as a bidder. As Mr. Banerji explains, who was counsel for the NHAI, the Court made critical rulings about PEL’s character as a bidder. **RER-9**, Banerji Second Expert Report, ¶¶ 12-13.

PEL’s arbitrary action to retract its offer after being awarded a tender of national importance, highlights PEL’s untrustworthiness and commercial unreliability. Commercial prejudice caused to PEL was a consequence of its own actions, as observed by the Supreme Court. The Supreme Court specifically affirmed that PEL is not commercially reliable and trustworthy in the light of its conduct in the context of the transaction in question.

This is a substantial and negative adjudication about PEL, and its characteristics as a bidder, rendered by the supreme legal authority in India, and issued in connection with a public transportation project of national importance in India.

RER-9, Banerji Second Expert Report, ¶¶ 14-15 (emphasis added).

466. It would be of great concern to a government agency (whether in India or abroad) to know, as the Delhi High Court and India Supreme Court held, that PEL “chose to go back on its offer” *after* PEL realized that “the next bidder quoted a much lower amount.” *Id.*, ¶ 13. It is because of this conduct based on profit – that PEL *renege*d on its bid – and the Supreme Court held PEL “not (commercially) reliable and trustworthy.” *Id.* PEL’s *adjudicated* lack of commercial reliability and trustworthiness are relevant and material facts that would justify declining PEL as a PPP partner in a substantial government infrastructure project. In this case, even more so, because PEL was *arguendo* seeking a direct award of the Mozambican project, and thus circumvent the ordinary process of a bidding process, and

misrepresented to the MTC that it “deserves the trust of a direct award,” contrary to the Indian Judgments.

467. PEL’s criticisms that the NHAI’s actions were “unwarranted and unjust” and designed to make “an example” of PEL, despite the reasoned rulings of the Delhi High Court (affirmed by the India Supreme Court), reveal PEL’s tendency to blame the government agency for PEL’s own failures; signal PEL’s troubling refusal to accept judicial rulings; show PEL’s lack of remorse and unwillingness to acknowledge that PEL should not have reneged on its winning bid; and display PEL’s stubbornness. These are *troubling characteristics* for a potential PPP partner for a USD \$3 billion, 30-year infrastructure project in Mozambique. Indeed, as the India Supreme Court held, *PEL had “no one else to blame, but itself.” Id.*, ¶ 9.
468. PEL belittles the Supreme Court’s Judgment. PEL’s Reply, ¶ 679, devotes one paragraph to the Judgment, suggest the Court simply held that PEL had “stipulated” to “forfeit its bid security” and that the “NHAI’s temporary debarment of PEL was not illegal, irrational or perverse.” In doing so, PEL ignores the breath and importance of the factual findings and legal rulings of the India Supreme Court which, like the rulings of the Delhi High Court, substantially call into question PEL as a potential PPP partner in a government project.
469. The Supreme Court’s Judgment is, without doubt, a *substantial and negative* ruling about *PEL’s characteristics as a bidder* in a public transportation project.³⁹ The Court’s ruling, that PEL is “not commercially reliable and trustworthy,” was relevant and material to the MTC’s decision whether PEL was a suitable PPP partner, and justified ceasing dealings with PEL. The record establishes that the concealed matters were relevant and material.
470. Fourth, the temporal overlap of when the NHAI’s blacklisting of PEL was in force, the issuances of the Indian Judgments, and PEL’s “making” of its alleged “investment,” further establish the relevance and materiality of PEL’s nondisclosures and/or concealments. The periods the blacklisting and issuances of the Judgments were not years before the events

³⁹ The Supreme Court has stated: “Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts. ... Not only does blacklisting takes away this privilege, *it also tarnishes the blacklisted person’s reputation and brings the person’s character into question.*” **RER-3**, Banerji Expert Report, ¶ 10 (citing **RLA-19**, *UMC Techs. v Food Corp. of India*, SCC Online SC 934 (India Supr. Ct., 2020), ¶ 14 (emphasis added)).

- giving rise to this dispute. As discussed above, the blacklisting was in force, and the Indian courts rendered their judgments, *precisely while* PEL was making of its alleged investment.
471. PEL argues that “materiality” is established if Mozambique would have ceased dealing with PEL had it made the disclosures. Reply ¶¶ 667 and 693 (arguing Mozambique must show that “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.”).
472. That is what the former MTC Minister and the MTC legal counsel, who were engaged in the discussions with PEL, have testified in their witness statements. For example, Minister Zucula has stated: “PEL never disclosed these materials facts to the MTC or me. If these facts had been disclosed by PEL, as they should have, the MTC would have rescinded the MOI and any authorization for PEL to participate in the public tender, and would have ceased all further dealings with PEL.” **RWS-2**, Zucula Witness Statement, ¶ 24; **RWS-1**, Chauque Witness Statement, ¶¶ 25-27 (The MTC would have ceased dealings with PEL).
473. As admitted by David Baxter, PEL’s PPP expert, “[g]overnments *enjoy large discretion* in how they choose to award infrastructure projects.” **CER-7**, Expert Report of David Baxter, ¶ 17 (emphasis added). Because the MTC Minister and MTC legal counsel, engaged in the negotiations with PEL, testify that, *in their discretion*, they would have ceased dealings with PEL had it made the disclosures, their testimony is sufficient to establish that the MTC would have ceased dealings with PEL. As the Delhi High Court held, “*any prudent businessman* placed in a similar situation would naturally have taken” the decision adopted by the NHAI. **RLA-20**, at ¶ 21.
474. In its Reply, PEL’s first argument on “materiality” is that “Mozambique made no inquiries at all that would have required the disclosure(s).” *Id.*, ¶ 704. That is not a “materiality” argument – it is an argument about whether PEL had a duty to disclose (and it did).
475. PEL’s second argument on “materiality” is that Mozambique is “mak[ing] a mountain out of a mole hill,” the blacklisting “did not prevent PEL from contracting with any other public authorities in India (or elsewhere),” and it is “no indicia” of “bad acts.” *Id.*, ¶ 705. PEL’s claim that the blacklisting “did not prevent PEL from contracting *with any other* public authorities in India” has been proven false – based on the exclusion of PEL as a bidder by

the Jharkhand Water Resources Department. Moreover, the rulings in the Judgments of the Delhi High Court and India Supreme Court are highly condemnatory of PEL.

476. PEL quotes the self-serving declaration of its representative, Mr. Daga, who asserts the NHAI blacklisting “is not relevant.” Reply ¶ 705. “Relevance” is a legal question for this Tribunal, and not for Mr. Daga. Moreover, Mr. Daga’s statement reveals much about the corporate culture at PEL. “Mr. Daga was the face of PEL ‘on the ground’ in Mozambique.” **CWS-2**, Witness Statement of Ashish Patel, ¶ 33. If Mr. Daga and PEL believe that the Judgment of the India Supreme Court holding PEL is “not commercially reliable and trustworthy” is not “relevant” to whether PEL was a suitable PPP partner for the MTC, that confirms PEL was the entirely wrong PPP partner for the MTC’s project. Mr. Daga’s assertion displays arrogance and a lack of respect for the Judgment of the India Supreme Court. Mr. Daga’s statement that, “I seriously doubt that Mozambique would have found this information relevant or done anything in relation to it, if it had known,” *id.*, is self-serving speculation.
477. PEL’s third argument that it is not believable Mozambique would not have awarded the project to PEL, because “PEL was the only party with the know-how necessary to develop the Project,” Reply ¶ 706, is hopeful thinking and wrong. The MTC found, as part of the public contest, that another bidder was better than PEL. PEL also speculates it would have been selected because the “Council of Ministers deemed the Project of ‘national strategic interest.’” *Id.* However, if PEL had revealed the blacklisting and Judgments, it would have had the opposite effect: PEL’s blacklisting was held to be “completely justified” because PEL “had a second thought and under the garb of ostensibly re-visiting a business decision withdrew from the tender,” despite that the NHAI infrastructure project was “of critical national importance both in terms of their economics and logistical relevance.” **RER-3**, Banerji Expert Report ¶ 14 (Judgment, Exhibit 6, ¶¶ 20-21). PEL’s blacklisting by the NHA, and the resulting Judgments were relevant and material to the MTC’s decision whether PEL was a suitable PPP partner for the MTC’s project.

G. PEL Had A Duty to Disclose PEL’s Blacklisting by The NHAI, and The Indian Judgments to Mozambique Because Under The International Principle of

Good Faith, The Investor has an Obligation to Provide The Host State with Relevant and Material Information Concerning The Investor.

478. Mozambique has established that, under the internationally recognized principle of good faith, an investor has an obligation to provide the host State with information about the investor that is relevant and material to the host State making the decision whether to approve the investor/investment. This duty arises from general principles of international law, and therefore arises outside of the subject treaty, and independently of local law.

479. The tribunal in *Plama Consortium* (composed of esteemed international arbitrators, Carl F. Salans, Professor Albert Jan van den Berg, and the late V.V. Veeder) held:

The principle of good faith encompasses, inter alia, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment.

RLA-31, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), ¶ 144 (emphasis added).

480. This language in *Plama Consortium* is worth detailed consideration, because the international principle of good faith applied to, and governed, PEL's dealings with the MTC (and, by extension, with Mozambique).

481. "Good faith is a supreme principle, which governs legal relations in all of their aspects and content." **RLA-30**, *Inceysa*, ¶ 230 (emphasis added).

482. "Any legal relation starts from an indispensable basic premise, namely the confidence each party has in the other. If this confidence did not exist, the parties would have never entered into the legal relation in question, because the breach of the commitments assumed would become a certainty, whose only undetermined aspect would be the question of time." *Inceysa*, ¶ 232 (emphasis added). "This implicit confidence that should exist in any legal relation is based on the good faith with which the parties must act when entering into the legal relation, and which is imposed as a generally accepted rule or standard. Asserting the contrary would imply supposing that the commitment was assumed to be breached, which is an assertion obviously contrary to the maxim *Pacta Sunt Servanda*, unanimously accepted in legal systems." *Id.*, ¶ 233 (emphasis added).

483. The international “principle of good faith” “exist[s] independently of specific language to this effect in the Treaty.” **RLA-29**, *Hamester*, ¶ 124. In *Plama Consortium*, “[t]he Tribunal [found] that Claimant’s conduct is contrary to the principle of good faith which is part not only of Bulgarian law ... *but also of international law* – as noted by the tribunal in the *Inceysa* case.” *Id.*, ¶ 144 (emphasis added).
484. First, *Plama Consortium* held that “[t]he principle of good faith encompasses, *inter alia*, the obligation for *the investor to provide the host State with relevant and material information concerning the investor* and the investment.” *Id.*, ¶ 144 (emphasis added).
485. The *Plama Consortium* holding is unambiguous. Based on the international principle of good faith, the investor (PEL) has an “obligation” to “provide” the host State (the MTC and Mozambique) with “relevant and material” “information concerning” PEL. The NHAI’s blacklisting of PEL, and the resulting Judgments of the Delhi High Court and the India Supreme Court, clearly constitute “information concerning the investor” (PEL).
486. As elaborated above, the NHAI’s blacklisting of PEL, and the Judgments upholding PEL’s blacklisting, and holding PEL “not commercially reliable and trustworthy,” were material to the MTC’s decision whether PEL was a suitable PPP. Thus, PEL had an “obligation” to “provide” (that is, *disclose*) the NHAI’s blacklisting and Judgements to the MTC and Mozambique because such information was – without a doubt – “concerning the investor.”
487. Based on the record herein, Mozambique has established that, under the international principle of good faith, which arises independent of the treaty and local law, PEL had an obligation (or duty) to make the disclosures to the MTC and Mozambique.
488. Second, *Plama Consortium* held that “[t]his obligation is particularly important when the information is necessary for obtaining the State’s approval of the investment.” *Id.*, ¶ 144.
489. The phrase “particularly important” underscores that, where the information is necessary for obtaining the State’s approval of the investment, the principle of good faith compels disclosure even more. PEL already had an obligation to disclose because the information is material and concerning the investor. If the information is necessary to the State’s approval of the investor, the disclosure obligation is *heightened*.

490. PEL’s disclosure obligation was heightened because the blacklisting and Judgments were necessary to the MTC’s decision whether to “approve” PEL as an investor and its proposed investment. If PEL had made the disclosures, the MTC would have been justified in ceasing dealings with PEL, even after the MOI was signed. The Indian courts held that “*any prudent businessman* placed in a similar situation would naturally have taken” the decision, taken by the NHAI, not to deal with PEL. The information was relevant to the MTC’s approval of PEL, because, as the Supreme Court observed, blacklisting “brings the *person’s character* into question.” Here, while PEL was seeking a direct award of this infrastructure project in Mozambique, representing that it “*deserves the trust of a direct award,*” the Indian courts had instead held that because PEL reneged on a bid in a public project of “*national importance*” in India, and PEL is “*not commercially reliable and trustworthy.*” PEL reneged on the *economic terms* of its NHAI winning bid, which is especially material to the MTC’s evaluation of the economic terms of PEL’s proposal (and of its PFS).
491. Third, *the international policy of transparency*, which is a corollary of the international principle of good faith, likewise imposed an obligation on PEL, or at least, reinforced PEL’s obligation under the principle of good faith, to make the subject disclosures.
492. As stated by Mr. Baxter, PEL’s PPP expert witness, during the public procurement process, whether it consists of a direct award or a competitive bidding contest, “best practices require,” specifically, “*transparency.*” CER-7, Baxter Expert Report, ¶ 138.
493. However, transparency is reciprocal. Just as the State has transparency obligations towards the investor, so too does the investor as a matter of international public policy, have a duty to be transparent towards the State:
- As for policy, BITs oblige governments to conduct their relations with foreign investors *in a transparent fashion*. *Some reciprocal if not identical obligations lie on the foreign investor.*
494. RLA-32, *Fraport AG Frankfurt Airports Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007), ¶ 402 (Emphasis added). The international policy of transparency obligated PEL to make the subject disclosures.

495. Fourth, similarly, PEL had an implicit duty to disclose based on the internationally recognized principle of “fair dealing,” which often goes hand-in-hand with good faith, as reflected in the common term “good faith and fair dealing.” As the International Institute for the Unification of Private Law (“UNIDROIT”) has observed, it is well established that “[a] party may avoid the contract when it has been led to conclude the contract by the other party’s fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, *according to reasonable commercial standards of fair dealing, the latter party should have disclosed.*” **RLA-128**, UNIDROIT Principles of International Commercial Contracts (2010), Art. 3.2.5 (emphasis added).

496. Therefore, PEL had a duty or obligation of disclosure under international law.

H. Under Mozambican Law and the Public Tender Documents for this Project, PEL Also had A Duty to Disclose NHAI’s Blacklisting and The Indian Judgments to Mozambique.

497. Mozambique has established that PEL also had a duty or obligation to disclose pursuant to Mozambican law and the public tender documents for this project.

498. First, PEL had an obligation to make the disclosures pursuant to Mozambican law because the disclosures were required by the tender documents.

499. As discussed in the Statement of Defense, ¶ 496, the MTC’s Tender Notice (**C-24**, “Application of Participants and Fulfillment”) states that bidders seeking prequalification for the tender contest must “demonstrate that they have the capabilities and/or experience in the development, operation and management of railways, and ports and commercial activities.” (*Id.*, Clause 2.1). According to Clause 2.3, the bidder must certify under oath that the bidder “has not been disqualified from conducting commercial activities”:

Each member of the interested party must state, under oath, that it and its shareholders, as well as its subsidiaries or affiliates, comply with the following ... ii) ... have not been disqualified from conducting commercial activities

C-24 (Tender Notice), Clause 2.3 (emphasis added).

500. “Each member of the interested party” must provide the certification, under oath. PEL, obviously, was a “member” of the interested party – the PGS Consortium. Therefore, PEL

had an affirmative duty to disclose whether it had been “disqualified from conducting commercial activities.”

501. There is no temporal limit in the Clause 2.3 requirement that the bidder disclose whether it has been disqualified from conducting commercial activities. The disclosure is not limited to pending disqualifications. Thus, the Tender Notice broadly requires the bidder to certify, under oath, that it has “not been disqualified from conducting commercial activities.”
502. It is eminently clear that the NHAI’s blacklisting of PEL, and the Delhi High Court and India Supreme Court Judgments *constitute evidence that PEL had “been disqualified from conducting commercial activities.”* *Id.* PEL was disqualified from conducting commercial activities with the NHAI for one year.
503. As Mr. Banerji explains, under India Supreme Court precedent, “blacklisting” is “the decision of State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into contractual relationship with such persons” **RER-9**, Banerji Second Expert Report, ¶ 18. “Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts.” *Id.*, ¶ 25.
504. PEL has presented no evidence that, in response to the Tender Notice, PEL made the disclosures. If PEL had made the disclosures, as the MTC’s witnesses have stated, it would have been disqualified from participating in the bidding contest. PEL violated the Tender Notice, which is the initial notification of the bidding process, and by doing so fraudulently induced the MTC to permit PEL to participate in the contest as part of the PGS Consortium.
505. Second, PEL had an obligation to make the disclosures pursuant to Mozambican law, because of, among other things, the principles of transparency and good faith embodied within Mozambique’s civil code, and the requirements of Mozambique’s procurement laws. **RER-7**, Muenda Second Legal Opinion, ¶¶ 104-116.
506. PEL deliberately withheld such information and even intended to advance to the stage of signing the concession contract aware, or at least should be aware that, under the law, it was prevented from participating in public tenders. *Id.*, ¶ 107 (citing Article 21(1)(c) of the Mozambique Public Procurement Regulation).

507. In this regard, the provisions of Article 227 of the Mozambique Civil Code are applicable in the preliminary (understood as pre-contractual) phase, as well as in the formation of the contract itself. The duty to observe the principle of good faith thus applies to the formation of the contract and during its execution, as it follows from the general principles contained in the Mozambique Regulation of Public Contracting, Article 4(1). *Id.*, ¶ 108.
508. The duty to disclose arising from the principle of good faith enshrined in Article 227 of the Mozambique Civil Code requires the complete and absolute disclosure of information that may have an impact on the formation of consent and during the entire period of validity of the legal transaction. *Id.*, ¶ 111.
509. As Ms. Muenda opines, PEL’s concealment “constitutes a serious violation of the duty of information to which PEL is bound by the Mozambican rules in the processes contractual terms.” *Id.*, ¶ 115. “Furthermore, if the Mozambican government had access to that [concealed] information even during the stage of the tender in which PEL participated, that fact was enough to disqualify the Consortium in which PEL was a party” *Id.*, ¶ 116.
510. PEL’s arguments fail to overcome PEL’s disclosure obligation under Mozambican law.
511. PEL’s argument that, because NHAI notified the blacklisting after the MOI was signed, Article 227 of the Mozambican Civil Code, which “applies to pre-contractual liability,” does not establish a duty to disclose (Reply ¶¶ 697 and 701), is wrong, because the NHAI’s blacklisting was in force during PEL’s “making” its alleged “investment.”
512. Similarly, PEL’s argument, that according to Professor Medeiros, “PEL did not have a duty to disclose the NHAI’s temporary debarment,” Article 227 “arises in the context of pre-contractual liability,” (Reply ¶ 698), is wrong, because the NHAI’s blacklisting was in force during PEL’s making its alleged investment.
513. PEL’s argument, relying on Professor Medeiros, that “Mozambique did not comply with its duty to self-inform.” Reply ¶ 699. Mr. Daga states: “The Government never asked me for any such information.” Second Daga Witness Statement, ¶ 178. International principles of law are incorporated into national law. PEL’s argument fails because, under the international principle of good faith, PEL had an obligation to make the disclosures. It is, obviously, no defense to a person with a duty to disclose that the person to whom the

disclosure must be made “did not ask.” PEL’s duty to disclose also is not satisfied by failing to make the disclosure and later arguing that the information was “publicly available.” Reply ¶ 699. If a party has a duty to disclose, *it must disclose*, or the duty is meaningless.

514. PEL’s argument about “symmetry” is irrelevant also because PEL had a preexisting duty to disclose under international law. PEL cites no evidence that the MTC had a reason to suspect the NHAI blacklisting. Fishing throughout the world, looking for a blacklisting of PEL, would have been burdensome for Mozambique, since it had no information about what agencies in what countries blacklisted PEL. PEL also did not disclose, in its 2011-2012 Annual Reports, that it was blacklisted by the NHAI and the India Supreme Court held PEL “not commercially reliable and trustworthy.” **R-43**, PEL Annual Report, 2010-2011.⁴⁰ As Professor Medeiros notes, the Tribunal must consider “lack of symmetry in the negotiations,” **CER-3**, Second Medeiros Expert Report, ¶ 70.2. Here, the lack of symmetry is that PEL had the relevant information readily available at its fingertips, and could have disclosed it to the MTC. Mr. Daga, who was dealing with the MTC, admits he had knowledge of the blacklisting: “The Government never asked me for any such information ... had it done so, I would have provided the information” Daga Second Witness Statement, ¶ 179.
515. PEL’s “most important” argument, that “the duty of information arising out of Article 227 of the MCC only arises in the context of pre-contractual negotiations,” and “[g]iven the temporary debarment occurred after the MOI’s conclusion, there is no question ... that PEL had no duty to inform Respondent of its temporary debarment by the NHAI prior to the MOI’s signature,” Reply ¶ 701, which is a rehash of its temporal argument is wrong because the NHAI’s blacklisting was in force during PEL’s making its alleged investment.

⁴⁰ Under Indian law, “PEL [also] had an obligation to disclose the fact of its blacklisting when seeking to participate in other government projects. Government procurement laws, *concepts of transparency and good faith*, legal duties not to engage in fraudulent concealment of material facts, and general contract principles require that blacklisted entities, like PEL, disclose their blacklisting to governments with whom they are dealing.” **RER-3**, Banerji Expert Report, ¶ 26 (emphasis added). PEL says: “This argument is nonsense; this Tribunal is not being called upon to apply ‘implicit’ disclosure obligations arising under Indian law.” Reply ¶ 703. PEL is wrong. PEL’s duty of disclosure can arise under Indian law, because India is its main place of business.

516. Finally, PEL cannot overcome Mozambique’s contention that there was a “continuing fraud” because PEL did not disclose the blacklisting before submitting the PFS, and in subsequent discussions with MTC, when seeking to participate in the public tender. Reply ¶ 703. PEL argues again that “at no time did Mozambique ever request disclosure,” *but PEL had a duty to disclose*. PEL’s blacklisting also was in force until 19 May 2012, and PEL submitted the PFS to the MTC on 2 May 2012. There also was a continuing fraud, since PEL wrote to the MTC on 5 October 2012 representing it was “trustworthy,” and anew concealing the India Supreme Court had ruled, just months before, that PEL is “not commercially reliable or trustworthy.” The October 5th letter is also within the time period of PEL’s making of its investment, since Professor Medeiros argues it extends to 16 April 2013.
517. The additional arguments by PEL’s legal expert, Professor Medeiros, do not warrant a different result under Mozambican law. Professor Medeiros argues that “the duty of information is not a general rule that requires all doubts, flaws in interpretation or mistakes of the counterparty to be clarified.” **CER-3**, Medeiros Second Expert Report, ¶ 70.1. Professor Medeiros criticizes that “only a moralistic understanding of the law would lead to that conclusion.” *Id.*, ¶ 70.1.1.
518. Here, there are not mere “doubts, flaws in interpretation or mistakes of the counterparty” or a “moralistic understanding of the law.” The Delhi High Court and India Supreme Court upheld that PEL’s blacklisting, ruling PEL is “not commercially reliable and trustworthy,” in the context of a public transportation project. These concealments were made in the course of PEL “making” its alleged “investment,” and thus were made in the course of the MTC allegedly providing “its consent,” which would give rise to the “obligation” of disclosure, pursuant to the principle of good faith, as Professor Medeiros admits in ¶ 70.2.
519. Professor Medeiros’ reference to the duty of “self-information” (*id.*, ¶ 70.2) does not defeat PEL’s preexisting duty of disclosure under international law, which is incorporated into national law. Professor Medeiros also cites no evidence that the MTC would have had a reason to suspect, and thus investigate, the NHAI blacklisting, during the relevant time period.

520. Finally, Professor Medeiros repeats PEL’s old argument that, even if there as a duty to disclose, “the temporary debarment occurred on 20 May 2011, after the MOI had been entered into (on 6 May 2011)” and PEL “could not have transmitted information about a situation that *had not yet occurred* in the pre-contractual phase.” *Id.*, ¶ 70.3. However, as discussed above, the NHAI blacklisting remained in effect for a year, and that time period overlaps PEL’s making of the alleged investment. Professor Medeiros’s suggestion that execution of the MOI is the temporal limit is wrong, and ignores that PEL has alleged (and Professor Medeiros has argued) that PEL’s making of the investment extends beyond the execution of the MOI.

521. Professor Medeiros’ arguments that the MTC “did not ask” ran afoul of international law:

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

RLA-30, *Inceysa*, ¶ 238 (emphasis added).

522. Here too, Mozambique also presupposed good faith behavior on the part of future PPP partners. The MTC had no reason to know of PEL’s blacklisting and the resulting Judgments against PEL. Like the claimant in *Inceysa*, PEL committed fraudulent concealment “for the purpose of establishing a legal relationship” with the MTC.

I. PEL Also had A Duty to Disclose PEL’s Blacklisting by The NHAI, and The Indian Judgments to Mozambique, Under International PPP Best Practices.

523. Mozambique also has established that PEL had a duty or obligation to disclose the NHAI’s blacklisting of PEL and the Indian Judgments pursuant to international PPP best practices, as confirmed by Mozambique’s international PPP expert, David Ehrhardt.

524. “It is best practice for the proponent to disclose as much or more than what would be required in a publicly initiated competitive tender. *See C-255*, World Bank Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects Volume II, at p. 53.” **RER-11**, Ehrhardt Expert Report, ¶ 139.

525. For example, “integrity information should have been disclosed” by PEL to the MTC. *Id.*, § 6.1.2. As Mr. Ehrhardt explains,

It is also best practice for governments to include *integrity* and due diligence criteria in their evaluations. The World Bank USP Guidelines advise governments to “Set the criteria that will be used to assess *the reputation and integrity of the USP proponent.*” The sample integrity due diligence guidance given includes “The USP Proponent does not appear on *any globally recognized blacklists.*” And “The USP Proponent *has not, ... been ... disqualified pursuant to administrative suspension or debarment proceedings.*” See Exhibit C-255, World Bank Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects Volume II, at p. 36.

RER-11, Ehrhardt Expert Report, ¶ 144 (emphasis added).

According to the World Bank USP Guidelines, USP proponents should submit *integrity information* that is at least as rigorous as would be required for a publicly initiated competitive tender. I believe this would include information on *commonly required indicators of integrity* and good standing. *This would include data on non-performance of contracts, blacklisting by a major client, and ongoing or recent litigation.*

Id., ¶ 145 (emphasis added) (citations omitted).

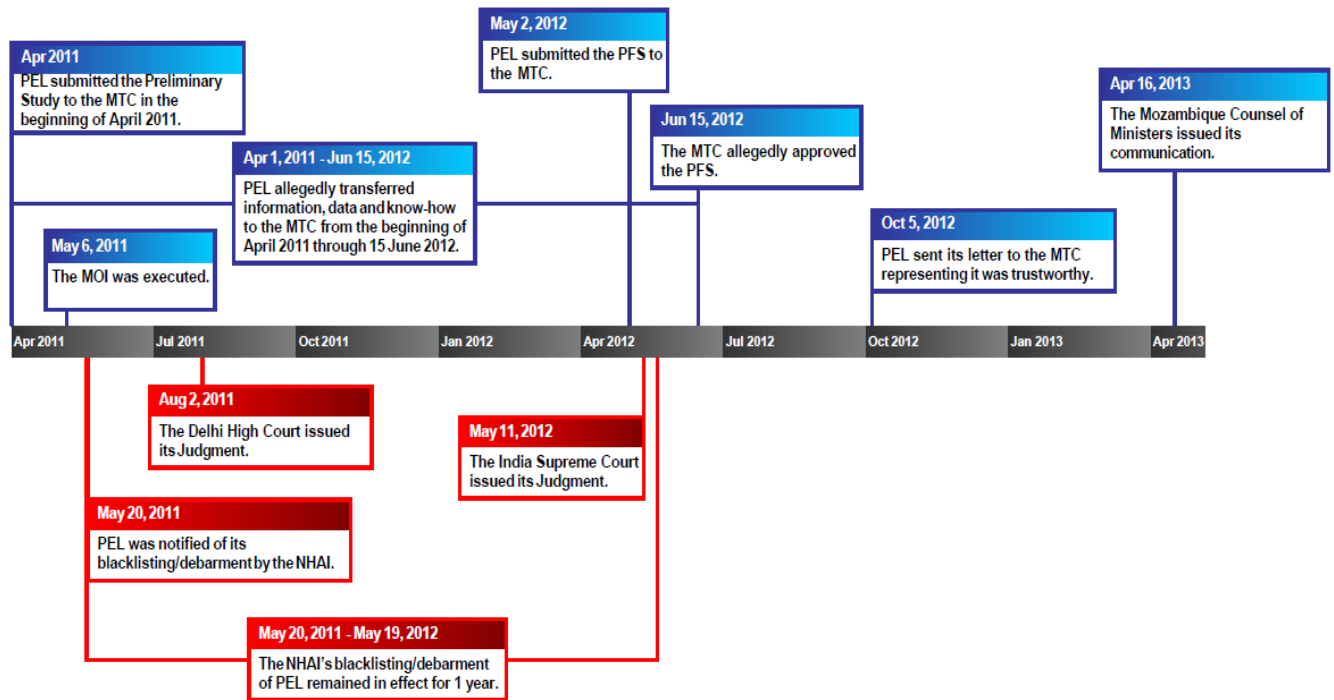
526. Mr. Ehrhardt opines: “In my experience, *it is best practice* that the following situations *be disclosed under integrity* and due diligence *criteria* for competitive tendering: Failure to perform on an awarded contract; *Pending or recent past litigation; Debarment or blacklisting by a government or international agency.*” *Id.*, ¶ 146 (emphasis added).
527. Mr. Ehrhardt concludes that: “PEL’s PFS was submitted on May 2, 2012, *while it was blacklisted* by the National Highways Authority of India and about one week before the Supreme Court of India issued a judgement on PEL’s pending litigation. In its PFS, PEL *did not disclose* any of this *integrity information.*” *Id.*, ¶ 149 (emphasis added).
528. Under international PPP best practices, PEL’s concealments also would have resulted in its exclusion or disqualification as a PPP partner. “For the reasons given above, information on PEL’s *integrity*, ethical standards, *legal proceedings, blacklisting, and debarment should have been disclosed to MTC. Following industry practice, failure to disclose this information would have been sufficient grounds to reject PEL in any of the USP, direct award, or competitive tendering scenarios.*” *Id.*, ¶ 150 (emphasis added).
- J. First, Mozambique Has Established That PEL’s Claims are Inadmissible Because, at A Minimum, PEL Violated the Principle of Good Faith by Failing to Disclose or Concealing, from The MTC and Mozambique, PEL’s**

Blacklisting by the NHAI, and the Judgments of the Delhi High Court and India Supreme Court Upholding PEL's Blacklisting and Holding PEL Is "Not (Commercially) Reliable and Trustworthy," While PEL Was Seeking to Obtain a Direct Award Representing that it "Deserves the Trust of a Direct Award."

529. In *Inceysa*, the tribunal held that the investor's concealments, regarding its financial status and industry expertise during the public bidding process, violated the principle of good faith, the principle that no one should be permitted to profit from their fraud, international public policy, and the prohibition against unlawful enrichment and, therefore, the tribunal dismissed the investor's claim. See **RLA-30**, *Inceysa*, ¶¶ 230-257.
530. Mozambique has established that PEL's treaty claims are inadmissible because, at a minimum, PEL violated the international principle of good faith by engaging in the subject concealments of material facts regarding PEL's suitability as a PPP partner.
531. The obligation of good faith is the foundation for the entire investor-State process. "The principle of good faith has long been recognized in public international law, as is also in all national legal systems," in order to constitute an investment, assets must have been invested *bona fide*. **RLA-33**, *Phoenix Action*, ¶¶ 106-107. "The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance." *Id.*, ¶ 106 (emphasis added).
532. Specifically, "[i]n the contractual field, good faith means *absence of deceit and artifice* during the *negotiation and execution of instruments that gave rise to the investment*, as well as *loyalty, truth* and intent to maintain the equilibrium between the reciprocal performance of the parties." *Inceysa*, ¶ 231 (emphasis added).
533. The record establishes that PEL violated the *paramount principle of good faith*, by failing to disclose to, and/or concealing from, the MTC and Mozambique PEL's blacklisting by the NHAI and that it remained in effect, and the Judgments upholding PEL's blacklisting, because the concealed facts were relevant and material to the MTC's decision whether PEL would be a suitable PPP partner. PEL's concealments induced the MTC and Mozambique to continue dealings with PEL after execution of the MOI. Further, the former MTC

Minister and the MTC legal counsel, who negotiated with PEL, have testified that they would have exercised their discretion to stop dealing with PEL had it made the disclosures.

534. Where “*a material change occurred*” concerning the investor “that could have an effect on the host State’s approval, the investor was, by virtue of the principle of good faith, obliged to inform the host State of such change. Intentional withholding of this information is therefore contrary to the principle of good faith.” *Plama Consortium*, ¶ 145 (emphasis added). The consequence of the concealment was that the tribunal “cannot, therefore, grant the substantive protections” of the treaty. *Id.*, ¶ 146.
535. The time periods of the blacklisting and issuances of the Judgments overlap with PEL’s “making” of its alleged “investment,” as is clearly demonstrated by the following graph:



536. In the graph, the blue boxes comprise the time period of PEL’s “making” of its alleged “investment,” according to PEL’s allegations, and the opinions of PEL’s legal expert. The making of PEL’s alleged investment extends from April 2011 through 15 June 2012 according to PEL, and through 16 April 2013 according to PEL’s legal expert. In the graph, the boxes in red comprise the time periods when the NHAI’s blacklisting of PEL was in force, and of the issuance of the Judgments. The red boxes mark the events concealed by

PEL, and fall squarely within PEL's "making" of its "investment." This is a critical aspect of the good faith analysis, because it not only establishes temporal overlap, but PEL's lack of good faith in contemporaneously seeking to obtain a direct award, while concealing facts that show PEL was not reliable and trustworthy (and, not only "facts," but an actual blacklisting order, that remained in force, by an agency of the country in which PEL is incorporated and headquartered, and two ensuing court Judgments, including by the India Supreme Court, actually holding PEL to be "not commercially reliable and trustworthy.").

537. PEL's violation of the principle of good faith is established, for these various reasons:
538. First, PEL violated the principle of good faith by failing to disclose that, shortly after signing the MOI, it was blacklisted by the NHAI. The MOI was signed on 6 May 2011. But, in its Reply, PEL does not dispute that just fourteen days later, on 20 May 2011, the NHAI issued its order blacklisting PEL for one year. Nonetheless, and although PEL had just executed the MOI, PEL violated the principle of good faith by thereafter concealing from the MTC that it had been blacklisted, in order to induce the MTC to continue with the process envisioned under the MOI and continue dealing with PEL. As the Tribunal in *Inceysa* observed, the "implicit confidence that should exist in any legal relation is based on the *good faith* with which the parties must act *when entering into the legal relation*, and which is *imposed as a generally accepted rule or standard.*" **RLA-30**, *Inceysa*, ¶ 233 (emphasis added). Once PEL was blacklisted, and given the proximity of the blacklisting to the signing of the MOI, PEL should have disclosed its blacklisting to the MTC.
539. The facts surrounding the NHAI blacklisting demonstrated that PEL was not a suitable PPP partner because the NHAI project involved a public transportation infrastructure project, PEL was declared the winning bidder, and then *renege*d on the terms of its winning bid. These facts brought into question whether PEL was commercially reliable and trustworthy and, in particular, given the proximity of the blacklisting to the execution of the MOI.
540. Second, PEL violated the principle of good faith by failing to disclose that the NHAI's blacklisting order was in force while PEL was "making" its alleged "investment." PEL's argument that PEL did not need to disclose the blacklisting, because PEL allegedly received the NHAI order "after" *the MOI was signed* by the parties, is based on a mistaken undertaking of the precedents and, rather, further confirms PEL's bad faith.

541. At a minimum, the requirement of good faith continues throughout the “making” of the “investment.” Despite that PEL concedes that the blacklisting was in force from 20 May 2011 to 19 May 2012, PEL continued to conceal its blacklisting, and that it remained in force, during that time period in which PEL was allegedly “making” its “investment” which extends from April 2011 through 15 June 2012 according to PEL, and through 16 April 2013 according to PEL’s legal expert. There is temporal overlap between the time the NHAI blacklisting order was in force and the time when PEL was making its alleged investments. PEL should have disclosed that the NHAI’s blacklisting of PEL was in force.
542. Third, PEL violated the principle of good faith by failing to disclose the NHAI blacklisting order, and that the blacklisting was in force, prior to or in connection with submitting its PFS for approval to the MTC. PEL alleges its PFS was part of its “investment.” PEL did not submit the PFS until 2 May 2012. PEL does not dispute that the NHAI’s blacklisting order (of 20 May 2011) *preceded the PEL’s presentation of the PFS* (on 2 May 2012) by a year. PEL’s presentation of the PFS on 2 May 2012 also fell within the period of time in which the NHAI blacklisting remained in force (from 20 May 2011 to 19 May 2012). Nonetheless, PEL continued to conceal its blacklisting from the MTC and Mozambique.
543. In the PFS, PEL made representations regarding its experience: “PEL has extensive experience in infrastructure construction and contracting but it also has experience in financing large projects.” **R-7**, PFS, page 115. “When financing the project, it is critical to evaluate the project for its techno financial viability.” *Id.* Yet, PEL continued to conceal that the NHAI had blacklisted PEL in connection with such a project, and the India courts affirmed, precisely because PEL had reneged on the financial terms on its bid.
544. Fourth, PEL violated the principle of good faith by failing to disclose the Judgment of the Delhi High Court. During the blacklisting period (20 May 2011 to 19 May 2012), the High Court issued its Judgment (on 2 August 2011) upholding the NHAI’s blacklisting, and this Judgment followed execution of the MOI by less than three months, and preceded PEL’s presentation of the PFS by nine months. Nonetheless, PEL continued to conceal its blacklisting, and concealed the High Court Judgment, from the MTC and Mozambique.
545. The factual findings by the Delhi High Court demonstrated that PEL was not a suitable PPP partner, because of its lack of reliability and trustworthiness. If these facts had been

revealed to the MTC, the MTC would have been within its rights to be alarmed by the High Court's finding that "PEL knew the nature of bid it was making," yet had "a second thought and under the garb of ostensibly re-visiting a business decision withdrew from the tender." It is even more concerning that the High Court declared that PEL acted in this manner in connection with a project "of critical national importance both in terms of their economics and logistical relevance." Thus, the MTC would have been justified in rejecting PEL, and ceasing dealings with PEL, based on the fact that, despite the "critical national importance" of the NHAI project, PEL "withdrew at the last minute." The High Court's characterization of PEL's conduct, in the course of a bid contest as, "to say the least, unbusinessman like," also was sufficient to reject PEL. Like the NHAI, the MTC would have been within its rights to reject PEL, since that was "a decision which any prudent businessman placed in a similar situation would naturally have taken." **RER-3**, Banerji Expert Report ¶ 14 (citing Judgment, Exhibit 6, ¶¶ 20-21. PEL concealed the High Court Judgment, because it feared that, given the temporal overlap, the disclosure would have ended dealings with the MTC.

546. Fifth, PEL violated the principle of good faith by failing to disclose the Judgment issued by the Supreme Court of India. During the blacklisting period (20 May 2011 to 19 May 2012), the Supreme Court also issued its Judgment (on 11 May 2012) upholding the NHAI's blacklisting of PEL. Nonetheless, PEL continued its concealments.
547. PEL's Reply ignores that the India Supreme Court, specifically, held that "[PEL] is not (commercially) reliable and trustworthy in the light of its conduct in the context of the transaction in question. We cannot find fault with [the NHAI's] conclusion because [PEL] chose to go back on its offer ... after realizing that the next bidder quoted a much lower amount." **RER-3**, Banerji Expert Report, ¶ 23 (citing Judgment, ¶ 24 (emphasis added)). This is a damning holding by the Supreme Court that goes directly to PEL's character. This was a project of "critical national importance" and PEL "withdrew at the last minute." After reviewing all relevant facts, the Supreme Court affirmed PEL "chose to go back on its offer" after PEL realized "the next bidder quoted a much lower amount." Precisely because PEL *renege*d, the Supreme Court held PEL "not commercially reliable and trustworthy."

548. What is PEL's response to the Judgments of the Delhi High Court and India Supreme Court? PEL response is that "this is a minor, temporary issue between PEL and a single Indian administrative authority." Reply ¶ 52. Not so. PEL's lack of commercial reliability and trustworthiness were significant material factors that would have justified the MTC to reject PEL as a PPP partner in this project of national importance in Mozambique. The use of the word "dereliction" by the India Supreme Court, and the Court's concern that there was a need to prevent "recurrence of such activity ... on the part of [PEL]," are highly concerning, and would have further justified the MTC in ceasing dealings with PEL.
549. In *Inceysa*, the tribunal concluded that the investor's concealment, of its financial status and lack of industry expertise during the bidding process (*id.*, ¶ 236), violated its good faith obligations that rendered the treaty claims *inadmissible*. "The conduct mentioned above constitutes an obvious violation of the principle of good faith that must prevail in any legal relationship." *Id.*, ¶ 237 (emphasis added). The *Inceysa* tribunal observed: "It is clear to this Tribunal that, had it known the aforementioned violations of *Inceysa*, the host State, in this case El Salvador, would not have allowed it to make its investment." *Id.* "Faced with this situation, this Tribunal can only declare its incompetence to hear *Inceysa*'s complaint, since its investment cannot benefit from the protection of the BIT, as established by the parties during the negotiations and the execution of the agreement." *Id.*, ¶ 239.
550. PEL's representative asserts that PEL "thought that the Project was a blockbuster." CWS-4, Second Witness Statement of Ashish Patel, ¶ 32. Thus, indeed, PEL would have feared making these damning disclosures, so PEL instead intentionally concealed these material facts – all along the way – and that violates the principle of good faith.
551. Importantly, if the Judgments had been revealed by PEL to the MTC, and the MTC had refused to have any further dealings with PEL for the aforementioned reasons, this Tribunal would be hard-pressed to find that the MTC had not been fully justified in its decision.
552. Sixth, PEL violated the principle of good faith by failing to make the disclosures during the course of its alleged transfer of information to the MTC. According to PEL, these exchanges extended over a year, from April 2011 through 15 June 2012. This provided many opportunities for PEL to make the disclosures, but PEL never disclosed.

553. Seventh, PEL violated the principle of good faith by failing to make the disclosures precisely during the window of time in which the MTC was deciding whether to approve PEL's PFS (between PEL's presentation of the PFS on 2 May 2012, and the MTC's alleged approval of the PFS on 15 June 2012).
554. This window of time was critical, according to PEL's legal theory about the making of its investment. PEL alleges that "PEL received, upon approval of the PFS by the MTC, a right to implement the Project through a concession with the Government and the subsequent profits that would flow from that work." SOD ¶ 12. PEL alleges that, "[i]n the weeks following PEL's presentation of the PFS to the Mozambican delegation, PEL engaged in further detailed technical and commercial discussions with various experts and officials from both the MTC and CFM." *Id.*, ¶ 14. Professor Medeiros also states that, "the behavior of the Parties 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." **CER-3**, Medeiros Second Expert Report, ¶ 19.4. However, at no time during these discussions, did PEL disclose to the MTC that it had been blacklisted in India precisely because PEL had reneged on the commercial terms of its bid to the NHAI.
555. As stated by Mr. Zucula and Mr. Chauque, if PEL had disclosed these facts to the MTC, the MTC's "behavior" would have been dramatically different, and the MTC would have stopped further dealings with PEL. This means that the PFS would not have been, *arguendo*, approved by the MTC, because the PFS was allegedly approved on 15 June 2012, which is after the High Court upheld the PEL's blacklisting on 2 August 2011, and after the Supreme Court upheld PEL's blacklisting on 11 May 2012. If the PFS had not been, *arguendo*, approved by the MTC, PEL would have had no rights under the MOI, and that would have ended dealings between PEL and the MTC. *Inceysa, id.*, ¶ 231 ("[i]n the contractual field, good faith means absence of deceit and artifice *during the negotiation and execution of instruments* that gave rise to the investment, as well as [speaking the] truth.") (Emphasis added). Based on its concealments, PEL defrauded the MTC into allegedly approving the PFS. PEL comes before this Tribunal with unclean hands.

556. Eighth, PEL violated the principle of good faith by failing to make these disclosures between the dates when the MTC allegedly approved the PFS (15 June 2012) and PEL's law expert stated that PEL concluded making of its alleged investment (16 April 2013).
557. The approval of the PFS did not end PEL's disclosure obligation, because PEL concealed the existence of the blacklisting from the MTC to induce it to approve the PFS while the blacklisting was in force (the PFS was submitted on 2 May 2012, and the blacklisting remained in force to 20 May 2012). Similarly, under the principle of good faith, PEL had an ongoing obligation to reveal throughout the making of its investment. PEL's argument, that after the blacklisting ended, it no longer had an obligation to disclose is disingenuous, because a party could then conceal its blacklisting and ran out the clock. Continuing concealment also does not extinguish wrongful acts and is further evidence of bad faith.
558. PEL alleges that it had various communications with the MTC after the alleged approval of the PFS, but again PEL never made the disclosures. In the dark, the MTC continued dealing with PEL. As Minister Zucula recalls, although the PFS was insufficient, "[i]n good faith, the MTC continued discussions and gave PEL the benefit of the scoring advantage for the public tender contest." **RWS-2**, Zucula Witness Statement, ¶ 18. If the MTC had been informed of the blacklisting, it would have ceased dealings with PEL, and never provided PEL with a bidding point advantage nor allowed it to participate in the contest.
559. For example, on 18 June 2012, PEL wrote to the MTC purporting to "exercise" its right of refusal, which according to PEL's theory of the case was an important milestone in making its investment. **R-11**. However, in that letter, PEL continued to conceal that, one month earlier on May 11th, the Supreme Court issued the Judgment upholding the NHAI's blacklisting and ruling PEL is "not commercially reliable and trustworthy." *Id.*
560. Similarly, in a 22 June 2012 letter to the MTC, PEL undertook to have direct negotiations with CFM, which according to PEL's theory of the case was another important milestone in making its investment. PEL stated that it would "dialogue with CFM and keep [the MTC] apprised about the developments on a regular basis." **R-12**. Obviously, if PEL had disclosed its blacklisting to CFM, that also would have ended those conversions.

561. On 5 October 2012, PEL again wrote to the MTC, and this is particularly troublesome. Seeking to induce the MTC to make a direct award, PEL represented to the MTC that:

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

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

562. However, in that letter, PEL continued to conceal from the MTC that PEL’s “vast experience in infrastructure projects” included that, just five months before, on 11 May 2012, the India Supreme Court had entered the Judgment instead adjudging *PEL to be*

“not commercially reliable and trustworthy.”

RER-3, Banerji Expert Report, ¶ 23 (Judgment, Exhibit 7, ¶ 24 (emphasis added)).

563. PEL’s October 5th letter is significant because was PEL asking, precisely, that the MTC execute a concession agreement. In this regard, although PEL was boasting of its alleged “vast experience” with highway infrastructure projects, PEL again concealed that PEL’s experience with those same “highway” projects in India included that it had been blacklisted for *reneging on economic terms*. Because PEL was invoking its “experience” with transportation infrastructure projects to induce the MTC to find extraordinary circumstances to make a direct award, PEL should have stated the entire truth, which included its blacklisting in such a project by the NHAI, particularly given the time overlap.

564. Lack of “trust” was a significant issue in the blacklisting of PEL. As the Delhi High Court held, PEL had “*no qualms in ditching the project at the nth hour.*” PEL overbid the NHAI project to win and then “*ditched it.*” The Supreme Court explained, in holding that PEL “is not commercially reliable and trustworthy,” that PEL “chose to go back on its offer of paying a premium ... after realizing that the next bidder quoted a much lower amount.” Giving this contemporaneous history, PEL’s representation to the MTC that PEL should be provided a direct award based on “trust” also violated the principle of good faith.

565. In Its October 5th letter, PEL notes that the MTC project is of “*is of national importance and will benefit the Government of Mozambique in many ways.*” **R-15** (5 October 2012 letter from PEL to the MTC; emphasis added). However, PEL again conceals the Delhi

High Court affirmed PEL's blacklisting because PEL reneged on its bid on a project "of critical national importance both in terms of their economics and logistical relevance."

566. On 30 January 2013, and as part of the bidding process, the MTC published a request for manifestations of interest. **R-22** and **R-23**. On 8 March 2013, the PGS Consortium, which included PEL, sent an expression of interest to the MTC. **R-24**. However, PEL, as part of the consortium, continued to fail to disclose PEL's blacklisting and the Judgments to the MTC. If those facts had been disclosed, the MTC would not have allowed PEL (independently or through the PGS Consortium) to participate in the public contest. Contrary to PEL's argument, the public contest is not outside the relevant time period for the admissibility analysis. The MTC published the request (30 January 2013), and the PGS Consortium (including PEL) submitted their response (8 March 2013), *before* PEL concluded its investment (which according to PEL's legal expert, is when the Council of Ministers issued its communication on 16 April 2013).
567. Just like "Inceysa acted improperly in order to be awarded the bid that made its investment possible and, therefore, it cannot be given the protection granted by the BIT," *Inceysa*, ¶ 243, PEL violated the principle of good faith, in order to induce Mozambique to continue dealing with PEL including in the tender, and thus PEL's treaty claims are inadmissible.
568. Finally, PEL's attempts, at justifying its failure to disclose, further demonstrate that PEL violated the principle of good faith. PEL's only factual witness that speaks to the concealments is PEL's representative during the negotiations, Mr. Daga.
569. Mr. Daga confirms that the concealment by PEL was *intentional*, because Mr. Daga admits he had knowledge of the blacklisting. Mr. Daga states: "The Government never asked me for any such information ... had it done so, I would have provided the information" Daga Second Witness Statement, ¶ 179. While Mr. Daga disagrees with the term "blacklisting," he does not dispute that PEL "did not disclose [it] to the Government." *Id.*
570. Rather, Mr. Daga argues that the information was allegedly "publicly available," *id.*, ¶ 177, but does not submit evidence of when and where. He also argues that the "Tender Documents" did not "preclude" PEL from participating in the "tender process," because "the impediment that Mozambique relies on prohibited participation" of bidders subject to "professional discipline" emphasis that this is only "while the sanctions lasts," *id.*, ¶ 179.

However, Mr. Daga ignores that the blacklisting was in force while PEL was “making” its “investment,” and the NHAI blacklisting was indeed a “professional” sanction, when one considers the language of the Delhi High Court and India Supreme Court Judgments.

571. Mr. Daga argues that “[a]t 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.” *Id.*, ¶ 180. This argument is wrong. The blacklisting was in force while PEL was “making” its “investment,” and that is the relevant consideration. If the disclosure had been made while the blacklisting was in force, the MTC would have had no further dealings with PEL, and thus PEL would have never been even a participant in the subsequent public tender.
572. What is even more concerning about Mr. Daga’s statements is that they reflect a corporate culture at PEL that, rather than be open, truthful and transparent, PEL “looks for reasons” to “threat the needle” and avoid disclosures. While that may work in defense of legal claims, it is no defense when the issue is equitable, whether PEL was acting in “good faith.”
573. PEL violated the principle of “good faith” by intentionally and repeatedly concealing this material information from the MTC, particularly given the circumstances described above, and by taking the position (which Mr. Daga has confirmed) that “I did not have to tell you before you did not ask me.” This attitude is *repugnant* to the principle of good faith, particularly given the severe criticisms levied of PEL by its home courts – the Delhi High Court and India Supreme Court – that PEL is “not commercially reliable and trustworthy.”
574. It is even more egregious, and reflects terribly on PEL, that Mr. Daga is the PEL representative who sent the letter, dated 5 October 2012, to the MTC, representing that, based on “[t]he vast experience that PEL has accumulated in the development of Infrastructure projects in Roads, Highways, port and railway infrastructure and other undertaking of large dimensions and responsibility, we believe that *makes PEL a candidate that deserves the trust of a direct award.*” See **R-15** (emphasis added).
575. Considering that Mr. Daga has admitted that, when he wrote this letter, he was aware of the NHAI blacklisting (which is part of the “experience that PEL has accumulated in the development of Infrastructure projects”), Mr. Daga violated the principle of good faith and mislead the MTC by stating that PEL “deserves the trust of a direct award,” while at the

- time that he wrote that letter Mr. Daga knew that the India Supreme Court had held (also earlier in 2012) that PEL was instead “not commercially reliable and trustworthy.”
576. Moreover, this breach of the principle of good faith, is not just another “red herring,” as PEL likes to argue. Mr. Daga’s concealment of the India Supreme Court’s ruling came in the context of trying to obtain a direct award, which is at the crux of this dispute.
577. Ninth, PEL violated the principle of good faith by failing to disclose, also because its blacklisting was a change in relevant and material information concerning PEL. Prior to the execution of the MOI on 6 May 2011, PEL already knew that the NHAI had issued its order to show cause to PEL on 24 February 2011. Shortly after the MOI was signed on 6 May 2011, PEL was formally notified of its blacklisting by the NHAI on 20 May 2011. PEL’s argument, repeated often by PEL, its representatives and expert witness, that PEL somehow gets away with nondisclosure because the blacklisting began two weeks after the MOI was signed, is wrong and, instead, further demonstrates PEL’s deceitful character.
578. Regardless of the fact that the NHAI’s notification to PEL of the blacklisting occurred after the MOI was signed, under the principle of good faith, PEL should have informed the MTC of the “change in circumstances” concerning PEL’s suitability as a potential PPP partner. Material changes in circumstances require disclosure. *Plama Consortium*, ¶ 145 (“If a *material change* occurred” concerning the investor (in *Plama Consortium*, the change was related to the investor’s shareholding) “that *could have an effect on the host State’s approval*, the investor was, by virtue of the principle of good faith, obliged to inform the host State of such change. Intentional withholding of this information is therefore contrary to the principle of good faith.”) (Emphasis added). PEL’s blacklisting was, at a minimum, a change in circumstances concerning the “investor” that “*could have an effect on the host State’s approval*” of PEL as a PPP partner. “Could have an approval” is a low threshold.
579. Tenth, PEL also violated the principle of good faith by failing to be transparent and failing to engage in fair dealing with the MTC and Mozambique. PEL had a reciprocal obligation to be transparent towards the host State, yet PEL concealed information relevant and material information to the MTC’s determination whether PEL was a suitable PPP partner. This is a lack of fair dealing, particularly given that the Judgments were pertinent to PEL’s character as a bidder, and overlapped in time with the MTC’s consideration of PEL.

580. As *Inceysa* held, the investor’s “conduct” of failing to disclose material information regarding the investor during the making of the investment (in that case, during the bidding process) “constitute[d] an obvious violation of the principle of good faith that must prevail in any legal relationship.” The tribunal considered that these “transgressions” “made it possible for Inceysa to make the investment that generated the present dispute.” *Id.*, ¶ 237.

581. Similarly, based on the record presented before this Tribunal, and for the foregoing reasons, Mozambique has established that PEL violated the principle of good faith by concealing its blacklisting by the NHIA in India, which remained in force, as well as concealing the Judgments of the Delhi High Court and India Supreme Court upholding PEL’s blacklisting and holding, specifically, that PEL is “not commercially reliable and trustworthy,” which matters concerned PEL’s suitability as a potential PPP partner, and given that PEL’s nondisclosures or concealments overlapped PEL’s “making” of its alleged “investment.”

K. Second, Mozambique Has Established That PEL’s Claims are Inadmissible Because PEL Engaged in Fraudulent Concealment by Failing to Disclose.

582. “[I]t is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection ...” *Minnotte*, ¶ 131, note 191 (citing the principle, *nemo auditur propiam turpitudinem allegans*; emphasis added).

583. As the *Inceysa* tribunal held, the investor could not “enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that *its act had a fraudulent origin and, as provided by the legal maxim, ‘nobody can benefit from his own fraud.’*” *Inceysa*, ¶¶ 240, 242 (emphasis added).

584. In *Inceysa*, the investor was denied treaty protection because it engaged in fraudulent conduct in order to induce being awarded the bid: “since Inceysa acted improperly *in order to be awarded the bid* that made its investment possible and, therefore, it cannot be given the protection granted by the BIT.” *Id.*, ¶ 243 (emphasis added).

585. “[A]fford[ing] protection to investments made fraudulently would have enormous repercussions for those States which signed agreements for reciprocal protection of investments and included the clause ‘in accordance with law’, in order to exclude from the protection of said treaties the investments not made in accordance with the laws and other

norms of the State that receives the investment.” *Id.*, ¶ 250. As discussed below in the section addressing the illegality, the subject treaty invoked by PEL, contains such a clause.

586. Fraudulent conduct includes the *fraudulent concealment of material facts*. In *Plama*, the tribunal dismissed the treaty claim, because the investment was obtained by fraudulent concealment, in breach of the principle of good faith and international public policy.

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

RLA-31, *Plama Consortium*, ¶ 135 (emphasis added).

587. Based on the record, Mozambique has established that PEL’s claims are inadmissible also because PEL engaged in the following *fraudulent nondisclosures or concealments*, that:

- (1) PEL had been blacklisted by the NHAI in India in conjunction with a public transportation project of national importance, and the NHAI’s blacklisting of PEL was in force;
 - (2) The Delhi High Court had rendered a Judgment upholding PEL’s blacklisting; and
 - (3) The India Supreme Court had rendered a Judgment upholding PEL’s blacklisting, and holding that PEL is “not commercially reliable and trustworthy.”
588. PEL had a duty to make these disclosures, under internationally accepted principles, and the time periods when PEL’s blacklisting by the NHAI was in force and of the issuance of the Judgments overlap the period of PEL’s “making” of its alleged “investment.” Under Mozambican law, PEL also had a duty to make these disclosures in connection with the MTC’s public tender, and PEL submitted its statement of interest (the first step in the public tender) also within the time period when PEL was “making” of its alleged “investment.”
589. PEL’s nondisclosures or concealments were “fraudulent,” because PEL had a duty or obligation to disclose and engaged in *intentional* nondisclosure. The intentional nature of the nondisclosure is established by the fact that PEL’s lead negotiator with the MTC, Mr. Daga, has admitted that he was aware of the concealed information (that is, of the NHAI’s blacklisting), and yet did not disclose it to the MTC intentionally, because in his view, the MTC “did not ask”: “The Government never asked me for any such information . . . had it

- done so, I would have provided the information.” Daga Second Witness Statement, ¶ 179. Even if Mr. Daga had been unaware, PEL certainly had knowledge of the information.
590. PEL’s making of its alleged “investment” followed as a “result of a deliberate concealment amounting to fraud, calculated to induce” the MTC to deal with PEL, and it “precludes the application of the protections of the [treaty].” **RLA-31**, *Plama Consortium*, ¶ 135. Because PEL’s dealing with the MTC “had a fraudulent origin,” no liability on the part of Mozambique can arise from them, since “nobody can benefit from his own fraud.” **RLA-30**, *Inceysa*, ¶¶ 240, 242.
591. At a minimum, even in the absence of fraud, the principle of *nemo auditur propiam turpitudinem allegans* is broader, and stands for the proposition that no one can benefit from his/her own wrongs. As noted by the *Inceysa* tribunal, “*Inceysa acted improperly* in order to be awarded the bid that made its investment possible and, therefore, it cannot be given the protection granted by the BIT.” *Id.* ¶ 243. Here, even if the Tribunal did not agree that PEL’s nondisclosures amounted to *fraudulent* concealments (which they did), the record establishes that PEL “acted improperly” in failing to make the disclosures.
592. Indeed, PEL has conceded that, “in order for Mozambique’s fraudulent concealment claim to succeed,” Mozambique must show that PEL had a “legal duty” to make the disclosures and PEL’s failure to disclose was “material.” Reply ¶¶ 667 and 693 (emphasis added). Mozambique has satisfied these two factors. Mozambique also has established that PEL did not make the disclosures and that, by failing to make them, PEL induced the MTC and Mozambique to continue dealings with PEL. As cited above, the former MTC Minister and the MTC legal counsel, who negotiated with PEL have testified they would have exercised their discretion to stop dealing with PEL had PEL made these disclosures, and such a decision by a government agency would have been justified according to the Judgments of the Indian courts, as well as the opinions of Mozambique’s expert witnesses.
593. Accordingly, Mozambique has established that PEL’s treaty claims are inadmissible also because PEL engaged in fraudulent concealment by failing to make the subject disclosures.

L. Third, Mozambique Has Established That PEL's Claims are Inadmissible Because PEL Would Be Unjustly Enriched.

594. The *Inceysa* tribunal held that “[t]he acts committed by Inceysa during the bidding process are in violation of the legal principle that *prohibits unlawful enrichment*.” *Id.* ¶ 253 (emphasis added). “Inceysa resorted to fraud to obtain a benefit that it would not have otherwise obtained. Thus, through actions that violate the legal principles stated above [such as the principles of good faith and that a person should not benefit from his/her wrongs], Inceysa tried to enrich itself, signing an administrative contract with MARN, which, without any doubt, would produce considerable profit for it.” *Id.*, ¶ 255. Because granting “protection to Inceysa” would “favor its unlawful enrichment,” *id.*, ¶ 256, the tribunal was “incompetent to hear the dispute brought before it,” *id.*, ¶ 257.
595. Mozambique has established that PEL's claims are inadmissible because PEL would be unjustly enriched. The inadmissibility of PEL's treaty claims, based on unjust enrichment, is compelled by the facts. PEL and the MTC had a contractual dispute over PEL's rights under the MOI. The MTC agreed to provide PEL a scoring advantage in the public contest. This approach resolved the dispute, because undoing the results of the contest, if PEL's consortium did not prevail, prejudices the winning bidder. PEL's consortium came in third place. Yet, PEL takes the inequitable position that the MTC should ignore the contest results (results the PEL consortium never appealed, and thus waived the right to challenge), and revert to the MOI, which would violate the rights of the winning bidder. PEL seeks over \$100 million in speculative/unproven lost profits for a venture it was never awarded, without quantifying any of the relatively *de minimis* costs of a PFS—costs that PEL agreed to bear under the MOI. This would amount to “unjust enrichment.”
596. PEL also would be “unjustly” enriched by an award, because PEL engaged in wrongdoing (like the investor in *Inceysa*, PEL violated the principles of good faith and that a person should not benefit from his wrongs] to induce, and did induce, the MTC to continue dealing with PEL and allow PEL to participate in the public contest as part a consortium, whereas, if PEL had made the subject disclosures as it had a duty to do, because the disclosures concerned PEL's suitability as a PPP partner, the MTC would have ceased further dealings with PEL, and that decision would have been entirely justified as was foreshadowed by the

- Indian courts. Based on its misconduct, “no tribunal” can “afford protection” to PEL and issue an award that would favor and result in PEL’s unjust enrichment. *Id.*, ¶ 256.
597. PEL’s Reply does not dispute that its claims are inadmissible based on unjust enrichment.
- M. Fourth, Mozambique Has Established That PEL’s Claims are Inadmissible Because PEL Violated the Tender Documents and Mozambican Law by Failing to Disclose.**
598. Mozambique also has established that PEL’s treaty claims are inadmissible, because PEL violated Mozambican law and the tender documents by failing to make the disclosures.
599. A Contracting Party “cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments *made in violation of their laws.*” **RLA-33, Phoenix Action**, ¶ 101 (emphasis added). “The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law. The fact that an investment is in violation of the laws of the host State can be manifest and will therefore allow the tribunal to deny its jurisdiction.” *Id.*, ¶ 102.
600. The foregoing principle – that “*protection is not afforded to illegal investments*” – can be “either based on clauses of the treaties, as in the present case ..., or absent an express provision in the treaty, based *on rules of international law, such as the ‘unclean hands’ doctrine or doctrines to the same effect.*” **RLA-32, Fraport**, ¶ 328 (emphasis added).
601. First, PEL violated Mozambican law and the Bidding Documents, **C-27**, by failing to make the disclosures. The Bidding Documents, at Clause 8, enumerate “impediments” to participation in the public tender process. Clause 8.1(g) states that a bidder is disqualified if it “has defrauded the State.” As discussed above, PEL engaged in fraudulent concealment and, thus, defrauded the State. As a result, PEL’s treaty claims are inadmissible.
602. MTC also concealed that it had signed a secret “side letter” (**C-233**) with its consortium partners. PEL and the MTC had agreed to resolve their contract dispute over the MOI, by the MTC providing the MOI right of preference scoring advantage to the PGS Consortium, in which PEL participated, as part of the public contest for this project. However, PEL concealed from the MTC that this secret “side letter” with its two consortium partners, in which they allegedly agreed and conspired that if the PGS Consortium was not declared

the winner, PEL would revert to making claims that it had a right to a direct award under the MOI, and the consortium partners would actually share in the direct award.

603. This letter establishes further bad faith by PEL. PEL agreed to participate in a public tender contest, and *even before the contest began*, PEL had already decided, and conspired with its partners, that *PEL would not honor the results of the contest if the consortium lost*, and PEL would revert to insisting instead on the MOI, concealing this side letter and *PEL's intent to dishonor the results of the public contest* from the MTC, in order to fraudulently induce the MTC to allow PEL to participate in the contest with a scoring advantage. The side letter was signed on 8 March 2013 (C-233). The secret side letter was signed on the *very same day* that Mr. Daga submitted the expression of interest to the MTC (also 8 March 2013, *see C-26 and R-24*), in response to the MTC's Tender Notice.
604. This constitutes another significant concealment by PEL within the time period in which PEL was "making" its alleged "investment." After participating in the public tender as part of a consortium, PEL's intention to revert to the MOI alone if the PGS Consortium did not prevail, was bad faith, and to the detriment of the MTC, and the prejudice of the winning bidder. PEL concealed this untenable situation that PEL intended to create from the MTC. If, the MTC had awarded the concession nonetheless to PEL, the winning bidder would surely have brought a claim against the MTC arguing the MTC wrongfully granted the concession to PEL, although the PGS Consortium came in third place.
605. Second, PEL violated Mozambican law and the Tender Notice by failing to make the subject disclosures in connection with responding to the MTC's Tender Notice.
606. As discussed above, Clause 2.3 of the MTC's Tender Notice requires that bidders, seeking prequalification for the tender contest, must certify under oath that the bidder "has not been disqualified from conducting commercial activities": "Each member of *the interested party must state, under oath, that it* and its shareholders, as well as its subsidiaries or affiliates, comply with the following ... ii) ... *have not been disqualified from conducting commercial activities*" C-24 (Tender Notice), Clause 2.3 (emphasis added). The disqualification that must be disclosed is not limited to pending disqualifications – there is

no such limitation in Clause 2.3. The Tender Notice broadly requires the bidder to certify, under oath, that it has “not been disqualified from conducting commercial activities.”⁴¹

607. PEL has provided no evidence that it complied with these requirements and disclosed that PEL had been “disqualified from conducting commercial activities” when the NHAI blacklisted it in India. PEL merely states “[t]he PGS Consortium submitted an Expression of Interest (‘EOI’) in March 2013, in accordance with Mozambique’s deadline.” Statement of Claim, ¶ 206 and note 232 (citing **C-26**, Letter from Kishan Daga of PEL to Minister Zucula of MTC, dated 8 March 2013; this cover letter also was submitted by Mozambique, as **R-24**). However, despite the Tender Notice’s requirements, PEL has produced no evidence that it made the disclosures, in connection with its response to the Tender Notice, which was while PEL was seeking prequalification to participate in the public tender.
608. Mr. Daga’s cover letter, dated 8 March 2013, to the MTC (both parties have the same version, *see C-26* and **R-24**), which according to PEL is its response to the Tender Notice, violated Clause 2.3, by failing to disclose the NHAI’s blacklisting and Judgments. Mr. Daga’s March 8th letter attaches no such disclosures. *See C-26* and **R-24**. PEL also has produced no evidence that it ever made the subject disclosures in response to the Tender Notice – at any later time during the public contest. This submission by PEL to the MTC is also within the relevant time period, so it is material. Specifically, Mr. Daga’s March 8th letter was sent within the time period when PEL was allegedly making its investment, which according to its legal expert, Professor Medeiros, comprises a period up to 16 April 2013.⁴²
609. There can be no doubt that the NHAI’s blacklisting of PEL, and the Indian Judgments upholding the NHAI’s blacklisting, *constitute evidence that PEL has “been disqualified from conducting commercial activities.”* That was the effect of the NHAI’s blacklisting –

⁴¹ Mr. Daga’s statement, that “[t]he Tender Documents only required disclosure of *existing* disqualifications,” Second Daga Witness Statement, ¶¶ 179-180 (emphasis added), is thus wrong.

⁴² Although PEL has introduced as an exhibit Mr. Daga’s March 8th letter (*see C-26*), the cover letter submitted by PEL does not attach the PGS Consortium’s Expression of Interest (“EOI”) that was submitted to the MTC with that letter, and that was required to have the subject certification. Therefore, the Tribunal should draw an inference that PEL did not make the disclosures in the EOI. Based on the passage of time, Mozambique does not have the EOI (**R-24**).

it disqualified PEL from conducting commercial activities (from *contracting with the NHAI*). Therefore, PEL's response to the Tender Notice without the disclosures constitutes (in and of itself) another fraudulent concealment by PEL designed to, and did, fraudulently induce the MTC to allow PEL to participate, through the consortium, in the public tender.

610. Third, PEL's treaty rights are inadmissible because the PEL's alleged investment is an illegal investment under Mozambican law (as discussed in the merits section below). Illegal investments are not protected under international law. *Fraport*, ¶ 332 ("As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.").

611. And Fourth, in its Reply, PEL fails to overcome these inadmissibility grounds.

612. PEL's first repeats that "PEL's temporary debarment by the NHAI in India" postdates "the Preliminary Study and PEL's entry into the MOI. This is an unsurmountable hurdle for Respondent." Reply ¶ 712. As discussed above, there is no unsurmountable hurdle because PEL's nondisclosures overlap the period of time when PEL made its investment.

613. PEL's second argument is an unsupported assertion that "Respondent has failed to prove any illegality under Mozambican law let alone under public international law, which is also fatal to its case." Reply ¶ 713. However, this assertion also is mistaken, as PEL violated various provisions of Mozambican law and the tender documents, as discussed herein.

614. PEL's third mistaken argument, that the bribery is an alleged "red herring," Reply ¶ 714, is addressed below. PEL has failed to dispute that it implicitly offered a bribe to the former MTC Minister, and that its offer of a trip to India to the former MTC Minister is corruption.

N. Fifth, Mozambique Has Also Established That PEL's Claims are Inadmissible Because PEL Violated International Public Policy, by Failing to Disclose.

615. International public policy is defined as "a series of fundamental principles that constitute the very essence of the State, and its essential function is to preserve the values of the international legal system against actions contrary to it." **RLA-30, Inceysa**, ¶ 245.

