

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

AND

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

BETWEEN

PATEL ENGINEERING LIMITED

Claimant

and

THE REPUBLIC OF MOZAMBIQUE

Respondent

**REJOINDER ON OBJECTIONS TO
JURISDICTION**

7 FEBRUARY 2022



Contents

I.	EXECUTIVE SUMMARY	1
II.	PROCEDURAL BACKGROUND	8
	A. <i>Mozambique Continues to Employ Its Obstructive Tactics to Undermine and Derail This Arbitration</i>	8
	B. <i>Mozambique Failed to Disclose the Requested Documents and Now Seeks to Discredit PEL's Document Production</i>	9
III.	FACTUAL BACKGROUND.....	21
	A. <i>PEL Conceived of the Project, Which Mozambique Previously Thought Was Not Feasible</i>	21
	B. <i>Mozambique Granted PEL a Right to a Direct Award of the Project Concession Together with Exclusivity and Confidentiality Rights in Exchange for PEL's PFS</i>	27
	C. <i>Mozambique Approved the PFS and Asked PEL to Exercise Its Right of First Refusal</i>	47
IV.	MOZAMBIQUE HAS FAILED TO DEMONSTRATE THAT THIS TRIBUNAL LACKS JURISDICTION OVER PEL'S CLAIM.....	56
	A. <i>The Tribunal Has Jurisdiction Ratione Personae</i>	56
	B. <i>The Tribunal Has Jurisdiction Ratione Materiae</i>	61
	C. <i>The Tribunal Has Jurisdiction Ratione Temporis</i>	103
	D. <i>The Arbitration Clause in the MOI Does Not Affect the Jurisdiction of This Tribunal</i>	106
V.	MOZAMBIQUE'S ALLEGATIONS AS TO THE INADMISSIBILITY OF PEL'S CLAIM REMAIN UNSUBSTANTIATED.....	115
	A. <i>Mozambique Has Moved Away from Its Allegation of Fraudulent Concealment While Nevertheless Maintaining Its Red Herring concerning PEL's Temporary Debarment vis-à-vis the NHAI</i>	115
	B. <i>Mozambique's Own International Legal Authorities Require It to Provide a Clear and Convincing Showing of a Serious Violation of Law</i>	116
	C. <i>Mozambique Continues to Mischaracterise the Temporary Debarment and Grossly Overstate its Consequences</i>	122
	D. <i>Temporary Debarment was Neither Relevant Nor Material to the Project And Has No Effect on PEL's Claims</i>	126
	E. <i>PEL Was Not Obligated to Disclose the Temporary Debarment to Mozambique</i>	145
	F. <i>Mozambique's Unfounded Bribery Claim Provides No Basis for the Inadmissibility of PEL's Claim</i>	146
VI.	MOZAMBIQUE RED HERRING STRATEGY EXPOSES ITS DOUBLE STANDARDS ON PROFESSIONAL INTEGRITY	149
VII.	PRAYER FOR RELIEF	154

I. EXECUTIVE SUMMARY

- 1 Pursuant to Annex I *octies* of Procedural Order No. 1, Claimant submits its Rejoinder on Objections to Jurisdiction (“**Rejoinder on Jurisdiction**”) in reply to Respondent’s Rejoinder on the Merits and Reply to Objections to Jurisdiction dated 29 November 2021 (“**Reply on Jurisdiction**”) and a chronology of key events related to the dispute.¹ All capitalised terms, unless otherwise defined in this Rejoinder on Jurisdiction, have the meanings given to them in the Claimant’s Reply on the Merits and Response to Objections to Jurisdiction, dated 9 August 2021 (“**Reply**”).
- 2 This investment dispute arises from Mozambique’s sovereign decision to deprive PEL of its investments in the Project in manifest disregard of the fundamental principle of *pacta sunt servanda*.
- 3 Mozambique repeatedly reneged on its binding promise to realise a public-private partnership (“**PPP**”) with PEL in exchange for PEL’s investments in the conceptual and development phases of the Project. Mozambique’s administrative roller coaster with PEL was an outright and unjustified repudiation of the MOI and in gross violation of the investment protection standards under the Treaty.
- 4 In the Reply on Jurisdiction, Mozambique repeats its unsubstantiated jurisdictional and admissibility objections, which are designed to leave PEL without its legitimate investment treaty remedy and to secure Mozambique’s immunity in the face of its gross violations of the Treaty.
- 5 Mozambique first deployed a strategy to undermine this Arbitration by commencing the ICC Arbitration. Then it devised a failed ploy to delay and derail this Arbitration by seeking a stay pending the ICC Arbitration. In parallel, Mozambique advanced preliminary objections in this Arbitration, which remain not only unsupported, but also largely contradicted, by contemporaneous evidence. These circumstances must ultimately weigh in the Tribunal’s cost allocation.
- 6 Mozambique has repeatedly disregarded its own laws on administrative integrity, transparency, and honesty by failing to keep (or at least alleging so)

¹ **Exhibit C-380**, Chronology of events related to the dispute.

and later failing to disclose numerous categories of relevant and material documents. To justify its non-compliance with its own laws, Mozambique presents incorrect and inconsistent explanations, including a belated, and entirely unsubstantiated allegation of secrecy under Mozambican law. PEL seeks adverse inferences from Mozambique's failure to produce the relevant and material documents that it was required by law to retain.

7 Mozambique's unabated distortion of the facts, including those that it argues inform its preliminary objections, extends to its presentation of the Project. By way of example, Mozambique would have this Tribunal remain incognizant of the fact that:

- (a) PEL conceived a Project that would add a deep-water port to a mere offloading ramp existing in Macuse. The former would have the capacity to accommodate large vessels that would be required to transport coal and other cargo, while the latter only allowed fisherman to dock their boats and unload their catch; and
- (b) the Project is far from being unfeasible or unbankable, having recently received USD 400 million on funding from Ethos Asset Management Inc USA ("**Ethos**") in what was described to be a "*vote of confidence ... in the viability of the Project*". That the Project (including Phases 1, the port at Macuse, and 2, the rail corridor) remains of national strategic importance is clear from the public statements of Ethos's CEO: "*The Project is to be one of the largest infrastructure projects in Africa with an estimated total investment cost of approximately USD 3 billion. Given the size and geographic importance of the corridor, the Project will unquestionably be a key agent of social and economic change for the benefit of affected communities and for the country as a whole.*"² TML Executive Director Virat Kongmaneerat touted this major financing deal, noting that the "*Project can continue to move forward with the resettlement and construction of the port ... putting TML and Mozambique on the regional transportation map.*" While this information was publicly available prior to Mozambique filing its

² **Exhibit C-343**, 360 Mozambique, *Ethos Asset Management Inc., USA announces major deal in Mozambique with Thai Mozambique Logistica, S.A., to finance the building of the Macuse port and rail infrastructure in the sum of \$400 million USD*, dated 19 November 2021.

Reply on Jurisdiction, it chose to omit this development from the Tribunal.

- 8 Mozambique continues to advance a false interpretation of the MOI, which remains unsupported or, even contradicted, by its negotiation history, its content and Mozambique's own conduct following the conclusion of the MOI.
- 9 Conversely, PEL's interpretation of the MOI is consistent with its negotiation history, its plain language, and the Parties' conduct following its conclusion. Moreover, PEL's narrative is founded on contemporaneous correspondence exchanged between the Parties, the authenticity of which is not in dispute.
- 10 PEL has shown that the differences between the Portuguese version of the MOI presented by Mozambique and the English version of the MOI are inconsequential. Mozambique does not address the fact that the last draft MOI it shared with PEL on the morning of its signature, as being the final version, included the promise of a concession agreement and the representation that this Portuguese version of the MOI would be translated into English. Mozambique leaves a hanging doubt as to its own conduct that resulted in different (be it inconsequential) versions of the MOI.
- 11 Mozambique's objections concerning the Tribunal's jurisdiction *ratione personae* and *ratione temporis* are so manifestly frivolous that they do not even deserve space in an executive summary. Equally unavailing remain Mozambique's repeated arguments that PEL's investment was not made in accordance with Mozambican law. Mozambique appears to have approached these objections as a mere box-ticking exercise, without submitting any cogent evidence or analysis.
- 12 Mozambique devotes much ink to its repeated allegation that PEL's investment is not protected by the Treaty because it consisted of pre-investment activities. Pre-investment activities are those which precede the actual investment. PEL reiterates that the MOI did not envisage a *pre-investment* activity, because (1) it bound Mozambique into a PPP with PEL, subject only to two conditions (*i.e.*, Mozambique's approval of the PFS and PEL's exercise of its right of first refusal) which had been fulfilled, and (2) in exchange for Mozambique's commitment to award the Project concession to it directly, PEL invested in the Project in accordance with the MOI as the first part of a unified investment.

PEL's investments in the Project meet the Treaty definition of "investment" and, to the extent relevant, the *Salini* criteria.

- 13 That no concession agreement was ultimately signed with PEL (by reason of Mozambique's own wrongful conduct) is irrelevant for this Tribunal's jurisdiction *ratione materiae*. The ultimate necessity of a concession agreement and other ancillary instruments or measures for projects of this nature do not detract from the fact that PEL invested in the Project (as it was required to do) in exchange for Mozambique's binding obligation under the MOI to realise the Project *with* PEL.
- 14 As the contemporaneous record shows, Mozambique has in fact acknowledged on three different occasions, by initiating a direct award process *with* PEL, that the MOI bestowed PEL with acquired rights to realise its investment in the Project:
- (a) on 15 June 2012, upon the approval of the PFS, the MTC designated CFM as PEL's public partner in the Project;³ and
 - (b) on 16 April 2013, the Council of Ministers at its 10th Ordinary Session confirmed PEL's right to implement the Project by initiating a direct award process *with* PEL in the "national strategic interest".⁴
 - (c) On 18 April 2013, the MTC invited PEL to "negotiat[e] the terms of the concession", while requesting PEL to provide USD 3 million bank guarantee which the MTC would hold "until the conclusion of the [concession] contract."⁵
- 15 The negotiation of a project vehicle with CFM was not a new condition set by Mozambique upon its approval of the PFS. The so-called "condition" was in fact Mozambique confirming and commencing fulfilment of its promise, under the MOI, to realise a PPP with PEL. It was CFM who wrongfully refused to negotiate with PEL. As an instrumentality of Mozambique, CFM was bound

³ **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

⁴ **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

⁵ **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013. Five days later, on 23 April 2013, PEL responded "to convey our sincere appreciation to the Council of Ministers of the Republic of Mozambique and your Excellency for inviting us to the negotiation process leading to the signing of the concession agreement In consideration of the national interest and the need of this project, we would work together the Government to make this project a great success." See **Exhibit C-30**, Letter from Kishan Daga of PEL to MTC Minister Zucula concerning PEL's acceptance of the MTC's offer to commence negotiations for a concession agreement for the Project, dated 23 April 2013.

to act consistently with Mozambique's promise to realise the Project with PEL. In addition, CFM's refusal to engage with PEL was inconsistent with CFM's own active participation in the process leading to the preparation and approval of the PFS. Mozambique is estopped from relying on its own failure to implement the direct award process in accordance with the MOI.

- 16 Mozambique's arguments that the MOI granted conditional or contingent rights remain unavailing. The MOI provided for two conditions precedent to PEL being granted a legal right to a concession – not a contingent right. In any event, there were no contingencies once Mozambique approved the PFS and PEL exercised its right of first refusal. The Parties were bound to enter into a concession agreement in respect of the Project. Mozambique itself acknowledged that fact by requesting PEL to commence negotiations with its choice of public partner, CFM, to implement the PPP, and by requiring PEL to submit a USD 3 million bank guarantee.
- 17 The contemporaneous record shows that there was no uncertainty around Mozambique's determination to proceed with the Project. Mozambique treated the Project as a matter of priority to its infrastructure and as a matter of national strategic importance. There was no doubt that Mozambique wished to award a concession for the Project (as in fact it did), and pursuant to the MOI, it was obligated to award that concession to PEL. Had Mozambique honoured its commitment to proceed with PEL, there would have been no genuine legal or commercial impediments to the ultimate realisation of the concession.
- 18 Mozambique continues to argue that this Tribunal lacks jurisdiction *ratione materiae*, because this dispute, in the absence of an exercise of sovereign powers by Mozambique, is a contractual one. PEL repeats its position that it is sufficient to ascertain *prima facie* if the alleged acts are capable of constituting a breach of the invoked treaty and the matter of the exercise of sovereign powers is part of the merits analysis. In any event, the record is replete with acts of different governmental bodies, including the Council of Ministers, the highest executive decision-making body in Mozambique. Further, the impugned conduct involves key decisions made concerning the Project in the “*national strategic interest*” or in recognition of the use of an “*innovative special economic zone*”. Only a sovereign could make such decisions.

- 19 As the dispute before this Tribunal is a treaty dispute governed by international law, Clause 10 of the MOI, including its reference to ICC Arbitration, remains legally inapplicable to it.
- 20 Mozambique doubles down on its attempts to construct *ex post facto* impediments in the realisation of the direct award. It argues, without any contemporaneous evidence, that PEL’s temporary debarment by the NHAI in India from 20 May 2011 to 20 May 2012 would have led to Mozambique’s withdrawal from the PPP with PEL after the conclusion of the MOI. The Reply on Jurisdiction reveals its bluff, as Mozambique is unable to settle on its characterisation of the rather benign facts surrounding the temporary debarment: it casually hops from “*fraudulent concealment*” to “*failure to provide*” to “*intentional concealment*” to “*acting improperly*”. This metamorphosis betrays Mozambique’s difficulty in articulating a cogent legal standard that both meets the high standard set by international law and fits the facts. This Tribunal can decide such serious allegations only based on substantiated facts rather than inferences. On a proper interpretation of the facts, and taking Mozambique’s allegation at its very highest, PEL failed to provide Mozambique with information that was publicly available, that Mozambique never deigned to seek or request, and upon which Mozambique has failed to show, based on evidence originating *in tempore insuspecto*, that it would have acted had it known. That cannot rise to the level of an international wrong for the purposes of an admissibility objection. Mozambique’s *ex post facto* iterations of professional character or integrity issues (to the extent relevant) could raise, at most, business ethics issues (which, to be clear, it does not), which do not engage legal rules or principles of Mozambican or international law.
- 21 Mozambique’s red herring strategy aimed at discrediting PEL (one of India’s most integrated infrastructure and construction services conglomerates with over 250 projects under its belt since 1949)⁶ falls flat.
- 22 In the Reply on Jurisdiction, Mozambique has not put forward any clear and convincing evidence in support of its bribery allegations. The bribery allegation remains supported only by the self-serving witness statement of Minister Zucula, who the Maputo City Court has recently sentenced to ten-year

⁶ Exhibit C-162, Patel Engineering, Corporate Brochure; Exhibit C-349, PEL’s video presentation.

imprisonment for his part in a bribery scandal arising from the purchase of two Embraer aircrafts by LAM, the flag carrier of Mozambique. PEL reminds the Tribunal that Mr Daga has denied the bribery allegations in categorical terms.

- 23 In the end, after several volte-faces, Mozambique did not live up to its end of the bargain. Instead, it put the Project out to a suspiciously conducted tender and awarded it to ITD, a company whose CEO and largest shareholder have a consistent record of bribery and corruption scandals dating back decades. Mozambique cannot be heard to use the fact that PEL never received the actual concession as a defence when it was Mozambique's breach of the Treaty that resulted in PEL not receiving the concession in the first place.
- 24 Mozambique would have this Tribunal ignore the MOI in favour of alleged equities and industry or procurement practices. This case does not turn on equities or industry or public procurement practices (if it did, it would be in PEL's favour in any event). It is about the rule of law: the letter and purpose of the MOI and the Treaty and the administrative inconsistency of Mozambique in breach of the MOI and the Treaty. In any event, jurisdiction and admissibility are matters governed by international law. Industry or public procurement practices at best inform the merits of the case.
- 25 The Tribunal will have noticed the unnecessary bluster, repetition, inconsistency, and confusion in Mozambique's jurisdictional and admissibility objections. Once the smoke clears, the conduct of PEL and Mozambique can be objectively assessed against the applicable law, and the investments of PEL, and its corresponding claims, can and will be safely upheld as qualifying for protection and admissibility under the Treaty.

II. PROCEDURAL BACKGROUND

A. *Mozambique Continues to Employ Its Obstructive Tactics to Undermine and Derail This Arbitration*

26 PEL explained in its SOC, Reply, and submissions on the Stay Application that Mozambique commenced the ICC Arbitration to undermine this Arbitration and maximise the prospect of conflicting awards for Mozambique’s future challenges to enforcement.⁷ This follows from *inter alia* (a) the timing of Respondent’s filing of the ICC Arbitration, (b) Mozambique’s refusal to consolidate the parallel proceedings and to agree to any form of transparency between the proceedings, and (c) Mozambique’s written pleadings in the ICC Arbitration that are largely *verbatim* plagiarised from its pleadings in this Arbitration.

27 Respondent’s latest ploy to delay and derail this Arbitration failed. On 1 October 2021, after nearly all the pleadings in this proceeding had already been filed, Mozambique submitted its completely unsubstantiated Stay Application.⁸ On 3 November 2021, the Tribunal dismissed Mozambique’s Stay Application correctly finding that:

*“[T]he outcome of the ICC Arbitration is not material to the outcome of this arbitration. This Tribunal is not bound by any findings of the ICC Tribunal and is completely independent. Each tribunal has been appointed under different instruments of consent and deals with **different causes of action.**”⁹*
(Emphasis added)

28 The Tribunal knows well by now the procedural background of this Arbitration and Mozambique’s ICC claim.¹⁰ Nevertheless, Claimant briefly addresses Respondent’s continued inaccurate representations concerning the procedural background of the present dispute below:

(a) First, Mozambique relies on PEL’s letter dated 18 August 2014 to allege that the commencement of the ICC Arbitration was “*consistent with the parties’ contemporaneous understanding of how the dispute should be resolved.*”¹¹ PEL’s mere reference to Clause 10 of the MOI

⁷ SOC, paras. 34-49; Reply, paras. 27-30; PEL’s Response to Mozambique’s Stay Application, dated 15 October 2021, paras. 2-4, 10-19.

⁸ PEL’s Response to Mozambique’s Stay Application, dated 15 October 2021, paras. 34-39.

⁹ Procedural Order No. 4, dated 3 November 2021, para. 35. (Emphasis added)

¹⁰ The Tribunal can review that material here: *see* SOC, paras. 34-49; Reply, paras. 27-30; PEL’s Response to Mozambique’s Stay Application, dated 15 October 2021, paras. 2-4, 10-19.

¹¹ Reply on Jurisdiction, para. 967.

in correspondence with the MTC does not justify the commencement of the ICC proceedings by Mozambique. PEL has never brought any claims before the ICC tribunal. PEL appropriately submitted a claim under the BIT which has a different cause of action from Mozambique's ICC claim as this Tribunal confirmed in its Procedural Order No. 4.¹²

- (b) Second, Respondent wrongly accuses Claimant of aggravating the dispute and taking advantage of the coronavirus pandemic when commencing this Arbitration.¹³ As explained elsewhere, after nearly two years of unsuccessful negotiations, Claimant commenced this Arbitration on 20 March 2020, a day before the Treaty was set to expire.¹⁴ PEL wished to avoid any (unmeritorious) jurisdictional objections (and associated costs) that could coincide with filing after that date. Besides, two years of failed negotiation is more than sufficient time to attempt a settlement in good faith had Mozambique been interested.
- (c) Third, Respondent maintains that the ICC tribunal held that it has jurisdiction “*over the parties’ local law contractual dispute*”.¹⁵ The ICC tribunal has never decided that it has jurisdiction over any part of the Parties’ dispute, nor has it yet issued any decision on its jurisdiction. Rather, the ICC tribunal cited PEL’s position that it does not dispute the ICC tribunal’s jurisdiction over Mozambique’s contractual claims based on the *prima facie* valid arbitration clause in the MOI.¹⁶

B. Mozambique Failed to Disclose the Requested Documents and Now Seeks to Discredit PEL’s Document Production

1. Mozambique incorrectly portrays the Parties’ Document Production

29 In the Reply on Jurisdiction, Respondent tries to create an impression that it produced a “*voluminous record*”¹⁷ to PEL both before this Arbitration was commenced and during the document production process. Mozambique even compares the number of pages produced by each party alleging that it disclosed more than 75 pages of “*substantial previously undisclosed documents*” while

¹² Procedural Order No. 4 dated 3 November 2021, para. 35.