616. PEL's claims are inadmissible based on PEL's violations of international public policy.

617. First, PEL's nondisclosures or concealments rendered PEL's claims inadmissible, because they violate international public policy, reflected in the principles of good faith and fair dealing, and that a claimant cannot benefit from its own wrongdoing, discussed above. *Plama Consortium*, ¶ 143 (granting treaty "protection" to the claimant's investment "would also be contrary to the basic notion of international public policy - that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal.").
618. Second, PEL's nondisclosures or concealments also rendered PEL's claims inadmissible, because they violate international public policy, reflected in the MZ-India BIT requirement that the investment be in accordance with Mozambican law.
619. "[T]he inclusion of the clause 'in accordance with law' in the agreements for reciprocal protection of investments follows international public policies designed to sanction illegal acts and their resulting effects." *Plama Consortium*, ¶ 247. Such a provision "*is a clear manifestation of said international public policy, which demonstrates the clear and obvious intent of the signatory States to exclude from its protection investments made in violation of the internal laws of each of them.*" *Id.*, ¶ 246 (emphasis added).
620. In its Reply, PEL does not dispute that the MZ-India BIT contains such a provision. Article 1(b) defines an "investment" as made "in accordance with the national laws of the Contracting Party in whose territory the investment is made" **RLA-1**, MZ-India BIT, Art. 1(b). Article 2 states: "This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations" *Id.*, Art. 2.
621. Thus, the *Inceysa* tribunal observed: "It is uncontroversial that *respect for the law is a matter of public policy* not only in El Salvador, but in any civilized country. If this Tribunal declares itself competent to hear the disputes between the parties, it would completely ignore the fact that, above any claim of an investor, *there is a meta-positive provision that prohibits attributing effects to an act done illegally.*" *Inceysa*, ¶ 248 (emphasis added). "It is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which, as already indicated, is a principle of international public policy." *Id.*, ¶ 249.

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

Id., ¶ 252 (emphasis added).

622. And Third, PEL's claims also are inadmissible, because PEL's investment is contrary to Mozambican law, as discussed below in the merits section.

623. PEL's Reply does not dispute that its claims are inadmissible based on public policy.

IV. PEL'S CLAIMS ARE INADMISSIBLE BASED ON ITS ATTEMPTED BRIBERY OF THE MTC MINISTER, AND VIOLATIONS OF THE MOI'S ANTI-CORRUPTION CLAUSE, THE BIDDING DOCUMENTS' ANTI-CORRUPTION PROVISIONS, AND MOZAMBIKAN ANTI-CORRUPTION LAW.

624. Mozambique has established that PEL's claims are inadmissible based on PEL's attempted bribery of the MTC Minister and/or violation of the MOI's anti-corruption clause, the bidding documents' anti-corruption provisions, and Mozambican anti-corruption law.

625. First, PEL's claims are inadmissible based on its attempted bribery of the MTC Minister.

626. Bribery or attempted bribery are grounds that render a claim inadmissible. *Metal-Tech*, ¶ 389 (“[t]he idea ... is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.”); **RLA-36**, *World Duty Free Ltd. v. Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006) ¶ 17 (denial of admissibility of a claim on the basis of corruption is supported by “international public policy”).

627. Former MTC Minister Paulo Zucula, who was the MTC Minister who negotiated directly with PEL, has submitted a sworn witness statement, in which he describes the attempted bribery by Mr. Daga, the lead representatives of PEL:

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

RWS-2, Zucula Witness Statement, ¶ 25 (emphasis added).

628. Mr. Zucula further explains that he:

understood Mr. Daga's suggestion that PEL 'would help me out' *as an indirect or implicit offer of a bribe to me, a Mozambican government official*. It was illegal for PEL to offer to 'help me out.' My personal interests were irrelevant. I immediately told Mr. Daga that I was declining both his invitation for a trip to India and his offer to 'help me out.'

Id., ¶ 26 (emphasis added).

629. Mr. Zucula's explanation that he understood Mr. Daga's statement, that "he would help me out," as an attempted bribe is objectively reasonable. This is because, as Mr. Zucula states, his personal interests are irrelevant. Telling someone that you are going to "help him out" is offering a personal benefit to the person, and that would be offering a bribe, if PEL is offering a personal benefit to Mr. Zucula, a government official.

630. No surprise that Mr. Daga denies "offering a bribe." He is not going to admit it. But what Mr. Daga says in his Second Witness Statement, and what he does not say, is important.

631. Mr. Daga admits sitting next to Mr. Zucula, so there was the necessary privacy. Daga Second Witness Statement, ¶ 174. Mr. Daga states Mr. Zucula was not addressing the project on that "short" flight. *Id.* Mr. Zucula was asking Mr. Daga about his "family." *Id.* Instead, Mr. Daga turned the conversation to the project.

632. Mr. Zucula has indicated that Mr. Daga said "that he was inviting me to 'come visit us in India, so that we may unlock these problems, and we will help you out.'" Mr. Zucula also has stated that he "told Mr. Daga that I was declining both his invitation for a trip to India and his offer to 'help me out.'"

633. Notably, in his Second Witness Statement, Mr. Daga *does not deny* that he stated to Mr. Zucula "that he [Mr. Daga] was inviting me [Mr. Zucula] to 'come visit us in India, so that we may unlock these problems' *Id.*, ¶¶ 173-175. Mr. Daga also *does not deny* that Mr. Zucula "denied his invitation for a trip to India" As discussed below, Mr. Daga *also does not deny* that the offer of the trip, in and of itself, violates the anti-corruption provisions in the MOI and bidding documents, and Mozambican anti-corruption law.

634. Mr. Zucula has stated that, at the time, “PEL was struggling to gain traction with its post-PFS negotiations.” Zucula Witness Statement, ¶ 25. Mr. Daga *also does not deny* this point, and *does not deny* that he offered Mr. Zucula this trip to India to “unlock these problems.” Mr. Daga offers no explanation why it would be necessary to go to India to “unlock problems.” Mr. Zucula testified that Mr. Daga’s statement that he wanted to “unlock these problems” was immediately followed by Mr. Daga’s statement he would “help me [Mr. Zucula] out.” The business reference is followed by the personal benefit.
635. Mr. Daga denies he told Mr. Zucula he would “help him out,” *but does not deny* that Mr. Zucula “told Mr. Daga that I was declining both his invitation for a trip to India and his offer to ‘help me out.’” Mr. Daga *does not dispute* that Mr. Zucula told him that he was declining his “offer” to “help me out” – Mr. Daga simply denies making the “offer.”
636. As discussed below, the offer of a trip to a Mozambican government official is, in and of itself, an act of corruption under Mozambican law. The trip confers a personal economic benefit on the government official, regardless of whether Mr. Daga also said to Mr. Zucula that “we would help you out.” The *offer of the trip alone* is sufficient to constitute a bribe, because the offer of that economic benefit was directly linked by Mr. Daga to “unlock[ing] these problems.” Again, it must be emphasized that, in his Second Witness Statement, Mr. Daga does not deny that he offered the trip (the financial benefit) to Mr. Zucula, and offered it in the context of “unlock[ing] these problems.” (If, after reading this analysis, Mr. Daga submits a new witness statement also denying these statements, it would not be credible).
637. PEL argues Mr. Zucula has been charged with corruption unrelated to the subject matter of this dispute. Mozambique was transparent about this in its Statement of Defense. That, however, does not establish that what Mr. Zucula recounts in his witness statements did not happen. Conversely, the Tribunal also must consider and weigh *PEL’s own character*, as reflected in the circumstances under which the NHAI blacklisted PEL, as well as in the Judgments of the Delhi High Court and India Supreme Court about PEL, all of which reflect terribly and negatively on PEL’s own character and bring its words into doubt.
638. If the Tribunal concludes that, based on the record, there is, at a minimum, a reasonable possibility that Mr. Daga attempted to bribe Mr. Zucula (and that reasonable possibility exists because it is undisputed that Mr. Daga offered the trip (the financial benefit) to Mr.

Zucula in the context of “unlock[ing] these problems”) that is sufficient to constitute corruption and/or attempted robbery, which renders PEL’s claims inadmissible.

639. Second, in addition or in the alternative, and regardless of whether the Tribunal finds that Mr. Daga spoke the words that he was going to “help me [Mr. Zucula] out,” PEL’s claims also are rendered inadmissible based on PEL’s violation of the violated the anti-corruption clauses in the MOI and the bidding documents, and Mozambican anti-corruption law.
640. Mr. Daga’s has not denied that he offered Mr. Zucula a trip to India, and that Mr. Zucula told Mr. Daga he was declining his offer of a trip to India. Mr. Daga’s offer to Mr. Zucula of a trip to India, in and of itself, violated the anti-corruption clauses in the MOI and the bidding documents, and Mozambican anti-corruption law.
641. In his witness statement, Mr. Zucula also indicated that,

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

RWS-2, Zucula Witness Statement at ¶ 26 (citing MOI, **R-1** & **R-2**, Clause 9) (emphasis added).

642. In addition, the bidding documents, **C-27**, Clause 8.5, also expressly provides that a bidder is disqualified if it violates Mozambican anti-corruption law.
643. Based on Mozambican anti-corruption law, Clause 9 of the MOI prohibits PEL from offering any “gifts, payments, remunerations or other types of offers” to government officials. However, in his witness statement, Mr. Daga *does not deny* offering the trip to India to Mr. Zucula, *does not deny* that Mr. Zucula rejected Mr. Daga’s offer of a trip to India (and that Mr. Zucula never went on that trip to India), and *does not deny* that the offer of a trip to a Mozambican government official violates Clause 9 of the MOI, Clause 8.5 of the bidding documents, and Mozambican anti-corruption law. Similarly, in its Reply, PEL *does not deny* that Mr. Daga offered *the trip* and *the trip offer* violates the anti-corruption clauses in the MOI and bidding documents, and Mozambican anti-corruption law.

644. Mr. Daga's offer of the India trip to Mr. Zucula violated, at a minimum, the anti-corruption clauses in the MOI and the bidding documents, and Mozambican anti-corruption law, and constitutes additional grounds to hold PEL's claims inadmissible.

V. PEL'S REPEATED ACCUSATION THAT THE REPUBLIC OF MOZAMBIQUE IS ENGAGING IN "GUERRILLA TACTICS" IS PERJORATIVE AND INSULTING TO THE POLITICAL HISTORY OF MOZAMBIQUE, AND IS FURTHER GROUNDS TO FIND PEL'S CLAIMS INADMISSIBLE.

645. PEL's repeated accusation that the Republic of Mozambique is engaging in "*guerilla tactics*" in this arbitration is pejorative and insulting to the political history, including the revolutionary and human rights struggles, of Mozambique, and is further grounds to find PEL's treaty claims inadmissible.

646. The Mozambican War of Independence was an armed conflict between the insurgent revolutionary forces of the Mozambique Liberation Front or FRELIMO (*Frente de Libertação de Moçambique*) and Portugal, which lasted ten years, between 1964 and 1974. Portugal's severe and inhumane history of exploitation and mistreatment of the Mozambican population was the impetus for the War of Independence. FRELIMO had little hope for achieving a conventional military victory against a significantly larger Portuguese military force. Thus, FRELIMO's hopes rested on urging the local populace to support the insurgency, which resulted in a forced negotiated independence with Portugal. The 1974 Lusaka Accord mandated turn-over of power to FRELIMO.

647. As the International Court of Justice later recounted in the case of *Portugal v. Australia*, 1995 I.C.J. 90, 1995 WL 688255 (Judgment, 30 June 1995), **C-99**, the United Nations supported the insurgents' cause, not only in Mozambique, but Angola and Guinea Bissau. "[I]n resolution 312 (1972), the Security Council reaffirmed 'the inalienable right of the peoples of Angola, Mozambique and Guinea (Bissau) to self-determination and independence' and recognized 'the legitimacy of their struggle to achieve that right' (para. 1). The same position is reflected by Council resolution 322 (1972) and by General Assembly resolutions 2270 (XXII), 2395 (XXIII) and 2507 (XXIV)." *Id.*, ¶ 8. "The United Nations also decided to take steps which went further than mere calls and affirmations. In resolution 180 (1963) the Security Council requested that 'all States should refrain forthwith from offering the Portuguese Government any assistance which would enable it

to continue its repression of the peoples of the Territories under its administration, and take all measures to prevent the sale and supply of arms and military equipment for this purpose to the Portuguese Government' (¶ 6).” *Id.*, ¶ 9. The World sided with the insurgents in Mozambique, Angola and Guinea Bissau supporting their fight for freedom from Portugal.

648. Needless to say, the Portuguese occupation and oppression of the Mozambican populace, and Portugal’s ten-year military campaign against Mozambique’s independence, resulted in countless human rights abuses and unmeasurable suffering within Mozambique. Accordingly, the insurgent freedom fighters of FRELIMO are heroes and martyrs of the Mozambican War of Independence, and a proud part of Mozambican political history.
649. Throughout this arbitration, PEL has made various *ad hominem* accusations against the Republic of Mozambique. PEL has now gone too far. PEL accuses Mozambique of engaging in “*guerilla tactics*” (both here and in the ICC arbitration). The following are some examples of PEL labelling of Mozambique’s legal defense as “*guerilla tactics*”:
- “Mozambique’s *guerrilla tactics* are not confined to causing chaos by commencing parallel proceedings.”), PEL’s Reply on the Merits and Response to Objections on Jurisdiction, PCA Proceedings, ¶ 31 (emphasis added).
 - “The [Stay] Application is double-down of such *guerilla tactics*.” Claimant’s Response to Respondent’s Application for a Stay of the Proceedings, PCA Proceedings, ¶ 34 (emphasis added).
 - “Claimants [in the ICC, Mozambique] sought to establish (a one way only) confidentiality between the two arbitrations, so as to *camouflage their guerilla tactics*.” Respondent’s [in the ICC, PEL] Stay Application, ¶ 24 (emphasis added).
650. PEL’s repeated labelling of Mozambique’s legal defense as “*guerilla tactics*” is pejorative and insulting to the political history of Mozambique. It goes beyond a total lack of civility, for PEL to implicitly analogize, by repeatedly using the label “*guerilla*,” between the Mozambican government’s legal defense of PEL’s claims in these arbitration proceedings, and the revolutionary and human rights struggles of Mozambique.
651. PEL counsel’s repeated use of the term “*guerilla*” against Mozambique is particularly poignant and offensive given that PEL’s counsel include two *Portuguese* law firms

(Miranda & Asociados and Pimenta & Asociados) *that know better* (Miranda & Asociados even has an affiliated office in Mozambique), and three United Kingdom law and barrister firms (CMS Cameron McKenna Nabarro Olswang LLP, Doughty Street Chambers, and previously Addleshaw Goddard LLP) *that know or should know better*.

652. For law firms, particular law firms based in countries with colonial histories like the United Kingdom and Portugal, to repeatedly accuse a former colonial territory, Mozambique, of engaging in “guerilla tactics” is reprehensible. The World no longer accepts such behavior, whether it be in politics, commerce, social relations or international arbitration.
653. PEL’s accusations that Mozambique is engaging in “guerilla tactics” go beyond political insensitivity, and demonstrate PEL’s vitriol and a complete lack of respect towards the host State. PEL’s accusations further *confirm* that PEL would have been a terrible PPP partner.
654. PEL’s accusations cannot be tolerated by this PCA Tribunal. This arbitration proceeding is being administered under the auspices of the Permanent Court of Arbitration. The PCA seats at not less than the Peace Palace, at The Hague, which also houses the International Court of Justice. PEL’s accusations that Mozambique is engaging in “guerilla tactics” is no small matter, and cannot be dispelled as inconsequential to the Tribunal’s deliberations.
655. This Tribunal cannot allow a party to an international arbitration, which is represented by multiple international legal counsel, to insult and show a complete lack of respect for the political history, including the revolutionary and human rights struggles, of the respondent Sovereign State. This Tribunal should have no part of it, nor should tolerate it.
656. PEL’s repeated accusations that the Republic of Mozambique is engaging in “guerilla tactics” are further grounds for this PCA Tribunal to hold, and this Tribunal must hold, that PEL’s treaty claims are inadmissible. At a minimum, the Tribunal should issue an “issue sanction” that, even if it *arguendo* finds liability, PEL will be awarded no damages.

- VI. THIS TRIBUNAL LACKS JURISDICTION OVER PEL’S TREATY CLAIMS. THIS DISPUTE DOES NOT ARISE FROM AN INVESTMENT BECAUSE (1) THE MOI AND ATTENDANT RIGHTS ARE NOT AN “INVESTMENT” BUT A MERE OPTION, (2) THERE WAS NO EXERCISE OF SOVEREIGN POWER, (3) PEL IS NOT AN INVESTOR, (4) ASSIGNED ITS RIGHTS AND FAILED TO EXHAUST LOCAL REMEDIES, AND (5) THE BIT HAS BEEN TERMINATED.**
657. Mozambique has established that the Tribunal lacks jurisdiction over PEL’s treaty claims, because this dispute does not arise from an “investment.” Under unanimous investment treaty precedents, the MOI and its attendant rights are not an “investment.” The MOI and its attendant rights are an option or a contingent right of preference. The precedents are consistent in holding that such rights do not constitute an “investment.”
658. In addition, the Tribunal lacks jurisdiction because there was no exercise of “sovereign power” by the MTC or Mozambique in connection with the MOI or related dealings with PEL; PEL is not an investor because it made no “investment”; in any event PEL assigned its right to the PGS Consortium, and cannot turn back the clock after it lost the public tender as that would be unjust to the winning bidder; and the BIT was terminated by India (PEL’s sovereign) prior to the time when PEL consummated any “investment.”
659. In its Reply, PEL does not dispute that the jurisdictional analysis must begin with the premise that “[c]laimants have the burden of proving that this Tribunal has jurisdiction.” **RLA-42**, *Caratube Int’l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (27 September 2017) ¶ 309. This means that PEL must establish jurisdiction; thus, any questions in this regard must be resolved in favor of Mozambique.
660. The Tribunal lacks jurisdiction *ratione materiae*, *ratione personae*, and *ratione temporis*, for the various alternative reasons, that follow.
- A. This Tribunal Lacks Jurisdiction (*Ratione Materiae*) Because The MOI and PEL’s Related Activities and Expenditures Are Not an “Investment” under International Law. At Most, The MOI, *Arguendo*, Provided PEL Contingent Rights (A Right of Preference) or an Option, Which Are Not an “Investment.”**
661. Mozambique has established that the Tribunal lacks jurisdiction (*ratione materiae*), because the MOI and its attendant rights are not an “investment,” under the investment treaty precedents. *All* investment treaty tribunals that have addressed the issue have *unanimously* concluded that *contingent rights are not an “investment”* pursuant to international law. Here, the MOI and its attendant rights were contingent on the occurrence

of certain specified conditions. Only after these conditions were satisfied, did the MOI provide PEL with a right in the nature of an *option* (that is, a *right of preference/direito de preferência* or, assuming *arguendo*, a *contingent right of first refusal*) but, again, the existence of these rights was entirely dependent on the fulfillment of the conditions specified in the MOI. As such, the MOI and its attendant rights are not an “investment.”

662. Entering into a contract, like the MOI (assuming *arguendo* that it is valid and enforceable) that merely provides the option of entering into a concession or PPP agreement contingent on the satisfaction of certain conditions is different, obviously, from entering into the concession or PPP agreement, which constitutes the “investment” under the precedents. It is undisputed that the MOI and its attendant rights were contingent on the occurrence of certain specified conditions.⁴³ As a result, that PEL engaged in pre-investment activities and dealings with the MTC, and made pre-investment expenditures, in connection with the MOI, does not give rise to an “investment.”
663. First, the issue that the MOI and its attendant rights are alleged contingent rights, and not an “investment,” must be addressed up-front and center in the jurisdictional analysis, because it is conclusive on this Tribunal’s lack of jurisdiction.
664. To try to detract attention from this dispositive issue, PEL buries its discussion, of whether the MOI and its attendant rights are contingent, in the *Salini* factors. See Reply ¶¶ 599-610. However, this issue must be addressed first (regardless of whether it also fits within the *Salini* factors) because, given that the MOI and its attendant rights are not an “investment” under the investment treaty precedents – that is, under international law generally – this, alone, mandates dismissal of these proceedings for lack of jurisdiction.
665. This is so because 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*.” **RLA-33**, *Phoenix Action*, ¶ 77 (emphasis added). Thus, even if the asset or right fits within the general definition of an investment, or within one of the

⁴³ For purposes of the jurisdictional analysis, it matters not whether the conditions in the MOI were satisfied and why. The Tribunal looks to the underlying instrument to determine the nature of the contract (the MOI, assuming *arguendo* that it is valid and enforceable (which it is not), is the only contract) and it is *contingent*. Otherwise, the Tribunal would be reversing the proper order of the analysis, and improperly creating jurisdiction on the basis of alleged fault or liability.

examples of an investment, set forth in the subject BIT, the tribunal must still consider whether the asset or right may properly be considered an “investment” in the developing investment treaty jurisprudence. See **RLA-53**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) ¶¶ 45-47 (emphasis added) (“To conclude that *a contingent liability* is an asset under Article 1(a) of the Treaty and hence a protected investment, *would really go far beyond the concept of investment*”; “[e]ven if a claim to return of performance ... has a financial value” under Article I(a)(iii), “it cannot amount to *recharacterizing as an investment dispute* a dispute which *in essence concerns a contingent liability*.”).

666. *Joy Mining* is on point. Regardless of the fact that the claimant asserted that its rights and claims satisfied the definitions of an investment in the treaty, consideration must still be given to the general concept of an “investment” under international law. Considering the *overarching understanding* of what constitutes an investment in international law, the *Joy Mining* tribunal rejected the claimant’s argument that its alleged right, which amounted to a contingent right, is an asset regardless of the definition of an investment in the treaty.
667. Thus, PEL’s arguments, in its Reply ¶¶ 610-611, that “[e]ven if the ICSID cases relied upon by Mozambique are relevant ..., PEL has made a qualifying investment in accordance with Article 1(b) of the Treaty,” fail, because PEL cannot overcome the contingent nature of the MOI and its attendant rights, by pointing to definitions (Article 1(b)) in the treaty.⁴⁴

⁴⁴ In its Reply ¶¶ 591-592, PEL argues that “certain tribunals have examined the notion of ‘investment’ under Article 25(1) of the Convention in light of ICSID practice. Respondent relies on these decisions to argue that PEL’s investment is not a qualifying investment because it is a mere ‘option’. Respondent’s argument should be rejected outright because the authorities interpreting the notion of investment under the ICSID Convention are not relevant” However, elsewhere, PEL contradicts itself and cites authorities “interpreting the notion of investment under the ICSID Convention” when it is convenient to PEL. Reply ¶ 513(b) (PEL cites **CLA-86**, *Koch Minerals Sarl and Koch Nitrogen Int’l Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, which discusses the “holistic approach to the meaning of ‘investment’ in Article 25(1) of the ICID Convention,” ¶ 6.59). The cases cited by Mozambique (discussed below) represent the status of international law; they are relevant because the definitions of “investments” in BITs must be interpreted in the context of international law. As noted in, **CLA-87**, *Mytilineos Holdings SA v. State Union of Serbia & Montenegro and Republic of Serbia*, (cited by PEL’s Reply ¶ 576), “[i]t must also be considered whether these activities constitute an ‘investment’ *in the usual practice of investment arbitration* to be within the Tribunal’s jurisdiction.” *Id.*, ¶ 88 (emphasis added).

668. Second, under the investment treaty precedents, the MOI and its attendant rights are not an “investment.” The MOI and its attendant rights are *contingent rights, dependent* on the occurrence of conditions specified in the MOI. Only after these various conditions are satisfied, did the MOI provide PEL with a right in the nature of an *option* (that is, a *contingent right of preference/direito de preferência* or, assuming *arguendo*, a *contingent right of first refusal*). As such, the MOI and its attendant rights cannot be an “investment.”
669. In its Reply, PEL ignores the starting point, that “[t]o date, most tribunals have been *reluctant to consider pre-investment activities and expenditures, which do not ultimately come to fruition, as covered investments.*” **RLA-130**, Barton Legum, Investment Treaty Arbitration Review at 11 (Law Business Research Ltd. 2020) (emphasis added). That is precisely the situation here, regardless of PEL’s pre-investment activities and expenditure, the MOI provides only an alleged option or alleged contingent rights, and a PPP concession agreement between PEL and the MTC never came to fruition. As a result, the MOI (even if valid) and its alleged attendant rights are not an “investment” under international law.
670. The decision in *Joy Mining*, is on point. The dispute arose out of a “Contract for the Provision of Longwall Mining Systems and Supporting Equipment for the Abu Tartur Phosphate Mining Project,” executed between Joy Mining Machinery Ltd. and the General Organization for Industrial and Mining Projects of the Arab Republic of Egypt (“IMC”). *Id.*, ¶ 15. “[S]ince the outset each party [] claimed that performance problems which surfaced [were] to be blamed on the other.” *Id.*, ¶ 18. “Joy Mining submitted the dispute to ICSID arbitration under the” UK-Egypt BIT. *Id.*, ¶ 22. Joy Mining claimed “the Contract is an investment under this Treaty and that the decisions by IMC and Egypt not to release [the subject contractual] guarantees are in violation of the Treaty. In particular, it is claimed that nationalization or measures having an effect equivalent to expropriation have been undertaken in respect of the bank guarantees, that the free transfer of funds has been prevented, that discrimination has taken place and that, generally, fair and equitable treatment and full protection and security have not been accorded.” *Id.*, ¶ 22.
671. To try to establish an “investment,” Joy Mining argued that, as “[t]he Contract specifies, ... the Company’s scope of work included, among other items, engineering and design,

delivery of materials and equipment, spare parts, maintenance tools, supervision of installation, inspection, test start-up operations and commissioning, training of personnel and technical assistance. Some of these activities involved long-term commitments by the Company, such as the obligation to produce and maintain stocks of spare parts for a period of not less than ten years.” *Id.*, ¶ 37.

672. The *Joy Mining* tribunal first addressed the issue of the “existence of an investment.” *Id.*, ¶ 41 (heading of the section starting with ¶ 41). “The first contention of [Joy Mining] in this respect is that the bank guarantees *constitute an asset* which thus *qualifies* under the *definition of investment of the Treaty*.” *Id.*, ¶ 44 (emphasis added).

673. The *Joy Mining* tribunal concluded that the bank guarantees were not an “investment,” because they were *contingent* in nature.

The Tribunal *is not persuaded* by the [Joy Mining]’s argument *that this is an investment*, as a bank guarantee *is simply a contingent liability*.

Id., ¶ 44 (emphasis added).

674. In this regard, the *Joy Mining* tribunal explained that,

To conclude that a contingent liability is an asset under Article 1(a) of the Treaty and hence a protected investment, *would really go far beyond the concept of investment, even if broadly defined, as this and other treaties normally do*.

The Company has also asserted that its claim falls within Article I(a)(iii) of the Treaty which includes within the scope of investment ‘*claims to money or to any performance under contract* having a financial value’, and that it also should be considered a ‘pledge’ under Article I(a)(i) of the Treaty.

The Tribunal is not persuaded by this argument either. *Even if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterizing as an investment dispute a dispute which in essence concerns a contingent liability*.

Id., ¶¶ 45-47 (emphasis added).

675. Therefore, the holding in *Joy Mining* is clear. Under international law, when the alleged asset, whether it be a contract or a right, *is contingent in nature*, it is not an “investment,” regardless of whether the alleged contract or right otherwise fits within the definition of an

“investment” in the BIT. This is so even if the asset is a claim to money or performance under contract having financial value, because it is a mere contingent contract or right.

676. Considering the *overarching understanding* of what constitutes an investment in international law, the *Joy Mining* tribunal thus rejected the Joy Mining’s argument that its alleged right, which amounted to a “contingent” right, is an “investment” regardless of the definition of an investment in the treaty. In addition, the *Joy Mining* tribunal also rejected the Joy Mining’s argument that its claim, that the claimant was entitled to performance under contract having a financial value, would suffice, because that would recharacterize as an investment dispute a dispute which in essence concerns a contingent liability.
677. Similarly, in *PSEG Global*, the tribunal concluded that option agreements are not an “investment.” **RLA-55**, *PSEG Global Inc., The North Am. Coal Corp. & Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction (4 June 2004). Specifically, the *PSEG Global* tribunal held that one of three claimants lacked standing where its only link to the case was a Memorandum of Understanding (“MOU”) that conferred an option to acquire an ownership interest by means of a shareholders’ agreement to be negotiated at a later time.

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

Id., ¶ 189 (emphasis added). There is “a limit” as to what “can reasonably encompass an “investment,” and that limit is imposed by international law. The *PSEG Global* tribunal held that an “option” cannot be “interpreted” as an “investment,” echoing *Joy Mining*.

678. Here, the MOI and its attendant rights are *contingent* in nature, and therefore they are not an “investment” under international law, regardless of the definitions in the MZ-India BIT.
679. As detailed below in the merits section, the MOI, in and of itself, did not – and could not – grant PEL the PPP concession. Rather, the MOI provided PEL with a *contingent direito de preferência* (as stated in Clause 2 of both parties’ controlling Portuguese MOIs, R-1, C-

5b) that pursuant to Clause 8 was subject to Mozambican law. The *direito de preferência* was *conditioned* upon PEL submitting an acceptable PFS for that purpose. Mozambique’s generally-applicable PPP laws promulgated shortly after the MOI defined the “*direito de preferência*” in the context of an unsolicited PPP proposal (like PEL’s), as a 15% scoring advantage in a public tender. Specifically, in the PPP Law, public tenders are required absent a finding of “exceptional” and “last resort” circumstances (a finding never made in the MOI or PFS), and entities deemed to be the proponent of an unsolicited PPP proposal (as PEL claims to be) are provided a “*direito e margem de preferência de 15%*” in the public tender. **RLA-6**, Mozambique Law No. 15-2011, Art. 13(1) & (5).⁴⁵ Therefore, the MOI provided PEL a *contingent* “right” (*contingent* because the right was *dependent on PEL’s satisfaction of various conditions* specified in the MOI) to receive a valuable 15% scoring preference in the public tender – but did not vest PEL with any concession.

680. As former Minister Zucula explains, “[t]he MOI is a contingent document, or gentlemen’s agreement to try to agree, and not a binding contract for a concession.” **RWS-2**, Zucula Witness Statement, ¶ 6.⁴⁶ “Under the MOI, various conditions had to be satisfied by PEL in order to obtain a right of first refusal” *Id.*, ¶¶ 9-10. Even the “right of first refusal is a right that PEL could have decided not to exercise, and thus there was no binding commitment by both parties to enter into a concession.” *Id.*, ¶ 7. “The MOI also did not

⁴⁵ “The ‘*right of preference*’ contemplated in the MOI, to be provided to PEL under certain contingencies, such as the approval of the [PFS], was the ‘right of preference’ specified in Mozambican law with respect to unsolicited PPP proposals or private initiative. This ‘preemptive right’ was defined in Law No. 15/2011, art. 13 (5), as a ‘15% preemptive right and margin’. That is, the ‘preemptive right’ of Clause 2(2) of the MOI is the same 15% ‘preemptive right’ that Mozambican law provides for PPP proposals submitted by private initiative, which require a public tender. Mozambican law, as provided for in Art. 13 (5) of Law No. 15/2011, is also clear that in the context of unsolicited proposals, such as that suggested by the PEL, the entity considered as the proposer receives a scoring advantage and is not entitled to compensation for the costs incurred in preparing the proposal.” **RWS-1**, Chauque Witness Statement, ¶ 13; **RWS-2**, Zucula Witness Statement, ¶ 6.

⁴⁶ The “MOI does not grant PEL the right to implement the project *ab initio*. The MOI aims to regulate the feasibility study of the project, which would be implemented based on a partnership between the Public and Private Sector (PPP) where the definition of the basic terms and conditions for the granting of a concession for the construction, operation and exploration of the Project, would be made by the Government of Mozambique to PEL.” **RWS-1**, Chauque Witness Statement, ¶ 23.

contain the necessary terms for a PPP concession and did not go through the necessary approvals for PPP concessions, because it was not intended to award the concession to PEL. PEL would later request a direct award, which confirms it was not given by the MOI.” *Id.*

681. As Mr. Chauque observes, the MOI also was conditional, because it “recognize[d] that the project may not be technologically or commercially viable: ‘If, for any reason, the aforementioned corridor is considered to be technically and commercially unviable, the signatory parties agree to sign a new memorandum to carry out another study for the purpose similar.’ *See* Clause 7.” **RWS-1**, Chauque Witness Statement, ¶ 15.
682. As opined by Mozambique’s local PPP expert, even considering the PFS, “the MOI and PFS cannot be viewed as sufficient or prudent basis *to grant a concession* for a Project of this size, type, and complexity.” **RER-6**, Betar Second Expert Report, ¶¶ 6-11 (emphasis added). No government would provide “a ‘blank cheque’ for a private company to develop [a] 3 billion USD Project without requiring defined ‘terms and conditions’ and only in exchange of a ‘study’ without significant investment.” *Id.*, p. 30/31.
683. Mr. Chaque explains that “the MOI simply promised a *direito de preferência* if PEL conducted, at its own expense, a PFS acceptable for that purpose, and thus made a similar bargain as what the PPP law would specify concerning the *direito de preferência* afforded to proponents of unsolicited proposals on PPP projects.” **RWS-3**, Chauque Second Witness Statement, ¶ 20. “Neither the MOI nor the subsequent pre-visibility study *specified the material terms* for a long-term rail and port concession.” **RWS-1**, Chauque Witness Statement, ¶ 7 (emphasis added). “Nor did MTC request that PEL provide the commercial terms of the concession—*e.g.*, concession fee, duration, project partners, etc.—prior to approving the PFS. It would have been extremely unusual and inappropriate for MTC to promise or grant PEL the concession based only on PFS approval, as that would effectively give PEL a “blank check” as it relates to negotiating the terms and conditions of the concession, including the many fundamental commercial terms not specified in the PFS or elsewhere.” **RWS-3**, Chauque Second Witness Statement, ¶ 21. Mr. Chaque concludes that, ultimately, the “*MTC never granted PEL the concession after PFS approval*

or acted as though PEL had received the concession once the PFS was approved.” *Id.* (emphasis added).

684. As Mozambique’s international PPP expert opines, “[a]n entity would have understood that the right was non-binding and not a guarantee of an award, definitive concession agreement, or successful project execution.” **RER-11**, Ehrhardt Expert Report, ¶¶ 103-107. “MOUs are not legally binding. They cannot be binding because governments will not, and indeed cannot, commit to a deal without knowing the terms. So, while an MOU is generally *an honest statement of intent*, the obligation on government is moral, not legal – at least *as these matters are generally understood in the industry*. *An agreement to agree on deal terms is simply not considered enforceable in the industry in the same fashion as an actual, definitive agreement.*” *Id.*, ¶ 106. “*An experienced entity would not have thought it had a legally enforceable agreement based only on a MOU or even a term sheet.* And here, the MOI at issue is less specific than either of those preliminary documents of intent – indeed, it specifies none of the basic terms and conditions of a concession. As the record demonstrates, PEL itself knew that a *lengthy definitive concession agreement was ultimately required* to secure concession rights – making the MOI, by definition, not the definitive and binding agreement.” *Id.*, ¶ 107 (emphasis added).
685. In any event, *it is undisputed that PEL and the MTC never executed any PPP concession agreement*, and the concession for this project was instead granted to the winning bidder of the public tender contest, ITD (the Italian-Thai Development Public Company Limited). Therefore, this is a case where *a PPP concession was never established*.
686. Obviously, Mozambique and PEL disagree on what were the alleged contingent rights of PEL under the MOI, but there can be no dispute that these alleged rights (whatever they are) *were contingent*, even if one considers PEL’s own reading of the MOI.
687. PEL defines its “investment” *as convenient* to its different arguments. While in opposition to Mozambique’s argument, that PEL did not make an “investment” as defined in the BIT, PEL argues for a “holistic” approach (Reply ¶ 532), when confronted with the argument that the investment did not comply with local law, PEL argues strictly that: “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.” Reply ¶ 548. Regardless of what PEL

argues, “[t]he tribunal must identify precisely the dispute brought before it.” **RLA-53**, *Joy Mining Machinery*, ¶ 41. PEL’s theory of the case is that its alleged rights emanate from the MOI.

688. PEL has repeatedly conceded the *contingent nature* of the MOI by arguing that it provided PEL with *an option or conditional right*. For example, in its Reply, *PEL calls the MOI an “option” on multiple occasions*:

- In its Reply ¶ 234, PEL states “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.” (Emphasis added).
- In its Reply ¶ 238, PEL states, on the basis of its witnesses’ testimony, the MOI “*gave PEL the option* to implement the Project by signing a concession agreement with the Government, should the PFS be approved.” (Emphasis added).
- In its Reply ¶ 251, PEL notes that an MTC representative allegedly made a presentation wherein he stated that “PATEL shall benefit from *a right of 1st option* in the eventual implementation of the project.” (Emphasis added).
- In its Reply ¶ 759(b), PEL argues 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.” (Emphasis added).

689. Significantly, even under PEL’s theory of the case, the fact that the MTC had to approve the PFS confirms *arguendo* that PEL’s alleged right to a direct award of the concession (as PEL claims it was provided by the MOI) *was contingent*.

690. In its Reply ¶ 48, PEL argues that Mozambique “made a clear written promise to PEL to grant it a concession in respect of the Project, *subject to conditions . . .*” (Emphasis added). In its Reply ¶ 180, PEL argues that the MTC “grant[ed] PEL a right to a direct award of a concession *subject to the fulfilment of certain conditions*.” (Emphasis added). In its Reply ¶ 557, PEL argues that it had “a right to a direct award of a concession *subject to the fulfilment of certain conditions*.” (Emphasis added). PEL even refers to the conditions as “conditions precedent”: “PEL would directly be awarded a concession upon the satisfaction of the *MOI’s two conditions precedent*.” *Id.*, ¶ 267 (emphasis added). Even PEL’s lead

representative Mr. Daga admits that the MOI contained “conditions precedent” to PEL’s alleged rights. Second Daga Witness Statement, ¶ 94.

691. Even PEL’s own legal expert, Professor Medeiros, concedes that, under the MOI, there were various “*conditions on which the right to the concession depended.*” CER-6, Second Medeiros Legal Opinion, ¶ 15.6.1 (emphasis added). Professor Medeiros later repeats that: “*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.*” *Id.*, Executive Summary (emphasis added).
692. In addition, the fact that PEL could walk away from the project, even after the MTC approved the PFS, confirms *arguendo* that PEL’s alleged right to a direct award of the concession (as PEL claims it was provided by the MOI) *was and option and non-binding.*
693. In its Reply ¶ 200, PEL admits that: “*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.*” (Emphasis added). In its Reply ¶ 234, PEL admits: “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.”
694. Similarly, PEL’s lead negotiation Mr. Daga also admits that, in his opinion, PEL could walk from the project even after the MTC approved the PFS:

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.*

Second Daga Witness Statement, ¶ 57 and 65 (citing even the Portuguese, Mr. Daga declares 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.”) (Emphasis added); Daga Witness Statement, ¶ 39 (the MTC “was insistent that, after reviewing the PFS, *the MTC would have discretion to approve it or not, depending on how satisfied it was with the results.*”) and ¶ 40 (“*PEL would have a right of first refusal of the concession award in the case our circumstances had changed or the concession offered by the Government was no longer in our interests.*”) (Emphasis added). PEL’s admissions, including those of its lead negotiator Mr. Daga, confirm that its alleged right in the MOI was, at best (and even after the MTC approval), *a non-binding option.*

695. Nonetheless, *PEL will argue whatever*, even if it means contradicting itself. PEL seems to have forgotten what it and its witnesses argued above – that its alleged right under the MOI was an “option” – and then takes the completely contradictory position in its Reply ¶ 599, where PEL tries (but fails) to dispute Mozambique’s argument that an “option” is not an “investment.” PEL contradicts itself and argues instead that, “[a]t the outset, Claimant notes that *Respondent mischaracterises PEL’s investment by referring to it as an ‘option’ or ‘a contingent liability.’*” (Emphasis added). PEL’s accusation that Mozambique has mischaracterized the alleged “investment” as an “option” “investment” is frivolous. PEL itself repeatedly mischaracterized its alleged right under the MOI as an “option.”
696. Therefore, even under PEL’s own interpretation, the MOI provided *arguendo a contingent* right to PEL prior to the MTC’s approval of the PFS, and provided *arguendo an option* to PEL after the MTC’s approval of the PFS. The MTC may not have approved the PFS, but even if it did, PEL may not have executed its alleged option, but even if it did, PEL still may not have been able to reach agreement with CMF, but even if it did, PEL would have still had to actually negotiate a mutually-acceptable concession agreement with the MTC, define “all necessary and material terms of the concession,” and attempt to fulfill all the procedures, requirements, and approvals of the PPP regulations, among other things. *See CER-6*, Second Legal Opinion of Rui Medeiros ¶ 15.5; *CER-5*, Second Versant Expert Report, ¶ 210 (“It is Claimant’s affirmative case that . . . Claimant and Respondent should have entered into direct negotiations to agree [sic] the terms of the Concession”).⁴⁷
697. All the foregoing further confirms that, even in PEL’s view, the MOI was a *contingent* document—*conditional* on PFS approval, and on negotiation and execution of a definitive concession agreement, and on the various other approvals necessary for a direct award and for granting concession rights. As to the concession itself, it is plain that the MOI could not be anything more than a preliminary document or an “*agreement to agree*,” because neither the MOI nor the PFS contained the necessary terms and conditions for a concession

⁴⁷ Thus, PEL now submits a new “loss of chance” damages theory that recognizes that PEL did not “negotiate[] key terms for the Concession” and its claimed “back-up” damages are now instead PEL’s alleged “lost opportunity to obtain a Concession agreement for the Project through direct negotiations with Respondent.” *CER-5*, Second Versant Expert Report ¶¶ 22-23, 210.

(they did not even contain PEL's bid price), and because the MTC reserved the right to not approve the PFS, *PEL reserved the right not exercise any "option" – PEL had the right to walk away even after the MTC approved the PFS*, and the parties therefore could not have reached agreement on a definitive concession agreement (as it, in fact, happened – PEL and the MTC never executed any PPP concession agreement for this project).

698. This is even more plain from MTC's sensible, harmonizing interpretation of the MOI, which confirms that the MOI merely provided a *direito de preferência* that was the 15% *direito de preferência* in the necessary public tender. In no circumstance is a *conditional* 15% scoring preference an "investment."
699. PEL's response is, again, its flip-flop argument that "Respondent mischaracterises PEL's investment by referring to it as an 'option' or 'a contingent liability.'" Respondent appears to conflate the MOI, which is a binding contract, 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." Reply ¶ 599. Similarly, PEL argues "the MOI was a binding contract signed by the MTC on behalf of the Government, at an official signing ceremony." *Id.*, ¶ 609.
700. The fundamental defect in PEL's argument (in addition to the fact that MPEL has admitted repeatedly that its alleged rights under the MOI were a mere "option" – even after the MTC would have approved the PFS) is that it speaks of the binding nature of the MOI *in general*. The question is not whether – generally – the MOI is "binding," but rather what is the MOI specifically binding or contingent about? The alleged right (in the light most favorable to PEL) which Mozambique claims emanate from the MOI is a contingent *direito de preferência* that, upon the satisfaction of certain *conditions*, would result in PEL being awarded a scoring advantage in the public contest. The alleged right which PEL claims at the crux of this arbitration – the alleged right to a direct award of a concession, is (arguendo, according even to PEL's own theory) undeniably contingent before the MTC's approval, and a mere option, after the MTC's approval, because it is based on the satisfaction of certain conditions. Even in PEL's own words, "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.” Reply ¶ 599 (emphasis added). It is unremarkable that the MOI is, at the same time, binding (assuming *arguendo* that it is valid and enforceable) in affording rights if these conditions are satisfied. That, however, does not detract from the conclusion that, with respect to the alleged right to the concession for the subject PPP project, that alleged right is *contingent* and or an *option*, and neither qualifies as an “investment.”

701. Third, PEL’s attempts to distinguish *Joy Mining* and *PSEG Global* are flawed and fail.
702. Notably, in its discussion of whether the MOI and its attendant rights can constitute an investment given that they are contingent, PEL ignores *Joy Mining*. PEL argues that “Respondent quotes three cases in support of its argument that PEL’s investment is not an investment in keeping with ICSID case law.” Reply ¶ 600. But, PEL then ignores *Joy Mining* and does not dispute its holding that a “contingent” right is not an “investment,” regardless of the definition of an investment in the treaty. Reply ¶¶ 600-609.
703. Instead, PEL’s entire discussion of *Joy Mining* is found in one paragraph in the Reply ¶ 596. PEL make no effort to discuss the holding in *Joy Mining* addressed above. Instead, PEL engages in a feeble attempt to distinguish *Joy Mining*, which fails.
704. PEL argues that “[t]he passage of *Joy Mining* relied upon by Respondent is an analysis of the investment under the relevant treaty.” *Id.* PEL’s argument does not detract from the relevance of *Joy Mining*. The *Joy Mining* tribunal held that, regardless of whether the asset may fit in the definition of an investment in the treaty, due consideration must be afforded to the concept of an “investment” under international law. **RLA-53**, *Joy Mining*, Thus, the tribunal observed that, “[t]o conclude that a *contingent liability* is an *asset* under Article 1(a) of the Treaty *and hence a protected investment, would really go far beyond the concept of investment*, even if broadly defined, as this and other treaties normally do.” **RLA-53**, *Joy Mining*, ¶ 45 (emphasis added).
705. PEL argues that “[t]he tribunal then moved on to analyse whether the investment was a qualifying investment under Article 25 of the ICSID Convention. It did not state that investment treaty tribunals in general must consider the notion of investment under the developing jurisprudence, as Respondent contends it did.” Reply ¶ 596. This attempt to distinguish also fails, because that is what *Joy Mining* held. The tribunal considered “the concept of investment” in international law, and on that basis found that a *contingent* asset

cannot be an “investment.” **RLA-53**, *Joy Mining*, ¶¶ 41-47. It was after holding a contingent asset is not an investment in international law, that it addressed Article 25 and held “it lacks jurisdiction” “because the claim falls outside both the Treaty and the Convention” (*id.*, ¶¶ 48-63).

706. *Joy Mining* is not the only investment treaty precedent that has conclude that a *contingent* asset or right cannot be an “investment,” under international law. For example, in, **RLA-54**, *Mihaly Int’l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002), the tribunal also held that a contingent right cannot be an “investment,” regardless of the definition of an investment in the BIT. *Mihaly* is discussed in detail below, but for present purposes suffices to note that it involved a letter of intent (like this MOI), which made the award of the infrastructure project contingent on certain conditions, including execution of a project contract, which was not executed. As a result, the tribunal held that expenditures of the claimant in connection with the letter of intent did not amount to an “investment.” *Id.*, ¶¶ 47, 48 and 51.
707. PEL attempts to distinguish *PSEG Global*, but its effort fails and backfires (as discussed next), because *PSEG Global* emphasizes that, without an executed concession contract, there can be no investment, if the context of the dispute is a concession project.
708. Fourth, the MOI remains a contingent contract, or option, and nothing more, and cannot be an “investment” under international law, because an actual PPP concession agreement for this project was never negotiated nor executed by PEL and the MTC. It is undisputed that the parties never entered into a PPP concession agreement.
709. *The existence of an actual executed “PPP concession agreement” is critical to the existence of an “investment,” when the ultimate investment is a “PPP concession.”*
710. PEL’s attempt to distinguish *PSEG Global* not only fails, but actually conclusively defeats jurisdiction. PEL cannot dispute the general principle of international law for which Mozambique cited *PSEG Global*, that there is “a limit” as to what is an “investment,” and an “option” cannot be “interpreted” as an “investment,” concurring with *Joy Mining*. As the *PSEG Global* tribunal held, “[w]hether the Memorandum [of Understanding] is valid and in force is immaterial for the purpose of the Tribunal’s decision. *The Tribunal considers that the Respondent’s argument that the definition of investment does not include*

an option is persuasive as a general approach. Broad as many definitions of investment are in treaties of this kind, there is a limit to what they can reasonably encompass as an investment. Options such as this particular one cannot, in the view of the Tribunal, be interpreted as an ‘investment’.” *Id.*, ¶ 189 (emphasis added).

711. In its Reply ¶ 606, PEL attempts to distinguish *PSEG Global* by citing the following language, but that language does not help PEL. The *PSEG Global* held that there was an “investment” because (unlike here) the parties had “executed a concession agreement”, and distinguished *Mihaly* because in that case “the parties never signed a concession contract”:

It is not disputed either that both parties unequivocally believed that the Contract [that is, *the concession agreement*] *had become effective* on the date of the signing by the Ministry. The Contract is couched in proper legal language.

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 Zhinvaly where the parties expressly acknowledged that the Claimant did not have an investment.*

RLA-55, *PSEG Global Inc.*, ¶¶ 80 and 81 (emphasis added).

712. As noted in the preceding paragraph, in its Reply ¶ 606, PEL cites ¶ 80 of the *PSEG Global* decision. However, PEL omitted half of ¶ 80, which held that the “essential point” is whether the concession agreement has been executed and is in force. The entire ¶ 80 states:

The essential point that the Tribunal must establish, however, is a legal one. Does the Concession Contract exist? The answer to this question is not difficult as the parties do not dispute the fact that the Concession Contract does exist, was duly signed, submitted to the Daniştay and approved by this body and later executed with all the legal formalities and requirements. 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.

Id., ¶ 80 (emphasis added).

713. In its Reply, PEL also ignores ¶ 104 of the *PSEG Global* decision, where the tribunal reinforced that there must be a concession contract, and concluded that: “A contract is a

contract. *The Concession Contract exists*, is valid and is legally binding. This conclusion is sufficient to establish that the Tribunal *has jurisdiction* on the basis of *an investment having been made in the form of a Concession Contract.*” *Id.*, ¶ 104 (emphasis added).⁴⁸

714. The *PSEG Global* tribunal made specific reference to *Mihaly*, discussed below in more detail. In that case, the claimant and government had signed a letter of intent, as well as a letter of agreement and letter of extension, but the tribunal held that the letter of intent merely provided a contingent right and cannot be an “investment,” because the parties have never entered into an actual concession agreement. As concluded by the *Mihaly* tribunal, “none of the documents, in conferring exclusivity upon the Claimant, *created a contractual obligation for the building, ownership and operation of the power station.*” **RLA-54**, *Mihaly*, ¶ 48 (emphasis added). “Ultimately, *there was never any contract* entered into between the Claimant and the Respondent *for the building, ownership and operation of the power station.*” *Id.*, ¶ 47 (emphasis added).
715. In the present case, in stark contrast to *PSEG Global* where “the parties do not dispute the fact that the Concession Contract does exist,” *id.*, ¶ 80, and instead similarly to *Mihaly* where “the parties never signed a concession contract,” *id.*, ¶ 80, PEL and the MTC *never executed a PPP concession agreement*, so there can be no “investment.”
716. It is undisputed that a *PPP concession agreement* between PEL and the MTC *does not exist*. No PPP concession agreement *was ever executed* between PEL and the MTC. It would turn PPP law and practice on its head for this Tribunal to hold that there was some sort of implied PPP concession. *Without an executed PPP concession agreement, there can be no PPP concession between PEL and the MTC*. Rather, on 26 July 2013, the MTC notified the PGS Consortium of its decision to award the concession to ITD. **R-32**.
717. As per the decisions in *PSEG Global* and *Mihaly*, the existence of an executed PPP concession agreement is critical to the existence of an “investment,” where the alleged

⁴⁸ This “tactic” is typical of PEL’s entire Reply. PEL will cite portions of precedents out of context, or cite only the portions of precedents that favor it, and ignores those portions that do not favor it, even when the unfavorable language is contained in the same sentence that PEL cites or in other paragraphs related to the same issue. When a precedent is cited for a general principle of international law, PEL will ignore the principle and argue that the facts are different to try to distinguish the case, but that cannot overcome the principle of law stated in the precedent.

“investment” would have been a PPP concession.⁴⁹ This is particularly true where, as here, the very purpose of MOI (that is, the memorandum of *interest*) was to be an expression of “interest.” **R-2**, Recitals b and d (“MTC is interested in developing” a port and rail line; “PEL has shown keen interest in the development of said Project”). However, the MOI was not the concession agreement and *provided a roadmap for further negotiations*.

718. In its Reply ¶ 606, also to attempt to distinguish *PSEG Global*, PEL cites the following language from the decision, but it also does not help PEL, and instead establishes that letters of intention are not binding contracts, but *merely facilitate further negotiations*, and there can be no investment until the concession agreement is executed:

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 [the concession agreement], why would they then have signed, submitted for approval and executed a Contract? *Letters of intention or other instruments would 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.

Id., ¶ 103 (emphasis added).

719. Like the “letters of intention” in *PSEG Global*, the MOI also was intended to facilitate further negotiations, and without satisfaction of its conditions did not give rise to any rights and, even after satisfaction of its conditions, a PPP concession agreement still would have had to be executed before there was an “investment.”
720. As cited above, “[t]o date, most tribunals have been *reluctant* to consider *pre-investment activities and expenditures, which do not ultimately come to fruition, as covered investments*.” **RLA-130**, Investment Treaty Arbitration Review, 11 (2020). Regardless of PEL’s pre-investment activities and expenditure pursuant to the MOI, a PPP concession agreement between PEL and the MTC never came to fruition.

⁴⁹ As discussed below, there are compelling reasons, based on international law and PPP practice, why a treaty tribunal should not delve in to a PPP dispute where the parties never executed a concession agreement.

721. In addition, “in the case of direct contractual relations between a private investor and a host State the characterization of a transaction as an ‘investment’ carries particular weight for the purpose of establishing whether an ‘investment’ took place.” **CLA-87**, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, ¶ 97 (emphasis added). The MOI does not even contain the word “investment.”
722. Because a PPP concession agreement was never executed, the MOI and its alleged attendant rights never become part of any “investment,” and they are not an investment in and of themselves.⁵⁰ As held in the precedents discussed below, the parties’ contractual dispute over the MOI is not transformed into a treaty dispute, nor is treaty jurisdiction created, and PEL’s legal recourse is, *arguendo*, to bring a local law claim under the MOI, which PEL must do in the pending ICC arbitration under the MOI’s ICC arbitration clause.
723. Fifth, PEL alleges that it undertook work and incurred expenditures in connection with the MOI and subsequent dealings with the MTC. However, these are pre-investment activities and expenditures, which also do not give rise to an “investment.”
724. In this regard, the relevant precedent is **RLA-54**, *Mihaly Int’l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002). In its Reply ¶ 602, PEL’s argument that “Mihaly is inapposite” is wrong. The facts in *Mihaly* are virtually identical and its ruling is relevant to these proceedings, and confirms *Joy Mining*.
725. In *Mihaly*, claimant Mihaly Int’l, a U.S. company, pursued building a power plant in Sri Lanka. “The Government of Sri Lanka determined that the supply of electricity within the Republic should be improved by the erection of a new power generation facility. It wished this facility to be constructed and operated by private enterprise.” *Id.*, ¶ 38. Sri Lanka “called for expressions of interest on a build own transfer (BOT) basis. The Claimant was

⁵⁰ The conclusion that a lack of a concession dooms PEL’s treaty claims is further confirmed by Article 1(b)(v) of the BIT, which, as discussed below, defines an “investment” as “every kind of asset *established or acquired*” including “(v) business *concessions conferred* by law or under contract” **RLA-1**, MZ-India BIT, Article 1(b)(v) (emphasis added). The BIT specifically requires that, in circumstances where a claimant asserts the investment was a business concession, the concession must have been actually “established or acquired,” which is not the situation here.

- one of a number of consortia of international investors, financiers and utilities suppliers to develop, on an exclusive basis, a 300 MW thermal power station on a BOT basis The expression of interest itself was obviously the product of considerable work and expenditure of money on the part of Claimant.” *Id.* “25 groups expressed interest in the project. Of these, five were invited to enter into negotiations, and from that group of five, *the Claimant was selected as a recipient of the Letter of Intent.*” *Id.*, ¶ 39 (emphasis added).
726. “Negotiations ensued and resulted in the issue to the Claimant of a Letter of Intent.” *Id.*, ¶ 40. The LOI provided “*exclusivity*” for a time period “to enable the sponsor to finalize the project proposal.” *Id.* The LOI “define[d] what technical inputs are required in order to reach project finalization and negotiation.” *Id.* It “stated that the Government accepted a number of principles on the basis of which matters should proceed. *Negotiations were to proceed in an orderly fashion for the project leading to the signing of a contract by the end of the third quarter of 1993.* The estimated cost of the project was ... \$400 million.” *Id.*, ¶ 41. Although the LOI noted that it was “a Statement of Intention and does not constitute an obligation binding on any party,” it required that “the *Government shall use its best efforts* to take, or cause to be taken, all action and to do, or cause to be done, all things necessary or proper or advisable under applicable laws and regulations *to consummate the transactions contemplated hereby as promptly as practicable.*” *Id.* (emphasis added).
727. Following the LOI, “there were further extensive negotiations and indeed the parties had arrived at Draft 5 of the Power Purchase Agreement.” *Id.*, ¶ 42. Because “the exclusivity period ... was coming to an end,” *id.*, ¶ 42, the parties signed a “Letter of Agreement” (“LOA”), *id.*, ¶ 43. The LOA stated: “*in furtherance of our Letter of Intent ... issued as a result of your proposal ... and the ongoing discussion and negotiations that have taken place since then ... , we are pleased to confirm that we are satisfied with the degree of progress that has been made in completing the requirements set forth in the Letter of Intent and hereby issue this [LOA] for the purpose of this [LOA] subject to contract, [setting forth that an] understanding has been reached between the parties on the following matters*” which included, for example, economic terms for the project. *Id.*, ¶ 44 (emphasis added).
728. “It was apparent that considerable further sums of money and effort were expended in planning the financial and economic modeling so as to arrive at the basis of understanding

mentioned in the [LOA].” *Id.*, ¶ 45. The LoA “is conditional upon CEB agreeing on the contract with SAEC [South Asia Electricity Co., a Sri Lanka company formed to negotiate and manage the distribution of the supplies of electricity], and all other associated agreement to facilitate the completion of arrangements for your financing the project with various lenders from whom commitments/expressions of interest have been obtained and presented to us so that a financial closing can occur on or about February 15, 1994.” *Id.*

729. “The parties [then] entered into a Letter of Extension [“LOE”] ... in response to a request by the Claimant for reinstatement of exclusivity on the project in the light of the fact that financial closing on 15 February, as specified in the [LOA], had not eventuated.” *Id.*, ¶ 46. “The [LOE] imposed [a] number of obligations on the Claimant, one of them was that if the Claimant failed to achieve any of the milestones by the due date, the [LOE] should automatically cease to be operative. There was also provision for an extension of the period of the exclusivity provided for by the [LOE] and it again concluded ‘this [LOE] does not constitute an obligation binding on any party.’” *Id.* However, the [LOE] again reiterated that “*the Government shall use its best efforts ... to consummate the transactions contemplated hereby as promptly as practicable.*” *Id.* (emphasis added).
730. Similarly, here, PEL sought to build an infrastructure project in Mozambique. The MTC project was supposed to be on a BOT (build, operate and transfer) basis. Like the LOI in *Mihaly*, PEL and the MTC signed an MOI, although the word “interest” in the MOI is less committal than the word “intent” in the *Mihaly* LOI. Here, regardless of the competing versions of the MOI submitted by the parties, the MOI also contains conditions before a PPP agreement would be awarded to PEL, and executed between the MTC and PEL. It is undisputed that no version of the MOI is a PPP agreement in and of itself, nor awarded the PPP project to PEL in and of itself. Even PEL’s English version of the MOI (**C-5A**) (which has different Article 2 language not found in PEL’s Portuguese version of the MOI (**C-5B**), or in the MTC’s English/Portuguese versions of the MOI (**R-1 and 2**)) requires, *arguendo*, that, after various conditions are satisfied, the MTC would still have to “*issue a concession of the project in favour of PEL.*” See **C-5A** (emphasis added). However, the MOI imposes no obligation that the MTC “shall use its best efforts ... to consummate the transactions contemplated hereby as promptly as practicable.” PEL must satisfy the various conditions.

731. The MOI was not followed by any additional contracts specifying the parties' "intent." The MTC did not sign a LOA or LEO "confirming" it was "satisfied with the degree of progress" PEL made "in completing the requirements in the [MOI]" or confirming having reached agreement with PEL over the economic terms for the PPP agreement, as in *Mihaly*. The MTC did not sign an LOA setting forth a projected deadline for closing the transaction (in contrast, the *Mihaly* LOA stated a "financial closing can occur on or about February 15, 1994."), or agreeing to "consummate the transactions contemplated hereby as promptly as practicable." The MOI is more contingent and less committal than the *Mihaly* contracts.
732. The *Mihaly* contracts and PEL's MOI are *contingent expressions of interest*, as held in *Mihaly*. As concluded by the tribunal, "none of the documents, in conferring exclusivity upon the Claimant, *created a contractual obligation for the building, ownership and operation of the power station.*" **RLA-54, *Mihaly*, ¶ 48** (emphasis added). "Ultimately, *there was never any contract* entered into between the Claimant and the Respondent *for the building, ownership and operation of the power station.*" *Id.*, ¶ 47 (emphasis added). Similarly, the MOI, in and of itself, did not establish a PPP relationship or grant PEL a PPP concession for this project, and, ultimately, there was no PPP agreement for this project.
733. It is entirely justifiable, and consistent with international law and practice, that without the parties executing a PPP agreement there can be no "investment." This is so, because, as the *Mihaly* tribunal explained, substantial efforts and even the expenditure of large sums of money pursuing government projects are simply features of modern-day commercial activity, which are common in the pursuit of such business ventures:

It is an undoubted feature of modern-day commercial activity that huge sums of money may need to be expended in the process of preparing the stage for a final contract. However, the question whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or small. Ultimately, it is always a matter for the parties to determine at what point in their negotiations they wish to engage the provisions of the Convention by entering into an investment. Specifically, the Parties could have agreed that the formation of a South Asia Electricity Company was to be treated as the starting point of the admitted investment, engaging the responsibility of the Respondent for the Claimant's failure to complete other arrangements to achieve the milestones by the due date mentioned in the Letter of Extension. The facts of the case point to the opposite conclusion. The Respondent clearly signaled, in the various documents which are relied upon by the Claimant, that it was not

until the execution of a contract that it was willing to accept that contractual relations had been entered into and that an investment had been made.

Id., ¶ 51 (emphasis added). .

734. Here too, the MOI (regardless of the version advocated by the parties), signals that it is not, in and of itself, awarding any PPP concession, and that it is not until the execution of a PPP agreement, that an investment has been made.
735. PEL’s claims it undertook efforts and made expenditures, following execution of the MOI, and in pursuit of its ultimately failed enterprise to obtain the PPP project, but they do not result in an “investment.” The MOI did not create a contractual obligation that PEL would receive the project without more. The rights in the MOI are contingent on conditions.
736. In addition, the MOI provided that PEL would bear the expenses related to the MOI. *See R-2*, MOI, Clause 1(1) (expenses “will be entirely borne by PEL”). In Clause 1(1), the parties acknowledged that PEL would be performing work in connection with the MOI, and PEL would bear the costs of such efforts. PEL’s representative, Mr. Daga, admits that the cost of the PFS were PEL’s sole responsibility. *CWS-1*, Daga Witness Statement ¶ 39. The *Mihaly* contracts contained no such clause, which is even more the reason why the MOI is not an “investment,” even more clearly than the contracts in *Mihaly*.
737. Following the reasoning in *Mihaly*, in *Zhinvali*, which concerned the rehabilitation of a hydroelectric power plant, the tribunal also held that because

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

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

738. Finding that the expenditures were not an “investment,” the tribunal noted that, during the “exclusivity period,” “the Respondent [had] *expressly insisted that all expenses involved*

*in pushing the Project forward were for the Claimant's account.” Id., ¶ 411 (emphasis added). Here too, during the exclusivity period, the MTC requested in the MOI that all expenses in preparing the PFS would be the responsibility of PEL. In *Zhinvali*, because the transaction did not close and the expenditures were for the claimant, the tribunal “decided that ... *there is no ‘investment’ in this case As a result, the Centre is without jurisdiction, and this Tribunal is without competence, with regard to the merits of this arbitration.” Id., ¶ 417 (emphasis added). Here too, because the MOI did not result in a concession agreement, this Tribunal is without jurisdiction. Echoing *Mihaly*, the *Zhinvali* tribunal held that the claimant’s recourse may properly be in another forum, but not at ICSID. *Id.*, ¶¶ 418-419. Again, the same is the case here – PEL’s remedy may be in recourse to the ICC arbitration, but not before the PCA in this UNCITRAL arbitration.**

739. Sixth, PEL’s arguments that it engaged in lengthy negotiations with the MTC, and PEL’s repeated accusations that the MTC/Mozambique allegedly engaged in improper conduct in connections with the negotiations for the project, also do not establish an “investment.”

740. The *Mihaly* tribunal held that, to the extent that *Mihaly* asserted Sri Lanka did not negotiate in good faith, that did not create treaty jurisdiction absent the existence of an “investment”:

It may be and the Tribunal does not have to express an opinion on this, that during periods of lengthy negotiations even absent any contractual relationship obligations may arise such as the obligation to conduct the negotiations in good faith. *These obligations if breached may entitle the innocent party to damages, or some other remedy. However, these remedies do not arise because an investment had been made, but rather because the requirements of proper conduct in relation to negotiation for an investment may have been breached. That type of claim is not one to which the Convention has anything to say. They are not arbitrable as a consequence of the Convention.*

Id., ¶ 51 (emphasis added).

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

Nor does the Tribunal’s determination that the subject-matter of the dispute, if any, falls outside the jurisdiction of ICSID and beyond the competence of the Tribunal preclude whatever recourse [*Mihaly*] may have at its disposal

to pursue its claim arising out of a commercial, financial or other type of dispute. The Tribunal's conclusions are declared to be without prejudice to any rights of action which may be available before other instances, national or international, with the consent of the Parties, if required.

Id., ¶ 61 (emphasis added).

742. Here too, this Tribunal should not become embroiled in contractual disputes over pre-investment issues that are better suited for local tribunals or ADR mechanisms selected by the parties. Like the letters in *Mihaly*, the MOI is not a PPP agreement, and its provisions (if not its spirit) confirm the parties envisioned that a PPP agreement would eventually have to be executed if all contingencies, *inter alia*, were satisfied. The “remedy” to PEL may be a contractual claim under the MOI, but “is not one to which the [BIT] has anything to say.” *Id.*, ¶ 51. PEL’s claims are “are not arbitrable as a consequence of the [BIT].” *Id.* The forum for PEL to pursue such claims is in the ICC arbitration, under to the MOI’s arbitration clause selecting the ICC for disputes arising from the MOI, as discussed below.
743. That PEL engaged in pre-investment work like the PFS does not change the analysis. In *Joy Mining*, the contract was not an “investment,” although it “involve[d] a number of additional activities ... such as engineering and design, production and stocking of spare parts and maintenance tools and incidental services such as supervision of installation, inspection, testing and commissioning, training and technical assistance.” **RLA-53**, *Joy Mining*, ¶ 55.
744. Thus, regardless of whether PEL devoted substantial time (as it alleges) to negotiations and work it performed in connection with the MOI, the MOI was contingent, and thus those efforts were simply preparatory and do not create an investment, because PEL and the MTC never agreed to the terms of, nor entered into, a PPP concession agreement.
745. Seventh, PEL’s attempts to distinguish *Mihaly* and *Zhinvali* are flawed and fail.
746. In its Reply ¶ 602, PEL tries to distance itself from *Mihaly*, arguing that “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.” That is incorrect.

747. The *Mihaly* tribunal did not hold that there was no binding obligation, *generally speaking*. Rather, the *Mihaly* tribunal specifically held that there was no “investment,” because none of the three documents signed by Mihaly and Sri Lanka created a contractual obligation *for the building, ownership and operation* of the power station.
748. According to the *Mihaly* tribunal, “[t]he most crucial and controversial contentions of the Parties were concentrated *upon the existence vel non of an ‘investment.’*” **RLA-54, *Mihaly***, ¶ 32 (emphasis added). “It is in this factual setting that the Tribunal has been asked to consider *whether or not, the undoubted expenditure of money, following upon the execution of the Letter of Intent, in pursuit of the ultimately failed enterprise to obtain a contract, constituted ‘investment’*” *Id.*, ¶ 48 (emphasis added).
749. In this regard, the *Mihaly* tribunal specifically concluded that, a “crucial and essential feature” was “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.*” *Id.*, ¶ 48 (emphasis added).
750. Similarly, the *Mihaly* tribunal noted that “[t]he Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of States, let alone that of developing countries or Sri Lanka for that matter, to the effect that *pre-investment and development expenditures* in the circumstances of the present case could automatically be admitted as ‘investment’ *in the absence of the consent of the host State to the implementation of the project.*” *Id.*, ¶ 60 (emphasis added).
751. Therefore, the specific obligation that was lacking was a contractual obligation for the *building, ownership and operation* of the subject power station, precisely because “*there was never any contract* entered into between the Claimant and the Respondent *for the building, ownership and operation* of the power station.” *Id.*, ¶ 47 (emphasis added).
752. The efforts and expenditures of the *Mihaly* claimant followed the execution of the LOI. These efforts and expenditures were made “in pursuit” of the contract for the building, ownership, and operation of power station. However, the claimant, at the end of the day, did not obtain the contract. Although the LOI, and other letters, provided “exclusivity” to Mihaly, none of them “created a contractual obligation for the building, ownership and operation of the power station.” Similarly, the tribunal held that “[t]he operation of SAEC

was contingent upon the final conclusion of the contract with Sri Lanka, thus the expenditures for its creation would not be regarded as an investment until admitted by Sri Lanka.” *Id.*, ¶ 47 (emphasis added). Because no contract was ever concluded for the power station, the claimant’s pre-investment efforts and expenditures pursuing the contract “would not be regarded as an investment until admitted by Sri Lanka.”⁵¹

753. PEL cites ¶ 48 of the *Mihaly* decision in its Reply ¶ 602. However, PEL ignores that the cited language states that the “contractual obligation” that was lacking was for the *building, ownership and operation* of the power station. Similarly, PEL cites ¶ 59 of the *Mihaly* decision in its Reply ¶ 603. However, PEL ignores that the cited language states that “none of these Letters contain any binding obligation either on Sri Lanka or the Claimant” “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.” The *Mihaly* tribunal never generally held that the letters did not have any aspects that were binding based on the satisfaction of their conditions.
754. The *Mihaly* tribunal concluded that no “investment” had arisen as a result of the claimant undertaking work and incurring expenditures in connection with the LOI, LOA and LOE.
755. In its Reply ¶ 605, PEL also tries to distance itself from *Zhinvali*, arguing that “it found no express or constructive consent to the treatment of the claimant’s development costs as an ‘investment’”: “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.*” **RLA-56, *Zhinvali*, ¶ 349** (emphasis added).

⁵¹ As the *Mihaly* tribunal explained, *if the “negotiations during the period of exclusivity, or for that matter, without exclusivity, had come to fruition,* it may well have been the case that the moneys expended during the period of negotiations might have been capitalised as part of the cost of the project and thereby *become part of the investment.* By capitalising expenses incurred during the negotiation phase, the parties in a sense may retrospectively sweep those costs within the umbrella of an investment.” **RLA-54, *Id.*, ¶ 50** (emphasis added).

756. But the cited language cannot possibly help PEL. Relying on *Mihaly*, the *Zhinvali* tribunal held that Georgia had not consented to treating the development costs as an “investment.” That is precisely the situation here. Mozambique never consented to treat PEL’s expenses, allegedly incurred in connection the MOI, as an “investment.” Rather, the take-away from *Zhinvali* is that the host State must, explicitly or impliedly, consider the subject asset (including, but not limited to, contracts and expenditures of money) to be an “investment.”
757. Applying this principle to the MOI, more broadly, it is obvious that Mozambique did not consent, whether explicitly or impliedly, to treat the MOI as an investment, because under MOI’s reading the MOI provided only a right of preference, and even according to PEL’s own reading, the MOI – at best – “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.” Reply ¶ 599 (emphasis added). The rights under the MOI are contingent, even under PEL’s own theory, and therefore there was no consent to treat the MOI, and the work performed and expense incurred by PEL in conjunction with the MOI, as an “investment.” The investment would have been the PPP concession, and it would have been realized through the execution of the PPP agreement, but it was awarded to the winning bidder, IDT.⁵²
758. PEL ignores that the *Zhinvali* tribunal rejected the same argument PEL makes herein. In *Zhinvali*, claimant ZDL “naturally [took] the position that this case is different from the

⁵² Similarly, in its Reply, ¶ 604, PEL cites the following language from, **CLA-95**, *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007: “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 was not an ‘investment’ within the meaning of Article 25(1).” *Id.*, ¶ 60. However, PEL ignores the next sentence in the decision, which states: “The present facts are quite different from those in *Mihaly*. It is undisputed that the Parties had a contractual relationship. The claims of the Claimant are based on a valid contract between the Parties.” *Id.*, ¶ 61. PEL ignores what the contract was about. The contract was for “location and salvage of the cargo of the ‘DIANA,’ a British vessel that sank off the coast of Malacca in 1817.” *Id.*, ¶ 7. Thus, this was not a concession or PPP agreement. (Also, in contrast, here, the PPP agreement was never entered into by PEL and the MTC). Moreover, PEL ignores that the sole arbitrator held *there was no investment*: “Having concluded that *the Contract is not an ‘investment’* within the meaning of Article 25(1) of the ICSID Convention, the Tribunal is impelled to find that it lacks jurisdiction in the present case.” *Id.*, ¶ 48 (emphasis added).

Mihaly Case.” *Zhinvali*, ¶ 411. Similar to various arguments made by PEL to try to establish an investment, ZDL argued that “[t]he key ingredient missing in Mihaly is present here. Georgia has a binding obligation to ZDL by virtue of the preliminary agreements, promissory estoppel and the Settlement Agreement.” *Id.* But the tribunal rejected ZDL’s argument: “But this conclusory assertion does not amount to proof that the Respondent *consented to take responsibility for the Claimant’s development costs as a qualifying investment* under Georgia law. Again, the Claimant’s argumentation, in the Tribunal’s view, has more to do with an alleged breach of contract or other culpable conduct by the Respondent *rather than with any notion of ‘investment.’*” *Id.* (emphasis added).

759. And, notably, PEL also conveniently ignores the following holding of the *Zhinvali* tribunal, which is equally devastating to its claim that there was an “investment”:

Here we have a situation where, at least during the ‘exclusivity period’ ..., *the Respondent expressly insisted that all expenses involved in pushing the Project forward were for the Claimant’s account. So, at least to this extent, the Tribunal sees the opposite of conduct implying consent* because Georgia *expressly denied any State responsibility for expenditures* of the Claimant during this time period.

Zhinvali, ¶ 412 (emphasis added).

760. Similarly, because the MOI expressly provides that PEL would bear the expenses related to the MOI (**R-2**, Clause 1(1)), this is the “opposite of conduct implying consent” by the MTC to an “investment,” given that the MTC had expressly denied any State responsibility for expenditures of PEL under the MOI.
761. Finally, in its Reply ¶ 608, PEL cites, **RLA-77**, *William Nagel v. The Czech Republic, SCC Case No. 049/2002*, Final Award (9 September 2003), to mistakenly argue that the “exclusivity” clause can be an “investment.” *PEL’s citation is intentionally misleading.* PEL cites ¶¶78-82. However, the paragraphs (¶¶78-82) that PEL cites are found in the part of the award (¶¶ 47-141) where the tribunal is *describing the arguments of the claimant, Nagel*. The *decision* of the *Nagel* tribunal begins in ¶ 263. *Notably, the Nagel tribunal held the exact opposite -- that there was no “investment”*:

the Arbitral Tribunal concludes that Mr Nagel’s rights under the Cooperation Agreement – alone or in conjunction with surrounding factors, such as the conduct of persons acting on behalf of the Czech Government,

did not constitute an asset and an investment protected under Article 12 of the Investment Treaty.

RLA-77, *Nagel*, ¶ 335 (emphasis added).

762. The explanation of the *Nagel* tribunal is the final nail on the coffin of PEL’s fundamentally flawed argument that so long as the contract is generally “binding” there is an investment. The *Nagel* tribunal also held the exact opposite, which PEL again ignores. Although the tribunal concluded that there was a binding contract, it nonetheless held that the contract was not an investment, because it was a preliminary agreement to negotiate. So, the fact that the contract is binding – alone – does not establish an investment. Specifically, the *Nagel* tribunal held that the Cooperation Agreement was “a contract which under Czech law created legal obligations for the parties to the Agreement.” **RLA-77**, *Nagel*, ¶ 320. However, “[w]hile the Agreement was an important basis for further work, the Arbitral Tribunal considers that *it was only of a preparatory nature and cannot find that the rights derived from it had a financial value.*” *Id.*, ¶ 328 (emphasis added). “The Arbitral Tribunal therefore concludes that Mr Nagel’s rights under the Cooperation Agreement were not such as to constitute an ‘asset’ and an ‘investment’ within the meaning of Article 1 of the Investment Treaty.” *Id.*, ¶ 329 (emphasis added).⁵³

B. This Tribunal Lacks Jurisdiction (*Ratione Materiae*) Because There was No Exercise of Sovereign Power by Mozambique. As A Result, This Is Purely A Contractual Dispute.

763. The Tribunal lacks jurisdiction (*ratione materiae*), because there was no exercise of sovereign power by Mozambique.

⁵³ Further, the tribunal held there was no investment, although “Mr. Nagel held binding rights to participate jointly in any GSM licence involving CRA.” *Id.*, ¶ 79. Here, a PPP agreement was never entered into by PEL and the MTC, and PEL never had “binding rights” to participate in the concession with the consortium that won the public contest. The loser of the contest has no right to participate in the concession. Even considering Nagel’s argument, that “[u]nless 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,” *id.*, ¶ 79 (emphasis added), the concession was awarded to the ITD consortium, which did not include PEL. Further, the Nagel tribunal held that Nagel’s agreement “was *only of a preparatory nature and cannot find that the rights derived from it had a financial value.*” *Id.*, ¶ 328. Therefore, the tribunal squarely rejected Nagel’s argument. PEL thus misleadingly cites Nagel’s rejected argument and ignores the contrary decision of the tribunal.

764. In its Reply ¶ 614, PEL argues that “[w]hether 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*.” PEL argues that, “[r]ather, 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.” *Id.*, ¶ 615. However, PEL’s argument fails because, precisely in order to establish a *prima facie* violation, PEL must establish that Mozambique exercised its sovereign power.

765. As the tribunal observed in, *Abaclat*:

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

RLA-64, *Abaclat and Others. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) ¶ 318 (emphasis added); **RLA-65**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) ¶ 544 (“A claim is to be considered a *pure contract claim* where the Host State, party to a specific contract, *breaches obligations arising by the sole virtue of such contract*.”) (Emphasis added). Indeed, if there has been *no exercise of sovereign power* by the host State, then the investor has failed to meet *its burden of establishing jurisdiction*.

766. PEL, which bears the burden of proof on jurisdictional issues, has failed to establish that Mozambique exercised its sovereign power, and therefore PEL has failed to meet its *prima facie* burden. In addition, these proceedings are now past the *prima facie* stage, and thus PEL has a burden to establish, by a preponderance of the evidence, that Mozambique exercised its sovereign power on the merits so that jurisdiction may be conclusively established. PEL has failed to do so, and has not even attempted to do so in its Reply.

767. The decision of the United States Supreme Court in *Weltover* is persuasive,⁵⁴ and helpful because it addressed the *distinction between sovereign activity and commercial activity*. The Supreme Court held that a State engages in commercial activity when it exercises “only those powers that can also be exercised by private citizens,” as distinct from those “powers peculiar to sovereigns.” **RLA-66**, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Put differently, a foreign state engages in commercial activity “in the manner of a private player within” the market. *Id.*

the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in “trade and traffic or commerce.”

Id. (emphasis added).

768. Here, because Mozambique did not exercise sovereign power, there is a lack of jurisdiction. The validity, enforceability or equilibrium of the MOI, and of the contractual provisions contained in the MOI, *were not unilaterally altered by any sovereign act of the MTC or Mozambique*. This is undisputed and undisputable, based on the record.

769. As explained in *Weltover*, to determine whether a State has exercised sovereign power, the issue is not “the aim of fulfilling uniquely sovereign objectives.” That the MTC’s project was to develop national infrastructure is not the focus. The issue is whether “the particular actions that the State performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce.” The actions of the MTC or Mozambique are actions in which a private party engages in trade or commerce.

770. PEL cannot dispute that a private party can enter into a contract and implement a tender contest – in the private sector, a tender contest is called an “RFP” – request for proposals. A private party can agree to give an RFP bidder a scoring advantage. Just because a disappointed bidder, in a public procurement contest or private RFP setting, claims the MOI or RFP was breached, it does not mean it was through an exercise of *sovereign power*.

⁵⁴ *Weltover* has been relied upon by investment treaty tribunals, including in **RLA-60**, *Poštová Banka*, ICSID Case No. ARB/13/8, ¶ 320, note 490 .

771. PEL claims the MTC breached its obligations under the MOI; this is a commercial dispute. However, the “mere non-performance of a contractual obligation does not by itself fall within the scope of the State’s undertakings under the Treaty.” **RLA-63**, *Toto Construzioni*, ICSID Case No. ARB/07/12 at ¶ 103. As *Toto Construzioni* explained, “A State could, as an ordinary contracting partner, have a dispute with an investor. For a breach of Article 2 of the Treaty, however, the State or its emanation *has to go beyond what an ordinary contracting partner would do and act within its sovereign authority.*” *Id.*, ¶104 (emphasis added). “The authority to expropriate is a typical example of a prerogative that can only be exercised by the State (or by its emanation) as holder of the ‘*puissance publique.*’” *Id.*, ¶107. Here, there is no such action taken by Mozambique.
772. In contrast, in *Toto Construzioni*, there was an “expropriation by Lebanon” which “is a prerogative that does not pertain to the simple performance of ordinary contractual duties. It falls within the scope of the ‘*puissance publique*’ that must be used to allow performance of the contract by Toto and enters within the scope of Article 2, paragraph 3 of the Treaty.” **RLA-63**, *Toto*, ¶108. Here, there was no “expropriation” by Mozambique, or any other sort of sovereign action. There was no expropriation law or decree enacted by Mozambique, and there also was no indirect expropriation.
773. To establish a treaty violation, the violation of the contract must involve a sovereign act. “A violation can certainly result from the violation of the contract, but without a possible violation of the contract constituting, *ipso jure*, and in itself, a violation of the Treaty.” **RLA-67**, *Consortium RFCC v. The Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award (22 December 2003), ¶ 48. At best, PEL can point only to a breach of the MOI’s contractual terms and PEL’s alleged attendant rights related to the MOI, without any exercise of sovereign power by the MTC or Mozambique.⁵⁵
774. In its Reply ¶ 617, PEL argues that “the protagonists are broader than the contractual counterparties to the MOI. Mozambique, through several of its organs and state-owned

⁵⁵ In its Reply ¶¶ 614-615, PEL argues that a *prima facie* standard applies. That is incorrect. *Prima facie* standards are applied at the pleading stage, but this case is beyond that – it has advanced to the hearing stage. Therefore, PEL has now the burden to prove jurisdiction, and thus cannot rely on its mere allegation that the dispute arises out of an “investment.” *Caratube*, ¶ 309 (“[c]laimants have the burden of *proving* that this Tribunal has jurisdiction.”) (Emphasis added).

entities, namely the MTC, the CFM and the Council of Ministers, breached PEL's treaty rights." However, the issue is not the identity of the actors, but whether the actors exercised "sovereign power" (and, here, they did not). Similarly, the issue is not whether the investor asserts that the actors violate treaty rights, but whether alleged violations of treaty rights involved the exercise of sovereign power (and, here, they did not).

775. In its Reply ¶ 618, PEL repeats that "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." But, again, PEL cannot specific any exercise of sovereign power by Mozambique.

776. It matters not matter that PEL's lawyers are asserting treaty claims. The issue is not what treaty claims lawyers have artfully plead, but whether the MTC or Mozambique exercised sovereign power. For example, breach of contract and expropriation are two different things. A breach of contract can be committed by anyone (a private actor can obviously breach a contract), while expropriation is inherently governmental in character (a private actor cannot expropriate). Unless the breach is the result of sovereign authority, such as through a legislative decree, the answer will be the filing of a complaint at the domestic level. Only when there has been an exercise of sovereign authority, as well as various other conditions are met, can there be recourse at the international level.

777. For example, in *Waste Management*, the tribunal explained:

The Tribunal concludes that it is one thing to expropriate a right under a contract and *another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum. The law of breach of contract is not secreted in the interstices of Article 1110 of NAFTA.*

RLA-103, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), ¶ 175 (emphasis added).

778. Similarly, Mozambique took absolutely no sovereign action that resulted in PEL losing its contractual rights. PEL is free to pursue its contractual rights before the ICC, pursuant to

the MOI's ICC arbitration agreement. In fact, there is appending ICC arbitration initiated by Mozambique and the MTC to resolve the parties' underlying contractual dispute. Mozambique and the MTC have done exactly what they needed to do – initiated that ICC arbitration so the parties may resolve their underlying contractual dispute.

779. Similarly, in its Reply ¶ 619, PEL argues that “Mozambique breached Article 3(4) of the Mozambique-Netherlands BIT (the ‘Umbrella Clause’) *by breaching its obligations under the MOI.*” (Emphasis added). However, again, the basis of the alleged breach is Mozambique's alleged obligations “under the MOI,” and PEL still cannot establish that there was an exercise of sovereign power by Mozambique.⁵⁶
780. In this regard, PEL's repeated *ad hominem* accusations against Mozambique for initiating the ICC arbitration (that Mozambique seeks to “undermine and derail” these proceedings, Reply ¶¶ 27-30) are nonsense. A private party can commence an ICC arbitration to resolve a contractual dispute. Mozambique has respected the parties' ICC arbitration agreement, and pursued its rights thereunder. Mozambique has engaged in no sovereign action.
781. As alleged by PEL, the acts by the MTC of which PEL complains are, *arguendo*, mere ordinary contractual breaches of a commercial nature. For example, *Mozambique enacted no legal and regulatory changes nor took any other such sovereign action* to affect PEL's alleged contractual rights under the MOI. The alleged actions are *inactions* of the MTC were, *arguendo*, merely the same as those of a commercial counterpart. Even PEL's allegation that the Council of Ministers allegedly “reneged” on its prior decision, and allegedly conducted themselves “arbitrarily,” Reply ¶ 618, does not give rise to a sovereign

⁵⁶ The cited language in *SGS v. Paraguay* does not hold otherwise. See Reply, ¶ 620. That tribunal makes the unremarkable observation that even where “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.” **CLA-106**, *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 142. But, that treaty claims may be based on contractual breaches, does not obviate the requirement that the host State must have still exercised sovereign power in connection with said breaches. Based on the lack of exercise of sovereign power, and the other *ratione materiae* grounds discussed herein, this dispute does not arise under the MZ-India BIT and international law, but is a contract dispute.

act. A private, commercial counterparty, arguendo, can renege its prior decisions and act in an arbitrary manner, and also breach contractual commitments in an MOI.

782. Accordingly, the Tribunal lacks jurisdiction, because PEL has failed to meet its burden of establishing an exercise of sovereign power by Mozambique. There is none.

C. This Tribunal Lacks Jurisdiction (*Ratione Materiae*) Because The MOI Is Not an “Investment” Under the BIT.

783. Mozambique does not dispute that Article 1(b) of the MZ-India BIT generally defines an “investment” 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” and provides nonexclusive examples including these three cited by PEL: “(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; and (v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals ...” **RLA-1**, MZ-India BIT, Article 1(b). Mozambique disputes the manner in which PEL selectively quotes portions of this definition out of context. The entire definition must be considered.

784. Mozambique has established that the MOI and its attendant rights are not an “investment,” as defined in the BIT, because PEL made no investment in the territory of Mozambique, the MOI and its attendant rights are not an “investment” under Article 1(b) (iii), (iv) and (v), and the alleged investment was not in conformity with the laws of Mozambique.

785. First, Article 2 of the BIT requires that the investment must be made “in the territory of the other Contracting Party.” Article 1(f)(ii) defines “territory” of Mozambique. However, there is no evidence in the record that PEL made any “investment” in the territory of Mozambique. PEL never signed, was never awarded nor ever developed and implemented a concession in Mozambique. The concession was awarded to the winning bidder, ITD, and ITD (not PEL) made the investment. *There is no investment by PEL in Mozambique.*

786. As Mozambique argued in its Statement of Defense, ¶ 377, even if PEL’s work and expenses related to the MOI were considered an “investment” (but they are not – they are mere commercial expenditures, as discussed above), there is no evidence that PEL’s work was performed, and PEL’s expenses were incurred, in Mozambique.

787. Notably, PEL was not able to produce a single piece of paper confirming its alleged work and expenses. For example, Mozambique’s Request No. 10 stated: “Provide documents sufficient to show all costs PEL incurred with respect to the Preliminary Study, including timecards, invoices, or similar records.” Request No. 11 stated: “Provide the studies, reports, and reference documents that PEL personnel relied upon with respect to the Preliminary Study or PEL’s alleged “recommendations as to the port location.” Request No. 38 stated: “Provide timecards or similar records establishing the personnel involved and time and costs actually incurred by PEL in preparing the prefeasibility study (the ‘PFS’).” Request No. 46 stated: “Provide documents establishing the amounts actually spent by PEL individually, and not the PSG Consortium, in preparing the public tender submission.” In response to all requests, *PEL had no documents*. The Tribunal must draw the inference that *none of the MOI related work was performed in Mozambique*.
788. By all indications, PEL’s work under the MOI was performed, and its related expenses were incurred, *in India*. In the Statement of Claim, PEL can offer nothing more than this argument: “There is no doubt that the Project *was to be developed on Mozambique’s territory*, and that the *Preliminary Study, the MOI, and the PFS* were all developed *with the Mozambican territory in mind*.” Statement of Claim ¶ 261 (emphasis added).
789. PEL’s argument that it made an investment in Mozambique, because “the Preliminary Study, the MOI, and the PFS were all developed *with the Mozambican territory in mind*” is ludicrous. There is no evidence, and PEL does not even claim, that the Preliminary Study, the MOI, and the PFS were all developed in Mozambique – the work was in India.
790. In its Reply ¶ 536, PEL even acknowledges that “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.” In its Reply at ¶ 537, PEL argues that a contractual relationship is an investment, but that is not the case. As discussed above, the only contract is the MOI and it is an option, not an investment. Merely signing a six-page piece of paper (the MOI) is also not an investment under *Salini* or any precedent.
791. In its Reply at ¶ 538, PEL can only identify *two alleged actions* undertaken in Mozambique: “PEL posted a person for a year at the location of the potential port to monitor weather conditions. 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.” These two actions are *de minimis*. Further, they must be disregarded because PEL failed to produce documents to support such alleged work or expenses.

792. Instead, PEL reverts to its same argument – that while they were doing all the work in Indian, they were thinking about Mozambique: “ultimately, every penny PEL spent in connection with the Project, *no matter where physically expended*, was in furtherance of its investment in Mozambique.” *Id.* But working in India, “*with the Mozambican territory in mind*,” is not equivalent to making an investment in Mozambique.⁵⁷
793. PEL is unable to show it made an investment in the territory of Mozambique, and that ends the MZ-India BIT analysis. Even if the Tribunal delved further, the MOI and its attendant bundle of rights also do not satisfy the definitions in Article 1(b) (iii), (iv) and (v).
794. Second, MOI and its attendant bundle of rights do not satisfy the definition of an investment under Article 1(b)(v), because *no concession “conferred by law or under contract” was “established or acquired” by PEL.*
795. Article 1(b)(v) defines an investment as “every kind of asset *established or acquired*” including “(v) business *concessions conferred by law or under contract . . .*” **RLA-1**, MZ-India BIT, Article 1(b)(v) (emphasis added).

⁵⁷ In its Reply ¶ 535, PEL argues 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,” citing **CLA-93**, *Nova Scotia Power Inc. v. Bolivarian Republic of Venezuela II*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award, 30 April 2014. However, PEL cannot dispute Mozambique’s point that *Nova Scotia Power* is distinguishable because it involved an actual contract to buy coal, and thus it did not matter that claimant “carried out no physical in-country activities in connection with this and had no physical, in-country presence.” *Id.*, ¶ 130. Even so, the tribunal found that there was *not* an investment because it was “unclear to what extent cash flows terminated in Venezuela and thus the extent to which the host State received benefit.” *Id.*, ¶ 131. Similarly, **CLA-81**, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 (cited by PEL for proposition that investment may be made in host State “without a direct transfer of funds there”), involved actual contractual relationships relating back to a state entity and directly benefitted the host State. *Id.*, ¶ 124 (“It is undisputed that KMTI, a Ukrainian state entity, now owns a substantially renovated sailing vessel for the training of its cadets, which also offers the prospect of revenues from tourist operations. Respondent does not dispute that the funds for such a renovation would otherwise have had to come from the State’s coffers, or that the State lacked the financial resources to undertake the renovation.”).

796. The *word tense* that the drafters of the MZ-India BIT used is critical. Despite PEL’s attempts to rewrite the BIT, the overarching (or *chapeau*) definition of an “investment” in Article 1(b)(v) clearly is written in the *past tense*, when it refers to what constitutes an “investment”: “[t]he term ‘investment’ means every kind of asset *established or acquired*” including “business *concessions conferred* by law or under contract.” *Id.* (Emphasis added).
797. Accordingly, it is clear and unambiguous that Article 1(b)(v) contains a *specific temporal limitation* that, to qualify as an investment, the concession must be one that has already been “established or acquired,” as opposed to a (contingent or even vested) “right” to negotiate a direct award of a concession or even to be awarded a concession.⁵⁸
798. To qualify as an investment, the concession is not one that may be obtained by the investor in the future, but one that has already been “established or acquired” by the investor. Specifically, a concession that has actually been “conferred by contract or law.” Thus, in the case of “business concessions,” Article 1(b)(v) limits “investments” to concessions that were actually established, acquired or conferred, and does not include rights to concessions that have not been actually established, acquired or conferred.⁵⁹
799. *The MOI and its attendant bundle of rights do not satisfy the definition of an investment in Article 1(b)(v), because no concession “conferred by law or under contract” was ever “established or acquired” by PEL.*
800. Despite PEL’s efforts to try to get around this road block, it cannot. Even in its Reply ¶ 518, PEL admits that PEL “did not physically sign[] a concession agreement.” PEL’s use of the qualification – “physically” – does not change that PEL did not sign a concession

⁵⁸ The Tribunal must be guided by the customary rules of treaty interpretation as codified in the 1969 Vienna Convention on the Law of Treaties. **CLA-5.** According to Article 31(1), “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

⁵⁹ The past tense temporal limitation in the MZ-India BIT is important, because it is different than the definitions of an “investment” in other BITs entered into by Mozambique. PEL cannot dispute that, in contrast, none of the definitions of “investment” in the US-MZ BIT, UK-MZ BIT, Japan-MZ BIT and Dutch-MZ BIT include the temporal limitation (that the investment must have been “established or acquired”) included in the MZ-India BIT. SOD ¶¶ 371-372. The Tribunal must give effect to the inclusion, in the MZ-India BIT, of the temporal limitation.

agreement with the MTC, and never entered into a concession agreement with the MTC. Instead, it is undisputed that *the concession was conferred to ITD*, the winning bidder in the public tender contest. See **R-32** (MTC notification, dated 26 July 2013, to the PGS Consortium (which included PEL) of its decision to award the concession to ITD.).

801. In its Reply, PEL argues that a “direct right to a concession ... became vested in PEL once Respondent approved the PFS and PEL exercised its right of first refusal by agreeing to proceed with the Project.” *Id.*, ¶ 518. However, that is not what Article 1(b)(v) requires.
802. Even if PEL’s interpretation of the MOI is adopted, and the MOI required the MTC to directly negotiate or award a concession to PEL upon the satisfaction of certain conditions, there is a critical difference between, on the one hand, the MOI allegedly imposing on the MTC an obligation to negotiate with PEL a direct award (or even award to PEL a concession) and, on the other hand, PEL having “established or acquired” a concession “conferred by law or under contract.” Even if PEL had the “vested” right it alleges to negotiate or be awarded the concession (which Mozambique disputes), still no concession “conferred by law or under contract” was ever “established or acquired” by PEL.
803. PEL blames the MTC and argues that, the reason why the concession was not conferred, is because of Mozambique’s “breach of the Treaty.” Reply ¶ 518. However, PEL improperly puts the cart before the horse. If there was no investment under the BIT, whether the BIT was breached is irrelevant – the Tribunal never reaches that question.
804. PEL’s experts also cannot overcome the fact that no concession “conferred by law or under contract” was ever “established or acquired” by PEL. Rather, the arguments of PEL’s experts support Mozambique’s contention.
805. Mr. Baxter, PEL’s PPP expert, states that “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.” Reply ¶ 519 (citing **CER-7**, Baxter Expert Report, ¶¶ 153-154). However, Mr. Baxter does not state PEL established or acquired a concession. Mr. Baxter testifies that PEL “could expect” a direct award of the concession. Mr. Baxter testifies that the concession agreement “could have been negotiated later.” “Could expect”

and “could have negotiated” is not the same as PEL having been conferred or granted a concession.

806. Similarly, PEL’s legal expert, Professor Medeiros, opines that “[t]he 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*,” and that, if the contingencies were met, which included also “the relevant authorization of the Government,” “PEL would enjoy a true and effective *right to the concession* by direct award,” PEL would have a “legitimate expectation” “to be granted the concession by direct award,” and eventually that “right” to be awarded a concession would be “confirmed.” Reply ¶ 519 (citing CER-3, Medeiros Second Expert Report, ¶¶ 15.0-15.6). However, Professor Medeiros does not state that PEL and the MTC ever entered into a concession agreement. Professor Medeiros testifies that PEL had a “right of first refusal/*direito de preferência*” and, even if its “legitimate expectation” was perfected, PEL simply had a “right” “to be granted the concession by direct award.” Again, *a right to be granted a concession* (which is all that Professor Medeiros argues PEL would have had even if all conditions, *arguendo*, had been satisfied, CER-3, Medeiros Second Expert Report, ¶ 15.4), is not the same as PEL having been granted a concession and having executed a concession agreement (as discuss here, that right may give, *arguendo*, PEL a contract claim but does not become an “investment” even if the MTC, *arguendo*, breached such a right).
807. No concession was ever “conferred” on PEL “by law or under contract” and PEL never “established or acquired” any PPP concession. As former Minister Zucula testifies, “PEL was not directly awarded the Project or the concession for the Project under the MOI.” RWS-2, Zucula Witness Statement, ¶ 5. As noted, the concession was granted instead to the winning bidder of the public contest, ITD. As PEL’s own experts concede, the MOI only provided contingent rights to PEL. But even after those contingencies would have been satisfied (and, according to the record, they were not satisfied, as discussed in the merits below), PEL would have had (again, according to PEL’s experts – Mozambique does not agree that PEL would have even had such a right) simply a “right” “to be granted the concession by direct award.” However, that is not what Article 1(b)(v) requires.

808. In addition, as discussed below, Mozambique has established that the MOI did not provide PEL with a right to be awarded the subject concession; even if the MOI awarded such a right, PEL never satisfied the contingencies in the MOI; the requirements for an actual award of a concession under Mozambican law, and international PPP practice, also were never satisfied; PEL was instead provided the bidding advantage, as the MOI required, to participate in the public tender contest, but PEL's consortium came in third place, and PEL never appealed the results. For these and other reasons, PEL never established or acquired a concession conferred by law or under contract. In this regard, Mozambique respectfully refers the Tribunal to the discussion on the merits below, to avoid repetition. The evidentiary record negates that there was ever an "investment" under Article 1(b)(v).
809. Third, PEL cites Article 1(b)(iii), but does not provide any analysis as to why it applies (and cannot introduce new arguments later in rejoinder). See Reply ¶ 522.
810. Article 1(b)(iii) defines an investment as "every kind of asset *established or acquired*" including "(iii) *rights to money or to any performance under contract having a financial value ...*" **RLA-1**, MZ-India BIT, Article 1(b)(iii) (emphasis added).
811. However, PEL has not disputed that this general provision is supplanted by the specific provision in Article 1(b)(v) which applies to "concessions." It is a settled norm of legal interpretation, including treaty interpretation, that where a law, or treaty, contains provisions specific to a particular matter, those specific provisions govern as to that matter over the more general provisions of the law, or treaty. Under the general principle proclaimed by Grotius, *generalia specialibus non derogant* (general words do not derogate from special words), specific provisions take precedence and prevail over general provisions in a treaty. The existence of a specific provision withdraws a question governed by it from under the effect of the general provisions. This principle starts from the logical assumption that if the parties inserted in the treaty a specific provision to govern a question, they intended to settle this question definitively in this way. "Established cannon of treaty interpretation" include the principle *generalia specialibus non derogant*. **R-81**, Bilateral Investment Treaties, 86 Am. J. Int'l L. 371, 374 (April 1992).⁶⁰

⁶⁰ For example, the principle was applied by the ICJ in *First Admissions Case* (1948), **R-81**, ICJ Rep. 57 at 64, where the Court applied the specific Article 4 of the United Nations Charter

812. Accordingly, because the subject matter of this dispute relates to a “concession,” the more specific provision relating to concessions in Article 1(b)(v) governs, and PEL made no “investment” under Article 1(b)(v).
813. Further, as in *Joy Mining*, where the claimant “asserted that its claim falls within Article I(a)(iii) of the Treaty which includes within the scope of investment ‘claims to money or to any performance under contract having a financial value,’” the tribunal was “not persuaded by this argument either. Even if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterizing as an investment dispute a dispute which in essence concerns a contingent liability. *Id.*, ¶¶ 45-47.
814. In any event, PEL also has not demonstrated that it “established or acquired” “rights to ... performance under contract having a financial value.” *Id.* (emphasis added).
815. According to Article 1(b)(iii), the “rights” must be to “performance under contract having financial value.” Specifically, the performance must be due under contract – here the only contract is the MOI. Thus, the performance due under the MOI must have financial value. Moreover, PEL must have established or acquired the right to said performance under the MOI. None of these requirements have been satisfied by PEL.
816. As discussed in the merits, the MOI is invalid and unenforceable because it is contrary to Mozambican law, on a number of grounds. Thus, the MOI, in and of itself, has no financial value. PEL has presented no evidence that the MOI, in and of itself, has any market value. Further, even if it were valid and enforceable, PEL did not “establish” or “acquire” any “right to performance” under the MOI, because any rights of PEL under the MOI were “contingent” on PEL’s satisfaction of specific conditions, and PEL did not satisfy the conditions precedent. As such, the contingent rights in the MOI have no value, and PEL has not presented any evidence that the contingent rights have any market value. At best, the MOI provided PEL with a right of preference/*direito de preferência* (or, option) which was satisfied when the MTC provided PEL’s consortium with a scoring advantage in the

instead of Article 24’s general provisions on new member admissions. This principle is generally recognized. *See, e.g., R-147, Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6 (Interim Ruling on Issues under the Deed of Settlement), 19 December 2014, ¶ 74 (“the specific clause prevails over the more general clause”) (citing New York law).

public contest. This is simply a scoring advantage and it has no independent market value, because it is particular to the bidder. PEL does not present any evidence to the contrary.

817. PEL's *ex post* and *ex ante* damages theories are irrelevant, because even PEL's experts conceded that the MOI is not a concession agreement. Realizing its *ex post* and *ex ante* theories are speculative given that no concession was conferred, PEL seeks to introduce a new damages theory on Reply: "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." Reply ¶ 1081. The new theory makes no difference because, as discussed below, it is also speculative and wrong. In any event, this new theory does not bring PEL within Article 1(b)(iii). Article 1(b)(iii) requires that there be "rights to ... *performance* under contract having a *financial value*." Here, the *performance* would have been the negotiation of a direct award. The negotiation itself has no market value, and PEL presents no evidence of any such market value. According to PEL, PEL's new damages theory is based on the alleged "lost chance" to "make a profit" "which would have followed the award of the concession by the MTC," which never happened. PEL's forward-looking alleged lost profits theory also does not fit Article 1(b)(iii), which requires that the rights be "established or acquired." Moreover, the value of the "chance" to make a profit, on the one hand, and the value of the "right" to "negotiate a direct award," on the other hand, *are not synonymous*. PEL's theory focuses on lost profits (which would have followed the award of the concession by the MTC) whereas the value of the right to negotiate (precedes the award of the concession by the MTC). These are apples and oranges.
818. Similarly, although PEL argues that "Mozambique says nothing of the other rights acquired by PEL, including its rights to exclusivity and confidentiality," Reply ¶ 530, there is nothing to say about them because PEL also has placed no financial value on them.
819. Therefore, because PEL has failed to establish that its alleged "rights to performance under" the MOI "have a *financial value*," PEL made no investment under Article 1(b)(iii).
820. Fourth, PEL cites Article 1(b)(iv), but also does not provide any analysis as to why it applies (and cannot introduce new arguments later in rejoinder). *See* Reply ¶ 513(a).

821. Article 1(b)(iv) defines an investment as “every kind of asset *established* or *acquired*” including “(iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party.” **RLA-1**, MZ-India BIT, Article 1(b)(iv) (emphasis added).
822. PEL argues that Mozambique “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” Reply ¶ 531. These observations are insufficient to satisfy Article 1(b)(iii).
823. PEL has not demonstrated that the alleged “know-how” are “intellectual property rights” under Mozambican law. PEL also has not demonstrated that it has “established or acquire” such “intellectual property rights” in Mozambique under Mozambican law. As described above, PEL also has not demonstrated (and has no records to demonstrate) that it provided any services in Mozambique that would even involve PEL’s alleged “know-how.”⁶¹
824. In sum, PEL is trying to fit a round peg into a square hole, and it won’t fit. It is clear that PEL did not make any “investment,” as that term is defined in the MZ-India BIT. The MOI and its attendant bundle of rights do not satisfy the definition of an investment, because no concession “conferred by law or under contract” was ever “established or acquired” by PEL. *PEL’s alleged rights under the MOI are merely contingent, precisely because PEL never signed a concession agreement.*
825. As PEL acknowledges in its Reply, the Tribunal could “consider that PEL never actually signing a concession document to be separate from its right to acquire a concession.” Reply ¶ 532. They are different. Even PEL’s experts admit that there is a difference between the right to negotiate a concession and the concession itself. And, as PEL also acknowledges, the Tribunal could consider “that such a distinction meant that the concession element of its investment is contingent.” *Id.*

⁶¹ In its Reply ¶ 513(b), and for its “know-how” argument, PEL cites **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. That claimant “trained approximately 63 engineers, and provided significant equipment and personnel to the Motorway.” In contrast, that claimant actually made a “contribution in terms of know-how, equipment and personnel.” *Id.*, ¶¶ 115-116.

826. The alleged MOI rights are contingent because, *arguendo*, they were conditioned on a number of contingencies in the MOI that PEL was unable to satisfy and, again, ultimately no concession agreement was ever awarded or signed. Thus, as PEL also acknowledges, the Tribunal could conclude “that contingent assets fell outside the scope of the Treaty.” *Id.* Indeed, *there can be no contingent asserts under the treaty because the BIT strictly requires that the assets be “established or acquired.”*
827. The foregoing insurmountable, definitional obstacles are not overcome by PEL’s “holistic” approach, Reply ¶ 532, because *it cannot override* the language of the treaty. *Id.* PEL’s argument, that “the Tribunal should not surgically separate those aspects of the unitary whole that would fall within the Treaty and those that would fall outside,” is flawed because the definition in the MZ-India BIT governs what is an “investment.” PEL cites no cases that hold that the holistic approach can be used to contradict the express language in the definitional section of a BIT. Instead, in its Reply ¶ 576, PEL cites, **CLA-87**, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, but ignores that it held that “[t]he provisions of these treaties, and the BIT in the present case, are decisive for the qualification as an ‘investment.’” *Id.*, ¶ 88.⁶² Here, PEL cannot bootstrap a potential concession that was never agreed upon, entered into or signed into an alleged “investment.” A holistic approach cannot overcome that there was no investment under the definition in the MZ-India BIT, and particularly where the investment agreement (here, the concession agreement) was never signed, and was instead awarded to a competitor winning bidder.
828. Elsewhere in its Reply, PEL argues: “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.*” Reply ¶ 548 (emphasis added). However, as discussed above,

⁶² Rather, in **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, cited by PEL at ¶ 513(b), which discusses the “holistic approach to the meaning of ‘investment’ in Article 25(1) of the ICID Convention,” the tribunal reiterated: “The Tribunal notes, again, that *the Respondent does not contend that KOMSA was not an investor with an investment* under Article 25(1) of the ICSID Convention, as regards its equity interest in the FertiNitro project.” *Id.*, ¶ 6.60 (emphasis added).

the MOI (and its preceding preliminary study – which PEL undertook voluntarily before the MOI was signed) does not fit within the definition of an “investment” in the BIT.

829. Therefore, the MOI and its attendant bundle of rights cannot constitute a “investment” under the definition in the MZ-India BIT, because no concession has been established or acquired by PEL, and PEL also was not conferred any concession. As discussed below, and without prejudice, PEL may be able to assert commercial claims elsewhere (before the ICC Tribunal), but there is no jurisdiction under the MZ-India BIT.

D. This Tribunal Lacks Jurisdiction (*Ratione Materiae*) Because The MOI and PEL’s Related Activities Are Also Not an Investment Applying the Traditional *Salini* Factors.

830. In its Reply ¶ 574, PEL questions the application of **RLA-57**, *Salini Costruttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ABR/00/4, Decision on Jurisdiction (16 July 2001). PEL then makes the misleading argument that “Respondent fails to explain the relevance of the Salini test outside the ICSID context.” *Id.*, 575.
831. However, as already explained by Mozambique, the *Salini* factors have been applied, by multiple treaty tribunals, to define the limits of what is an investment. There is no need to follow PEL into a rabbit hole of academic discussion. As the *Salini* tribunal itself held, to determine whether there is jurisdiction, including under a BIT, due consideration should be given to the jurisprudence. **RLA-57**, *Salini*, ¶ 44; **RLA-58**, *Nova Scotia Power Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award Excerpts (30 April 2014) ¶ 80 (“No matter what the forum [that is, regardless of whether the proceedings are under the Convention or Additional Facility Rules], *the ordinary meaning of investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for an examination of the inherent features of an investment.*”) (Emphasis added).
832. Continuing its baseless attacks, PEL argues “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.*” Reply ¶ 577 (emphasis added). What are these six (not two) factors addressed by Mozambique that according to PEL have nothing to do with *Salini*? Whether PEL contributed money/assets (SOD ¶ 404); duration investment (*id.*, ¶ 405); and whether there is “investment” risk (*id.*, ¶ 406); and whether there is a contribution to

economic development (*id.*, ¶ 414); as well as two additional factors often applied by tribunals, whether PEL complied with local law (*id.*, ¶ 417); and whether PEL acted *bona fides* (*id.*, ¶ 417). These **are** the *Salini* factors. PEL is blowing smoke, again.

833. Indeed, the *Salini* tribunal held that these factors should be considered:

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

In reality, these various elements may be *interdependent*. Thus, *the risks of the transaction may depend on the contributions and the duration of performance of the contract*. As a result, these various criteria should be *assessed globally* even if, *for the sake of reasoning*, the Tribunal considers them *individually* here.

RLA-57, *Salini*, ¶ 52 (emphasis added). And, the two other factors have been added since that decision. See **RLA-33, *Phoenix Action*, ¶ 114** (“to establish an investment ... the following six elements have to be taken into account: 1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested *bona fide*.”).

834. Mozambique has established that PEL’s alleged has not satisfied the *Salini* factors.

835. To begin, we must determine what PEL asserts to be its investment. According to PEL’s allegations, “[i]n 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*.” Reply ¶ 548 (emphasis added). PEL’s preparation and expenditures related to the preliminary study prior to the execution of the MOI, and the execution of the MOI, do not constitute an “investment” under the *Salini* factors. In addition, even if PEL’s activities and expenditures post execution of the MOI but related to the MOI are considered, they also do not constitute an “investment” under the *Salini* factors.

836. First, Mozambique has established that PEL made *no contribution in money or other assets that qualified* as an “investment” under the investment treaty jurisprudence.

837. In the Statement of Claim, ¶ 276(a), PEL’s sole argument with respect to this factor is that “PEL expended several million dollars⁶³ to fund the preliminary study and the PFS.” In its Reply, does not add anything new. PEL repeats that it “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 and engineering.” *Id.*, ¶ 579. PEL repeats that it “identified and developed” the concept (which Mozambique denies), *id.*, but *arguendo*, even if it did, that was just a part of the preliminary study and PFS. PEL again repeats that its alleged “investment consisted of the commission of the Preliminary Study, the MOI, and the rights underlying the MOI.” *Id.*, ¶ 780.
838. However, according to the various investment treaty precedents discussed above, such *pre-investment activities and expenditures* are not considered to be an “investment” under international law. *See, e.g., RLA-130*, Investment Treaty Arbitration Review (2020), 11 (“[t]o date, most tribunals have been reluctant to consider pre-investment activities and expenditures, which do not ultimately come to fruition, as covered investments.”).
839. PEL’s execution of the MOI, and related alleged contribution of money and assets made towards preparing the MOI like the preparation of the preliminary study, or towards satisfying the conditions of the MOI like the PFS, are all *pre-investment activities and expenditures* that do not rise to the level of an “investment” under international law.
840. The MOI and its alleged attendant rights were, *arguendo*, *contingent rights*, *dependent* on the occurrence of conditions specified in the MOI. For example, as held in *Joy Mining*, to conclude that such contingent rights are an investment, “would really go far beyond the concept of investment, even if broadly defined.” *Id.*, ¶¶ 45-47. Although PEL also refers to the MOI and its attendant rights as an “option,” the *PSEG Global* tribunal held that

⁶³ As indicated above, PEL also has totally failed to substantiate these alleged expenditures. Mozambique’s Request No. 10 stated: “Provide documents sufficient to show all costs PEL incurred with respect to the Preliminary Study, including timecards, invoices, or similar records.” Request No. 38 stated: “Provide timecards or similar records establishing the personnel involved and time and costs actually incurred by PEL in preparing the prefeasibility study (the ‘PFS’).” Request No. 46 stated: “Provide documents establishing the amounts actually spent by PEL individually, and not the PSG Consortium, in preparing the public tender submission.” In response to all requests, PEL had no documents to produce, thus a negative inference is appropriate.

“there is a limit to what they can reasonably encompass as an investment,” and an option “cannot be interpreted as an investment.” *Id.*, ¶ 189.

841. PEL’s alleged contribution of money and assets related to the MOI were pre-investment activities and expenditures. In *Joy Mining*, the claimant also asserted that its alleged “investment” included its “claims to money or to any performance under contract having a financial value,” but the tribunal also rejected that argument, on the basis that such expenditures “cannot ... recharacterize[e] as an investment dispute a dispute which in essence concerns a contingent liability.” *Id.*, ¶¶ 45-47. Similarly, in *Mihaly*, despite that the claimant and Sri Lanka had executed a Letter of Intent and a Letter of Agreement, and “considerable ... sums of money and effort were expended in planning the financial and economic modeling,” *id.*, ¶ 45, the tribunal concluded that the claimant’s pre-investment expenditures were not an “investment,” noting that “[i]t is an undoubted feature of modern-day commercial activity that huge sums of money may need to be expended in the process of preparing the stage for a final contract,” *id.*, ¶ 51. Until the “the final conclusion of the contract with Sri Lanka,” “the expenditures for its creation would not be regarded as an investment until admitted by Sri Lanka.” *Id.*, ¶ 47. Also as reiterated in *Zhinvali*, “the proposed Zhinvali Project transaction did not close and, thus, the costs of the ‘development phase’, in the words of the *Mihaly* Case, were not ultimately ‘swept up’ under the umbrella of an integrated, three phase investment project” *Id.*, ¶ 410.
842. Thus, without a PPP concession agreement executed by PEL and the MTC, there is no “investment.” *See, e.g., PSEG Global*, ¶ 104 (“The Concession Contract exists, is valid and is legally binding. This conclusion is sufficient to establish that the Tribunal has jurisdiction on the basis of an investment having been made in the form of a Concession Contract.”). Without an executed concession agreement, PEL’s alleged activities and expenditures related to the MOI remain “pre-investment.” As held in *Mihaly*, the Letter of Intent and Letter of Agreement did not “create[] a contractual obligation for the building, ownership and operation of the power station.” *Id.*, ¶ 48. “Ultimately, there was never any contract entered into between the Claimant and the Respondent for the building, ownership and operation of the power station.” *Id.*, ¶ 47. Similarly, PEL and the MTC never executed a PPP concession agreement, and therefore there was no “investment.”

843. To the contrary, since the MOI requires PEL to bear the expenses related to the MOI, this is the “opposite of conduct implying consent” by the MTC to an “investment,” given that the MTC denied responsibility for PEL’s expenditures under the MOI. *See RLA-56, Zhinvali*, ¶ 412.
844. Second, Mozambique has established that the duration factor has not been satisfied.
845. Here, there was no qualifying “investment” in the first place (the MOI and PEL’s related activities and expenditures are pre-investment), so the duration factor cannot be satisfied.
846. Even if PEL’s pre-investment activities and expenditures were considered, PEL’s Reply cannot dispute that, under the MOI, PEL was required to provide the PFS within 12 months, and one year falls short of the minimal length of time upheld by the doctrine, which is from 2 to 5 years. *See RLA-57, Salini*, ¶ 53 (“Although the total duration for the performance of the contract, in accordance with the CCAP, was fixed at 32 months, this was extended to 36 months. The transaction, therefore, complies with the minimal length of time upheld by the doctrine, which is from 2 to 5 years.”); *RLA-33, Phoenix Action*, ¶ 124 (“duration criterion generally requires that the investment project be carried out over a period of at least two years.”).
847. In its Reply ¶ 581, PEL argues that “it is clear that the investment was envisaged to be a long-term investment,” “construction of the Project itself was due to take place over 6 years,” and “[i]t was envisaged that the Project concession would have a 30-year term.” *Id.*, ¶ 581-582. However, PEL’s arguments are irrelevant, because PEL and the MTC never executed a PPP concession agreement, and the concession was awarded instead to IDT. Also, PEL alleges that its “investment was made when it commissioned the Preliminary Study in February 2011 and when it entered into the MOI on 6 May 2011.” Reply ¶ 548.
848. Realizing that it is unable to show the necessary duration on the facts, PEL also argues that “the duration for an investment referred to in *Salini* ought not to be mechanically applied and that duration depends on the circumstances of each case.” Reply ¶ 584. Here, there is no “mechanical” application – PEL cannot overcome that it never made an investment, particularly when considering the circumstances – that no PPP concession came to fruition.
849. Third, Mozambique has established that the element of “investment” risk is lacking.

850. As discussed above, because there was no qualifying “investment” in the first place (the MOI and PEL’s related activities and expenditures are pre-investment), the MOI and those activities and expenditures could not have given rise to an element of “investment” risk.
851. In its Reply ¶ 585, PEL argues that “*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.” (Emphasis added). However, it is settled that mere “risk” does not satisfy this *Salini* factor – there must be, specifically, “investment risk.” “It may be that any transaction involves a risk, but what is required for an investment is a risk that is *distinguishable from the type of risk* that arises in an ordinary commercial transaction. Furthermore, the relevant risk is that which is *specific to the investment which did take place, not the lost opportunity to make a different investment or commercial decision.*” *Nova Scotia*, ¶ 105 (emphasis added).
852. PEL’s argument that a concession as “envisioned” cannot establish investment risk, because the concession is not an “specific investment which did take place.” *Nova Scotia*, ¶ 105. PEL’s arguments that, in connection with the MOI, “PEL did not know whether the PFS would find the Project to be feasible or whether it would be approved by the MTC” and “could not predict the outcome of the transaction,” Reply ¶ 588, also cannot establish investment risk, because “the relevant risk” is “not the lost opportunity to make a different investment,” **RLA-58**, *Nova Scotia*, ¶ 105. PEL instead alleges its “investment was made when it commissioned the Preliminary Study ... and when it entered into the MOI.” Reply ¶ 548.
853. Even PEL’s barrage of baseless accusations against the MTC, in connection with their dealings over the MOI, are irrelevant because they do not establish investment risk – those risks were simply commercial risks. “A commercial risk covers [...] *the risk that one of the parties might default* on its obligations, which risk exists in any economic relationship.” **RLA-60**, *Poštová Banka, a.s., Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, (9 April 2015) ¶ 369 (emphasis added).
854. Indeed, there was no “investment risk,” because PEL’s expenditures and actions were “pre-investment activity.” PEL took the risk it may not be awarded the concession, if it could not meet the conditions and could not win the public tender, but that is a commercial risk.

855. In its Reply, PEL cannot dispute that the lack of an executed PPP concession agreement and the fact that the concession never came to fruition between PEL and the MTC, confirm that there was no “investment” risk. In sharp contrast, in *Salini*, the project was awarded to the claimant Italian companies, the “works were completed” after 36 months and the government took over the completed project. *Id.*, ¶¶ 2, 3, 4. As a result, the *Salini* tribunal concluded that “[a] construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor.” *Id.*, ¶ 56. Here, there was no concession with PEL and PEL did not construct the project. In its Reply, PEL does not dispute or address the foregoing points. *See Reply* ¶¶ 585-589.
856. Similarly, Mozambique argued that in *Beijing Urban*, the claimant entered into a contract with Yemen to construct an airport. During phase two of construction (after phase one was completed), the claimant alleged that Yemen use military force to prevent its entry into the project and terminated the contract. **RLA-62**, *Beijing Urban Construction Group Co Ltd v. Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, (31 May 2017) ¶¶ 22-27. The tribunal held these facts satisfied the *Salini* factors. *Id.*, ¶ 136. “It is obvious that construction of an international air terminal worth in excess of a hundred million dollars contributes to the host State’s economic development.” *Id.*, ¶ 137. “[T]he Tribunal has no difficulty in concluding that BUCG did make an investment in Yemen ...” *Id.*, ¶ 138. Here, there was no concession with PEL and PEL did not construct the project. In its Reply, PEL also does not dispute or address the foregoing points. *See Reply* ¶¶ 585-589.
857. Similarly, Mozambique argued that, in *Toto Costruzioni*, there also was an executed construction contract. “The dispute arose from a Contract dated 11 December 1997 entered into between the *Lebanese Republic* ..., on one hand, and *Toto Costruzioni* ..., on the other hand, in the context of the construction of a portion of the Arab Highway ... Pursuant to the Contract, Toto undertook to build [a] section of the Arab Highway ...” **RLA-63**, *Toto*, ¶ 16. The tribunal held that a construction contract in which the execution of the works extends over a substantial period of time involves by definition the necessary element of risk. *Id.*, ¶ 78. “Thus, it is the considered conclusion of this Tribunal that the construction carried out by Toto in Lebanon was an ‘investment’ ..., and as such, the disputes related to this construction qualify for the ICSID arbitration.” *Id.*, ¶ 87. Again, here, there was no

concession with PEL and PEL did not construct the project. In its Reply, PEP also does not dispute or address the foregoing points. See Reply ¶¶ 585-589.

858. Instead, in its Reply ¶ 587, PEL cites **RLA-61**, *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280, Award (26 November 2009), but this decision does not help PEL. Rather the *Romak* tribunal held that “[a]ll economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of nonperformance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally.” *Id.*, ¶ 229 (emphasis added). Indeed, it would render meaningless the distinction between investments and commercial transactions if any type of risk would be sufficient to establish an investment.
859. In its Reply ¶ 587, PEL highlights the next paragraph in *Romak*, that “[a]n ‘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.” But this language obviously refers to a situation where there is an investment in place (for example, such as a PPP concession), not a contingent pre-investment contract, like the MOI.
860. Rather, under the MOI, PEL had the unilateral option of walking away even after the PFS was approved, and therefore PEL could control its expenses and the downside of the ultimate economic outcome of the MOI transaction. See Second Daga Witness Statement, ¶ 57 (“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.”) and ¶ 65 (“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.”).
861. Thus, there is an absence of “investment” risk, and PEL also cannot satisfy this factor.
862. Fourth, Mozambique has established that the element, that there must be a contribution to the economic development of the host State, is also absent.

863. In its Reply ¶ 590, PEL argues that “*the Project* was a quintessential example of a project contributing to the economic development of the host state,” and accuses Mozambique of making “feeble” arguments in contrasting “this case with *Salini* where the construction of the infrastructure had started.” However, despite its rhetoric, PEL is mistaken.
864. PEL again commits the same fundamental mistake, of focusing on “the Project.” However, “the Project” (that is, the PPP concession for construction of the rail and port) is irrelevant, because PEL was not awarded “the Project,” PEL and the MTC never executed a PPP concession agreement, and “the Project” was awarded to someone else, IDT. PEL also ignores that its theory of the case is that its “investment was made [instead] when it commissioned the Preliminary Study ... and when it entered into the MOI.” Reply ¶ 548. PEL cannot rely on a project that *PEL never executed* to claim that it made a contribution to the economic development of Mozambique, because a contribution cannot be made through a nonexistent project. Similarly, PEL cannot claim that “it” made a contribution to the economic development of Mozambique though somebody else’s (IDT’s) project.
865. Mozambique’s contrasting of this situation with *Salini* is entirely correct, because in *Salini* the parties executed the construction contract for the highway project and the claimants substantially performed under the construction contract. Thus, as the tribunal held, under those circumstances, “the contribution of the contract to the economic development of the Moroccan State [could not] seriously be questioned.” **RLA-57, *Salini*, ¶ 57.**
866. In its Reply ¶ 590, PEL also argues that it allegedly contributed unspecified “know-how” to the MTC, which allegedly allowed it “to organise the tender and ultimately pursue the Project.” However, *arguendo*, so did every other bidder on the public tender contest – each bidder presented its own version of the proposed project, as well as its own technical and economic know-how regarding its particular bid, but that does not create an “investment.”
867. In *Salini*, the contactors also provided the host State with know-how, but the significant difference is that it was provided in connection with the construction of the project. *See RLA-57, Salini, ¶¶ 53* (“used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works”). Instead, PEL’s preliminary study and PFS, and related activities, were, as discussed above, *pre-investment* submissions, which do not raise to the level of an “investment,” and also *were not subsumed* into a

subsequent investment, because there was no concession between PEL and the MTC. Indeed, in *Salini*, the “contribution” factor was established by the construction of the road itself, *id.*, ¶ 57, and the know-how was just one of the aspects involved in the construction. Nothing in *Salini* suggests that unspecified “know-how” – in the absence of an award of the project – constitutes an “investment.” Even if PEL had, *arguendo*, a trade secrets or other sort of intellectual property claim under local law to pursue, that does not convert that commercial dispute into a treaty dispute.

868. Fifth, the investment must be in accordance with the laws of the host State. As discussed, Mozambique has established that the MOI were interpreted to require a concession, as PEL urges, then it violated Mozambican law, including the PPP Law. In its Statement of Claim and again in its Reply, does not add anything regarding this factor in its *Salini* discussion.
869. And Sixth, the alleged investment also must be a *bona fide* investment. As discussed above, PEL breached the internationally recognized principle of good faith, and acted fraudulently to induce the MTC to deal with PEL, by concealing that PEL had been blacklisted in India, and that the Supreme Court of India had held PEL to be “not commercial reliable and trustworthy.” In its Statement of Claim and again in its Reply, does not add anything regarding this factor in its *Salini* discussion.⁶⁴
870. In sum, then, the various *Salini* factors weigh heavily in favor of the conclusion that there is no “investment,” under international law, and therefore this Tribunal lacks jurisprudence also on these additional grounds.

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

871. In its Reply, PEL disregards the crux of Mozambique’s *ratione personae* argument, that a party cannot be an “investor” without making what qualifies as an “investment.” Mozambique has established that PEL is not an “investor,” because PEL did not make an “investment” under investment treaty precedents, the MZ-India BIT and Mozambican law.

⁶⁴ Additionally, the most-favored-nations clause also cannot be used to create jurisdiction where “there is no investment within the meaning of the BIT.” **RLA-58**, *Nova Scotia*, ¶ 146. In its Statement of Claim and again in its Reply, PEL ignores this factor in its *Salini* discussion.

872. Contrary to PEL’s rhetoric, Mozambique does not “conflate” or “confuse” the notions of “investor” and “investment.” Reply ¶ 498. It is a basic proposition that PEL cannot be an “investor” unless PEL made an “investment.”
873. As discussed above, PEL did not make an “investment,” because options are not recognized as “investments” in the investment treaty precedents. As discussed above, PEL also did not make an “investment” under the provisions of the MZ-India BIT, and because PEL did not register its “investment” as required by Mozambican law. As a result of PEL’s failure to make what qualifies as an “investment” under the precedents, treaty and local law, PEL cannot be considered to have been an “investor.” SOD ¶ 427.
874. PEL cannot distinguish *Cementownia* and *ST-AD GmbH*, Reply ¶ 501, because those authorities concur that “an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that [he] was an investor at the relevant time, *i.e.*, at the moment when the events on which it claim is based occurred,” **RLA-68**, *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award (17 September 2009), ¶ 112, and “a BIT cannot apply to the protection of an investor before the latter indeed became an investor under said BIT,” **RLA-69**, *ST-AD GmbH v. Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013), ¶ 300.
875. PEL also notes that under Article 1(c) of the MZ-India BIT an investor must be a national of the other party. Nonetheless, although that is one characteristic of an investor, a party simply cannot be an “investor” without making what qualifies as an “investment.”

F. This Tribunal Lacks Jurisdiction (*Ratione Personae*) Because the Real Party in Interest is The PGS Consortium; PEL Cannot Bring these Claims Alone, and the PGS Consortium Cannot Be Joined in this Proceeding.

876. Mozambique also has established that the Tribunal lacks jurisdiction *ratione personae*, or PEL lacks standing, because the PGS Consortium is the real party in interest, PEL cannot bring these claims alone, and the PGS Consortium cannot be a party to this proceeding.
877. First, the *real party in interest* is, undeniably, *the PGS Consortium*. The crux of this arbitration is that PEL claims that it had the alleged right to be awarded the subject concession by the MTC. However, even assuming that such right exists, it would have

belonged to the PGS Consortium formed by PEL, Grindrod and SPI, and not to PEL alone. PEL cannot avail itself of the rights of the PGS Consortium in this arbitration.

878. The decision, in **R-148** *ACP Axos Capital GmbH v. Kosovo*, ICSID Case No. ARB/15/22, 3 May 2018 (Award) , is on point. In this case involving a public-private partnership, the tribunal unambiguously held that the claimant, who participated in a consortium, could not bring claims alone and separate from the consortium, related to the concession:

Axos alone cannot avail itself of the rights, if any, belonging to the Consortium formed by Axos and Najafi

Id., ¶¶ 187-195 (emphasis added).

879. The *ACP Axos* tribunal held that “[t]he Claimant is this arbitration is Axos and Axos alone. According to Axos, a protected investment would arise from the rights acquired by the Selected Bidder following its selection as such.” *Id.*, ¶ 187 (emphasis added). “It is not in dispute that *the bid submission was made by the Consortium.*” *Id.*, ¶ 190 (emphasis added). “The detailed Bid Document defines the ‘Consortium’ as follows: ‘The consortium (‘Consortium’) composed of ACP Axos Capital GmbH (‘Axos’), Najafi Companies (Najafi).’” *Id.*, ¶ 191. “The Selected Bidder was therefore the Consortium Axos/Najafi, not Axos alone. Whatever rights are attached to the status of a Selected Bidder those rights belonged to the Consortium, not to Axos alone.” *Id.*, ¶ 192. “Assuming *arguendo* that such rights exist *and regardless of the nature and scope of these rights*, the rights of the Selected Bidder *belonged to the Consortium formed by Axos and Najafi, not to Axos alone.*” *Id.*, ¶ 189 (emphasis added).

880. Based on the foregoing, the *ACP Axos* tribunal held:

It follows that Axos cannot avail itself of the rights of the Axos/Najafi Consortium in this arbitration. This finding is fatal to Axos’ jurisdictional theory regardless of the other reasons leading to the dismissal of this case.

Id., ¶ 195 (emphasis added).

881. To paraphrase the *ACP Axos* tribunal, here, PEL participated in the public bidding contest as part of the PGS Consortium. “*The bid submission was made by the PGS Consortium.*” The PGS Consortium bid document defines the “Consortium” as *composed* of PEL, Grindrod and SPI. See **C-190A**, PGS Consortium Bid, p. 1 (“The undersigned consortium

comprising of Patel Engineering Ltd., Grindrod Limited and SPI-Gestao e Investimientos S.A. ('the Consortium') is pleased to present ..."); C-37 (PGS Consortium letter to MTC, dated 27 June 2013). The PGS Consortium received the MOI's right of preference by being awarded the 15% scoring advantage, the PGS Consortium accepted PEL scoring advantage in the bidding contest, PEL consented to that procedure, the MTC relied on said consent and provided the scoring advantage to the PGS Consortium, and the PGS Consortium (not PEL alone) presented the bid proposal in the public bidding contest. Therefore, the real party in interest is clearly the PGS Consortium, and not PEL.

882. PEL also cannot argue that it is bringing completely *separate* claims from those of the PGS Consortium. PEL is asserting, as the basis for its treaty claims, that the public tender was not scored properly by the MTC and that the PGS Consortium should have won the public tender instead. PEL is also asserting that the 15% scoring advantage, emanating from its alleged rights under the MOI, was not properly calculated during the tender contest. Thus, in adjudicating PEL's treaty claims, consideration must be given to these local law claims that, under a "subject matter test" (see, the *Monetary Gold* discussion below) are part of or overlap precisely the rights of the PGS Consortium.
883. Specifically, in this arbitration, PEL claims that it should have been awarded the concession,⁶⁵ and seeks the alleged lost profits of the concession had it been awarded to the PGS Consortium. However, those are claims and damages that now only the PGS Consortium may assert,⁶⁶ but not PEL individually. In fact, because *whatever rights PEL*

⁶⁵ PEL claims it should have been awarded the concession. See, e.g., Reply ¶ 517 ("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."); ¶ 180 ("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"); ¶ 216 ("PEL would be granted the right to a direct award"); and ¶ 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").

⁶⁶ PEL also claims that the PGS Consortium should have been awarded the concession. See, e.g., Reply ¶ 419 ("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."); ¶ 419(b) ("The financial proposals scores were not calculated in accordance with the formula specified in the Tender Documents and the MTC's later clarifications"); ¶ 419(c) ("Selection of ITD as the highest bidder was not based on the criteria and formula given in the Tender Documents"); ¶ 419(d) ("The MTC did not add a 15% scoring

had in the MOI were subsumed into the PGS Consortium's participation in the bidding contest, there is nothing left for PEL to claim alone and separately from the PGS Consortium, because PEL's instant claims conflict with the alleged rights of the PGS Consortium. "Assuming arguendo that such rights (to be awarded the concession) exist and regardless of the nature and scope of these rights," such rights "belonged to the PGS Consortium formed by PEL, Grindrod and SPI, not to PEL alone." Therefore, the rights (if any) to be awarded the subject concession or recover lost profits "belong to the PGS Consortium, and not to PEL alone." "It follows that PEL cannot avail itself of the rights of the PGS Consortium in this arbitration." "This is fatal to PEL's jurisdictional theory."

884. If, as PEL claims, the winner of the public tender was truly the PGS Consortium, then PEL is placing itself in a position adverse to the interests of the PGS Consortium, by claiming that PEL should have been awarded the concession instead pursuant to the MOI instead. As clearly held in *ACP Axos*, once PEL joined the PGS Consortium, it lost any rights to pursue the concession alone. What PEL is asking this Tribunal to rule and award in this arbitration, would create total uncertainty and complete havoc in public bidding contests.⁶⁷
885. Second, in the *alternative*, the record also establishes that, on the basis of its overt actions, PEL assigned its rights under the MOI to the PGS Consortium, and cannot undo that assignment simply because the PGS Consortium came in third place in the public contest.
886. Contrary to PEL's argument, the UNIDROIT principles recognize that, under international law, an "assignment of a right *transfers* to the assignee: (a) *all the assignor's rights to payment or other performance under the contract* in respect of the rights assigned, and (b)

advantage to the financial proposal's scores"); and 431 ("The winning bidder was chosen based on improper procedure"); ¶ 442 (PEL claims there were "flaws in the scoring of the bids"). As a result, PEL claims that "*the PGS Consortium properly submitted the complaint ...*" *Id.*, ¶ 449 (emphasis added). "*The PGS Consortium did not proceed with the further administrative and judicial appeal of the tender as it would be pointless at that time.*" *Id.*, ¶ 457 (emphasis added).

⁶⁷ PEL argues that it notified the MTC 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." Reply ¶ 411. This is a general statement. This is no disclosure that PEL had a secret side-deal. This is also no justification for PEL renegeing on its decision to participate in the public tender as part of the PGS Consortium. If this Tribunal held that a self-serving reservation is sufficient to avoid the results of a public tender process, it would, indeed, throw international PPP tendering into total havoc.

all rights securing performance of the rights assigned.” **RLA-128**, UNIDROIT Principles of International Commercial Contracts (2010), Art. 9.1.14 (emphasis added).

887. PEL mistakenly argues that it “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. These rights were not assigned to the PGS Consortium.” Reply ¶ 503. PEL is wrong, because the assignment can operate *as a matter of law*, based on overt actions that PEL took that are inconsistent with retaining the MOI rights.
888. By participating in the PGS Consortium, PEL assigned – by its overt actions and as a matter of international law (including investment treaty decisions like *ACP Axos*) – to the PGS Consortium its alleged rights under the MOI (the MOI right of preference reflected in the 15% scoring advantage). *The MTC relied upon the assignment* of PEL’s rights to the PGS Consortium, and provided the scoring advantage to the PGS Consortium, and allowed PEL to participate in the public contest through the PGS Consortium. The MTC therefore relied on PEL’s overt actions of joining the PGS Consortium, assigning to the PGS Consortium its MOI rights, and participating through the PGS Consortium in the public bidding contest.
889. After losing the public contest as part of the PGS Consortium, and never appealing the results through the administrative process, PEL cannot seven years later seek to undo its prior assignment and participation in the PGS Consortium, and revert to insisting on the MOI alone, to the detriment of the MTC, and the prejudice of the winning bidder in the public bidding contest. If, despite the fact that another bidder won the public contest, the MTC had awarded the concession nonetheless to PEL, the winning bidder could have brought a claim against the MTC arguing the MTC wrongfully granted the concession to PEL despite that the PGS Consortium came in third place.
890. PEL’s argument that, PEL “entered into *a side letter* with SPI and Grindrod,” Reply ¶ 503, cannot overcome the assignment which, as a matter of law, resulted from PEL’s overt actions and the MTC’s reliance on those actions, including PEL’s participation in the PGS Consortium (in other words, *PEL is estopped*). PEL has submitted no evidence that PEL or the PGS Consortium ever delivered a copy of the alleged “side letter” (C-233) to the MTC, and PEL does not even allege that PEL placed the MTC on notice of that side letter.

The “side letter” is a *secret document* that was *concealed by PEL from the MTC*. Therefore, PEL cannot overcome its overt actions which resulted in an assignment, under accepted international legal principles such as UNIDROIT, *by some secret side-deal*.

891. The side letter also must be disregarded because it violates the bidding documents, and was fraudulently concealed by PEL. The Tender Notice disqualifies a potential bidder that has a conflict of interest, which is defined to include a “Bidder whose hiring for a service which, by its nature, conflicts with the service subject to this selection.” C-27, ¶¶ 8.2 and 8.3(c). If, by its side letter, PEL retained an alleged right to service this concession by a direct award, that right conflicted with PEL’s submission, as part of the PGS Consortium, to the public contest to obtain the right to service the concession, and also would conflict with the rights of the winning bidder to service the concession. Nonetheless, PEL was signed the letter on 8 March 2013 (C-233) the same day Mr. Daga submitted the expression of interest to the MTC (also 8 March 2013, *see* R-24), in response to the Tender Notice.
892. Third, in the *alternative*, the PGS Consortium is a necessary party but cannot be joined in this proceeding, because it includes a Mozambican national (SPI), and therefore this Tribunal lacks jurisdiction also for this reason.
893. The *Monetary Gold* decision established the basic principle that an international tribunal should refuse jurisdiction over a dispute if its resolution involves the determination of the rights and obligations of a *non-party to the proceedings*. RLA-71, *Case of the Monetary Gold Removed from Rome in 1943*, ICJ Reports 1954 (15 June 1954).
894. UNCITRAL tribunals, like in *Larsen*, have followed this principle:

[U]nder international law, there is a general principle that a non-national tribunal cannot deal with a dispute *if its very subject matter will be the rights or duties of an entity not a party to the proceedings*, or if as a necessary preliminary to dealing with a dispute it has to decide on the responsibility of a third party over which it has no jurisdiction.

RLA-72, *Larsen v. The Hawaiian Kingdom*, PCA Case No. 1999-01, Award (5 February 2001) ¶ 13 (citing *Monetary Gold* and additional ICJ decisions) (emphasis added); *see also* ¶ 11.8. Importantly, the tribunal held that the *Monetary Gold* principle was not confined to the ICJ, but was applicable to UNCITRAL proceedings and “it can see no reason either of principle or policy for applying any different rule.” *Id.*, ¶¶ 11.16-11.17. The tribunal concluded that the proper test was not whether there was a substantial risk of prejudice to the absent party, but rather the “subject matter test.” *Id.*, ¶¶ 11.20-11.21.