¹³ Reply on Jurisdiction, para. 970-971.

¹⁴ SOC, paras. 35-37; PEL’s Response to Mozambique’s Stay Application, dated 15 October 2021, para. 13.

¹⁵ Reply on Jurisdiction, para. 983.

¹⁶ **Exhibit R-59**, ICC Proc. Order No. 5, dated 16 August 2021, para. 25.

¹⁷ Reply on Jurisdiction, para. 7.9.

PEL provided only 158 pages of duplicative and apparently unsubstantial documents.¹⁸

30 These allegations do not stand up to the slightest scrutiny. As explained in the Reply, out of Mozambique’s mere 9 voluntarily disclosed documents, 3 had previously been exhibited, 2 comprised publicly-available legislation, and 1 was a letter from PEL.¹⁹ When this is taken into account, Mozambique *only produced 3 documents* that were not already in PEL’s possession. In contrast, PEL voluntarily disclosed *76 responsive documents*, and then an additional *156 documents* following the Tribunal’s order. Later, on 11 October 2021, and upon Respondent’s request, PEL also produced *154 documents* in native format (these documents were submitted as PDFs on 14 June 2021). Thus, in total, Claimant disclosed *386 documents*.

31 As to the substantive value of the documents produced by the Parties, Claimant’s production involved *inter alia* documents related to the Project’s conception, the Preliminary Study, internal discussions of the MOI, drafts and copies of the MOI exchanged between the Parties, as well as documents relied upon by its forensic expert, Mr LaPorte. Respondent’s characterisation of the MOI drafts (key documents given Respondent’s challenge to PEL’s English version of the MOI) as not “*substantial*” documents is peculiar given that 13 of Respondent’s Document Requests related to the negotiations of the MOI.²⁰ In contrast, all 3 new documents voluntarily disclosed by Mozambique covered only limited aspects of the tender process.

32 Respondent misleads the Tribunal by alleging that “*a significant portion of the documents in PEL’s possession were provided to PEL contemporaneously or in the claim negotiation phase.*”²¹ Respondent does not explain which documents it provided during the settlement negotiations. This is because no contemporaneous factual documents were produced by Respondent at the time. As to the documents provided contemporaneously, Respondent probably refers to the correspondence between the Parties which Claimant obviously did not request Respondent to produce.

¹⁸ Reply on Jurisdiction, para. 353.

¹⁹ Reply, para. 32.

²⁰ Tribunal’s Decision on Respondent’s Document Production Schedule, dated 31 May 2021, Document Requests Nos. 16-28.

²¹ Reply on Jurisdiction, para. 354; *see also* para. 7.9.

33 Respondent notes that “*the bulk of the potentially relevant documents are already exhibited*”.²² However, Respondent does not mention that most of the contemporaneous factual documents in the record were submitted by Claimant. Mozambique failed to adduce even a single document that could shed a ray of light on its conduct in this case, including its arbitrary decision making. ***Out of the 56 factual exhibits Respondent adduced with its SOD, only 17 were new to the Arbitration. The remaining 39 documents had previously been submitted by PEL; Respondent simply reintroduced those exhibits as its own by attaching an “R” exhibit number to a previously submitted “C” exhibit, an entirely uncustomary practice designed to hide the paucity of its evidence.*** Respondent submitted 26 additional exhibits with the Reply on Jurisdiction; however only 3 documents could be considered as contemporaneous factual evidence.

2. Mozambique failed to produce documents it was obliged to archive in accordance with Mozambican law

34 PEL explained in the Reply and in the comments to its Document Production Schedule that under Mozambican law, Mozambique has a legal obligation to keep copies of several core documents requested by PEL.²³ In particular, the following ***critical documents*** for this Arbitration ***must*** exist and Respondent ***must maintain them in its national archives*** as a matter of Mozambican law:

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

35 As Professor Medeiros explains, under Mozambican administrative law, Mozambique has a duty “*to keep and preserve administrative documents - such as those relating to a public tender procedure or the minutes of meetings of the Council of Ministers – and this is instrumental in giving effect to the right to access administrative information and, therefore, giving effect to the principle of administrative transparency.*”²⁴

36 Decree 36/2007 of 27 August, which regulated the State archive system from 2007 to 2018, was replaced by Decree 84/2018 of 26 December, which is still

²² Reply on Jurisdiction, para. 354.

²³ Reply, paras. 35-39, 92, 322-324, 369, 462-467.

²⁴ CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 78.6.

in force to date. Both explicitly list “*contracts*” as documents which must be *permanently archived*,²⁵ while documents related to governance and transparency within the public administration (*e.g.* documents prepared in the context of the Council of Ministers meetings, and the minutes of such meetings) and documents related to administrative procedures (as is a tender) must be kept in the intermediate archive for five years and thereafter permanently kept.²⁶

37 Indeed, even Mozambique’s legal expert Ms Muenda confirms that there is a duty to keep documents and that this ensures administrative transparency:

*“existe um dever de manter os documentos e que o mesmo assegura a transparência [...] esse seja o princípio que guia a administração pública.”*²⁷

38 However, as demonstrated below, attempting to justify its non-compliance with the legal obligations under Mozambican law, Respondent concocts new inconsistent explanations of its failure to disclose certain documents. None of these explanations holds water.

Where are Mozambique’s MOI Originals?

39 Mozambique has failed to produce its original versions of the MOI for inspection by Claimant’s expert. Initially, in response to Claimant’s Document Request No. 3 dated 30 April 2021, Mozambique stated that it “*is searching for all ‘original hard copy’ versions of the MOP*”.²⁸ Then, on 1 July 2021, after being prompted by PEL, Mozambique explicitly alleged that it could not find its original copies of the MOI notwithstanding its legal obligation to archive them.²⁹

²⁵ **CLA-271**, Decree 36/2007, of 27 August, Article 3 and Annex III; **CLA-272**, Decree 84/2018 of 26 December, Article 3 and Annex III.

²⁶ **CLA-271**, Decree 36/2007, of 27 August 2007, Article 3 and Annex III; **CLA-272**, Decree 84/2018 of 26 December 2018, Article 3 and Annex III. As explained by Professor Rui Medeiros in his Second Legal Opinion, Mozambican law recognises a freedom of access to all public documents and archives, without the need for the applicant to show any direct and legitimate interest in access thereto and refusal to produce such documents must be justified: “[t]he public powers shall keep archives available, other than the exceptions set out in law”, and “[a]ll information shall be kept in records which are duly catalogued and indexed so as to facilitate the right to information”, and “[o]pen Public Administration is based on freedom of access to public documents and archives, without the need for the person requesting them to demonstrate that he has a direct and legitimate interest in accessing them, or the purpose for which the information is intended”, except for (exceptional) legal restrictions.” **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 79; **CLA-239**, Law No. 34/2014, of 31 December 2014, Article 10.

²⁷ **RER-7**, Second Legal Opinion of Ms Teresa Muenda, para. 148: “*there is a duty to keep documents and that this ensures administrative transparency; [...] this is the principle that guides the public administration*” (free translation).

²⁸ Tribunal’s Decision on Claimant’s Document Production Schedule, dated 31 May 2021, p. 8, Document Request No. 3.

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

40 Now, in the Reply on Jurisdiction, Respondent for the first time argues that “*PEL has not identified any obligation for MTC to retain original copies of [the MOI]*”.³⁰ This is wrong and contradicts the legal opinion of Respondent’s own expert who acknowledged such an obligation.³¹ Understanding that this argument inevitably fails, Respondent offers another novel explanation — original copies of the MOI have not been located “*due to rehabilitation work in the relevant buildings or the ‘passage of time’*”.³² Respondent cannot even settle on the purported justification for its failure to disclose documents that it initially agreed to produce voluntarily and that it is required by law to keep in its possession.

Where are Mozambique’s Records of the Council of Ministers’ Meetings?

41 Mozambique has failed to disclose documents related to the Council of Ministers’ meetings where the decision to hold a public tender was made, and the meeting of 16 April 2013 where the Council of Ministers decided to proceed with the direct award of the Project to PEL. Specifically, Mozambique did not produce minutes and/or notes relating to these critical meetings, including any preparatory documents, attendee lists, or documents shared in advance of, during, or after, these meetings took place.

42 In responses to Claimant’s Document Production Requests Nos. 13, 15, and 16 Respondent maintained that it conducted searches and did not identify any responsive documents except those that are already in the record.³³ PEL explained in the Reply that records of the Council of Ministers meetings must exist and be permanently archived pursuant to Mozambican law.³⁴

43 Now, attempting to cover its non-compliance with Mozambican law, Respondent again concocts a new explanation for its failure to produce the relevant documents related to the Council of Ministers’ meetings. Respondent alleges that decisions of the Council of Ministers are “*communicated verbally to the public through spokespersons after the meeting.*”³⁵ Respondent

³⁰ Reply on Jurisdiction, para. 355.1.

³¹ Ms Muenda’s states that “[a]ccording to the [Decree 36/2007, dated 27 August], the **Agreements, covenants and contracts** are in the current archive during the period corresponding to their validity, thereafter moving to the intermediate archive, being filed for a mandatory period of 10 years” (free translation). **RER-7**, Second Legal Opinion of Ms Teresa Muenda, para. 155. Ms Muenda failed to mention that after such 10 years of intermediate archive these documents must be permanently kept.

³² Reply on Jurisdiction, para. 355.1.

³³ Tribunal’s Decision on Claimant’s Document Production Schedule, dated 31 May 2021, pp. 31, 36, 38, Document Requests Nos. 13, 15, and 16. As explained in the Reply, documents in the record are letters between the MTC and PEL that are not responsive to Document Requests Nos. 13, 15 and 16. See Reply, paras. 318-325, 367-371.

³⁴ Reply, paras. 322-324, 369, 378.

³⁵ Reply on Jurisdiction, para. 258, see also para. 355.2.

purposely conflates the press releases issued after the Council of Ministers' meetings communicating the decisions made with the records of such decisions and minutes of such meetings that must exist and be archived in accordance with Mozambican law.³⁶

44 Respondent further alleges that responsive documents related to these requests “*would be deemed secret under Mozambican law.*”³⁷ Mozambique provides no details as to the documents that could be deemed secret and the basis for classifying such documents as a state secret; Ms Muenda vaguely refers to “*some memoranda*” and “*projects and/or information from the Ministries*” that “*may*” be classified as such.³⁸ However, in order for information to be classified as a “*State secret*” under Mozambican law, certain criteria must be met. Ms Muenda fails to address this entirely.³⁹

45 In any event, in its Response to PEL’s Document Requests, Mozambique never invoked “*special political or institutional sensitivity*” with respect to these documents.⁴⁰ Under Procedural Order No. 1, documents classified as secret can be produced if a counterparty provides a confidentiality undertaking or, absent such agreement, the documents could be produced with the political or institutionally sensitive information redacted.⁴¹

46 Instead, both the Tribunal and Claimant are left with an almighty gap of knowledge in relation to pivotal governmental meetings to which only Respondent holds the key but refuses to share the access.

Where is Mozambique’s Complete Tender File?

47 Mozambique did not produce documents relating to the suspect public tender for the Project, including the complete tender file; the bidding documents submitted by the companies that were pre-qualified for the tender; the scoring tabulation of every individual scorer in respect of the financial proposals; information as to the potential conflict of interest of the scorers; minutes and attendee lists of meetings during which the bids were scored; and the

³⁶ See paras. 34-37 above; Reply, paras. 322-324, 369, 378; **CER-6**, Second Legal Opinion of Professor Rui Medeiros, paras. 77-80.

³⁷ Reply on Jurisdiction, para. 355.2.

³⁸ **RER-7**, Second Legal Opinion of Ms Teresa Muenda, paras. 157, 159.

³⁹ **CLA-239**, Law No. 34/2014, of 31 December 2014, Article 21(2); **CLA-271**, Decree 36/2007, of 27 August 2007, Annex III, p.87; **CLA-272**, Decree 84/2018 of 26 December 2018, Annex III.

⁴⁰ According to Procedural Order No. 1, para. 60 “[a] Party may request that a Document should not be produced, alleging compelling grounds of special political or institutional sensitivity (**including evidence that has been classified as secret by a government or a public international institution**).” (Emphasis added).

⁴¹ Procedural Order No. 1, para. 61.

documents showing that the rules and procedures were complied with.⁴² None of these important documents, that should be in Respondent’s possession, were produced.

48 Respondent alleges that it disclosed the tender file and refers to the “*the voluminous documents*” it disclosed and documents already in PEL’s possession.⁴³ Respondent again misleads the Tribunal. Technical and financial evaluation reports disclosed by Respondent and correspondence submitted by Claimant in the record do not constitute the tender file. As explained in the Reply, a complete set of documents reflecting the tender process, including the documents mentioned above, must exist and be kept in archives pursuant to Mozambican law.⁴⁴ Contrary to Mozambique’s allegations,⁴⁵ the tenderers’ proposals are not confidential and may even be consulted by the losing bidders.⁴⁶ Indeed, in a tender of this nature, transparency is key, and hence maintaining the documents would be critical for policy reasons to ensure that the process can be vetted at any time.

49 Furthermore, the Reply on Jurisdiction contains several wrong allegations with respect to Respondent’s disclosure of certain other categories of documents:⁴⁷

(a) Mozambique wrongly asserts that “*PEL does not point out to any law requiring the creation or retention*” of documents relating to the PFS analysis, assessment, and approval.⁴⁸ To the contrary, in the comments to its Document Production Schedule, PEL expressly referred to Articles 92 and 93 of Law 14/2011 of 10 August requiring Mozambique to create documents for any decision taken by the Government.⁴⁹ PEL also cited Decree 36/2007 of 27 August 2007 (repealed and replaced by Decree 84/2018 of 26 December) that requires Mozambique to retain documents related to administrative procedures in the intermediate archive for five years and thereafter to keep them permanently.⁵⁰

⁴² Tribunal’s Decision on Claimant’s Document Production Schedule, pp. 49-54, Document Request No. 21.

⁴³ Reply on Jurisdiction, para. 322.

⁴⁴ Reply, paras. 461-468.

⁴⁵ Reply on Jurisdiction, paras. 282, 324-325.

⁴⁶ Reply, para. 463; **CLA-67A**, Decree No. 15/2010, of 24 May 2010; **CLA-65A**, Law No. 15/2011, of 10 August 2011.

⁴⁷ This Rejoinder does not seek to deal exhaustively with Respondent’s failure to disclose documents under each of Claimant’s Document Requests ordered by the Tribunal. Claimant refers to its Reply submission; where the Document Request is not directly addressed herein, no admission is intended.

⁴⁸ Reply on Jurisdiction, para. 215.

⁴⁹ Tribunal’s Decision on Claimant’s Document Production Schedule, dated 31 May 2021, p. 19, Document Request No. 8. **CLA-19**, Law No. 14/2011, of 10 August.

⁵⁰ Tribunal’s Decision on Claimant’s Document Production Schedule, dated 31 May 2021, p. 19, Document Request No. 8. **CLA-271**, Decree 36/2007, of 27 August, Article 3 and Annex III; **CLA-272**, Decree 84/2018 of 26 December,

- (b) Respondent argues that it produced documents evidencing that the MTC instructed the CFM to negotiate with PEL in respect of the Project.⁵¹ This is not correct. Respondent refers to Exhibit R-65⁵² which is in fact a letter dated 20 June 2012 from the MTC to the CFM simply forwarding PEL’s letter dated 11 June 2012 that had already been submitted by Claimant in the record as Exhibit C-10.⁵³ In any event, Exhibit R-65 does not demonstrate any instructions from the MTC to the CFM to negotiate with PEL.
- (c) Respondent contends that Claimant’s arguments related to Respondent’s failure to produce the concession contracts and other documents related to the current status of the Project are “*abuse [sic] and frivolous*” because the Tribunal denied PEL’s requests with respect to these documents.⁵⁴ To avoid addressing PEL’s arguments, Mozambique misrepresents PEL’s position. As explained in the Reply, in accordance with Mozambican law, PEL submitted a formal information application on 23 September 2020 asking for, among other things, copies of the concession contracts and the EPC agreements with respect to the Project and copy of the feasibility study related to the Project.⁵⁵ To date, Respondent has never properly addressed this application, despite of its legal obligation to do so,⁵⁶ and has no legal or valid justification for this failure.

50 In sum, as follows from the above, Mozambique has disregarded its own laws repeatedly — laws which are designed to ensure integrity, transparency and honesty within Mozambique’s own government — by failing to keep (or at least alleging so) and later failing to disclose numerous categories of documents. To justify its non-compliance with its own laws, Mozambique presents incorrect and inconsistent explanations.

Article 3 and Annex III. As explained in the Reply and above, Decree 36/2007 of 27 August, approving the National System of State Archives (presently Decree 84/2018, of 26 December), established that all documents produced and received by bodies and institutions of Public Administration (e.g. the MTC), including central bodies of the State must be duly archived in the State Archive (“*Arquivo do Estado*”). As follows from Annex III of Decree 84/2018 of 26 December, contracts, agreements and associated documents must be permanently archived. The PFS is a document related to the MOI (*i.e.*, the MTC’s contract), therefore it must be permanently archived together with the MOI.

⁵¹ Reply on Jurisdiction, 227.

⁵² **Exhibit R-65**, Memorandum of Interest signed between MtC and Patel Engineering, dated 20 June 2012.

⁵³ **Exhibit C-10**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding “*The discussion held on 11.05.2012 in regards to Rail corridor at CFM office*”, dated 11 June 2012.

⁵⁴ Reply on Jurisdiction para. 332-333.

⁵⁵ Reply, paras. 470-475; **Exhibit C-336**, Letter from Antonio Veloso of Pimenta e Associados to the MTC regarding access to information request, dated 23 September 2020.

⁵⁶ **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 79; **CLA-239**, Law No. 34/2014, of 31 December 2014, Article 10.

51 This leaves a serious vacuum of evidence on Respondent's side that must have tangible consequences in this Arbitration. As explained in the Reply, in light of Mozambique's failure to produce these documents (which it must preserve and archive pursuant to its own laws), adverse inferences must be drawn against Mozambique, and the burden of proving that the tender process was conducted in a fair and transparent manner in accordance with Mozambican law should shift to Respondent.⁵⁷ The same applies to the above categories of documents which Respondent must have, but has chosen not to produce. For instance, Respondent cannot be seen to question PEL's MOI that is original and open for inspection, when it has elected not to produce its own copy that it was mandated by law to retain. Equally, when it comes to internal government meetings for which it has not produced notes or meeting minutes, the Tribunal must determine that the failure of Respondent to either keep or produce those documents is because they confirm the MOI as Claimant interprets it: as the right to a direct award to Claimant properly given under Mozambican law.

3. Mozambique incorrectly presents PEL's compliance with the document production obligations

52 Ironically, Respondent now asks the Tribunal to draw adverse inferences against PEL, because PEL allegedly did not produce or produced a small number of documents related to: (1) PEL's project conception; (2) PEL's participation in developing the Preliminary Study; (3) discussions with Mr Prabhu regarding the MOI's translations; (4) the costs incurred with respect to the Preliminary Study, PFS, and PGS Consortium's bid proposal; (5) meetings with the CFM and the MTC, (6) communications with offtake miners, (7) project cost estimate documentation; (8) communications among the PGS Consortium members about appeal of the tender results; and (9) PEL's temporary debarment by the NHAI.⁵⁸

53 Respondent's purported grievances in relation to PEL's production of documents ring particularly hollow considering its own conduct in these proceedings, as demonstrated above. Regardless, Mozambique's allegations are unfounded and should be disregarded by the Tribunal:

- (a) **First**, as Respondent acknowledges, Claimant produced a number of documents with respect to the above requests in the course of document

⁵⁷ Reply, paras. 40, 466, 469.

⁵⁸ Reply on Jurisdiction, paras. 7.9, 51, 350-352, 787, 933-958; fn. 4.

production or with its pleadings. For example, PEL disclosed documents related to the Project's conception (*see* Exhibit C-196),⁵⁹ PEL's participation in developing the Preliminary Study (*see* Exhibit C-200),⁶⁰ communications with offtake miners (*see* Exhibits C-57, C-58, C-59),⁶¹ and PEL's temporary debarment by the NHAI (*see* Exhibits C-326 – C-328, C-329, C-330, R-83).⁶²

(b) **Second**, there is no reason to believe that additional documents exist. As has been consistently explained by PEL, most of the requested documents are not available due to the passage of time.

(c) **Third**, unlike Respondent, PEL did *not* have a legal obligation to retain the requested documents.

54 Finally, Claimant addresses in detail Respondent's misrepresentations concerning certain categories of documents below.

55 Mozambique unjustifiably accuses PEL of “[withholding] evidence from its SOC and the document production process”.⁶³ In particular, Mozambique refers to the chat messages from the secretary of the MTC's Minister regarding the PFS and the Rio Tinto Memorandum prepared by the Ministry of Planning and Development.⁶⁴ This is staggering. Both the chat messages (prepared by the MTC's employee) and Rio Tinto Memorandum (prepared by the Ministry of Planning and Development) should be in Mozambique's possession. The fact that Respondent was not able to find these documents in its records does not mean that PEL was required to “front-load” them, as Respondent asserts.⁶⁵ This is further evidence of (interpreted in the light most favourable to Mozambique) Mozambique's mismanagement of its own records. Indeed, it is Mozambique who failed to disclose Rio Tinto's proposal which was explicitly

⁵⁹ **Exhibit C-196**, Mozambique Coal Export Spreadsheet prepared by Kishan Daga.

⁶⁰ **Exhibit C-200**, Email from Isaias Muhate of the MTC to Kishan Daga of PEL attaching work plan and fee proposal, dated 26 February 2011.

⁶¹ **Exhibit C-57**, Letter from PEL to Rio Tinto, dated 14 February 2012; **Exhibit C-58**, Letter from PEL to JSPL, dated 15 February 2012; **Exhibit C-59**, Letter from Rio Tinto to PEL, dated 21 February 2012.

⁶² **Exhibit C-326**, Letter from PEL to the NHAI regarding Letter of Award, dated 24 January 2011; **Exhibit C-327**, Letter from PEL to the NHAI regarding bid security, dated 1 February 2011; **Exhibit C-328**, Letter from PEL to the NHAI regarding Non-acceptance of Letter of Award, dated 3 February 2011; **Exhibit C-329**, Show Cause Notice issued by the NHAI, dated 24 February 2011; **Exhibit C-330**, Letter from PEL to the NHAI regarding Reply to Show Cause Notice, dated 1 March 2011; **Exhibit R-83**, PEL's Document Production, Bates No. 0000314-0000316.

⁶³ Reply on Jurisdiction, paras. 231, 233.

⁶⁴ **Exhibit C-226**, Chat between Kishan Daga of PEL and Arlanda Reis Cuamba of the MTC regarding presentation of the PFS, dated 9 May 2012; **Exhibit C-228**, Chat between Kishan Daga of PEL and Arlanda Reis Cuamba of the MTC regarding PEL's logo, dated 13 July 2012; and **Exhibit C-230**, Memorandum for the Investment Council under the Framework of the Rio Tinto Project for the Development of an Integrated Transportation Corridor, dated 1 August 2012.

⁶⁵ Reply on Jurisdiction, para. 233.

mentioned in the Rio Tinto Memorandum that squarely falls within the scope of Claimant's Document Request No. 5.⁶⁶

56 Mozambique unreasonably argues that PEL did not produce judicial records of the proceedings in the Indian courts related to PEL's temporary debarment by the NHAI.⁶⁷ Unlike Respondent, Claimant made every effort to obtain the requested documents and confirmed its attempts to obtain the requested documents with documentary evidence. On 28 September 2021, PEL filed an application with the Supreme Court of India to obtain certified copies of the requested judicial records.⁶⁸ As Claimant explained in correspondence with the Tribunal, it was not possible to file such an application earlier because of the Supreme Court's closure due to the COVID pandemic and the personal circumstances of PEL's representatives.⁶⁹ After making the application, Claimant undertook to update the Tribunal and Respondent about the status of the application every week.⁷⁰ On 30 November 2021, Claimant informed the Tribunal and Respondent that the case file requested by PEL from the Supreme Court of India was "*weeded out (document not available)*".⁷¹ PEL explained that "*this means that the case file is no longer available, most likely because it was destroyed due to the age of the file.*"⁷²

57 Mozambique alleges that PEL did not produce communications related to the Jharkhand matter, and "*concealed*" that case.⁷³ According to Mozambique, documents related to that case are covered by Document Request No. 50. Not only are the documents related to the Jharkhand case not covered by the plain wording of the request as narrowed by the Tribunal, but any documents related to that case are beyond the time frame of Request No. 50. The Tribunal narrowed down the request to include only "*[i]nternal memoranda prepared by PEL regarding the fact that it was precluded or disqualified from submitting bids by the National Highways Authority between January 2011 and July*

⁶⁶ **Exhibit C-59**, Letter from Rio Tinto to PEL, dated 21 February 2021. As follows from Rio Tinto's letter addressed to PEL, the proposal had been submitted before 21 February 2021. Mozambique ignores Rio Tinto letter that indicates a date of the proposal (Reply on Jurisdiction, para. 239). Instead, it refers to the date of the Rio Tinto Memorandum to allege that the proposal was not within the time frame of Claimant's Document Request No. 5.

⁶⁷ Reply on Jurisdiction, paras. 352, 933-942.

⁶⁸ **Exhibit C-344**, PEL's Application to the Supreme Court of India for a case file copy, dated 28 September 2021.

⁶⁹ **Exhibit C-345**, Letter from CMS to the Tribunal regarding Respondent's Document Production Request No. 53, dated 23 September 2021.

⁷⁰ **Exhibit R-82**, PEL Communication C-21, dated 28 September 2021; **Exhibit R-84**, PEL communication C-34, dated 16 November 2021.

⁷¹ **Exhibit C-346**, Email from Daria Kuznetsova of CMS to the Tribunal, attaching a copy of the response from the Supreme Court of India, dated 30 November 2021.

⁷² *Id.*

⁷³ Reply on Jurisdiction, fn. 32.

2013.”⁷⁴ According to Mozambique’s submission, the events related to Jharkhand matter occurred in 2015.⁷⁵ Accordingly, PEL obviously had no obligation to produce any such documents related to this matter.

⁷⁴ Tribunal’s Decision on Respondent’s Document Production Schedule, dated 31 May 2021, p. 85, Document Request No. 50. (Emphasis added)

⁷⁵ Reply on Jurisdiction, para. 420.

III. FACTUAL BACKGROUND

58 This section addresses the factual background of the case to the extent relevant to Respondent's objections to the jurisdiction of this Tribunal. Of course, many of these facts will also be material to liability and quantum. It deals with:

- (a) PEL's conception of the Project (**subsection A**);
- (b) The MOI and PEL's rights thereunder (**subsection B**); and
- (c) The approval of the PFS and PEL's exercise of its right of first refusal (**subsection C**).

59 Subsections A to C are relevant to this Tribunal's jurisdiction *ratione materiae*. PEL addresses the factual aspects of its alleged failure to disclose its temporary debarment by the NHAI in India, which forms the basis of Mozambique's admissibility objection, in Section V below.

A. *PEL Conceived of the Project, Which Mozambique Previously Thought Was Not Feasible*

60 As previously explained, further to a visit to Mozambique in late 2008 and initial research in 2010, PEL conceived of and developed the original concept to build and operate a railway corridor in Mozambique between Moatize in the Tete province, and a port in the Zambesia province, to be built between Quelimane and Chinde to transport coal and other minerals from the land to the coast (the Project).⁷⁶ The CFM had previously considered the Project to be unfeasible because the siltation and swampland along the Macuse coast made Macuse an unsuitable location for a port.⁷⁷

61 As further explained, Respondent's contention in its Reply on Jurisdiction that the Project was its own concept is not supported by evidence. It merely relied on the 2009 Resolution, setting out Mozambique's general overall strategy for the integrated development of the transport system, which did not discuss PEL's specific Project.⁷⁸ As for its alternative argument that other actors conceived of the Project, it is belied by Mozambique's own failure to produce any document in response to Claimant's Document Request (requesting

⁷⁶ Reply, paras. 138-155; SOC, paras. 53-67; **CWS-1**, Witness Statement of Mr Kishan Daga, paras. 10-27; **CWS-3**, Second Witness Statement of Mr Kishan Daga, paras. 3-12.

⁷⁷ Reply, para. 139; **CWS-1**, Witness Statement of Mr Kishan Daga, para. 15; **CWS-3**, Second Witness Statement of Mr Kishan Daga, paras. 10-11.

⁷⁸ Reply, para. 144; **RLA-15**, Resolution No. 37-2009 (30 June 2009), Official Mozambique Republic Gazette.

evidence that companies other than PEL showed interest in the Project during the relevant period between the 2009 Resolution and 2011).⁷⁹

62 PEL further adduced evidence to the contrary in the form of a draft excel spreadsheet demonstrating that it was conducting initial research on the Project in mid-2010,⁸⁰ contemporaneous correspondence and evidence of meetings with numerous Government officials in early 2011 regarding its concept for the Project,⁸¹ its financing and commissioning of the Preliminary Study,⁸² and importantly, the PFS itself.⁸³

63 Mozambique nonetheless continues to dispute that the Project was PEL's concept through five core arguments, which all fail for the reasons developed below.

64 **First**, Mozambique insists that the idea of a port at Macuse was not PEL's concept.⁸⁴ Relying on the Preliminary Study, it argues that the MTC's own experts suggested that Macuse, which according to Mozambique, had been a port in the 1990s, would be an appropriate location for the port.⁸⁵

65 This argument is conceptually flawed. It treats the idea of a "*port*" in Macuse as being equivalent to PEL's Project. As is clear from the picture below, there has never been a port in Macuse, but rather a mere offloading ramp which allowed fisherman to dock their boats and unload their catch:⁸⁶

⁷⁹ Tribunal's Decision on Claimant's Document Production Schedule, dated 31 May 2021, pp. 5-7, Document Request No. 2.

⁸⁰ **Exhibit C-196**, Mozambique Coal Export Spreadsheet prepared by Kishan Daga.

⁸¹ **Exhibit C-198**, Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Kishan Daga of PEL regarding meeting, dated 11 February 2011; **Exhibit C-199**, Email from Kishan Daga of PEL to Rupen Patel of PEL regarding meeting with the Minister of Planning and Development, dated 15 February 2011 ("*I apprised him [Minister of Planning] about our mining activities and then told [him] about . . . 2. Rail road link from tete to chinde. . . He has shown interest . . . and wants to meet again with Ashish . . . Looks very bright changes for these projects. . . . Meeting with transport minister is fixed on 17th morning. Meeting with presidents son is fixed on 20th evening. (dinner meeting). Meeting with deputy mine minister is fixed on Monday morning.*"); **Exhibit C-55**, Letter from PEL to Ministry of Planning and Development, regarding "*Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde*", dated 17 February 2011; **Exhibit C-3**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding "*Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde*", dated 17 February 2011.

⁸² **Exhibit C-200**, Email from Isaias Muhate of the MTC to Kishan Daga of PEL attaching work plan and fee proposal, dated 26 February 2011; **Exhibit C-4a**, Preliminary Study to Assess Potential Port Locations in Zambezia to Connect the Moatize Coal Mines by Rail, March 2011.

⁸³ **Exhibit C-6b**, Pre-Feasibility Study (Final and Complete), April 2012; **Exhibit C-227**, Email from Jafar Ruby of the MTC to Kishan Daga of PEL attaching the presentation to the CFM, dated 17 May 2012.

⁸⁴ Reply on Jurisdiction, paras. 23-27.

⁸⁵ *Id.* at paras. 24-25.

⁸⁶ **Exhibit C-347**, Google Earth view of Macuse offloading ramp. Adjacent buildings shown on the picture are some village offices and a school. **Exhibit C-348**, Video of Minister Zucula's visit on a future Macuse port's site, May 2012. A video of a site visit by representatives of PEL, the MTC, and the CFM in May 2012 also confirms that there was no port in Macuse at the time.



66 The Project included an innovative transportation corridor that would unlock the potential of Mozambique’s mineral-rich Tete province by connecting it via railway to a deep-water port Macuse, which would have the capacity to accommodate large vessels that would be required to transport coal and other cargo. These are two entirely different concepts. In this respect, the fact that there once was a “port” in Macuse is irrelevant.

67 Further, to the extent Mozambique’s argument is founded on the Preliminary Study, it is devised to obscure the relevant timeline. PEL conceived of the Project in the period between its first site visit in 2008, which led to its conducting initial research in mid-2010, and then to convincing the government to conduct the Preliminary Study,⁸⁷ which PEL commissioned between February and April 2011.⁸⁸ By that time, PEL already had conceived of the Project and convinced the government to consider it.⁸⁹

68 **Second**, Respondent maintains that it did not view the Project as infeasible. In support, it argues that an alleged plan to develop a railway line between Tete and Nacala (Line 4) as envisaged in the 2009 Resolution somehow demonstrates that Mozambique viewed a port at Macuse as feasible.⁹⁰ Mozambique’s reliance on the 2009 Resolution suffers from the same conceptual flaw as its previous argument. Namely, it does not refer to PEL’s

⁸⁷ CWS-1, Witness Statement of Mr Kishan Daga, paras. 10-34; CWS-3, Second Witness Statement of Mr Kishan Daga, paras. 3-22; **Exhibit C-196**, Mozambique Coal Export Spreadsheet prepared by Kishan Daga; **Exhibit C-198**, Email from Rafique Jusob of Mozambique’s Investment Promotion Centre to Kishan Daga of PEL regarding meeting, dated 11 February 2011; **Exhibit C-199**, Email from Kishan Daga of PEL to Rupen Patel of PEL regarding meeting with the Minister of Planning and Development, dated 15 February 2011; **Exhibit C-55**, Letter from PEL to Ministry of Planning and Development, regarding “*Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde*”, dated 17 February 2011; **Exhibit C-3**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding “*Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde*”, dated 17 February 2011.

⁸⁸ **Exhibit C-200**, Email from Isaias Muhate of the MTC to Kishan Daga of PEL attaching work plan and fee proposal, dated 26 February 2011; **Exhibit C-4a**, Preliminary Study to Assess Potential Port Locations in Zambezia to Connect the Moatize Coal Mines by Rail, March 2011.

⁸⁹ Reply, paras. 156-162; SOC, paras. 67-77.

⁹⁰ Reply on Jurisdiction, para. 26.

Project concept at all.⁹¹ As is clear from the map submitted with the Reply and reproduced below, the transportation corridor proposed by PEL has nothing to do with the corridor foreseen in the 2009 Resolution.⁹²



As the map makes clear, Line 4 (the Nacala Corridor) bears no relationship or resemblance to the transportation and deep-water port project conceived of by PEL.⁹³

69 **Third**, Mozambique contends that PEL never established the feasibility of the Project because it never undertook a bankable feasibility study.⁹⁴ This is beside the point. Again, Respondent tries to obscure the relevant timeline by jumping back and forth in time. PEL’s arguments regarding its conception and development of the Project concerns the period between the 2008 site visit through its commissioning of the Preliminary Study and completion of the PFS.⁹⁵ Respondent’s entire discussion relates to subsequent events.

70 **Fourth**, Mozambique contends that the twenty expressions of interest in the tender process somehow demonstrate that PEL did not conceive of the Project.⁹⁶ This again is irrelevant and obscures the relevant timeline, as the tender happened years after PEL conceived of the Project and PEL’s work was unlawfully appropriated by Mozambique to form the basis of the tender in the first place. This also supports PEL’s case that its concept was attractive to

⁹¹ The thrust of the passage cited by Respondent is that the main purpose of the Nacala Corridor (Line 4) was to feature the ports of Beira and Nacala, which might then allow for additional ports at Quelimane, Macuse, and Pebane to become a possibility, *i.e.*, it could allow for the feasibility thereof. This is a far cry from developing the transportation corridor and deep-water port concept envisaged by PEL.

⁹² Reply, paras. 144-145; CWS-3, Second Witness Statement of Mr Kishan Daga, para. 12.

⁹³ Reply, paras. 144-145. Both the Nacala (in green) and Macuse (in blue) corridors are shown on the map. As explained by Mr Kishan Daga, the Macuse corridor was only mapped by the MTC in 2012, after the PFS was approved by the MTC: “The Nacala corridor was shown on the map that I obtained from the [MTC] in 2013. The Nacala corridor project had been developed by Vale company. I had seen that map displayed in the MTC’s offices before 2012, and the Macuse corridor was not there. It was only in 2012, after the PFS was approved, that the MTC mapped the Macuse Corridor.” CWS-3, Second Witness Statement of Mr Kishan Daga, para. 12.

⁹⁴ Reply on Jurisdiction, paras. 29-33.

⁹⁵ Reply, paras. 138-163.

⁹⁶ Reply on Jurisdiction, para. 35.

many market stakeholders, which participated in the tender that Mozambique organised on the basis of PEL's PFS.⁹⁷

71 **Fifth**, Respondent refers again to the 2012 Rio Tinto letter as evidence that other actors conceived of the Project.⁹⁸ It does not address PEL's submissions on the timing of the letter (*i.e.*, **after** the Preliminary Study and after PEL had discussed Rio Tinto's possible participation in the Project), which renders it irrelevant. Nor does it address the fact that its contents, read plainly, do not support that Rio Tinto conceived the Project.⁹⁹

72 **Sixth**, Respondent criticises PEL's evidence that it was conducting initial research as not "*demonstrat[ing] project conception or establish[ing] the feasibility of any specific project.*"¹⁰⁰ Again, Respondent relies on the feasibility of the Project, which comes **after** the conception of the Project and is accordingly irrelevant. As Professor Medeiros explains, the first stage of implementing a PPP through a direct award is the "*conception phase*", with conception being defined as "*the development of the idea and the preparation of preliminary drafts of the undertaking initiative.*"¹⁰¹ As Professor Medeiros concludes, in accordance with Article 9 of Decree 16/2012, of 4 June 2012 (the PPP Regulations):

*"the MoI embodies, in itself, the 'conception' phase of the project, resulting from an unsolicited proposal, in which the underlying idea is immediately indicated in general terms - and even if this were not the case, the pre-feasibility study certainly 'conceives' the characteristics of the project."*¹⁰²

73 What is more, PEL's evidence demonstrates that it in fact performed the work of conceptualising the Project; in other words, it conducted the initial research in mid-2010 Project, commissioned the Preliminary Study, and carried out the PFS itself.¹⁰³ This in turn supports PEL's case that it conceived the Project during this period.

⁹⁷ Reply, paras. 380-391.

⁹⁸ Reply on Jurisdiction, para. 35; SOD, para. 40.

⁹⁹ **Exhibit C-59**, Letter from Rio Tinto to PEL, dated 21 February 2012; **Exhibit C-379**, The Ministry of Planning and Development Presentation regarding Rio Tinto's proposal with translation, August 2012.

¹⁰⁰ Reply on Jurisdiction, para. 36 and *see* generally 36-38.

¹⁰¹ **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 13.3 at fn. 5; **CLA-64A**, Decree No. 16/2012, of 4 June 2012, Article 9.

¹⁰² **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 55.3.3(i).

¹⁰³ Reply, para. 149. **CWS-1**, Witness Statement of Mr Kishan Daga, paras. 10-34; **CWS-3**, Second Witness Statement of Mr Kishan Daga, paras. 3-22; **Exhibit C-196**, Mozambique Coal Export Spreadsheet prepared by Kishan Daga; **Exhibit C-198**, Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Kishan Daga of PEL regarding meeting, dated 11 February 2011; **Exhibit C-199**, Email from Kishan Daga of PEL to Rupen Patel of PEL regarding meeting with the Minister of Planning and Development, dated 15 February 2011; **Exhibit C-55**, Letter

- 74 In contrast, it rings more than a little hollow for Respondent to criticise PEL’s evidence when Respondent’s only evidence discussing Mozambique’s alleged conception of the Project is the after-the-fact testimonies of former Minister Zucula and Mr Chauque.¹⁰⁴
- 75 Furthermore, Mozambique’s argument that it would have conceived of the Project contradicts its entire case that the right provided for in the MOI would equate to a 15% scoring advantage in the public tender (*quod non*). Under Article 13(5) of the PPP Law¹⁰⁵ and Article 14(3) of the PPP Regulations,¹⁰⁶ only unsolicited proposals (“**USP**”) brought forward by a private entity benefit from such an advantage in a public tender procedure, precisely as a means to reward the proponent for bringing the idea forward, that is, for conceiving and presenting it to the authorities, such conception phase being considered by law as the first stage of a public procurement procedure based on an USP.¹⁰⁷
- 76 Mozambique’s case also contradicts its own behaviour when entering into the MOI: why would Mozambique willingly grant a right of first refusal if not to reward PEL for having brought forward an idea which the government had not previously entertained?
- 77 The foregoing demonstrates that Respondent neither has documentary evidence nor (credible) witness evidence to support its case that it conceived of the Project rather than PEL. By contrast, PEL’s affirmative evidence in this regard is considerable.¹⁰⁸ Moreover, Respondent’s argument is in any event inconsistent even with its own interpretation of the MOI.

from PEL to Ministry of Planning and Development, regarding “*Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde*”, dated 17 February 2011; **Exhibit C-3**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding “*Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde*”, dated 17 February 2011; **Exhibit C-200**, Email from Isaias Muhate of the MTC to Kishan Daga of PEL attaching work plan and fee proposal, dated 26 February 2011; **Exhibit C-4a**, Preliminary Study to Assess Potential Port Locations in Zambezia to Connect the Moatize Coal Mines by Rail, March 2011; **Exhibit C-6b**, Pre-Feasibility Study (Final and Complete), April 2012; **Exhibit C-227**, Email from Jafar Ruby of the MTC to Kishan Daga of PEL attaching the presentation to the CFM, dated 17 May 2012.