895. Under the “subject matter test,” the crux of this dispute involves the rights of the PGS Consortium, not a party to these proceedings. As discussed, the PGS Consortium submitted the bid, not PEL. PEL cannot bring the claim on behalf of the PGS Consortium, without the other partners (Grindrod and SPI) and in the name of the PGS Consortium.
896. Therefore, *Monetary Gold* bars PEL’s entire claims. PEL claims that the public tender was wrongly scored and the concession should have been awarded to the PGS Consortium. PEL cannot bring such claims, because they belong to the PGS Consortium, the bidder. At a minimum, this tribunal must find that it lacks jurisdiction over all claims and damages *related to the public tender*. PEL also cannot assert claims and damages *pursuant to the MOI*, because they were merged into PGS Consortium’s rights related to the public tender, when the PGS Consortium was provided the MOI scoring advantage. Resolution of a claim by the PGS Consortium, over its bid and the correctness of the tender scoring, involves consideration of the scoring advantage given PGS Consortium on the basis of the MOI. Therefore, the Tribunal lacks jurisdiction over *the entirety* of PEL’s claims.
897. In its Reply ¶¶ 506-507, PEL argues that *Monetary Gold* does not apply because this dispute does not involve the rights “of another State.” That is too limited a reading of *Monetary Gold*. Although the particular facts of *Monetary Gold* involved the rights of another State, the relevant principle is that a tribunal should not exercise jurisdiction over claims that involve the rights of *a missing a party*. PEL cannot dispute this basic proposition and ignores that UNCITRAL tribunals also have followed this principle: “under international law, there is a general principle that a non-national tribunal cannot deal with a dispute if its very subject matter will be the rights or duties *of an entity not a party to the proceedings*”) **RLA-72, *Larsen v. The Hawaiian Kingdom***, PCA Case No. 1999-01, Award (5 February 2001) ¶ 13 (citing *Monetary Gold*; emphasis added).
898. In its Reply, PEL also fails to dispute that the missing PGS Consortium, or its partners, could not be joined in this arbitration proceeding without defeating jurisdiction. Under Article 1(d)(i) of the MZ-India BIT, a “national” is defined “in respect of the Republic of India, [as] persons deriving their status as Indian nationals from the law in force in India.” In analyzing jurisdiction, the nationality of each partner of a partnership is taken into account. It is undisputed that Grindrod is a South African company, and SPI is a

Mozambican company. Their nationalities would defeat jurisdiction under the MZ-India BIT, because the consortium is a “partnership,” and was never incorporated as a separate juridical entity. Daga Witness Statement, ¶ 123 (“PEL partnered with” Grindrod and SPI). Under a “subject matter test,” proceeding with PEL’s claims alone, could result in inconsistent judgments between Mozambique and other members of the PGS Consortium.

899. PEL also cannot be allowed to pursue its “portion” of PGS Consortium’s claim, because that would create way to circumvent the “nationality” limitation in the MZ-India BIT. That also would be impermissible because the PGS Consortium was permitted to participate in the bidding contest as a consortium, and not as individual members. The PGS Consortium also made it clear that its members were participating as a consortium, and not as individual bidders. *See C-190A*, PGS Consortium Bid, p. 1. Therefore, based on the nationality limitation in the MZ-India BIT, here was no consent to treaty jurisdiction by Mozambique as to one member of the PGS Consortium, because the PGS Consortium would not have qualified as a national of India. PEL cannot overcome the limitation of the MZ-India BIT, and manufacture jurisdiction, by unilaterally (and years after the bidding process was completed) seeking to separate itself from the PGS Consortium, because that would not reflect the factual reality of the bidding submittal. By seeking to separate itself from the PGS Consortium, PEL also cannot overcome the *Monetary Gold* principle, that the arbitration cannot proceed with all interested parties, which would then include the two other members of the PGS Consortium individually.

900. Thus, also because the PGS Consortium, or its partners, are necessary parties, and cannot be joined, this proceeding must be dismissed pursuant to the *Monetary Gold* principle.

G. This Tribunal Lacks Jurisdiction (*Ratione Materiae/Ratione Temporis*) Based on PEL’s Violation of International Law Principles and Mozambican Law.

901. Mozambique has established that the Tribunal lacks or should decline to exercise its jurisdiction because PEL violated international law principles and Mozambican law.

902. First, an investment “will not be protected if it has been created in violation of national or international principles of good faith,” “fraud or deceitful conduct,” etc. These general

principles recognized in international law “exist independently of specific language to this effect in the Treaty.” **RLA-29**, *Hamester*, ¶¶ 123-124.⁶⁸

903. As discussed in the admissibility section, above, by failing to make the subject disclosures, PEL violated the international principle of good faith, engaged in fraudulent conduct, violated international public policy, and would be unjustly enriched. That discussion is incorporated herein by reference. As a result, the Tribunal lacks or should decline to exercise its jurisdiction because PEL violated these international law principles.
904. Second, disputes arising from “an investment made illegally” are not subject to treaty “jurisdiction” because they are not “within the premises for which the consent was given.” *Inceysa*, ¶¶ 182-183. By failing to make the disclosures, PEL also violated Mozambican law and the tender documents, as discussed in the admissibility and merits sections of this memorial. Those discussions also are incorporated herein by reference. If the MOI is interpreted to require the MTC to make a direct award of the concession to PEL without a public tender, that also would violate Mozambican law, as discussed in the merits section of this memorial. The nature and gravity of such a violation is very serious indeed. Based on PEL’s violations of Mozambican law, including Mozambican PPP law, and the bidding documents, the Tribunal also lacks or should decline to exercise its jurisdiction.
905. Third, the MZ-India BIT contains express legality requirements, that the investment must comply with Mozambican law. This means that the alleged investment does not fit within the MZ-India BIT, because it violated Mozambican law for the reasons mentioned above.
906. The alleged investment also violated the local registration requirement.

⁶⁸ PEL cannot muddy the waters. The investor’s violation of international law principles *also* goes to the analysis of whether the tribunal has or should exercise its *jurisdiction*. See **R-145**, *Minnotte*, ¶ 131 (“tribunals have treated arguments based on fraud, etc., as going to jurisdiction or admissibility.”); *Metal-Tech*, ¶ 374 (“objections based on the violation of international public policy and transnational principles as well as on fraud” go to “jurisdiction and admissibility.”); **RLA-30**, *Inceysa*, ¶ 179 (“Tribunal must consider the principle of ‘Good Faith’ when determining [its] *jurisdiction*”) and ¶¶ 230-244 (good faith, fraud, public policy and unjust enrichment go to jurisdiction); *Vannessa Ventures*, ¶ 113 (good faith is considered by the Tribunal “when exercising its jurisdiction and to be applied in the context of admissibility and/or ... the merits phase.”).

907. “States may specifically and expressly condition access of investors to a chosen dispute settlement mechanism, or the availability of substantive protection. One such common condition is an express requirement that the investment comply with the internal legislation of the host State.” **RLA-29**, *Hamester*, ¶ 125.
908. PEL mistakenly argues that “[t]here is no requirement that PEL register its investment as a condition to jurisdiction under the Treaty.” Reply ¶ 560.
909. Article 1(b) of the BIT requires that the “investment” must be made “in accordance with the national laws of the Contracting Party,” Article 2 requires that the investment must be “accepted as such in accordance with its laws and regulations” (Mozambican law), and Article 12(1) requires that “all investment shall be governed by the laws in force in the territory of the Contracting Party” (Mozambican law). **RLA-1**, MZ-India BIT.
910. In this regard, Article 22(1) of the Mozambique Investment Law (“MIL”) required PEL to register its alleged investment. **RLA-8**. Article 2, Section 1, states that the MIL “seeks to establish *the basic and uniform legal framework for the process of carrying out* both national and *foreign investments* eligible for the guarantees and incentives provided for in this law, in the Republic of Mozambique.” Article 22, Section 1 further states that a
- foreign investor, within one hundred and twenty (120) days counted from the date of notification of the decision authorizing the investment project, shall register the undertaking involving direct foreign investment with the authority responsible for monitoring the inflow of capital, and register subsequently each actual capital import operation that takes place.*
- Id.* (emphasis added).
911. PEL does not dispute that it failed to comply with the MIL registration requirements. As such, PEL’s “investment” is not authorized and treaty arbitration is not available.
912. Instead, PEL argues that Mozambique is “estopped” from invoking the lack of registration. The “estoppel” argument fails. In its Reply ¶ 567, PEL quotes *Desert Line*’s holding that: “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.*” **CLA-282**, *Desert Line Projects LLC v. The Republic of Yemen*, Award, 6 February 2008, ¶¶ 120-121 (citing

RLA-32, *Fraport AG Frankfurt Airports Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007)) (emphasis added).

913. However, Mozambique did not “knowingly overlook and endorse an investment.” PEL’s argument overlooks that the MIL registration requirement comes into effect “within one hundred and twenty (120) days counted from *the date of notification of the decision authorizing the investment project.*” MIL, Article 22 (emphasis added). Mozambique contends that the MOI is *not an “investment,”* and thus Mozambique did not “knowingly overlook and endorse an investment” that was unregistered. There can be no estoppel.
914. It is PEL that contends that, “[i]n 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.” Reply ¶ 548. Thus, if it is an “investment,” as PEL contends, then it needed to be registered within 120 days of execution of the MOI, and it was not, which brings it outside of the definition of an “investment” under the MZ-India BIT.
915. PEL cannot dispute that *Tamimi* is on point. In *Tamimi*, the claimant submitted claims against the Sultanate of Oman, arising out of claimant’s investment in development and operation of a limestone quarry in Oman. **RLA-70**, *Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015) ¶¶ 1, 45-48. The claimant’s investment was created through two lease agreements signed between his companies Emrock and SFOH, and the Omani state-owned enterprise OMCO. *Id.*, ¶ 49. Oman raised jurisdictional arguments, including that the OMCO-SFOH Lease Agreement never came into force because SFOH was never registered in Oman. *Id.*, ¶ 98. Omani law required registration. *Id.* Oman asserted Omani law did not recognize the existence of companies not registered in Oman, or their contracts and claimant has not register SFOH. *Id.*, ¶ 99.
916. The tribunal held that it had no jurisdiction *ratione temporis* over the OMCO-SFOH Lease Agreement, because it was null and void as a result of SFOH’s failure to register. The tribunal found a company must be registered. *Id.*, ¶ 301. “[F]oreign investors wishing to conduct business in Oman are subject to the Foreign Capital Investments Law (“FCIL”). Under the FCIL, non-Omanis may not conduct a ‘*commercial, industrial or tourism*’ business in Oman unless they first obtain a license. The Commercial Register Law Amendment also requires “any natural or legal person” must obtain a “license from the

Ministry of Commerce and Industry” before “exercising commerce in the Sultanate.” *Id.*, ¶ 302. As a non-Omani entity doing business in Oman, SFOH was required to register on the Commercial Registry of Oman and obtain a license from MOCI. *Id.*, ¶ 309.

917. In its Reply ¶ 501(c), PEL cannot distinguish *Tamimi*. PEL first argues that Tamimi found a lack of “*ratione temporis* over the claimant’s investment – not jurisdiction *ratione personae*.” *Id.* That makes no difference – so, there is no *ratione temporis*. PEL then admits that “SFOH, which was the UAE company, through which the claimant had invested in the lease agreement, had failed to register a company in Oman as required by Omani law. 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.” *Id.* The failure to register precluded jurisdiction, and the same is the case here with respect to PEL’s failure to register its alleged investment per the MIL.

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

918. Mozambique has established that this Tribunal lacks jurisdiction, because India provided notice of termination of the MZ-India BIT, and the sunset clause does not apply.

919. PEL does not dispute that the MZ-India BIT has been terminated. Statement of Claim, ¶ 281 (“India purported to terminate the Treaty on 22 March 2019 with effect from 21 March 2020, pursuant to Article 15(1) of the Treaty.”).

920. Although Article 15(2) of the MZ-India BIT⁶⁹ contains a “sunset clause,” it only applies “in respect of *investment made or acquired before the date of termination* of this Agreement.” **RLA-1**, Art. 15 (emphasis added). PEL concedes that “Article 15(2) of the Treaty contains a ‘sunset clause’ which extends the Treaty’s protections for 15 years from

⁶⁹ Article 15 of the MZ-India BIT provides: “(1) This Agreement shall remain in force for a period of ten (10) years and thereafter it shall be deemed to have been automatically extended *unless either Contracting Party gives to the other Contracting Party a written notice of its intention to terminate the Agreement. The Agreement shall stand terminated one year from the date on receipt of such written notice.* (2) Notwithstanding termination of this Agreement pursuant to paragraph (1) of this Article, *the Agreement shall continue to be effective for a further period of fifteen (15) years from the date of its termination in respect of investment made or acquired before the date of termination of this Agreement.*” **RLA-1**, Art. 15 (emphasis added).

the date of termination *in respect of investments made prior to such termination.*” Reply ¶ 282 (emphasis added).

921. PEL mistakenly argues that “PEL’s investment was made in 2011, almost a decade prior to March 2020. The Treaty thus continues to be effective in relation to the current dispute before this Tribunal. Accordingly, this Tribunal has jurisdiction *ratione temporis*⁷⁰ over this dispute.” Statement of Claim, ¶ 283.
922. Mozambique has established the contrary – that the sunset clause does not apply, and therefore there is no treaty jurisdiction, because *PEL did not make an “investment”* while the MZ-India BIT was in force, for the various reasons discussed herein.

I. The Tribunal Lacks Jurisdiction (*Ratione Temporis*) Because Laches Bars PEL’s Belated Pursuit of this Treaty Arbitration.

923. Mozambique has established that this Tribunal lacks or should decline to exercise jurisdiction based on the doctrine of “laches,” because PEL unreasonably delayed almost ten years before initiating this treaty arbitration, to the prejudice of Mozambique. Despite PEL’s attempt to belittle this issue, Reply ¶ 625 (PEL mistakenly says that “[t]his is not a serious objection”), this is a serious issue. It is so serious, that PEL leads its Reply arguing about the various categories of documents that are missing. *See* Reply ¶¶ 31-57. Despite PEL’s insulting accusation that Mozambique is engaged in “guerrilla tactics,” Reply ¶¶ 31, there is no diabolical strategy behind Mozambique’s inability to produce documents. In this regard, PEL also ignores that it too has had great trouble producing substantial categories of documents, as discussed below. The problem is simple – the passage of time. PEL waited too long to bring this claim, and therefore laches bars PEL’s belated claims. This laches bar applies from a jurisdictional or admissibility perspective.
924. Despite PEL’s attempt to question the applicability of laches in international arbitration and that “this is not a serious objection” (Reply ¶ 624), an UNCITRAL tribunal, precisely, has acknowledged that “[l]aches is an equitable defense asserted *to bar the adjudication of*

⁷⁰ PEL’s argument, in its Reply, ¶ 624, that “Respondent does not put forward any objection to the Tribunal’s jurisdiction *ratione temporis*” and that “[t]his is an objection to the Tribunal’s jurisdiction *ratione materiae*,” contradicts PEL’s other argument, in its Statement of Claim, ¶ 283, that based on the sunset clause “this Tribunal has jurisdiction *ratione temporis* over this dispute.” Regardless of this semantic debate, the point is that the sunset clause does not apply.

stale claims. The doctrine is premised on the theory that a claim that is plagued with undue delay prejudices a defendant *because evidence is no longer available to defend against the claim.*” **RLA-80**, *Confor & Tembec v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal (7 September 2005), ¶ 165 (emphasis added).

925. Despite PEL’s attempt to be dismissive of the Virginia Law Review cited by Mozambique (Reply ¶ 624), the commentators observed that, “[o]ften called ‘extinctive prescription’ in international law, *the doctrine of laches is defined generally by international jurists and scholars as the bar of claims by lapse of time*. Although variations of this definition exist, the underlying concept remains constant: Undue delay in the presentation of an action *before an international tribunal* will vitiate the merits of the claim and work inequity between the litigation parties. *Laches, in its most basic application, addresses the right to adjudicate an action under international law regardless of the substantive merits at issue.*” **RLA-81**, A. R. Ibrahim, *The Doctrine of Laches in Int’l Law*, 83 VA. L. Rev. 647, 650-51 (April 1997) (emphasis added). These are basic principles that cannot not be disputed.
926. Indeed, “a stale claim presented before an international tribunal raises *an important presumption: The respondent is prejudiced by the undue delay.*” *Id.*, at 681 (emphasis added). Therefore, “[a]ny *substantial delay* in presenting the claim must be accompanied by an exculpatory reason overcoming the respondent’s defense of laches. Otherwise, the delay *will be presumed* negligent and unreasonable.” *Id.*, 678 (emphasis added). “The decisive factor is...whether the respondent *has suffered prejudice ...*” **RLA-82**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011). ¶ 88 (emphasis added). “It is for the Tribunal to determine whether the passage of time in this case is such as to render [the investor’s] claim *inadmissible...*” *Id.*, ¶ 89 (emphasis added).
927. PEL filed this claim belatedly. PEL admits that “PEL’s investment was made *in 2011*, almost a decade prior to March 2020,” Statement of Claim, ¶ 283. PEL submitted its Notice of Arbitration is dated 20 March 2020. At a minimum, before filing this claim, PEL allowed *seven years* to pass after the MTC awarded the concession to another bidder. *See R-32* (on 26 July 2013, the MTC formally notified the PGS Consortium of its decision to award the concession to ITD.). The delay of seven years gives rise to the presumption of

prejudice discussed above. In its Reply, PEL has failed to overcome this presumption of prejudice, although it was raised by Mozambique. SOD ¶¶ 611-622.

928. Further, the prejudice to Mozambique in these proceedings, resulting from PEL's undue seven-year delay, is not only an un rebutted presumption, but is very real. As held by the UNCITRAL tribunal in *Confor & Tembec*, the doctrine of laches "is premised on the theory that a claim that is plagued with undue delay prejudices a defendant *because evidence is no longer available to defend against the claim.*" **RLA-80**, *Confor & Tembec*, ¶ 165 (emphasis added). That is precisely the situation presented here.
929. There are various categories of documents, that are relevant and material to Mozambique's defense, many of them that PEL no longer has based on the passage of time, that are no longer available because of PEL's undue seven-year delay in bringing this arbitration, and this has resulted in actual prejudice to Mozambique. The following are some examples.

(1) The MTC's Original Versions of the MOI.

930. Because of the passage of time, the MTC has been *unable to locate its original versions of the MOI*. The original versions of the MOI are material to Mozambique's defense, because a dispute has arisen regarding the different versions of the MOIs. The MOI is the contractual foundation of PEL's treaty claims. The original MOIs constitute "evidence" that is no longer available to defend against the treaty claims.
931. PEL is seeking to prejudice Mozambique on the basis that the MTC has been unable to locate the original versions of the MOI. Repeatedly throughout its Reply, PEL argues that "Mozambique has failed to produce its original versions of the MOI." *See, e.g.*, Reply ¶ 47. PEL argues that, "[i]n contrast, PEL has produced its original versions of the MOI." *Id.*, ¶ 94. Regardless of the passage of time, and PEL's seven-year delay in initiating these proceedings, PEL requests that the Tribunal make "inferences" against Mozambique for "its failure to produce documents," including the MOI. *Id.*, ¶ 31.
932. Therefore, Mozambique *has been actually prejudiced by the passage of time*, because the MTC can no longer locate its original MOIs. Mozambique will be further prejudiced if the

Tribunal draws negative inferences against Mozambique on the abasis of its inability to now find the original versions of the MOI, *ten years after the MOI was executed*.⁷¹

(2) **Records Regarding NHAI’s Blacklisting of PEL Maintained by PEL’s Legal Counsel or PEL Regarding the Judicial Proceedings in India.**

933. The records of the NHAI’s blacklisting of PEL, and the records of the judicial proceedings before the Delhi Supreme Court, as well as the Indian Supreme Court, are relevant and material to whether PEL’s claims are inadmissible and/or the Tribunal lacks jurisdiction.

934. Mozambique’s Request No. 53 stated: “Provide all pleadings from the court proceedings in which PEL challenged its blacklisting by the National Highways Authority of India.” There can be no dispute that the Indian law firm that represented PEL in these judicial proceedings had (at one time) copies of said files. Nonetheless, on 28 September 2021, PEL’s counsel wrote to the Tribunal (communication C-21) and stated that:

the Indian law firm instructed by PEL in the underlying temporary debarment proceedings does not have any documents responsive to Document Production Request 53, in light of the significant passage of time.

R-82, PEL communication C-21 (28 September 2021), ¶ 5 (emphasis added).

935. The blacklisting followed the execution of the MOI by only two weeks. The MOI was signed on 6 May 2011, and PEL was notified of its blacklisting by the NHAI on 20 May 2011. According to PEL’s own words, there has been a “*significant passage of time*” since these events occurred, and thus certain documents are no longer available.

936. Similarly, PEL no longer has the great majority of its own records of the NHAI’s blacklisting and the related judicial proceedings. In its September 28th communication,

⁷¹ In its Reply, PEL argues that Mozambique had an alleged obligation to archive the MOIs. PEL ignores that Mozambique did archive and produced scanned copies of both MOI’s versions in Portuguese and English. See **R-1** and **R-2**. These scanned copies are sufficient to comply with any obligation of the MTC to archive copies of the MOI. It would be antiquated and contrary to the manner in which the world retains most documentation today, which is by scanned electronic copy, if this Tribunal drew a negative inference against Mozambique, because the MTC no longer could find the paper originals of the MOIs more than ten years after they were signed. The issue arises in these proceedings, only because the parties have submitted different copies of the English version of the MOI. As a result, instead, the principle of laches comes into play and defeats the exercise of jurisdiction, because Mozambique is no longer able to access relevant and material evidence as a result of the passage of time and PEL’s seven-year delay in bringing this arbitration.

PEL also indicated: “PEL can further report that, having conducted a reasonable search of its systems, it can now confirm that: (1) PEL has no further responsive documents under Request 53 to provide, apart from the document referred to in paragraph 4 above” – that document was only the “cover page of one document responsive to ... Request No. 53.” **R-82**, PEL communication **C-21** (28 September 2021), ¶¶ 4-5.

937. PEL produced **R-83**, PEL Bates No. 0000314-0000316 (consisting of the NHAI correspondence, dated 20 May 2011, notifying PEL of its blacklisting). The NHAI blacklisting notification identifies a number of relevant and material records that PEL has not produced, including PEL’s bid to the NHAI, the NHAI’s letter of award (“LOA”), PEL’s letter declining to accept the award, the NHAI’s order to show cause, PEL’s response to the order to show cause, amendments communicated by PEL through the NHAI website, and other PEL written submissions. The NHAI blacklisting notification informs PEL that “your act of nonacceptance has resulted in huge financial loss,” “apart from the cost of the time and effort, to the NHIA,” and “[i]t is further noted that *this is the first case* where a bidder has not accepted the LOA, and warrants exemplary action, to curb any practice of ‘pooling,’ and ‘*malafide*’ in the future.” *Id.* “NHAI is of the considered view that no justifiable grounds have been made out in support of your action of nonacceptance of the LOA. Keeping in view the conduct of the [PEL representatives], NHAI finds that they are *not reliable and trustworthy* and have caused *huge financial loss* to the NHAI.” *Id.* The materiality of these documents to admissibility is obvious, particularly considering PEL’s blatant misrepresentation to this Tribunal that this matter was “minor.” Reply ¶ 17.

938. Although PEL repeatedly complains that the MTC was unable to locate certain documents pertinent to issues in these proceedings (and which Mozambique considers also would be relevant *but to its defense herein*), PEL ignores it and its Indian counsel have been unable to produce multiple categories of documents based on the significant passage of time.

(3) Indian Judicial Records Regarding the NHAI’s Blacklisting of PEL.

939. The judicial files – themselves – regarding the Delhi Supreme Court’s and the Indian Supreme Court’s Judgments are relevant and material to Mozambique’s contentions that PEL’s claims are inadmissible or the Tribunal lacks jurisdiction.

940. As the Tribunal is aware, despite this Tribunal's order that PEL must obtain and produce those judicial records, PEL has reported that the Indian courts have been unable to locate those records because of the passage of time. *See, e.g., R-84*, PEL communication C-34, dated 16 November 2021, from PEL's counsel to the Tribunal, stating that "the Supreme Court has not identified any responsive documents in its archives to date."
941. In its Reply, PEL complains about Mozambique not having been able to locate certain documents, like the MOI. However, it is a basic reality that, with the passage of time, documents are lost or cannot be located, precisely like the India Supreme Court has been unable to locate official files concerning judicial proceedings involving PEL, particularly where, as here, PEL contends that there has been a "*significant passage of time.*"
942. Similarly, on 28 September 2021, PEL's counsel wrote stating that PEL's India counsel "had applied to the Supreme Court of India for a complete copy of the court file," but that judicial records *may no longer "exist"* based on "*the passage of time.*" **R-85**, PEL email to Mozambique counsel, dated 28 September 2021 (emphasis added).

(4) **PEL's Notes, Agenda's, Minutes and Reports of Its Meetings with the MTC and MTC Minister Zucula.**

943. Mozambique's Request No.8 stated: "Provide PEL's agendas, notes, meeting minutes, and reports from the conferences PEL alleges to have undertaken with Minister Zucula in paragraphs 22-27 of the SOC and 32-33 of CWS-1."
944. Paragraphs 22-27 of the Statement of Claim are PEL's allegations that the Council of Minister instructed the MTC to have direct negotiations with PEL, and the MTC did a "*volte face.*" PEL references these MTC meetings and Minister Zucula's alleged reaction to the Preliminary Study and what PEL alleges was the intent of the subsequent MOI. If these meetings have the significance PEL ascribes to them, it is presumed that written documentation would have existed regarding the meetings, topics, and discussions.
945. However, PEL stated that it "has not identified any responsive document." The Tribunal held: "The Tribunal takes note of PEL's representation that it has conducted a search and has not identified any responsive document. Respondent may draw the appropriate inferences." An appropriate inference is that those documents cut against PEL and support Mozambique or, based on the passage of time, PEL no longer has these documents. Such

an inference is also proper with respect to the following requests, because in response to each of them PEL indicated that it was unable to find any documents, although the requested documents are such that PEL should have had them, at least at one time.

(5) **PEL's Records of its Expenditures and Scope of Work in Connection with PEL's Preliminary Study, and Related to PEL's Claim that PEL Originated the Idea of the Project.**

946. Mozambique's Request No. 10 stated: "Provide documents sufficient to show all costs PEL incurred with respect to the Preliminary Study, including timecards, invoices, or similar records." PEL alleges the "Preliminary Study PEL conducted in early 2011" comprises its "investment." Statement of Claim, ¶ 257(c). The nature/costs of this alleged investment are material to the existence of the investment/damages. Mozambique contends the costs of the Preliminary Study/PFS were minimal (if not nominal) relative to damages sought. SOD ¶¶ 928-934. It is presumed that PEL, like any contractor pursuing a new project, retained records tracking costs and the scope of its preliminary study.
947. Mozambique's Request No. 11 stated: "Provide the studies, reports, and reference documents that PEL personnel relied upon with respect to the Preliminary Study or PEL's alleged "recommendations as to the port location." These documents provide evidentiary support to Mozambique's contentions that PEL did not "conceive" the project "idea," but made use of prior MTC studies and work of MTC specialists, to describe a port idea that predated PEL's involvement. *See* SOD ¶¶ 33-41. The records are relevant and material to Mozambique's defenses pertaining to jurisdiction, the merits and damages.
948. In response to both requests, PEL again stated that: "PEL has conducted a search in respect of the documents and has not identified any responsive document."

(6) **PEL's Records Regarding The Discussions and Meetings Between PEL and MTC Representatives Regarding the Translations of the MOI.**

949. Mozambique's Request No. 24 states: "Provide all documents reflecting communications between PEL and Mr. Prabhu related to the MOI, including all emails regarding the MOI, notes of meetings or phone calls regarding to the MOI, and versions of the MOI exchanged between PEL and Mr. Prabhu." Mozambique's Request No. 27 further states: "Provide the copy of the Portuguese translation of the MOI that you claim Mr. Prabhu reviewed but that

was not printed on letterhead.” And, Mozambique’s Request No. 25 states: “Provide all PEL documents related to the meetings between Mr. Prabhu and Mr. Chauque to translate the MOI, including agendas, notes, and meeting minutes.” Mr. Chauque is the MTC legal counsel who represented the MTC during the negotiations with PEL.

950. “Mr Prabhu” is “the only Portuguese speaker in PEL’s team who attended the MTC on the day of the signing” of the MOI. Reply ¶ 102. PEL’s communications with Mr. Prabhu are relevant to the meaning, interpretation, and authenticity of the MOI versions, as PEL references his involvement in review of MOI drafts, among other things. See CWS-1 ¶¶ 35, 42-43. A significant issue in this dispute centers upon what language was included in the MOI. Accordingly, the MOI negotiations and intentions are relevant and material to determining the intended language and resolution of the document authenticity questions.
951. In response to all three requests, PEL again stated: “PEL has conducted a search in respect of the documents and has not identified any responsive document.”

(7) **PEL’s Records to Support its Expenditures and Scope of Work in Connection with PEL’s Prefeasibility Study (“PFS”).**

952. Mozambique’s Request No. 38 stated: “Provide timecards or similar records establishing the personnel involved and time and costs actually incurred by PEL in preparing the prefeasibility study (the ‘PFS’).” PEL asserts it spent “millions” on the PFS, but never substantiates an amount. The records are presumed to exist, as contractors track costs, including project pursuit costs like a pre-feasibility study. The documents are material to Mozambique’s contention that the PFS did not evince a high degree of project development or mobilized resources. SOD ¶¶ 41, 91, 576. The minimal amount PEL is believed to have spent, relative to its claims and the nature of the project, is believed to support Mozambique’s position relative to the lack of commercial logic of the PFS and the MOI’s contemplated right of preference in the public tender, as per PPP law and industry practices. *Id.*, ¶ 67. The cost of the PFS is also relevant to damages, because if any damages are owed, it *arguendo* may only be the cost of preparing the PFS, since lost profits on a pre-feasibility “idea” of a project are far too speculative. *Id.*, ¶¶ 928-934.
953. In response, PEL again stated: “PEL has conducted a search in respect of the documents and has not identified any responsive document.”

(8) PEL's Records of Its Communications with CFM.

954. Mozambique's Request No. 44 stated: "PEL's agendas, notes, meeting minutes, and reports from the communications PEL alleges to have undertaken with Mr. Mualeia at CFM, including documentation regarding the details of the equity proposal that PEL alleges it made to CFM in paragraph 85 of CWS-1." The details of PEL's alleged proposal to Mr. Mualeia, including detailed terms by which it allegedly extended a 20% equity offer, are relevant to the CFM negotiations. The amount/mode of payment PEL was requiring in exchange for an equity percentage is relevant to contextualize CFM's point that it lacked funds for PEL's proposal. Given the significance PEL attaches to these meetings, and the importance of establishment of what PEL calls the "Project Company," it is presumed that PEL would retain written documentation of the type sought in the Request.
955. In response, PEL again stated: "PEL has conducted a search in respect of the documents and has not identified any responsive document."

(9) PEL's Records of Its Expenditures.

956. Mozambique's request No. 46 states: "Provide documents establishing the amounts actually spent by PEL individually, and not the PSG Consortium, in preparing the public tender submission." The amount PEL spent on the public tender submission, while known to each bidder that the costs in developing the submissions were not recoverable, is relevant and material to demonstrate that the costs of the less robust PFS were modest and reflect efforts commonly undertaken in pursuit of PPP projects without any guarantee of an award. SOD ¶ 67. The amount PEL spent on the public tender submission is relevant to damages, if any basis for awarding non-speculative damages was found to exist.
957. In response, PEL again stated: "PEL has conducted a search in respect of the documents and has not identified any responsive document."
958. As noted, in regard to each category of documents disused above, where PEL indicated it could no longer find any responsive documents, considering that the requested documents would have been commonly prepared or kept by a reasonable contractor, an appropriate inference is that either the missing documents cut against PEL and support Mozambique or, based on the passage of time, PEL no longer has these documents.

959. In summary, these belatedly-filed proceedings present *a textbook example* for application of the doctrine of laches, because based on PEL's undue seven-year delay, a substantial amount or relevant and/or material "evidence is no longer available to defend against the claim," **RLA-80, Confor & Tembec**, ¶ 165. In its pleadings, PEL repeatedly complains Mozambique is unable to produce certain documents, based on the passage of time. On the basis of the doctrine of laches, which has been acknowledged by UNCITRAL tribunals, this Tribunal should decline to exercise its jurisdiction, or should consider PEL's claims inadmissible.

VII. THIS TRIBUNAL LACKS JURISDICTION, OR SHOULD DECLINE TO EXERCISE JURISDICTION, OVER THE PARTIES' CONTRACTUAL DISPUTE PURSUANT TO THE PARTIES' ICC ARBITRATION AGREEMENT.

960. The MOI contains a valid and enforceable ICC arbitration agreement.

961. First, the ICC arbitration agreement governs resolution of the parties' underlying contractual dispute. This is undisputed. PEL has conceded that the ICC tribunal, in the pending, ICC arbitration, has jurisdiction over the parties' underlying contractual dispute. Therefore, this Tribunal lacks jurisdiction to issue a decision on the underlying contractual dispute, and must wait for the ICC tribunal to issue its decision, even if this Tribunal considers that it has jurisdiction to adjudicate the parties' treaty dispute.

962. Second, the ICC arbitration agreement is broad enough to include also the parties' treaty dispute. The ICC arbitration agreement is not a local judicial forum selection clause, and is not a mere local contractual arbitration clause, and thus the investment treaty cases dealing with situations involving local forum and judicial selection clauses (cited by PEL) are inapplicable. ICC arbitration is international arbitration, the ICC has adjudicated treaty claims (even the President of this UNCITRAL Tribunal has adjudicated a treaty claim in an ICC proceeding), and the tribunal in the pending, ICC arbitration is composed of respected international arbitrators. In the MOI, the parties elected the ICC dispute resolution mechanism for international arbitration, and it includes treaty claims.

963. This Tribunal has no jurisdiction, and if it went forward with this UNCITRAL arbitration, any award adverse to Mozambique would be subject to *judicial annulment or nonrecognition* under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention").

A. This Tribunal Lacks Jurisdiction (*Ratione Materiae*) Because The Parties' ICC Arbitration Agreement Governs Resolution of The Parties' Underlying Contractual Dispute.

964. The parties ICC arbitration agreement governs resolution of the parties' underlying contractual dispute, and deprives this UNCITRAL Tribunal of jurisdiction.

1. Mozambique Has Commenced A Pending ICC Arbitration Pursuant to The MOI's Arbitration Agreement to Resolve The Parties' Underlying Contractual Dispute.

965. As described in Mozambique's Statement of Defense, ¶¶161-165; 301-361, Mozambique and the MTC have initiated an ICC Arbitration in Mozambique against PEL, seeking declaratory and other relief on the parties' underlying contractual dispute arising out of the MOI. Despite PEL's rhetoric, Mozambique and the MTC duly filed the ICC Arbitration pursuant to the arbitration agreement in Clause 10 of the MOI, which is severable from the MOI and requires arbitration under ICC Rules in Mozambique. Clause 10 provides:

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

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

966. Mozambique commenced the ICC Arbitration shortly after PEL escalated the parties' disagreement and commenced this UNCITRAL proceeding. Mozambique did so to enforce the parties' agreed-upon ICC dispute resolution procedure – and ensure that the parties' dispute arising out of the MOI was resolved quickly and efficiently, before a jurisdictionally-unquestioned Tribunal (at least with respect to the parties' underlying contractual dispute regarding the MOI), and in the location agreed upon by the parties. *See* SOD ¶¶ 161-165; 301-361; *see also* ICC Statement of Claim, **R-61**, ¶¶ 5.

967. Mozambique's actions in commencing the ICC Arbitration under Clause 10 of the MOI are consistent with the parties' contemporaneous understanding of how the dispute should be resolved. On 18 August 2014, after all material events that gave rise to this dispute, PEL notified Mozambique “of its intention to refer the dispute on the above project to

- arbitration” and increased its earlier \$4 million demand to USD \$10 million. **R-57.** PEL threatened that if Mozambique did not pay, it would “commence arbitration proceedings, *as provided for in Clause 10 of the MOI.*” *Id.*, 2 (emphasis added).
968. Until PEL commenced this UNCITRAL proceeding, the parties agreed ICC arbitration was the appropriate arbitral mechanism if their dispute escalated to arbitration. The ICC Rules seek to resolve disputes within six months, making it sensible choice for PPP procurement disputes since expediency is important. **R-58**, ICC PO2 ¶ 3(vi). The parties’ agreement to a Mozambique seat was sensible and efficient for disputes involving a proposed 30-year, USD \$3 billion PPP project in Mozambique, and an important deal point for Mozambique.
969. However, after it got intentional counsel, PEL ignored the parties’ agreed-upon ICC dispute resolution procedure. Four years after acknowledging that Clause 10 of the MOI controlled, on 25 June 2018, the English law firm Addleshaw Goddard wrote to the MTC, as counsel for PEL. For the first time, PEL threatened a claim under the Mozambique-India BIT, seeking a windfall of USD \$100-200 million. SOD ¶ 157.
970. For months, the parties engaged in settlement efforts (PEL was represented by counsel and the MTC and Mozambique acted *without counsel*), and were going to meet in Portugal in March, 2020, when the MTC and Mozambique decided that it had become prudent to retain counsel. Because Mozambique and the MTC had recently retained the counsel (Dorsey & Whitney LLP), and based on the coronavirus pandemic and the prohibitions against travel instituted by Mozambique and the United States (Dorsey is based in the United States), Mozambique and the MTC proposed to PEL that the parties enter into a standstill agreement without prejudice for a “brief postponement” until Dorsey could be brought up to speed and meet with its clients, and a safe meeting in Portugal could be planned. PEL unreasonably rejected the standstill proposal. SOD ¶¶ 158-159.
971. PEL aggravated the dispute seeking to take advantage of the start of the coronavirus pandemic in early 2020, where there was much uncertainty and the alternatives to virtually manage arbitration used today were not in place. On 20 March 2020, despite PEL being advised that Mozambique and the MTC were unable to meet with their newly retained counsel due to COVID travel restrictions, PEL’s English lawyers hurriedly served the UNCITRAL Notice of Arbitration. PEL raced to serve this ad hoc UNCITRAL arbitration

- claim, refusing to provide any time for new counsel Dorsey to learn the case and meet with its clients. *Id.* PEL's actions in its manner of initiation of this arbitration further show bad faith, and support finding its claims inadmissible pursuant to the principle of good faith.
972. In light of PEL's actions, Mozambique commenced the ICC Arbitration. Mozambique sought to have the core dispute concerning the MOI resolved quickly in the parties' agreed-upon ICC arbitral mechanism. Prompt resolution of the local contractual law dispute – by a neutral, swift, international ICC tribunal whose jurisdiction over the local contractual law dispute is uncontested and not subject to unresolved treaty jurisdiction complexities – furthered efficient resolution and will resolve case-dispositive issues in this arbitration.
973. The crux of the parties' dispute relates to the existence, validity, and scope of "rights" that PEL alleges in the MOI. PEL argued as much in its response to Mozambique's bifurcation motion. *See* PO3. Likewise, PEL's Statement of Claim states that, in PEL's view, "Mozambique made its specific promises to PEL *in the MOI* which formed the basis of its legitimate expectations," *id.*, ¶ 321 (emphasis added), and that Mozambique thereafter breached the "promises" or "contractual commitments" PEL alleges are embodied in the MOI. *Id.*, ¶¶ 31, 327. In short, PEL fundamentally contends *the MOI* gave PEL "a right to the direct award of the project concession." Reply § IV(B).
974. Mozambique disputes that the MOI gave PEL the rights it claims. SOD
975. , § V. For example, the six-page MOI, if valid and binding, only offered PEL a "*direito de preferência*" that gave PEL a contingent option for a 15% scoring preference in the public tender (consistent with industry practices and as defined in generally applicable PPP legislation during the parties' dealings). *Id.* This *direito de preferência* – properly defined under the MOI and applicable local law – is not an "investment" under treaty jurisprudence, was not breached and would not, in any event, give rise to the "lost profit" damages PEL seeks on its illusory and unbuilt proposed project. *Id.* In short, Mozambique's position on the MOI dispute is fatal to PEL's treaty jurisdiction, liability, and damages arguments.
976. The local contractual law issues are, therefore, essential and a priority to the parties' international law treaty dispute. Resolution of the local contractual law issues adverse to PEL will preclude PEL's recovery on any treaty claim. PEL's alleged "right" to a

concession is no “investment” – and was not treated unfairly, breached in a matter violative of an umbrella clause, or indirectly expropriated – *if it does not exist*.

2. The ICC Tribunal Has Already Concluded It Has Jurisdiction Over The Parties’ Local Law Contractual Dispute Pursuant to The MOI’s ICC Arbitration Agreement.

977. This Tribunal is presented with a scenario where another international arbitral Tribunal has, at a minimum, uncontested jurisdiction over the local contractual law dispute – a core predicate issue to the treaty claims. The ICC Tribunal may also promptly conclude that it has jurisdiction to decide the treaty dispute PEL brought before this UNCITRAL Tribunal.
978. The ICC’s Tribunal’s jurisdiction is uncontested as to the local contractual law dispute. The local contractual law dispute includes Mozambique’s requests for declaratory relief as to the existence, validity, and scope of PEL’s alleged MOI-derived “rights.” **R-61**, ICC Statement of Claim §§ IV, XII; SOD § V. In the ICC arbitration, PEL conceded that the ICC Tribunal has jurisdiction over the contractual law dispute. **R-59**, ICC PO5 ¶¶ 24-27.⁷²
979. Therefore, the ICC Tribunal’s jurisdiction over the local contractual law dispute is uncontested by PEL and has been acknowledged by the ICC Tribunal. The ICC Tribunal has not yet ruled on its jurisdiction over the international law treaty dispute, although it has bifurcated this question as discussed below. Conversely, at PEL’s behest, this UNCITRAL Tribunal declined to bifurcate Mozambique’s jurisdictional objections, joined the jurisdictional issues to the merits and quantum, and has not ruled on its jurisdiction over any aspect of the parties’ dispute. *See* PO3.⁷³

⁷² *See also* **R-58**, ICC PO2 ¶ 3(i) (“As confirmed by the Parties at the CMC, neither Party has presented any objections to the [ICC Tribunal’s] jurisdiction.”); **R-59**, ICC PO5 ¶ 21 (PEL “accepted this Tribunal’s jurisdiction” and “has not shown why this [ICC] Tribunal should await a decision by the UNCITRAL Tribunal to decide the contract claims that fall under its (accepted) jurisdiction.”).

⁷³ Of note, PEL rejected Mozambique’s reasonable consolidation proposal, which respected the ICC arbitration agreement. Instead, PEL sought to renegotiate the ICC arbitration agreement by excising the parties’ agreement to a Mozambican seat for the arbitration. **C-183** and **C-184**.

3. The ICC Tribunal Rejected PEL’s Stay Application and Is Deciding The Prerequisite Contract and Property Issues That Form The Underlying Basis of PEL’s Treaty Claims in This Proceeding.

980. Faced with the ICC Arbitration whose jurisdiction over the MOI dispute PEL could not contest, PEL sought to delay the ICC proceedings into irrelevancy. Claiming that the two arbitration proceedings were “parallel proceedings” that carried risks of inconsistent decisions, PEL sought to stay the jurisdictionally-unquestioned ICC proceeding pending this UNCITRAL Tribunal’s final award on the treaty issues. PEL’s tactics were unsuccessful and backfired. The ICC Tribunal recently confirmed its uncontested jurisdiction over the local contractual law dispute pursuant to the compulsory arbitration agreement in the MOI. The ICC Tribunal will proceed to a decision on the MOI disputes which form the underlying factual basis of PEL’s treaty claims.
981. On 10 June 2021, after Mozambique submitted its 19 May 2021 Statement of Claim, PEL filed an application to stay the ICC Arbitration until a final award in this arbitration. **R-59**, ICC PO5 ¶¶ B, 3; *see* **R-62**, PEL ICC Stay Application. PEL contended that the arbitrations qualified as “parallel proceedings” and that policy considerations—the “risk of conflicting decisions” and “duplication of costs and efforts” – justified a stay in favor of the first-filed proceeding. **R-59**, ICC PO5 ¶¶ 4-5. PEL argued that the circumstances satisfied the conditions of the ILA’s non-binding Recommendation 5 for a stay, and also referenced the interpretation of the ILA Recommendations by the tribunal in **RLA-141**, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PA Case No. 2016-7. *Id.* ¶¶ 3, 6.
982. Mozambique responded that PEL’s requested stay was inconsistent with the MOI’s ICC arbitration agreement (as PEL contended this UNCITRAL Tribunal’s decision would leave “very few (if any) residual issues for the [ICC] Tribunal to determine”); would require the UNCITRAL Tribunal to prematurely decide merits questions including the scope and validity of the MOI’s arbitration agreement; necessitated a finding that the UNCITRAL Tribunal had valid jurisdiction over the dispute; and would cause material prejudice to Mozambique, namely, the denial of its right to have the dispute decided in a timely manner in an ICC arbitration seated in Mozambique, pursuant to the MOI’s valid and enforceable ICC arbitration agreement. *Id.*, ¶¶ 9-12; *see* **R-63**, Mozambique Answer to ICC Stay

Application. Mozambique observed that PEL’s treaty claims are premised and depended on disputed contract issues – most significantly, on the validity of the MOI and the existence of rights under the MOI – meaning that at a minimum the ICC Tribunal should adjudicate *first* the local contractual law dispute, pursuant to its unquestioned jurisdiction over the local contractual law claims. **R-59**, ICC PO5 ¶¶ 13, 21

983. In its Procedural Order 5, dated 16 August 2021, the ICC Tribunal denied PEL’s Stay Application. *Id.* ¶¶ 14-22. The ICC Tribunal refused to stay, holding that it has jurisdiction over the parties’ local law contractual dispute pursuant to the parties’ compulsory arbitration agreement in the MOI. *Id.* The ICC Tribunal held that:

the Arbitral Tribunal is not satisfied that ‘arbitral efficiency’ warrants a stay in this case and/or of any ‘exceptional circumstances’ that could effectively outweigh the Claimants’ [Mozambique’s] prejudice in not having this issue *resolved timely before a tribunal whose jurisdiction to hear the Claimants’ contract claims has been accepted by the Respondent [PEL]*.

Id. ¶ 17 (emphasis added).

The Respondent [PEL] claims that granting a stay in this case would leave this Tribunal with “*very few (if any) residual issues for this Tribunal to determine*”, but it has not shown the basis for its assumption that this Arbitral Tribunal should be bound by the decision to be rendered in the UNCITRAL Arbitration; why the UNCITRAL Tribunal has “better jurisdiction” to hear *first* those issues for which this Tribunal has jurisdiction (which is an issue yet to be determined, as explained below); and/or why the UNCITRAL Tribunal is the most ‘convenient’ forum to determine those issues over which it has jurisdiction (again, which is yet to be determined) *first*, other than the fact that it was constituted first, which is not, in itself, determinant.

Id., ¶ 18 (emphasis in the original).

A stay would also hardly be reconcilable with the Respondent’s [PEL’s] own assertion that it is not asking the Claimants [Mozambique] to give up their contractual rights, but merely for a temporary pause. If and to the extent that an earlier decision in the UNCITRAL Tribunal could have an impact on the outcome of this arbitration (including on the enforceability of a future award), a stay could *de facto* amount to a definitive – and not only temporary – denial of the Claimants’ [Mozambique’s] rights under the arbitration agreement that served as the basis for the institution of this arbitration and the constitution of this Tribunal, if and to the extent that those rights exist (a matter which has not yet been decided by the Tribunal).

Id., ¶ 19.

Therefore, the Arbitral Tribunal is not satisfied that these circumstances would justify staying this proceeding where there is a *prima facie* valid arbitration agreement invoked by the Claimants [Mozambique] as the basis for this Tribunal’s jurisdiction, merely upon the fact that the UNCITRAL Tribunal was constituted first.

Id., ¶ 20.

Moreover, the Respondent [PEL] has accepted this Tribunal’s jurisdiction over “*certain contract claims arising out of the MOP*”. Again, the Respondent [PEL] has only asserted that this Tribunal should stay the entirety of the claims before it, pending a decision in the UNCITRAL Arbitration, but it has not shown why this Tribunal should await a decision by the UNCITRAL Tribunal to decide the contract claims that fall under its (accepted) jurisdiction.

Id., ¶ 21.

Accordingly, the Arbitral Tribunal does not believe that the requested stay of proceedings satisfies the “exceptional circumstances” test.

Id., ¶ 22.

984. Thus, the ICC Tribunal refused to stay the proceedings. It is undisputed that the ICC Tribunal will proceed to adjudicate, at a minimum, the merits of the underlying contractual dispute between the parties, where PEL had conceded that the ICC Tribunal has jurisdiction to decide pursuant to the ICC arbitration agreement in the MOI.⁷⁴

4. The ICC Tribunal Has Jurisdiction to Adjudicate The Parties’ Underlying Contractual Dispute. This UNCITRAL Tribunal Lacks

⁷⁴ Separately from the question of the ICC Tribunal’s clear jurisdiction over the local contractual law dispute, the ICC Tribunal decided to receive submissions on its jurisdiction over the “Treaty Claims.” **R-59**, ICC PO5 ¶¶ 23-27. PEL had never requested preliminary dismissal of any Treaty issues in the ICC Arbitration, but in the context of its failed Stay Application, PEL had newly objected to the ICC Tribunal’s jurisdiction over certain Treaty issues and Mozambique’s related requests for declaratory relief, as further discussed below. *See, e.g.*, **R-59**, ICC PO5 ¶¶ 24-27. In light of the ICC Tribunal’s unexpected decision to bifurcate the jurisdictional issue, the parties have been briefing the international law questions before the ICC Tribunal, in advance of a potential hearing scheduled for 7 October 2021. **R-60**, ICC PO6.

Jurisdiction or, in The Alternative, Should Abstain from Doing So, and Yield to The ICC Tribunal at Least on This Issue.

985. First, here, there clearly is an underlying local law contractual dispute between the parties. The ICC Tribunal has decided that it has jurisdiction to adjudicate that contractual dispute pursuant to the ICC arbitration agreement in the MOI. PEL has conceded that the ICC has jurisdiction to decide the contractual dispute. The resolution of the treaty dispute between the parties is dependent upon the prior resolution of the contractual dispute. Without the contractual rights that PEL asserts, and that Mozambique disputes, there are no local rights to protect under the BIT and therefore PEL's treaty claims disappear.
986. PEL's argument that "there is no genuine contractual dispute" is wrong. There is a genuine underlying contractual dispute between PEL and Mozambique: The parties dispute which is the correct version of the MOI; whether the MOI is valid and enforceable; what are the parties' rights and obligations under the MOI; whether PEL had the right to a direct award of the concession or to negotiate for a direct award under the MOI; whether PEL resolved its claims under the MOI by agreeing to participate in the public bidding contest with a bidding point advantage to account for any MOI rights; whether the public bidding contest was in accordance with Mozambican law; whether PEL lost the bidding contest; whether PEL failed to timely appeal the contest result; and whether PEL is thus now barred from reverting to asserting contract rights under the MOI. As the ICC Tribunal has now acknowledged, it has jurisdiction to resolve the underlying contractual dispute, which has been presented on a declaratory judgment basis to the ICC, because the MOI's arbitration clause states that "*Any dispute* arising out of this memorandum between the parties shall be referred to arbitration" under the ICC arbitration rules. **R-2**, MOI, Clause 10.
987. Second, the parties' underlying contractual dispute must be decided in the pending ICC Arbitration pursuant to the parties' valid, enforceable and exclusive ICC arbitration agreement. Based on the existence of the ICC arbitration agreement, this UNCITRAL tribunal lacks jurisdiction to adjudicate the parties' underlying contractual dispute.
988. Indeed, the ICC Tribunal's jurisdiction over the parties' underlying contractual dispute is uncontested. PEL has expressly admitted and confirmed to the ICC Tribunal that it had no objections to its jurisdiction. **R-58**, ICC Proc. Order No. 2 ¶ 3(i) ("As confirmed by the Parties at the CMC, neither Party has presented *any objections to the Arbitral Tribunal's*

jurisdiction.”). The ICC Tribunal also has indicated that its “*jurisdiction to hear the Claimants’ contract claims has been accepted by the Respondent [which, in the ICC, is PEL].*” **R-59**, ICC Proc. Order No. 5 ¶ 17. Denying PEL’s application to stay the ICC proceeding, the ICC Tribunal also has – indeed – concluded that it has jurisdiction over the contractual dispute: PEL “has not shown why this [ICC] Tribunal should await a decision by the UNCITRAL Tribunal to decide the contract claims *that fall under its (accepted) jurisdiction.*” *Id.* ¶ 21. At the hearing, PEL told the ICC Tribunal’s that “*we do not contest that yes, there is a valid arbitration clause in clause 10, and for that reason we did not contest this tribunal’s jurisdiction over contractual claims.*” **R-64**, 7 October 2021 ICC Hearing, 1:34–35.

989. There is, obviously, also a treaty dispute between the parties, but its resolution is dependent on the prior resolution of the underlying contract dispute, because the existence of PEL’s MOI-derived contract “rights” is fundamental to treaty jurisdiction, liability and damages. Likewise, absent an MOI breach, PEL has no umbrella claim. The MOI – particularly the existence, validity, and scope of disputed rights PEL alleges the MOI provided it – forms the fundamental and underlying basis for PEL’s treaty claims. At a minimum, the existence of these alleged fundamental “rights” must be decided under Mozambican law, as the ICC Tribunal is required to do under the parties’ compulsory ICC arbitration agreement in the MOI. Only if PEL can establish the existence of its alleged MOI rights, do the issues of treaty jurisdiction, liability, or damages even become potentially relevant.
990. Arbitral jurisprudence provides ample illustrations of why contract disputes under municipal law are material – if not fundamental – to treaty claims. The reason is simple: the existence, validity, and scope of the alleged “right” to be protected by an investment treaty’s substantive standards is one to be resolved under local law.

In order to determine whether an investor/claimant holds property or assets capable of constituting an investment *it is necessary in the first place to refer to host State law*. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.

RLA-46, *Emmis 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), ¶ 162 (emphasis added).

991. Indeed, it is a fundamental principle of international law that “[i]nvestment disputes are about investments, investments are about property, and property is about specific rights over tangibles and intangibles *cognizable by the municipal law of the host state.*” **RLA-136**, Zachary Douglas, *The International Law of Investment Claims*, ¶ 101, Cambridge University Press, 2009 (emphasis added). “Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to the municipal law of property.” *Id.* ¶ 102. “[T]hat property law is the municipal law of the state in which the claimant alleges that it as an investment.” *Id.* “Investment treaties do not oblige the host state to protect intangible property rights that are not cognizable in the legal order of the host state.” *Id.* ¶ 110.
992. Thus, for a treaty claim to exist, the alleged “rights affected must exist under the law which creates them.” *Id.* ¶ 111 (discussing **RLA-121**, *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN 3481, Award (3 February 2006)). It follows that, as a prerequisite for its treaty claims, PEL must have “an actual and demonstrable” right under Mozambican law applicable to the MOI. **RLA-92**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID), Award (31 March 2010), ¶ 142 (“an investor cannot recover damages for the expropriation of a right it never had”).
993. In this context, tribunals examine domestic law to determine the existence of the claimant’s alleged rights. *See, e.g.*, **RLA-137**, *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) at ¶¶ 117-134 (examining domestic law to conclude that claimant never in fact possessed the alleged right that was purportedly breached); **RLA-138**, *Apotex, Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013) at ¶¶ 207-218 (holding that an application process “governed exclusively by U.S. law and regulation” may not be characterized as “property” for purposes of investment claim).
994. Particularly where the alleged right arises out of a purported contract, like the MOI, the tribunal must first examine whether the contractual rights were “enforceable in the courts of the State in accordance with the substantive law of that country.” **RLA-74**, *F-W Oil Interests Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 March 2006), ¶ 152; **RLA-56**, *Zhinvali*, ¶¶ 297-304 (considering rules of interpretation

under domestic law in determining whether alleged contract establishes a qualifying “investment” under Article 25(1)). When the alleged rights do not exist under local law, the treaty claim predicated on the existence of those rights fails.

995. Here, the key disputed “rights” and “contractual commitments” PEL relies upon for the existence of a protected “investment” (and jurisdiction of this Tribunal) are, by PEL’s own admission, PEL’s “rights under the MOI.” As Mozambique previously explained:

Specifically, PEL’s investment treaty arbitration claims ‘arise out of’ the MOI, because the MOI allegedly provides the underlying substantive rights which PEL seeks to protect pursuant to the MZ-India BIT. This is confirmed by PEL’s pleadings. The “investment” PEL alleged in its Request for Arbitration was “*its rights under the MOI, including its valuable right to be awarded a concession for the USD \$3.115 billion Project that PEL had itself conceived of, and its right of first refusal, both of which were abrogated by the MTC.*” **R-46**, Request for Arbitration ¶ 81 (emphasis added). In its Statement of Claim, PEL likewise defines its alleged ‘investment’ through its flawed allegations regarding rights conferred through the MOI. *See* SOC ¶ 257(a) (the alleged “*direct award of a concession to implement the Project, as well as all of the rights under the MOI associated with the Project*”) (emphasis added). To the extent PEL now also contends that any alleged “know-how” constitutes an investment that did not receive appropriate protection, those assertions, too, “arise out of” the MOI. PEL alleges its “know-how was explicitly protected by the MOI,” *see* SOC ¶ 257(b), and contends it was Mozambique’s alleged commitments in the MOI that formed “the fundamental basis upon which PEL invested in Mozambique” and caused PEL to “complete the PFS at its own costs,” *see, e.g.*, SOC ¶ 324). Plainly, this dispute “arises out of” the MOI, which forms the “fundamental basis” of the alleged rights, and whose alleged breach is the *sine qua non* of the subject claims.

SOD ¶ 324.

996. Simply stated, if the MOI did not make the contractual commitments or give PEL the rights PEL alleges (*e.g.*, the alleged “right to the concession”), PEL’s arguments for treaty jurisdiction would fail without question. *See id.*, ¶¶ 362 *et seq.* The precise question fundamental to this Tribunal’s jurisdiction over the treaty claims – that is, whether there was a valid MOI (the alleged investment) in the first place and what rights it provides the parties – is being resolved by another international tribunal: the ICC Tribunal.
997. Crucially, that ICC Tribunal’s jurisdiction over the underlying local contractual law dispute is unchallenged by PEL, precisely, because the parties consented to exclusively arbitrate

“any dispute arising out of the MOI” under the ICC Rules in Mozambique, and the ICC Tribunal has already concluded that it indeed has jurisdiction over the local contractual law dispute, pursuant to the compulsory ICC arbitration agreement in the MOI.

998. Moreover, the outcome of the local contractual law dispute is fundamental and a prerequisite to whether any treaty standards were violated. There can be no treaty claims without underlying local law contractual rights based on a valid and enforceable MOI.
999. PEL’s treaty claims in this UNCITRAL proceeding are premised on local contractual law allegations that Mozambique made certain “promises” or “contractual commitments” embodied in the MOI (e.g., the alleged “right to the direct award of the project concession”), which then formed the basis of PEL’s “legitimate expectations,” which Mozambique treated unfairly when it allegedly reneged on those same “contractual commitments.” *E.g.* SOC § V. If PEL is incorrect about the existence, validity, and scope of those so-called MOI “rights,” “promises,” or “commitments,” then PEL states no colorable claim for breach of the FET standard in the circumstances of this case. SOD § VI. The same holds true, of course, for PEL’s MFN claim –which is premised on PEL’s incorporation of an umbrella clause and allegations that Mozambique breached contractual obligations in the MOI. *Id.* § VII. PEL’s indirect expropriation claim likewise rises or falls on the MOI dispute: “an investor cannot recover damages for the expropriation of a right it never had.” **RLA-92**, *Merrill* at ¶ 142 (“The right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument.”); *see* SOD, § VIII. PEL itself confirmed that the MOI dispute is a predicate to treaty liability in its response to Mozambique’s bifurcation application. *See* ICC PO3 ¶ 40.
1000. It is for all these reasons that Mozambique’s Statement of Defense led its merits discussion with a robust recitation of why the MOI does not (and could not under Mozambican law) give PEL the rights it alleges. Statement of Defense, § V. The MOI dispute is fundamental to the parties’ positions on substantive treaty liability. *Id.*, §§ V-VIII.
1001. PEL’s damages theories drive home the materiality of the MOI dispute. In no instance does PEL attempt to articulate a damages theory that is not predicated on its allegation that the MOI gave PEL the “right to the direct award of the project concession.” Reply § IV(B).

PEL never attempts to articulate the value of its alleged “know-how,” such as the minimal cost of the Pre-Feasibility Study that it contends was a condition precedent to the vesting of the MOI-derived “right” to a concession. Rather, the basis for all three of PEL’s latest damages methodologies – ex post, ex ante, and “loss of chance” DCF calculations – is that PEL allegedly lost “the value of its rights under the MOI,” which PEL calls “its rights to the concession.” *E.g.*, CER-5, Second Versant Expert Report, ¶¶ 5-6, 49.

1002. The fundamental assumption PEL’s counsel instructed its damages experts to make is that “the Concession would have been rightfully awarded to Claimant.” *Id.* ¶ 6. PEL’s damages experts expressly went about their task on the assumption that “the MOI was legally binding and obligated Respondent to negotiate with PEL for the award of the Concession directly.” *Id.* ¶ 51. The accuracy of that assumption is, of course, the MOI dispute. And that MOI dispute is being resolved by the ICC Tribunal.
1003. Accordingly, the ICC Tribunal’s decision on the local contractual law dispute is material, and a prerequisite, to PEL’s fundamental damages assumptions and, by extension, to whether PEL will be able to prove a single dollar of non-speculative lost profits herein.
1004. In short, unlike before this UNCITRAL Tribunal (where difficult jurisdictional and admissibility questions abound), the ICC Tribunal has uncontested jurisdiction over the parties’ underlying contractual law dispute. The underlying contractual law dispute properly will be decided with reference to Mozambican law. Therefore, the underlying contractual law dispute must be resolved in accordance with the parties’ express agreement in the MOI to arbitrate before the ICC (which *undisputedly* governs the underlying contractual law dispute). The resolution of the underlying MOI dispute is, therefore, indisputably material – indeed, fundamental – to PEL’s treaty case.
1005. *Although treaty tribunals normally have jurisdiction to review also underlying contractual issues, the situation presented here is different, because here the parties entered into an ICC arbitration agreement that mandates resolution of the underlying contractual law dispute by ICC arbitration, and the jurisdiction of the ICC Tribunal in the ICC Arbitration is, again, undisputed and has been acknowledged by the ICC Tribunal.*

1006. Therefore, as a result of the ICC arbitration clause, this Tribunal lacks jurisdiction over the underlying contractual dispute, this Tribunal cannot proceed with this arbitration and issue an award until after the ICC issues its final award on the underlying contractual dispute.⁷⁵
1007. Third, this Tribunal lacks jurisdiction because the parties' ICC arbitration agreement is more specific to the MOI and the parties' instant dispute arising from the MOI, and thus governs over the general dispute resolution provisions of the MZ-India BIT.
1008. For example, in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (Decision of the Tribunal on Objections to Jurisdiction), 29 January 2004, **R-116**, "SGS concluded an agreement with the Philippines regarding the provision of comprehensive import supervision services (*the CISS Agreement*), under which SGS would provide specialized services to assist in improving the customs clearance and control processes of the Philippines. A dispute having arisen between the parties concerning alleged breaches of the CISS Agreement, SGS invoked in the request for arbitration the provisions of a bilateral Agreement of 1997 between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments (the BIT)." *Id.*, ¶ 1 (emphasis added). But there was a "dispute resolution agreement included in the CISS Agreement, according to which 'all disputes' have to be submitted to the Regional Trial Courts of Makati or Manila." *Id.*, ¶ 51.
1009. The SGS tribunal addressed the question "*whether the BIT or the ICSID Convention purport to confer upon investors the right to pursue contractual claims under the BIT disregarding the contractually chosen forum.*" *Id.*, ¶ 139 (emphasis added).
1010. "One possibility is that this right is conferred by Article VIII(2) of the BIT itself, which gives the investor a choice to submit the dispute 'either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration', and in the latter case, a further choice between ICSID and UNCITRAL

⁷⁵ PEL's response, that the ICC Arbitration "will not bind this Tribunal," contradicts what PEL told the ICC Tribunal (where it sought a stay arguing that this UNCITRAL proceeding would have a preclusive/binding effect on the ICC proceeding, leaving "very few (if any) residual issues for [the ICC] Tribunal to determine," **R-59**, ICC Proc. Order No. 5 ¶ 18). Although the ICC arbitration clause is compulsory, and thus could have a preclusive effect on PEL, at this stage that need not be decided because *Cairn* simply requires "materiality."

arbitration. The question is whether Article VIII(2) was intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims are concerned.” *Id.*, ¶ 140. The tribunal answered the question in the negative. “Two considerations lead the majority of the Tribunal to give a negative answer to this question.” *Id.*, ¶ 141.

1011. “The first consideration involves the maxim *generalia specialibus non derogant*. Article VIII is a general provision, applicable to investment arrangements whether concluded ‘prior to or after the entry into force of the Agreement’ (Article II). *The BIT itself was not concluded with any specific investment or contract in view. It is not to be presumed that such a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties.* As Schreuer says, ‘[a] document containing a dispute settlement clause *which is more specific in relation to the parties and to the dispute* should be given precedence over a document of more general application.’” *Id.* (emphasis added).
1012. “The second consideration derives from the character of an investment protection agreement *as a framework treaty*, intended by the States Parties to support and supplement, *not to override or replace, the actually negotiated investment arrangements made between the investor and the host State.*” *Id.* (emphasis added).
1013. The SGS tribunal unambiguously concluded that the parties’ specific contractual arbitration clause could not be overridden by the general BIT dispute resolution clause: “For these reasons, in the Tribunal’s view, *the BIT did not purport to override the exclusive jurisdiction clause in the CISS Agreement, or to give SGS an alternative route for the resolution of contractual claims which it was bound to submit to the Philippine courts under that Agreement.*” *Id.*, ¶ 143 (emphasis added).
1014. The SGS tribunal reiterated, that for these reasons, “[t]he Tribunal *cannot accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims.*” *Id.*, ¶ 153 (emphasis added).
1015. The reasoning in *SGS* governs the resolution of this question here, as well. Like in *SGS*, here, PEL is also bringing a treaty claim invoking the dispute resolution provisions of the MZ-India BIT. However, like in *SGS*, the subject “investment agreement” (as discussed above, PEL claims that its “investment” includes the MOI) contains a dispute resolution

clause that provides for ICC arbitration of “all disputes” (also like in *SGS*) arising from the MOI. This Tribunal, like the *SGS* tribunal, is also tasked with the question whether the MZ-India BIT confers upon PEL “the right to pursue contractual claims under the BIT disregarding the contractually chosen forum.” As *SGS* held, the answer is “no.”

1016. The maxim *generalia specialibus non derogant*, the MZ-India BIT contains a “general” dispute resolution provision. The MZ-India BIT itself “was not concluded with any specific investment or contract in view.” As a result, “it is not to be presumed that such a general provision has the effect of overriding specific provisions of particular contracts,” like Clause 10 of the MOI (the ICC arbitration agreement), which was “freely negotiated between the parties.” To paraphrase Schreuer as cited in *SGS*, “a document containing a dispute settlement clause,” the MOI, “which is more specific in relation to the parties and to the dispute should be given precedence over a document,” the MZ-India BIT, “of more general application.”
1017. Similarly, the MZ-India BIT, which is an “investment protection agreement as a framework treaty, intended by the States Parties to support and supplement,” does “not to override or replace, the actually negotiated investment arrangements,” the MOI, “made between the investor and the host State.”
1018. Accordingly, the ICC arbitration clause, which is more specific to the parties’ underlying contractual dispute arising under the MOI, controls over the more general dispute resolution provisions of the MZ-India BIT. Thus, this tribunal lacks jurisdiction over the underlying contractual dispute, and must wait for the ICC to resolve the contract dispute.
1019. As the *SGS* tribunal “summarise[d], in the Tribunal’s view its jurisdiction is defined by reference to the BIT and the ICSID Convention. But the Tribunal *should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively*. *SGS* should not be able to *approve and reprobate* in respect of the same contract: *if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim*. The Philippine courts are available to hear *SGS*’s contract claim. Until the question of the scope or extent of the Respondent’s obligation to pay is clarified—whether by agreement between the parties or by proceedings in the Philippine courts as provided for in Article 12

of the CISS Agreement - a decision by this Tribunal on SGS's claim to payment would be *premature*." *Id.*, ¶ 155 (emphasis added).

1020. Although the ruling described above in *SGS* focused on the contract claims, it applies equally, here, to the parties' treaty dispute, because the ICC arbitration agreement is broad enough to encompass the parties' treaty dispute, as discussed further below.

1021. The *SGS* tribunal held that, although the arbitration provisions of the CISS Agreement could be overridden by the ICSID Convention (which contains an exclusivity provision in Article 26),⁷⁶ the arbitration provisions of the CISS Agreement could not be overridden by the UNCITRAL Rules, which contain no equivalent provision:

A party to a contract containing an exclusive jurisdiction clause would obtain an override if it opted for ICSID arbitration (by virtue of Article 26), *but not if it opted for UNCITRAL arbitration (since the UNCITRAL Rules contain no equivalent provision)*.

Id., ¶ 148 (emphasis added).⁷⁷ Notably, the *SGS* tribunal specifically held that the more specific contractual arbitration provision cannot be overcome on the basis of the more general BIT, where the claimant opted for UNCITRAL arbitration, like in this proceeding.

1022. Because the ICC arbitration clause is broad enough to encompass the treaty dispute, the ICC arbitration agreement, which is more specific to disputes related to the MOI, governs over the more general dispute resolution provisions of the MZ-India BIT, also with respect to PEL's treaty claims, and this Tribunal lacks jurisdiction over this entire dispute.⁷⁸

⁷⁶ As the *SGS* tribunal explained, "Article 26 of the ICSID Convention has this effect. Article 26 provides: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy'" *Id.*, ¶ 144.

⁷⁷ Because *SGS* was an ICSID case, the tribunal held it "is faced with a valid and applicable exclusive jurisdiction clause, affecting the substance of SGS's claim." *Id.*, ¶ 149.

⁷⁸ In *SGS*, the tribunal ultimately found that it had jurisdiction over only certain treaty claims, *id.*, ¶ 162, but the tribunal did not analyze whether the dispute resolution clause in the contract was broad enough to include the treaty claims as is contended here, and, in contrast to Mozambique, the "Philippines did appear to acknowledge that a large proportion of the amount claimed was payable," *id.* "The Tribunal holds that it has jurisdiction over SGS's claim under Articles X(2) and IV of the BIT, but that in respect of both provisions, *SGS's claim is premature and must await the determination of the amount payable in accordance with the contractually-agreed process.*" *Id.*, ¶ 163 (emphasis added). Based on its decision to wait for resolution of the underlying contractual dispute, "it is not necessary for the Tribunal to consider whether Article 12 of the CISS

1023. Fourth, in the alternative, even if it had jurisdiction to adjudicate the parties' underlying contractual dispute, this UNCITRAL Tribunal should in its discretion abstain from exercising jurisdiction and should and yield to the ICC Tribunal at least on this issue.
1024. Mozambique submitted a motion to stay this proceeding until the ICC issues its award on the underlying contractual dispute. This Tribunal denied the stay in Procedural Order No. 4 on procedural grounds, but never reached the substance.
1025. Procedural Order No. 4 did not address Mozambique's substantive contentions, which established good cause. The Tribunal elevated procedural points over substance:
- Mozambique did not "choose to proceed in two parallel arbitrations," because it objected to this proceeding all along, insisting on the ICC arbitration agreement.
 - There was a "material change in circumstances" because the ICC Tribunal had only recently acknowledged its jurisdiction over the parties' underlying contractual dispute.
 - There can be no *sine die* suspension because there is a contemplated date for resumption: after April, 2022, when the ICC Tribunal issues its award. No "guarantee" is required, and the concern that the ICC Tribunal would engage in unreasonable delay is speculative. The concern that a stay "would cause unreasonable delay" is eclipsed by the fact that PEL delayed over seven years to bring this arbitration.
 - The timing of the stay application cannot be criticized. The Tribunal declined to reach the merits on Mozambique's early motion to bifurcate, postponing them to the hearing.
 - The observation that "the causes of action appear to be different, considering only that one proceeding is based on the Treaty and the other on the MOI," supports that there are a treaty dispute and an underlying contractual dispute; thus, this treaty arbitration must wait because there can be no treaty claims without underlying contractual rights, and the parties' submitted their contractual dispute to ICC arbitration (this situation is different from cases where a treaty tribunal ordinarily may address contractual issues).
1026. The Tribunal has an obligation to resolve the substantive contentions of the parties. Even if it decided not to rule on the substance of the motion to stay, the Tribunal must address

Agreement is wide enough to encompass a claim under substantive provisions of the BIT, and what the legal consequences of an affirmative answer would be." *Id.*, ¶ 164.

these issues in connection with Mozambique’s present argument that, even if it had jurisdiction to adjudicate the contractual dispute, this Tribunal should abstain and yield to the ICC Tribunal at least on the contract issue, for the reasons discussed above; primarily, that resolution of the treaty claims require that the contractual dispute be adjudicated first, and under the arbitration agreement the ICC must adjudicate the contractual dispute. Therefore, Tribunal either should suspend⁷⁹ these proceedings or abstain from issuing an award until after the ICC issues its final award on the underlying contractual dispute.