¹⁰⁴ Reply on Jurisdiction, para. 28.

¹⁰⁵ **CLA-65A**, Law No. 15/2011, of 10 August 2011.

¹⁰⁶ **CLA-64A**, Decree No. 16/2012, of 4 June 2012.

¹⁰⁷ **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 2.4. See also **CLA-64A**, Decree No. 16/2012, of 4 June 2012, Article 9(1).

¹⁰⁸ Reply, para. 149. **CWS-1**, Witness Statement of Mr Kishan Daga, paras. 10-34; **CWS-3**, Second Witness Statement of Mr Kishan Daga, paras. 3-22; **Exhibit C-196**, Mozambique Coal Export Spreadsheet prepared by Kishan Daga; **Exhibit C-198**, Email from Rafique Jusob of Mozambique’s Investment Promotion Centre to Kishan Daga of PEL regarding meeting, dated 11 February 2011; **Exhibit C-199**, Email from Kishan Daga of PEL to Rupen Patel of PEL regarding meeting with the Minister of Planning and Development, dated 15 February 2011; **Exhibit C-55**, Letter from PEL to Ministry of Planning and Development, regarding “*Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde*”, dated 17 February 2011; **Exhibit C-3**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding “*Expression of Interest for Infrastructure Projects in Mozambique: Rail Corridor from Tete to Chinde*”, dated 17 February 2011; **Exhibit C-200**, Email from Isaias Muhate of the MTC to Kishan Daga of PEL attaching work plan and fee proposal, dated 26 February 2011; **Exhibit C-4a**, Preliminary Study to Assess Potential Port Locations in Zambezia to Connect the Moatize Coal Mines by Rail, March 2011; **Exhibit C-6b**, Pre-Feasibility Study (Final and Complete), April 2012; **Exhibit C-227**, Email from Jafar Ruby of the MTC to Kishan Daga of PEL attaching the presentation to the CFM, dated 17 May 2012.

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

78 In the Reply, PEL demonstrated that the terms of the bargain between the Parties were clear on the face of the MOI, whichever version was considered, namely:

- (a) PEL agreed to carry out the PFS at its sole expense, in consideration of which Mozambique promised that if it approved the PFS and PEL decided to implement the Project through the exercise of its right of first refusal, Mozambique would grant PEL a concession to implement the Project.
- (b) As a logical flipside to its commitment to award the concession directly to PEL, Mozambique granted PEL exclusivity rights in relation to the Project (and any substantially similar projects), committed not to grant rights in respect of the Project to any other party, and to keep the information shared in relation to the Project confidential.¹⁰⁹

79 PEL further showed that this was supported by the plain language of the MOI, the contents of which, other than Clause 2(1), are *common ground*. In summary:

- (a) Clause 1 contained PEL's obligation to carry out the PFS at its own expense.¹¹⁰
- (b) Clause 2 contained Mozambique's obligation to grant PEL the concession in respect of the Project, subject to Mozambique's approval of the PFS and PEL's decision to implement the Project through the exercise of its right of first refusal. Crucially, Clause 2(2), which is common ground, provided: "[a]fter the approval of the pre-feasibility study PEL shall have the right of first refusal for the implementation, of the project on the basis of the concession which will be given by the Government of Mozambique."¹¹¹

¹⁰⁹ Reply, paras. 164-172.

¹¹⁰ **Exhibit C-5A**, English Version of the MOI, Clause 1; **Exhibit C-5B**, Portuguese Version of the MOI, Clause 1; **Exhibit R-1**, Portuguese Version of the MOI, Clause 1; and **Exhibit R-2**, English Version of the MOI, Clause 1.

¹¹¹ **Exhibit C-5A**, English Version of the MOI, Clause 2(2); **Exhibit C-5B**, Portuguese Version of the MOI, Clause 2(2); **Exhibit R-1**, Portuguese Version of the MOI, Clause 2(2); and **Exhibit R-2**, English Version of the MOI, Clause 2(2).

- (c) Clause 7 essentially provided that the Parties should enter into a new memorandum to undertake another study of a similar project, should the corridor envisaged by the MOI be found techno commercially unviable.¹¹²
- (d) Clause 6 granted PEL exclusivity rights in relation to the Project (and substantially similar projects) “*during the prefeasibility study and the process of approval for the project*”, and prevented Mozambique from granting any right or authorisation to any other party for the development or expansion of the Project.¹¹³ While the latter obligation was not limited in time, it logically applied until PEL had exercised its right of first refusal, after which point the concession was awarded to PEL per the MOI. Conversely, if PEL refused to implement the Project, Mozambique was no longer bound by the exclusivity clause in the MOI and could seek out other interested parties.
- (e) In the same vein, Clause 11 of the MOI protected the confidentiality of the Parties data, documents and information “*until the approval of the project*”.¹¹⁴

80 PEL further rebutted Mozambique’s case that the MOI was a “*contingent, non-binding preliminary document*” intended to memorialise that PEL would undertake the PFS at its own cost, and if the PFS was deemed acceptable by the MTC, PEL would benefit from a 15% margin of preference in the tender in respect of the Project that would be organised by Mozambique.¹¹⁵ PEL showed that this argument was exclusively founded on extraneous evidence not contained in the MOI.¹¹⁶ After all, there is simply no reference in the MOI to any concept of a “*tender*,” “*15%*,” a “*margin of preference*,” or the notion of a competitive bidding stage of any kind.

81 PEL also showed that its own interpretation of the MOI was supported — and conversely Mozambique’s interpretation was contradicted — by (i) the commercial logic of the MOI;¹¹⁷ (ii) the Parties’ conduct after the MOI was

¹¹² **Exhibit C-5A**, English Version of the MOI, Clause 7; **Exhibit C-5B**, Portuguese Version of the MOI, Clause 7; **Exhibit R-1**, Portuguese Version of the MOI, Clause 7; and **Exhibit R-2**, English Version of the MOI, Clause 7.

¹¹³ **Exhibit C-5A**, English Version of the MOI, Clause 6; **Exhibit C-5B**, Portuguese Version of the MOI, Clause 6; **Exhibit R-1**, Portuguese Version of the MOI, Clause 6; and **Exhibit R-2**, English Version of the MOI, Clause 6.

¹¹⁴ **Exhibit C-5A**, English Version of the MOI, Clause 11; **Exhibit C-5B**, Portuguese Version of the MOI, Clause 11; **Exhibit R-1**, Portuguese Version of the MOI, Clause 11; and **Exhibit R-2**, English Version of the MOI, Clause 11.

¹¹⁵ Reply, paras. 173-207.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at paras. 205-207.

entered into, whereby Mozambique approved the PFS and then asked PEL to “*expressly exercise its right of first refusal*,” which PEL did three days later;¹¹⁸ and (iii) the documents regarding the negotiation history of the MOI identified during the document production phase.¹¹⁹

82 Despite the above, Mozambique continues to put forward its implausible interpretation of the MOI, which continues to fail.

1. Respondent does not rebut the fact that the MOI is a binding agreement on its face

83 In the Reply, PEL explained that Respondent’s case that the MOI was an agreement to agree was belied by (i) the mandatory language used in the MOI, which created obligations for the Parties, (ii) the inclusion of a dispute resolution clause in the MOI and (iii) the fact that an official signing ceremony was organised.¹²⁰

84 In response, Mozambique’s repeats that the MOI was an agreement to agree essentially because the MOI was not a concession agreement.¹²¹

85 While the MOI is obviously not a concession agreement (and PEL has never argued that it was), it was nevertheless a binding contract that afforded PEL the right to a direct award of a concession agreement, subject to two preliminary conditions (*i.e.*, the approval of the PFS and PEL’s exercise of its right of first refusal), both of which it fulfilled.

86 Furthermore, Respondent’s argument fails in that it is not founded on the wording of the MOI, but on the evidence of Mr Ehrhardt which merely opines on a general industry practice and not the MOI specifically.¹²²

87 Finally, Respondent reluctantly acknowledges that the MOI contained binding dispute resolution, exclusivity, and confidentiality clauses.¹²³ Yet, Respondent neither discusses PEL’s obligation to conduct the PFS, which it has acknowledged elsewhere,¹²⁴ nor how such obligation marries with the confidentiality and exclusivity obligations and PEL’s right of first refusal.

¹¹⁸ Reply, paras. 208-213.

¹¹⁹ *Id.* at paras. 214-241.

¹²⁰ *Id.* at paras. 175-177.

¹²¹ Reply on Jurisdiction, paras. 103-112.

¹²² **RER-11**, Expert Report of Mr David Ehrhardt.

¹²³ Reply on Jurisdiction, para. 107.

¹²⁴ *See e.g.* SOD, paras. 50-52.

88 When those obligations are considered together, and the MOI is read as a whole, it is clear that the MOI was not an agreement to agree.¹²⁵ A large infrastructure project may be procured and implemented through multiple contracts between the same or different parties. The necessity of one or more additional contracts in the project timeline does not detract from the binding nature of the first agreement in that series, such as the MOI.

- i. Respondent's argument that the MOI was not valid and binding agreement under Mozambican law continues to fail

89 PEL adduced extensive Mozambican law evidence to demonstrate that, contrary to Respondent's argument, the MTC had the power to enter into the MOI and to grant PEL a right to a direct award of a concession;¹²⁶ and that Mozambique's argument that material terms of a concession and authorisations were missing from the MOI was founded on a purposeful conflation between the MOI and the concession agreement itself.¹²⁷

90 In the Reply on Jurisdiction, Mozambique deals with its argument on the alleged invalidity and non-binding nature of the MOI with unusual concision in one single paragraph. Such paragraph merely cross-refers to the legal opinion of Ms Muenda and to the reports of Mr Ehrhardt and MZBetar.¹²⁸

91 This does not constitute a response to PEL's argument. The points raised by Ms Muenda relate again to the concession contract itself as opposed to the MOI. PEL therefore refers to Professor Medeiros' second legal opinion which has extensively addressed these points.¹²⁹ As for the reports of Mr Ehrhardt and MZBetar, they do not constitute evidence of Mozambican law and are accordingly irrelevant.

- ii. Respondent's argument that the MOI merely granted a 15% scoring advantage to PEL continues to fail

92 In the Reply on Jurisdiction, Respondent repeats its theory that PEL was only granted a 15% scoring advantage under the MOI.¹³⁰ Whilst it quietly abandons some of its most far-fetched points on the interpretation of the MOI, it does not respond in any meaningful way to PEL's argument in the Reply. Furthermore,

¹²⁵ CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 59-63.

¹²⁶ Reply, paras. 180-181; CER-6, Second Legal Opinion of Professor Rui Medeiros, Section 3.

¹²⁷ Reply, para. 182.

¹²⁸ Reply on Jurisdiction, para. 114 referring to RER-7, Second Legal Opinion of Ms Teresa Muenda, conclusion 6; RER-6, Second MZBetar Expert Report, Sections 5.2-5.3; RER-11, Expert Report of Mr David Ehrhardt, Sections 3, 5, and para. 328.

¹²⁹ CER-6, Second Legal Opinion of Professor Rui Medeiros, Executive Summary E, H, to L and Section 3.

¹³⁰ Reply on Jurisdiction, Section D.

to the extent it puts forward new points in support of its theory, they do not withstand elementary scrutiny.

93 At the outset, Respondent’s repetition of its mantra that the MOI was only 6 pages long and accordingly could not have granted a concession to PEL,¹³¹ is exclusively founded on general comments about industry practice and accordingly does not assist its interpretation of this specific MOI. Under no known legal theory does the length of a document gauge how binding it is.

94 Turning to the interpretation of the MOI, Respondent makes eight core arguments, which all fall flat.

1. Mozambique’s interpretation of Clause 2(2) remains unsupported either by the MOI or Mozambican law

95 Mozambique’s interpretation of the MOI as merely granting a 15% scoring advantage to PEL is chiefly founded on its interpretation of Clause 2(2) of the MOI.¹³²

96 In the Reply, PEL demonstrated that:

(a) The wording of the MOI itself does not support Mozambique’s interpretation, *i.e.*, the English version of the MOI neither refers to a tender, nor to a margin of preference, nor to a 15% scoring advantage; and the Portuguese version translated the right of first refusal as “*direito de preferencia*” but does not refer to a public tender or a scoring advantage.¹³³

(b) Clause 2(2) of the MOI, which is identical in all the versions of the MOI, explicitly refers to a concession, not to a tender or a scoring advantage, *i.e.*, it provides PEL with “*the first right of refusal for the implementation of the Project on the basis of the concession which will be given by the Government of Mozambique.*”¹³⁴

(c) Professor Medeiros confirmed that PEL’s right of first refusal / *direito de preferencia* is compatible with the direct award of a concession.¹³⁵ He further explained that a right to a bonus is an entirely different

¹³¹ Reply on Jurisdiction, paras. 74-76.

¹³² *Id.* at paras. 77-80.

¹³³ Reply, paras. 185-188.

¹³⁴ Reply, paras. 189-190; **Exhibit C-5A**, English Version of the MOI, Clause 2(2).

¹³⁵ Reply, paras. 197-198, 201.

concept from a right of first refusal / *direito de preferencia* under Mozambican law.¹³⁶

97 In the Reply on Jurisdiction, Mozambique's repeats its theory, which is articulated on two bases.

98 First, it contends that it does not matter that the English version of the MOI does not refer to right of preference because the Portuguese version prevails and whether "*PEL in preparing the MOI drafts translated *direito de preferencia* as right of refusal or right of preference in English is non-determinative*"¹³⁷ not least because the MOI allegedly does not refer to a direct award.¹³⁸

99 Respondent's claim that the MOI does not refer to a direct award does not assist its case. Clause 2(2) refers explicitly to "*a concession, which will be given by the Government of Mozambique*".¹³⁹ Conversely, it does not refer to a tender or to any scoring advantage.

100 What is more, Respondent's allegation that PEL translated the expression *direito de preferencia* as right of first refusal is disingenuous. As explained in the Reply, the "*right of first refusal*" was a concept proposed *by PEL*,¹⁴⁰ which was included in all of PEL's early internal drafts of the MOI as well as in the draft that PEL first shared with Respondent.¹⁴¹ The expression "*direito de preferência*" first appeared *in the translation of the MOI* done by a translation company, on 18 April 2011.¹⁴² The last version of the MOI circulated by Mozambique on the morning of 6 May 2011 reflected the language provided by the translation company.¹⁴³ It was therefore a concept introduced by PEL in the English phrase '*right of first refusal*', *not* an English translation of a Portuguese phrase introduced by Mozambique designed to foreshadow a future law.

101 Second, Respondent maintains that Clause 2(2) of the MOI must be read in conjunction with Clause 8 of the MOI, which refers to the fact that the project

¹³⁶ Reply, paras. 197-198; 201.

¹³⁷ Reply on Jurisdiction, para. 116.

¹³⁸ *Id.* at paras. 115-117, 119-120.

¹³⁹ **Exhibit C-5A**, English Version of the MOI, Clause 2(2).

¹⁴⁰ Reply, para. 226.

¹⁴¹ Reply, paras. 227-234; **Exhibit C-225**, Email from Ashish Patel of PEL to Rupen Patel of PEL and Sandeep Shetty with copy to Kishan Daga of PEL attaching draft of the MOI, dated 5 April 2011.

¹⁴² Reply, para. 231; **Exhibit C-202**, Email from Arquimedes Nhacule of Aries to Kishan Daga of PEL attaching Portuguese translation of the MOI, dated 18 April 2011, Clause 7.

¹⁴³ Reply, para. 232; **Exhibit C-204**, Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Fausto Mabota of Aries copying Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 6 May 2011.

must be implemented within the laws approved by the Government of Mozambique, which in turns means that PEL was granted a 15% *direito de preferencia* in accordance with such laws.¹⁴⁴ This also does not assist Respondent’s case.

102 At the outset, it is noteworthy that Clause 8 of the Portuguese version of the MOI, which Respondent repeatedly argues prevails over the English version, does not even contain a reference to Mozambican *law*. It refers to *principles* approved by the Government of Mozambique:

*“A implementação do Projecto será feita dentro dos princípios a aprovar pelo Governo de Moçambique.”*¹⁴⁵

103 Further and in any event, Respondent cannot qualify the right provided by Clause 2(2) with the general reference in Clause 8 when the negotiation history demonstrates that the Parties deliberately decided not to refer to domestic law in respect of the right of first refusal.¹⁴⁶ The 6 May 2011 version of the MOI circulated by Mozambique did not contain the reference to Mozambique domestic law, which Mozambique had tried to add to the relevant clause, in the version of the MOI that was circulated on 3 May 2011.¹⁴⁷

104 Further and in any event, as explained by PEL in the Reply and supported by the Professor Medeiros’ legal opinions, the “*direito de preferência*” is a different concept from the bonus system set forth in Article 13(5) of the PPP Law, which was not even in force when the MOI was entered into.¹⁴⁸

105 Respondent attempts to dispute this point by stating that it is somehow incorrect as matter of law and fact.¹⁴⁹ Yet, Mozambique’s statement is not supported by its own legal expert. Rather, Respondent’s own expert acknowledges that at the time when the MOI was entered into, the PPP Law was yet to enter into force.¹⁵⁰ This, in turn, means that the “*direito de preferência*” could only correspond to such right as defined in the Civil Code. When Respondent’s expert deals with the “*direito de preferência*” in the Civil Code, which she considers applicable to the rights granted under the MOI,¹⁵¹

¹⁴⁴ Reply on Jurisdiction, paras. 78-82; 118.

¹⁴⁵ **Exhibit C-5B**, Portuguese Version of the MOI, Clause 8.

¹⁴⁶ Reply, para. 233.

¹⁴⁷ **Exhibit C-203**, Email from Judite Mula of Aries to Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 3 May 2011, Clause 7(2): “*Uma vez preparado o RFD pela PEL e aprovado pelo Governo de Moçambique, a PEL terá o direito de preferência para realizar o Projecto, dentro dos limites legalmente aceites.*”

¹⁴⁸ Reply, para. 235; **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 2.4. (Emphasis added)

¹⁴⁹ Reply on Jurisdiction, paras. 128-129.

¹⁵⁰ **RER-7**, Second Legal Opinion of Ms Teresa Muenda, para. 13.

¹⁵¹ *Id.* at paras. 4-5.

she also *agrees* with Professor Medeiros’ legal opinion that once the “*direito de preferência*” has been exercised the parties are bound to proceed to sign the “*definitive contract*”.¹⁵²

106 As discussed further below, this is precisely what happened in the present case as a matter of fact. Once PEL exercised its right of first refusal, the Parties were bound to enter into a concession agreement in respect of the Project. Mozambique itself acknowledged that fact, and commenced its implementation, by requesting PEL to commence negotiations with its choice of public partner, CFM, to create the PPP, an action it would only have taken once the decision was approved to move forward with a direct award to PEL.¹⁵³ Governments typically do not move forward to actual PPP negotiations between specific and exclusive private and public parties unless and until they have selected their chosen candidates — both the private bidder and the public entity — for the given project.

2. Mozambique’s new interpretation of the exclusivity clause is as inapt as its previous one

107 As explained in the Reply, Respondent’s theory that the exclusivity clause provided that PEL would exclusively have a preferential position at the public tender and PEL could exercise its right of first refusal within the tender process contradicts the wording of Clause 6 and Respondent’s own case (*i.e.*, it meant that PEL had a scoring advantage *as well as* right of first refusal).¹⁵⁴

108 In the Reply on Jurisdiction, Respondent abandons this hopeless argument. Respondent now contends that the exclusivity clause was “[a]t most...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.”¹⁵⁵ According to Mozambique, this is standard practice for unsolicited proposals¹⁵⁶ and the clause clearly referred to the requirement of Mozambican law,¹⁵⁷ which meant PEL had to be subject to a tender process.

109 Respondent’s new interpretation of Clause 6 of the MOI is just as inapt as its previous one.

¹⁵² **RER-7**, Second Legal Opinion of Ms Teresa Muenda, para. 6(iii).

¹⁵³ **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

¹⁵⁴ Reply, paras. 194-195.

¹⁵⁵ Reply on Jurisdiction, para. 85, *see also* para. 84.

¹⁵⁶ *Id.* at para. 85.

¹⁵⁷ *Id.* at para. 121.

110 **First**, Respondent’s interpretation does not give any effect to the second sentence of Clause 6, which contemplated that the MTC would not grant concession rights to any other party. This sentence had nothing to do with a scoring preference in a tender. It is obvious on its face:

*“MTC also agrees not to give any rights/authorization to any other party for the development/expansion of a port between Chinde and Pebane for similar objectives, nor for the development/expansion of any rail corridor from Tete to the province of Zambezia within the area referred under objective of the present memorandum.”*¹⁵⁸

111 **Second**, Respondent’s interpretation is illogical. It is not possible to grant a scoring advantage to two participants in a tender, such that it would make no sense to have an exclusive right to such scoring advantage. This is because the scoring advantage is only granted to the proponent of the unsolicited proposal, which triggers the tender – not to any other proponent. This is confirmed by the relevant provisions of the current Mozambican law, which only use the singular in respect of the proponent benefitting from the scoring advantage.¹⁵⁹

112 **Third**, it is incorrect that Mozambican law at the time required that PEL participate in a tender. As explained in the Reply and supported by Professor Medeiros’ legal opinion, there is no doubt that it was possible to grant PEL a right to a direct award of a concession, which was permissible under the law applicable at the time when the MOI entered into force, Decree No. 15/2010 of 24 May 2010 (the Public Procurement Rules),¹⁶⁰ as well as explicitly envisaged by the PPP Law, which would be the law in force by the time the PFS was approved (in May 2012) and a concession was awarded in line with the MOI.¹⁶¹

3. Mozambique’s stands by its bizarre arguments on Clause 2(1) of the MOI

113 In the Reply, PEL showed that:

- (a) There was no inconsistency between Clause 2(1) and 2(2) of the MOI.¹⁶² PEL had a right to refuse to implement the Project, even if its PFS was approved.¹⁶³ If, however, Mozambique approved PEL’s PFS

¹⁵⁸ **Exhibit C-5A**, English Version of the MOI, Clause 6.

¹⁵⁹ **CLA-64A**, Decree No. 16/2012, of 4 June 2012, Article 14(3); **CLA-65A**, Law No. 15/2011, of 10 August 2011, Article 13(5).

¹⁶⁰ **CLA-67A**, Decree No. 15/2010 of 24 May 2010.

¹⁶¹ **CLA-65A**, Law No. 15/2011, of 10 August 2011; Reply, para. 180.

¹⁶² SOD, para. 80.

¹⁶³ Mozambique’s own legal expert confirms as much. See **RER-7**, Second Legal Opinion of Ms Teresa Muenda, para. 6.

and PEL decided to implement the Project, Mozambique had an obligation to issue a concession in PEL's favour.¹⁶⁴

- (b) Mozambique's argument that the reference to Clause 7 in Clause 2(1) of the MOI created some other condition for the issuance of a concession was a bizarre argument, which is wrong on the face of the clauses.¹⁶⁵ The reference simply ensured that (i) if pursuant to Clause 7, a new memorandum was entered into because the PFS determined that the Project was not commercially viable, (ii) the Parties' obligations set out in Clause 2(1) of the MOI would remain the same, namely PEL would still have the obligation to carry out a PFS and the Government would still have an obligation to issue a concession.¹⁶⁶

114 Respondent repeats its arguments in the Reply on Jurisdiction, without addressing PEL's submissions in any meaningful way.¹⁶⁷

4. Mozambique has little to say to rebut PEL's argument on the commercial logic of the MOI

115 As explained in the Reply, Respondent's theory that PEL would undertake to conduct the PFS at its own costs and then be content with a mere scoring advantage in a tender makes no sense from a commercial perspective.¹⁶⁸

116 Respondent's only rebuttal in this respect is to refer to general industry comments, which do not displace PEL's case.¹⁶⁹

5. Mozambique is at the end of its rope when it attempts to dispute its own documented conduct after the MOI entered into force

117 As explained in the Reply, Mozambique's conduct after the MOI entered into force unequivocally demonstrates that the Parties had a shared and consistent understanding of PEL's right of first refusal, essentially that PEL had a right to execute the Project, after its PFS was approved.¹⁷⁰

118 In keeping with such shared understanding, on 15 June 2012, after it had approved PEL's PFS, Mozambique wrote to PEL and asked that PEL

¹⁶⁴ Reply, paras. 199-200.

¹⁶⁵ SOD, para. 81; Reply, paras. 202-204.

¹⁶⁶ Reply, paras. 202-204.

¹⁶⁷ Reply on Jurisdiction, para. 130-131.

¹⁶⁸ Reply, paras. 205-207.

¹⁶⁹ Reply on Jurisdiction, para. 132.

¹⁷⁰ Reply, paras. 208-212.

“*[e]xpressly exercise its right of first refusal,*”¹⁷¹ which PEL did three days later, on 18 June 2021.¹⁷²

119 This is fatal to Mozambique’s case that PEL’s right of first refusal was a scoring preference in the context of a tender.¹⁷³ There was no tender, or even intimation of a tender, at the time that Respondent itself called on PEL to expressly exercise the right in the MOI.

120 Mozambique nonetheless attempts to dispute the obvious. Mozambique states that the letter asking PEL to exercise its right of first refusal does not grant PEL a concession and tries to make a point out of the fact that PEL referred to the exercise of its right in its response as its “*right of preference*”.¹⁷⁴

121 Linguistic semantics does not come near to rebutting PEL’s case. It is common ground that the 15 June 2012 letter did not grant PEL a concession in and of itself. PEL’s case is that the letter shows that the Parties shared a consistent understanding of PEL’s right of first refusal, essentially that PEL had a right to execute the Project, after its PFS was approved. As for the fact that PEL responded by stating that it “*would like to inform that we expressly exercise our right of preference for implementation of the project*”,¹⁷⁵ this does not put into question that the Parties both understood that PEL would be implementing the Project, not that a tender would take place. The right of first refusal and the right of preference are one and the same here.

122 Perhaps aware of the weakness of its position, Mozambique relies on a letter written by Minister Zucula on 11 January 2013 *after* the dispute had arisen,¹⁷⁶ which it disingenuously describes as having been written “*at or near the same time, in June 2012.*”¹⁷⁷ This neither does Respondent any credit, nor assists its case.

¹⁷¹ **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 11 June 2012.

¹⁷² **Exhibit C-12**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of the project, dated 18 June 2012.

¹⁷³ **CER-3**, Legal Opinion of Professor Rui Medeiros, para. 23.4 (where Professor Medeiros draws the following conclusions in relation to the MTC’s letter of 15 June 2012, and PEL’s response of 18 June 2012 (“*This behaviour of the Parties confirms that, at that time, immediately after the approval of the Pre-Feasibility Study, the MTC and PEL assumed that the contract granted PEL the right of direct award of the concession contract. In fact, if the MTC offered PEL the possibility of exercising its right of preference before considering any bids of third parties and before launching a tender procedure, it is obvious that it never considered the right of preference set out in Clause 2 (2) of the MoI to be a right to be exercised in a public tender procedure....*”).

¹⁷⁴ Reply on Jurisdiction, paras. 141-142.

¹⁷⁵ **Exhibit C-12**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of the project, dated 18 June 2012.

¹⁷⁶ Reply on Jurisdiction, para. 143 referring to **Exhibit C-19**, Letter dated 11 January 2013 from Minister Zucula of MTC to Kishan Daga of PEL reneging on MTC’s commitment to award the concession to PEL.

¹⁷⁷ Reply on Jurisdiction, para. 143.

123 Respondent finally relies upon the testimonies of Minister Zucula and Mr Chauque in this Arbitration.¹⁷⁸ It goes without saying that these have little weight in comparison with the letters exchanged between the Parties contemporaneously before the dispute had arisen.

6. Mozambique's 10-page attempt to dispute the content and relevance of the negotiations documents is toothless

124 In the Reply, PEL demonstrated that the documents identified by it in the document production process confirm its interpretation of the MOI, specifically that the Parties intended to grant PEL a right to a concession¹⁷⁹ and a right to refuse to implement the Project,¹⁸⁰ as well as that the exclusivity right was a logical flipside to PEL's right to a concession.¹⁸¹

125 Mozambique disputes all the above points in 10 pages that mainly consist of repeating arguments it has already made elsewhere and are not relevant to the interpretation of the negotiation documents.¹⁸² Mozambique's case is considerably undermined by its failure to produce a single document to support its case. All the negotiation documents have been adduced by PEL when it is not credible that Mozambique lost all its own documents, not least when it had a legal obligation to preserve them.¹⁸³

a) Mozambique does not displace PEL's case that the negotiation documents support the fact that the Parties intended to grant PEL a right to a concession

126 PEL showed in the Reply that:

(a) It was PEL's understanding from the beginning that it would be granted a right to a concession if the PFS was deemed acceptable by Mozambique, which is supported by early internal drafts of the MOI and internal correspondence.¹⁸⁴

¹⁷⁸ Reply on Jurisdiction, para. 144.

¹⁷⁹ Reply, paras. 216-223.

¹⁸⁰ *Id.* at paras. 224-235.

¹⁸¹ *Id.* at paras. 236-241.

¹⁸² Reply on Jurisdiction, paras. 147-184.

¹⁸³ See paras. 34-37 above.

¹⁸⁴ Reply, paras. 217-218; **Exhibit C-201**, Email exchange between Kishan Daga of PEL and Ashish Patel of PEL attaching draft of the MOI, dated 13 March 2011; **Exhibit C-220**, Email from Ashish Patel of PEL to Kishan Daga of PEL regarding the MOI, dated 24 March 2011.

- (b) It was also the Parties' shared understanding, as confirmed by the drafts later exchanged between the Parties.¹⁸⁵
- (c) It was unequivocally also Mozambique's understanding in that the language of Clause 2(1) referring to the grant of a concession agreement to PEL was included in the last version of the MOI shared *by Mozambique* on the very morning of the signing of the MOI, as being the "*final revised version*",¹⁸⁶ and the cover email to such version indicated that the English version would be finalised accordingly – which is consistent with PEL's original English version of the MOI.¹⁸⁷

127 Mozambique **first** seeks to dispute the probative value of the documents themselves pertaining to the MOI's negotiation history, including the fact that PEL relied on internal drafts.¹⁸⁸ This is a weak argument, particularly coming from a party that not only has not adduced a single of its own documents in this respect but also has requested documents related to the negotiations of the MOI, including drafts of the MOI, from PEL in 13 of its Document Requests on the basis they were relevant and material to the outcome of the dispute.¹⁸⁹ Moreover Mozambique's criticism of the evidentiary value of PEL's internal drafts does not take into account the fact that PEL also adduced the drafts exchanged with Mozambique, which are consistent with PEL's internal drafts.¹⁹⁰

128 **Second**, Mozambique makes a number of purportedly prejudicial points, which are irrelevant and need not be addressed.¹⁹¹

129 **Third**, Mozambique's main argument regarding PEL's right to a concession is that the earlier drafts of the MOI showed that a detailed bankable study was

¹⁸⁵ Reply, paras. 219-220; **Exhibit C-225**, Email from Ashish Patel of PEL to Rupen Patel of PEL and Sandeep Shetty with copy to Kishan Daga of PEL attaching draft of the MOI, dated 5 April 2011, Clause 6; **Exhibit C-202**, Email from Arquimedes Nhacule of Aries to Kishan Daga of PEL attaching Portuguese translation of the MOI, dated 18 April 2011, Clause 6; **Exhibit C-203**, Email from Judite Mula of Aries to Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 3 May 2011, Clause 7.

¹⁸⁶ Reply, paras. 221-222; **Exhibit C-204**, Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Fausto Mabota of Aries copying Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 6 May 2011, Clause 2.

¹⁸⁷ **Exhibit C-204**, Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Fausto Mabota of Aries copying Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 6 May 2011.

¹⁸⁸ Reply on Jurisdiction, paras. 152-153.

¹⁸⁹ Tribunal's Decision on Respondent's Document Production Schedule, dated 31 May 2021, Document Requests Nos. 16-28.

¹⁹⁰ **Exhibit C-204**, Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Fausto Mabota of Aries copying Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 6 May 2011; **Exhibit C-222**, Email from Isaías Muhate of the MTC to Kishan Daga of PEL attaching draft of the MOI, dated 14 April 2011; **Exhibit C-225**, Email from Ashish Patel of PEL to Rupen Patel of PEL and Sandeep Shetty with copy to Kishan Daga of PEL attaching draft of the MOI, dated 5 April 2011.

¹⁹¹ Reply on Jurisdiction, para. 155.

necessary for PEL to obtain a concession agreement.¹⁹² Again, this is irrelevant given that this condition was neither kept in the later drafts that were exchanged, nor in the final MOI.

130 **Fourth**, Mozambique is clearly embarrassed by the fact that the last draft it shared with PEL on the morning of the signature included the promise of a concession agreement in Clause 2 and the representation that this version of the MOI would be translated into English.

131 Yet Mozambique does not explain what happened between the last draft and the version that it provided to PEL for signature. Indeed, it has not produced any documents to explain its own conduct or dispute PEL's case.

132 Instead, to get out of the corner in which it has painted itself, Respondent disingenuously suggest that a draft that was exchanged *two days before* the signing — on 4 May 2011¹⁹³ — prevails over the last draft that was communicated to PEL *on the very morning* of the signing.¹⁹⁴ What is more, the misleading suggestion is pointless as the draft in question also contained the wording that now appears in Clause 2(1) of PEL's original English version of the MOI regarding the grant of a concession to PEL. Clause 2 of the draft MOI circulated on 4 May 2011 provided:

*“A PEL realizara um estudo de pré-viabilidade (EPV), com base no relatório da Comissão, a fim de avaliar o local adequado para o Porto e concluir a rota para a Linha Férrea, assim que for assegurado que, uma vez este aprovado nos termos de cláusula 7 desde Memorando, será outorgada pelo Governo da Republica de Moçambique a concessão do Projecto a favor da PEL.”*¹⁹⁵

133 In other words, Respondent does not rebut the case that the last draft circulated by Mozambique contained the promise of a right to a concession to PEL and that it was circulated with a cover email representing to PEL that this version of the MOI was final and would be translated into English. Some further changes appear to have occurred during the day at the MTC.¹⁹⁶ Respondent has not explained the changes it made or the reason for the need for any changes

¹⁹² Reply on Jurisdiction, paras. 160-164.

¹⁹³ Reply on Jurisdiction, para. 166 referring to **Exhibit C-271**, Email from Jose Manuel Caldeira to Kishan Daga and others attaching MOI, dated 4 May 2011.

¹⁹⁴ Reply on Jurisdiction, para. 165 referring to **Exhibit C-204**. Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Fausto Mabota of Aries copying Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 6 May 2011.

¹⁹⁵ **Exhibit C-271**, Email from Jose Manuel Caldeira to Kishan Daga and others attaching MOI, dated 4 May 2011.

¹⁹⁶ **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 35.

considering the Parties' clear email of that very morning. The only inference remaining therefore is that the Parties agreed to grant PEL a right to a concession in line with the evidence on record.

b) Mozambique does not displace PEL's case that the Parties intended to grant PEL a right to refuse to implement the Project

134 In the Reply, PEL showed that the right of first refusal was a concept proposed by PEL,¹⁹⁷ which was included in the exclusivity clause of all of PEL's early internal drafts of the MOI as well as in the draft that PEL shared with Respondent during a meeting on 5 April 2011.¹⁹⁸ This in itself made it implausible that the right of first refusal was intended as a Portuguese word with a meaning under Mozambican law when at this stage no Portuguese speaker or Mozambican lawyer was involved.

135 After the 5 April 2011 meeting, PEL transmitted the further amended clause, which still contained the expression right of first refusal to a translation company which it commissioned.¹⁹⁹ The expression "*direito de preferência*" first appeared in the translation of the MOI done by such translation company, on 18 April 2011.²⁰⁰ It is still the language provided by the translation company that was reflected in the last version of the MOI circulated by Mozambique on the morning of 6 May 2011.²⁰¹

136 Importantly, the 6 May 2011 version of the MOI circulated by Mozambique did not contain the reference to Mozambique domestic law, which Mozambique had tried to add to the relevant clause, in the version of the MOI that was circulated on 3 May 2011.²⁰²

137 Mozambique has no argument in response to this documentary evidence. As a result, it merely rehashes points made elsewhere which are irrelevant to PEL's right to refuse to implement the Project (a right which is consistent with the concept of *direito de preferência*, as confirmed by Mozambique's own legal expert).²⁰³ It repeats, in a disorderly manner, *inter alia* (i) that PEL needed to

¹⁹⁷ Reply, paras. 226-234.

¹⁹⁸ **Exhibit C-225**, Email from Ashish Patel of PEL to Rupen Patel of PEL and Sandeep Shetty with copy to Kishan Daga of PEL attaching draft of the MOI, dated 5 April 2011.

¹⁹⁹ **Exhibit C-202**, Email from Arquimedes Nhacule of Aries to Kishan Daga of PEL attaching Portuguese translation of the MOI, dated 18 April 2011.

²⁰⁰ *Id.*

²⁰¹ **Exhibit C-204**, Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Fausto Mabota of Aries copying Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 6 May 2011.

²⁰² **Exhibit C-203**, Email from Judite Mula of Aries to Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 3 May 2011.

²⁰³ **RER-7**, Second Legal Opinion of Ms Teresa Muenda, para. 6.

carry out a bankable study to be granted a concession,²⁰⁴ (ii) that the fact the right of first refusal originated from PEL's internal drafts is irrelevant because the government operated in Portuguese,²⁰⁵ (iii) that the documents adduced by PEL have no probative value,²⁰⁶ and (iv) that it is clear that the MOI was a mere option.²⁰⁷ PEL has previously rebutted all these points.

138 Finally, it makes the perplexing suggestion that the draft shared with Mozambique during the 5 April 2011 meeting suggests 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.*"²⁰⁸ It is clear on the face of the relevant clause in the draft, reproduced below, that it does not support Respondent's argument. The clause was merely an attempt by PEL to expand the scope of its right of first refusal, which was refused by Respondent in later drafts:

*"GOM has agreed that PEL shall have the right of first refusal to undertake the Project. GOM has also agreed that it will not provide any right/permission whatsoever to any third party for developing / expansion of the port between Beira and Pebane for similar purpose nor for developing / expansion of the Rail corridor between Tete and the proposed port. In case GOM wants to develop new or expand anything similar to the Project, then PEL shall have a right of first refusal to undertake and execute the same. PEL will also have first right of refusal on any future upgrades to the Project."*²⁰⁹

c) Mozambique does not displace PEL's case that the Parties intended for the exclusivity right to be a logical flipside to PEL's right to a concession

139 In the Reply, PEL showed that the exclusivity clause was included in the very first internal drafts of the MOI developed by PEL and highlighted internally as a key right for PEL.²¹⁰ While the timing of the exclusivity clause was hotly debated between the Parties, it was never intended to be exercised in a public tender and Mozambique never sought to include any language referring to an exclusive scoring advantage in a tender.²¹¹

²⁰⁴ Reply on Jurisdiction, paras. 170-171.

²⁰⁵ *Id.* at para. 172.

²⁰⁶ *Id.* at para. 173.

²⁰⁷ *Id.* at para. 174.

²⁰⁸ *Id.* at para. 173.