B. This Tribunal Lacks Jurisdiction (*Ratione Materiae*) Because the Parties’ ICC Arbitration Agreement Also Governs the International Law Treaty Dispute.

1027. This Tribunal also lacks jurisdiction over the treaty dispute. Jurisdiction over the treaty dispute is also exclusively with the ICC Tribunal. Clause 10 grants the ICC jurisdiction over “*any dispute[s] arising out of*” the MOI. Clause 10 is broad enough to include treaty claims: it includes “any dispute” irrespective of the cause of action: *i.e.*, contract claims and those based on international law including treaty. SOD, § IV(B).
1028. The ICC arbitration agreement in Clause 10 of the MOI is not a forum selection clause. It is an *alternative dispute resolution clause*, calling for “dispute” resolution by arbitration before the ICC. Importantly, the ICC arbitration agreement focuses on, and refers to arbitration, the “dispute,” and does not focus on which party is asserting the “treaty claims.” PEL’s fundamental flaw in its analysis is that it fails to focus on whether the parties’ international law *dispute* is within the MOI’s ICC arbitration agreement.
1029. First, under its plain meaning, the ICC arbitration agreement (Clause 10) is broad enough to include the parties’ international law dispute, including the treaty claims.

⁷⁹ Rather than repeat here Mozambique’s reasons why a discretionary suspension is required, Mozambique refers the Tribunal to its Application for a Stay, ¶¶ 68-90, and incorporates its reasoning for a discretionary suspension herein by reference. In summary, the ICC and UNCITRAL arbitration rules are similar, and both tribunals are composed entirely of international arbitrators, so there is no fear of local bias. The ICC will resolve the contractual dispute by the 29 April 2022 final award extended deadline. By filing a motion to stay in the ICC, PEL itself recognized that one of these proceedings should yield to the other, and argued no prejudice would result. PEL will present its case on the contract issues to the ICC Tribunal, and PEL will be able to debate the effect of an ICC award before this Tribunal. The ILA and *Cairn* factors are satisfied, and this Tribunal should yield to the ICC.

1030. The parties' ICC arbitration agreement must be interpreted pursuant to its plain meaning, and clearly provides that "any dispute" arising from the MOI must be referred to ICC arbitration. This ICC Tribunal has jurisdiction over the parties' *international law dispute*.
1031. The key sentence in Clause 10 states: "Any dispute arising out of this memorandum between the parties shall be referred to arbitration." **R-2**, MOI, Clause 10.
1032. This sentence is mandatory and exclusive in nature – it mandates that "any dispute" arising out of the MOI between the parties "*shall*" be referred to arbitration. The sentence structure makes "any dispute" subject to resolution by mandated arbitration before the ICC. Therefore, Clause 10 of the MOI (the arbitration agreement) is a *dispute resolution clause*.
1033. In Clause 10 of the MOI, the parties selected the phrase "any dispute." The parties did not impose any limitation or restriction on the phrase "any dispute." The parties could have stated that "any contractual dispute" shall be referred to arbitration, but did not say that. The parties also could have carved out and excepted international law disputes, including treaty claims, from the reach of Clause 10, but also did not do that
1034. Rather, the parties selected the word "any" to modify the word "dispute." According to Oxford Lexicon Dictionary, the word "any" is, grammatically speaking, a "determiner." "Any" is "used to express a lack of restriction in selecting one of a specified class." See <https://www.lexico.com/definition/any>.
1035. In this sentence in Clause 10, the "specified class" is "dispute" and the determiner "any" means that there is a lack of restriction "in selecting one of a specified class." A contractual dispute, and an international law dispute, are certainly each "one" type of a dispute, with "dispute" again being the "specified class." Therefore, the parties' use of the word "any" means that Clause 10 contains "a lack of restriction in selecting" the particular type of dispute that is subject to resolution by mandated arbitration before the ICC.
1036. As the ICC Tribunal has already held, it has jurisdiction to resolve *the parties' contractual dispute*, including the parties' rights under the MOI. A contractual dispute is a type of dispute subject to Clause 10. The ICC arbitration agreement is also broad enough to include *the parties' international law dispute*, because an international law dispute is also a type of dispute and thus subject to Clause 10. Treaty claims are understood to be part of

an international law dispute. Therefore, Clause 10 encompasses the parties' international law *dispute*, including the PEL's treaty claims (as well as Mozambique's and the MTC's own contentions and requested relief in the ICC regarding the international law dispute).

1037. Thus, PEL's arguments are fundamentally flawed, because PEL fails to focus on the "dispute" – which is the actionable word utilized by the parties in their ICC arbitration agreement. As discussed, the arbitration agreement "refers" to ICC arbitration "[a]ny *dispute* arising out of" the MOI, and "any dispute" includes the parties' treaty dispute.

1038. Second, the conclusion that the parties selected ICC arbitration for resolution of treaty disputes is confirmed because Clause 10 is identical to the Standard ICC Arbitration Clause, which is sufficient to encompass international law disputes, including investment treaty claims.

1039. The following is the "Standard ICC Arbitration Clause":

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

See <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/> (emphasis added).

1040. The Standard ICC Arbitration Clause focuses on "all disputes" that "arise" under a contract and refers them to ICC arbitration. Clause 10 in the MOI is identical to the Standard ICC Arbitration Clause. As cited above, Clause 10 also focuses on "all disputes" that "arise" under the MOI and refers them to ICC arbitration.

1041. It is undisputed that, under the ICC Arbitration Rules, the ICC administers investment treaty arbitrations. The ICC may obtain jurisdiction *over investment treaty disputes* by arbitration clauses in an investment treaty *or in an investment contract, like the MOI*. *See R-52*, "2021 ICC Rules of Arbitration Unveiled," Cleary Gottlieb (12 November 2020) (The ICC may obtain jurisdiction to administer investment treaty arbitrations by investment treaty or by investment contract; "Thus, although investment treaty disputes have traditionally constituted only a small portion of the ICC's case docket, the draft 2021 ICC Rules reflect the institution's ambition to enhance its position as a favoured dispute resolution forum and mechanism for commercial and sovereign actors alike.").

1042. In Reply ¶ 633, PEL argues “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.” However, PEL misses the point.
1043. The point is that the ICC considers the language of the Standard ICC Arbitration Clause sufficient to bring within ICC jurisdiction international law disputes, including investment treaty claims. This is confirmed by the fact that the ICC recently added to the ICC Arbitration Rules specific provisions related to investment treaty arbitration,⁸⁰ yet the ICC did not change the Standard ICC Arbitration Clause, or specify that a different arbitration clause, should be used for purposes of investment treaty arbitration. Thus, the view of the ICC is that an arbitration clause (like Clause 10) that refers “all disputes” “arising out of” the subject contract to ICC arbitration is sufficient to bring within ICC jurisdiction international law disputes, including investment treaty claims.
1044. Accordingly, the parties’ selection of ICC arbitration to cover all disputes (without excluding a treaty dispute, as the parties would have been required to do under *Cambodia Power*, discussed next) is consistent with the ICC’s Standard Arbitration Clause.⁸¹

⁸⁰ In particular, Article 13(6) of the 2021 ICC Arbitration Rules provides that, if the arbitration agreement is *based on a treaty* and unless the parties agree otherwise, the arbitrator shall not share the nationality of any of the parties. Article 13(6) mirrors Article 39 of the ICSID Convention, which restricts the appointment of arbitrators that share the nationality of any of the parties. *Id.* In addition, Article 29(6)(c) of the 2021 ICC Arbitration Rules provides that the ICC Emergency Arbitrator Provisions are not available in treaty-based arbitrations. Article 29(6)(c) reflects the ICC’s view that emergency arbitrator proceedings are not suitable *for investment treaty arbitration* because states and state-owned companies do not have the ability to comply with their short time limits.

⁸¹ The fact that the ICC regularly resolves investment law disputes does support that the ICC has jurisdiction over the parties’ international law dispute. The ICC has been administering investment treaty arbitrations since 1996. *See R-56*, “2019 ICC Dispute Resolution Statistics,” ICC Dispute Resolution Bulletin (2020, Issue 2) (Since 1996, when the first BIT case was registered, to date, ICC has administered 42 cases based on BITs.”). Therefore, when the MOI was entered into in 2011, the ICC was administering investment treaty arbitrations, and it was proper for the parties to agree to arbitrate all disputes, including treaty disputes, before the ICC.

1045. Third, *Cambodia Power* is persuasive and supports Mozambique’s contention that the ICC arbitration agreement is broad enough to encompass the parties’ international law dispute.
1046. In *Cambodia Power*, the tribunal addressed three arbitration agreements with virtually identical “arising out of” language, similar to that in the arbitration agreement in Clause 10 of the MOI. **RLA-44**, *Cambodia Power Co. v. Kingdom of Cambodia, Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011). The decision in *Cambodia Power* is persuasive and supports Mozambique’s contention that the ICC arbitration agreement is broad enough to include the parties’ investment law *dispute*.
1047. Specifically, in *Cambodia Power*, the subject Power Purchase Agreement contained an agreement to arbitrate, requiring arbitration “[i]f any *dispute* or difference of any kind whatsoever shall arise between Edc and the Company in connection with or *arising from this Agreement...*” *Id.*, ¶ 10 (emphasis added). The Power Purchase Agreement was later renovated with a similar arbitration clause, except only that the new clause said “*arising out of this agreement*” instead of “arising from this agreement.” *Id.*, ¶ 11 (emphasis added). And, the subject Implementation Agreement also contained an agreement to arbitrate, requiring arbitration “[i]f any *dispute* or difference *arises out of* or in connection with this Agreement” *Id.*, ¶ 12 (emphasis added)
1048. The language in the three *Cambodia Power* arbitration agreements is virtually identical to the “any dispute” “arising out of” language in Clause 10 of the MOI, which also broadly requires arbitration of “[a]ny *dispute arising out of* this memorandum between the parties.”
1049. The *Cambodia Power* tribunal analyzed the “any dispute” arbitration clauses, and concluded that they were all sufficiently broad to include *international law disputes*”:

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

Cambodia Power, ¶ 336 (emphasis added).

This broad form of arbitration clause (which appears, albeit with slightly different wording, in each of the agreements) *would allow the Parties to articulate claims on the basis of any remedies available in law or equity, including customary international law (as long as these are claims that could*

be said to arise out of or be in connection with each agreement). The Tribunal is satisfied that the Claimant is entitled to bring these claims in this case under each arbitration clause.

Id., ¶ 337 (emphasis added).

1050. In its Reply ¶¶ 636-639, PEL argues that Mozambique’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.” PEL also argues that “Respondent’s argument, which is founded on a misunderstanding of the notion of customary international law, therefore fails.” However, it is PEL that incorrectly seeks to distinguish *Cambodia Power* by focusing on a distinction between international investment law and customary international law.

1051. To the contrary, in *Cambodia Power*, the claimant asserted international law violations:

Respondents’ acts and omissions ... contravene established principles of international investment law ... for which Claimant is entitled to and claims such remedies and relief as may be just and proper” – such as for expropriation.

Id., ¶¶ 327-330 (emphasis added).

1052. The *Cambodia Power* tribunal cited the aforementioned language in that claimant’s request for arbitration (“Respondents’ acts and omissions ... *contravene established principles of international investment law*”) to conclude that “Claimant made clear that it was seeking to raise claims *under customary international law*.” *Id.*, ¶ 328 (emphasis added).

1053. The tribunal also stated: “[c]ustomary international law *is inevitably relevant in the context of foreign investment (and ICSID arbitration)*, given that it comprises a body of norms that establish minimum standards of protection in this field.” *Id.*, ¶ 334 (emphasis added).

1054. Additionally, in this regard, the *Cambodia Power* tribunal concluded that:

Respondents cannot contend that they were taken by surprise or that they did not understand what the Claimant meant by “principles of international investment law”. *The body of “international investment law” includes the principles of state responsibility.* For that matter, the Respondents themselves acknowledged that it was “probable that *the Claimant [wa]s making a claim for expropriation*”. The Claimant’s reference was unequivocal. The wording used, combined with the commencement of an ICSID arbitration which is the typical forum where customary international law claims are raised, should have

made it clear to the Respondents that the Claimant intended to pursue claims under customary international law.

Id., ¶ 329 (emphasis added).

1055. Bilateral investment treaties have shaped, and continue to shape, customary international law. “Customary international law” must “be given its current content, as it has been shaped by the conclusion of hundreds of bilateral investment treaties, including NAFTA, and by modern international judgments and arbitral awards.” See **RLA-149**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Award, 11 October 2002) at ¶ 102. Similarly, Article 38(1) of the ICJ Statute enumerates the sources of international law, and provides that international law has its basis in international custom, international conventions and treaties, and general principles of law. See Statute of the International Court of Justice, 39 AM. J. INT’L L. SUPP. 215 (1945) **R-86**, Article 38(1). Therefore, the MZ-India BIT treaty forms part of customary international law, and the parties ICC arbitration agreement sweeps within its ambit also the parties’ treaty dispute.
1056. But even if there was a meaningful difference between international investment law and customary international law for purposes of this analysis, PEL misses the point. Even considering the dichotomy between contract and international law claims, the *Cambodia Power* tribunal held that the “any dispute” “arising out of” language was broad enough to include *both* local “law or equity” claims, as well as international law claims (such as customary international law in that case). Thus, the significance of the *Cambodia Power* holding is that it supports Mozambique’s contention that the “any dispute” “arising out of” language (here, any dispute arising out of the MOI), is broad enough to include both the parties’ local contractual law dispute and also the parties’ international law dispute.
1057. PEL cannot reasonably deny that its investment treaty arbitration claims “arise out of” the MOI, because the MOI allegedly provides the underlying contractual rights which PEL seeks to protect under the subject treaty. The “investment” PEL alleged in its Request for Arbitration was, precisely, “*its rights under the MOI*, including its valuable right to be awarded a concession ... and its right of first refusal” Request for Arbitration, ¶ 81 (emphasis added). The parties’ international law dispute clearly “arises out of” the MOI,

which is the “fundamental basis” of the alleged underlying rights, whose alleged breach is the *sine qua non* of PEL’s treaty claims.

1058. Moreover, and importantly, the *Cambodia Power* tribunal held that, in order for the arbitration agreements to *exclude* jurisdiction over investment law claims, the arbitration clauses have to specifically exclude investment law protection:

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

Id., ¶ 335 (emphasis added).

1059. Here, the MOI’s ICC arbitration agreement *does not contain any exclusion of international law disputes*. Like the arbitration agreements in *Cambodia Power*, the MOI’s arbitration agreement *does not* indicate that the parties expressly excluded their international law disputes from the scope of their consent. Therefore, due to the lack of exclusion of treaty claims in Clause 10, Clause 10 includes investment treaty claims, and such claims must be resolved in ICC arbitration – this UNCITRAL tribunal lacks jurisdiction.

1060. Fourth, PEL’s citations regarding local forum and judicial selection clauses are not persuasive because the ICC Arbitration Agreement is not such a clause.

1061. In its Reply ¶ 630, PEL argues that an arbitration clause in a contract does not prevent an investor from commencing a treaty claim, as the causes of action are different, and cites **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. That is not what the *Ad Hoc* Committee concluded in *Aconquija/Vivendi*.

1062. The clause was an exclusive *local administrative tribunal* forum selection clause:

Article 16 (4) of the Concession Contract ... provides that “[f]or purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán.

Id., ¶ 14 (emphasis added).

1063. Because the contract had a *local administrative tribunal* clause, the *Ad Hoc* Committee concluded that “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.” *Id.*, ¶ 103
1064. The *Aconquija/Vivendi* decision makes sense in its context, a local forum selection clause that selected the *local administrative tribunal* and was limited to the “interpretation and application of this Contract.” As such, it cannot be said to encompass an international law dispute. However, that is not the situation here. Clause 10 of the MOI does not select a local administrative tribunal or local judicial forum, and is not limited to contract claims.
1065. In its Reply ¶ 630 and note 758, PEL also argues that the ruling in *Vivendi* has been followed by other tribunals. But those decisions are distinguishable because they selected local judicial tribunals and, in one case, arbitration but before a local chamber of commerce. See **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, ¶ 573 (held that “the same set of facts and circumstances can give rise to claims for municipal law brought before national courts and claims for breach of a treaty brought before an international tribunal.” That may be the case, but the issue here is whether the MOI’s arbitration agreement is broad enough to encompass both. Clause 10 of the MOI does not select “national courts.”); **CLA-105**, *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (cites, at ¶¶ 479-482, the language in *Aconquija/Vivendi*, but Clause 19 of the MOC provided for resolution of “uncertainties and controversies” arising “from the execution of this Contract” to the “competent tribunals of the Bolivarian Republic of Venezuela,” *id.*, ¶ 478); **CLA-106**, *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 (cites, at ¶¶ 141-142, the language in *Aconquija/Vivendi*, but “Article 9 [of the Contract] concerning dispute resolution ... provided that ‘[a]ny conflict, controversy or claim deriving from or arising in connection with this Agreement, breach, termination or invalidity, shall be submitted to the Courts of the City of Asunción,’” *id.*, ¶ 34); and **CLA-104**, *Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020 (also cites, at ¶ 163, the language in *Aconquija/Vivendi* that “whether there has been a breach of the BIT and whether there has been a breach of a contract are different questions,”

and the contract involved an arbitration clause but it selected arbitration before the local Chamber of Commerce of Lima, *id.*, ¶ 71, but the issue here is whether the MOI's arbitration agreement is broad enough to encompass the parties' international law dispute).

1066. In contrast, the MOI's arbitration agreement is not a local administrative or judicial forum selection clause limited to contractual disputes. The MOI requires arbitration under the ICC Arbitration Rules, the ICC is an international organization, and this ICC Tribunal is composed of international arbitrators experienced in international law disputes. There are no local Mozambican arbitrators in this ICC Tribunal, there is no carve out of any international law dispute in the parties' arbitration agreement, and the parties' arbitration agreement is broad enough to encompass the parties' existing international law dispute.
1067. PEL call Mozambique's analysis "fallacious" and states Mozambique "has not adduced a single authority to the contrary." Reply ¶ 631. PEL needs to re-read *Cambodia Power*.
1068. Fifth, the MOI's Arbitration Clause is not incompatible with the treaty, but even if it was, the parties' specific ICC arbitration agreement takes precedence.
1069. In its Reply ¶ 640, PEL states that "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." But it is PEL that is mistaken.
1070. The MOI's arbitration clause is not incompatible with the MZ-India BIT.
1071. Specifically, Article 9(2) of the MZ-India BIT provides:

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.

Id., Article 9(2) (emphasis added).

1072. In their ICC arbitration agreement, the parties agreed to submit their unresolved disputes for resolution in accordance with the laws of Mozambique: "[t]he arbitration *will be governed by Mozambique law...*" (emphasis added). Therefore, PEL accepted per Article 9(2) that the parties may agree to submit their dispute "for resolution, in accordance with the law of the Contracting Party which has admitted the investment...."

1073. The ambiguity is over what Article 9(2) means when it states that the parties may submit their dispute to arbitration before “*that Contracting Party’s competent judicial, arbitral or administrative bodies.*” *See id.* (Emphasis added). The Treaty does not define these terms. However, because there is an internationally recognized strong policy in favor of arbitration, Article 9(2) should be interpreted in a broad manner.
1074. In Reply ¶ 644, PEL argues that “Mozambique’s only recognised arbitral body is the Centre for Arbitration Conciliation and Mediation.” Thus, let’s review the characteristics of the Centre. The Centre “is a non-profit organisation, created in 2002.” *Id.*, Submissions at note 40 (citing http://www.cacm.org.mz/?page_id=39). PEL also notes that the Centre is an organization “affiliated to the Confederation of the Economic Associations of Mozambique (CTA).” The ACT is a non-governmental organization. *See* <https://cta.org.mz/sobre-a-cta/> (“A CTA é uma organização económica não-governamental ...”).
1075. However, the ICC has these same characteristics. The ICC is a nonprofit organization formed in 1919. <http://www.iccwbo.ru/about-icc/istoriya/>. The ICC is a nongovernmental organization. And, the ICC provides arbitration services in Mozambique. The ICC is also currently proceeding with the parties’ ICC arbitration seated in Mozambique.
1076. Therefore, given the lack of definition in the Treaty, if the characteristics of the Centre satisfy Article 9(2) as PEL admits in its Reply, the ICC satisfies Article 9(2) because it shares in the characteristics. Because the parties elected “[t]he arbitration will be governed by Mozambique law and the rules of the International Chamber of Commerce shall be followed,” and “[t]he venue of the arbitration shall be at the Republic of Mozambique,” the MOI’s Arbitration Clause cannot be said to be incompatible with Article 9(2).
1077. Moreover, even if the parties’ arbitration agreement in the MOI were incompatible with Article 9(2), then the parties’ arbitration agreement takes precedence over and supersedes the UNCITRAL forum provided by Article 9(2), for the reasons that follow.
1078. Sixth, PEL waived by contract its right to UNCITRAL arbitration (even if it had such a right) and is now estopped from invoking UNCITRAL arbitration. **RLA-126**, J. Crawford, *BROWNIE’S PRINCIPLES OF PUBLIC INT’L LAW*, at 420 (“[a] considerable weight of authority supports the view that estoppel is a general principle of international law”).

1079. PEL admits “estoppel is a general principle of international law.” Reply ¶ 648. PEL cites cases for the unremarkable proposition that a waiver must be clear. *Id.*, ¶ 649, note 780. PEL then claims that Mozambique does not cite any cases, *id.*, ¶ 648, but PEL is wrong.
1080. For example, and as discussed above, the parties’ selection of the phrase “any dispute” in Clause 10 is broad enough to include *an international law dispute*, which includes PEL’s treaty claims. And, as held in *Cambodia Power*, where there is an “any dispute” clause, the issue is rather whether the arbitration agreement expressly excluded international law disputes. The ICC arbitration agreement *does not* indicate that the parties *excluded* their international law disputes from the scope of their consent; therefore, there was a waiver or estoppel.
1081. The facts also support waiver or estoppel. In his Witness Statement, PEL’s lead negotiator Mr. Daga admits the parties met “three or four times to negotiate the terms of the MOI” and “exchanged two or three drafts before finalizing the MOI.” **CWS-1**, Daga Witness Statement, ¶¶ 37-38. Therefore, there was negotiation of the MOI’s terms, yet the parties did not exclude treaty disputes from their ICC arbitration agreement.
1082. In its Reply ¶ 654, PEL makes the conclusory statement, without support, that “[i]t goes without saying that [the UNIDROIT principles] do not establish any support for the proposition that this Tribunal should yield to the ICC Arbitration.” To the contrary, the UNIDROIT principles recognize that “parties are free to enter into a contract and *to determine its content.*” **RLA-128**, UNIDROIT Principles of International Commercial Contracts (2010), Art. 1.1 (emphasis added). “The principle of freedom of contract is of paramount importance in the context of international trade.” *Id.*, Art. 1.1., Comment 1 (“Freedom of contract as a basic principle in international trade.”). Such rights “freely to agree on the terms of individual transactions, are at the cornerstones of an open, market-oriented and competitive international economic order.” *Id.* Thus, the UNIDROIT principles further confirm that there was a waiver or estoppel because the parties did not exclude treaty disputes from their ICC arbitration agreement. This Tribunal must respect the parties’ exercise of their freedom of contract, and uphold the ICC arbitration agreement.
1083. Returning to its rhetoric, in its Reply ¶ 656, PEL accuses Mozambique of making “absurd” arguments and of “fallacious” reasoning in citing *Mobil Cerro*. However, in *Mobil Cerro*, the tribunal concluded that an ICC arbitration “*did not put an end to this [ICSID] case*”

because “[t]he State was not a party to the ICC arbitration” and therefore the treaty claims “[were] was not (and could not) have been resolved by the ICC tribunal, *which jurisdiction was limited to the contractual dispute.*” **RLA-47**, *Mobil Cerro Negro, Ltd., Mobil Cerro Negro Holding, Ltd., Mobil Corp., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Venezolana de Petróleos, Inc. Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014) ¶ 216 (emphasis added). In contrast to *Mobil Cerro*, Mozambique is a party to the ICC Arbitration, and the ICC Tribunal has the jurisdiction and without substantive expertise to decide the BIT claims.

1084. PEL’s attempt to distinguish *Southern Pacific* also fails. That tribunal took the approach, of suspending the ICSID arbitration and yielding to the ICC arbitration:

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

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

1085. Further, the ICC has decided that it has jurisdiction, at a minimum with respect to the underlying contractual dispute. Thus, *Southern Pacific* is also relevant in its holding that:

the same question is also *sub judice* in another forum, where the proceedings involve the same Parties and the same dispute. The ICC tribunal has already answered this question in the affirmative, holding that Egypt and the Claimants agreed to resolve any disputes by ICC arbitration.

Id., ¶ 81.

1086. Thus, in *Southern Pacific* the ICC had decided the issue (and the matter was being reviewed by French courts), but that does not detract from the crux of the ruling, that because the ICC arbitration was subjected to French law by agreement, it was preferable for the ICC tribunal and then the French courts (if the parties sought resort to the courts, as they did in that case) to determine the question of the validity and scope of the ICC arbitration clause.

1087. Here, PEL has admitted that the MOI's arbitration agreement requires ICC arbitration subject to Mozambican law, and thus under this same rationale the ICC tribunal should decide (and it has) the validity and scope (at least so far as to the underlying contractual dispute) of the ICC arbitration clause, and this ICSID tribunal should yield to the ICC. For the foregoing reasons, this Tribunal lacks jurisdiction, at a minimum, over the parties' underlying contractual dispute, and also over the parties' treaty dispute. In the alternative, the Tribunal should abstain with respect to the parties' underlying contractual dispute, and wait to address the treaty claims after the ICC tribunal adjudicates the contract claims.

VIII. MOZAMBIQUE ENGAGED IN NO WRONGFUL CONDUCT AND DID NOT BREACH THE TREATY.

1088. PEL's unprecedented FET, expropriation, and MFN claims all fail. As established *supra* Section II, the MOI did not provide PEL the rights it alleges. Mozambique acted in accordance with the MOI, Mozambique's procurement and PPP laws, and industry best practices when conducting a competitive public tender for this proposed \$3 billion concession, and affording PEL its 15% *direito de preferência* in recognition of its MOI and PFS. There was no internationally wrongful conduct by Mozambique.

1089. PEL cites many cases for general legal principles (which are often common ground), but none for application of those Treaty standards to the subject facts or analogous circumstances. The reason is because there are no awards finding a Treaty violation in analogous circumstances.

1090. In light of the parties' latest contentions, Mozambique submits that a particularly notable merits case is that of *Oxus Gold v. Uzbekistan*. **RLA-117**, *Oxus Gold PLC v. Republic of Uzbekistan et al*, Ad Hoc Arb., Final Award (17 December 2015).

1091. In *Oxus Gold*, the claimant asserted that based on a Preliminary Exploration Agreement (PEA), a certain government decree, other alleged documents and actions of the Uzbek Government, and successful completion of a Preliminary Feasibility Study, "Claimant secured the exclusive right to explore and develop the Khandiza Deposit through a concession agreement." *Id.*, ¶¶ 236-237, 256-257. Like PEL here, that claimant never successfully negotiated and executed a definitive concession agreement. Rather, the claimant asserted, like PEL, that "the condition precedent to development rights . . . was a

positive outcome of the Phase 1 Study” (also called a “Preliminary Feasibility Study”) and that upon the government’s approval of that study, “it secured development rights . . . and Respondent had a duty to negotiate [a concession] agreement in good faith.” *Id.* The claimant complained that the respondent “breached its obligations by . . . instructing Claimant to enter into a joint venture” and later “awarding the Project” to another by “presidential decree.” *Id.*, ¶ 238. The *Oxus Gold* claimant made a similar barrage of FET, expropriation, and umbrella clause claims as PEL advances here.

1092. The respondent, like Mozambique here, established that “Claimant’s claims turn largely on a false factual predicate, i.e., that Claimant had a legal right to develop the Khandiza Deposit” based on a “Preliminary Feasibility Study.” *Id.* ¶ 259. The claimant in those circumstances merely had limited exploration rights, and any right to develop the project “would need to be approved by the various governmental authorities” and “remained contingent on the approval of the Cabinet of Ministers of [a] Bankable Feasibility Study.” *Id.* ¶ 259.

1093. The *Oxus Gold* Tribunal *denied the claimant’s claims*, even though that claimant offered *far* more evidence of an alleged right to a concession than PEL presents here. In *Oxus Gold*, the Tribunal observed (*id.*, ¶¶ 270-287):

1093.1. an agreed-upon PEA;

1093.2. successful completion of the Preliminary Feasibility Study;

1093.3. various subsequent “supplemental agreements”;

1093.4. a further “Letter of Intent” that provided for the preparation of a “draft concession agreement”;

1093.5. a governmental “Decree” that that “expressly provide[d] that the Cabinet of Ministers . . . grants [claimant] the exclusive right to develop the [project]”;

1093.6. multiple draft concession agreements and drafts of relevant authorizing decrees;

1093.7. various intra-state correspondence suggesting approval of the concession; and

1093.8. evidence of actual, deep, and ongoing concession negotiations.

1094. Yet, even this evidence—which dwarfs the mere six-page MOI and PFS that PEL relies upon in this case—did not provide the claimant an “unconditional right to develop the [Project] through a concession agreement.” *Id.* ¶ 287.
1095. In this case, as established *supra* Section II, PEL did not have an unconditional right to develop the Project. PEL simply had (and received) a 15% *direito de preferência* as specified in the MOI, the PPP Law, and PPP industry practice. The MOI, PFS, and subsequent correspondence are far less evidence of any unconditional right to a concession than the further letters of intent, decrees, draft concession agreements, and other evidence addressed in *Oxus Gold*. And even if the MOI were interpreted as broadly as PEL suggests, PEL now recognizes that the MOI and PFS did not grant PEL the concession—rather it would only provide a “right to negotiate” a mutually acceptable concession agreement.
1096. *Oxus Gold* teaches that PEL fails on the merits even if its anomalous and overbroad interpretation of the MOI were adopted. The *Oxus Gold* Tribunal concluded that even if the claimant held a “right to formal, exclusive, and good faith negotiations to develop the [Project] jointly with the Uzbek Parties on mutually acceptable terms,” *that is not the same as a right to the concession, and the award of the project to another did not constitute a Treaty violation. Id.*
- 1096.1. As to expropriation, the Tribunal concluded “*a right to formal negotiations cannot be subject to expropriation.*” *Id.*, ¶ 301. “Finding that a right to mere formal negotiations” of a concession agreement “could be subject to expropriation . . . would lead to transforming an obligation to do something to a certain standard . . . into an obligation to achieve a certain result.” This cannot be the meaning of expropriation under a BIT. *Id.*
- 1096.2. As to FET, “Claimant cannot be deemed to have had a legitimate expectation to a particular result of the negotiation process.” *Id.*, ¶ 330.
- 1096.3. As to an umbrella clause claim, “the Claimant failed to establish that it actually held an obligation protected by the umbrella clause.” *Id.*, ¶ 381. “Claimant did not secure the alleged unconditional right to develop the Project,” and the “mere failure to be granted such development rights cannot be deemed a breach of an obligation . . . as such contractual obligation did not exist.” *Id.*, ¶¶ 374, 376.

1097. Mozambique discussed *Oxus Gold* in its SOD, with focus on the umbrella clause issue, and PEL's Reply never addresses its substance.
1098. Nor can PEL distinguish *F-W Oil* and the several other arbitral decisions cited by Mozambique, where "letters of interest" and other preliminary, pre-concession agreements were appropriately found not to establish the legal rights or promises alleged by claimants (causing corresponding Treaty claims to fail).
1099. In this case, the Tribunal will find that PEL did *not* have the rights to directly and exclusively negotiate a definitive agreement held by the claimant in *Oxus Gold*. PEL's *direito de preferência* was subject to Mozambican law expressly defining it as a 15% *direito de preferência* in the required public tender for a \$3 billion PPP rail/port concession, and thus is no promise of direct negotiations or a direct award. PEL's alleged exclusivity and confidentiality rights were limited to the period of PFS study and approval, and do not preclude a tender following PFS approval—which is standard industry practice for unsolicited PPP proposals of this type. Yet, even if PEL had some claimed right to directly and exclusively negotiate, PEL cannot presuppose successful negotiation of a definitive concession agreement and had no unconditional right to the concession itself. Like the *Oxus Gold* claimant, PEL fails on all three of its stated Treaty claims.

A. PEL Fundamentally has no Underlying Rights to a Concession that are Protected by the Treaty.

1100. Section V of Mozambique's SOD contained more than fifty pages of analysis establishing that PEL did not have the alleged underlying rights that it sought to "protect" using the Treaty. SOD ¶¶ 455-627. The fact that PEL did not have the rights it alleged was then a substantial component in each of the subsequent sections of Mozambique's SOD, disproving PEL's varied contentions on the FET, MFN, and indirect expropriation claims. SOD §§ VI-VIII.
1101. Likewise, Mozambique's fact section in this Rejoinder thoroughly establishes that PEL did not have the rights it alleges in this proceeding. It also demonstrates that Mozambique followed international best practices (in tendering this PPP procurement and providing PEL the 15% scoring preference) and thus did not treat PEL unfairly or inequitably in any event. All this is fatal to PEL's claims. *Supra* § II.

1102. PEL is keenly aware of its vulnerability relative to whether it actually has any enforceable right to the concession that was treated unfairly, or violated contrary to an imported umbrella clause, or indirectly expropriated. PEL is also keenly aware of Mozambique’s position that, at a minimum, the fundamental issue of whether the MOI actually gave PEL the rights it alleges is squarely within the jurisdiction and competence of the ICC Proceeding—a proceeding that PEL has sought to minimize, stay, and disrupt at every turn.
1103. For these reasons, PEL’s 333-page Reply inappropriately *attempts to ignore Section V of Mozambique’s Statement of Defense altogether*. PEL contends that Section V—which contained argument common to each prong of the subsequent Treaty causes of action (SOD §§ VI-VIII)—relates only to “domestic law” and that “domestic law” is not “*relevant*.” PEL then ignores Section V; disingenuously claims the subsequent sections of Mozambique’s Statement of Defense were “a mere 46 pages” and therefore suggest “weakness” on the merits (*even though Mozambique’s discussion was longer than the corresponding 38-page discussion in PEL’s Statement of Claim*); and skips to its Treaty analysis, where PEL recites lengthy legal standards (even after acknowledging many of them are “common ground”) and repeatedly rehashes its inaccurate factual narrative.
1104. Mozambique is confident the Tribunal will see through PEL’s rhetoric and misdirection.
1105. It is clear that Section V of Mozambique’s Statement of Defense analyzed crucial matters in this proceeding, and cannot be swept under the rug by PEL. Mozambique explained in SOD Section V that (among other things):
- 1105.1. The Portuguese versions of the MOI are controlling. SOD § V(B)(1)-(2).
- 1105.2. To the extent relevant, Mozambique’s English MOI, which was substantively in accord with both parties’ controlling Portuguese MOI, is the correct English version. SOD § V(B)(1)-(2).
- 1105.3. The MOI is governed by Mozambican law. SOD § V(B)(4).
- 1105.4. Under international jurisprudence and Mozambican law, the MOI is a preliminary, non-binding document (particularly as to any concession itself)—and, if interpreted as PEL claims, would be void and unenforceable for numerous reasons including nondisclosure of PEL’s blacklisting, the lack of necessary

approvals for the grant of concession rights, and patent inconsistency with both Mozambique's PPP Law and international PPP practices. SOD § V(B)(5).

- 1105.5. Even if the MOI were erroneously interpreted as PEL claims, the subsequent enactment of the uncontested PPP Law and PPP Regulations would invalidate PEL's alleged right to a direct award concession based only on a PFS and without a tender. SOD § V(B)(6).
- 1105.6. In any event, PEL incorrectly interpreted the MOI. The MOI did not provide PEL the rights it alleges. For example, the MOI only provided the *direito de preferência* as defined in the PPP Law, and the exclusivity provision was limited to the term of the PFS study and approval and conditioned upon the forthcoming PPP law (requiring tenders for projects of this type). SOD § V(B)(7).
- 1105.7. Furthermore, PEL's failure to satisfy condition precedents of its alleged rights (*e.g.*, formation of a project company with CFM) and voluntarily participation in the tender caused PEL's alleged rights to either fail or be extinguished. SOD § V(B)(7).
- 1105.8. For these and other reasons, Mozambique never breached the MOI or any alleged rights derived therefrom. If anything, PEL breached and repudiated the MOI through its conduct and blacklisting nondisclosure. PEL's alleged rights were also extinguished due to laches or other time bars, because of the passage of time and PEL's failure to appeal the tender. SOD § V(B)(8)-(10).
1106. Mozambique restates Section V of its SOD. Because PEL fails to directly address Section V in Reply, it stands significantly un rebutted and is dispositive.
1107. It is also clear that, contrary to PEL's suggestion, Section V was based on both domestic Mozambican law—which is controlling as to the existence and scope of the alleged property rights—and *more*. Among other things, Section V referenced international arbitral decisions on non-binding preliminary agreements like the MOI, international practices for PPP procurement, and the laws and decisions of several legal systems relative to why a six-page MOI could never be interpreted as a binding right to a concession. *E.g.*, SOD § V(B)(5).

1108. PEL is also plainly in error when asserting that domestic law is not relevant to this Tribunal’s analysis. PEL’s assertions are wrong as a matter of investment law. They are also inconsistent with PEL’s submittal of purported Mozambican law Legal Opinions (by a Portuguese professor of law not admitted to the bar in Mozambique), admissions that the MOI is governed by Mozambican law by its own terms, and the extensive discussion of Mozambican law in both the contemporaneous correspondence and the parties’ arbitral submissions.

1109. International jurisprudence demonstrates that the existence, validity, and scope of the alleged “right” to be protected by an investment treaty’s substantive standards is one to be resolved *under host State law*:

In order to determine whether an investor/claimant holds property or assets capable of constituting an investment *it is necessary in the first place to refer to host State law*. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.

RLA-46, *Emmis*, ICSID Case No. ARB/12/2, ¶ 162 (emphasis added).

1110. It is a fundamental principle of international law that “[i]nvestment disputes are about investments, investments are about property, and property is about specific rights over tangibles and intangibles *cognizable by the municipal law of the host state*.” **RLA-136**, Zachary Douglas, *The International Law of Investment Claims*, ¶ 101, Cambridge University Press, 2009 (emphasis added). “Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to the municipal law of property.” *Id.*, ¶ 102. “[T]hat property law is the municipal law of the state in which the claimant alleges that it as an investment.” *Id.*

1111. Accordingly, “[i]nvestment treaties do not oblige the host state to protect intangible property rights that are not cognizable in the legal order of the host state.” *Id.*, ¶ 110. For a Treaty claim to exist, the alleged “rights affected must exist under the law which creates them.” *Id.*, ¶ 111 (discussing *EnCana Corporation v. Republic of Ecuador*).

1112. It follows that, as a prerequisite for its Treaty claims, PEL must have “an actual and demonstrable” right under Mozambican law applicable to the MOI. *E.g.*, **RLA-92**, *Merrill*, ¶ 142 (“an investor cannot recover damages for the expropriation of a right it never had”).

1113. In this context, tribunals frequently examine domestic law to determine the existence of the claimant’s alleged rights. *See e.g.*, **RLA-137**, *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), ¶¶ 117-134 (examining domestic law to conclude that claimant never in fact possessed the alleged right that was purportedly breached); **RLA-138**, *Apotex, Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013), ¶¶ 207-218 (holding that an application process “governed exclusively by U.S. law and regulation” may not be characterized as “property” for purposes of investment claim).
1114. Particularly where the alleged right arises out of a purported contract, like the MOI here, the reviewing tribunal must first examine whether the alleged contractual rights were “enforceable in the courts of the State in accordance with the substantive law of that country.” **RLA-74**, *F-W Oil v. Trinidad and Tobago*, ¶ 152; *see also* **RLA-56**, *Zhinvali v. Georgia*, ¶¶ 297-304 (considering rules of interpretation under domestic law in determining whether alleged contract establishes a qualifying “investment” under Article 25(1)). When the alleged rights do not exist under local law, the Treaty claim predicated on the existence of those rights fails.
1115. Here, the key disputed “rights” and “contractual commitments” PEL relies upon for the existence and scope of a protected “investment” (relevant to both jurisdiction and the merits) are, by PEL’s own admission, PEL’s “rights under the MOI.” As Mozambique previously explained (SOD ¶ 324):

Specifically, PEL’s investment treaty arbitration claims ‘arise out of’ the MOI, because the MOI allegedly provides the underlying substantive rights which PEL seeks to protect pursuant to the MZ-India BIT. This is confirmed by PEL’s pleadings. The ‘investment’ PEL alleged in its Request for Arbitration was ‘*its rights under the MOI*, including its valuable right to be awarded a concession for the USD\$3.115 billion Project that PEL had itself conceived of, and its right of first refusal, both of which were abrogated by the MTC.’ **Exhibit R-46**, Request for Arbitration ¶ 81 (emphasis added). In its Statement of Claim, PEL likewise defines its alleged ‘investment’ through its flawed allegations regarding rights conferred through the MOI. *See* SOC ¶ 257(a) (the alleged ‘*direct award of a concession to implement the Project, as well as all of the rights under the MOI associated with the Project*’) (emphasis added). To the extent PEL now also contends that any alleged ‘know-how’ constitutes an investment that did not receive appropriate protection, those assertions, too, ‘arise out of’ the MOI. PEL alleges its ‘know-how was explicitly protected by the MOI,’ *see* SOC ¶ 257(b), and contends it was

Mozambique’s alleged commitments in the MOI that formed ‘the fundamental basis upon which PEL invested in Mozambique’ and caused PEL to ‘complete the PFS at its own costs,’ *see, e.g.*, SOC ¶ 324). Plainly, this dispute ‘arises out of’ the MOI, which forms the ‘fundamental basis’ of the alleged rights, and whose alleged breach is the *sine qua non* of the subject claims.

1116. PEL cannot escape these well-established principles of international investment law jurisprudence by arguing Article 12 the Treaty specifies that the investments shall be “governed by the laws in force” in Mozambique “except as otherwise provided in this Agreement.” Reply ¶¶ 723 *et seq.* Consistent with the authorities above, nothing in the Treaty displaces the domestic legal standards for determining the existence, scope, and validity of the alleged property or contract rights PEL seeks to “protect” under the Treaty. The Treaty’s FET standards and the like address how alleged investment rights should be *treated*—not what they mean and whether they validly exist.
1117. For similar reasons, PEL’s reliance on *Vivendi* is unavailing. Reply ¶ 726, citing **CLA-102**. Whatever its merits, *Vivendi* addressed certain analytical distinctions between a “breach of the BIT” versus a “breach of contract.” *Id.* PEL offers no authority for the suggestion that domestic law is neither relevant nor controlling to the question of whether the contract or property right existed in the first instance. As described above, the alleged right sought to be protected by the BIT *must be cognizable under domestic law*. *E.g.*, **RLA-136**, Zachary Douglas, *The International Law of Investment Claims*, ¶ 101; **RLA-92**, *Merrill*, ¶ 142; **RLA-74**, *F-W Oil*, ¶ 152; **RLA-46**, *Emmis*, ¶ 162.
1118. Section V of Mozambique’s SOD establishes, on the merits, that PEL did not have the rights it alleges (under Mozambican law and more). Nonexistent rights cannot be treated in a manner violative of any Treaty standards. PEL’s failure to address Section V directly is not just telling—it is yet another dispositive ground for dismissing PEL’s claim.

B. Mozambique Did Not Breach the Treaty’s Fair and Equitable Treatment Standard.

1119. SOD Section VI further established that Mozambique did not breach the FET standard. SOD ¶¶ 628-720. In short, Mozambique did not frustrate any legitimate expectations—because Mozambique and the MOI never promised PEL direct award concession rights based only on a PFS; PEL never relied on such a nonexistent “promise”; and to the extent PEL did so rely, reliance would have been unreasonable in light of the proper interpretation

of the MOI, Mozambican laws, and PPP industry practices. *Id.* Similarly, Mozambique acted consistently and transparently, consistent with the facts, procurement regime, and local and international PPP practices, and certainly did act in an “arbitrary” or “bad faith” manner. *Id.* Mozambique explained the pertinent facts and law, and further cross-referenced Section V of its SOD and its robust fact discussion.

1120. PEL’s Reply restates lengthy, boilerplate legal standards that are largely common ground, and then recycles its flawed factual narrative. In its sections purporting to *apply* the general legal principles, PEL *never* cites any arbitral awards analogous to the present circumstances—because there are no international arbitral awards favorable to PEL’s novel attempt to make a Treaty claim out of a mere MOI and the pre-concession, procurement circumstances present here. PEL’s alleged facts have been thoroughly debunked *supra* Section II. Mozambique will summarize the matters again here for convenience, but the Tribunal is referred to Section II for a complete discussion.

1. PEL Does Not Meaningfully Contest Mozambique’s Articulation of the Applicable Legal Standards, and Cannot Distinguish Cases Finding That Preliminary Agreements Like the MOI Are Non-Binding.

1121. The SOD articulated the legal standards for the FET standard. SOD ¶¶ 628 *et seq.* PEL states that as to the legal standard, there “appears to be broadly common ground.” Reply ¶ 732.

1122. Mozambique therefore incorporates by reference the applicable legal standards as specified in the SOD, without further duplication. SOD ¶¶ 628 *et seq.*

1123. PEL’s cannot downplay the aspects of broadly agreed-upon legal standards, which are, unfavorable to PEL.

1124. For example, as stated in the SOD ¶ 630, a violation of the FET standard “occurs only when it is shown that an investor has been treated in such an *unjust or arbitrary manner* that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in light of the *high measure of deference* that international law generally extends to the right of domestic authorities to regulate matters within their own borders.” **RLA-86**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award (13 November 2000), ¶ 263 (emphasis added).

Although *S.D. Myers* involved NAFTA, the cited principle is international in application, and cannot be refuted by PEL.

1125. Likewise, PEL cannot minimize *Toto Construzioni*. As established in the award in that proceeding:

1125.1. “The *threshold* for finding a violation of the fair and equitable standard is *high*” **RLA-144**, *Toto Construzioni v. Lebanon*, ICSID Case No. ARB/07/12 (Award), ¶ 155 (emphasis added);

1125.2. “For an alleged breach of contract to be considered as a breach of the fair and equitable treatment principle, State conduct is required.” *Id.*, ¶ 161. Indeed, an in such circumstances the alleged breach “must be the result of behavior going *beyond what an ordinary contracting party* could adopt.” *Id.* (emphasis added).

1125.3. “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.” *Id.*, ¶ 163. Here, irrespective of whether the Treaty required recourse to domestic courts, the alleged contract at issue—the MOI—contains an ICC arbitration clause, and the tender process specified domestic judicial appeals. The fact that PEL did not avail itself to either is both telling on the merits, and relevant to the FET analysis, as PEL cannot demonstrate that Mozambique treated any alleged breach of the MOI unfairly through the available, agreed-upon dispute resolution processes. In fact, Mozambique has initiated an ICC arbitration, which is pending, to resolve at a minimum the parties’ fundamental underlying contract dispute.

1126. *Toto Construzioni* further noted that “legitimate expectations” are not premised on the “perception of the [allegedly] frustrated investor” (*id.*, ¶¶ 165-166).

1127. Nor can PEL sidestep the observation that “a possible breach of an agreement does not necessarily amount to a violation of a BIT.” **RLA-87**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), ¶ 289. While PEL accurately concedes it has no discrimination claim, and the referenced quotation was within a portion of the award discussing the discrimination prong of FET,

the observation that alleged breaches of agreement do not necessarily amount to BIT violations has broader applicability (*see, e.g.*, the awards above) and is not substantively contested (as confirmed below).

1128. *As to the general legal standards governing legitimate expectations*, PEL admits there is significant “common ground.” Reply ¶ 735. PEL concedes, among other things, that:

1128.1. The question of legitimate expectations must be “determined objectively and not by reference to the investor’s subjective expectations.” Reply ¶ 735(b);

1128.2. “Not every breach of a contractual promise is a breach of the investor’s legitimate expectations for purpose 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 breach must constitute an outright and unjustified repudiation of the transaction.” Reply ¶ 735(d).

1129. PEL purports to partially question whether the investor’s due diligence about the conditions of the investment is a “prerequisite for reasonable and legitimate expectations.” Reply ¶ 737. PEL acknowledges that due diligence is required for FET claims relating to the stability of the regulatory framework. Reply ¶ 738. Contrary to PEL’s contention, however, the same principle of reasoned due diligence applies to the present circumstances. While PEL may not couch its claim in terms of regulatory stability, the undisputed facts are that the MOI was signed shortly before promulgation of Mozambique’s PPP law and conditioned the alleged rights on future Mozambican law applicable to the procurement. The PPP law required public tenders unless the Mozambican government granted an exception reserved for duly substantiated, extraordinary “last resort” circumstances. In assessing what expectations PEL objectively should have had when executing a MOI with a MTC Minister (who lacked authority to grant such a “last resort” exception and never did), and determining whether PEL’s presently claimed expectation to a direct award without competition is reasonable, PEL is appropriately charged with due diligence relative to the PPP Law and other matters pertaining to PPP procurement. SOD ¶ 633; *see also supra* § II.

1130. Crucially, PEL cannot distinguish *F-W Oil* and the several other arbitral decisions cited by Mozambique, where “letters of interest” and other preliminary, pre-concession agreements

were appropriately found not to establish the legal rights or promises alleged by claimants (and, as discussed above in the jurisdictional section, cannot even be an “investment”). PEL merely asserts in conclusory fashion that these cases do not apply because the host state had not entered into a binding contract, while here PEL claims to have entered into such a contract, Reply ¶ 740.

1131. Yet PEL *fails to directly respond to the section of Mozambique’s SOD discussing these cases*, and for good reason: PEL’s analysis is incorrect. *See* SOD ¶ 680, incorporating SOD § V(B)(5)(a) (unrebutted by PEL’s Reply). Regardless of whether certain provisions of the MOI could be deemed binding (although they were contingent nonetheless), PEL must still concede that the MOI was *not binding as to the concession itself* precisely because it was contingent on the satisfaction of various conditions, and PEL and the MTC never executed an actual PPP concession agreement. *Supra* § II(D)(2).
1132. The six-page MOI is plainly less a binding contract for a concession than the *post-award* “heads of agreement,” “letters of agreement,” MOUs, and other documents at issue in Mozambique’s cited cases—yet in all those instances, Tribunals appropriately found that the agreements were simply preliminary and not a basis for binding concession rights, as detailed below.
1133. *Concession rights can only be granted by a duly-executed concession agreement between the host State and the concessionaire*. Any other holding by this Tribunal would turn public concession practice on its head, and would open up a Pandora’s Box that would allow every disappointed bidder, like PEL, or any interested party that signed an MOU, LOI, MOI or similar document, to flood the gates of investment treaty arbitration with baseless claims, like this one, about what could have been if a concession had been granted that never was – this also would create devastating uncertainty in the public procurement process, and would discourage governments from entering into exploratory documents like MOUs, LOIs and MOIs.
1134. Indeed, as SOD’s unrebutted Section V explained (SOD ¶¶ 480-487), in the context of infrastructure and development projects, international tribunals “have been very reluctant to acknowledge that an investment has actually been made *until the contract has been signed or at least approved and acted upon*.” **RLA-74, F-W Oil**, ¶ 126 (emphasis added).

1135. Tribunals have smartly rejected attempts to conjure treaty jurisdiction or treaty violations on the basis of pre-concession or preliminary agreements—even in instances where the purported investor presents a significantly stronger case than PEL.
1136. For example, in *F-W Oil*, the claimant executed a “*Confidentiality Agreement*,” was the winning bidder in a public tender, was “awarded the tender ‘subject to the negotiation and execution of a mutually agreeable operating agreement,’” and received a “*Letter of Intent*” together with draft “*Heads of Agreement*.” *Id.* ¶¶ 8, 27, 63, 89-90 (emphasis added). The Tribunal, however, appropriately looked to domestic law to evaluate the existence of contractual rights from dealings before the conclusion of a formal concession agreement. *Id.* ¶ 15. It observed that:
- In the common law, a contract to negotiate, even when supported by consideration, is not regarded as a contract known to law—it is too uncertain to have any binding force; and no Court can estimate the damages for breach of such an agreement.
- Id.* ¶ 177-178.
1137. Accordingly, the *F-W Oil* Tribunal rejected claimant’s assertion that there was a “Definitive Operating Agreement” or any other locally enforceable contract rights arising from the parties’ activities prior to execution of a mutually acceptable concession agreement, and declined jurisdiction. *See, e.g., id.*, ¶¶ 162-164, 183. The Tribunal likewise rejected claimant’s argument that alleged “contribution of intellectual property,” including its alleged “confidential plans and economic models, produced as part of its offer,” represented an “investment” *Id.*, ¶ 184.
1138. Compared to *F-W Oil*, PEL offers far fewer facts evincing agreement to substantive concession terms or intent to be bound to a definitive concession agreement. PEL was *not* the winning bidder; was *not* awarded a concession of any type (even subject to negotiation); and did *not* negotiate a letter of intent and heads of agreement pertaining to the substantive terms of a concession agreement.
1139. As in *F-W Oil*, “the real complaint of the Claimant in this case is that it was prevented (by the actions of various parties on the [State] side) from acquiring the investment to which it believed it had become entitled.” *Id.* ¶ 213.

1140. PEL, like *F-W Oil*, has not shown that it “acquired any legal right to that effect.” *Id.* This is fatal to PEL’s claim on the merits and jurisdictionally.
1141. Other tribunals have also prudently declined to find binding concession rights in documents that are not binding concession agreements. For example:
- 1141.1. The *Mihaly* tribunal found expenditures made in preparation and in connection with a “*Letter of Intent*,” “*Letter of Agreement*,” and “*Letter of Extension*” were not an “investment.” See **RLA-54**, *Mihaly*, ICSID Case No. ARB/00/2.
- 1141.2. The *Zhinvali* tribunal found that development expenditures incurred where the parties failed over a three-year period “to conclude a definitive set of agreements to finance and implement” an infrastructure project were *not* an investment— notwithstanding alleged promises or “*preliminary agreements*” to sign an already “*fully negotiated*” concession agreement. **RLA-56**, *Zhinvali*, ICSID Case No. ARB/00/1, ¶¶ 1-2, 190-195, 410-412.
- 1141.3. The *Generation Ukraine* Tribunal declined to give legal effect to a “*Protocol of Intentions*” defining “the basis on which the parties will endeavor to identify, research, finance, and complete” certain rail estate and development projects, calling it merely “an *agreement to agree*.” **RLA-75**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9 (Award) (16 September 2003), ¶¶ 18.8-18.9.
- 1141.4. In *Genin*, a “*tentative agreement*” setting forth substantive terms, characterized as a “*memorandum of understanding*,” was found to not be a binding agreement, and thus there was no violation of the subject BIT. **RLA-76**, *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001), ¶¶ 177, 341, 346.
- 1141.5. And in *Nagel*, a “*Cooperation Agreement*” between a State-owned company and the claimant, whereby “the parties would jointly seek to obtain” a telecommunications license, was not a binding “guarantee that a license would in fact be obtained.” **RLA-77**, *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award (9 September 2003), ¶¶ 1, 326-328.

1142. As discussed in the lead introduction to this Section, PEL also ignores *Oxus Gold* and its finding that a Preliminary Feasibility Study and body of documents and evidence far more substantial than PEL's MOI did not provide a claimant an unconditional right to a concession.
1143. Similarly, in *ACP Axos Capital GmbH v. Kosovo*, ICSID Case No. ARB/15/22, 3 May 2018 (Award), **R-148**, the tribunal appropriately observed that there was no valid and binding contract between the parties in a tendered PPP, because, among other things, the parties had not executed definitive agreements and "Kosovo retained the unfettered right to cancel the privatization." *Id.*, ¶ 196.
1144. PEL cites no analogous case where a "Memorandum of Interest" was found to be a binding promise to or award of a concession, much less agreement to concession terms. As is evident from the language of the MOI itself, *as to concession rights*, a letter of intent is at most an "agreement to agree" and, therefore, is not legally binding for this reason. To be binding, a letter of intent must include, among other things, material terms of the subject-matter of the letter—in this case, of the subject PPP concession project. As discussed in further detail *supra* Section II, the MOI does not include all material terms of the subject PPP concession project and, thus, it is not and could never be a legally binding agreement by Mozambique to award the subject project to PEL.
1145. Indeed, PEL itself now admits that the MOI did not grant PEL the award. Even in PEL's telling, it is only a right to negotiate a definitive concession agreement. This is a prototypical, preliminary, "agreement to agree," as confirmed above.
1146. Whether aspects of the MOI could be deemed binding does not change this analysis—the question is whether the MOI was binding *as to the concession rights for which PEL claims a legitimate expectation*. As the arbitral cases above demonstrate, the MOI was plainly a "preliminary agreement" and, as to the concession itself, could never be anything more than an "agreement to agree." *See also supra* § II(D)(2) (MOI merely an "agreement to agree" as PEL admits that the MOI did not and could not award the actual concession). Thus, *F-W Oil* and similar cases are fatal to PEL's case, and cannot be distinguished by PEL.

1147. PEL references *Tethyan Copper* and *MTD Chile* as to legal standards (Reply ¶ 741), but those cases are readily distinguishable, because both involve instances where there *already were definitive investment contracts* and the complained-of action was failure to grant *permits* thereafter. SOD ¶¶ 647-652, 679.
- 1147.1. As PEL acknowledges, in *Tethyan* the claimant had an existing “joint venture contract”—the complained-of action was failure to grant a subsequent mining license. Reply ¶ 741, citing **CLA-134**, *Tethyan Copper Company Pty Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability (10 November 2017). Here, however, there was no agreed-upon joint venture, no definitive concession agreement was negotiated or agreed upon, and this it is not a situation where concession rights had been granted but then subsequent routine licenses were denied. *Supra* § II. Likewise, PEL’s minimal *Pre-Feasibility Study*, which did not define the basic terms and conditions of a concession or purport to establish project feasibility, does not equate to “extensive exploration and feasibility work” as existed in *Tethyan Copper*. *Id.*; *contra* Reply ¶ 741.
- 1147.2. *MTD v. Chile* is similarly distinguishable, as there was a preexisting contract for a project and the issue involved denial of subsequent permits for alleged zoning reasons. *Contra* Reply ¶ 741, citing **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.
- 1147.3. Plainly, neither *Tethyan* nor *MTD v. Chile* involved a mere MOI that, as PEL now admits elsewhere, “did not award the actual concession” (*e.g.*, Reply ¶ 182).
1148. *As to the general legal standards on consistency, transparency, and non-arbitrary conduct*, PEL articulates no disagreement with Mozambique’s SOD. Reply ¶ 743-744, SOD ¶¶ 705 *et seq.*; SOD ¶¶ 713 *et seq.* Mozambique’s recitation is therefore incorporated by reference.
1149. *As to the general legal standards for good faith conduct*, Mozambique likewise incorporated its previously articulated principles, which are not meaningfully contested. SOD ¶¶ 717 *et seq.* PEL asserts its position is that “bad faith on the part of Mozambique must be a breach of its obligation to act in good faith,” *e.g.*, Reply ¶ 752, and Mozambique

has never stated otherwise. Of course, no such “bad faith” exists, as demonstrated in the SOD, the robust fact section of this Rejoinder, and below.

2. Mozambique Did Not “Reneg[e] on the Specific Assurances Contained In the MOI” Because the MOI Did Not Promise What PEL Alleges.

1150. To maintain its FET claim, PEL acknowledges that it must show that Mozambique “renege[d] on a promise that the investor reasonably relied upon.” Reply ¶ 755. As established in the SOD, PEL has not proven those requirements. *E.g.*, SOD ¶¶ 653-680.

(a) PEL Relies on the MOI for its Alleged “Promises,” but the MOI Never Gave PEL the Rights it Alleges.

1151. PEL’s case collapses due to a fundamental issue: PEL relies on its disputed interpretation of the MOI for its alleged “promises” (Reply ¶ 756), but the MOI did not (and could not) promise a concession or provide PEL enforceable concession rights. Among other things, the SOD established that:

1151.1. PEL cannot consistently and cogently articulate what it believed the six-page “Memorandum of Intent” promised. PEL inconsistency claimed MOI (1) *already awarded the concession* subject to a “waiver” of a right of first refusal upon presentation of a concession agreement and (2) *committed to a future award* if PEL “exercised” its right of first refusal. SOD ¶¶ 655-656.

1151.2. In actuality, neither of PEL’s internally-inconsistent interpretations are correct. Particularly as to a concession itself, the MOI was simply a non-binding “Memorandum of Intent” that governed the creation of a mere PFS, evidenced no meeting of the minds on the necessary and material terms of a concession, and certainly did not constitute an actual or promised award of concession rights. This was confirmed by Mozambican law, international law, and PPP procurement practices, and testimony of the MTC personnel involved in its negotiation. SOD ¶ 657.

1151.3. The MOI provided for a “*direito de preferência*” contingent on approval of the PFS. The PPP Law *defines what is meant* by a “*direito de preferência*” in a PPP Project. The PPP Law specifically addressed the situation PEL alleges to have occurred here, where a private entity sought to propose a PPP project, and states

that the entity deemed to be a proposer of a PPP Project is provided a “*direito e margem de preferencia*” in the form of a 15% scoring advantage in the public tender. Mozambique’s PPP Law confirmed that PPP procurement would be by public tender in all but the most exceptional “*last resort*” circumstances, not present or found for this project. At the time the MOI was executed, a direct award of a concession of this type *would not even have been allowable* under Mozambican procurement law. Mozambique’s award of a right of preference, in the form of a 15% “*direito de preferência*,” to the entity making an unsolicited proposal for a PPP project and submitting preliminary studies is consistent with international PPP custom and practices. SOD ¶¶ 659-661, 664.

- 1151.4. PEL’s assertion that its English version of Clause 2(1) provided for a direct award is baseless. That language is nowhere found in either of the parties’ Portuguese versions or MTC’s English version of the MOI. This is critical—both parties have the same Portuguese language version of the MOI and they do not contain the additional language in PEL’s English version, and the MTC’s English version is consistent with both parties’ Portuguese versions. Out of four versions, PEL’s English version is the only one that is different and has the additional language that PEL claims favors PEL. However, not only is the additional language inconsequential (because the MOI, at the end of the day, does not—in and of itself—create or establish a PPP concession), but PEL’s purported Clause 2(1) is also internally inconsistent, in that it would negate the need for a “first right of refusal” or “*direito de preferência*” in Clause 2(2). If PEL is awarded the concession under Clause 2(1) if, *arguendo*, the PFS is approved, PEL needs no right of first refusal. If satisfaction of the condition automatically results, *arguendo*, in a concession, then PEL also needs no right of first refusal. PEL’s invalid English Clause 2(1) also makes the alleged right to a direct award contingent on an unintelligible reference to approval of “the terms under Clause 7” (which relates to when the project is not techno-commercially feasible). Finally, PEL’s alleged right to a direct award in Clause 2(1) would require the PFS “to finalize the rail route,” which it certainly did not do nor ever commenced. SOD ¶ 665.

- 1151.5. PEL’s reference to the MOI’s “exclusivity” clause (Clause 6) of the MOI ignores its limiting language and misunderstands how exclusivity works for unsolicited PPP proposals. PEL omits the express limiting language in that clause, *i.e.*, that it applies only “[d]uring the prefeasibility study and the process of approval for the project,” and is subject to “the terms of the specific legislation.” The exclusivity clause is limited in duration, consistent with the public tender process required in the PPP legislation, and was not violated by MTC. The confidentiality provision is similarly limited in term and scope. SOD ¶ 667.
- 1151.6. In sum, PEL had no legal right or legitimate expectation to an undefined USD\$3 billion PPP new rail and port concession on the basis of the MOI or PFS. To the extent the MOI was deemed binding and given PEL’s inaccurate and inconsistent interpretation, the MOI and any promise of a direct award would have been set aside by the later enactment of the PPP law, invalidated by PEL’s blacklisting, fraud, and breaches, and made ineffectual by PEL’s failure to satisfy conditions precedent and define a feasible project. *Id.*
- 1151.7. Technical experts confirmed that in Mozambique and elsewhere, “it is not uncommon for entities pursuing PPP projects to provide proposals that are more comprehensive and demonstrate a higher degree of mobilized resources than the PFS, without any expectation of winning the tender or receiving the award (as shown by the bidder in the public tender for the subject project).” In fact, this was done *in the context of this specific project*, where the PGS Consortium submitted a more-than-900-page Technical Proposal in the public tender (dwarfing the PFS) expressly with knowledge that the costs of developing the proposal would not be recovered. SOD ¶ 669.
- 1151.8. The “flip flop” narrative that PEL pursues for purposes of Treaty claims collapses with the understanding, as explained above, that the MOI provided for at most a “*direito de preferência*” in the context of early-stage conceptual development of a large-scale potential PPP rail and port project. In allegedly “approving” the PFS, the MTC did not agree to a direct award—rather, consistent with the MOI, it allowed PEL to expressly exercise its “*direito de preferência*” and negotiate

with CFM if it so chose. PEL failed to reach agreement with CFM, further demonstrating that PEL failed to satisfy necessary conditions for a direct award. SOD ¶¶ 671-672.

- 1151.9. MTC's actions throughout this process were consistent with the proper interpretation of the MOI: at most, it granted a "*direito de preferência*," and that "*direito de preferência*" is defined in the PPP Law as a 15% bidding preference consistent with Mozambican and international practices for PPP infrastructure procurement. PEL's inconsistent articulation of any "legal rights," "promises," "assurances," or "legitimate expectations" to a direct award of a USD \$3 billion concession on the basis of a mere MOI and PFS are contrary to the facts, domestic and international law, industry practice, and common sense. SOD ¶ 675.
1152. Mozambique's harmonizing interpretation of the MOI, Mozambican law, PPP practice, and the parties' conduct is further confirmed *supra* Section II, which rebuts all of PEL's Reply arguments.
1153. PEL's Reply submits a new expert report on PPP procurement from Mr. David Baxter, but his report is composed of narrowly tailored opinions in response to carefully worked questions by counsel, which is not helpful. **CER-7**, Expert Report of David Baxter.
1154. PEL also submits a second "Legal Opinion" from Professor Medeiros, seeking to have him opine on Mozambican law and international PPP practices. **CER-6**, Second Legal Opinion of Rui Medeiros. Professor Medeiros does not demonstrate his qualifications for either: he is not admitted to practice law in Mozambique, and is no PPP expert.⁸²
1155. As related to PPP practices, both Mr. Baxter's and Professor Medeiros' reports are thoroughly rebutted by the international PPP expert retained by Mozambique, Mr. David Ehrhardt. **RER-11**, Expert Report of David Ehrhardt.

⁸² **RER-7**, Muenda Second Legal Opinion § II (Professor Medeiros not admitted to Mozambican bar). Because Professor Medeiros is not licensed in Mozambique, the Tribunal should deem his reports inadmissible, and the reports should not be considered. A Portuguese attorney without Mozambican licensure is not an expert in Mozambican law, just as British or Spanish attorneys without relevant licenses are not experts in the law of their former colonies.

1156. Mr. Ehrhardt is CEO of Castalia, a strategic consulting firm advising governments, multilateral institutions, and private firms on global infrastructure projects. Mr. Ehrhardt has extensive experience with PPP infrastructure projects, PPP procurement, and unsolicited PPP proposals; has personally advised on billions of dollars of transactions globally; and has developed leading best practice guides for PPP projects, including the World Bank’s PPP Reference Guide and APMG International’s PPP Body of Knowledge. He has also advised on PPP projects in Africa and in Mozambique, specifically. **RER-11**, Expert Report of David Ehrhardt § 1.
1157. As related to whether Mozambique made the alleged “promises” in the MOI, Mr. Ehrhardt concludes, among other things, that:
- 1157.1. It is common and best practice for PPP unsolicited proposals (USP) to be put to a public tender, in which the original proponent may be given some advantage—such as the 15% *direito de preferência* provided to PEL (*id.*, Executive Summary ¶ 2);
- 1157.2. Mozambique’s PPP law follows international best practice in this regard, mandating that unsolicited proposals, if they are to be accepted, must compete in a competitive tender, in which they receive a preference in the form of an additional 15 percent on their score, when the bids are evaluated (*id.*, ¶ 3);
- 1157.3. It is not true, as PEL and its witnesses say, that developers would not prepare unsolicited proposals if they did not have a guarantee of award. It is common for firms to prepare unsolicited proposals (at their cost) which they know will then be subject to competitive challenge. These proposals are, generally more fully developed and complete than the prefeasibility study PEL submitted (*id.*, ¶ 4);
- 1157.4. *An experienced entity would not have considered that the MOI, combined with submission of the prefeasibility study, gave it a right to direct award of a concession for the project.* This is because: (1) it is well understood in the industry that MOIs or even MOUs do not confer legal, binding rights to a concession—they are “agreements to agree” at most, that cannot be enforced because there is no way to know whether and what the agreement will be on key terms; (2) a PFS does not (and this one did not) establish the feasibility of the project, sufficiently

define the project, or satisfy the prerequisites for a concession award; and (3) Mozambican law prohibits direct award of contracts except in exceptional circumstances—circumstances which experienced developers would not have thought existed here (*id.*, ¶ 5, 73-102). An experienced developer would have thought the MOI and PFS gave it a 15 percent *direito de preferência* because that is what the PPP law applicable to the procurement states, and it is consistent with the use of the same term in the MOI (*id.*, ¶ 6);

1157.5. The parties' conduct was consistent with the view that PEL had a right to preferential treatment in the tender (*id.*, ¶¶ 7-11);

1157.6. PEL never established the feasibility of the project—in fact, its contemporaneous financial data showed the project was not viable (*id.*, ¶¶ 13-14);

1157.7. Even in a direct negotiation or award scenario, there are many ways in which a definitive concession agreement could not materialize, or the project could fail to be constructed or make a profit (*id.*, ¶¶ 17-22);

1157.8. The MOI and PFS did relate to “fiscal matters,” and therefore would require further approvals that were never sought or received (*e.g.*, *id.*, ¶ 30).