²⁰⁹ **Exhibit C-225**, Email from Ashish Patel of PEL to Rupen Patel of PEL and Sandeep Shetty with copy to Kishan Daga of PEL attaching draft of the MOI, dated 5 April 2011.

²¹⁰ Reply, paras. 236-239.

²¹¹ *Id.* at paras. 240-241.

- 140 Mozambique does not even openly acknowledge that it has abandoned its argument that the exclusivity right was an exclusive right to be granted a scoring advantage in the tender. However, it is clear that it has done so. It now states that the exclusivity clause was limited to the time when PEL prepared its PFS and such PFS was being approved.²¹² As explained above, this completely ignores the second sentence of the exclusivity clause and makes no logical sense that the Parties would have agreed that once the PFS was approved, Mozambique could shop around PEL's work to others.
- 141 As far as the negotiation documents are concerned, Respondent makes no point that rebuts PEL's interpretation of the exclusivity clause. Instead, it continues to rehash points made elsewhere, which are not relevant to the analysis of the clause, including (i) that the drafts MOI are irrelevant;²¹³ and (ii) that a bankable study should have been made available for a concession to be granted.²¹⁴
- 142 Respondent also takes out of context a quote of Mr Daga stating that the MOI was a preliminary document.²¹⁵ There is nothing in this quote; the MOI was the first in a series of contracts between the parties, as is typical in every direct award of a concession. However, this does not assist in the interpretation of the exclusivity clause. Nor does it undermine the fact that PEL intended to be granted the right to a concession, which is extensively supported by PEL's internal documents (*see* paragraphs 134-138 above).
- 143 Finally, Respondent maintains that, while there is no evidence that it sought to include language referring to an exclusive scoring advantage in a tender, the burden is not on it to adduce the same because the MTC did not have the intention to award PEL the Project based on a mere PFS but agreed on *direito de preferencia* providing a scoring advantage.²¹⁶
- 144 This is a circular argument, which is particularly unwelcome coming from the party that did not adduce any of its own drafts and negotiation documents in this Arbitration.

²¹² Reply on Jurisdiction, para. 176.

²¹³ *Id.* at para. 177.

²¹⁴ *Id.* at para. 178.

²¹⁵ Reply on Jurisdiction, paras. 179-180; **Exhibit C-211**, Email exchange between Kishan Daga of PEL and Ashish Patel of PEL regarding the MOI, dated 18 April 2011.

²¹⁶ Reply on Jurisdiction, para. 184.

7. Mozambique’s attempt to create a rule of Mozambican law whereby its witnesses’ impression of its alleged right under the MOI should prevail over those of PEL is not serious

145 It is clear from the above that Mozambique is asking this Tribunal to ignore the contents of the MOI and find that it provides what Respondent contends (or wishes) it says instead. Yet, it has not produced any documentary evidence to support such finding.

146 As a result, it has tried to create a special rule of Mozambican law for its own witnesses, which is Mozambique’s only evidence (other than non-specific expert evidence on project finance) in support of its theory that the MOI granted a 15% scoring advantage to PEL. It contends that the will of the declarant is more relevant under Mozambican law and accordingly that Mozambique’s witnesses control over PEL’s witnesses.²¹⁷

147 This bewildering argument is founded on a misquote of Professor Medeiros’ expert legal opinion. The relevant passage refers to Mozambique’s conduct after the MOI was entered into force as confirming that Mozambique also considered that PEL had right to be awarded the Project directly.²¹⁸ It does not refer to the intention of one party to a contract prevailing over that of the other.²¹⁹

148 In this context, it is also worth noting that Mozambique’s criticism of PEL’s witnesses for stating that PEL considered it key to be granted a right to a concession is unfounded. It revolves upon the same confusion that pervades Respondent’s submissions, namely the confusion between a right to a concession granted by the MOI (subject to two conditions) and the concession itself.²²⁰

8. Mozambique’s contention that the Portuguese version of the MOI should prevail is still irrelevant, and in any event wrong as a matter of fact and Mozambican law

149 Mozambique has not adduced its original versions of the MOI. It is thus concerned – rightly so – that the Tribunal will disregard its scanned English version of the MOI, which does not correspond to PEL’s original. As a result,

²¹⁷ Reply on Jurisdiction, paras. 91-92, 125.

²¹⁸ CER-6, Second Legal Opinion of Professor Rui Medeiros, paras. 19.1.2.

²¹⁹ *Id.*

²²⁰ Reply on Jurisdiction, para. 94-96.

it has concocted a theory whereby the Portuguese version of the MOI prevails over the English one.²²¹

150 As explained in the Reply:

- (a) The point is irrelevant because both the Portuguese and the English version of the MOI support PEL's interpretation and contradict that of Respondent.²²²
- (b) In any event, the negotiation history demonstrates that the Portuguese version of the MOI cannot prevail over the English one.²²³ On the morning of the signature, Mozambique circulated the last version of the MOI in Portuguese, which contained language mirroring Clause 2(1) of PEL's English version of the MOI, and undertook to implement the relevant changes during the day.²²⁴ Clearly, additional unilateral changes were made.²²⁵ However, Mozambique has failed to disclose any drafts of the MOI, or to give any explanation as to what happened on the day of the signing. On the basis of the available evidence, it can therefore only be inferred that the Portuguese version of the MOI, which does not include the wording Mozambique circulated to PEL and called "*final*" on the morning of the signing, does not prevail over PEL's English version of the MOI, which includes such wording.²²⁶
- (c) In any event, Mozambican law is of limited relevance to determine what promises the Parties made to each other in the context of examining the fulfilment of the Treaty's definition of "*investment*".²²⁷
- (d) And in any case, Professor Medeiros confirms that under Mozambican law, where the Parties agreed to the existence of two different languages with equal value, Mozambique must abide by the contract.²²⁸ The provisions referred to by Ms Muenda in support of Respondent's proposition that the Portuguese version of the MOI prevail are all inapposite.²²⁹

²²¹ Reply on Jurisdiction, paras. 185-194.

²²² Reply, para. 243.

²²³ *Id.* at paras. 244-247.

²²⁴ Reply, paras. 245-246; **Exhibit C-204**. Email from Rafique Jusob of Mozambique's Investment Promotion Centre to Fausto Mabota of Aries copying Kishan Daga of PEL attaching the Portuguese version of the MOI, dated 6 May 2011. Reply, para. 246; **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 35.

²²⁵ Reply, paras. 245-247.

²²⁶ *Id.* at para. 248.

²²⁷ Reply, para. 248; **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 3.4, para. 42.

²²⁸ Reply, para. 248; **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Sections 3.3 and 3.4.

²²⁹

151 In the Reply on Jurisdiction, Respondent rejects PEL’s argument that whichever version of the MOI is relied upon, PEL’s interpretation is supported.²³⁰

152 However, Mozambique is careful not to explain the reasons for such rejection. With good cause: Respondent has created a storm in a teacup. The only material difference between the different versions of the MOI is Clause 2(1), which is different in PEL’s original English version of the MOI. Yet, PEL’s interpretation of the MOI prevails regardless of whether or not Clause 2(1) is as per PEL’s original English version of the MOI.

153 Respondent further contends that PEL cannot rely upon the last draft exchanged because “*it is self-evident that the parties did not agree to that draft and instead made various significant revisions.*”²³¹

154 That Respondent makes this argument is audacious, given Mozambique’s failure to produce any document post-dating the last draft MOI it sent to PEL on the day of the signing and its inability to provide any explanation as to what happened between its sending such draft to PEL and the signing of the final MOI. Claimant’s position is clear: whatever amendments MTC made within the course of that day were never agreed with Claimant. This is dispositive of Respondent’s argument in relation to which PEL has sought an adverse inference (*see* paragraph 51 above).

155 Finally, Mozambique disputes Professor Medeiros’ conclusion that the Portuguese and English versions of the MOI have equal value.²³²

156 However, it does not address Professor Medeiros’ point that under Mozambican law, the Parties must abide by the terms of their contract, which in this case explicitly provided that the two versions of the MOI had equal value.²³³ It also fails to address Professor Medeiros’ point that the need to establish a hierarchy between versions only exist where there is a conflict between such versions, which does not exist in the case at hand.²³⁴

²³⁰ Reply on Jurisdiction, para. 187.

²³¹ *Id.* at para. 191.

²³² *Id.* at paras. 71, 72, 99, 185-194.

²³³ See **Exhibit C-5A**, English Version of the MOI, Clause 12 which sets forth the English-language MOI and the Portuguese-language MOI shall have equal value.

²³⁴ **CER-3**, Legal Opinion of Professor Rui Medeiros, para. 20.

- 157 Turning to the arguments Mozambique addresses, it continues to refer to provisions of Mozambican law that are not applicable.
- 158 Mozambique relies upon Article 5(2) of the PPP Regulations²³⁵ which sets forth that the Portuguese language prevails over a foreign language of the same document. However, as already explained by Professor Medeiros, this regulation does not apply considering that the MOI “*is clearly neither a works contract nor a contract for the supply of goods, nor a contract for the provision of services in the form of a concession contract*”.²³⁶
- 159 Similarly, Article 10 of the Mozambican Constitution merely sets forth that the official language in the Republic of Mozambique is the Portuguese.²³⁷ It does not have any impact on party autonomy enshrined in Article 405 of the Civil Code.
- 160 It follows from the above that Respondent has not proven its theory that the Portuguese version should prevail over the English version.

C. Mozambique Approved the PFS and Asked PEL to Exercise Its Right of First Refusal

- 161 In its previous submissions, PEL’s demonstration left no room for doubt as to the fact that Mozambique approved the PFS:
- (a) On 2 May 2012, PEL submitted the PFS to the MTC.²³⁸
 - (b) On 9 May 2012, PEL presented the PFS to representatives from the MTC, the CFM, the Ministry of Planning and Development, the Ministry of External Affairs, the Ministry of Mining, and the Ministry of Finance, demonstrating the importance of the Project to Mozambique, and the fact that all necessary decision makers were present.²³⁹
 - (c) Following its presentation to the Government, PEL then addressed a number of follow up queries in the course of May and early June 2012.²⁴⁰

²³⁵ **CLA-64A**, Decree No. 16/2012, of 4 June 2012.

²³⁶ **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 3.4, para. 37.3.

²³⁷ **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 3.4, para. 41.4; **CLA-48A**, The Constitution of the Republic of Mozambique.

²³⁸ **Exhibit C-193**, Letter from Kishan Daga of PEL to Paula Zucula of MTC, dated 2 May 2012.

²³⁹ Reply, para. 250; **Exhibit C-7**, Power Point Presentation, dated 9 May 2012; **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 70; **CWS-1**, Witness Statement of Mr Kishan Daga, para. 65.

²⁴⁰ Reply, para. 250; **CWS-3**, Second Witness Statement of Mr Kishan Daga, paras. 74, 75, 77, 78.

- (d) On 15 May 2012, PEL requested that the MTC approve the PFS so that the Parties could “*enter into the second phase of the project for signing of concession agreement.*”²⁴¹
- (e) On 17 May 2012, a member of the MTC gave a presentation to the CFM, expressly mentioning that “*PATEL shall benefit from a right of 1st option in the eventual implementation of the project.*”²⁴²
- (f) On 15 June 2012, in unequivocal terms, Mozambique approved the PFS and asked that PEL exercise its right of first refusal *i.e.*, to expressly confirm its intention to proceed with the concession and the Project.:

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

a) Expressly exercise its right of first refusal;

b) Negotiate with the CFMs the creation of a company to implement the project.”²⁴³

- (g) On 18 June 2021, PEL exercised such right, three days later, in the following terms:

“...we would like to thank you for accepting the report.

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

We would also like to inform you that we will proceed with CFM to incorporate an entity for implementation of the project as directed by you in your letter.”²⁴⁴ (Emphasis added)

162 This narrative is founded on contemporaneous correspondence exchanged between the Parties, the authenticity of which is not in dispute.

²⁴¹ **Exhibit C-8**, Letter from Kishan Daga of PEL to Minister Zucula of the MTC regarding “*Additional Information to the Prefeasibility Report for Development of Rail Corridor from Moatize to Macuse and Port at Macuse, Statement of fund utilisation and projected/estimated cash flow for the entire project*”, dated 15 May 2012.

²⁴² **Exhibit C-227**, Email from Jafar Ruby of the MTC to Kishan Daga of PEL attaching the presentation to the CFM, dated 17 May 2012.

²⁴³ **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

²⁴⁴ **Exhibit C-12**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of the project, dated 18 June 2012.

- 163 In this context, Respondent should not have put forward arguments to dispute it. It nonetheless presents a 7-page *potpourri* of points, which does not undermine PEL's case.
- 164 Mozambique's first argument is that the PFS was not sufficiently detailed, according to (i) its experts in this Arbitration²⁴⁵ and (ii) Minister Zucula's testimony in this Arbitration.²⁴⁶ This is easily dismissed. Mozambique approved the PFS of its own volition at the relevant time and did not hire any expert in this respect, albeit nothing prevented it from doing so. It no doubt had relevant experts inhouse in any event, and the questions it asked of PEL demonstrate that, had it wanted more detail, it would have asked for it. As for Minister Zucula's testimony, even putting to one side its credibility issues, it is contradicted by contemporaneous documentary evidence, which bears more weight than an *ex post facto* testimony.
- 165 Mozambique then repeats its argument that the MOI was not authorised and that no authorisation was received for the commitment of funds, such that Minister Zucula could not have validly approved a PFS granting PEL the right to a concession.²⁴⁷ This argument has already been addressed at length in the Reply as well as summarily at paragraph 89 above. It conflates the MOI and the concession agreement itself.
- 166 Mozambique goes on to repeat that the MOI only granted PEL a 15% scoring advantage in a tender.²⁴⁸ This is also easily dismissed: the contemporaneous correspondence on the right of first refusal simply does not refer to such scoring advantage, not to a public tender, and this argument is entirely inconsistent with the Parties' conduct, including PEL's exercise of its right of first refusal.
- 167 Finally, Mozambique argues that PEL failed to fulfil the conditions imposed by Mozambique *after* its approval of the PFS, notably forming a joint venture ("JV") with the CFM and securing offtake agreements with mining entities. Mozambique asserts that because of PEL's alleged failure to fulfil such

²⁴⁵ Reply on Jurisdiction, paras. 200-206; 216-217.

²⁴⁶ *Id.* at para. 214.

²⁴⁷ *Id.* at paras. 209-210, and 219.

²⁴⁸ *Id.* at paras. 209-220.

“conditions”, PEL’s rights expired.²⁴⁹ Mozambique is wrong on several counts.

168 At the outset, it is worth highlighting that Mozambique has acknowledged that such alleged conditions were not contained in the MOI. Rather, they were only introduced by Mozambique later on: the purported “condition” relating to setting up a JV with the CFM in a letter dated 15 June 2012²⁵⁰ and the alleged “condition” to secure offtake agreements in a letter dated 18 April 2013.²⁵¹ Mozambique further conceded that on two different moments, it initiated a direct award process with PEL, thus confirming its right to such a process under the MOI.

169 Precisely because it has been faced with this factual inevitability, Mozambique now concocts a novel legal argument that PEL’s right would have expired because it failed to fulfil the additional conditions imposed by Mozambique.²⁵²

170 Regarding the “condition” to negotiate with the CFM, it simply is no condition at all. Rather, it was part and parcel of the direct award process itself. At that stage, the MOI conditions had been satisfied, *i.e.*, the MOI had served its purpose and Mozambique had decided on and bound itself to a direct award process. The MTC’s identification of the CFM as PEL’s PPP partner, and request that PEL negotiate with the CFM forthwith, was therefore the first stage of the actual direct award process envisaged in the MOI, which would culminate in the execution of the concession agreement.

171 This is evidenced by Mozambique’s own laws, which Mozambique ignores; notably, the PPP Regulations,²⁵³ which set out the direct award procedures to be followed and the several stages thereof, *i.e.*, those envisaged for a public procurement procedure, duly adapted to the fact that a direct award is at stake.

172 Such stages comprise the following: a) conception,²⁵⁴ b) definition of the basic orienting principles, c) preparation of the technical, environmental and economic-financial studies, e) evaluation of the proposal (instead of the

²⁴⁹ Reply on Jurisdiction, paras. 7.6 and 129.

²⁵⁰ **Exhibit C-12**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of the project, dated 18 June 2012.

²⁵¹ **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

²⁵² Reply on Jurisdiction, paras. 7.6 and 129.

²⁵³ **CLA-64A**, Decree No. 16/2012, of 4 June 2012, Articles 9 and 17(3).

²⁵⁴ *Id.* at Article 10. “Conception” includes the development of the idea and preparation of sketches of the preliminary draft of the project, by the promoting entity, which can be either a public entity or a private entity (*i.e.*, in case of USPs).

evaluation of the bids), f) communication of the approval of the proposal (instead of the award), g) negotiation,²⁵⁵ h) approval of the enterprise and respective investment project, and i) entering into the contract.²⁵⁶ And even prior to the entry into force of this statute, the Public Procurement Rules (already in place) had set forth a similar procedure.²⁵⁷

173 As clearly flows from the process described above, when Mozambique, in its letter of 15 June 2012,²⁵⁸ approved the PFS and indicated that PEL should negotiate a JV with the CFM, it was simply confirming the approval of PEL's proposed project towards a PPP, to be followed by the necessary negotiations towards entering into the concession contract, and fulfilling its obligation to indicate who the public partner in such PPP would be.

174 Accordingly, Mozambique's request that PEL negotiate and form a JV with the CFM was not any sort of condition to an award at all, and certainly not under the MOI. Rather, it was the fulfilment of *Mozambique's* legal obligation to indicate the public partner that would participate in the enterprise from Mozambique's side, notably for the purpose of negotiating the terms of the concession contract. From a commercial perspective, it would have made no sense for Mozambique to inform PEL to negotiate and form a JV with CFM unless it was PEL who had been selected to carry out the Project.

175 In a feeble attempt to sustain its argument that negotiating and forming a JV with the CFM constituted a condition that expired, Mozambique relies on its legal expert, Ms Muenda.²⁵⁹ At the outset, it must be noted that Ms Muenda actually *confirms* PEL's understanding that the "*direito de preferência*" foreseen in the MOI is that set forth in Article 414 of the Civil Code, *i.e.*, it constitutes a right of first refusal.²⁶⁰

176 Notwithstanding this admission, Ms Muenda nevertheless fails to consider the public procurement process described above, thus mischaracterising the

²⁵⁵ **CLA-64A**, Decree No. 16/2012, of 4 June 2012, Article 21, which explains that '*negotiation*' consists in discussing and reaching agreements with the selected contractor as regards the contract proposal and eventual other supplementary contracts.

²⁵⁶ **CLA-64A**, Decree No. 16/2012, of 4 June 2012, Article 23, which explains that the contract is entered into by public deed, upon presentation of the financial guarantee foreseen in Article 33.1.(b), and must take place within 30 days after conclusion of the negotiation stage.

²⁵⁷ **CLA-67A**, Decree No. 15/2010 of 24 May 2010, Articles 9(1) and 113 *et seq.*

²⁵⁸ **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

²⁵⁹ **RER-7**, Second Legal Opinion of Ms Teresa Muenda, paras. 1-12.

²⁶⁰ *Id.* at para. 4.

reference to the CFM negotiations and JV formation as an additional condition imposed by Mozambique.

- 177 In any event, even assuming *arguendo* that Ms Muenda were correct (*quod non*), Mozambique's argument would nevertheless fail.
- 178 CFM is a state-owned entity and an instrumentality of Mozambique. Accordingly, *Mozambique* — and not PEL — is responsible for CFM's wrongful refusal to negotiate or form a JV with PEL.
- 179 Indeed, contrary to Mozambique's assertion, Mozambican law imposes a 20 % equity participation limit for state-owned entities like CFM when participating in PPP projects.²⁶¹ This is extremely problematic for Mozambique. After all, its sole purported justification for its decision to organise an illegal tender was PEL's alleged failure to offer more than 20% participation to CFM in the JV to implement the Project.²⁶²
- 180 In an attempt to maintain this indefensible position, Mozambique relies on the testimony of Mr Ehrhardt and Ms Muenda.²⁶³ Mr Ehrhardt's testimony relates to industry practice; it is not evidence of Mozambican law and accordingly, it is irrelevant.
- 181 Ms Muenda argues that the only reference to percentages in the share capital of a PPP undertaking are those in Article 33(1)(a) of the PPP Law, which only refers to shares reserved to sell via the stock market. She further appears to imply that Article 33(1)(b), relating to the opportunity for public or private Mozambican legal entities to participate in the share capital, only refers to cases where participations are reserved to be made through the stock market. On this basis, Ms Muenda concludes that given CFM's participation did not arise from a stock market sale, no limitation exists on the percentage of participation that could have been granted by PEL to the CFM.
- 182 Ms Muenda is wrong. The 20% limit applies not only to those situations where the participation is sold via the stock market (Article 33(1)(a)) but also to situations foreseen in Article 33(1)(b). The latter refers to applicable thresholds concerning State participation in the share capital of the undertaking

²⁶¹ Reply on Jurisdiction, paras. 228 and 229.

²⁶² **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL reneging on MTC's commitment to award the concession to PEL, dated 11 January 2013.

²⁶³ **RER-7**, Second Legal Opinion of Ms Teresa Muenda, paras. 36-44.

or in the joint venture equity, **unrelated to any stock exchange sale**. Indeed, Article 33(1)(b) expressly references and is subject to Article 33(1)(a)(i), which states precisely that State participation is limited to a maximum of 20%.²⁶⁴

183 Ms Muenda further states that the limitation of 20% contained in Article 34 of the PPP Regulations has nothing to do with the limitation of the percentage to be held by the State or state-owned entities. She says, in essence, that Article 34 only limits the financial facilities to be granted by the State (notably through participation in the share capital).

184 The fact that Article 34 is included in the chapter related to financial guarantees and incentives this is beside the point. Article 34(a) is clear in setting forth a 20% limitation in respect of the State's participation in PPP undertakings.²⁶⁵

185 Similarly, Article 37(2) of the PPP Regulations²⁶⁶ — which is not even mentioned by Ms Muenda — also refers to the 20% limit. This provision relates to PPP contracts and sets forth mandatory clauses to be included in such contracts, making an express reference to Article 33 of the PPP Law, analysed above.

186 Finally, perhaps the best evidence in fact of the 20% limit is that CFM's participation in TML, the joint venture implementing the Project, is precisely 20%.²⁶⁷

²⁶⁴ **CLA-65A**, Law 15/2011, of 10 August 2011, Article 33(1). “1. *The financial benefits of the PPP, LSP and BC project for the Country must be expressly stated in the contract to be signed between the contracting party and the contracted party, namely:*

(a) *the portion reserved for sale on the stock market in the name of economic inclusion in commercial market terms, preferably for Mozambican individuals, in the share capital of the enterprise or in the capital of the consortium, whether or not foreign investment is involved, guaranteed through:*

(i) *the State or other public entity indicated by it, in a percentage of not less than 5% nor more than 20% of said capital; or*

(ii) *the entity implementing the enterprise, with the same level of interest, for its unconditional sale, under the same terms and conditions provided for in subparagraph (i) above.*

(b) *the opportunity for Mozambican public or private legal entities to participate in the enterprise's share capital or the consortium's capital, under the terms that the parties negotiate and agree on, without prejudice to the provisions of (i) and (ii) of subparagraph a) above.” (Emphasis added)*

²⁶⁵ **CLA-64A**, Decree No. 16/2012, of 4 June 2012, Article 34: “*Based on the technical and economic-financial assessment of each project and having consideration for the national strategic interest or particular socio-economic interest, the Council of Ministers may expressly and exceptionally authorize the economic-financial viability of the PPP project that is economically viable but not financially feasible, through the following forms of alternative or combinable financial facilities: a) Co-participation of the State or other public entity in their financing, as a subsidy or as a stake in the share capital or through the rendering of a financial guarantee in an amount that does not exceed 20% of the total investment to be made in such project; [...]*” (Emphasis added)

²⁶⁶ **CLA-64A**, Decree No. 16/2012, of 4 June 2012, Article 37(2): “*In addition to the provisions of the previous paragraph, the PPP, LSP and BC contract must also contain clauses that explain the sharing of financial benefits and the pursuit of the socio-economic benefits provided for, respectively, in articles 33 and 34 of Law no. 15/ 2011, of August 10, in particular: a) the level of reserve ensured for Mozambican shareholding by natural and legal persons”.*

²⁶⁷ **Exhibit C-126**, Railway Gazette, Concession Signed for Construction of 525 km Coal Railway, dated 19 December 2013; **Exhibit C-127**, Club of Mozambique, Moatize-Macuse Project to Begin in Late 2018, dated 4 September 2017.

- 187 In sum, PEL offered the CFM the maximum participation percentage permitted by law. Notwithstanding this, the CFM wrongfully refused to even negotiate with PEL, let alone form a JV to implement the Project. In any event, Mozambique failed to ensure compliance with its legal duty to PEL, including by failing to offer up a public entity that would be willing to deal with PEL in good faith since the CFM was not. As a consequence, according to Article 275(2) of the Civil Code, Mozambique is estopped from invoking such a “*condition*”.²⁶⁸
- 188 Regarding the “*condition*” to secure offtake agreements with mining entities, the exact same rationale applies.
- 189 First and foremost, no such “*condition*” arises from the law, as inaccurately stated by Mozambique.²⁶⁹ This “*condition*” allegedly was imposed by means of the letter dated 18 April 2013 in which Mozambique (i) informed PEL of the decision taken by the Council of Ministers in its 10th Ordinary Session to proceed with the direct award, notably invoking reasons of national strategic interest (ii) invited PEL to begin the “*negotiation*” phase within 7 days (iii) requested that a bank guarantee of 0.1% of the value of the foreseen investment be presented within 30 days, such guarantee to remain valid until conclusion of the contract²⁷⁰ and (iv) requested the presentation of “*a statement, agreement or take or pay memorandum with mining companies, in order to make the project in question feasible.*”²⁷¹
- 190 Through this letter, Mozambique (once again) carried out stage (f) of the direct award procedure as per Articles 9 and 17 of the PPP Regulations,²⁷² *i.e.*, it informed PEL of its decision to proceed with the direct award after evaluation of its proposal.
- 191 In the context of the negotiation stage that mandatorily follows the decision to proceed with a direct award, Mozambique invited PEL to present offtake

²⁶⁸ **RLA-132**, Mozambique Civil Code, Article 275(2): “*if fulfilment of a condition is prevented, against the rules of good faith, by the party harmed by the fulfilment, the conditions is deemed as fulfilled [...]*”.

²⁶⁹ Reply on Jurisdiction, para. 277.

²⁷⁰ Such guarantee is foreseen in Article 33(1)(a) of the PPP Regulations — **CLA-64A**, Decree No. 16/2012, of 4 June 2012 — and corresponds to the guarantee that any bidder must present when it presents its proposal, and that must remain in force until the contract is entered into.

²⁷¹ **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

²⁷² **CLA-64A**, Decree No. 16/2012, of 4 June 2012, Article 9.

agreements with mining companies. Such negotiation stage, as set forth in the law, is to be concluded in 90 days.²⁷³

192 However, on 13 May 2013, that is, two weeks into such a 90-day period, Mozambique (illegally) revoked its prior decision²⁷⁴ and decided to proceed with the public tender.²⁷⁵ It is as such clearly abusive to state that PEL offered no offtake agreements: PEL was never afforded sufficient time to do so. It is also manifestly abusive to imply that it was because of this that Mozambique decided to forego the negotiations.²⁷⁶

193 As such, even if this were to be construed as a condition, Mozambique would be prevented from relying on its alleged non-fulfilment by virtue of Article 275(2) of the Civil Code.²⁷⁷

²⁷³ **CLA-64A**, Decree No. 16/2012, of 4 June 2012, Article 21.

²⁷⁴ **CER-3**, Legal Opinion of Professor Rui Medeiros, paras. 47-49.

²⁷⁵ **Exhibit C-34**, Letter from Luis Amandio Chauque of MTC to Kishan Daga of PEL reversing the MTC's regarding direct negotiations with PEL, dated 13 May 2013.

²⁷⁶ Reply on Jurisdiction, para. 277.

²⁷⁷ **RLA-132**, Mozambique Civil Code, Article 275(2).

IV. MOZAMBIQUE HAS FAILED TO DEMONSTRATE THAT THIS TRIBUNAL LACKS JURISDICTION OVER PEL'S CLAIM

194 In its Reply, PEL established that it meets the jurisdictional and procedural requirements set out at Article 9 of the Treaty and further rebutted Respondent's strained jurisdictional objections, which were neither supported by the Treaty nor by the well-established principles of international investment law.

195 In its Reply on Jurisdiction, Respondent chose not to engage with Claimant's Reply. Instead, it repeated its strained objections and expanded on them while dispensing with structure and ignoring concision. By way of example, there are 5 subsections dealing with jurisdiction *ratione materiae* followed by another main section on jurisdiction *ratione materiae*, which itself is divided up in two sections. Arguments on one point are also repeated and expanded upon in unrelated sections of the submissions.

196 In sum, Respondent's strategy appears to be to create as much confusion as possible in the hope that this will rescue its jurisdictional objections. Such strategy is regrettable, particularly in that it has forced Claimant to incur the costs of addressing unnecessarily long and confused submissions.

A. *The Tribunal Has Jurisdiction Ratione Personae*

197 In its previous submissions,²⁷⁸ PEL established that it is an "investor" for the purposes of Article 1(c) (defining the term "investor" as "any national or company of a Contracting Party") and Article 1(a) (defining "Companies" as "Corporation, firms and associations incorporated or constituted or established under the laws in force in any part of either of the Contracting Party") of the Treaty, in that it is a public company incorporated in India.²⁷⁹

198 In its SOD, Respondent chose to dispute this uncontroversial proposition through two far-fetched objections. First, it argued that PEL is not an "investor" because it allegedly has not made an "investment".²⁸⁰ Second,

²⁷⁸ SOC, paras. 252-253; Reply, para. 496.

²⁷⁹ **Exhibit C-1**, Certificate of Incorporation No. 7089 dated 2 April 1949, certifying the incorporation of Patel Engineering Company Limited pursuant to the Indian Companies' Act, VII of 1913, dated 2 April 1949; **Exhibit C-2**, Certificate of Incorporation No. 7039 Consequent on Change of Name in the Office of the Registrar of Companies, Maharashtra, Mumbai, dated 9 December 1999.

²⁸⁰ SOD, paras. 427-438.

Mozambique argued that PEL assigned its rights under the MOI to the PGS Consortium, such that it could not bring proceedings under the Treaty.²⁸¹

199 PEL previously addressed these same misguided arguments in its Reply.²⁸² It made clear that Respondent’s first objection conflated the notions of jurisdiction *ratione personae* (i.e., who is an “investor”) and *ratione materiae* (i.e., whether an “investment” was made). It was also premised upon three irrelevant legal authorities, which dealt with jurisdiction *ratione materiae* and/or *temporis* rather than jurisdiction *ratione personae*.

200 In the Reply on Jurisdiction, Respondent repeated its argument, continuing to confuse the notions of “investor” and “investment” and relying upon the same three irrelevant authorities.²⁸³ PEL therefore refers to the submissions it made in the Reply,²⁸⁴ which Respondent failed to address.

201 As to Mozambique’s second objection, PEL explained that as matter of fact and law 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. That fact alone is dispositive of Mozambique’s objection.²⁸⁵

202 PEL further demonstrated that in any event, the authorities relied upon by Respondent are irrelevant and do not support its contention that the assignment of rights under a contract (even if true) bar a treaty claim.²⁸⁶

203 In its Reply on Jurisdiction, Respondent nonetheless purports to circumvent the fact that PEL neither assigned its rights under the Treaty, nor its rights under the MOI, to the PGS Consortium. This attempt at discounting the obvious must fail.

204 **First**, Mozambique argues wrongly that PEL must be considered to have assigned its rights to the PGS Consortium as a matter of law.²⁸⁷

205 At the outset, Mozambique continues to ignore the difference between PEL’s right under the MOI and PEL’s right to bring a claim under the Treaty. This alone defeats Respondent’s argument.

²⁸¹ SOD, paras. 442-446.

²⁸² Reply, paras. 498-501.

²⁸³ Reply on Jurisdiction, paras. 871-875.

²⁸⁴ Reply, paras. 498-501.

²⁸⁵ *Id.* at para. 503.

²⁸⁶ *Id.* at paras. 504-508.

²⁸⁷ Reply on Jurisdiction, paras. 876-891.

- 206 In any event, the only investment treaty case referred to by Respondent does not support its case. Mozambique relies upon *ACP Axos v. Kosovo* as an authority establishing that “*once PEL joined the PGS Consortium, it lost any rights to pursue the concession*”.²⁸⁸
- 207 Yet, the passage of *ACP Axos* relied upon by Respondent does not relate to the question of whether *ACP Axos* was a qualifying investor for the purposes of jurisdiction *ratione personae* under the relevant investment treaty, *i.e.*, the Germany-Yugoslavia BIT.²⁸⁹
- 208 Rather, the question in *ACP Axos* was whether the bid submission made by *ACP Axos* together with its consortium partner, Najafi, constituted an offer within the meaning of the Kosovo Law on Obligations, which was accepted by Kosovo, such that there was a binding contract²⁹⁰ constituting an investment under the Germany-Yugoslavia BIT.²⁹¹ The tribunal held that no binding contract existed between *ACP Axos* and Kosovo *inter alia* because the purported offer, *i.e.*, the bid submission, was made by a consortium and not by *ACP Axos* alone.²⁹² This is the only point made in the passage referred to by Respondent. The tribunal’s jurisdiction *ratione personae* over *ACP Axos* was not even discussed in the award.
- 209 Mozambique further argues that contrary to the explicit contents of PEL’s side-letter with its consortium partners, PEL “*assigned its alleged rights under the MOP*” by participating in the public tender as a member of the PGS Consortium.²⁹³ Mozambique claims PEL is estopped from disputing this

²⁸⁸ Reply on Jurisdiction, para. 884.

²⁸⁹ Reply on Jurisdiction, paras. 878-884 referring to **RLA-148**, *ACP Axos Capital GmbH v. Kosovo*, ICSID Case No. ARB/15/22, 3 May 2018 (Award), paras. 187-195.

²⁹⁰ **RLA-148**, *ACP Axos Capital GmbH v. Kosovo*, ICSID Case No. ARB/15/22, 3 May 2018 (Award), paras. 152-245, but see in particular para. 152 setting out the relevant questions before the tribunal: “*Having carefully reviewed the material on the records, the Tribunal concludes that no valid contract for the purchase of the shares of PTK was ever formed between Axos and Kosovo. There are many reasons leading to this conclusion, each of which taken individually is sufficient to reach that conclusion. The Tribunal nonetheless believes that it is preferable to go through each of these reasons. As explained in the subsections that follow, there is no valid contract because the bid submission of 3 April 2013 is not an offer within the meaning of the Kosovo Law on Obligations (i). In addition, irrespective of whether there had been an offer, the 18 April 2013 letter would not constitute an acceptance (ii). Moreover, the bidder at the time of the exchange is not the Claimant in this arbitration. The bidder was the Consortium comprised of Axos jointly with Najafi whilst the Claimant is Axos alone (iii). Further, there could be no contract prior to the signing of the SPA because Kosovo retained the unfettered right to “cancel the Tender” until that date (iv). The Tribunal also accepts that Kosovar administrative law is relevant to determine whether the contract for the privatization of PTK was entered into and that the requirements of Kosovar administrative law were not complied with (v). Finally, the Tribunal notes that the conduct of the Parties after the exchanges of 3 April 2013 and 18 April 2013 also does not support the Claimant’s position that the Parties believed at the time that they had entered into a binding contract (vi).*”

²⁹¹ Reply on Jurisdiction, paras. 143-151.

²⁹² **RLA-148**, *ACP Axos Capital GmbH v. Kosovo*, ICSID Case No. ARB/15/22, 3 May 2018 (Award), paras. 187-195.

²⁹³ Reply on Jurisdiction, paras. 885-889.

because Mozambique allegedly relied upon such “assignment” and the side letter was “a secret document” which was “fraudulently concealed by PEL”.²⁹⁴

210 Respondent has not found a single authority to support its argument.²⁹⁵ Respondent merely refers to the UNIDROIT principles for the uncontroversial definition of the assignment of a right²⁹⁶ and makes another in passing reference to *ACP Axos*,²⁹⁷ which as explained above, is inapposite. Respondent cannot even identify any obligation for PEL to disclose the side letter, be it under international or domestic law, to support its serious fraud allegations.²⁹⁸

211 **Second**, Mozambique rehashes its unorthodox theory that the PGS Consortium is a necessary party to this Arbitration, such that this Tribunal has no jurisdiction because the consortium includes a Mozambican and a South African company.²⁹⁹

212 This fails for reasons already detailed in the Reply; the case quoted by Respondent, *Larsen v. the Hawaiian Kingdom* (which in turn relies upon the *Monetary Gold* case), is authority for the principle that an international tribunal cannot decide a dispute between the parties before it if the very subject matter of the decision would be the rights or obligations of a *State* which is not a party to the proceedings.³⁰⁰ This is plainly irrelevant to the case at hand, such that Mozambique has not adduced any authority to the effect that the PGS Consortium is a necessary party.

213 PEL did not bring any claim on behalf of, or in the name of, the PGS Consortium or its consortium partners. Nor did PEL bring a stand-alone treaty claim based exclusively on the grave irregularities of the tender process. Rather, the tender irregularities were pleaded in the context of PEL’s claim that it was deprived of its investments in the Project.

214 Respondent now disputes PEL’s reading of the *Monetary Gold* case on the basis that it is “*too limited*” and that the “*relevant principle is that a tribunal should not exercise jurisdiction over claims that involve the rights of a missing*

²⁹⁴ Reply on Jurisdiction, paras. 890-891.

²⁹⁵ *Id.* at paras. 885-891.

²⁹⁶ *Id.* at para. 886.

²⁹⁷ *Id.* at para. 888.

²⁹⁸ *Id.* at paras. 890-891.

²⁹⁹ *Id.* at paras. 892-900.

³⁰⁰ Reply, paras. 506-507.

party”, which it alleges has been endorsed by an UNCITRAL tribunal in *Larsen v. the Hawaiian Kingdom*.³⁰¹

215 It is clear on the face of *Larsen* (which discusses the *Monetary Gold* case at length) that Respondent’s reading of these two authorities is wrong:

- (a) The *Larsen* tribunal explicitly presented “*the Monetary Gold principle*” as one that applied to States: “*the second principle is that an international tribunal cannot decide a dispute between the parties before it if the very subject matter of the decision would be the right or obligations of a State which is not party to the proceedings.*”³⁰²
- (b) It went on to explain that the principle was well established in the jurisprudence of the International Court of Justice (“**ICJ**”) — the jurisdiction of which only extends to States and certain international organisations — quoting a number of ICJ cases.³⁰³
- (c) It then held that the principle was not confined to proceedings in the ICJ stressing that it was “*called on to apply international law to a dispute of a non-contractual character in which **the sovereign rights of a State not a party to the proceedings are clearly called in question***”³⁰⁴ and concluding as follows:

“*As the International Court of Justice explained in the Monetary Gold case (ICJ Reports, 1954, at p. 32), **an international tribunal may not exercise jurisdiction over a State unless that State has given its consent to the exercise of jurisdiction.** That rule applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings. While it is the consent of the parties which brings the arbitration tribunal into existence, such a tribunal, particularly one conducted under the auspices of the Permanent Court of Arbitration, operates within the general confines of public international law and, like the International Court, **cannot exercise jurisdiction over a State which is not a party to its proceedings.***”³⁰⁵ (Emphasis added)

- (d) Nowhere in its decision did the *Larsen* tribunal seek to extend the *Monetary Gold* principle to missing private parties in general as

³⁰¹ Reply on Jurisdiction, para. 897, see also paras. 893-900.

³⁰² **RLA-72**, *Larsen v. The Hawaiian Kingdom*, PCA Case No. 1999-01, Award (5 February 2001), para. 11.8. (Emphasis added).

³⁰³ *Id.* at paras. 11.9-11.15.

³⁰⁴ *Id.* at para. 11.17. (Emphasis added).

³⁰⁵ *Id.*

Respondent contends. In that case, it was the United States of America that was indispensably absent, undoubtedly a *State* party.

216 Other investment treaty tribunals have confirmed that the *Monetary Gold* principle only applies where the determination of a third State’s international responsibility is at stake.³⁰⁶

217 Just as Respondent’s other objections to this Tribunal’s jurisdiction *ratione personae*, Respondent’s argument that the PGS Consortium is a necessary party therefore continues to fail. It follows that Mozambique has not rebutted Claimant’s case that PEL is a qualifying “investor” under the Treaty.