1158. As to the factual and legal matters, Mozambique has likewise submitted second witness statements from Mr. Luis Amandio Chauque—the MTC attorney involved on the Project contemporaneously—and former Minister Paulo Francisco Zucula, who was the MTC Minister who executed the MOI and was a substantial point of contact for PEL. **RWS-3**, Chauque Second Witness Statement; **RWS-4**, Zucula Second Witness Statement. Mozambique has further offered a Second Legal Opinion from Ms. Teresa Filomena Muenda—the only Mozambican attorney offered as an independent expert in this proceeding, and who has significant experience in Mozambican commercial law matters including PPPs. **RER-7**, Muenda Second Legal Opinion.

1159. These witnesses all rebut the anomalous and extraordinary interpretation that PEL assigns to the MOI. As described in their reports and discussed more fully *supra* Section II, PEL's contention that a six-page MOI granted PEL a right to the concession based only on a PFS

approval is fundamentally at odds with the MOI itself, Mozambican law and procurement practices, and the parties' intent and conduct.

1160. And as to the technical matters, PEL cannot even muster an expert to rebut MZBetar—the only *independent engineering experts* in this case. MZBetar actually works on such concession projects. With respect to PEL's alleged rights, MZBetar's Second Report reiterates that the PFS did not reflect a high degree of project development or resources; did not define the basic terms and conditions of the concession; and would not be a prudent or expected basis for the grant of a concession. **RER-6**, Betar Second Expert Report §§ 5.1-5.3. MZBetar likewise confirms that, as a matter of industry practice, the Portuguese MOI would be viewed as controlling, and in any event the MOI does not grant PEL a right to a direct award (especially one premised on a PFS clearly deficient for that purpose). *Id.*, § 5.7.
1161. In persisting with its flawed contention that the MOI promised that Mozambique “would grant PEL a concession to implement the Project,” PEL relies on the same arguments thoroughly addressed in the fact section. Reply ¶ 756. They are briefly dismissed below.
1162. PEL first contends that its interpretation is “clear on the face of the MOI,” relying on Section IV.B of its Reply. Reply ¶ 758. That is incorrect, as detailed in Section II(D) of Mozambique's Rejoinder. The proper, straightforward MOI analysis has four key steps (*see also* **RER-3**, Chauque Second Witness Statement ¶ 29):
- 1162.1. First, the parties' substantively identical Portuguese MOI controls, as required by law and industry practice, and to avoid the dispute regarding the authenticity of the parties' disputed and conflicting English versions;
- 1162.2. Second, the MOI provides in relevant part for a “direito de preferência” (Clause 2(2)) subject to the “laws approved by the Govt. of Mozambique” throughout the implementation of the project (Clause 8);
- 1162.3. Third, Mozambique's generally-applicable PPP laws promulgated shortly after the MOI expressly defined the “direito de preferência” in the context of this type of unsolicited PPP proposal. In the PPP Law, *public tenders are required* absent a finding of exceptional, “*last resort*” circumstances (a finding never made in the

MOI or PFS), and entities deemed to be the proponent of an unsolicited PPP proposal—what PEL claims to be—are provided a “*direito e margem de preferencia de 15%*” in the public tender. **RLA-6**, Mozambique Law No. 15-2011, Art. 13(1) & (5). PEL received the 15% *direito de preferência*—a preference that is, if anything, a more generous advantage than typically provided to the proponents of unsolicited PPP proposals—in the 2013 public tender. However, the PGS Consortium was not the winning bidder, and did not advance an appeal. Ultimately, the project concept was infeasible even after substantial modifications, cannot be financed, and—a decade after the MOI—the rail line and coal port is not being built by anyone.

- 1162.4. Fourth, PEL’s references to other MOI provisions, primarily exclusivity (Clause 6) and confidentiality (Clause 11), also do not grant a concession or dictate an unusual, disfavored, and unworkable direct award, because per the MOI they applied only during the prefeasibility study and approval period, and were conditioned upon the “terms of the specific legislation”—*i.e.*, the PPP Laws requiring a public tender.
1163. PEL briefly references MOI Clause 1 (Reply ¶ 758), but that is not an operative clause as to the PFS or the effect of PFS approval, and nothing therein promises a concession. Clause 1 is consistent with Mozambique’s understanding that the purpose of the MOI was to “regulate the preparation of a modest *Pre-Feasibility Study*” and that if PEL submitted an acceptable PFS, it may be able to receive a *direito de preferência* in the public tender, and secure a concession if it won that tender. As an alternative, and not as an obligation of the MOI, MTC also retained the flexibility to investigate an extraordinary direct award procurement, if PEL satisfied all conditions precedent and secured the necessary “last resort” exception specified in the PPP Law. *Supra* § II; *e.g.*, **RWS-4**, Zucula Second Witness Statement ¶¶ 3-7; **RWS-3**, Chauque Second Witness Statement ¶¶ 16-29.
1164. PEL focuses its attention on MOI Clause 2, but inappropriately relies on its substantively anomalous English-language MOI and wrongly suggests that all versions have similar effect. *Id.*; Reply ¶ 758. In reality, as earlier detailed, both parties’ controlling Portuguese

MOI included the following language (as excerpted from PEL’s preferred Portuguese MOI, **Exhibit C-5B**):

Cláusula 2
(Estudo de pré-viabilidade)

1. A PEL realizará um estudo de pré-viabilidade (EPV), dentro de 12 meses que submeterá ao Governo para a respectiva aprovação.
2. Aprovada a pré-viabilidade do empreendimento, a PEL terá o direito de preferência para a implementação do projecto na base da Concessão a ser outorgada pelo Governo.

1165. In English, Clause 2 states (as specified in Mozambique’s English-language MOI, **Exhibit R-2**):

CLAUSE 2

(Pre-feasibility Study)

1. **PEL** shall carry out a pre-feasibility study (PFS) within 12 months and will submit to the government for the respective approval.
2. After the approval of the pre-feasibility 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.

1166. Plainly, nothing in Clause 2(1) promised a concession. As to Clause 2(2), as earlier described, PEL itself cannot articulate what the undefined English-language “first right of refusal” did. The Portuguese MOIs are controlling, and used the term “direito de preferência,” which is a term of art in Mozambique, and is defined in the PPP Law and industry practice for this particular circumstance: as the 15% *direito de preferência* to be afforded in the public tender following a proponent’s PPP proposal. *Supra* § II(D)(1)-(2).

1167. Recognizing the weakness of its position as a matter of plain language contract interpretation, PEL quickly resorts to new arguments on “negotiation history,” again referencing Section IV.B of its Reply. Reply ¶ 759. Section IV(D)(5)-(6) of this Rejoinder addresses the pervasive errors in PEL’s MOI negotiation narrative. As detailed therein:

1167.1. Rather than confirming any “mutual intent to grant PEL a right to the direct award of a concession” (Reply ¶ 223), the negotiation documents confirm that PEL initially sought to impermissibly “silently block all corridors” and “lock all exits [with] one agreement” (C-224 at 2)—even though PEL did not even know where that corridor or port would go. Notwithstanding this apparent intent to take advantage of Mozambique, even PEL recognized that any promise to a “definitive agreement” would need to be predicated on a “detailed bankable feasibility report.” *See, e.g., C-202, C-222, C-225.* The agreed-upon, executed MOI omitted all mention of detailed bankable feasibility reports or promises of definitive agreements, and instead merely granted PEL a *direito de preferência* if a PFS was approved. There certainly was no mutual and binding intent to promise a concession premised only a PFS—and PEL’s attempts to argue to the contrary through unexecuted internal drafts demonstrates the fallacy of its case. *Supra* Section IV(D)(5).

1167.2. PEL’s contentions that 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” are similarly disproven. (PEL’s reference to the MOI providing an “*option*” also confirms Mozambique’s position that this Tribunal has no jurisdiction, and that the MOI could be nothing more than a preliminary “agreement to agree” as to the concession itself.) The negotiation history confirms there was no mutual intent to grant PEL the type of right of first refusal it now inconsistently alleges (as either a right to be awarded the project or a right to refuse the project), based merely on a PFS rather than a DPR. Rather, after various drafts, the parties agreed to provide PEL only a *direito de preferência* upon approval of a modest PFS. As discussed, that *direito de preferência* was the same as that expressly defined in Mozambique’s PPP law as a 15% *direito de*

preferência in the public tender, as confirmed by Mozambique in the same month the PFS was approved. *Supra* Section IV(D)(6).

1168. PEL next repeats earlier assertions that its purported exclusivity right was a “logical flipside to [a] commitment to award the concession directly to PEL.” Reply ¶ 760.
1169. As already detailed *supra* Section II(D)(7), this is inaccurate. The executed MOI contained a limited exclusivity clause—limited to the duration of PFS development and approval, and limited to the terms of the specific legislation (i.e., the PPP laws, which at time of PFS approval required a public tender in all but the most extraordinary “last resort” circumstances). The MOI contained no right to a concession, and exclusivity during the PFS study period is no “flipside” to such an illusory right. Properly understood, exclusivity simply meant that no other entities would receive the award while PEL undertook the PFS. As a proponent of an unsolicited PPP proposal, it is common for the project propounded by that proponent to be competitively tendered, with a preferential right in the form of a shortlist preference and/or scoring advantage provided to the proponent. That is precisely what occurred here: no other party received the award during the PFS, and after the PFS was approved, the parties investigated procurement options and sensibly chose a public tender, with PEL receiving significant value for its MOI and PFS, in the form of the 15% direito de preferência.
1170. Mr. Ehrhardt’s analysis confirms that Mozambique’s interpretation of the MOI’s exclusivity clause is proper and aligned with PPP practices globally (**RER-11**, Ehrhardt Expert Report ¶ 250 (emphasis added)):

The exclusivity was expressly stated to be only *for the duration of the prefeasibility study and its approval process*. **This is standard process for a USP which can then be subject to competition. It protects the proponent from the government giving the project to another firm while the study is still going on, and thus depriving the proponent of the benefit of its efforts on the study.** Contrary what Mr. Baxter implies, the granting of exclusivity during the period in which the study is prepared and approved would have made it clear to PEL that it *did not have exclusivity after the approval of the project*. PEL not having exclusivity after the approval of the process is consistent with the PPP Law, which requires a tender, and inconsistent with the theory that PEL had a right of direct award.

1171. PEL’s reference to Clause 11 is similarly unavailing. The confidentiality clause is similarly self-limiting—applying only during the prefeasibility study and approval period, and conditioned upon Mozambican law applicable to the PPP procurement—and in no way specifies any promise or right to a concession. *See R-1 & R-2*, MOI, Clause 11; *RWS-3*, Chauque Second Witness Statement ¶ 29.4; *RWS-4*, Zucula Second Witness Statement ¶ 6.
1172. In any event, confidentiality provisions are a hallmark of unsolicited PPP proposals, even when exposed to a competitive tender. “Thus, the existence of intellectual property protection is no evidence that direct award was what the parties had in mind.” *RER-11*, Ehrhardt Expert Report ¶ 249.
1173. PEL’s efforts to sidestep, with heavy rhetoric, Mozambique’s reasoned contentions—*e.g.*, PEL’s assertions that Mozambique attempts to “deny the obvious” (Reply ¶¶ 762 *et seq.*)—fall flat:
- 1173.1. Mozambique has firmly established that the MOI is not binding as to a concession and could be nothing more than a non-binding preliminary agreement, an “agreement to agree.” *Supra* §§ II(D)(2) (fact, MOI, and Mozambican law analysis), V(B)(1) (international jurisprudence in accord). Whether certain obligations of the MOI—*e.g.*, PEL’s alleged obligation to complete the PFS—are binding does not change the analysis as to the fighting issue in this case: concession rights. As to any right to the concession, the MOI is patently not a definitive, binding agreement. *Id.*
- 1173.2. PEL cannot refute that the MOI’s *direito de preferência* could be, and was to be, materialized in the necessary public tender, as detailed above, *supra* Section II, and in the SOD. PEL’s resort to MOI drafts and the parties’ conduct misstates the facts—in reality, both negotiation history and conduct support Mozambique’s reasoned interpretation of the MOI. *Supra* § II.
- 1173.3. PEL’s assertion that Mozambican law contradicts Mozambique’s interpretation of the *direito de preferência* is (1) notable for underscoring the importance of Mozambican law to this FET analysis (and the corresponding insufficiency of

PEL’s Reply, which seeks to ignore Section V of Mozambique’s SOD in all but the umbrella clause discussion) and (2) wrong.

- a. Professor Medeiros, upon whom PEL relies, is not admitted to the Mozambican bar and also lacks relevant qualifications on PPP procurement practices in Mozambique or elsewhere. His opinion that a 15% *direito de preferência* is “incompatible” with the “concept and typical structure of the . . . *direito de preferência*” are inaccurate both as a matter of Mozambican law and industry practice. **RER-7**, Muenda Second Legal Opinion ¶¶ 48; **RER-11**, Ehrhardt Expert Report § 10.
- b. In any event, even if the *direito de preferência* was interpreted as Professor Medeiros desires (under Mozambican Civil Code 414 *et seq*), it would mean that PEL simply had *a right of acceptance to the terms or offer proposed by Mozambique*. Here, the stated condition precedents to a direct award would have included a partnership with CFM—and when PEL failed to satisfy that condition, PEL’s alleged rights were waived and extinguished. **RER-7**, Muenda Second Legal Opinion ¶¶ 1-12; *see also* **RER-11**, Ehrhardt Expert Report, Executive Summary ¶¶ 7-12.

1173.4. As the exclusivity provision, PEL wrongly suggests that it was “not limited in time” (Reply ¶ 772), when Clause 6’s plain language and the common industry interpretation of such clauses demonstrate otherwise. *Supra* § II(D). In any event, PEL recognizes that it is impossible for exclusivity to last forever. So, based on “logic” PEL offers this limitation: that the exclusivity period “applied until PEL had exercised its right of first refusal.” Reply ¶ 772. Here, however, PEL claims to have exercised the *direito de preferência* immediately following PFS approval—*meaning exclusivity ends with PFS approval*. All this is consistent with Mozambique’s contention that exclusivity was *limited to the period of the PFS study*. Once the PFS was complete and accepted, PEL, as the proponent of an unsolicited PPP proposal, was then accorded its 15% *direito de preferência* in the competitive public tender—all in accordance with Mozambique’s PPP Law

and best/expected industry practices in this precise USP scenario. *Supra* § II; see **RER-11**, Ehrhardt Expert Report.

1174. In sum, PEL’s interpretation of the MOI—that a six-page “Memorandum of Interest” promised a blank-check or *carte blanche* concession award based only on a PFS—is fundamentally at odds with the parties’ conduct, Mozambican law, and international PPP practice. A \$3 billion concession of this type cannot be (and was not) promised or awarded on the basis of a mere MOI and a modest *Pre-Feasibility Study* that fails to even specify PEL’s bid price (much less the numerous other items necessary for a concession award of this type). Many other approvals, beyond the authority of a MTC Minister, would have been required for the MOI and PFS had their effect been to grant PEL any binding right to a \$3 billion concession. Internationally, the common, expected, and appropriate practice for unsolicited PPP proposals is to do precisely what MTC did: provide the proposer a preferential scoring right in the public tender. *Supra* § II.
1175. Accordingly, the MOI did not make the specific “promises” or “assurances,” and granted none of the valid, enforceable “rights,” that PEL alleges. And as *Oxus Gold* confirmed, a “Claimant cannot be deemed to have had a legitimate expectation to a particular result of the negotiation process.” **RLA-117**, *Oxus Gold PLC v. Republic of Uzbekistan et al*, Ad Hoc Arb., Final Award (17 December 2015) ¶ 330. All this is fatal to PEL’s merits case.

(b) Any Alleged Reliance by PEL on Disputed MOI “Promises” Would be Unreasonable and Inconsistent with Mozambican Law and International PPP and Procurement Practices.

1176. As established in the SOD, PEL did not actually rely on its alleged (and non-existent) MOI “promises,” as it now contends. And to the extent that PEL did rely, such reliance was patently unreasonable in light of Mozambican law and PPP/procurement practices. See SOD ¶¶ 681-704. The SOD explained, among other things, that:

1176.1. PEL’s own inconsistent versions of the MOI—with only its English version providing for an alleged right to a direct award in Clause 2(1), and that clause making a nonsensical reference to approval under Clause 7—demonstrate there was no meeting of the minds or reliance on that term.

- 1176.2. Likewise, PEL’s diametrically opposed articulations of the “right of first refusal”—each inconsistent with the reasoned interpretation that the *direito de preferência* was the 15% *direito de preferência* in the PPP Law that PEL knew to be forthcoming and controlling on the procurement—and its participation in the public tender demonstrate PEL did not conduct the PFS on the belief that a pre-feasibility study alone would entitle it to a direct award.
- 1176.3. PEL’s actions in submitting more significant proposals than the PFS as part of the public tender process, expressly with the understanding that those project pursuit costs are not to be reimbursed, likewise demonstrates PEL did not conduct the PFS on the belief that the MOI gave it a direct award.
- 1176.4. Industry practices for unsolicited PPP proposals further confirm that interested concessionaires like PEL submit proposals and pre-feasibility studies without the expectation of a direct award. Indeed, typical practice is precisely what MTC provided (and what the MOI and PPP Law contemplated): a bid bonus in the eventual public tender.
- 1176.5. International awards, and the laws and procurement practices in Mozambique and across the globe (including India), all confirm that a binding concession would not be conveyed through a six-page “Memorandum of Interest,” which was at most a non-binding agreement to agree as to a concession.
- 1176.6. As noted above, MTC’s communications following the MOI and PFS, refusal to directly award the Project to PEL, and use of the public tender process (affording PEL a *direito de preferência*) are consistent with the reasoned interpretation of the MOI, Mozambican PPP Laws, and PPP procurement practice.
- 1176.7. Under this PPP law, a direct concession award is not permitted except for exceptional, “last resort” circumstances, not present here—which PEL never referenced in the MOI and PFS, and does not substantiate in its SOC (or Reply). PEL’s arguments, when read together, indicate that PEL relied on the PPP law but also “relied” on the government *violating* that law, which is unreasonable. PEL concededly had knowledge of the PPP Law when executing the MOI.

- 1176.8. Additionally, PEL's pursuit of this Project while failing to disclose its home-country blacklisting is, using PEL's words, the "*coup de grâce*" on its claim to legitimate expectations. *Contra* SOC § 335. Regardless of when the blacklisting rulings were made by any court, such rulings were final before PEL submitted the PFS in 2012. At no time has PEL ever disclosed that it was blacklisted, and certainly not the reasons for it. Even assuming PEL proved the other aspects of reliance discussed here (PEL does not), it would be grossly unreasonable for PEL to rely upon any purported promise to grant a direct concession award to an entity that, unbeknownst to Mozambique, had been blacklisted as a contractor *by its own home country* for commercial untrustworthiness.
1177. PEL's Reply fails to address all these points, and makes inaccurate assertions as to those points it does attempt to rebut. Reply ¶¶ 778-794. Namely:
- 1177.1. PEL's reliance is not demonstrated by the fact that it submitted the PFS. Submittal of an acceptable PFS, for the purpose of receiving the 15% *direito de preferência* granted in the MOI, is evidence of Mozambique's understanding of the MOI. *Supra* § II.
- 1177.2. PEL's contemporaneous correspondence during and after PFS approval likewise demonstrate that PEL knew that PFS approval did not automatically grant it the concession. PEL stated, in English, that it had merely a "right of preference"—and recognized if a direct award alternative was to be considered, it required formation of a project company with CFM (among other things) and a "last resort" exception from the government (that a MTC Minister alone could not provide). *Supra* § II.
- 1177.3. PEL likewise never disputed the substance of Minister Zucula's June 2012 meeting. Contemporaneous with PFS approval, Minister Zucula explained—without objection—that the MOI's *direito de preferência* could be materialized as the 15% *direito de preferência* per the PPP Law. *Supra* § II.
- 1177.4. Professor Medeiros' focus on the recipient's alleged impression of a declarant's statements (1) misunderstands the facts above, (2) if taken as true, would suggest that the MOI should be interpreted against PEL and in favor of MTC's

understanding because PEL drafted the MOI, and (3) cannot override the legal principles specifying that (a) a “meeting of the minds” is required for on contractual obligations (like those alleged here) and (b) per the parties’ agreement on FET legal standards, the Tribunal’s analysis is “objective” rather than based on the purported investor’s subjective expectations. *Supra* §§ II, V(B)(1).

- 1177.5. PEL appears to concede that it could not rely on a promise that did not exist, but states—inaccurately and without substantiation—that Mozambique’s interpretation of the MOI is “incorrect.” For the reasons earlier established, Mozambique’s interpretation is accurate and constitutes the only harmonizing interpretation of the MOI.
1178. PEL does not dispute that the reasonableness of its alleged reliance would be contradicted if, as Mozambique asserted, directly awarding a \$3 billion concession on the basis of a six-page MOI and mere PFS was contrary to industry practice. *See* Reply ¶¶ 783 *et seq.*
1179. PEL attempts to avoid this issue through new testimony from PEL’s new PPP expert (Mr. Baxter) and Professor Medeiros, to no avail. *Id.*
1180. Mozambique’s international PPP expert, Mr. Ehrhardt, and its technical experts at MZBetar thoroughly rebut Mr. Baxter’s opinions. For example, as earlier described and detailed further in their reports:
- 1180.1. *Rather than a direct award, it is common and best practice for PPP unsolicited proposals (USP) to be put to a public tender*, in which the original proponent may be given some advantage—such as the 15% *direito de preferência* provided to PEL. **RER-11**, Ehrhardt Expert Report, Executive Summary ¶ 2. Mozambique’s PPP law follows best practices in this regard. *Id.*, ¶ 3.
- 1180.2. *An experienced entity would not have considered that the MOI, combined with submission of the prefeasibility study, gave it a right to direct award of a concession for the project.* This is because: (1) it is well understood in the industry that MOIs or even MOUs do not confer legal, binding rights to a concession—they are “agreements to agree” at most, that cannot be enforced because there is no way to know whether and what the agreement will be on key terms; (2) a PFS

does not (and this one did not) establish the feasibility of the project, sufficiently define the project, or satisfy the prerequisites for a concession award; and (3) Mozambican law prohibits direct award of contracts except in exceptional circumstances—circumstances which experienced developers would not have thought existed here (*id.*, ¶ 5, 73-102). An experienced developer would have thought the MOI and PFS gave it a 15 percent *direito de preferência* because that is what the PPP law applicable to the procurement states, and it is consistent with the use of the same term in the MOI (*id.*, ¶ 6).

1180.3. Professor Medeiros’ “comments on the public interest and best practices in PPP processes” are “*not . . . well supported by the literature or economic theory.*” *Id.*, ¶¶ 259 *et. seq.* (emphasis added). PEL’s experts also fail to mention that “*the very worst way to reward a USP is to give the proponent an uncontested right to a direct award of the contract.*” *Id.*, ¶ 265.

1180.4. MZBetar’s Second Report reiterates that the *PFS did not reflect a high degree of project development or resources; did not define the basic terms and conditions of the concession; and would not be a prudent or expected basis for the grant of a concession.* **RER-6**, Betar Second Expert Report §§ 5.1-5.3. MZBetar likewise confirms that, as a matter of industry practice, the Portuguese MOI would be viewed as controlling, and in any event the MOI does not grant PEL a right to a direct award (especially one premised on a PFS clearly deficient for that purpose). *Id.*, § 5.7.

1181. This, it is clearly *PEL’s* new assertions on industry practice that are “unfounded and misleading.” *Contra Reply* ¶ 786.

1182. PEL next attempts to avoid the fact that a direct award was precluded at the time of MOI’s execution, by arguing that a direct award was not contrary to the PPP Law promulgated shortly after the MOI and for which “the Parties contemplated . . . would govern the award of the concession.” *Reply* ¶ 787-88.

1183. PEL does not appear to contest here that a direct award right for a PPP project of this type would be illegal and void under Law 15/2010, the procurement law in force prior to the PPP Law, because this Project does not meet any of the narrow exclusions for when direct

awards (instead of the general regime of public tenders) is acceptable.⁸³ Indeed, that point was all but conceded by PEL’s legal expert in the SOC, who acknowledged that “[t]he case at the base of the MoI does not fit within any of the sub-paragraphs in Article 113(2)” of Decree 15/2010, which list the “cases in which direct award may be adopted.” **CER-3**, Medeiros Expert Report ¶ 34.

1184. Thus, it remains the case that at the time of the MOI’s execution, a direct award of a project of this type was precluded by law. To the extent PEL claims to rely on “promises” in the MOI to a direct award (which are disputed), that reliance is patently unreasonable.

1185. As to the PPP Law, PEL is correct to observe that it governs the procurement of this project after the PPP Law’s promulgation, and that PEL’s expectations and the nature of any alleged MOI rights or promises must be viewed with consideration to Mozambique’s PPP and procurement laws and practices.

1186. However, that point is fatal—not helpful—to PEL’s case. The PPP Law demonstrates that PEL’s purported understanding of the MOI is unreasonable, and that a MOI with a MTC Minister could never promise a \$3 billion concession award based only on PFS approval. For example (*see supra* § II):

1186.1. Mozambican attorneys Ms. Muenda and Mr. Chauque reiterate that the PPP Law required a public tender; the MOI and PFS lacked the approvals necessary for a “last resort” direct award; and the MOI and PFS further failed to satisfy the PPP Law’s prerequisites for a direct award.

1186.2. Mr. Ehrhardt likewise explains, *inter alia*, that:

⁸³ **RWS-1**, Chauque Witness Statement ¶ 14 (explaining that in the legal regime, an award by direct agreement for a project of this nature does not meet the requirements and would not be allowed); **RER-2**, Muenda Expert Report ¶¶ 3, 11 (any MOI direct award right contrary to, among other things, Article 113 of Decree 15/2010); *see* **RER-1**, Betar Expert Report ¶¶ 119-126 (direct award of this project contrary to Mozambican and international procurement practices and preferences, and Mozambican procurement laws known to industry).

- a. Mozambique’s PPP Law would be understood by an industry participant to require a competitive tender for an unsolicited proposal of this type (RER-11, Ehrhardt Expert Report ¶¶ 75-77);
- b. A sophisticated entity would not have considered that this \$3 billion project satisfied the exceptional, “last resort” circumstances for a disfavored direct award under the PPP Law or PPP practice—those circumstances are limited to small projects, cases where there is no competitive interest, emergencies, or other circumstances objectively not present (*id.* ¶¶ 5(c), 43, 58(c), 256);
- c. The studies required by the PPP Law, PPP Regulations, and PPP practice prior to a decision on a concession award had not been completed by PEL (*id.* ¶¶ 78-81);
- d. The project, concession contract, and key commercial terms required by Mozambican law and PPP practice were not yet defined (*id.* ¶¶ 88);
- e. Financial feasibility of the Project had not been established as required by the PPP Regulations (*id.* ¶¶ 89-91);
- f. The right described in the MOI is not that of a direct award, in light of the PPP Law and industry practice (*id.* ¶¶ 92-94).

1187. PEL cannot prove that a disfavored, “last resort” direct award, contrary to the PPP Law’s sensible and standard public tender regime, is reflective of PPP best practices or objectively appropriate in the circumstances of this project. PEL’s unadorned assertion that there is “no doubt that in light of the PPP Law, it was reasonable to rely upon Mozambique’s promise that it would be granted a concession agreement” (Reply ¶ 791) is pure poppycock—the PPP Law requires public tenders for projects of this type absent objectively unwarranted, “last resort” exceptions that MTC itself could not approve: MTC did not and could not “promise” a definitive concession agreement; and it is patently and objectively unreasonable to believe that a six-page MOI and mere PFS would promise a definitive concession agreement. *Supra* § II.

1188. Finally, relative to the reasonableness of PEL’s alleged reliance on (nonexistent) promise of a concession, PEL cannot dismiss the fact that it was blacklisted for commercial

untrustworthiness in India. Reply ¶ 792. Far from being a “red herring,” PEL’s blacklisting demonstrates that PEL can have no objective expectation of a guaranteed concession award: Mozambique would have been well within its rights and industry practices to “reject PEL in any of the USP, direct award, or competitive tendering scenarios” in light of the integrity concerns reflected by its Indian disbarment. *E.g.*, **RER-11**, Expert Report of David Ehrhardt, ¶¶ 180-186.

1189. It follows that PEL has not proven that it relied on the nonexistent promise of a concession, or that such reliance would have been reasonable. Again, “Claimant cannot be deemed to have had a legitimate expectation to a particular result of the negotiation process.” **RLA-117**, *Oxus Gold PLC v. Republic of Uzbekistan et al*, Ad Hoc Arb., Final Award (17 December 2015) ¶ 330.

(c) **Mozambique Did Not “Reneged” on “Promises” That Did Not Exist, and in Any Event There Was No Sovereign Action or “Outright and Unjustified Repudiation” of the MOI.**

1190. Contrary to PEL’s assertions, Mozambique did not “renege[] on its promise to grant PEL a concession” because—as established above—no such promise existed. Reply ¶ 797.

1191. Of note, in drafting this section of its Reply, it appears PEL forgot its own admission elsewhere that “the MOI did not award the actual concession” (*e.g.*, Reply ¶ 182) and could not award the concession because the MOI and PFS lacked necessary approvals. At most, even in PEL’s telling, PEL held a mere right to *negotiate* a definitive concession agreement. *Supra* § II(D)(2). Mozambique could not “renege on a promise to grant PEL a concession” when PEL now concedes that the MOI did not award the concession and would only grant, at most, a conditional negotiation right.

1192. Section II of this Rejoinder, the Second Witness Statements of Mr. Chauque and Mr. Zucula, and the Expert Report of David Ehrhardt debunk the *volte face* narrative that PEL again relies upon here. Reply ¶¶ 798 *et seq.*

1193. To recap, the parties’ conduct after MOI execution confirms MTC’s understanding of the MOI. There were no significant *volte-faces*. Mr. Ehrhardt confirms that, viewed objectively as a matter of local and international PPP industry practice, “*the parties conduct*

was consistent with the view that PEL had a right to preferential treatment in a competitive tender.” RER-11, Ehrhardt Expert Report, Executive Summary ¶¶ 7-12.

1194. When the PFS was approved, MTC explained to PEL, in a June 2012 meeting (documented without objection in later correspondence to PEL) that the MOI’s *direito de preferência* was the 15% preference at tender. *Supra* § II(F).
1195. At times in 2012 or 2013, MTC also investigated the possibility of a direct award should PEL satisfy the necessary conditions—including formation of a project company with CFM and securing offtake agreements. The direct award investigation was an alternative under consideration, not an obligation, and PEL’s own correspondence confirmed that the PPP Law required public tenders and that in a direct award scenario PEL would need to receive an elective “last resort” exception from the Government. *Supra* § II(F)-(K).
1196. PEL failed to satisfy the conditions for a direct award (formation of joint venture with CFM, receipt of offtake commitments from miners, or others specified in the PPP Law), and the project appropriately went to tender. *Supra* § II(F)-(K).
1197. PEL cannot demonstrate that a direct award based on a PFS was an appropriate procurement process for this megaproject (it is not, and given the minimal information in the PFS a direct award would be precluded by law and PPP practice). *Id.*
1198. PEL likewise misstates Mozambican law and PPP financing practices when suggesting that CFM’s participation in a joint venture must be limited to the 20%—no such limitation exists. *Supra* § II(G). MTC had no obligation to “instruct” CFM to negotiate with PEL; in any event, PEL did in fact negotiate directly with CFM without MTC’s involvement or hindrance; and it was PEL who wrongly assumed a 20% cap on CFM’s participation and improperly assumed that CFM would be required to inject cash (that, as PEL alleges, it did not have at the time). *Id.*
1199. In the competitive tender, PEL received its 15% *direito de preferência* in recognition of its MOI and the PPP Law, and thus received the expected (and substantial) value for a mere PFS. *Supra* § II(J)-(L).
1200. PEL’s repeated contentions are further dispelled in Section II and need not be duplicated here. It is of further note, however, that rather than litigating any alleged right to a direct

award through available dispute resolution mechanisms, PEL chose to participate in the tender process, as part of the PGS Consortium, and recognized in doing so that MTC had no obligation to award it the project. By participating in a tender, it was not appropriate for PEL to then seek a direct award, in its own name, as a fallback if it scored low. Now, the finality of international tenders, strict protest procedures found in public procurement procedures in Mozambique and globally, and rights of third parties (the first and second place finishers, for instance) must be considered and respected. *Supra* § II(J)-(K).

1201. For the same reasons as stated above, Mozambique did not “renege” on any “promise not to grant the concession to another.” Reply ¶ 816. No such promise existed. PEL’s assertions again belie its confusion about what the MOI did. As repeatedly established above, the MOI and its exclusivity provision were consistent with the international best practice embodied in the PPP law: once the PFS is approved, the project goes to tender, with the USP proponent (PEL) granted a 15% *direito de preferência*. *Supra* § II.
1202. PEL’s speculation that Mozambique “reneged on a promise to keep PEL’s PFS and know-how confidential” is firmly denied. Reply ¶ 819. As established in Section II and again earlier in this Section:
 - 1202.1. The MOI’s confidentiality provision is limited to the period of PFS approval. In fact, PEL now admits that “*the promise of keeping data confidential was meant to last only until approval of the PFS*” (Reply ¶ 821);
 - 1202.2. MTC never requested that PEL provide its PFS without a watermark; PEL’s two chat messages with an assistant do not state otherwise; and PEL cannot point to any exhibit sent by it or received by MTC that constitutes its PFS *sans* logo. There is no competent evidence that MTC disclosed PEL’s PFS to any competitor (*supra* § II(H));
 - 1202.3. Even if MTC did utilize aspects of PEL’s PFS for organizing the tender (such as basic project definition or the potential length of the rail line, as suggested by PEL), that would be no breach of the MOI or any “promise” embodied therein. Rather, use of PFS or other USP proponent documents for this purpose is common and expected in the industry (*supra* § II(L)(1));

1203. Finally, even if MTC erred in its belief that the *direito de preferência* in the MOI was the same as the 15% *direito de preferência* in the PPP law (it did not), *PEL still has not established internationally wrongful conduct*. As PEL earlier conceded:

1203.1. “Not every breach of a contractual promise is a breach of the investor’s legitimate expectations for purpose 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 breach must constitute an outright and unjustified repudiation of the transaction.” Reply ¶ 735(d).

1203.2. “For an alleged breach of contract to be considered as a breach of the fair and equitable treatment principle, State conduct is required.” *Id.*, ¶ 161. Indeed, an in such circumstances the alleged breach “must be the result of behavior going beyond what an ordinary contracting party could adopt.” *Id.*

1204. Here, Mozambique’s belief that the MOI should be read (in accordance with how the PPP Law and international PPP best practices afford preference rights to the proponent of an unsolicited proposal) (1) is not a wrongful exercise of “sovereign power” and (2) does not “constitute an outright and unjustified repudiation of the transaction.”

1204.1. First, MTC was well within in rights to harmonize the MOI with the PPP Law (that PEL concedes was applicable to the procurement) and procurement best practices. But even if deemed a breach, this behavior plainly does not “go[] beyond what an ordinary contracting party could adopt.” Any contracting party, in procuring services, has it within its power to align its procurement practices with the law and industry common sense. This Tribunal would be breaking unprecedented ground if it were to conclude otherwise.

1204.2. Second, such action also plainly does not constitute an “outright and unjustified repudiation.” PEL received substantial value from the MOI and PFS: a 15% *direito de preferência*. That *direito de preferência* is, if anything, *more generous* than what similarly situated USP proponents receive internationally. **RER-11**, Ehrhardt Expert Report § 2. Thus, there was no wrongful “repudiation” of the transaction or “annihilation” of any rights that would constitute internationally wrongful conduct.

1205. Of note, the primary alleged “exercise of sovereign power” that PEL relies upon *is the one decision PEL claims favorable to it*. PEL contends that “the 18 April 2013 letter refers to the grant of the concession to PEL by direct award in the ‘national strategic interest.’” Reply ¶ 827. PEL mischaracterizes this letter, as detailed in Section II. The letter merely conditionally opened the door to direct negotiations, subject to offtake agreements that PEL never provided. Such a decision is not an exercise of “sovereign power,” and sovereigns are not alone in considering the “national strategic interest.” In any event, PEL cannot point to what it characterizes as a *favorable* decision as evidence of the exercise of sovereign power in a *breach*.
1206. PEL’s assertion that its rights were “annihilated, without justification” is wholly unjustified bombast. Mozambique did not breach any legitimate expectations held by PEL such as to constitute internationally wrongful conduct, and PEL certainly has not proven otherwise.

3. Mozambique Acted Consistently and Transparently.

1207. The SOC, ¶¶ 708-712, established, among other things, that:
- 1207.1. PEL’s allegations collapse with the understanding that there was no right to a direct award in the MOI, but rather, at most, a *direito de preferência*. After the PFS, MTC asked PEL to exercise its *direito de preferência*—not to jump into direct negotiations of a concession agreement. MTC offered a path of negotiations relative to a joint venture with CFM, but PEL failed to reach agreement with CFM—and PEL presents no evidence that CFM took conflicting stances on its willingness and capability to partner with PEL.
- 1207.2. When discussions with CFM fell through, MTC indicated it would conduct a public tender. A public tender is precisely the procurement method established in Mozambique’s PPP Law, and strongly recommended by the World Bank and in the industry—precisely because it *promotes* transparency in public procurement.
- 1207.3. After PEL complained about the public tender, it is true that for a brief period the Council of Ministers contemplated further discussions. *See C-29; RWS-2, Zucula Witness Statement ¶ 19*. But it is not true, as PEL alleges, that the Council of Ministers had “decided to award the Project directly PEL.” Rather, as evident in the cited letter, it was merely an invitation to negotiate subject to unmet

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

1208. The above recitation fairly demonstrates that MTC apprised PEL of MTC’s positions, afford PEL the *direito de preferência* indicated in the MOI, gave consideration to PEL’s positions and discussed them with the Council of Ministers, and then conveyed the Council of Ministers’ interim and final decisions to PEL
1209. In Reply, PEL summarizes the same “*volte face*” narrative that it articulated at greater length in the facts, and reiterated again relative to legitimate expectations. Reply ¶¶ 831-839. Mozambique fully rebutted PEL’s inaccurate narrative in Section II and above, and need not repeat the facts again. There were no significant *volte faces*; MTC told PEL on numerous occasions on the *direito de preferência* was to be materialized as the 15% in the public tender; and any investigation of a direct award was as an alternative (not an obligation) and was made futile by PEL not satisfying the stated and admitted prerequisites for such an elective, exceptional, and “last resort” procurement methodology.
1210. PEL newly asserts that “the tender process organized by Mozambique lacked transparency and consistency throughout, as set out in greater detail in Section IV.K.” Reply ¶¶ 840 *et seq.* PEL fails to note that these complaints, if valid (they are not), would be complaints to be made by the *PGS Consortium*—since PEL individually did not participate in the tender. PEL has not demonstrated that it has standing to complain about the tender here, or that such a belated protest is within the jurisdiction of the Tribunal. Nor has PEL

provided good cause for why it withheld these structural complaints and tender arguments until the Reply.

1211. Nevertheless, Mozambique has thoroughly addressed these new arguments in Section II(L).

1212. PEL's—and Mr. Baxter's—structural complaints about the tender documents are belied by the competitive reality, and addressed by Mr. Chauque and Mozambique's technical and international PPP experts. *Supra* § II(L)(2); **RWS-3**, Chauque Second Witness Statement ¶ 96; **RER-6**, Betar Second Expert Report; **RER-11**, Ehrhardt Expert Report. To summarize:

1212.1. As to the detail in the Tender Notice or Tender Documents, these complaints are dismissed by the commercial reality that the documents were sufficiently detailed to generate expressions of interest from twenty companies. **RWS-3**, Chauque Second Witness Statement ¶ 96.3.

1212.2. As to the length of time available, other bidders were able to prepare their expressions of interest and proposals in the time allotted, and that is not surprising. PEL omits that the tender deadline was extended, and no bidding party—including PEL—further complained about the length of time available. Mr. Daga ignores that the time allotted was consistent with Mozambican law (which PEL conceded), and further ignores the commercial reality that the PGS Consortium and other, more experienced entities did submit their tenders in time. *Id.*, ¶ 96.4.

1212.3. Mr. Ehrhart confirms that these time and tender information issues, even if assumed to be true, “may have been disadvantageous to other bidders, but would have advantaged PEL, since it was more prepared and had more information.” **RER-11**, Ehrhardt Expert Report ¶ 23.

1212.4. MZBetar likewise observes that “PEL never sought the additional detail that Mr. Baxter now claims” that by “going to tender without the additional details. . . PEL accepted the proceeding with the available details at the time.” **RER-6**, Betar Second Expert Report ¶ 35.

- 1212.5. Experts appropriately observe the “irony in Mr. Baxter attempting to point out imperfections in a competitive tender while appearing to support award of a \$3 billion project without competition at all.” *E.g.*, **RER-11**, Ehrhardt Expert Report ¶ 25.
1213. PEL likewise has no standing to complain about when other bidders were notified of its MOI-derived *direito de preferência*, as further established *supra* Section II(D)(3):
- 1213.1. Mr. Ehrhardt explains that the alleged nondisclosure of PGS’s competitive advantage to other bidders did not treat PEL unfairly, because if true it would result in other competitors bidding less aggressively and thus would increase the PGS Consortium’s possibility of success. **RER-11**, Ehrhardt Expert Report ¶¶ 271-272.
- 1213.2. MZBetar likewise confirms that this would not adversely affect PEL’s position at the tender; it would, if anything, be something to be claimed by other bidders; and PEL neither sought a clarification to the tender documents (to tell the other bidders that it had a *direito de preferência*) or appealed on this basis. **RER-6**, Betar Second Expert Report ¶ 35(b).
- 1213.3. PEL’s *direito de preferência* was explained to bidders in the tender information bulletin, and no entrant protested the outcome. *E.g.*, **C-25**, Tender Informational Bulletin (“The consortium Patel, Grindrod, and SPI was awarded 15 points in relation to its right of preference in the context of the [MOI]”).
1214. Seeking to improperly extend the ambit of BIT arbitration to bid protests, PEL argues that the “evaluation of the proposals was a quintessential example of lack of transparency and consistency.” Reply ¶ 846. In actuality, PEL speculates wildly, misunderstands the tender process and best practices, and cannot contest the evaluation or its outcome. As more fully set forth *supra* Section II(L)(4):
- 1214.1. The disclosed criteria were appropriate, and even if they did allow for a certain amount of “subjective interpretation” by evaluators, that is common and proper for a PPP project of this type. **RER-11**, Ehrhardt Expert Report ¶ 279.

- 1214.2. It is common ground that the main criteria were disclosed to bidders. PEL's complaints that sub-criteria were also not disclosed misunderstands industry practices; this is not standard practice and disclosure of evaluators' sub-criteria could allow bidders to "game the system." *Id.*, ¶ 280.
- 1214.3. As MZBetar established, the "public tender followed the applicable rules and procedures, there was no material error or mistake in scoring, and there was no identified evidence of 'serious irregularities.'" **RER-1**, Betar Expert Report § 5.3 & ¶ 100. MZBetar examined the scoring in detail, explaining how the sub-criteria applied on the technical proposal were appropriate and consistent with the bidding documents, and how the financial scoring formula now championed by PEL would yield nonsensical results (e.g., bidders with lower concession premium would receive much larger scores—in PEL's case, it would receive a score more than 1900x larger by waiting until the end of the concession to make payment rather than the beginning). *Id.*, ¶¶ 75 *et seq.* *PEL offers no expert to rebut MZBetar's technical conclusions.*
1215. As Mr. Chauque explains (**RWS-3**, Chauque Second Witness Statement ¶¶ 87 *et seq.*), the rules for the tender were detailed in, among other things, the Tender Documents (**R-23**) and Clarifications sent to all bidders (**R-29**). At no time did PEL or the PGS Consortium contemporaneously complain about the period provided for the tender, or other structural aspects of the tender process.
1216. Mozambique explained the outcome of the tender in its information bulletin sent to all bidders, as per the Tender Documents. That bulletin is **C-25**. As explained therein, 21 entities expressed interest in the project; six entities were shortlisted; four proposals were received; and three entities reached the financial scoring stage. The PGS Consortium "was awarded 15 points in relation to its right of preference in the context of a Memorandum of Understanding entered into between this company and the MTC." *Id.* MTC explained the main and sub-criteria employed on both the technical and financial evaluation, and specified that in the final composite scoring, ITD scored 94 points; CLZ scored 89; and the Patel/PGS Consortium scored 76. *Id.*

1217. All companies were informed of their bid protest and appeal rights, which required a claim and guarantee within 3 days; followed by a hierarchical appeal within another three days; followed by a judicial appeal within 10 days. *E.g., id.* Strict compliance with the appeal procedures and timelines are necessary in the tender context, due to the reliance interests of the winning bidder, the strong need for finality of tenders, and the public interest in cost-efficient procurement. It is for similar reasons that strict limits are placed on what types of damages, if any, are awarded in bid protests.
1218. While PEL wrote various letters complaining about the tender outcome, the appeal procedures were not followed, and PEL never submitted a judicial appeal at all. Lacking any formal, judicial appeal, MTC appropriately issued the award to the winning bidder.
1219. Nevertheless, MTC did refute PEL's contemporaneous assertions about the tender. In **R-35**, for instance, MTC explained (among other things):
- 1219.1. PEL's assertions about undisclosed criteria and incorrect formulas were incorrect. For example, the primary criteria were precisely the same as those specified in the Tender Documents. To minimize the subjectivity of each evaluator, the evaluators employed sub-criteria within the primary criteria, and came together to issue joint marks. These sub-category guides did "not represent a change in the criteria but a means to grant more precision to the criteria set forth and listed in the Public Tender Documents." This is not unusual. Indeed, the PGS Consortium and other bidders chose to participate in the tender, which listed only the five primary criteria, *without even requesting clarification*. The PGS Consortium likewise did not request clarification on the scoring formulas which it belatedly complained about.
- 1219.2. The 15% direito de preferência was applied in PEL's favor. MTC explained how it assigned the 15%, and further noted that even if the calculation of the 15% was in error as to the financial evaluation (which it disputed), it would not have changed the PGS Consortium's third-place score.
1220. In the document production phase of this arbitration, Mozambique likewise provided PEL with the Technical and Financial Evaluation Reports for this tender (**C-234** and **C-240**).

These documents explained the scoring process and breakdown, and included comments from evaluators on the strong and weak points of each proposal.

1221. The Evaluation Reports confirm that, rather than being “rigged,” the scores have a reasoned basis. The largest component of the score related to the Technical Proposal. Thus, two key examples from the Technical Proposal are provided below.
1222. First, the Evaluation Reports confirm that the PGS Consortium received low scores from evaluators as it related to the organic composition of the concessionaire. *See C-234*. Specifically, the PGS Consortium received low scores for experience as builders of railways and port terminals, and for endorsements/off takers. It received high scores for experience in railway and port operation.
 - 1222.1. This is wholly consistent with the facts. As noted, the PGS Consortium sought to have PEL be the “EPC Contractor” with presumed responsibility over the construction. PEL has no experience with such projects in Mozambique, and had little experience with this type or magnitude of rail and port construction anywhere. Evaluators noted the lack of information on the infrastructure builder and that it “does not present a record of having built works similar to the object of the bid.” Conversely, at the tender stage, PEL partnered with Grindrod for operational expertise, and in light of Grindrod’s greater experience the PGS Consortium received higher scores in those areas.
 - 1222.2. Likewise, evaluators noted that the PGS Consortium did not include offtakers. Accordingly, the PGS Consortium received appropriately low scores in that subcategory. As PEL itself noted elsewhere, the existence of firm offtake agreements is fundamental to the feasibility of this endeavor.
1223. Second, the PGS Consortium received high scores for its understanding of the technical aspects of the project, but low scores relative to its understanding beyond the object, i.e., of the broader developmental aspects important to this concession. It likewise received low scores on strategic vision, which was disclosed in the Tender Documents as 50% of the score. The PGS Consortium had lower scores than competitors ITD and CLZ on strategic partnership, human capital development, social projects, and project schedule. *Id.*

- 1223.1. While the other bidders' proposals are not available (their production was not ordered by the Tribunal, due to their confidentiality under Mozambican laws and procurement practices, and the incorporation of confidential third-party information throughout the submissions), this scoring is also supported by the Evaluation Report. The evaluators noted that, relative to others, PEL's "interpretation and understanding of the project [was] restricted only to the object of the bid," PEL proposed to bring a "huge list of foreign workers to be brought from India, including unskilled workers," and even though PEL "previously carried out the pre-feasibility study, which gave it a certain advantage over other bidders, it presented a timetable for implementing the project above expectations." *Id.*
- 1223.2. Mr. Chauque reiterates that for this concession, it was known that the government's objective extended beyond simple placement of rail or construction of port. The idea of a transport corridor of this type, if it could be made feasible, was to usher in social development and economic prosperity throughout the region. As demonstrated by the Evaluation Reports, other bidders provided significantly more compelling strategic visions in this regard. **RWS-3**, Chauque Second Witness Statement ¶ 95.
1224. Expert analysis confirms that the tender certainly was not "rigged," and dispels PEL's various attacks. For example, Mr. Ehrhardt explains:
- 1224.1. Evaluators are not typically required to sign a "declaration of independence" as PEL contends, and the lack of such documents is neither surprising nor evidence of impropriety. **RER-11**, Ehrhardt Expert Report, ¶ 277.
- 1224.2. It is not typical that the tender file includes the additional notes, attendee lists, etc., that PEL speculatively alleges it should include. *Id.*, ¶ 278.
- 1224.3. The disclosed criteria were appropriate, and even if they did allow for a certain amount of "subjective interpretation" by evaluators, that is common and proper for a PPP project of this type. *Id.*, ¶ 279.

- 1224.4. It is common ground that the main criteria were disclosed to bidders. PEL’s complaints that sub-criteria were also not disclosed misunderstands industry practices; this is not standard practice and disclosure of evaluators’ sub-criteria could allow bidders to “game the system.” *Id.*, ¶ 280.
- 1224.5. The nature and weight of the “strategic vision” criterion was entirely appropriate and expected for a PPP project of this type. *Id.*, ¶ 281.
- 1224.6. The evaluators’ scores were not “suspiciously consistent” as PEL asserts. *Id.*, ¶ 282. Rather, consistent scoring is just as likely to be a sign of a robust and credible evaluation. *Id.*; accord **RER-6**, Betar Second Expert Report ¶ 37(d).
- 1224.7. In any event, PEL’s expert Mr. Baxter never assigned a motive as to why MTC would not seek to select the bidder that provided the best offer, and could not opine that the PGS consortium objectively was the best bidder. **RER-11**, Ehrhardt Expert Report ¶¶ 283-285.
1225. Mr. Ehrhart also adroitly observes the irony of PEL complaining about the rigor of the competitive international tender with numerous entrants and no appeals—when PEL advocates for an anomalous direct award procurement with no competitive tension at all, premised on short review of a mere PFS (*id.*):
- At the conclusion of Mr. Baxter’s testimony, he must find himself in an incongruous position. He argues that the government should have awarded the contract following nothing more than a brief review of a modest pre-feasibility study. At the same time, he demands minutely detailed sub-criteria and recording of minutes for a competitive award. It strikes me as strange to support lower levels of rigor and scrutiny in a direct award than in a competitive tender. Most experts would take the opposite position.
1226. The experienced engineers at MZBetar are similarly critical of PEL’s speculation about the tender evaluation, explaining, among other things, that:
- 1226.1. The sub-criteria were appropriate and consistent with the disclosed main criteria. PEL never requested clarification (on this or other matters) if it believed there was too much ambiguity or room for subjective evaluation in the disclosed criteria.

- RER-6**, Betar Second Expert Report ¶ 35. PEL also never appealed per the established and typical protest procedures if it felt the evaluation was in error. *Id.*
- 1226.2. PEL is incorrect about the scoring, including the relative scoring of ITD and the PGS Consortium on key criteria. For example, as to strategic vision, PEL incorrectly asserts that ITD was given the maximum score and incorrectly suggests that the innovative special economic zone proposed by ITD was not a requirement of the tender documents. In reality, the Bidding or Tender Documents disclosed to PEL and other bidders the need for strategic vision beyond the construction and operation of the railway line and port, and thus ITD was satisfying a key disclosed objective of the tender better than the PGS Consortium. *Id.*, ¶ 37(a).
- 1226.3. Similarly, PEL is wrong when it asserts that it received the lowest score on the technical proposal. PEL offers no expert with the relevant knowledge and experience to assess the comparative advantages and disadvantages of the tender submissions. *Id.*, ¶ 37(b).
- 1226.4. PEL may complain that the financial scoring process was “obscure,” but it was explained in MZBetar’s first report, and in any event there were established procedures for submitting requests for clarification pre-bid and for submitting appeals post-scoring. PEL did not utilize either, thus it cannot complain eight years later that the financial scoring process lacked clarity. *Id.*, ¶ 37(e).
- 1226.5. PEL is incorrect when it contends that only certain of the evaluators applied PEL’s 15% direito de preferência to the technical proposal. Analysis of the full scoring tables demonstrates that the 15% was applied as stated by MTC. *Id.*, ¶ 38.
- 1226.6. In all circumstances, even after consideration of PEL’s belated complaints, the tender outcome would not change: ITD would still receive the highest score. *Id.*, ¶ 39.
1227. Accordingly, PEL’s argument by counsel and after-the-fact complaints do not demonstrate the tender was “rigged,” and cannot demonstrate that the PGS Consortium offered the best proposal. In actuality, the PGS Consortium placed in third place because other bidders

offered stronger proposals, as confirmed in the evaluation reports and described above. The PGS Consortium did not appeal—for good reason.

1228. PEL’s further assertions that Mozambique did not produce the enter tender file are disproven above, and detailed further *supra* Section II(D)(6).
1229. Finally, PEL’s citation to *Tecmed* remains inapposite. Reply ¶ 857. As set forth in SOD ¶ 789, in *Tecmed*, the investor had a legally binding contract, requiring only a renewal of its permit to operate a landfill. Here, in contrast, PEL did *not* have a legally binding contract. Moreover, Mozambique had no obligation to come to terms with PEL on a definitive concession agreement—as PEL itself admits when conceding that the MOI “did not grant PEL the award” and presenting its new *loss of chance* damages methodology recognizing only the possibility of successful negotiations. In any event, PEL is wrong as to the effect of the MOI, wrong as to the nature of the parties’ communications and any “changes in heart,” and wrong when asserting that MTC’s stated “justifications” were “demonstrably untrue.” *Supra* § II.
1230. As with the rest of its FET claim, PEL has not proven that Mozambique failed to act consistency and transparently with respect to any investment, much less to a degree that would constitute internationally wrongful conduct.

4. Mozambique Did Not Breach Any Obligation to Refrain from Acting in an Arbitrary Manner.

1231. PEL repeats the same flawed arguments in this section—except that instead of accusing Mozambique of “volte faces” or “changes of heart,” PEL adds the term “U-turn” to its rhetorical repertoire. Reply ¶¶ 860 *et seq.*
1232. SOD ¶¶ 715 *et seq.*, Section II of this Rejoinder, and the merits sections above have rebutted PEL’s assertions, and in the interest of brevity the facts will not be duplicated again. PEL’s argument is premised on its inaccurate assertions that Mozambique performed “U-turns” that were “not justified in fact or in law.” This is counterfactual. Only Mozambique offers a coherent, consistent interpretation of the MOI, PPP Law, and the *direito de preferência*. The MTC’s actions in conducting a public tender and affording PEL a 15% *direito de preferência* are wholly consistent with international PPP practices and controlling Mozambican law. PEL cannot refute the technical merits of MZBetar’s

unrebutted report demonstrating that the tender was scored appropriately, so it relies on Mr. Baxter for the assertion that the tender carried “hallmarks of arbitrariness” (Reply ¶ 879). However, Mr. Baxter’s new conclusions have been thoroughly rebutted by both MZBetar and Mr. Ehrhardt. *Supra* § II(D)(L).

1233. At bottom, it would be far more “arbitrary” and inappropriate for Mozambique to directly award a \$3 billion concession to an inexperienced entity like PEL, on the basis of a six-page MOI and mere PFS, than anything PEL complains about herein. For example, Mr. Ehrhardt concludes (**RER-11**, ¶ 108 (emphasis added)):

I expect that an experienced entity in PEL’s position would have thought it had a contingent ‘direito de preferência’ if a tender should be held on the project. The entity would understand the ‘direito de preferência’ to be right to a 15 percent preference margin in a tender, as provided in Mozambique’s PPP law. This expectation is consistent with the language of the parties’ Portuguese-language MOI documents (which in Mozambique are considered controlling), Mozambique’s laws on unsolicited proposals, and industry standards in Mozambique and globally. *PEL’s claimed interpretation—that the MOI should be interpreted to provide it a right to a direct award based only on a PFS—is inconsistent with industry practices and practicalities, the requirements of PPP procurement in Mozambique, and the language of the MOI.*

5. Mozambique Acted in Good Faith.

1234. PEL cannot demonstrate any bad faith on the part of Mozambique. PEL repeats the same arguments rebutted before. Reply ¶¶ 881 *et seq.*; *compare supra* § II and above. Each are baseless. For example:

1234.1. There was no bad faith relative to PEL’s negotiations with CFM. MTC had no obligation to “instruct” CFM to negotiate with PEL; PEL did, in fact, directly negotiate with CFM; MTC never hindered those negotiations; and PEL’s belief that CFM would have been required to make substantial cash infusions and be limited to 20% equity misstate PPP industry practice and Mozambican law. *Supra* § II(G). Formation of a project company with CFM was an admitted prerequisite of an extraordinary direct award. If any bad faith is to be found, it is on the part of PEL, who now insists on an anomalous right to the concession even though its own contemporaneous correspondence recognized that under the PPP law it

sought an elective, “last resort” exception and must form a project company if a direct award were to be considered. *Id.*

1234.2. The fact that PEL had a “mere 15% scoring advantage” is not “demonstrably false. . . justification.” It is the only accurate interpretation of the MOI that harmonizes its plain language, Mozambican law, the parties’ conduct, and accords with PPP best practices for unsolicited proposals. *Supra* § II(D).

1234.3. Mozambique’s contemporaneously expressed reliance on “the legal and regulatory framework of Public-Private Partnerships” is plainly not “bad faith.” Mozambique accurately observed that a public tender was the appropriate course of action, and granted PEL the 15% direito de preferência in light of its MOI and PFS. *Supra* § II.

1234.4. PEL’s assertions of “sinister” plots, based on two chat messages with an assistant (merely requesting a flash drive of PEL’s PFS) and an alleged memorandum that Mr. Daga secretly took from Ministry personnel and did not disclose until its Reply (which, *inter alia*, explained the need for public tenders under the PPP Law), are preposterous. *Supra* § II(H). In any event, nothing PEL alleges herein is inconsistent with the MOI or PPP industry practices, which presuppose running a tender based upon information in the proponent’s PFS. *Id.*

1235. In sum, far from demonstrating “bad faith” on the part of Mozambique, the facts prove that Mozambique acted in accordance with the MOI, the PPP Law, and PPP best practices in running a competitive public tender and giving PEL a 15% direito de preferência in recognition of its MOI and PFS. No one appealed the tender. PEL has not established any breach of the Treaty’s FET standard.

C. Mozambique Did Not Indirectly Expropriate Anything, Because PEL Had No Enforceable Concession Rights.

1236. PEL’s Reply contains a brief section on indirect expropriation. Reply ¶¶ 894-937. This is a claim PEL did not advance in its Request for Arbitration. PEL’s Statement of Claim devoted a mere five paragraphs to whether anything was expropriated, at the very end of its Merits discussion, without citing a single exhibit. SOC ¶¶ 419-423. The sum total of PEL’s argument is that PEL had alleged rights to “a direct concession in respect of the

Project,” including rights to “exclusivity” and “confidentiality” that “no longer have any value . . . now that Mozambique has granted the concession to another company.”

1237. Oddly, PEL now accuses Mozambique of not “address[ing] PEL’s case” because Mozambique’s SOD focused on the fact that “there was nothing to expropriate.” Reply ¶ 895.

1238. Mozambique reiterates what the SOD and the above portions of this Rejoinder already established: *PEL did not have the rights it claims, and therefore those rights were not expropriated:*

1238.1. PEL had no “right to the concession”—it had a 15% *direito de preferência* as stated in the MOI, the PPP law, and confirmed by PPP industry practices for unsolicited proposals. *Supra* § II(D).

1238.2. The MOI’s exclusivity provision was limited to the period of PFS approval and subject to the forthcoming PPP Law. Thus, Mozambique did not “expropriate” or “neutralize” any right when putting the project to a competitive tender after PFS approval—that is *precisely how unsolicited proposals work* under the PPP law and industry practices. *Id.*

1238.3. The MOI’s confidentiality provision is likewise limited to the period of PFS approval—as PEL itself now concedes (Reply ¶ 821)—and subject to Mozambican law applicable to the procurement (*i.e.*, the PPP Law). Mozambique therefore did not “expropriate” any such right by putting the project to tender, because that occurred *after PFS approval* (*i.e.*, after the admitted expiration of any confidentiality right) and was a requirement of the PPP Law. PEL’s speculation that “know-how” from its PFS was utilized inappropriately has been rebutted earlier: there is no evidence that any confidential portions of the PFS were shared with competitors, and in any event disclosure of information of the type PEL complains about is not a breach of the time-limited confidentiality or exclusivity clauses and *would be in accordance with industry standards*. Again, PEL misunderstands both the limited nature of its alleged MOI “rights” and industry standard procurement practices for unsolicited PPP proposals. *Supra* § II.

1239. These three issues continue to form the basis of PEL’s expropriation claim (Reply ¶ 894), and PEL’s position on each has been rebutted in the preceding fact and FET discussions.
1240. The SOD further established how, beyond the fundamental flaws above, PEL has not satisfied the additional significant hurdles for an indirect expropriation claim. Among other things:
- 1240.1. PEL had no “legitimate claim to an asset that could be appropriated”;
- 1240.2. PEL identified no “expropriatory conduct”;
- 1240.3. PEL did not demonstrate the necessary “exercise of sovereign authority”;
- 1240.4. the PPP Law and requirement to go to a tender were applied in a *bona fide*, non-discriminatory manner; and
- 1240.5. enactment and application of the PPP Law were appropriate. SOD ¶¶ 766-818.
1241. PEL now acknowledges it “does not take any issue with the enactment of the PPP Law.” Reply ¶ 896.
1242. PEL does not discuss *Oxus Gold* or its conclusion “that a right to formal negotiations cannot be subject to expropriation.” **RLA-117**, ¶ 301. As that Tribunal observed, “[f]inding that a right to mere formal negotiations” of a concession agreement “could be subject to expropriation . . . would lead to transforming an obligation to do something to a certain standard . . . into an obligation to achieve a certain result.” This cannot be the meaning of expropriation under a BIT. *Id.*

1. PEL Does Not Meaningfully Contest Mozambique’s Articulation of The Applicable Legal Standards

1243. PEL concedes 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.” Reply ¶ 898.
1244. PEL likewise acknowledges that “some tribunals have found it necessary to determine whether there was an asset capable of expropriation under domestic law.” Reply ¶ 898. To be clear, domestic law is the touchstone to the existence of the allegedly appropriated property or contract right, as established in the SOD and above.

1245. PEL concedes it is “common ground” that “for a breach of contract to amount to expropriation, it must involve the exercise of sovereign power by the host state, and there must be a complete neutralization of the investment, not a mere loss of value.” Reply ¶ 898.
1246. Notably, as the Respondent in *Biwater Gauff* noted, “it is a well-established principle of international law that an investor cannot seek compensation from a State because of its own poor performance and weak business planning.”⁸⁴ That well-established principle is based, in part, on *Waste Management*, where the Tribunal found international law of expropriation does not “eliminate the normal commercial risks of an investor” or burden the State with “compensating for the failure of a business plan.”⁸⁵ Simply stated, PEL’s failed business plan does not warrant a finding of expropriation.
1247. Likewise, “it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum.” **RLA-103**, *Waste Management*, ¶ 175.

2. PEL Cannot Demonstrate That Anything Was Expropriated.

1248. *Oxus Gold* is fatal to PEL’s case. “[A] right to formal negotiations cannot be subject to expropriation.” **RLA-117**, ¶ 301. As that Tribunal observed, “[f]inding that a right to mere formal negotiations” of a concession agreement “could be subject to expropriation . . . would lead to transforming an obligation to do something to a certain standard . . . into an obligation to achieve a certain result.” This cannot be the meaning of expropriation under a BIT. *Id.*
1249. PEL does not address *Oxus Gold*. PEL’s claims are premised on its debunked assertions elsewhere, and fail.

⁸⁴ See **RLA-102**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), ¶ 440.

⁸⁵ See *id.*, ¶ 443; **RLA-103**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), ¶ 177.

1250. First, PEL cannot escape Mozambican law that is binding on the MOI. As established in the SOD § V and above in Section II, PEL did not have the rights it alleges.
1251. To the extent relevant, PEL also did not hold an “investment” as established in the jurisdictional sections of this Rejoinder.
1252. Second, Mozambique did not take any measures that “neutralized PEL’s investment.” PEL’s “U-turn” narrative has been addressed at length *supra* Section II and earlier in this merits discussion.
1253. And notably, expropriation presents a potentially higher hurdle for PEL to surmount—because PEL cannot show that its alleged (non-existent) “rights” were fully “neutralized.” PEL’s *direito de preferência* was materialized as the 15% *direito de preferência* in the public tender. That the PGS Consortium nonetheless scored in third place—due to *inter alia* PEL’s inexperience, the PGS Consortium’s relatively poor strategic vision for the corridor, and the strength of the more-experienced and better-resourced competitors—does not mean that the MOI-derived *direito de preferência* was “neutralized.” PEL likewise received full value for its alleged, time-limited exclusivity and confidentiality “rights”—no one else was afforded a right to conduct a feasibility study, or granted concession rights, during the period of PEL’s PFS study and approval. *Supra* § II.
1254. PEL’s assertions that the tender was “irregular and suspect” are premised on speculation and have been fully addressed *supra* Section II(L).
1255. Third, PEL has not proven that Mozambique exercised sovereign power. As described several times above, MTC’s conduct in interpreting the MOI consistent with the host state’s PPP Law and industry best practices for unsolicited PPP proposals, and running a competitive tender with no appeals, is no exercise of “sovereign power”—it is workaday contractual procurement.
1256. Finally, PEL’s arguments regarding the “economic impact of the measures” and whether PEL’s “reasonable expectations” were interfered with are all belied by the facts. There were no economic impacts to PEL because PEL did not have the rights it alleged and was never guaranteed a concession. “Reasonable expectations” cut against PEL, because as explained in the facts and FET section above, PEL had no reasonable or legitimate

expectation to an extraordinary, elective, “last resort” award of a \$3 billion concession on the basis of a six-page MOI and mere PFS.

1257. PEL’s argument that MTC’s decision to go to a public tender on a PPP megaproject of this type were not in the “*bona fide* public interest” is particularly bold. PPP experts and authorities the world over confirm that public procurement best practice is to do precisely what MTC did: conduct a public tender, while affording PEL a generous 15% *direito de preferência*. The May 2013 documents PEL cite expressly state that the decision to go to tender was made based upon the “legal and regulatory framework of Public-Private Partnerships,” which Mozambique has confirmed is in accord with industry best practices. Reply ¶¶ 925-926. This decision was not an impermissible “reversal” because the April 2013 letter did not to give PEL a direct award, but rather was merely a conditional investigation of direct negotiations that was quickly clarified. *Id.*; *supra* § II(K). Nothing in the record demonstrates that Mozambique or MTC were acting in anything other than the “bone fide public interest,” and PEL certainly does not prove otherwise. *Id.*
1258. In short, MTC gave PEL precisely what the MOI, the PPP Law, and industry practices specify: a 15% *direito de preferência* in a competitive, and sensible, public tender. PEL never had concession rights, never lost concession rights, and the alleged “Project” has never been built. This is a far cry from expropriation of any sort.

D. Mozambique Did Not Breach Any Allegedly Incorporated Umbrella Clause Because It Never Breached the MOI.

1259. PEL’s Reply flips the order of its umbrella clause claim, moving it after the expropriation claim to the end of its Merits discussion. Reply ¶¶ 938 *et seq.* In so doing, it appears PEL wishes to bury its quiet concession that domestic law is relevant (indeed controlling) as to the existence and scope of its alleged rights; avoid various impediments that would preclude PEL from having any valid and enforceable right to a concession under Mozambican law; and to distance itself from the observation that whether PEL has the rights it alleges is a fundamental issue appropriate for resolution by the ICC Tribunal under the MOI’s dispute resolution clause.
1260. Regardless of PEL’s organizational maneuvers, the analysis remains as stated in the SOD. Far from spending “less than a paragraph defending its conduct in respect of the claim,” as

PEL wrongly suggests in its Reply ¶ 939, Mozambique expressly incorporated Section V of the SOD. Section V established over more than 50 pages that PEL did not (and could not) have the enforceable rights to a concession that PEL alleges—a fundamental issue to the FET, MFN, and expropriation claims. PEL cannot diminish Section V by addressing it only partially and indirectly in its umbrella clause discussion, and then moving the umbrella clause claim to the end. Mozambique hereby incorporates by reference Section V of its SOD.

1261. Section VII of the SOD further established that Mozambique did not breach the Treaty’s MFN clause, even if an umbrella clause was imported (which is disputed).
1262. The preceding sections of this Rejoinder—including Section II—likewise firmly establish that PEL did not have the rights it claims, and that the MOI was not breached.
1263. PEL’s contention that the “breaches of the MOI are so clear that they require little, if any, consideration of Mozambique’s law” (Reply ¶ 940) is, flatly, wrong. If anything, the *lack* of any MOI breach is paramount.
1264. Accordingly, PEL’s MFN/umbrella clause claim fails on the merits. As stated in *Oxus Gold*, with regards to an umbrella clause claim, “the Claimant failed to establish that it actually held an obligation protected by the umbrella clause.” *Id.*, ¶ 381. “Claimant did not secure the alleged unconditional right to develop the Project,” and the “mere failure to be granted such development rights cannot be deemed a breach of an obligation . . . as such contractual obligation did not exist.” *Id.*, ¶¶ 374, 376.

- 1. The Parties Dispute Whether Importation of an Umbrella Clause is Appropriate in This Instance, And Whether the ICC Arbitration Clause in the Subject Contract Should Be Respected. Nonetheless, PEL Does Not Meaningfully Contest Mozambique’s Articulation of Legal Standards Applicable to an Umbrella Clause Breach Analysis: Domestic Law Governs.**

1265. First, as to the legal standards, the threshold question is whether PEL can even pursue an umbrella claim. There is no umbrella clause in the Treaty. PEL attempts to use the Treaty’s Most Favored Nation (“MFN”) clause to import an umbrella clause contained within in the Mozambique-Netherlands BIT.

1266. The SOD explained, among other things, that under a MFN clause, PEL must demonstrate unequal treatment between PEL and MZ investors, or between PEL and other foreign investors. Beyond the purpose of a MFN clause to ensure non-discrimination, international law is unsettled on when importation of various procedural or substantive rights from other Treaties is appropriate (including as to new, substantive rights), and it is an emerging issue of concern relative to recent generations of BITs. SOD ¶¶ 721-739.
1267. *Teinver v. Argentina* and other authorities referenced in the SOD found it “persuasive” that MFN clauses should not be utilized for “incorporation of a new right or standard of treatment not provided for in the Treaty.” **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), ¶ 884. The *Teinver* Tribunal distinguished various decisions relative to incorporation—many relied upon by PEL here—on multiple bases including that “the relevant base treaties appear to have provided rights or protection which the claimants sought to improve upon by having recourse to more favorable provisions in other treaties” (such as those “cases dealing with more favorable dispute resolution provisions”) or where the provisions claimants sought to incorporate “could be considered part of fair and equitable treatment (which was provided for in the base treaty).” *Id.*, ¶¶ 886-887.
1268. Here, as in *Teinver*, PEL seeks “to invoke the MFN Clause to incorporate an umbrella clause in circumstances where there is no umbrella clause in the Treaty, nor any reference to or mention of such a clause.” *Id.*, ¶ 890. The SOD explained that incorporation of an umbrella clause in these circumstances—to purportedly elevate certain contract breaches to a Treaty violation—is no insignificant matter and cannot be easily presumed. Like in *Teinver*, the Tribunal should “not be persuaded that the decisions in *MTD [v. Chile]* and *Bayindir [v. Pakistan]* cases support Claimants’ claim to invoke the umbrella clause” in another Treaty. *Id.*
1269. Although it is correct that the Tribunal in *Teinver* considered the MFN importation of umbrella clause issue while giving meaning to that treaty’s phrase “in all matters governed by this Agreement,” the Tribunal did not rest its opinions solely upon that language. For example, the Tribunal noted that, in many cases the claimant cited, “the relevant base

treaties appear to have provided rights or protection which the claimants sought to improve upon by having recourse to more favorable provisions in other treaties” (*id.*, ¶ 880) – *i.e.*, the MFN clause was used to import provisions based on pre-existing rights, not to import totally *new* rights, as PEL seeks to do here. The Tribunal further explained that, in the cases of *MTD v. Chile and Bayindir v. Pakistan*, putting aside the specific phrase at issue, “the MFN clause was used to invoke FET provisions in circumstances where there was reference to fair and equitable treatment in the base treaties. In this case, Claimants seeks to invoke the MFN Clause to incorporate an umbrella clause in circumstances where there is no umbrella clause in the Treaty, nor any reference to or mention of such a clause.” *See id.*, ¶ 890 (emphasis added). The Tribunal thus found the claimant’s attempt to import the umbrella clause (a totally new right) was ineffective. *See id.*, ¶ 891.

1270. Here, it is undisputed that the India-MZ BIT does *not* contain an umbrella clause, which is the reason PEL attempts to import one via the MFN clause. Regardless of the absence of the phrase “in all matters governed by this Agreement,” the fact remains that, as in *Teinver*, PEL is attempting to invoke a new substantive right non-existent in, and not even referenced in, the India-MZ BIT, all without demonstrating that it is similarly situated to the foreign investors which it suggests may be treated more favorably. While there may be diverging opinions among tribunals, PEL has not established the appropriateness of such incorporation under international law.
1271. Likewise, because there was no investment, there is no Treaty jurisdiction and a MFN or imported umbrella clause claim cannot be pursued. SOD ¶¶ 740-744. PEL also has not demonstrated that there was any binding obligation of the State, such that there can be no umbrella clause claim. SOD ¶¶ 745-752.
1272. Second, as an additional threshold issue, PEL has not demonstrated that *this* Tribunal is the appropriate venue for this case. This is particularly true as to the umbrella clause claim, where PEL is expressly asserting Treaty liability on the basis of an alleged contractual breach—all while ignoring that same contract’s express and exclusive election for ICC arbitration.

1273. The MOI upon which PEL bases its umbrella claim includes an express dispute resolution procedure. MOI Clause 10 specifies arbitration in Mozambique under the ICC Rules for “any dispute arising out of” the MOI. **R-1 & R-2**, MOI Clause 10.
1274. The SOD established that the MOI’s ICC arbitration clause should govern (*e.g.*, SOD ¶¶ 759-762):
- 1274.1. “In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.” *See RLA-53, Joy Mining*, ICSID Case No. ARB/03/11, ¶ 90.
- 1274.2. As another tribunal reasoned, if the umbrella clause imports contractual obligations, that would include the forum selection clause, which “raises an issue of admissibility.” *See RLA-107, Bureau Veritas*, ICSID Case No. ARB/07/9, ¶ 142. “[T]he parties to a contract are not free to pick and choose those parts of the Contract that they may wish to incorporate into an ‘umbrella clause’ provision...and to ignore others.” *Id.*, ¶ 148. The fact that the parties executed the agreement with the exclusive jurisdiction provision *after* the BIT was ratified suggests the parties “intended the exclusive contractual jurisdiction...to be absolute and without exception...” *Id.*, ¶ 146.
- 1274.3. “The Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively.” **RLA-116**, *SGS v. Philippines*, ICSID Case No. ARB/02/6, ¶ 155. “[I]f the parties to the contract have agreed on an exclusive jurisdiction to resolve a dispute under the contract...then it is exclusively for that forum to resolve all aspects of the dispute under the exclusive jurisdiction clause.” *See RLA-107, Bureau Veritas*, ¶ 154.
1275. PEL does not contest this line of authority, but instead seeks to dismiss it, citing academic literature and saying that the approach taken in *SGS v. Philippines* has been criticized. Reply ¶¶ 957.

1276. Earlier in this Rejoinder, Mozambique’s has detailed the appropriateness of the ICC arbitration, and will not repeat those facts and law here. Crucially, however, PEL’s academic critiques fail to account for how the MOI’s dispute resolution clause differs from a standard contractual forum selection clause. MOI Clause 10 is an *exclusive election for international arbitration* under the ICC Rules. It specifies were Treaty claims arising out of the MOI must be brought—not merely the forum to litigate purely contractual disputes.
1277. Yet, in any event, PEL has not articulated why this Tribunal should not respect the parties’ contractual election of *which international arbitral body* should hear the dispute arising out of the MOI. As stated in **RLA-107**, *Bureau Veritas*, ¶ 142, which PEL does not directly address:
- “[T]he parties to a contract are not free to pick and choose those parts of the Contract that they may wish to incorporate into an ‘umbrella clause’ provision...and to ignore others.” *Id.* at ¶ 148. The fact that the parties executed the agreement with the exclusive jurisdiction provision *after* the BIT was ratified suggests the parties “intended the exclusive contractual jurisdiction...to be absolute and without exception...” *Id.* at ¶ 146.
1278. It follows, then, that if PEL wishes to wholesale incorporate the MOI—the alleged contract—and its alleged breach into its Treaty claim, it must take the bad with the good.
1279. The MOI specifies ICC arbitration, exclusively, for “any dispute arising out of the MOI.” An umbrella clause claim premised on the MOI is a “dispute arising out of the MOI.” Indeed, the MOI is the foundational basis for such a claim, and the dispute would not exist without it. MOI Clause 10 is entitled to no less respect than the MOI clauses PEL (inaccurately) claims MTC breached.
1280. Third, if the Tribunal were to assume that the Treaty’s MFN clause imported an umbrella clause, and further assumed that it should hear that claim irrespective of the MOI’s ICC arbitration clause, PEL does not meaningfully contest Mozambique’s articulation of the general legal principles applicable to the umbrella clause claim.
1281. Whether an umbrella clause has been breached is a question governed by the law of the host state, which PEL does not significantly dispute. SOD ¶¶ 746-752, 763; Reply ¶¶ 966-970. PEL suggests that a detailed analysis of Mozambican law may not be necessary if the

“breaches of the MOI are manifest on their face,” Reply ¶ 970, but then spends the subsequent seventeen pages discussing its alleged breaches with liberal references to Mozambican law.

1282. In the present case, if anything is “manifest” on its face, it is that MTC never breached the MOI. PEL cannot escape or diminish the domestic law governing both the MOI and the PPP procurement, all which further confirms that PEL did not (and could not) have the rights it alleges. SOD § V; *supra* § II.

2. PEL Cannot Establish That It Had Its Claimed Rights or That The MOI Was Breached.

1283. PEL’s assertions that the MOI was breached in violation of an incorporated umbrella clause rely on the same inaccurate contentions addressed earlier in this Section and *supra* Section II, and ignore the bulk of SOD § V.

1284. As in *Oxus Gold*, PEL has not “establish[ed] that it actually held an obligation protected by the umbrella clause.” **RLA-117** at ¶ 381. “Claimant did not secure the alleged unconditional right to develop the Project,” and the “mere failure to be granted such development rights cannot be deemed a breach of an obligation . . . as such contractual obligation did not exist.” *Id.* ¶¶ 374, 376.

1285. PEL repeats its arguments that “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.” Reply ¶¶ 972 *et seq.* This incredible interpretation of the MOI—that it gave PEL a blank-check award based on a mere PFS—has been thoroughly rebutted in Section II and in the earlier FET and expropriation discussions. *Oxus Gold* and other authorities cited above likewise demonstrate the fallacy of PEL claiming any contractual right or legitimate expectation to a concession based on a MOI and Preliminary Feasibility Study.

1286. PEL cites the opinions of Messrs. Baxter and Medeiros as to what was intended by the MOI, but they have been rebutted by the opinions of Mr. Ehrhardt, MZBetar, and Ms. Muenda.

1287. Mr. Ehrhardt concludes that (**RER-11**, Ehrhardt Expert Report ¶ 108):

I expect that an experienced entity in PEL's position would have thought it had a contingent 'direito de preferência' if a tender should be held on the project. The entity would understand the 'direito de preferência' to be right to a 15 percent preference margin in a tender, as provided in Mozambique's PPP law. This expectation is consistent with the language of the parties' Portuguese-language MOI documents (which in Mozambique are considered controlling), Mozambique's laws on unsolicited proposals, and industry standards in Mozambique and globally. PEL's claimed interpretation—that the MOI should be interpreted to provide it a right to a direct award based only on a PFS—is inconsistent with industry practices and practicalities, the requirements of PPP procurement in Mozambique, and the language of the MOI.

1288. MZBetar likewise concludes (**RER-6**, Betar Second Expert Report ¶ 23):

[T]he MOI does not support the fact that PEL was granted a right to the direct award of the project concession. [It is] also our opinion that an experienced industry participant would not interpret the MOI in the way PEL now suggest[s].

1289. Ms. Muenda is the only Mozambican attorney offering a Legal Opinion in this matter, and she rejects Professor Medeiros' inaccurate conclusions about Mozambican law. For example:

1289.1. Ms Muenda's Second Legal Opinion further confirms that the right referenced in Clause 2 is clearly different than a right to the concession; PEL did not have a right to the direct award or exclusivity for the same; the *direito de preferência* should be read relative to the same term in the PPP Law; and that *direito de preferência* was afforded the meaning Professor Medeiros suggests (under CC Art. 414, related to certain contracts of purchase and sale), it would mean that PEL simply had a right of acceptance to the terms or offer proposed by Mozambique. Here, the condition precedents to a direct award would have included a partnership with CFM—and when PEL failed to satisfy that condition, PEL's alleged rights were waived and extinguished. **RER-7**, Muenda Second Legal Opinion ¶¶ 1-12; *see also* **RER-11**, Ehrhardt Expert Report, Executive Summary ¶¶ 7-12.

1289.2. There is no incompatibility between the *direito de preferência* in the PPP law and the *direito de preferência* in the MOI. *Id.* ¶¶ 45-49.

- 1289.3. If the MOI were interpreted as a direct award right in the matter now suggested by PEL, it would be void, and both the MOI and PFS lack the necessary content and approvals. *Id.* ¶¶ 65-94.
1290. The Second Witness Statements of former Minister Zucula and Mr. Chauque are likewise fatal to PEL’s positions, as fully described in Section II(D). In short, it was never the parties’ intent to give PEL a right to a direct award based only on a PFS, and that is not what the MOI or PFS did.
1291. PEL’s witnesses misunderstand or misstate PPP practices, the commercial logic of the PFS, the scope of the MOI’s time-limited exclusivity and confidentiality clauses, and whether the MOI was binding. These contentions have all been addressed earlier, but in short:
- 1291.1. It is common and best practice for PPP unsolicited proposals (USP) to be put to a public tender, in which the original proponent may be given some advantage—such as the 15% *direito de preferência* provided to PEL (**RER-11**, Ehrhardt Expert Report, ¶ 2);
- 1291.2. Mozambique’s PPP law follows international best practice in this regard, mandating that unsolicited proposals, if they are to be accepted, must compete in a competitive tender, in which they receive a preference in the form of an additional 15 percent on their score, when the bids are evaluated (*id.* ¶ 3);
- 1291.3. It is not true, as PEL and its witnesses say, that developers would not prepare unsolicited proposals if they did not have a guarantee of award. It is common for firms to prepare unsolicited proposals (at their cost) which they know will then be subject to competitive challenge. These proposals are, generally more fully developed and complete than the prefeasibility study PEL submitted (*id.* ¶ 4);
- 1291.4. An experienced entity would not have considered that the MOI, combined with submission of the prefeasibility study, gave it a right to direct award of a concession for the project. This is because: (1) it is well understood in the industry that MOIs or even MOUs do not confer legal, binding rights to a concession—they are “agreements to agree” at most, that cannot be enforced because there is no way to know whether and what the agreement will be on key terms; (2) a PFS

does not (and this one did not) establish the feasibility of the project, sufficiently define the project, or satisfy the prerequisites for a concession award; and (3) Mozambican law prohibits direct award of contracts except in exceptional circumstances—circumstances which experienced developers would not have thought existed here (*id.* ¶¶ 5, 73-102). An experienced developer would have thought the MOI and PFS gave it a 15 percent *direito de preferência* because that is what the PPP law applicable to the procurement states, and it is consistent with the use of the same term in the MOI (*id.* ¶ 6);

- 1291.5. The exclusivity was expressly stated to be only *for the duration of the prefeasibility study and its approval process*. This is standard process for a USP which can then be subject to competition. It protects the proponent from the government giving the project to another firm while the study is still going on, and thus depriving the proponent of the benefit of its efforts on the study. Contrary what Mr. Baxter implies, the granting of exclusivity during the period in which the study is prepared and approved would have made it clear to PEL that it *did not have exclusivity after the approval of the project*. PEL not having exclusivity after the approval of the process is consistent with the PPP Law, which requires a tender, and inconsistent with the theory that PEL had a right of direct award. (*id.*, ¶ 250);
- 1291.6. The parties' conduct was consistent with the view that PEL had a right to preferential treatment in the tender (*id.*, ¶¶ 7-11);
- 1291.7. PEL never established the feasibility of the project—in fact, its contemporaneous financial data showed the project was not viable (*id.*, ¶¶ 13-14);
- 1291.8. Even in a direct negotiation or award scenario, there are many ways in which a definitive concession agreement could not materialize, or the project could fail to be constructed or make a profit (*id.*, ¶¶ 17-22);
- 1291.9. The MOI and PFS did relate to “fiscal matters,” and therefore would require further approvals that were never sought or received (*e.g., id.*, ¶ 30).

1292. Thus, PEL did not have the rights it claims from the MOI, and Mozambique did not breach or renege on the alleged rights. PEL references its earlier sections and fact discussion for fulsome discussion these matters (e.g., Reply ¶ 983), and Mozambique likewise refers the Tribunal to Section II and the earlier portions of this merits discussion rebutting each of PEL’s flawed contentions.
1293. PEL attempts, at the end of its discussion, to indirectly deflect Mozambique’s evidence that the rights PEL alleges would be precluded under Mozambican law. PEL is wrong on each count.
1294. First, it is correct that the MOI, if interpreted to do what PEL alleges, would not be binding because it would have required prior authorization by the Ministry of Finance and the Administrative Court. PEL’s assertion that the MOI and PFS did not relate to “fiscal matters” or give rise to a “public expenditure” is incorrect and these approvals are necessary, as confirmed by both Ms. Muenda and Mr. Ehrhardt.
1295. In any event, because PEL must concede that the MOI and PFS lacks necessary approvals to give rise to public expenditures, PEL is now forced to acknowledge that the MOI did not grant PEL the concession, but rather an alleged right to negotiate a concession. *See also supra* § II(D).
1296. PEL’s new, limited conceptualization of its rights—as a right to negotiate—confirms that the MOI could never be anything more than a preliminary, non-binding, “agreement to agree” as to the concession itself. It is fatal to PEL’s case on jurisdiction, because alleged negotiation rights and options are no investment. It is fatal to PEL’s case on the merits because, as stated in *Oxus Gold* and other jurisprudence, “Claimant did not secure the alleged unconditional right to develop the Project,” and the “mere failure to be granted such development rights cannot be deemed a breach of an obligation . . . as such contractual obligation did not exist.” **RLA-117**, ¶¶ 374, 376; *see also supra* § II. And it is fatal to PEL’s case on damages, since PEL cannot quantify any positive, non-speculative value to an alleged right to negotiate a concession it did not receive, on a project that was never built.
1297. Second, PEL’s blacklisting, and failure to disclose the same, does extinguish PEL’s rights (or, at a minimum, makes them purely speculative, as Mozambique had no obligation to

award a project to an entity disqualified for commercial untrustworthiness). The blacklisting matters are detailed in earlier sections. Professor Medeiros' attempts to argue that PEL had no duty to disclose are rebutted by both Ms. Muenda and Mr. Ehrhardt.

1298. Third, it cannot be reasonably disputed that the MOI is unenforceable as to the concession and lacks clauses normally found (and required) in concession contracts. PEL's Reply states Mozambique's position on this issue, but does not respond to it. Reply ¶¶ 1003-1004. It is plain that the MOI and PFS did not include the basic terms and conditions of a concession (they did not even specify PEL's bid price) and lacked necessary content to form the basis of a concession under the PPP Law, PPP Regulations, and industry practice, as earlier established.
1299. Professor Medeiros' separate assertions that the divergent interpretations and varying versions of the MOI do not demonstrate a lack of necessary "meeting of the minds" are incorrect. Reply ¶ 1004. These matters go to whether the parties mutually agreed on the same principal deal points, and thus go to both the *interpretation* and *existence* of an agreement. PEL also cannot cogently dispute that the Portuguese versions of the MOI must prevail under Mozambican law.
1300. Fourth, it is again correct that the MOI could not grant a right to a direct award under Mozambican PPP laws and procurement practices. This has been confirmed by Ms. Muenda, Mr. Ehrhardt, Mr. Chauque, and others. PEL's response again relies on distinguishing between a definitive concession agreement and an alleged promise to negotiate a definitive concession agreement, but this is fatal to PEL's positions as established above. If MTC and Minister Zucula were without power to approve an extraordinary "direct award" exception to the public tender requirement and give PEL the concession based on a mere PFS (and that appears to be common ground), PEL cannot articulate how it had an unconditional, binding entitlement to the concession rights on which it bases its claims and quantum.
1301. Fifth, Mozambique's position that the MOI provided PEL a 15% *direito de preferência*, as specified in the PPP law and consistent with PPP practices, is confirmed and need not be restated here. Professor Medeiros' various contentions about the right of first refusal or *direito de preferência* are rebutted by Ms. Muenda and Mr. Ehrhardt, among others. As

noted, Professor Medeiros is neither a Mozambican attorney nor a PPP expert. Mr. Baxter's assertion about industry practices has also been thoroughly rebutted by Mr. Ehrhardt and MZBetar, as described above.

1302. Sixth, it is likewise confirmed that the PFS did not satisfy the conditions of a concession. In addition to MZBetar's report (which PEL cannot dispute and offers no technical expert to rebut), this is further confirmed by Mr. Ehrhardt, with reference to both Mozambican procurement requirements and PPP industry practices. PEL can offer no evidence that the PFS satisfied the requirements for award of a concession. And that the PFS was "approved" is of no consequence, because the PFS was not approved for the purpose of giving PEL the concession—it was approved for the limited purpose of giving PEL the 15% *direito de preferência* afforded to proponents of unsolicited PPP proposals, per the MOI and PPP industry practices the world over. *Supra* § II(E).
1303. PEL again suggests that the MOI and PFS did not need to satisfy any requirements, because they were never intended to be "legal acts" approving "the ultimate concession," but rather a process for agreeing to conditions such that PEL could "*in the future . . . negotiate the concession*, and subsequently enter into the concession contract." Reply ¶ 1013. PEL is incorrect—if the MOI and PFS were to give it a right to a direct award, they must satisfy the technical, legal, and practical requirements for a direct award of a concession. Yet, as noted several times above, PEL's reluctant concession that it had, at most, *a right to negotiate* is fatal to its case. An alleged right to negotiate a future, definitive concession cannot be equated to a right to the concession, and cannot form the basis for the claims that PEL is now asserting. "Claimant did not secure the alleged unconditional right to develop the Project," and the "mere failure to be granted such development rights cannot be deemed a breach of an obligation . . . as such contractual obligation did not exist." **RLA-117, Oxus Gold**, ¶¶ 374, 376.
1304. Seventh, PEL's participation in the tender as part of the PGS Consortium, and failure to appeal to the same, preclude its present claims. This is true both on the basis of the estoppel, release, and accord satisfaction principles that Mozambique articulated (and PEL does not substantively address (*see* Reply ¶ 1014), and as a matter of logic and commercial reasonableness. *See supra* § II(K), II(L)(5). For example:

- 1304.1. In submitting its Proposal, the PGS Consortium confirmed that “*We are aware that you have no obligation to accept any received Proposal.*” *E.g.*, **C-37**, at page 7 of the Exhibit.
- 1304.2. The tender documents confirm that it would be a conflict of interest and impediment for a party to participate in the tender process both for itself and as part of a Consortium. *E.g.*, **C-27**, Item 8.4.
- 1304.3. Mr. Chauque explains that, setting aside the legal question of PEL’s MOI rights (which are disputed), it must be observed, as a matter of fact and procurement practice, that PEL cannot be active in a tender while also claiming a guaranteed direct award. The finality of tenders and interests of third parties must be considered. It would be insensible for a party to participate in a \$3 billion tender, come in third place, elect not to file any judicial appeal, and then argue years afterwards that it should either receive the concession or the alleged profits of the concession. Such action would either deprive the winning bidder (and the second-place bidder, for that matter) of their rights without due process of law, or result in a state guaranteeing financial success on a 30-year PPP project and paying twice for the same procurement. No procurement systems allow for such an odd and ill-conceived result. **RWS-3**, Chauque Second Witness Statement ¶ 73.
1305. Eighth, PEL has no response to Mozambique’s SOD sections discussing how Mozambique’s actions were legally justified and how any obligation of Mozambique under the MOI would have been excused or released due to PEL’s actions, breaches, and blacklisting—other than to say they “repeat Respondent’s previous arguments.” Reply ¶¶ 1016-1017. Mozambique’s arguments are restated and not substantively contested.
1306. Ninth, PEL does not substantively contest Mozambique’s contentions that PEL repudiated or breached the MOI through its conduct. Reply ¶ 1018. PEL claims Mozambique did not cite Mozambican law for the concept of a contractual breach, but cannot dispute that a material breach excuses the obligation to perform. PEL’s contentions herein do not disprove any of Mozambique’s assertions in the SOD, and SOD Section V is again restated.

1307. Tenth, PEL does not meaningfully address the additional defenses that preclude the existence of PEL’s alleged enforceable right to a concession, as specified in Section V of the SOD. Reply ¶¶ 1022 *et seq.*
- 1307.1. PEL does not engage with the observation that the PFS approval was invalid if interpreted for the purpose that PEL now gives it (vesting some right to the concession)—it simply says MTC was “satisfied” with the PFS but ignores Mozambique’s contentions throughout that the PFS approval did not do what PEL contends.
- 1307.2. The substantial import of PEL’s blacklisting is discussed fully in earlier sections. A disbarred or blacklisted entity like PEL has no binding, inviolate right to a concession.
1308. Eleventh, in attempting to sidestep time bars that would extinguish PEL’s claimed rights, PEL ignores the laches arguments in Mozambique’s SOD ¶¶ 611-622. The laches argument, also addressed earlier in this Rejoinder, is therefore un rebutted.
1309. As to the Mozambican statutes of limitations, PEL attempts to distinguish the cited periods by saying they relate to “situations where a preliminary rejection of an administrative complaint has occurred with no judicial appeal having been filed,” “claims related to the . . . provision of work by those exercising an industrial profession,” and “pre-contractual liability.” Reply ¶ 1026.
1310. PEL has not demonstrated that the present instances do not satisfy one or all of the stated circumstances. In this case, PEL (1) claims to have complained about the tender administratively but did not judicially appeal, (2) purports to have completed technical work on a PFS for a rail/port concession, and (3) complaints about the actions of MTC that admittedly occurred before any definitive concession agreement. These complaints are consistent with the scope of the cited limitation periods.
1311. Given PEL’s failure to address Mozambique’s laches argument and failure to distinguish the cited Mozambican statutes of limitations, it remains substantively uncontested that PEL’s alleged MOI rights are time-barred and extinguished.

1312. In light of the forgoing, the evidentiary record establishes that Mozambique did not breach the MOI nor any international investment treaty standard, or any imported umbrella clause. PEL seeks to disrupt the finality of international PPP infrastructure tenders, make an end-run around established procurement law and procedures and PPP dispute resolution processes, and raid the public fisc in unprecedented fashion—in the hopes of securing \$150MM in illusory profits on an unrealized project regarding which PEL never even executed a PPP concession agreement.

E. In Sum, Mozambique Prevails on the Merits.

1313. By now, this tribunal has heard a lot about the background of this dispute, but this dispute is really not that complicated or complex. The factual background favors Mozambique. Thus, PEL needs to resort to heavy rhetoric and a mountain of accusations, in order to try to create ambiguity and gray areas, but the facts still favor Mozambique on the merits.

1314. The parties executed an MOI. An MOI, like an MOU or LOI, is not a PPP concession agreement. This is undisputable. As a result, there was never any PPP concession between PEL and the MTC, no matter how much PEL tries to spin this issue. Rather, a contractual dispute arose between the parties regarding what are their rights under the MOI, but this Tribunal does not even need to delve into that dispute, because the parties resolved that dispute, by their actions. The MTC provided PEL with a 15% scoring advantage to account for PEL's alleged rights (whatever they may be) under the MOI in connection with PEL's participation in the public tender as part of the PGS Consortium. This accommodation resolved the parties' prior contractual dispute over the MOI.

1315. In the tender, the PGS Consortium, which included PEL, came in third place. The PGS Consortium never presented a timely appeal in the administrative procurement process, and also did not pursue further recourse in the courts. Under Mozambican law that was the end of the matter, and similarly under established PPP practice, anywhere in the world, that would be the end of the matter. A disgruntled bidder does not get to argue or litigate its grievances beyond the process established by local procurement law.

1316. PEL's relies on its alleged "reservation" of rights, and alleged participation in the public tender "under protest," but that cannot change the results of the public tender, nor can that permit PEL to renege on its participation in the tender as part of the PGS Consortium, and

revert back to the MOI. As noted, PEL's blacklisting in India certainly adumbrated what PEL would do here: participate in a tender process, accept the 15% scoring advantage to account for PEL's alleged rights under the MOI, and then renege on the tender.

1317. Indeed, PEL executed a secret side letter with its PGS Consortium partners, the same day the PGS Consortium submitted its request to prequalify for the public tender to the MTC, which demonstrates that PEL already had plans to renege on its bid if the PGS Consortium did not prevail in the public contest, and concealed this from the MTC.
1318. PEL's behavior is not acceptable in PPP procurement practice, whether in Mozambique or anywhere else in the world. If a disgruntled bidder could initiate litigation or arbitration based on preliminary agreements such as an MOI, even where the disgruntled bidder has already been provided a scoring advantage over the competitor bidders based on that MOI, it would turn accepted PPP practice on its head.
1319. This Tribunal must consider too the rights of the winning bidder, ITD. PEL is asking this Tribunal to render an award that the MTC, although PEL participated in the public tender through a consortium that received the 15% scoring advantage per the MOI, and the PGS Consortium came in third place, the MTC should have disregarded the results of the public contest, and awarded the concession to PEL nonetheless, ignoring the winning bidder, ITD. That would be an absurd result, yet is exactly what PEL claims the MTC should have done.
1320. Indeed, any award by this Tribunal in favor of PEL would create unmeasurable uncertainty that could potentially inflict heavy damage on procurement practices worldwide, and significantly chill the interest of governments in reviewing unsolicited proposals, like PEL's which resulted in the MOI.
1321. In sum, there is no violation of any standard, because the MTC and Mozambique did not exercise any sovereign powers. The MTC and Mozambique acted as commercial actors.
1322. Mozambique also has not violated any treaty standard that PEL invokes. The MTC and Mozambique did not violate the fair and equitable treatment standard, because the MTC provided PEL with a 15% scoring advantage to account for its alleged rights under the MOI. This was fair and equitable treatment of PEL, considering the MOI (and the MTC's interpretation of the MOI which cannot be said to be beyond reason), and resolved, or at

least was a reasonable way to resolve, the parties' contractual dispute. Even if the MTC was ultimately wrong in its interpretation of the MOI, or in its scoring of the public contest, which it was not, that would still not rise to the level of unfair or inequitable conduct under a treaty, because those decisions were entirely commercial conduct. The MTC also did not act unfairly or inequitably toward PEL when the MTC refused to ignore the results of the public tender, and refused to ignore the rights of the winning bidder, ITD, and therefore declined to issue a direct award, post-public contest, to PEL.

1323. The MTC and Mozambique also did not expropriate PEL's alleged "investment." There was no "investment," whether as a matter of law or in actuality, because no PPP concession agreement was executed between the MTC and PEL. There can be no direct or indirect expropriation without a sovereign act, and here there was none. The MTC awarded the concession to another party after a public contest, and that is a *commercial* act. The decision to organize a public tender is not a sovereign act, any more than the issuance of a sovereign bond is a sovereign act. This is no different than a private party awarding a contract pursuant to an RFP (request for proposal). PEL's argument that its alleged rights under the MOI were "neutralized" is just lawyer talk for "breached." The MTC also did not "expropriate" PEL's know-how. This is a plain contract dispute. There can be no expropriation of a concession agreement when a PPP concession was never entered into in the first place. Mozambique cannot be considered to have "expropriated" a PPP concession never established between the MTC and PEL – it would render the term meaningless.
1324. As discussed above, the MTC and Mozambique also did not violate the umbrella clause, because there was no breach of the MOI. The MOI was complied with by providing the scoring advantage to the PGS Consortium, of which PEL was a member. PEL accepted by its actions that specific accommodation, which is a reasonable way in which to account for PEL's alleged rights under the MOI, and that discharged any further MTC obligations under the MOI. PEL's contrary logic inserts uncertainty into the procurement process.
1325. Despite its heavy rhetoric and accusations, PEL has presented a *frivolous* claim. As noted, PEL is simply a disgruntled bidder trying to get a second bite at the apple. Mozambique has established that there has been no violation of any treaty standard or expropriation.

IX. THE FLAWS IN PEL'S DAMAGES CLAIMS REMAIN AND HAVE BEEN COMPOUNDED; PEL IS NOT ENTITLED TO RECOVER ANY DAMAGES.

A. Summary of The Flaws in PEL's Damages Claims

1326. PEL's damages claims suffer from several flaws, both legal and factual, and MTC addresses them in detail below. Most fundamentally, however, PEL's damages claims fail because of the mismatch between the right PEL claims – an alleged right to its own negotiated concession – and the project to which PEL compares itself: a TML concession that is not the project PEL proposed. To make matters still worse, *to the degree there was any similarity between the PEL project and the TML project (i.e. a rail corridor leading to a deep water coal port), that project has now been abandoned because it is not viable.*
1327. Based upon PEL's own then-contemporaneous projections, PEL's proposed coal-rail-port project was never financially viable. Moreover, if PEL had truthfully disclosed that its numbers reflected a non-viable project (rather than the "financially viable" project it wrongfully claimed), the proposal – and this case – would have ended before it ever began.
1328. In response to these stark, adverse facts, PEL and its quantum expert, Versant, attempt to distance themselves from PEL's own 2012 financial projections – as though by calling PEL's numbers merely "preliminary," one could erase the fact that those numbers demonstrate a non-viable project. Instead, PEL and Versant continue to advocate for a DCF method of future profits that is unreliable and not permitted by well-settled precedent.
1329. Then, PEL cites and misapplies legal concepts such as "loss of opportunity," in an effort to create the *appearance* of alternate legal and factual bases for damages. In reality, PEL's damages arguments twist back in on each other. Each damages argument, while labeled differently, still uses and relies on the unreliable DCF methodology.
1330. In sum, despite PEL's newfound desire to provide multiple options for the Tribunal to choose from, PEL's damages claims still all suffer, at their core, from these fundamental and fatal flaws:
- a. PEL is attempting to value a one-time TML project, instead of its own alleged rights (which would yield zero damages) as its basis for damages;

- b. The TML project PEL is attempting to value is actually itself a non-viable project that has been abandoned based on current economics;
- c. The mirage of future profits and lost opportunity PEL claims is in each instance based upon an wholly unreliable DCF methodology;
- d. The fact that Versant’s DCF methodology purports to show millions and millions of dollars of future profits for a project that TML has abandoned itself demonstrates how unreliable Versant’s analysis is; and
- e. While PEL is entitled to no damages, PEL itself has failed or refused to produce any evidence of direct costs upon which even those supposed damages could be awarded.

1331. For these and all of the detailed reasons that follow, as well as the above arguments demonstrating MTC’s lack of liability in all events, PEL is not entitled to any damages.

B. PEL’s New Damages Claims Are in Violation of Procedural Order No. 1

1332. As a preliminary matter, before addressing the substantive issues with PEL’s damages claim, Mozambique respectfully requests that the new damages claims of the Reply be stricken because they violate Procedural Order No. 1. The Order provides, in relevant part:

Absent leave from the Tribunal for good cause shown, no new argument shall be presented, and no new evidence shall be attached to the Reply on the Merits and Response to Objections to Jurisdiction regarding the Claim, except if required to rebut arguments and evidence submitted with the Statement of Defence and Objections to Jurisdictions and/or if evidence has arisen from the document production.

Procedural Order No. 1, dated 14 October 2020

1333. Among other things, PEL presents a new argument for *ex ante* damages. As Dr. Flores explains, “if Versant wished to perform an *ex ante* valuation of the Project, it should have relied on the information that Patel itself produced prior to its *ex ante* valuation date.” **RER-9** Second Expert Report of Dr. Daniel Flores (“Flores Second Expert Report”), ¶ 121. There is no excuse for PEL and Versant having failed to provide an *ex ante* valuation, if any, in its initial submission.

1334. Similarly, PEL – apparently now realizing the weakness of its claim based upon future profits and a DCF analysis, purports to provide two “loss of opportunity” damages figures in a (flawed) effort to hedge against the speculative nature of its DCF-based damages claims. PEL does not offer a reason or basis as to why – if a “loss of opportunity” damages amount was warranted in this matter (and it is not in all events) – PEL could not have presented the theory and amounts in its first submission.
1335. Finally, even as to the *ex post* DCF analysis, PEL now restates its prior damages claim – grossly inflating the amount from \$115.3 million to a new claim for \$156 million. While PEL purports to rely on the TML “bankable” Feasibility Study produced by MTC to justify its new damages claim, PEL never attempts to explain how or why its expert Versant could have submitted the first \$115.3 damages claim (a claim it was willing and able to present as supposedly valid, reasonable, and non-speculative in October 2020), but then increase those supposedly valid, reasonable and non-speculative damages claims by \$44 million on the basis of one document. If there had been non-speculative DCF inputs reasonably and justifiably supporting a claim of \$156 million in damages (there are not), those amounts should have been identified and supported by Versant as part of the initial submission of the claim.
1336. Pursuant to Procedural Order No. 1, each or all of the above new damages claims should be stricken.

C. Damages May Not Be Awarded for An Illegal or Fraudulently Obtained Alleged Right

1. Damages for The Alleged Right to the Direct Negotiation of a Concession Are Zero – Such an Alleged Right Would be Illegal Under Mozambique Law

1337. In Mozambique’s Statement of Defense, Mozambique provided factual, legal, and expert analysis demonstrating that PEL’s claim for USD \$115.3 million was baseless and unwarranted.
1338. Among the reasons why PEL is not entitled to the damages claimed, Mozambique demonstrated that the alleged right to a direct negotiation of a concession would be illegal under Mozambique law. *See* SOD ¶¶ 264-68; 472.2; 489-91; 524-554. The illegality of a direct award to PEL is further supported above. No willing buyer would pay for an illegal

and unenforceable right under Mozambique law; therefore the value of an illegal right was zero. *See id.* ¶¶ 825-26.

1339. As discussed above, notwithstanding PEL’s attempts to claim otherwise, an award of the alleged right to a concession without a public tender continues to be illegal under Mozambique law. Since no willing buyer would pay any amount for an unenforceable and illegal alleged contractual right, there are no damages for failure to provide PEL the alleged direct award of the concession.

2. Damages Cannot Be Awarded for An Alleged Right Procured By Fraud

(a) PEL Procured Its Alleged Rights in The MOI By Failing to Disclose Its Blacklisted Status

1340. Also discussed above, PEL have an obligation to disclose to the MTC its blacklisted status – particularly where that blacklisted status related specifically to a past incident in which PEL had bid on a transportation infrastructure project, won the contest and then reneged and withdrew that bid as economically non-feasible.

1341. Moreover, if MTC had known about PEL’s blacklisted status and the reasons for that blacklisting, MTC would have ceased all further dealings with PEL.

1342. PEL did not execute a PPP concession agreement with the MTC, and never would have executed such an agreement if the concealed facts had been revealed to the MTC.

1343. Without a concession agreement, not only was there no investment, but there are no damages – PEL is left with gross speculation.

(b) PEL Procured Its Alleged Approval of the PFS By Falsely Representing That Its Financials Demonstrated A “Financially Viable” Project

1344. In its Statement of Defense, Mozambique has demonstrated that PEL had procured its alleged rights in the MOI, and in particular, had procured the approval of the PFS, by attaching financial information in May 2012 that PEL represented demonstrated the PEL-proposed project was “financially viable,” when in fact those financials demonstrate that the project was not financially viable. *See* SOD ¶¶ 834-42 (citing **RER-4**, Flores Expert Report (Quadrant Economics), ¶¶ 36-37).

1345. In response, PEL protests that Mozambique’s claims of fraud in this regard are “disingenuous.” PEL attempts to dismiss Mozambique’s argument by claiming that its “cash flow” projections in May 2012 were merely a “worst case scenario,”⁸⁶ and “cannot be relied upon as an accurate assessment of future profits.” Reply ¶¶ 1119-1121. Specifically, PEL claims now that in 2012, PEL was not even trying to provide reliable financials in 2012 because “there was no concession agreement available at the time this preliminary projection was prepared.” “[T]he terms of the concession were unknown.” Reply ¶¶ 1121. “A detailed financial evaluation would be required, as part of a bankable feasibility study, to demonstrate the Project’s potential economic viability.” *Id.*
1346. PEL’s attempt to brush aside its May 2012 financials unwittingly admits the very fraud PEL was trying to disprove. Moreover, PEL’s argument contradicts its own theory of the case – and presents PEL’s alleged rights under the MOI for what they were: an as-yet undeveloped, un-granted concession, on unknown terms, for a project that, even on PEL’s argument, has essentially gone nowhere in the nine years since PEL proposed it.
- (i) PEL Unwittingly Admits The Very Fraud It Was Trying to Disprove
1347. First, as to the fraud, perhaps PEL is (now) telling the truth when it says that PEL would have needed a signed concession and a bankable feasibility study of its proposed project “to demonstrate the Project’s potential economic viability.” Reply ¶¶ 1121. The problem, for PEL, however, is that PEL *did not have* a signed concession, or a bankable feasibility study, when it said – in response to a specific request for financial information – that the project it had proposed in the PFS (such as it was) was “financially viable.”
1348. The Tribunal will recall that when PEL submitted its PFS, PEL did not include meaningful information on the economic feasibility of the project. PEL itself admitted in May 2012 that “at this stage of prefeasibility our more emphasis was on the technical feasibility. . . .” **C-9** at 1. PEL did not submit what PEL itself called a Statement of Fund Utilisation and

⁸⁶ As Dr. Flores explains, the most likely reading of PEL’s worst case scenario comments is not that the May 2012 financials provided a worst-case scenario, but that certain debt financing percentages were reviewed for sensitivity and were presented as worst case, along with many assumptions that were not at all “worst case.” **RER-9**, Second Flores Expert Report, ¶¶ 124-127.

projected/estimated cash for the entire project until 15 May, 2012, after MTC requested this information from PEL.

1349. In response to a request for financial information from MTC, PEL provided the May 2012 information – together with a cover letter. **C-8**. That cover letter specifically claimed that the attached financials demonstrated a financially viable project:

We are hereby submitting the estimated and projected commercial model and statement of utilisation of funds for the project. This model is based on certain assumptions and considering these assumptions gives a clear idea that even in worst case scenario also *it is financially viable* even without considering the multiple growths.

Id., 1-2 (emphasis added).

1350. Simply put, if PEL is to be believed, now, when it says that its May 2012 financials were not meant to demonstrate the future profits or the “Project’s potential economic viability,” then PEL’s claim to MTC in May 2012 that the project as proposed was “financially viable” was baseless, and its attachment of the May 2012 financials – which do not support a “financially viable” project – were at best misleading.
1351. In all events, if PEL had said to the MTC in 2012 what it had said in its Reply now – that PEL would have needed to know the terms of the concession, and to conduct a bankable feasibility study in order to demonstrate the Project’s potential economic viability – *at the least* such a statement would have raised a red flag about even allegedly approving the PFS.
1352. Indeed, as Mr. Zucula demonstrates in his second Witness Statement, if PEL had indicated in May 2012 that its now so-called “preliminary” financials did not support a finding of a financially viable project, the MTC would have ceased working with PEL immediately. **RWS-4**, Zucula Second Witness Statement, ¶ 15.
1353. In short, by claiming now that PEL’s May 2012 financials were insufficient to demonstrate the viability of its proposed project and not intended for that purpose, PEL admits its own fraud to MTC in May 2012.

(ii) PEL Unwittingly Disproves Its Own Theory of the Case

1354. Even if PEL’s argument against its own May 2012 financials did not prove fraud, PEL’s argument also contradicts PEL’s own theory of the case.
1355. When PEL is attempting to describe its theory of the “investment” that gives rise to its claim, PEL defines its alleged “investment” as its alleged rights conferred in the MOI. *See* SOC ¶ 257(a) (the alleged “direct award of a concession to implement the Project, as well as all of the rights under the MOI associated with the Project.”).
1356. Unfortunately for PEL, however, it is indisputable that a PPP concession agreement was never drafted, negotiated, finalized or executed by MTC and PEL. And given the pre-contractual and pre-investment status of any contemplated future concession, PEL is not entitled to damages based upon alleged, speculative future profits. *See, e.g., RLA-28, Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), ¶¶ 119-20, 122.
1357. In an effort to bolster its claim for future profits, despite the non-existent concession, PEL necessarily (albeit) wrongly claims that PEL’s imagined, but un-negotiated PPP concession was a *fait accompli* – PEL simply assumes there would have been no areas of any dispute, and a finalized concession was a virtual certainty. *See, e.g., Reply* ¶ 1099.
1358. PEL’s argument, while otherwise unavailing, see below, is refuted by PEL’s own attempt to excuse its lack of reliable financials at the time of the PFS:

“[T]here was no concession agreement available at the time this preliminary projection was prepared.” “[T]he terms of the concession were unknown.”
“A detailed financial evaluation would be required, as part of a bankable feasibility study, to demonstrate the Project’s potential economic viability.”

Reply ¶¶ 1121.

1359. Simply put, PEL is entirely correct when it admits that “the terms of the concession were unknown” – *because PEL never acquired nor establish a PPP concession nor ever executed the necessary PPP concession agreement*. The value of its alleged “investment” (even assuming *arguendo* there was one, although in reality there was no “investment”) therefore, cannot be the alleged future and speculative profits of a concession that PEL never had and never existed between PEL and the MTC.

(c) PEL's Two Frauds Are Related, and Are Together Particularly Inexcusable as It Relates to Damages

1360. While PEL attempts to brush aside its blacklisting as inconsequential, and its May 2012 financials as deliberately “worst case” and unreliable to show future profits or financial viability, the two problems are related, and significant.
1361. PEL was blacklisted in India precisely for bidding a project at a low-ball, poorly vetted price, before retracting that bid as unrealistic. *See RLA-21*. After PEL had bid a highway development tender, and the National Highways Authority of India (“NHAI”) informed PEL “that its bid had been accepted,” PEL reneged on its bid and, instead, “expressed its *inability to confirm its acceptance on the ground that its bid was found not commercially viable on a second look.*” *Id.*, ¶¶ 1-2 (emphasis added). PEL attempts to treat its nearly identical conduct as “business as usual” in this case.
1362. Here, PEL presented a loose PFS, unsupported by financials. Then, when Mozambique questioned the lack of financials, PEL presented a cash flow analysis PEL *said* supported financial viability, but which PEL now says was not even intended to show future profits and could not be relied upon. And more to the point, while PEL did not conduct a “second look” at PEL’s May 2012 financials, Dr. Flores has looked at them and has found that the project was not commercially viable on a second look. **RER-9**, Second Expert Report, ¶ 133.
1363. Were still more indicia that PEL’s proposal was never financially viable needed, in the year 2012, the TML project (upon which PEL relies for its damages analysis) failed even to get off the ground before TML eventually determined to phase the project, abandon the coal-specific port, and delay the rail line (potentially mothballing it altogether).
1364. Under the circumstances, it is regrettably offensive that PEL presents such a *blasé* attitude toward both its blacklisting and its May 2012 financial projections. If PEL had told the MTC that (1) it had been blacklisted, (2) that the reason for its blacklisting was presenting a bid it later retracted as *economically* nonviable, and (3) that its financials in support of its PFS were not actually sufficient to demonstrate the financial viability of the project, the MTC would have ceased further dealings with PEL right then, without any of the needless dispute that now arises. **RWS-4**, Zucula Second Witness Statement, ¶ 15.

(d) PEL's Excuses Attempting to Distance Itself From Its Own May 2012 Financials Also Demonstrate Violations Of Mozambique Law

1365. While the several frauds committed by PEL are sufficient to deny PEL any relief, it must also be noted that PEL admits that it was in violation of Mozambique law when it claims to be entitled to a direct concession without an economic and financial feasibility study.
1366. Mr. Ehrhardt explains the numerous requirements of an economic and financial feasibility study under Mozambique law, and highlights the items missing from PEL's PFS submission. *See RER-11*, Ehrhardt Expert Report, ¶¶ 81, 89-91. Without these required points of information, a concession would not have been permitted in all events. *Id.*

D. PEL Is Not Owed Damages Based Upon the Value of The Alleged Right in The MOI To Direct Negotiation of A Concession.

1. PEL Is Not Entitled to Alleged Future Profit-Based Damages for A Concession Never Awarded and That Never Happened.

1367. In its Statement of Defense, Mozambique demonstrated that international law does not permit alleged lost profits damages based upon a concession that was never awarded. Where a project's "future profits are so dependent on as yet unobtained preferential treatment from the government that any prediction of them would be entirely speculative," a discounted cash flow ("DCF") projected future damages analysis is not appropriate. *See RLA-28, Metalclad*, ¶¶ 119-20, 122.
1368. In response, PEL persists in seeking a lost profits valuation based now on multiple DCF analyses, and attempts to distinguish the precedent relied on by MTC. PEL's arguments are unavailing for two reasons: (1) PEL's attempts to distinguish MTC's case law are wrong, and, in all events (2) international law is replete with decisions recognizing that a DCF analysis is inappropriate where a project does not have a record of operations and profits (let alone where no project as proposed exists at all).
- a. PEL's Attempts To Avoid Mozambique-Cited Precedent Are Wrong.**
- i. *Bosca* is directly analogous to the current arbitration, and rejects an award based on lost profits or a DCF analysis.**
1369. Mozambique cites *Bosca v. Republic of Lithuania* for the proposition that no damages (regardless of how calculated or estimated) should be awarded for the "value" of a concession that is never awarded. *See RLA-83, Luigiterzo Bosca v. Republic of Lithuania*,

UNCITRAL, PCA Case No. 2011-05, Award (17 May 2013). PEL attempts to distinguish *Bosca* on the basis that “the rights on which PEL seeks to rely in this Arbitration are not ‘pre-contractual,’ as they were in Mr. Bosca’s case.” Reply ¶ 1088(a). In fact, however, the PEL rights are precisely “pre-contractual,” just as in *Bosca*.

1370. In *Bosca*, the claimant Bosca had been the winning bidder in a public tender for the acquisition of a beverage producer. **RLA-83**, *Bosca*, ¶¶ 5, 84. Lithuania was accused of wrongdoing in the process of negotiating the final award of the tender to Bosca. *Id.*, ¶ 285.
1371. While Bosca had “legitimate expectations” that Lithuania would approve the final contract, the “outcome of the process was by no means certain.” The parties “were still in pre-contractual negotiations.” *Id.*, ¶¶ 292, 296.
1372. Conceptually, there is no difference between a “winning bidder” (as in *Bosca*), and an alleged right to negotiate a concession based on the MOI (as in this case). (If anything, a “winning bidder” is in a much stronger position relative to expectations of award.) Both fact scenarios find the would-be-claimant in the same scenario – possessing at most an alleged right to *attempt* to finalize a concession that does not exist until it is actually negotiated and finalized. That is, even under PEL’s best version of its alleged rights under the MOI, PEL was still only allegedly entitled to direct *negotiations* of a concession – a concession that was never finalized, or even drafted. The fact that – according to PEL – the conditions for the award of a concession to MTC had been met, *see* Reply ¶ 1088(b), does not alter the fact that the terms of such a concession had not in fact been developed or agreed upon.
1373. While PEL self-servingly treats the outcome of negotiations as a near certainty, rather than speculation, in fact events demonstrate just how far the sparse MOI and PFS were from the terms of a concession.
- 1373.1. Neither the MOI nor the PFS had the necessary content on which to award a direct concession. **RWS-4**, Zucula Second Witness Statement, ¶ 4.
- 1373.2. The PFS did not even include a bid price, or other basic terms of a concession. *Id.* *See also* **RER-11**, Ehrhardt Expert Report, ¶¶ 82-88, 208-19.

- 1373.3. The PFS did not include any information about concessionaire entities or partners, project costs, or other items. **RWS-4**, Zucula Second Witness Statement, ¶ 4. “[M]any fundamental commercial terms [are] not specified in the PFS or elsewhere.” *Id.*
- 1373.4. PEL was also required, if it wished to *pursue* the project, to negotiate a project company, or joint venture, with CFM. *Id.*, ¶ 7. And “PEL did not successfully negotiate and form a project company with CFM.” *Id.*, ¶ 9. CFM was simply not interested in negotiating with PEL or investing in the project as suggested by PEL. *Id.*, ¶ 10.
- 1373.5. PEL did not provide the offtake or other mining commitments necessary. *Id.*, ¶ 13.
- 1373.6. PEL had not yet complied with economic, financial or environmental studies required by law. *See RER-11*, Ehrhardt Expert Report, ¶¶ 78, 141-164.
1374. In addition to the above, while PEL does not claim to consider it significant, it is still reasonably likely that in the course of any such negotiations PEL claims it was owed, PEL would have eventually been forced to disclose (as it now claims) that its own numbers were too preliminary to have been able to state that the project was actually “financially viable.” Such a disclosure in the course of any negotiations would have ended the discussions immediately. **RWS-4**, Zucula Second Witness Statement, ¶ 15.
1375. Accordingly, PEL’s attempt to distinguish *Bosca* is unavailing. As in *Bosca*, PEL is – at most – “only entitled to recover direct damages Lost profits based on the assumption of an agreed SPA are much too remote and speculative.” **RLA-83**, *Bosca*, ¶ 301.
- ii. ***Metalclad* is also directly applicable and precludes an award of alleged future profits for a concession never awarded.**
1376. PEL also attempts to distinguish *Metalclad*. Again, PEL is wrong.
1377. In *Metalclad*, the claimant *Metalclad* had built a transfer station and landfill for hazardous waste. **RLA-28**, at ¶ 45. Due to alleged wrongdoing by Mexico, *Metalclad* was prevented from operating the landfill. *Id.* at ¶ 45-69. *Metalclad* – like PEL here – attempted to support a claim of damages based upon a DCF analysis of future profits. *Id.*, ¶ 114.

1378. The *Metalclad* landfill had been constructed, but the landfill was never operated. *Id.*, ¶ 121. Indeed, the landfill was never operated because of the alleged wrongs by a Mexican municipality improperly refusing to grant permits. *Id.*, ¶ 45-69.
1379. *Metalclad's* decision regarding damages was simple and directly applicable:
121. The Tribunal agrees with Mexico that a discounted cash flow analysis is inappropriate in the present case because the landfill was never operative and any award based on future profits would be wholly speculative.
122. Rather, the Tribunal agrees with the parties that *fair market value is best arrived at in this case by reference to Metalclad's actual investment in the project.*
- Id.*, ¶¶ 121-22 (emphasis added).
1380. In this case, PEL never constructed, let alone operated, the project. Indeed, even TML, as the winning bidder of the public tender, has not built, let alone operated the project. Accordingly, as *Metalclad's* reasoning holds – a DCF analysis of future profits is not a valid methodology, and any award based on future profits would be “wholly speculative.” *Id.*, ¶ 121.
1381. Nor is it an answer, as PEL attempts, to blame the MTC for the fact that PEL has not built or operated the project. First, PEL simply assumes away its burden when it assumes that it was entitled to a concession (it was not), and that the supposed concession terms were sufficiently well-known. (They were not, as PEL elsewhere admits.) Second, even if one were (wrongly) to equate the TML concession with the PEL proposed project, as PEL attempts to do, even the TML concession never got off the ground, has not been built, and has now been dramatically curtailed – all for reasons having nothing to do with alleged wrongdoing by the MTC.
1382. As TML itself reported, Mozambique has faced many challenges in its political and economic outlook. **R-42** a 2. Mozambique experienced sporadic low-level insurgencies from the Renamo Party, *id.*, GDP growth was cut in half in 2016 (from 6.6% to 3.3%), and World Bank growth forecasts were revised downward in 2017. *Id.*
1383. Specific to coal, global consumption has stagnated; consumption in 2019 is at the same level as in 2011. **RER-4**, Flores Expert Report (Quadrant Economics), ¶ 65. Consumption

in India and China – two aspirational destinations for PEL’s coal exports, have similarly leveled off or are declining since approximately 2012. *Id.*, ¶ 65; Figure 1. Mitsui divested its equity stake in the Nacala Corridor for \$1 in 2021. *See id.*, ¶ 50.

1384. Given the current, and projected, state of the coal export market, as well as improvements made to both the Beira and Nacala ports and corridors, the central concepts of a deep sea coal port and a rail corridor have been abandoned – not because of the MTC or TML, but because the economics cannot be justified at the present. **RWS-3**, Chauque Second Witness Statement, ¶ 14.
1385. Third, in all events, the *Metalclad* Tribunal faced this exact argument. Claimant in *Metalclad* specifically contended that shortly after it purchased the company meant to facilitate the operation of the hazardous waste transfer station and landfill, Respondent had “embarked on a public campaign to denounce and prevent the operation of the landfill.” **RLA-28**, *Metalclad*, ¶ 37. The fact that the government Respondent in *Metalclad* had prevented the operation of the landfill did not, however, excuse the use of an unreliable DCF analysis; the *Metalclad* Tribunal still held that a DCF analysis of future profits would be wholly speculative. *Id.*, ¶ 121. Moreover, the *Metalclad* Tribunal expressly used cost-based damages – *as the measure of the fair market value of Metalclad’s investment*. *Id.*, ¶ 122.
1386. *Metalclad* is instructive for another reason as well. *Metalclad* favorably cites **RLA-38**, *Phelps Dodge v. Islamic Republic of Iran*, IUSCT Case No. 99, Award No. 217-99-2 (19 March 1986), for the proposition that damages based upon future profits are not appropriate where “the property’s future profits were so dependent on as yet unobtained preferential treatment from the government that any prediction of them would be entirely speculative.” *Id.*, 132-133.
1387. PEL attempts to distinguish *Metalclad* and *Phelps Dodge* on the basis that PEL’s rights were already allegedly obtained, in the MOI, and thus the holding of *Phelps Dodge* did not apply. *See Reply* ¶ 1089. In so arguing, PEL again conflates the alleged right of negotiation of a concession with an actual concession upon settled terms, and ignores the substantial uncertainty of the project *on any terms*.

1388. In *Phelps Dodge*, Iran was accused of taking *Phelps Dodge's* 19.36% ownership interest in a company meant to manufacture wire and cable. **RLA-38**, *Phelps Dodge*, ¶ 1. The Tribunal had no difficulty determining that claimant Phelps Dodge had a property interest in a project, *id.*, ¶ 29, – akin to PEL's alleged interest in the MOI.

1389. The problem with a future profits-based award was not whether an alleged right or interest existed, however. One may assume (for the sake of argument) that it did, just as it did in *Phelps Dodge*. The problem with a future profits-based award was that the future profits depended on such a collection of unproven uncertainties, including as-yet unobtained preferential treatment from the government, *id.*, ¶ 30, that an award based upon future profits was improper:

The Tribunal cannot agree that [the project company] had become a “going concern” prior to November 1980 so that such elements of value as future profits and goodwill could confidently be valued. In the case of [the project company], any conclusions on these matters would be highly speculative.

Id., ¶ 30.

1390. Similarly in this case, even assuming (again, for the sake of argument), that PEL was owed, as a matter of right, some as-yet un-negotiated, un-determined and un-signed concession, the project was not yet even defined, let alone a going concern for which future profits could be awarded.

(b) Numerous Additional Cases Refuse to Award Future Profits for Projects with No Operational History

1391. The fallacy of PEL's argument extends beyond the fact that it cannot validly distinguish *Bosca*, *Metalclad*, and *Phelps Dodge*. It is a well-settled principle that a claimant may not seek damages based upon future profits for a project such as this one without an operational history.

1392. For example, in *PSEG Global, Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, the Tribunal considered an argument by claimant PSEG Global, similar to the arguments of PEL in this case. **RLA-55**, *PSEG Global*, ¶¶ 281-89. In *PSEG Global*, claimant had been granted a concession for a power plant, including related mining. *Id.*, ¶ 302. However, at the time of the dispute, no mining had been undertaken, and the claimant had not yet started to build the plant. *Id.*, ¶¶ 303-04.

1393. The *PSEG Global* Tribunal first rejected an award of damages based upon Fair Market Value. Central to the Tribunal’s decision, from a financial and legal point of view, the project had not reached financial close, or started construction or operation. *Id.* ¶¶ 306-07. Accordingly, while there “might be a market” for a buyer willing to buy such an un-started project, it would be “a very limited market . . . that never comes anywhere near the amount claimed in this case.” *Id.*, ¶ 306.

1394. Even more aptly, the *PSEG Global* Tribunal rejected “loss of profits” as a basis for an award of damages. The reasoning of the Tribunal is particularly relevant to the present case:

310. The second heading of claim for compensation is based on the lost profits approach put forth by the Claimants. The Tribunal is mindful that, as the award in *Acuoven* noted, ICSID tribunals are “reluctant to award lost profits for a beginning industry and unperformed work.” This measure is normally reserved for the compensation of investments that have been substantially made and have a record of profits, and refused when such profits offer no certainty.

311. The Respondent convincingly invoked in support of its objections to this approach the awards in *AAPL* and *Metalclad*, which required a record of profits and a performance record, just as the awards in *Wena*, *Tecmed* and *Phelps Dodge* refused to consider profits that were too speculative or uncertain. The Respondent also convincingly noted that in cases where lost profits have been awarded, such as *Aminoil*, this measure has been based on a long history of operations.

312. The Claimants also noted that line of decisions, but distinguish the situation where there have been contractual arrangements “that establish the expectation of profit at a certain level and over a given number of years,” which results in the concern regarding speculation being removed. The Tribunal would have no difficulty with this proposition, because in fact a self-contained and fully detailed contract can well determine a basis for the calculation of future profits. However, the Tribunal must also note that in many long-term contracts it is most difficult if not impossible to calculate such future profits with certainty, particularly if the contract is subject to adjustment mechanisms and other possible variations with time.

RLA-55, *PSEG Global*, ¶¶ 310-12.

1395. As *PSEG Global*’s references make clear, international case law is replete with decisions refusing to award future profits in projects without a history of operations and profits. *See RLA-150*, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No.

ARB/87/3, Award (27 June 1990), ¶¶ 104, 108 (refusing to award future profits where profits were “merely possible” and not shown to be reasonably anticipated or “probable.”); **RLA-120**, *Wena Hotels v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, (December 8, 2000), ¶¶ 122-24 (favorably citing *Metalclad, supra*, and declining to award profits-based damages where on seized hotel had not been renovated by lessor, and the other hotel had been in operation for only 18 months); **RLA-85**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), ¶¶ 185-86 (rejecting a claim for future profits damages based upon a DCF analysis where a landfill had only been in operation for two years and a half); *see also* **RLA-122**, *Rusoro Mining v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016), ¶ 758-60 (noting that “DCF, however, cannot be applied to all types of circumstances. . .” and setting forth factors indicating that it cannot be applied here); **RLA-123**, *Khan Resources, Inc. v. Government of Mongolia*, PCA Case No. 2011-09, Award on the Merits (2 March 2015), ¶ 392 (rejecting a DCF methodology based upon uncertainties in financing, strategic partners, and commercial terms).

1396. Were the above rationale not already sufficient, the *PSEG Global* Tribunal also rejected an award for future profits because in *PSEG Global*, as in this case, the parties had failed to finalize the commercial terms between them.

313. Even assuming that none of those difficulties existed, *in this case the exercise becomes moot because the parties never finalized the essential commercial terms of the Contract, and as a result neither could the additional agreements concerning the sale of electricity, the Fund payments and the Treasury guarantee be finalized*. Relying on cash flow tables that were a part of proposals that did not materialize does not offer a solid basis for calculating future profits either. The future profits would then be wholly speculative and uncertain. By definition, the concept of *lucrum cesans* requires in the first place that there is a *lucrum* that comes to an end as a consequence of certain breaches of contract or other forms of liability. Here such an element is not only entirely absent but impossible to estimate for the future.

* * * *

315. The Tribunal will accordingly also not retain the lost profits heading of claim as the measure of compensation because it cannot be justified from a legal or economic point of view in the circumstances of the case.

RLA-55, *PSEG Global*, ¶¶ 313, 315.

2. So-Called “Individual Circumstances” Do Not Warrant Application of Versant’s DCF Analyses

(a) Individual Circumstances Do Not Cure PEL’s Speculative Damages

1397. In an effort to salvage an argument for application of a DCF analysis, and in particular its *ex post* DCF analysis, PEL cites *Crystallex International Corporation v. Bolivarian Republic of Venezuela* for the proposition that “whether a particular method is appropriate to utilize is based on the circumstances of each individual case.” Reply ¶ 1057 (quoting **CLA-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 886).

1398. Such “individual circumstances,” however, do not excuse applying a speculative damages methodology. PEL fails to note that *Crystallex* itself rejected as improper two of the four damages methodologies, *id.*, ¶¶ 900, 910; accordingly, “individual circumstances” is not a panacea against PEL’s obligation to demonstrate its damages, if any, by a reliable methodology.

1399. Moreover, even if a DCF analysis were otherwise appropriate – and it is not – the *Crystallex* Tribunal itself noted that applying any methodology based on alleged future profits requires that “the Claimant must prove that it has been deprived of profits that would have actually been earned. This requires proving that there is sufficient certainty that it had engaged or would have engaged in a profitmaking activity but for the Respondent’s wrongful act, and that such activity would have indeed been profitable.” *Id.*, ¶ 875.

1400. In this matter, there is simply no evidence – ongoing operations or otherwise – to demonstrate that the PEL-proposed project would have been profitable.

(b) Any Individual Circumstances Would Dictate Against Damages, Since The Coal Rail Corridor and Port Have Been Scrapped

1401. Indeed, events have proven (if the TML experience is comparable at all) that the project PEL proposed would have been dead on arrival.

1402. To begin with, recall that the project envisioned by PEL's PFS was a 516 km standard gauge rail corridor, with 25 MTPA, from Macuse to Moatize. *See* SOD ¶¶ 625-26 (and citations therein). The TML proposal, on the other hand, contemplated a 639 km cape gauge rail corridor with a different port terminating in Chitima in order to secure offtake from mines never contemplated by PEL. *See id.*
1403. The differences between the PEL project, on the one hand, and the TML project on the other – increased capacity, longer rail, and a different gauge – would have made the TML version of the project *more likely* to generate profits, particularly than the PEL version which PEL's own May 2012 financials demonstrate was not financially viable.
1404. Unfortunately, however, global economics have not developed favorably even for the project as proposed by TML. As Mr. Chauque explains, the TML project is not being built because it is not economically feasible. **RWS-3**, Chauque Second Witness Statement, ¶ 12. The TML Consortium could not finance the project at any time after the 2013 tender—even with the support of ITD, Mota-Engil and Chinese state-owned entities (with much greater relevant experience and far deeper resources than PEL). *Id.*, ¶ 13.
1405. Given the existing, current, and projected state of the coal export market, and the utilization and improvements made to both the Beira and Nacala rail/port corridors, the TML Consortium will not be proceeding as planned with a deep sea coal port and rail corridor, *because its economics cannot be justified at present*. Rather, TML will only seek to proceed with the development of a modest general cargo port at Macuse. A simple, general cargo port, with no rail line for coal export, certainly was not the Project allegedly conceived by PEL. *Id.*, ¶ 14.
1406. Simply put, the PEL proposal is not being built by anyone, and has never been shown to be financially viable. The TML proposal, though better than the PEL proposal (and better than the PGS consortium public tender bid), has not been built by anyone and is currently financially non-viable. Neither project forms a basis for a valid damages claim, considering “individual circumstances” or otherwise.
1407. Nor is it an answer for PEL to claim that TML is to blame for not building the TML project. Without evidence, PEL claims that TML suffered from a “lack of preparedness,” and was less familiar with the project than PEL. *See* Reply ¶ 1125.

1408. First, regarding PEL's so-called "unrivaled familiarity" with the project, as discussed above, PEL grossly overstates its role.
1409. As the Preliminary Study confirmed, the river at Macuse had already been in use for commercial purposes (since before the 1990s) and was already known to have better navigability conditions than elsewhere. **C-4**, 17-18. MTC's Preliminary Study explains there already was an existing port at Macuse, and "even plans for expansion of the port infrastructure and [to] build a railway link to link this port to Milange." *Id.*; see also **RWS-3**, Chauque Second Witness Statement, ¶ 6.
1410. It was likewise known that Macuse had comparative advantages to other areas along this coastline relative to geological conditions. *Id.*
1411. PEL's PFS did not give PEL unique insight into the project. Rather, as demonstrated in MTC's Statement of Defense, PEL's PFS is simply a "preliminary stage" study, consisting of general concepts with limited technical detail, and was submitted with no meaningful analysis of economic, commercial, and environmental feasibility. The PFS "did not reflect a high degree of design development or either a high degree of resources mobilized." SOD at ¶ 91 (citing **RER-1**, Betar Expert Report, at 61-62 (Conclusion A)).
1412. Moreover, by the time of the public tender submissions, any perceived advantage claimed by PEL in terms of "familiarity" was immaterial, because all parties to the public tender had developed their bid submissions.
1413. Regarding an alleged lack of preparedness, PEL gives itself "credit" for having formed its consortium at the time of its public tender, Reply ¶ 1125(b), as though the PGS Consortium could carry out the operational side of the Project as soon as the tender was awarded. As Mr. Ehrhardt explains, however, one certainly would not have expected any winning bidder to have started construction immediately (let alone operations). See **RER-11**, Ehrhardt Expert Report, ¶¶ 187-96.
1414. More importantly, PEL fails to acknowledge that the problem with the project is not its timing, but rather its viability.
1415. While PEL criticizes TML for not partnering with Mota Engil and CNCEC until June 2017, in fact, the selection occurred in 2016 or earlier. **R-88**, CLBrief, 10 July 2018 at 2/3. There

is no evidence that the timing of the selection, or the official signing, hindered the project in any way. In all events, whether one counts from 2016 or 2017, four or five years have passed since those selections. If PEL were right, that there was a reliable, valid manner to determine that the project – at least as proposed by TML – would cash flow with a EBITDA margin of 72%, *see RER-9*, Flores Second Expert Report, ¶ 98, certainly in the last *four or five years*, TML would have had every incentive to have actually undertaken the project as proposed. *Id.* It has not.

1416. The reason, of course, has nothing to do with whether contract participants were signed in 2013, 2016 or 2017. Rather, as recounted above, political, economic, and coal-specific pressures have rendered the third rail corridor and a deep water coal port commercially infeasible.
1417. If anything can be taken from these “individual circumstances,” it is only inexplicable temerity of PEL, who claims the right to take \$156 million from the Republic of Mozambique in recompense for a railway and coal port no one is building.

E. PEL’s Misapplication of “Loss of Opportunity” Case Law Does Not Save PEL’s Damages Claim

1418. Perhaps cognizant of the fact that its future profits, DCF-based analyses are too speculative, PEL purports for the first time to offer an alternate “loss of opportunity” or “loss of a chance” analysis. There are three fundamental flaws with PEL’s “loss of opportunity” damages number.
- a. The number does not avoid the speculative “future profits” or DCF-based damages amounts at all; in fact it improperly adopts those same flawed, impermissible amounts to generate a so-called “loss of opportunity.”
 - b. The “loss of opportunity” case law upon which PEL relies does not calculate the “loss of opportunity” in any manner proposed by PEL.
 - c. The absurd and guesswork “probability” applied to PEL’s alleged “loss of opportunity” has no basis in fact, and merely compounds the speculation of PEL’s damages claim. If anything, a “proper” probability, accounting for all contingencies and uncertainties, would yield no damages.

1419. Each of these flaws in PEL’s “loss of opportunity” damages are addressed below.

1. Damages Based Upon Impermissible, Speculative Inputs are Still Speculative.

1420. PEL’s “methodology” for purporting to calculate “loss of opportunity” damages is simply to multiply two of its DCF-based damages claims by 90% - thereby allegedly arriving at a distinct “loss of opportunity claim.” Reply ¶ 1102.

1421. While such a methodology is not actually supported by the decisions PEL cites, the preliminary factual problem is that PEL’s methodology does not *avoid* the speculative nature of the DCF analyses in this case; it actually adopts them. Dr. Flores succinctly notes: “any probability adjustment applied to Versant’s speculative and incorrect damages calculations would result in an incorrect and speculative assessment of damages.” **RER-9**, Flores Second Expert Report, ¶ 30.

2. Case Law Does Not Support The Methodology PEL Uses to Claim “Loss of Opportunity” Damages

1422. PEL appears to take proposed math for its “loss of chance” calculation from the following quotation:

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.

1423. PEL attributes this quote to **CLA-151**, *Lemire v. Ukraine*, ICSID Case. No. ARB 06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 246-251. *See* Reply ¶ 1096. However, the block-quoted text included by PEL in its Reply does not exist in *Lemire*. Rather, the decision from which PEL appears to be quoting is the Award in that same case. *See id.*, ¶¶ 246-51. However, PEL fails to note that in the very next paragraph, the *Lemire* Tribunal rejects the application of “loss of chance” damages to the circumstances of that case. *Id.*, ¶ 252. Accordingly, the *Lemire* decision provides no instruction as to what the Tribunal meant by “hypothetical maximum loss,” or how one determines the “probability of the chance” (whatever that means) coming to fruition.

1424. It is clear from other case law, however, including case law cited by PEL, that “loss of chance” does not involve multiplying speculative DCF-based damages times some

probability (whatever it might be), in order to simply relabel the now-discounted future profits as “loss of chance.”

1425. For instance, PEL cites *Gavazzi v. Romania* as a loss of chance case. Reply ¶ 1097 (citing **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, ¶ 224). PEL claims that *Gavazzi* stands for the proposition that loss of chance might be particularly appropriate instead of an award of sunk costs where – allegedly – the uncertainty in damages was brought about by Respondent’s conduct. *Id.*
1426. As an aside, even in a light most favorable to PEL, Mozambique does not agree that most, if any, of the uncertainty in PEL’s future profits claims are brought about by alleged conduct of the MTC (or more generally Mozambique for that matter). For instance:
- PEL, not the MTC, generated financials in May 2012 demonstrating a non-viable project, even while PEL claimed the project was viable.
 - PEL, not the MTC, failed to provide any other contemporaneous financial assessment of the project used by Versant to generate any damages, *ex ante* or otherwise.
 - The MTC was certainly not responsible for global coal price declines, uncertainty surrounding coal supply and demand, or rail customer supply and demand.
 - The MTC was not responsible for the eventual TML project being delayed and phased due to, among other things, a lack of clear viability.
 - The MTC is not responsible for the fact that, as even Versant admits, its DCF valuation “was sensitive to certain key parameters.” Second Versant Report, ¶ 56.
1427. In all events, focusing on *Gavazzi*, which actually held that “the DCF method or any cash flow-based approach *cannot* be used to determine compensation in the present case.” **CLA-299**, *Gavazzi*, ¶ 94. And *Gavazzi* most certainly did not thereafter bring the impermissible DCF analysis back into the damages case simply by multiplying the results of a DCF analysis by a probability and labeling it “loss of chance.”

1428. Instead, the *Gavazzi* Tribunal assessed whether an unlevered income valuation method based on a particular business plan applicable to the project could support an evaluation of future income. *Id.*, ¶ 95. Unfortunately for claimants, as with PEL here, the project in *Gavazzi* was, among other things, “embryonic,” and “only in an incipient stage,” “unduly optimistic,” “never finalised legally or commercially.” The *Gavazzi* Tribunal rejected the effort to establish future income, *id.*, 103-119, and *ultimately did not attempt to base a “loss of chance” damage award on alleged lost profits at all.* *Id.*, ¶ 228.
1429. Entirely contrary to PEL’s view, the *Gavazzi* Tribunal returned “to the only solid data available” in determining “loss of chance”: “the amounts invested by the Claimants” and an estimate of “the probable future return on such investment.” *Id.*, ¶ 229. The Tribunal found that while international investors typically could hope to double their investment, this particular investment was subject to significant risk. *Id.*, ¶ 230. While the excerpts of the decision do not clarify the precise amounts of the award, it is clear that the Tribunal in *Gavazzi* actually awarded only “50% of the share price and capital invested by the Claimants.” *Id.*, ¶ 232.
1430. Accordingly, *Gavazzi*, far from supporting PEL’s grandiose notions of “loss of chance” calculated by multiplying DCF-based profits times an alleged percentage, actually rejects precisely that methodology. Nor do other “loss of chance” decisions support PEL’s claims.
1431. More instructive is **RLA-48**, *Southern Pacific Properties (Middle East) Limited (“SPP”) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992. In *SSP*, claimant contracted to develop tourist complexes at the Pyramids area near Cairo and at Ras El Hekma on the Mediterranean coast. *Id.*, ¶ 43. Construction began at the Cairo site. Roads, water and sewage mains were built, some excavation occurred, and the main water reservoir was nearly completed. *Id.*, ¶ 61. Planning for certain of the buildings was completed, and 386 lots were sold. *Id.* Thereafter, however, Egypt cancelled the project, for a variety of claimed reasons. The Tribunal determined that the cancellation of the project was compensable, and considered SPP’s claims of damage. *Id.*, ¶ 179.
1432. The *SPP* Tribunal first rejected SPP’s DCF-based damages claims:

In the Tribunal's view, the DCF method is not appropriate for determining the fair compensation in this case because the project was not in existence

for a sufficient period of time to generate the data necessary for a meaningful DCF calculation. At the time the project was cancelled, only 386 lots – or about 6 percent of the total – had been sold. All of the other lot sales underlying the revenue projections in the Claimants' DCF calculations are hypothetical. The project was in its infancy and there is very little history on which to base projected revenues.

Id., ¶ 188.

1433. The SPP Tribunal then turned to SPP's claims for "loss of opportunity" damages. *Id.*, ¶ 198. Most assuredly, the *SPP* did not, having just rejected DCF analysis, re-adopt a DCF analysis as part of a "loss of opportunity" analysis. To the contrary, the *SPP* Tribunal began its "loss of opportunity" analysis by including the amounts of money actually spent by claimant. *Id.*, ¶¶ 198-211.⁸⁷
1434. Next, the *SPP* Tribunal considered claimant's argument that the value of their investment exceeded their out-of-pocket expenses. *Id.*, ¶ 212. In *SPP*, 6% of the lots had been sold, representing an already realized return on investment of at least \$3 million over the costs expended. *Id.*, ¶ 218. The Tribunal, far from awarding speculative future profits or extrapolating damages for claimed success, awarded precisely the sales above costs already experienced as SPP's loss of opportunity. *Id.*, 257.
1435. Thus, "loss of opportunity" does not excuse PEL's reliance on its DCF analyses, and it certainly does not permit PEL damages in the absence of actual experience and proof of loss exceeding its costs.

3. PEL's *Ipse Dixit* 90% Probability Has No Basis In Fact

1436. Were still more needed to reject PEL's baseless claim for a probability-discounted DCF methodology under the guise of "loss of chance," it must also be noted that PEL provides no support for the 90% "probability" of being awarded the concession beyond its own assertion that the award was a "virtual certainty."

⁸⁷ Tellingly, even as to actual costs expended, the SPP Tribunal did not award costs that were not properly documented. *Id.*, ¶ 203. While MTC does not agree that PEL is entitled to any damages, SPP's refusal to award undocumented costs is separately fatal to any alternative award to PEL of its costs in preparing the PFS, as noted below.

1437. First, as noted above, PEL's position that the concession was a "virtual certainty" is belied by PEL's own excuse as to why its May 2012 financials were unreliable for conduct a DCF analysis: "[a] detailed financial evaluation would be required, as part of a bankable feasibility study, *to demonstrate the Project's potential economic viability.*" Reply ¶ 1121.
1438. Second, PEL's 90% assumption fails to account for several potential outcomes with zero probability of a concession award to PEL under any other circumstances.
- a. If PEL had disclosed its blacklisted status, there is zero chance that the MTC would have actually granted PEL a concession and executed a PPP concession agreement. **RWS-4**, Zucula Second Witness Statement, ¶ 15.
 - b. If PEL had disclosed that its May 2012 financials did not support the conclusion that the project PEL proposed was financially viable, there is also zero chance that the MTC would have actually granted PEL a concession and executed a PPP concession agreement. *Id.*
 - c. PEL also had not yet complied with economic, financial or environmental studies required by law. *See RER-11*, Ehrhardt Expert Report, ¶¶ 78, 141-164. While any of these studies would have the potential to create difficulty in the award of the concession to PEL, the economic and financial feasibility studies present the greatest likelihood that the project would never have been awarded to PEL. Given the voluminous economic and financial feasibility required, *see id.*, at 143-163, it is a virtual certainty that PEL would have been forced to disclose the non-viability of the project if it had complied with Mozambique law. In any of these scenarios, there is also zero chance that the MTC would have actually granted PEL a concession and executed a PPP concession agreement with PEL. *Id.*
 - d. PEL had not negotiated a project company, or joint venture, with CFM. Without such a joint venture on agreed-upon terms, there is also zero chance that the MTC would have actually granted PEL a concession and executed a PPP concession agreement. **RWS-4**, Zucula Second Witness Statement, ¶ 7. And indeed, CFM was simply not interested in negotiating with PEL or investing in the project as suggested by PEL. *Id.*, ¶ 10.

F. The TML Project Is Not A Valid Basis for PEL's Claimed Damages, But Certainly Cannot at Once Be Both Comparable and Ignored

1. PEL Has Not Reasonably Responded to The Material Differences of The TML Project

1442. As explained in Mozambique's Statement of Defense, the current version of the project being undertaken TML (even before it was phased) was significantly different than the project PEL proposed in its PFS, in at least the following ways:

- a. PEL proposed capital expense to build the project of approximately USD \$3.115 billion. TML's current Bankable Feasibility Study ("BFS"), on the other hand, proposes a bigger (nearly 20% longer), better (more than 30% more capacity per year) railway, for approximately the same price. **R-42** a 4.
- b. The project proposed by PEL in the PFS was a 516 km line between Moatize and Macuse. Indeed four different "alignments" were considered in the PFS, ranging from 493 km to 518 km; none was longer than 518 km. **R-7**.
- c. On the other hand, the current TML Bankability Study envisions a total of 611 km, extending TML's project 129 km to unlock an additional thermal coal rich area not included in any version of PEL's MOI or PFS. **R-42** at 7.
- d. The additional length of the TML project is meant, in part, to accommodate the plan for 33 MTPA of coal. **R-42** at 4. PEL's project proposed only a maximum of 25 MTPA.
- e. The additional length is the result of TML needing to secure offtake agreements with several mines along the extended route – mines PEL did not even purport to service with either its PFS or public tender submission, in an effort to make the project bankable. **R-42** at 7.
- f. Based upon what little can be gleaned from the rough maps of the PEL PFS, the course of the PEL-proposed railway and the TML-proposed railway are significantly different in other respects as well.
- g. The project proposed by PEL assumed standard gauge rail lines, while the current TML Bankability Study calls for cape gauge rail construction to ensure compatibility with Mozambique's existing rail system. **R-42** at 7.

- h. The port solution developed by PEL had not actually finalized the location of the port as between two locations on the north bank of the river in Macuse. The PEL port also assumed a massive 1,500 m quay. **R-7**.
- i. The project proposed by PEL had been proposed to be commissioned with six years of a concession agreement. *See* Ex. C-8. The TML project concession agreement was signed in in December 2013, and four years later, the project completion was then estimated as Q4-2022, or some nine years after the concession.
- j. In fact, as of Q1-2021, construction on the TML project is scheduled now to begin only this year.⁸⁸ With at least a 3.5 year construction period, **R-42** at 5, the project cannot reasonably expect to experience revenues until at least 2024.
- k. Eventual completion of the project in 2024 is by no means certain. As of November 26, 2020, TML chairperson Orlando Marques put the cost of the Macuse rail and port complex and USD \$3.2 billion USD, of which about USD \$400 million was currently available (less than 15%).⁸⁹

1443. PEL made no meaningful effort to rebut these differences. Instead, PEL simply assumes that it would have come to the same 2017 plan and project as TML (without any evidence of that fact), but then actually realized that plan and project (despite the fact that TML has barely even proceeded).

1444. PEL's willingness to cherry pick the TML feasibility study from 2017, but then ignore the actual experience of TML since 2017, is improper, and does nothing to address either the differences between the project as proposed by PEL and TML, or the sheer speculation involved in how PEL would have turned a non-speculative profit on a project that has not even gotten off the ground.

⁸⁸ **RER-4, QE-5**, Jorge Marcos, "Mozambique: Construction works on Port of Macuse in Zambézia to start in 2021," Club of Mozambique, 27 November 2020; **RER-4, QE-6**, Club of Mozambique, "Mozambique: Work on Macuse port to begin next year – AIM Report," 30 November 2020.

⁸⁹ **RER-4, QE-6**, Club of Mozambique, "Mozambique: Work on Macuse port to begin next year – AIM Report," 30 November 2020.

2. Substantial Differences Between PEL, on The One Hand, And TML, on The Other, Compel The Conclusion That PEL Could Not Have Undertaken The TML Project.

1445. In its Statement of Defense, MTC demonstrated that it is unlikely that PEL could have undertaken the TML project. In response, PEL claims that in fact, its consortium was as qualified or more qualified than TML. Reply ¶¶ 1122-1125. There are several flaws in PEL's reply.

1446. First, PEL's claim is not that its consortium is entitled to a direct concession, but rather that PEL – on the basis of its own PFS in 2012 – was entitled to a concession. Grindrod – on whose expertise PEL relies extensively in attempting to shore up its own capabilities – was not part of the PFS, and not party to the MOI.

1447. Indeed, despite PEL's claims to the contrary, it was by no means a given that Grindrod would even have been permitted to participate in the project if it had been awarded as a direct concession to PEL. The secret side letter between PEL and its consortium partners carved out the direct award from an award to the consortium and stated:

If the Direct Award is successful, then the Consortium shall terminate and Patel Engineering and SPI shall be entitled to pursue the Project on their own. In such event, if all the Parties agree in writing, Grindrod may participate in the Project.

C-233, Side Letter between PEL, Grindrod and SPI, dated 8 March 2013.

1448. The secret side letter makes clear that PEL was not relying on Grindrod's eventual participation (or not) at the time of the MOI.

1449. Moreover, it was not necessarily a foregone conclusion that Grindrod would have stayed committed to the PEL/SPI/Grindrod consortium even if a public tender had been awarded. The MOU establishing the PGS consortium permitted the parties to the consortium to withdraw "for any reason." C-60. Accordingly, Grindrod's participation was far from the certainty PEL now self-servingly paints – it was always subject to the pleasure of the parties.

1450. In all events, PEL vastly overstates the terms of Grindrod's participation in trying to prop up the consortium's qualifications.

1451. Pursuant to the PGS consortium MOU, it was PEL, not Grindrod, who was anticipated to be the EPC contractor for the project. *Id.* Grindrod was to have been afforded preferential rights to “provide to the SPV and/or the EPC contractor, locomotives, rolling stock, signalling and safety equipments at mutually acceptable terms and conditions including but not limited to the pricing.” *Id.* Marco Raffinetti, a former executive of Grindrod, confirms that Grindrod was expected to offer O&M activities, not the construction and completion of the Project. *See CWS-5*, Witness Statement of Marco Raffinetti, ¶¶ 17-21.

1452. Moreover, PEL does nothing to rebut the other significant differences between it and TML. For instance:

- a. TML had not been blacklisted like PEL and did not fail to make such disclosures in violation of international law principles, Mozambican law, the tender document and PPP best practices.
- b. ITD has more than twelve times as many employees as PEL, and ITD’s outstanding projects are four times higher. *See RER-9*, Flores Second Expert Report, ¶ 43.
- c. To the contrary, PEL admitted that the PEL-proposed PFS represented “potentially one of the biggest projects in PEL’s history.” *See SOC, CWS-1*, Daga Witness Statement, ¶ 49. This revelation is completely contrary to PEL’s repeated misrepresentations to the MTC that this project was business as usual for PEL.

1453. After analyzing the matter, in light of all of the above, Dr. Flores continues to conclude:

I confirm that it is unclear whether Patel would have been capable of completing the Project. The possibility that a MOI could have resulted in the Project being awarded to Patel, only for Patel to then renounce it for lack of economic viability, underscores the fundamental point that valuing Patel’s rights under a MOI is not the same as valuing a shareholding interest in a project. The fact is that, after more than eight years since a concession was awarded, a company with the breadth and scale of ITD has not developed the Project – and has decided to drastically downsize its scope. Versant’s assumption that Patel would have been able to develop the Project is unrealistic and should be rejected.

RER-9, Flores Second Expert Report, ¶ 46.

G. Versant’s Several DCF Analyses Remain Fundamentally Flawed

1454. As the above makes abundantly clear, neither Versant’s original DCF analysis, nor its newly offered versions now, are appropriate. Even ignoring the above, however, Versant’s DCF analyses are themselves demonstrably speculative and flawed and must be rejected.

1. The Speculative and Unsupported Flaws of PEL’s Damages Claims Are Not Improved Simply by PEL Engaging in More Speculation

1455. Before addressing Versant’s several analyses individually, it should be noted that collectively, Versant’s new range of analyses are perhaps their own best evidence of the speculative nature of PEL’s damages.

1456. In reply to Mozambique’s well-founded criticisms of the speculative nature of PEL’s damages, PEL does not properly address its errors, but rather remarkably compounds its flaws – increasing its alleged damages by \$44 million, to \$156 million, using even worse assumptions fed into the same inapplicable DCF methodology.

1457. To make matters worse still, PEL then attempts to respond to the criticisms of MTC’s Statement of Defense by providing no fewer than three alternate damages amounts – all still using the inapplicable DCF methodology. These amounts range from \$44 million on an *ex ante* analysis (before interest) to \$140.4 million on an *ex post* analysis. That is, in response to Mozambique’s well-founded criticism that a DCF analysis is inapplicable, and would yield unreliable results, PEL has used the DCF analysis a total of five times, returning with five different results, all of them unreliable:

9 August 2021 <i>ex ante</i> DCF* “lost chance”	9 August 2021 <i>ex ante</i> DCF*	30 October 2020 <i>ex post</i> DCF	9 August 2021 <i>ex post</i> DCF “lost chance”	9 August 2021 <i>ex post</i> DCF
\$44.4 million	\$49.3 million	\$115.3 million	\$140.4 million	\$156 million

* *ex ante* amounts before alleged interest

1458. The vast disparities in Versant’s own DCF analyses help demonstrate the unreliable nature of the analyses. As the *Tecmed* Tribunal explained, addressing the disparities between *competing* experts:

The Arbitral Tribunal has noted both the remarkable disparity between the estimates of the two expert witnesses upheld throughout the examination directed by the parties and the Arbitral Tribunal at the hearing held on May, 20-24, 2002, and also the considerable difference in the amount paid under

the tender offer for the assets related to the Landfill —US\$ 4,028,788—223 and the relief sought by the Claimant, amounting to US\$ 52,000,000, likely to be inconsistent with the legitimate and genuine estimates on return on the Claimant’s investment at the time of making the investment. The non-relevance of the brief history of operation of the Landfill by Cytrar—a little more than two years— and the difficulties in obtaining objective data allowing for application of the discounted cash flow method on the basis of estimates for a protracted future, not less than 15 years, together with the fact that such future cash flow also depends upon investments to be made—building of seven additional cells— in the long term, lead the Arbitral Tribunal to disregard such methodology to determine the relief to be awarded to the Claimant.

RLA-85, *Tecmed*, ¶ 186.

1459. Here, similar disparities are even more troubling for application of a DCF analysis. First, PEL’s expert, Versant itself, has managed to run two different *ex post* DCF analyses, yielding results different by \$44 million dollars. The fact that Versant offered a \$115.3 million damages claim, and then increased the damages claim 35%, simply by abandoning previous (presumably allegedly supportable) inputs into the DCF analysis in favor of different estimates itself speaks to the sheer speculative nature of its DCF analysis.
1460. To be clear, Versant on behalf of PEL has not substituted previous estimates with actual fact, or operational data. It certainly has not substituted “precise and accurate information,” Reply ¶ 1101, in place of Versant’s previous (imprecise and inaccurate?) DCF inputs. To the contrary, Versant changed almost every assumption in its prior *ex post* DCF analysis based on an outdated four year-old estimates from a feasibility study TML generated on a project that is now not going forward as envisioned. See **RER-9**, Flores Second Expert Report, ¶ 52.
1461. As Dr. Flores explains in his report, “the fact that Versant changed its DCF valuation so drastically within a matter of months shows that (i) Versant had no confidence in its original DCF valuation, although it recommended that the Tribunal award more than a hundred million dollars in damages based on that exercise, and (ii) the DCF method can result in unreliable and speculative damages calculations.” *Id.*, ¶ 52. Using others’ speculation to inform one’s own speculation is still speculation.

1462. Second, as Dr. Flores several analyses make clear, and noted herein, the *ex post* and *ex ante* DCF analysis (in whatever iteration proposed by Versant) is still subject to massive reductions – including swings to zero damages – based merely on reasonable adjustments to Versant’s speculative inputs. *See* SOD ¶¶ 918-920.
1463. Third, none of Versant’s DCF analyses correct the fundamental problem noted by *Tecmed* – the disparity between modest (and at this point unproven and unsupported) amounts PEL may have spent in preparing the PFS, and the enormous sums PEL now claims as damages for a project that never happened.
1464. In short, PEL has demonstrated, by its own submission, that use of a DCF analysis in this matter is highly and unreliably susceptible to assumptions about the PEL project, because the project was never awarded to PEL as envisioned, and even as envisioned by TML, has never been (and likely will never be) operational. Instead, PEL and its damages expert Versant have been left to cherry pick assumptions about a project that never happened, as though simply by offering a range of options, one of them, or any of them, would be less speculative. They are not.
1465. In all events, PEL’s damages – in all of their permutations – continue to suffer the same speculative flaws as PEL’s prior submission, and PEL’s claims for damages based on these numbers should be rejected – even if the Tribunal were to find some breach by MTC.

2. Versant’s New *Ex Post* DCF Analysis Remains Fundamentally Flawed

(a) There Is No Valid Basis for Using an Outdated Four Year Old TML Feasibility Study as Allegedly Reliable

1466. As explained above, PEL purports to advance a new *ex post* DCF analysis, claiming \$156 million – a remarkable 35% increase over its own previous, supposedly supported and supportable damages claim.
1467. In order to attempt to allegedly justify restated damages, Versant relies on the 2017 TML feasibility study. The 2017 TML feasibility study was last updated more than four years ago and “does not reflect the current status and crumbling prospects of the Project.” **RER-9**, Flores Second Expert Report, ¶ 77.

1468. Moreover, a feasibility study does not necessarily (and certainly not by definition) have the reliability ascribed to it by Versant and PEL. As Dr. Flores explains:

Feasibility studies are sometimes labelled as “bankable” – as Versant does in its reports when referring to TML’s FS. This just means that the study achieves a quality and standard that would be acceptable for submission to bankers. Clearly, the better the prospects the higher the chances to obtain financing. Thus, feasibility reports tend to offer very rosy prospects for the projects they are assessing. The assumptions and inputs used must be validated critically when employed in a fair market valuation. Banks and lending institutions will commission an independent analysis of the viability of a project and determine whether it is worth the risk.

RER-9, Flores Second Expert Report, ¶ 78 (*citing* Craig Johnson and Michael McCarthy, “Essential Elements and Risks in Bankable Feasibility Studies for Mining Transactions,” Parsons, Behle, & Latimer, March 2001, p. 6).

1469. Indeed, there are specific indicia in the 2017 TML feasibility study that ought to have given Versant cause for concern. TML’s feasibility study was originally completed in September 2015. Less than two years later, in July 2017, TML updated its feasibility study to reflect “developments in the macro-economy of Mozambique as well as material refinements in Project design.” One of the changes TML implemented in the update was to lower the projected revenues by assuming lower tariffs for the Project related to bleaker outlook for thermal coal. Yet, without providing any explanation, the July 2017 update of the FS introduced “capacity reservation” fees as an additional source of revenue not considered in the original 2015 study, which contributed to offset the drop in revenues from the lower projected tariffs. *See* **RER-9**, Flores Second Expert Report, ¶ 79.

1470. As Dr. Flores opines, “[b]y uncritically relying on the updated TML’s FS, Versant’s new *ex post* DCF valuation is not reliable.” *Id.*, ¶ 79.

(b) A Simple Reasonableness Check Demonstrates that Versant’s *ex post* DCF Analysis Is Unreliable

1471. Indeed, a simple reasonableness check of TML’s majority partner’s ITD’s market capitalization shows how unreliable Versant’s new *ex post* DCF analysis is.

1472. Since Versant’s new *ex post* valuation is largely based on TML’s feasibility study, the equity value of the Project to the PGS consortium estimated by Versant should also represent Versant’s estimate of the equity value of the Project to TML.

1473. ITD, the majority partner of TML, is a publicly-traded company, whose shares are traded on the Stock Exchange of Thailand (“SET”). As a result, as a reasonableness check of Versant’s damages calculation, Dr. Flores analyzed the weight that Versant’s new *ex post* valuation of the Project would have on ITD’s total market capitalization. Dr. Flores’ analysis shows that Versant’s new *ex post* valuation of the Project is unreasonable. *Id.*, ¶¶ 59-64.
1474. As of 1 July 2021, Versant’s new *ex post* valuation date, ITD’s market capitalization was USD \$ 411.7 million. *Id.*, ¶ 55.
1475. Versant’s *ex post* equity value of the Project is based upon alleged future cashflows (after 1 July 2021) of USD \$ 563 million, which is the relevant benchmark for this analysis. *Id.*, ¶ 61-2.
1476. After adjusting for ITD’s 60% ownership interest in TML, Versant’s new *ex post* valuation implies that the Project would account for 82% of ITD’s total market capitalization as of 1 July 2021. *Id.*, ¶ 63.
1477. The above result implied by Versant’s valuation of the Project is unreasonable per se, given the large number of projects ITD is currently developing and the negligible investment ITD has put into the Project as of today. *Id.*, ¶ 64.

(c) Versant’s “Reasonableness Check” Shows that There Are No Damages to PEL

1478. In its submission, PEL alleged that Versant had provided a “reasonableness check” to its *ex post* DCF valuation by reviewing a transaction involving a railway and port infrastructure project connecting Moatize to the port of Nacala (the “Nacala Corridor” or “Nacala”).
1479. Problematically for PEL however, MTC noted that if the Nacala Corridor is considered a proper “reasonableness check,” that reasonableness check results in essentially no damages. This is true because, on 21 January 2021, less than four years after the 2017 transaction, Mitsui announced the sale of its 35% equity stake in the Nacala Corridor (as well as its 15% stake in Vale’s Moatize mine) back to Vale for a nominal amount of USD \$1. *Id.*, ¶ 68.

1480. Faced with these highly inconvenient facts, and contradicting its own prior analysis, Versant now states that there are unique, company specific factors related to Mitsui’s 2021 transaction and concludes that it does “not consider the NLC [Nacala Logistic Corridor] in 2021 to be comparable to the Project.” Second Versant Report, ¶¶ 191, 195.
1481. As Dr. Flores explains, Versant’s attempts to walk away from its own reasonableness check must be rejected.
1482. While different projects and transactions always present specific issues, that fact did not prevent Versant from pointing to Mitsui’s 2017 transaction to show that the valuation of the Project it presented in its first report was reasonable. Versant cannot dispose of its “reasonableness check” now only because a more recent transaction – one much closer to Versant’s *ex post* valuation date and, thus, more relevant to its valuation – implies no equity value for the Project. **RER-9**, Flores Second Expert Report, ¶ 70.
1483. Second, the simple fact is that Mitsui bought its stake in the Nacala Corridor for USD \$348 million, and sold it for USD \$1. This means that Mitsui must have considered the prospects of its investment in the Nacala Corridor no longer attractive as of 2021 compared to 2017. Given that Versant is trying to value the Project as of 2021, not 2017, Mitsui’s 2021 transaction represents a much more relevant transaction. *Id.*, ¶ 71.
1484. Third, while some factors relating to the Nacala Corridor might be less attractive than the one-time-proposed rail corridor to Macuse (which in fact is now relegated to Phase 2, in all events), other factors would make the brownfield Nacala Corridor more attractive than the greenfield corridor to Macuse. Versant’s efforts to cherry-pick project differences when they are helpful to its view, and ignore countervailing information must be rejected. *Id.*, ¶ 72.
1485. Finally, Versant simply and most inexcusably ignores the real world in which the Macuse rail corridor has not been started, is not now being built, and might never be built. Such circumstances are substantially more consistent with the USD \$1 value suggested by Mitsui’s sale, than the values alleged by PEL and Versant. *Id.*, ¶ 73.

1486. Dr. Flores therefor reaffirms his conclusion that, according to Versant’s own “reasonableness check” based on Mitsui’s purchase of a 35% equity stake in the Nacala Corridor, Versant’s *ex post* equity value of the Project should be essentially zero. *Id.*, ¶ 74.

(d) Specific Flaws in Versant’s *ex post* DCF Analysis

(i) Revenues - Pricing

1487. In its first report, Versant calculated projected annual revenues for the Project as the product of (i) prices, expressed in terms of a railway tariff in dollars per tonne-km and a port tariff in dollars per tonne, and (ii) quantities, measured as tonnes of coal transported via the railway and port. **RER-9**, Flores Second Expert Report, ¶ 81. Versant’s assumptions as to prices resulted in an overall weighted average tariff of US\$ 40 per tonne in 2023, the first year of operation in Versant’s original *ex post* projections, increasing annually by inflation from 2026 through the end of the concession.

1488. In its new report, “Versant radically changes its approach in estimating tariffs.” *Id.*, ¶ 83. As detailed more specifically by Dr. Flores, although Versant lowers the projected tariffs for the Project in its new *ex post* valuation, its projections still suffer from two issues.

1489. First, as Dr. Flores explains, it is unclear how risk is to be allocated between TML and the coal miners in the “take-or-pay” contracts that would have allegedly been signed for coal volumes to be transported through the Project. As the latter are exposed to the volatility of the market prices of thermal and metallurgical coal, it is likely that the tariff structure specified in those contracts would transfer part of that risk to the Project. It is reasonable to expect that, if coal prices were to experience a plunge, as they did in 2016, miners would only be able to pay lower transportation tariffs – otherwise, they would be better off halting production. *Id.*, ¶ 84.

1490. Without support, Versant attempts to assume away the problem, supposing that lower tariffs assumed in its projections would limit such risk and that take-or-pay contracts transfer the price risks to the coal miners in exchange for a tariff that considers long-term price expectations. However, stating that those contracts transfer all the risk to the miners is a convenient and unproven justification that Versant uses to convey the incorrect idea that the Project will generate the revenues Versant projects. *Id.*, ¶ 85.

1491. Versant also assumes that to counter lower coal prices, coal miners could embark on “structural changes to reduce costs, including downsizing, improving management, and budget discipline.” However, if anything, those past challenges with profitability would make coal producers more reluctant to enter into new take-or-pay commitments. *Id.*, ¶ 86.
1492. Second, Versant’s analysis ignores the downward pressure on transportation tariffs due to competition with the existing logistics corridors. *Id.*, ¶ 87.
1493. Versant assumes away this problem as well, stating that competition would not be an issue for the Project as its assumed tariffs would have been lower than those of competing transportation corridors, like Nacala. However, Versant ignores the fact that if the Project would have indeed offered its services at lower prices, competitors would have reacted, with a resulting uncertainty on whether the Project would have been able to secure the volumes of transported coal assumed by Versant in its projections. *Id.*, ¶ 88.

ii. Revenues – Quantities

1494. With regard to quantities of coal to be transported by the project, Versant failed to provide any meaningful analysis of the potential demand for the Project’s logistics services. **RER-9**, Flores Second Expert Report, ¶ 89.
1495. PEL and Versant attempt to make new arguments regarding the demand for coal, *see, e.g.*, Reply ¶ 1126, in an effort to shore up their deficiencies. However, PEL’s and Versant’s assumptions about the quantity of coal to be transported by the project remain speculative, for several reasons.
1496. First and foremost, the TML Project is now phased; the rail corridor is not currently being built at all, and the deep-water port being contemplated would not be built as a port for coal, but rather as a general cargo port. **RWS-3**, Chauque Second Witness Statement, ¶ 14. It is simply a *non sequitur* to imagine that – based on the TML Project – any amount of coal currently is or will be transported by a non-existent rail corridor. Second, even if one suspended reality to imagine that a corridor were being built for the transport of coal, Versant’s projections are speculative and unrealistic.
1497. As Dr. Flores explains in detail in Section VI of his Flores Second Expert Report, Versant’s new arguments do not support its assumptions about either coal demand or coal supply.

1498. By way of summary, in its second report, Versant reiterates its position that, if the Project were developed, it would have the same capacity that TML projected in the 2017 update of its feasibility study, 33 Mtpa, and a throughput of 30 Mtpa, resulting in an implied utilization of 91%. **RER-9**, Flores Second Expert Report, ¶168. Versant points to the market analysis presented in TML’s feasibility in 2015, according to which coal mines in Mozambique were delaying investment and adopting a “wait and see” attitude. *Id.*, ¶ 169.
1499. The problem, of course, is that in the years since 2015, neither the mine owners nor TML has seen fit to develop the project, despite Versant’s claims that there is such untapped potential.
1500. Third, there are several other assumptions that Versant makes regarding coal demand, that Dr. Flores concludes are unsupported or incorrect. Among them:
- a. Versant’s assumptions that Indian companies would be willing or able to invest millions of dollars to ramp up coal production in Mozambique is questionable. *Id.*, ¶ 173. To the contrary, among other things, India continues to reduce coal imports. *Id.*, ¶ 174. Versant’s assumptions as to Indian coal imports in 2031-51 certainly cannot be proven by reference to outdated projections from 2015 or 2017. *Id.*
 - b. Versant’s assumptions about India’s demand for thermal coal cannot be squared with recent, specific publicity stating it “remains to be seen if Moatize’s thermal coal will ever now be significantly mined.” *Id.*, ¶ 178 (quoting QE-70, “Mozambique: A nation in crisis,” *New African Magazine*, 1 June 2021, p. 10).
 - c. Versant ignores the fact that Mozambique currently “is among the most expensive coal to supply in the world,” suggesting that to the extent import demand for coal continues to exist, it is not likely even then that Versant’s estimates can be justified. *Id.*, ¶¶ 179-181.
1501. In short, Versant’s assumptions regarding coal demand remain speculative, unsupported, and even counterfactual, despite the fact (and perhaps precisely because) Versant purports to rely on the 2015 and 2017 TML projections.

1502. Fourth, and similarly, Versant’s assumptions about coal production in Mozambique remain unsupported. *Id.*, ¶¶185-87.
1503. Fifth, Versant’s assumptions regarding utilization of a supposed new Macuse corridor are inconsistent with the actual utilization of existing railways, and are not properly addressed by Versant.
1504. In Dr. Flores’ first report, he explained that given investments made in recent years to improve reliability and capacity of existing railways and given the fact that relevant railways had ample transportation capacity, the fact that mines failed to achieve the production targets it set suggests that transportation is not the only factor affecting the decision of ramping up operations. *Id.*, ¶ 188. As a consequence, it appears unlikely that the proposed corridor would ever have been utilized as assumed by Versant.
1505. In response, Versant maintains that by focusing on the capacity and utilization of the existing corridors, Dr. Flores ignored “the most important factor that prevents the mines in Tete from ramping up production, which is the high cost of transporting coal with the NLC and Sena-Beira corridor.” *Id.*, ¶ 189.
1506. The problem for Versant, however, is that “[t]o determine whether the Project would trigger a production ramp-up [assumed by Versant], one would need to establish whether the Project would allow Mozambican coal to be competitive internationally and not, as Versant does, assess whether the Project would be cheaper compared to other corridors within Mozambique.” *Id.*, ¶ 190.
1507. In substantial detail, Dr. Flores concludes that “it is unreasonable to assume that Mozambique could compete with Australia in the coal export markets.” *Id.*, ¶ 191. As a result, Versant’s assumptions that the proposed project (had it been completed) could have realized the throughput assumed by Versant is unreasonable.
1508. Dr. Flores responds to several other criticisms of Versant’s Second Report regarding the coal industry, *see, e.g., Id.*, ¶¶ 193-99. Suffice it to say here that Versant’s rosy assumptions of coal demand and supply are not realistic, and contribute significantly to the speculative and improper nature of Versant’s DCF analysis. Even a small adjustment in

Versant's throughput assumption – from 30 Mtpa to 25 Mtpa – eliminates PEL's damages completely, all else being equal. *Id.*, ¶ 89.

1509. In addition to all of the above, it must also be noted that Versant also impermissibly (and without explanation) inflates its quantity projections even while it purports to hold throughput and ramp up similar to the 30 Mtpa and ramp up compared to its first report. *Id.*, ¶ 90.
1510. As Dr. Flores explains, this is because Versant now includes “TML Feasibility Study's estimates of capacity reservation fees,” which were not included in its first report. These fees increase revenues in the first years of operations until the Project reaches its full projected production throughput. There are several issues with Versant's new capacity reservation fees. *Id.*
1511. Inclusion of this new “capacity reservation fee” is improper for several reasons. First, Versant does not provide any explanation of what capacity reservation fees represent and why it is reasonable to include them as an additional source of revenues in its new *ex post* valuation. *Id.*, ¶ 92.
1512. Second, the effect of including the “capacity reservation fee” is simply to make an already speculative ramp up assumption even more unrealistic. The unexplained fees mean that even in the first year of operation (of a now non-existent rail corridor) Versant effectively assumes in its projections a total throughput of 22 Mt - or 73.3% of the maximum throughput it assumes for the Project. That is an unrealistic ramp up assumption. *Id.*, ¶¶ 93. In contrast, TML's 2015 feasibility study assumed 50% of full capacity for the first year. In its *ex ante* valuation, Versant assumes 40% of full capacity for the first year. PEL's May 2012 financial projections assumed 20% of full capacity. *Id.*
1513. For the foregoing reasons, capacity reservation fees should not be included in Versant's *ex post* projections. Excluding capacity reservation fees decreases Versant's *ex post* damages by USD \$95.9 million or 61.5%, all else being the same. *Id.*, ¶ 94. This example further demonstrates the highly unreliable nature of the *ex post* DCF analysis as it relates to revenues.

(ii) Operating and Maintenance Costs

1514. In its first report, Versant calculated average operating and maintenance costs of 54% of revenues for railway and 50% of revenues for port, based on information from a sample of publicly traded companies.
1515. In its second report, improperly relying on TML's 2017 Feasibility Study, Versant projects much lower average operating and maintenance costs of 27% of revenues for railway and port combined, which it then increases to 34% of revenues.
1516. Versant's changes to operating and maintenance cost are, frankly, inexplicable.
1517. PEL's original projected average operating and maintenance costs in its May 2012 financials were 63% of revenues, or an EBITDA margin of 37%. **RER-9**, Flores Second Expert Report, ¶ 97. Those projections (certainly not worst case) were sourced from state-owned company Portos e Caminhos de Ferro de Moçambique ("CFM"), and they cannot be disregarded. *Id.* CFM is Mozambique's national port and rail authority and unlike PEL, CFM has actual experience owning and operating transportation corridors in the country, including Sena and Nacala. *Id.*
1518. The operating and maintenance costs in TML's 2017 feasibility study are demonstrably low. Those costs result in an average EBITDA margin before concession fees of 76% (or 72% after concession fees). As Dr. Flores explains, if that were an accurate estimate, one would have expected the TML version of the project to have been built already, to take advantage of such extraordinary margins. The fact that even TML has not seen fit to build the project described by its 2017 Feasibility Study strongly suggests that the operating and maintenance costs – and the corresponding EBITDA are not actually realistic or attainable. *Id.*, ¶ 98.
1519. Using PEL's original operating and maintenance costs of 63% of revenues eliminates Versant's *ex post* damages entirely, all else being the same. Also using the operating and maintenance costs of 54% for railway and 50% for port that Versant used in its original *ex ante* valuation eliminates Versant's *ex post* damages entirely, all else being the same. Indeed, average operating and maintenance costs higher than 45% of revenues (that is, EBITDA margins before concession fees lower than 55%) eliminate Versant's *ex post* damages entirely, all else being the same. *Id.*, 99.

(iii) Capital Expenditures – Cost Overruns

1520. Versant has changed its assumptions regarding capital expenditures, but the capital expenditure assumptions remain speculative and fail to properly account for cost overruns. *Id.*, ¶ 101.
1521. It is no answer, as Versant seems to claim, that the risks of cost overruns are already included in the company risk premium of the discount rate. *See*, **RER-9**, Flores Second Expert Report, ¶ 104-107. As Dr. Flores explains, there is no double-counting in properly accounting for both company risk premium and the risk of cost overruns for a mega-project. *Id.*, ¶ 105.
1522. Moreover, the problem for Versant is not merely whether some amount of cost overruns are accounted for in Versant’s analysis. The problem is the speculation involved in attempting to perform a DCF-analysis on a project that has never been built. Literature cited by Dr. Flores reports an average cost overrun on a project such as the mega project at issue here would be 44.7%. *Id.*, ¶ 107.
1523. Simply put, “As TML’s project is greenfield and its construction has yet to start, there is no actual data that would indicate that construction costs will turn out to match the USD \$3,200 million Versant calculates based on TML’s FS.” *Id.*, ¶ 103.
1524. Nor is it an answer to suppose, as Versant attempts to do, that an EPC contractor would simply take on all risk of cost overruns. *Id.*, ¶ 109. Again, Versant simply assumes away the uncertainty.
1525. In short, Versant’s analysis fails to factor in the possibility of any cost overruns in the Project. Cost overruns higher than 22% eliminate Versant’s *ex post* damages entirely, all else being the same. *Id.*, ¶ 110.

(iv) Capital Expenditures - Delay

1526. Delay in construction will also obviously affect any expected profits.
1527. In its new *ex post* DCF analysis, Versant uses four-and-a-half years for the construction period, adding six months to its original assumptions to account for “potential delays.” *Id.*, ¶ 112. Unfortunately, the TML version of the project experienced actual, not potential delays and it has fundamentally changed. The start of the construction of only a general

cargo port is still being defined, with the rail and deep-sea port for coal transportation being postponed *sine die*. Therefore, Versant's assumption in its DCF model of the construction of the Project as originally envisioned starting in January 2022 is unrealistic. A one year delay reduces Versant's *ex post* damages by USD \$46.7 million or 29.9%, all else being the same; a two year delay reduces Versant's *ex post* damages by USD \$85.6 million or 54.9%, all else being the same; and a three year delay reduces Versant's *ex post* damages by US \$118 million or 75.6%, all else being the same. *Id.*

(v) Discount Rate

1528. Versant is still underestimating the appropriate discount rate for a non-operational railway and port greenfield project in Mozambique, which, based on similar projects in high risk countries, should be well above the rates proposed by Versant.
1529. As Dr. Flores explains, Versant makes three main errors in its discount rate calculations: (i) it understates country risk by incorrectly excluding certain risk factors; (ii) it now acknowledges that the Project is not in operation, but it implements a pre-operational premium incorrectly; and (iii) it ignores the illiquid nature of the Project. Correcting these errors, the cost of equity for the Project is 26.2% as of July 2021, converging to 18.0% once the Project's debt is fully repaid. Using this properly calculated cost of equity eliminates Versant's *ex post* damages entirely, all else being the same. In fact, any cost of equity higher than 19.4% (converging to 13.6% when debt is fully repaid) would eliminate Versant's *ex post* damages entirely, all else being the same. *Id.*, ¶ 115; Annex A. Discount Rate.

(vi) Conclusions on Versant's *Ex Post* DCF Valuation

1530. In summary, the effect of Versant's errors further demonstrates the speculative natures and unreliability of the DCF analysis in this case. As Dr. Flores summarizes the effect of the above detailed critiques:

Figure 1
Sensitivities to Versant’s *Ex Post* Damages Calculation

	Assumption		Impact of Alternative Assumption		
	Versant	Alternative	Value	Change in Value	Percentage Change
	(1)	(2)	(3)	(4)	(5)
			(US\$ Millions)	(Percent)	
1. Versant			156.0		
Revenues					
2. Throughput	30 Mtpa	25 Mtpa	No Value	-156.0	-100.0%
3. Capacity Reservation Fees	US\$ 604 million	None	60.1	-95.9	-61.5%
Costs					
4. O&M Costs (% of Revenues)	34%	63%	No Value	-156.0	-100.0%
5. O&M Costs (% of Revenues)	34%	45%	No Value	-156.0	-100.0%
Capex					
6. Cost Overrun	None	22%	No Value	-156.0	-100.0%
7. Delay	No Delay	1-year	109.3	-46.7	-29.9%
8. Delay	No Delay	2-year	70.4	-85.6	-54.9%
9. Delay	No Delay	3-year	38.0	-118.0	-75.6%
Discount Rate					
10. Cost of Equity	18.1% - 10.3%	19.4% - 13.6%	No Value	-156.0	-100.0%
11. Cost of Equity	18.1% - 10.3%	26.2% - 18.0%	No Value	-156.0	-100.0%

1531. As Dr. Flores concludes: “As it was the case with its original valuation, the severity of the impact that necessary and reasonable corrections produce on Versant’s new *ex post* analysis unambiguously shows that Versant’s DCF valuation cannot be relied upon to quantify damages in this case and should therefore be rejected.” *Id.*, ¶ 116-17.

(e) Specific Flaws in Versant’s *ex ante* DCF Analysis

1532. Given PEL’s alleged narrative of this case, one might have thought that PEL would have led with an *ex ante* analysis of its claimed damages. After all, PEL claims to have had possessed unique effort and insight in 2012 as to the viability of a rail corridor and port to Macuse, and called it “financially viable” in 2012.

1533. PEL’s SOC did not include an *ex ante* analysis, however, and until its second report, Versant did not do one. The problem, as noted above and in the SOD, is that an *ex ante* analysis performed using the May 2012 financials – the only PEL financials existing prior to the breach – results in a non-viable project and no damages. *Id.*, ¶ 121.

1534. Versant now offers an *ex ante* analysis, but Versant still does not rely only on information available to PEL as of 2012, and Versant cherry picks only certain information from PEL's May 2012 financials. *Id.*, ¶ 122. However, PEL's May 2012 financials cannot be so easily dismissed. *Id.*, ¶ 127-33. As Dr. Flores succinctly concludes: "[PEL's] own projections in May 2012 represented its assessment of the cash flows of the Project and, contrary to Versant's *ex ante* valuation, they indicate that the Project was not financially viable." *Id.*, ¶ 133.

1535. In all events, when one examines the assumptions underlying Versant's *ex ante* DCF valuation, the analysis is, like the *ex post* DCF analysis, demonstrably unreliable and speculative. *Id.*, ¶ 134.

(i) Revenues - Pricing

1536. Based on Patel's May 2012 financial projections, Versant assumes a tariff of USD \$39 per tonne, increasing by 2% annually. In contrast, Versant uses a tariff of USD \$27 per tonne in its updated *ex post* model, based on TML's feasibility study. Versant does not appear to explain how one or the other tariff was more reasonable. Using USD \$27 per tonne, increasing by 2% annually, eliminates Versant's *ex ante* damages entirely, all else being the same. Indeed, any tariff lower than US\$ 36 per tonne – that is, only USD \$3 per tonne lower than what Versant assumes – eliminates Versant's *ex ante* damages entirely, all else being the same. *Id.*, ¶ 135.

(ii) Revenues – Quantities

1537. With regard to quantities of transported coal, Versant fails to provide any meaningful analysis of the potential demand for the Project's logistics services. *Id.*, ¶ 136. Versant uses its own assumptions, starting from 10 Mtpa in the first year and increasing yearly by 5 Mtpa to reach 25 Mtpa in the fourth year of operation. *Id.* However, both PEL's PFS and PEL's May 2012 financial projections assume a throughput of 5 Mtpa in the first year, also ramping up to 25 Mtpa. *Id.* Using PEL's own numbers, rather than Versant's ramp up to a 25 Mtpa throughput decreases Versant's *ex ante* damages by US\$ 25.4 million or 51.6%, all else being the same. *Id.*

(iii) Operating and Maintenance Costs

1538. Overall, Versant calculates average operating and maintenance costs in its *ex ante* valuation at 30% of revenues, or an EBITDA margin before concession fees of 70%. *Id.*, ¶ 137.
1539. As explained above, in PEL's May 2012 financial projections, average operating and maintenance costs represent 63% of revenues, or an EBITDA margin before concession fees of 37%. Using PEL's operating and maintenance costs of 63% of revenues, instead of Versant's 30%, eliminates Versant's *ex ante* damages entirely, all else being the same. Indeed, average operating and maintenance costs higher than 37.5% of revenues – that is, only 7.5 percentage points higher than the 30% it assumes – eliminate Versant's *ex ante* damages entirely, all else being the same. *Id.*, ¶ 138.
1540. In its *ex ante* analysis, Versant also includes certain non-operating costs. Versant includes costs related to concession fees and corporate social responsibility (“CSR”) reserves, cherry picking that information from TML's tender offer in July 2013. *Id.*, ¶ 139. However, if one uses instead the information contained in TML's feasibility study (on which Versant otherwise often relies), PEL's *ex ante* damages decrease by USD \$ 15.2 million or 30.8%, all else being the same. *Id.*

(iv) Capital Expenditures

1541. Versant's *ex ante* valuation suffers the same flaws as its *ex post* analysis, as it relates to capital expenditures. In Versant's *ex ante* analysis, cost overruns higher than 12% eliminate Versant's *ex ante* damages entirely, all else being the same. Regarding construction delays, a one-year delay reduces Versant's *ex ante* damages by US\$ 21.4 million or 43.5%, all else being the same; a two-year delay reduces Versant's *ex ante* damages by US\$ 38.9 million or 78.8%, all else being the same; and a three-year delay eliminates Versant's *ex ante* damages entirely, all else being the same. *Id.*, ¶¶ 142-43.

(v) Discount Rate

1542. Versant's *ex ante* valuation suffers the same flaws as its *ex post* analysis, as it relates to discount rate. As Dr. Flores explains, the cost of equity for the Project is 38.7% as of July 2013, converging to 25.9% once the Project's debt is fully repaid. Using this properly calculated cost of equity eliminates Versant's *ex ante* damages entirely, all else being the same. *Id.*, ¶ 145. In fact, any cost of equity higher than 25.2% (converging to 15.5% when

debt is fully repaid) would eliminate Versant's *ex ante* damages entirely, all else being the same. *Id.*

1543. There is also additional indicia that Versant is cherry picking sources, even as it relates to discount rates. When performing its *ex ante* analysis, Versant also ignores one of the country risk sources that it includes when calculating its average country risk premium in its *ex post* discount rate analysis. *Id.*, ¶ 146. Adding that country risk source in the calculation of Versant's *ex ante* discount rate, leaving all other aspects of its discount rate unchanged, eliminates Versant's *ex ante* damages entirely, all else being the same. Similarly, by correctly applying Versant's pre operational risk throughout its projection period, and not only during the construction period, also eliminates Versant's *ex ante* damages entirely, all else being the same. *Id.*, ¶ 145; Annex A.

(vi) Versant's "Reasonableness Test" Of Its *Ex Ante* DCF Analysis Is Flawed And Even Meaningless

1544. In an effort to bolster its flawed *ex ante* DCF analysis, Versant also offers what it refers to as a reasonableness test. *See* Second Versant Report, ¶¶ 203-05.

1545. According to Versant, there is significance in the fact its calculation of the upfront concession fee and the NPV of ongoing concession fees in the TML concession together add up to \$105 million. PEL has approximately a 50% interest in its consortium, and approximately half of those concession fees is a similar number to PEL's *ex ante* damages calculation, somehow verifying the reasonableness of the *ex ante* analysis. *Id.*

1546. As Dr. Flores explains:

Versant's calculations do not represent a "reasonableness test" of its *ex ante* DCF valuation.

First, it is unclear what Versant is trying to measure with its analysis. The NPV of the concession charge and concession fees represent only a portion of the expected benefits to Respondent, which would include income taxes and the economic benefits that a new infrastructure project may bring to Mozambique. Even assuming that the fees represent the whole benefit to Respondent, the fact that their NPV, as estimated by Versant, is similar to that of Patel's 47.22% share of the equity value of the Project, as also estimated by Versant, does not validate in any logical way the accuracy or reasonableness of the latter.

RER-9, Flores Second Expert Report, ¶¶ 151-52.

1547. Moreover, the calculation is circular, and is easily manipulated by improper use of discount rates in calculating the NPV of the concession fees. *Id.*, 153-54.

(vii) Conclusions on Versant’s *Ex Ante* DCF Valuation

1548. As with Versant’s *ex post* DCF analysis, the most significant point is not merely that Versant’s analysis is incorrect and improperly cherry picks inputs (although those points are certainly true). Rather, the most important point is that the dramatic sensitivities in the analysis demonstrate that the DCF analysis is unreliable and inappropriate here.

1549. Dr. Flores summarizes the problems as follows:

Figure 2
Sensitivities to Versant’s *Ex Ante* Damages Calculation

	Assumption		Impact of Alternative Assumption		
	Versant	Alternative	Value	Change in Value	Percentage Change
	(1)	(2)	(3)	(4)	(5)
			(US\$ Millions)	(Percent)	
1. Versant			49.3		
Revenues					
2. Rail and Port Tariff	US\$ 39	US\$ 27	No Value	-49.3	-100.0%
3. Rail and Port Tariff	US\$ 39	US\$ 36	No Value	-49.3	-100.0%
4. First Year Throughput	10 Mtpa	5 Mtpa	23.9	-25.4	-51.6%
Costs					
5. O&M Costs (% of Revenues)	30.0%	63.0%	No Value	-49.3	-100.0%
6. O&M Costs (% of Revenues)	30.0%	37.5%	No Value	-49.3	-100.0%
Capex					
7. Cost Overrun	None	12.0%	No Value	-49.3	-100.0%
8. Delay	No Delay	1-year	27.9	-21.4	-43.5%
9. Delay	No Delay	2-year	10.5	-38.9	-78.8%
10. Delay	No Delay	3-year	No Value	-49.3	-100.0%
Discount Rate					
11. Cost of Equity	25.4% - 12.7%	25.2% - 15.5%	No Value	-49.3	-100.0%
12. Cost of Equity	25.4% - 12.7%	38.7% - 25.9%	No Value	-49.3	-100.0%

1550. “As it is the case with its *ex post* valuation, the severity of the impact that necessary and reasonable corrections produce on Versant’s *ex ante* analysis unambiguously shows that Versant’s DCF valuation cannot be relied upon to quantify damages in this case and should therefore be rejected.” *Id.*, 148.

H. PEL Has Failed or Refused to Provide Any Record Evidence Of The Amount Of Any Direct Damage

1551. Mozambique does not agree that any damages are owing, both because Mozambique is not liable, and because even if it were *arguendo*, damages are not actually appropriate here. “To date, most tribunals have been reluctant to consider pre-investment activities and expenditures, which do not ultimately come to fruition, as covered investments.” **RLA-130**, Barton Legum, Investment Treaty Arbitration Review at 11 (Law Business Research Ltd. 2020) (emphasis added); *see also* **RLA-56**, *Zhinvali Development Ltd. v. Republic of Georgia*, ¶ 410 (emphasis added).
1552. Moreover, as Mr. Ehrhardt explains, many project development entities incur costs in developing both unsolicited and solicited proposals without any guarantees of direct award, and certainly without any expectation that they will be reimbursed their costs. **RER-11**, Ehrhardt Expert Report, ¶ 60. Consistent with these expectations, the MOI itself plainly stated that PEL was to bear the costs of its PFS.
1553. Nor is there a valid basis to award the costs of PEL’s public tender submission. Clause 12.1 of the “Bidding Documents,” states:
- The Bidder shall bear all costs resulting from the elaboration and submission of its proposal ... and the Contracting Entity in no case shall be responsible or debtor of these costs, irrespective of the conduct or the result of the Tender.
- C-27**, Clause 12.1.
1554. Ignoring these points (for the sake of argument), and based on all of the above, assuming any damages were owing, such damages could only be determined using a cost-based valuation.
1555. It is no answer to claim, as PEL does, that the principle of “full reparation” requires more than an award of sunk costs. As the *Metalclad* Tribunal aptly noted, where other measures of damage are unreliable, the “*fair market value is best arrived at* in this case by reference to Metalclad’s *actual investment in the project*.” *See* **RLA-28**, *Metalclad*, ¶¶ 121-22 (emphasis added).
1556. However, in this matter, PEL has either refused, or is unable to demonstrate, its costs of preparing the PFS.

1557. Mozambique requested documents detailing all costs incurred by PEL with respect to its preliminary study, the PFS, and its public tender. *See* Tribunal’s Decision on the Republic of Mozambique’s Requests for Document Production to Patel Engineering Limited, requests 10, 38, 39, and 46. In response, PEL stated it “has conducted a search in respect of the documents and has not identified any responsive document.” *Id.* Candidly, not only does not lack of evidence preclude an award of damages, but the lack of recordkeeping calls into serious question whether PEL actually undertook the so-called rigorous effort in allegedly preparing the preliminary study and PFS as it has claimed in these proceedings.
1558. Given the speculative nature of PEL’s DCF-based analyses, and the absence of record evidence of PEL’s non-recoverable costs incurred, PEL is not entitled to damages.

I. PEL Is Not Entitled to Interest

1559. Given the fact that PEL has not shown entitlement to any damages, it necessarily follows, of course, that PEL is not entitled to interest.

1. PEL Has Not Demonstrated Entitlement to Interest

1560. However, even if PEL were entitled to some damages, PEL has not demonstrated any “fair and equitable” interest applicable to such supposed damages. Rather, PEL merely asks, in its prayer for relief, that the Tribunal:

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;

Reply ¶ 1152(f); *see also* SOC ¶ 483(e).

1561. In fact, PEL freely admitted in its Statement of Claim that it did not present any calculations or claims of pre-award interest, because they were not (and are not) applicable to Versant’s (flawed) *ex post* DCF analysis. *See* SOC ¶ 481.
1562. As noted above, PEL’s attempt now, to add an *ex ante* DCF analysis is not only flawed, but a violation of Procedural Order No. 1, and PEL’s claim of interest on the *ex ante* analysis should likewise be stricken.
1563. In all events, even in its new submissions, PEL still does not purport to demonstrate or establish either a pre-award interest rate or calculation applicable to any analysis other than

its flawed *ex ante* DCF analysis, or a post-award interest rate or calculation at all. Neither MTC nor the Tribunal can be left to guess as to what relief PEL seeks in this regard.

1564. Most specifically, as shown above, to the extent that PEL were entitled to any damages at all, such damages would be limited to the cost-based methodology. PEL has offered no actual evidence as to the amount of such costs, and certainly no proof or calculation as to what an appropriate interest rate would be as to such damages, were any owed (and they are not).

2. Even As to Its Alleged *Ex Ante* Damages, PEL's Interest Claims Are Improper

1565. Moreover, even assuming, for the sake of argument only, that PEL were entitled to its alleged *ex ante* damages with its alleged interest component, PEL's expert's interest calculations are flawed in several respects.

1566. First, without so much as saying so, PEL includes a Versant interest calculation for its alleged *ex ante* damages that calculates *compound* interest.⁹⁰

1567. In its Statement of Claim, ¶ 408 fn. 607, PEL relied upon CLA-177, ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", in Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 38, to justify its so-called "reservation of rights" as to a claim of interest. The commentary to Article 38, however, does not support awarding any interest, nor the use of compound interest. *See id.*, Art. 38, cmt. 8.

1568. PEL has failed to establish that it is entitled to any pre-award interest. Pre-award interest would be entirely speculative and improper simply because there was no PPP concession agreement, nor project was ever built, and therefore PEL had not income from the project. Not only are its claimed lost profits unrecoverable as speculative, but to add pre-award interest on top of them would be to add speculation upon speculation.

⁹⁰ Nowhere in PEL's damages argument does PEL even mention, let alone support, that Versant's interest calculation is compound. Versant does not mention or support the use of compound interest either. MTC and Dr. Flores were left to examine the formulas in CER-5, Second Versant Expert Report at Appendix G.9 to determine that Versant was using a compound interest rate.

1569. For these same reasons, even if the Tribunal were to award, *arguendo*, nominal damages to PEL, post-award interest would also be improper. In awarding post-award interest, the Tribunal must consider the facts and circumstances. Here, there is no PPP concession agreement providing for interest, and the speculative nature of the alleged damages also confirm that any type of interest (whether pre- or post-award) would be unjust, given that no PPP relationship was ever acquired or established by PEL.
1570. In the alternative, as the Article 38, comment 8, of the Draft Articles, *supra*, explains, absent “special reasons,” an award should not include compound interest. *Id.* Use of simple, rather than compound, interest is meant “to prevent the claimant gaining a profit ‘wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal.’” *Id.* (quoting *Anaconda-Iran, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 13, p. 199, at p. 235 (1986)).
1571. While the Article 38 commentaries recognize that there are authorities also permitting compound interest, particularly in “special circumstances,” *see id.*, cmt. 9, because neither PEL nor Versant even acknowledge the issue of compound interest, neither PEL nor Versant make any effort to demonstrate why compound interest would apply here or be necessary to reflect any alleged loss by PEL.
1572. Relatedly, while Versant now cites **CLA-1**, Article 5 (1) for the proposition that “fair and equitable” interest rate should be applied to the alleged *ex ante* damages, *see CER-5*, Second Versant Expert Report at 215 fn. 302, Versant fails to account for the entirety of Article 5(1). Article 5(1), also specifies that the payment (if any were owed) “shall be made without *unreasonable* delay.” PEL itself failed to bring this arbitration promptly, and to this day, PEL has failed and refused to substantiate a cost-based methodology or quantify such damages, but has instead wrongfully claimed rights to tens and hundreds of millions of dollars. Any delay in payment (were such money owed) is thus largely due to PEL’s own conduct, lack of proof, and gross over-statements of its alleged damages. Neither PEL nor Versant account for any of these issues when claiming interest in the alleged *ex ante* damages. It would be neither “fair” nor “equitable” to impose an interest rate on Mozambique reflecting delay caused by PEL’s own delay, and baseless exaggeration of its claim.

1573. Third, even as to the calculation Versant does make, with regard to its flawed alleged *ex ante* damages, Versant's calculations are incorrect in several respects.
1574. As Dr. Flores explains in significant detail, Versant uses an inappropriately high interest rate, U.S. Prime Rate plus 2% for its calculations. *See RER-9*, Flores Second Expert Report, ¶¶ 155-67.
1575. By way of summary only, Versant's use of an interest rate equal to U.S. Prime Rate plus a 2% premium is unsupported and incorrect. First, the U.S. Prime Rate is used as a reference or basis for many types of loans, such as loans to small businesses and credit card debt. The actual rates at which lenders will lend and borrowers will borrow funds will depend on the risk profiles of the borrower and of the economic activity in which the funds will be employed. *See RER-9*, Flores Second Expert Report, ¶¶ 164.
1576. The error, for Versant, is that there is no "risk profile" associated with the interest on an award. Versant has not provided any economic analysis of the risks affecting a potential award of damages in this Arbitration. In fact, none of the risks that bank lending rates such as the U.S. Prime Rate seek to capture (namely, the risk that a business will not be able to repay the amounts borrowed) affect a potential award of damages. Therefore, since an award of damages is not subject to those banking risks, it would be inappropriate to award damages based on a bank lending rate such as the U.S. Prime Rate. *See id.*, ¶ 165. Nor, for that matter, has Versant provided a supportable rationale for its 2% increase over U.S. Prime. *Id.*, ¶ 166.
1577. Since a damages award is not exposed to business or lending risk, the yield of 6-month or 1 year U.S. Treasury bills would constitute a reasonable commercial rate in this context, not Versant's U.S. Prime Rate, assuming for the sake of argument only, that any damages due and owing, and not accounting for any of the other above difficulties with PEL's interest claim. *See id.*, ¶ 163.

J. Conclusions As to PEL's Damages Claims.

1578. In summation, PEL's damages present new damages theories and amounts in violation of Procedural Order No. 1 and are not appropriate in all events.

1579. PEL cannot recover damages for the value of an illegal alleged right to a direct award of a concession. Nor may PEL recover damages for an alleged contract right procured by hiding its blacklisted status from MTC.
1580. Despite PEL's efforts to attempt to distance itself from its fraud, it remains immutably true that: (1) PEL's May 2012 financials did not demonstrate a financially viable project, but (2) PEL told MTC exactly the opposite – that its May 2012 demonstrated a financially viable project. PEL's efforts to explain away those financials now only confirm that PEL had no basis ever to claim that the project it proposed was financially viable.
1581. Because PEL's own financials demonstrated a non-viable project, it should come as no surprise that PEL's efforts now to claim tens and hundreds of millions of dollars of damages now are speculative and improper.
1582. Well-settled precedent will not permit PEL's speculative DCF analyses for a project PEL was not awarded, did not build, and which has no operational history. TML's project is not a reasonable comparator, but even if it was, the TML project has also been abandoned as originally planned due to current economic infeasibility. There is simply no basis from which to find that any version of the coal-rail-port project PEL proposed is viable and would support non-speculative damages for alleged future profits.
1583. PEL's damages claims are not aided by attempting to claim "loss of opportunity." Such claims do not rely on DCF analyses, but on discrete reasonable proof of investment benefits, and PEL has none. Moreover, the "probability" PEL would ever have been awarded the claimed concession is likely zero, and clearly not a "virtual certainty."
1584. Under the circumstances, the only non-speculative basis for damages, if any were owing (and they are not), would be a cost-based methodology. PEL has failed, or refused, however, to provide evidence under such a methodology.
1585. On this record, no damages may be awarded.

X. MOZAMBIQUE SHOULD BE AWARDED ITS ATTORNEYS FEES AND COSTS AGAINST PEL AND ITS LITIGATION FUNDER

1586. In its Statement of Defense, Mozambique requested that it should be awarded its attorneys' fees and costs against both PEL and its litigation funder.

1587. In response, PEL makes a confused rebuttal. First, PEL actually *agrees* that the relief sought would be within the Tribunal’s broad discretion, at least as against PEL:

It follows from [the UNCITRAL Arbitration Rules 1976, Articles 38-40] 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.

Reply ¶ 1150(c).

1588. PEL’s only complaint as against itself, for the moment, appears to be that an award of attorney fees and costs is not issued as an interim award. *See id.* However, Mozambique did not request an “interim” – but a final – award of fees and costs.

1589. MTC did, however, raise the issue of its costs and fees, and rightly so. As MTC concedes, Article 40.2 permits the Tribunal substantial discretion in awarding fees and costs:

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.

UNCITRAL Arbitration Rules Article 40.2

1590. Mozambique submits that the circumstances of this case warrant the payment of its fees and costs of legal representation by PEL. PEL has persisted in claiming it conceived a project already within the MTC’s knowledge, and now brings a claim for a PPP concession it did not receive (there is no PPP concession agreement between PEL and the MTC) based on a project that has been now proven non-viable. In an effort to create the mirage of injury, PEL has claimed the TML concession to be comparable – a concession that was not only *not* comparable, but which itself abandoned the central features of a coal railway and a coal deep water port due to current economic nonfeasibility. Had PEL made the required disclosures, the MTC would have ceased all further dealings with PEL. PEL also misled the MTC with regard both to the financial viability of its proposal. And in spite of all of these facts (and the other facts and arguments raised above), PEL now as the temerity to

increase its claimed damages, to \$156 million, as the purported value of a project that absolutely no one is undertaking.

1591. PEL is simply a disappointed bidder that came in third place in the MTC public tender as part of the PGS Consortium, and the PGS Consortium never appealed the contest results in a timely fashion, and thus waived the right to complain. Seven years later, PEL files this UNCITRAL arbitration seeking a millionaire windfall. Just like PEL reneged its bid with the NHAI, PEL has again reneged on its participation in the MTC's public contest, and seeks to revert back to the MOI—although the 15% scoring advantage was provide to the PGS Consortium. Like the India Supreme Court held, PEL is not commercially reliable or trustworthy. PEL cannot be trusted, and must reimburse Mozambique for its fees and costs.
1592. Regarding PEL's litigation funder, while PEL complains regarding the law applicable to the direct liability of its litigation funder, the simple fact is that the litigation funder is funding attorneys' fees being incurred in the UK.
1593. Moreover, to the extent that the litigation funder and either PEL or its UK counsel have agreed that some other law applies, it is undisclosed, and it is irrelevant because the funding is taking place within the UK (thus UK public policy voids a clause to apply other law).
1594. Pursuant to the Code of Conduct for Ligation Funders, *see* **R-90**, Code of Conduct for Litigation Funders, January 2018, as an example, litigation funders are required, in their agreement, to:

. . . state whether (and if so to what extent) the Funder or Funder's Subsidiary or Associated Entity is liable to the Funded Party to:

10.1 meet any liability for adverse costs that results from a settlement accepted by the Funded Party or from an order of the Court;

10.2 pay any premium (including insurance premium tax) to obtain adverse costs insurance;

10.3 provide security for costs; and

10.4 meet any other financial liability

Id., § 10.

1595. Accordingly, in addition to the rulings in *Arkin* and *Moorview*, see SOD at ¶¶ 936-38, the litigation funding agreement between PEL or its counsel and the litigation funder itself likely provides (and/or is required to provide) whether and to what extent the litigation funder is responsible for the adverse award of costs and fees in the matter.
1596. In all events, the rationales supporting the rulings *Arkin* and *Moorview* – requiring a litigation funder to pay the court-ordered adverse costs of a litigation – are equally, if not more, relevant to this international arbitration.
1597. In a recent report on third-party funding in international arbitration, the ICCA-Queen Mary Task Force explored the arguments for and against permitting third-party funding in international arbitration. See **RLA-89**, International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, April 2018.
1598. In recounting the concerns regarding third-parties’ roles in funding litigation, the Task Force reported:

A separate but related concern is that third-party funding could lead an increase in number of speculative, marginal, or frivolous investor claims. Proponents of this view point to the high recoveries sought by claimants, which they argue may create an incentive to fund even cases with a low probability of success and which may promote inflation of estimated case values in an effort to attract funding. A favourable award, they argue, in any one sizable case could offset the cost of other unsuccessful cases.

Under this view, the development of portfolio funding, in which the range of claims in a particular portfolio vary in terms of likelihood of success, may encourage the bringing of more speculative or risky claims. *In a related vein, some argue that if claimants and funders are not compelled to pay the respondent state’s costs when they lose, they have an incentive to bring risky claims.*

Id., 203 (citations omitted).

1599. Such is precisely the concern in this case. As Mr. Chauque explains, PEL did not conceive of any economically feasible rail-port coal export project. PEL’s 2012 PFS is simply a “Pre-Feasibility Study,” on a previously-envisaged project concept that is not economically feasible and will not be built by anyone, *and did not contribute any quantifiable value to the Mozambican State or people.* **RWS-3**, Chauque Second Witness Statement, ¶ 15.

1600. Yet, buoyed by its litigation funder, and the *in terrorem* specter of a lottery ticket for \$156 million in claimed damages, PEL persists. This case is precisely the reason why – where a litigation funder enables a speculative, marginal or frivolous claim the Tribunal should issue any ultimate award of costs and fees, including Mozambique’s costs of legal representation and assistance, as against both PEL and its litigation funder. The litigation funder collaborated with PEL in the decision to pursue this baseless claim, and must share the burden of paying the fees and costs incurred by Mozambique.

XI. RELIEF SOUGHT

1601. Based on the foregoing, Mozambique is entitled to and seeks an Award, as follows:

1601.1. Dismissing PEL’s claims as inadmissible or, alternatively, declining jurisdiction;

1601.2. Sustaining Mozambique’s objections to jurisdiction;

1601.3. In the alternative, dismissing PEL’s case on the merits;

1601.4. Awarding PEL no damages;

1601.5. Ordering that PEL and its litigation funder pay Mozambique’s attorneys’ fees and all costs and expenses; and

1601.6. Granting Respondent such further or other relief as the Tribunal shall deem to be just and appropriate.

Dated: 29 November 2021.

Respectfully submitted,



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