B. The Tribunal Has Jurisdiction Ratione Materiae

218 PEL demonstrated in its previous submissions that it had made an investment in the Project including: (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 into and payment for the Preliminary Study; and (iv) the detailed PFS which Mozambique approved, and which later served as the basis for the irregular tender process which ultimately ended in the award of the Project to ITD.³⁰⁷

219 It further demonstrated that PEL’s investment not only squarely fell within the scope of Article 1(b) of the Treaty³⁰⁸ but also was made in the territory of Mozambique,³⁰⁹ and in accordance with Mozambican law.³¹⁰ Further, PEL showed that to the extent the *Salini* criteria were relevant outside the ICSID context, they were all met in this case.³¹¹ PEL also proved that to the extent an

³⁰⁶ **CLA-301**, *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Jurisdiction, 12 June 2020, para. 307: “... In any event, the concerns that the ICJ stated in *Monetary Gold* relate to a situation in which the very subject-matter of the dispute involves a determination of a third State’s international legal responsibility, such as where that determination is a necessary prerequisite for decision on the claimant’s claims. Those concerns do not apply in this context, because nothing the Tribunal might decide, by virtue of allowing Addiko to proceed with its claims against Croatia, would adjudicate the legality of any acts by Austria, whether under EU law, the BIT, or any other set of obligations. To be clear, this Tribunal will not be entertaining any claims about any acts of Austria. Moreover, nothing in this Decision would preclude Austria from presenting arguments in future to a different arbitral tribunal, or to the CJEU, about the validity of the BIT or the enforceability of its consent to arbitral jurisdiction under the BIT. Austria’s procedural and substantive rights thus will remain entirely unaffected by this Decision and by whatever ruling the Tribunal eventually renders on other issues as between Addiko and Croatia. Moreover, even to the extent the Tribunal is deciding herein that the Austria-Croatia BIT remains in force and has not been implicitly terminated, that decision takes no stand beyond the position that Austria apparently itself recently has taken, by declining to sign on (with other EU Member States) to the treaty for termination of various intra-EU BITs.” See also **CLA-302**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)*, ICSID Case No. ARB/10/18, Decision on Jurisdiction, 19 August 2013, para. 520: “[T]he principle applied in the *Monetary Gold* case, in the words of the ICJ, did not relate to the determination of ‘legal interests of non-parties’, but was a case where the Court would have had to ‘adjudicate upon the international responsibility’ of a State which had not consented to such adjudication.”

³⁰⁷ Reply, para. 510; SOC, para. 257.

³⁰⁸ Reply, paras. 513-534; SOC, paras. 258-263.

³⁰⁹ Reply, paras. 535-539.

³¹⁰ Reply, paras. 540-573; SOC, paras. 264-272.

³¹¹ Reply, paras. 574-590; SOC, paras. 274-276.

objective definition of “*investment*” exists and is relevant, its investment qualifies under such a definition.³¹² Finally, PEL established that a dispute had arisen with respect to its investment.³¹³

220 Mozambique continues to dispute all these points without materially engaging with PEL’s Reply. Its submissions consist of a repetition of its previous submissions, on which it expands. It has also presented its arguments in an order that defies logic and established practice. By way of example, Mozambique devotes 30 pages to the question of whether Claimant has made an investment under a purported objective definition of the notion of investment under international law before it finally turns to the question of whether PEL has made an investment under the Treaty.

221 For ease of reference, Claimant addresses Respondent’s argument in the same order as in the Reply and invites the Tribunal to follow this order for its deliberation on the question of its jurisdiction *ratione materiae*.

1. Claimant made an investment that falls within the scope of Article 1(b) of the Treaty

222 Claimant demonstrated that the MOI and the rights it establishes, fall within the broad *chapeau* of Article 1(b) of the Treaty (“*every kind of asset established or acquired*”) and within the list of examples of investments, specifically Article 1(b)(v) (“*business concessions conferred.... under contract*”) and Article 1(b)(iii) (“*rights ...to performance under a contract having a financial value*”).³¹⁴ PEL also demonstrated that the know-how it transferred to Mozambique constitutes an investment under the broad *chapeau* of Article 1(b), which embraces everything of economic value.³¹⁵

223 In the Reply, Claimant rebutted Respondent’s argument that the use of the past tense in Article 1(b) (referring to the assets “*established or acquired*”) and in Article 1(b)(v) (referring concessions to “*conferred*”)³¹⁶ demonstrated that the Treaty was intended to limit covered investments and thus did not cover the

³¹² Reply, paras. 591-611.

³¹³ Reply, paras. 612-622; SOC, paras. 277-279.

³¹⁴ Reply, paras. 513-534; SOC, paras. 258-263.

³¹⁵ Reply, paras. 513-534; SOC, paras. 258-263.

³¹⁶ SOD, paras. 367-368.

MOI and PEL's rights under it, which Mozambique alleges constitute a "contingent asset".³¹⁷

224 In its Reply on Jurisdiction, Respondent fails to engage with PEL's Reply in any meaningful way. Its latest attempt to defeat Claimant's case that (i) the MOI and PEL's rights thereunder constitute an investment and (ii) in any event, PEL's know-how constitutes an investment, therefore fails.

- i. Respondent does not rebut PEL's case that the MOI and PEL's rights thereunder constitute an "investment"

225 The MOI and PEL's rights thereunder are an investment under Article 1(b) of the Treaty. Respondent's attempt to dispute PEL's case in this respect is legally and factually incorrect.

226 Mozambique's legal interpretation of Article 1(b) of the Treaty can be summarised as follows:

- (a) The Tribunal must determine whether each of the three examples listed under Article 1(b) to which PEL refers to support its case that its "investment" falls within the scope of Article 1(b), as a separate definition that PEL must meet.³¹⁸
- (b) There is a hierarchy between the examples under Article 1(b), such that this Tribunal must only examine the example of "investment" given at Article 1(b)(v) of the Treaty ("*business concessions conferred by law or under contract*") to determine whether the MOI and PEL's rights thereunder are a qualifying investment, which by virtue of the maxim *generalis specialibus non derogant*, "supplants" Article 1(b)(iii) ("*right to money or to any performance under contract having financial value*").³¹⁹

³¹⁷ PEL explained that: (a) It was manifest that the MOI and PEL's right under the MOI were assets acquired or established by PEL, including its right to the direct award of the Project concession, which were not contingent rights (Reply, paras. 517-522). This included PEL's legal right to a concession which was not a contingent right (Reply, paras. 517-522). (b) The words "established", "acquired" or "conferred" did not seek to limit the scope of the investments covered by Article 1(b) of Treaty. Rather, the words "established", "acquired" referred to the different type of ownership of investments (Reply, paras. 523-527). As for the term "conferred", it was used to introduce the manner in which concession was granted ("*business concession conferred by law or by contract*") (Reply, para. 528). (c) Respondent said nothing of PEL's other qualifying investments, namely (i) the rights other than the concession agreement acquired under the MOI, including its rights to exclusivity and confidentiality, and (ii) the know-how PEL transferred to Mozambique (Reply, paras. 530-531). This meant that even if PEL was wrong in respect of (a) and (b) above (*quod non*), the Tribunal still ought to uphold its jurisdiction, in that it should consider the economic operation as a whole (Reply, paras. 532-533).

³¹⁸ Reply on Jurisdiction, paras. 794-829.

³¹⁹ *Id.*

(c) In respect of Article 1(b)(v), Respondent repeats its argument that the past tense in such Article and the *chapeau* of Article 1(b) means that a concession has to be physically conferred upon the investor to qualify as an investment under the Treaty because it does not cover “*contingent rights*”.³²⁰

(d) In respect of Article 1(b)(iii), Respondent argues that it also does not encompass contingent liability, based on *Joy Mining v. Egypt*, where the tribunal found that a bank guarantee was a “*contingent liability*”, which did not fall within the scope of investment “*claims to money or to any performance under contract having a financial value*”.³²¹

227 Respondent’s novel interpretation of Article 1(b) of the Treaty is either not supported by any authority, or, where authorities are quoted, they are inapposite.

228 First, Respondent does not explain how the wording of the Treaty supports its contention that the Tribunal must consider whether PEL has made an “*investment*” for the purposes of each example under Article 1(b) separately without considering the *chapeau* of the Article.

229 In fact, Respondent itself contradicts its own approach. It acknowledges that Article 1(b) of the Treaty contains a *chapeau* defining “*investment*” as “*every kind of assets established or acquired*” and “*provides nonexclusive examples*” of “*investment*” and insists that “*the entire definition must be considered*”.³²² Yet, it goes on to treat the nonexclusive examples as self-standing definitions of investments.

230 Nor does Respondent cite any authority in support of its approach. It appears that it is nothing more than a device aimed at circumventing the fact, which it does not dispute, that a broadly worded *chapeau* such as the one in the Treaty referring to “*every kind of asset*” embraces everything of economic value, virtually without limitation.³²³

231 Second, contrary to Respondent’s contention, the maxim *generalia specialibus non derogant* does not require this Tribunal to establish a hierarchy between

³²⁰ Reply on Jurisdiction, paras. 795-798.

³²¹ *Id.* at para. 813.

³²² *Id.* at para. 783.

³²³ Reply, para. 513.

Article 1(b)(v) and Article 1(b)(iii), such that Article 1(b)(v) “supplants” Article 1(b)(iii).

232 This maxim, which is also referred to as the principle of *lex specialis derogat legi generali*, essentially provides that if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former.³²⁴ As explained by the International Law Commission, there are two manners in which this relationship has been conceived. First, the specific rule should be read and understood within the confines or against the background of the general standard, typically as an elaboration or specification of the latter.³²⁵ Second, as a conflict resolution technique where two legal provisions that are both valid and applicable, are in no express hierarchical relationship, and provide incompatible direction on how to deal with the same set of facts.³²⁶

233 The present case does not fall within any of these two categories. Article 1(b)(iii) of the Treaty does not set a general standard of which Article 1(b)(v) of the Treaty would be an elaboration or a specification. This is supported by the presentation of Article 1(b) of the Treaty which lists all examples under the same article without introducing any hierarchy between them:

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

(i) movable and immovable property as well as others rights such as mortgages, liens or pledges;

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

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

(iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;

³²⁴ **CLA-303**, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, International Law Commission Fifty-eighth session Geneva, 1 May - 9 June and 3 July - 11 August 2006, para. 56.

³²⁵ *Id.*

³²⁶ *Id.* at para. 57.

(v) *business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals*”.³²⁷

- 234 What is more, there is another unrelated example of qualifying investment between (iii) and (v), namely (iv) (“*intellectual property rights, in accordance with the relevant laws of the respective Contracting Party*”). This makes it untenable to consider that (v) is an elaboration or specification of (iii). As the *Azurix v. Argentina* tribunal noted in relation to the BIT applicable in that case, the relevant treaty definition of ‘investment’ “*simply lists examples of what an investment is, the list is not exhaustive and each item is independent from each other*.”³²⁸
- 235 Nor is there a conflict between the two provisions, such that one should prevail over the other. Article 1(b) of the Treaty provides examples of five different types of investments that may fall within its scope. This does not mean that if an investment matches one of those examples (*e.g.*, immovable property at (i)) but not the other ones (*e.g.* shares in a company at (ii), rights to money under a contract at (iii)), a conflict exists. Such an interpretation of Article 1(b) would make no sense.
- 236 Respondent’s argument is therefore misguided. In this context, it comes as no surprise that the authorities it relies on to support it, namely (i) the academic article quoting the dissenting opinion of Samuel K.B. Asante in *AAPL v. Sri Lanka*,³²⁹ (ii) the ICJ advisory opinion in *Admission of a State to the United Nations (Charter, Art. 4)*³³⁰ and (iii) *Lao Holding v. Lao*,³³¹ are all inapposite.

³²⁷ **RLA-1**, Agreement Between the Government of the Republic of Mozambique and the Government of the Republic of India for the Reciprocal Promotion and Protection of Investments.

³²⁸ **CLA-304**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 63. (Emphasis added)

³²⁹ Reply on Jurisdiction, para. 811 referring to **Exhibit R-81**, Bilateral Investment Treaties, 86 Am. J. Int’l L. 371, 374 (April 1992), at 64. This dissenting opinion considered that the majority should have made its decision on liability under Article 4 of the UK-Sri Lanka BIT (compensation for losses), which set out specific rules in respect of the responsibility of a host State in respect of losses or damages sustained in civil disturbances, as opposed to under the general protection provided in Article 2(2) of such BIT (fair and equitable treatment, full protection and security and non-discriminatory treatment (**CLA-305**, *AAPL v. Sri Lanka*, ICSID Case ARB/87/3, Dissenting Opinion of Samuel K.B. Asante, 15 June 1990, pp. 579-582). It has nothing in common with the case at hand where there is no dispute as to the fact that the provision governing jurisdiction *ratione materiae* is Article 1(b).

³³⁰ This Advisory Opinion, which Respondent does not adduce, relates to the relationship between Article 4 of the Charter of the United Nations (setting out the conditions for membership in the United Nations) and Article 24 (referring to the political responsibilities assumed by the Security Council) (**CLA-306**, *Admission of a State to the United Nations (Charter, Art. 4)*, *Advisory Opinion*, ICJ Reports, 28 May 1948, p. 64). In that case, the Court found that owing to the very general nature of Article 24, it could not affect the special rules for admission which emerged of Article 4, such as the Security Council and the General Assembly were not afforded complete discretion in connection with the admission of new members to the United Nations (**CLA-306**, *Admission of a State to the United Nations (Charter, Art. 4)*, *Advisory Opinion*, ICJ Reports 28 May 1948, p. 64). It is clear on the face of this case that it must be distinguished from the case at hand. The latter not only deals with a single provision within the same Treaty (Article 1(b)), there is also no hierarchical relationship or conflict between the examples of “investment” set out in the subparagraphs such provision.

³³¹ *Lao Holding v. Lao*, it is plainly irrelevant. Respondent quotes a paragraph out of a passage, which deals with the interpretation of different arbitration clauses contained in a contract governed by New York law (**RLA-147**, paras. 72-74. See also para. 32 confirming that the dispute was a contractual dispute governed by New York law).

- 237 Third, PEL has already demonstrated in the Reply that Respondent’s argument regarding the tense used in Article 1(b) and 1(b)(v) is at odds with the Treaty. Respondent repeats the submissions it made in the SOD instead of engaging with PEL’s Reply. PEL therefore refers the Tribunal to paragraphs 517 to 534 of the Reply.
- 238 Fourth, cases interpreting investment treaties encompassing examples of investment comparable to Article 1(b)(iii) of the Treaty make it clear that such articles cover a very broad range of economic operations. In *Fedax v. Venezuela*, the tribunal specifically considered the language “*claims to money and claims to performance pursuant to certain contracts*” as an indication of a broad approach to qualifying investments.³³²
- 239 *Joy Mining* is inapposite. In that case, the tribunal considered under the terms of that specific treaty, whether a bank guarantee was an investment under the relevant treaty or an ordinary feature of a sales contract.³³³ It concluded that a bank guarantee was the latter, specifically because it was a contingent *liability*, in the sense that it could only potentially affect the day-to-day operations of *Joy Mining*, as Egypt had merely failed to return such guarantee.³³⁴
- 240 In the case at hand, the MOI is not an ordinary feature of a sales contract. Nor is the MOI a “*contingent liability*”. Unlike in *Joy Mining*, both PEL and Mozambique had taken steps to abide by the MOI; it was binding. What is more, PEL had rights under the MOI, including the right to exclusivity and confidentiality, as well as a right to a direct award of a concession subject to two conditions which were both fulfilled.
- 241 It follows that Respondent has not displaced Claimant’s case that Article 1(b) of the Treaty, as illustrated by the examples set out at (i) to (v) embraces everything of economic value, virtually without limitation.³³⁵

³³² See e.g. **CLA-307**, *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 5 ICSID Rep. 186 (2002), 11 July 1997, paras. 34-35.

³³³ **RLA-53**, *Joy Mining Machinery Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, para. 44.

³³⁴ *Id.*

³³⁵ Reply, para. 513. See also, **CLA-87**, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia I*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, paras. 103-107: “103. Such a definition, usually referred to as a “broad asset-based definition of investment,” follows a well-established pattern pursued by many other BITs. It combines a broad definition (“every kind of asset”) with an illustrative list of assets categories that fall within the definition of investment. 104. This type of definition clearly distinguishes the present BIT from other more narrow approaches, containing either an “exhaustive list” of covered activities/assets or a list of activities/assets that are not included in the definition of “investment” or even a combination of both. Article 1139 NAFTA is an example of such a combined approach. It first lists a number of activities under the heading “investment means” and then states what “investment does not mean”, including, claims to money arising from purely commercial sales and services contracts or from short term loan agreements... 106. The fact that some investment treaties narrow the notion

242 Turning to Mozambique’s factual arguments, they can be summarised as follows:

- (a) The MOI was not an investment because no physical concession was conferred on PEL for the purposes of Article 1(b)(v) of the Treaty.³³⁶
- (b) In any event, PEL’s right to a concession, even if granted, was contingent and PEL never satisfied the contingencies under the MOI.³³⁷ As a result, PEL had no right to be awarded a concession for the purposes of Article 1(b)(v)³³⁸ and also no right to performance under the MOI was established or acquired for the purposes of Article 1(b)(iii).³³⁹
- (c) In any event, the MOI has no financial value because it is illegal³⁴⁰ and/or contingent rights have no market value, which is evidenced *inter alia* by the fact that PEL’s request for damages in this respect is speculative.³⁴¹

243 This presentation of the MOI and PEL’s rights thereunder is incorrect for several reasons.

244 First, while it is common ground that PEL was not physically granted a concession agreement, this is part and parcel of Mozambique’s delict. Respondent cannot be heard to use the fact that PEL never received the actual concession as a defence when it was Respondent’s breach of the Treaty that resulted in PEL not receiving the concession in the first place. Besides, whether PEL did or did not receive the physical concession is irrelevant here for jurisdictional purposes.

of what constitutes an investment reinforces the impression that a broad investment definition such as the one contained in Article 1 of the Greece-Serbia and Montenegro BIT may cover assets and activities that go beyond what is traditionally included in the notion of foreign direct and indirect investment. According to a recent UNCTAD study a BIT stating that “investment includes ‘every kind of asset’ suggest[s] that the term embraces everything of economic value, virtually without limitation.” 107. In Bayindir v. Pakistan the tribunal found that a definition of investment corresponding to the one in Article 1(1) of the present BIT “is very broad” and cited a doctrinal thesis according to which “the reference to ‘every kind of asset’ is ‘[p]ossibly the broadest’ among similar general definitions contained in BIT’s.” Equally, the Tribunal in Fedax v. Venezuela found that the identical definition of investment in the Netherlands-Venezuela BIT “evidences that the Contracting Parties to the Agreement intended a very broad meaning for the term ‘investment’.” The Tribunal also observed that this broad approach of investment is not at all an exceptional situation; it rather reflects “the standard policy of major economic groupings such as the European Communities.” 108. It results that the definition of “investment” in the Treaty was deliberately very broad so as to cover the widest possible economic activities and to encourage economic cooperation between the two countries, as expressly stated in the BIT’s Preamble.”

³³⁶ Reply on Jurisdiction, paras. 801-807.

³³⁷ *Id.* at paras. 808 and 815.

³³⁸ *Id.* at para. 808.

³³⁹ *Id.* at para. 815.

³⁴⁰ *Id.* at para. 816.

³⁴¹ *Id.* at para. 817.

245 Second, as explained elsewhere, Article 1(b) of the Treaty does not require that a physical concession be granted to PEL for PEL’s investment in the form of the MOI and its rights thereunder to qualify under the Treaty. In this respect, to the extent Respondent relies upon the fact that the MOI was not a concession under Mozambican law to argue that it did not fall within the scope of Article 1(b)(v), such analysis has been rejected in *Flemingo DutyFree v. Poland*. In that case, the tribunal considered whether lease agreements concluded in relation to the operation of retail stores in Warsaw Chopin Airport could be considered to be investments as “*business concessions conferred under contract*”, explicitly mentioned in Article 1(1)(e) of the India-Poland BIT.³⁴² Poland has argued that “*the term ‘concession’ in the [India-Poland BIT] should be interpreted in accordance with the Polish Business Freedom Act, which was already in force at the time that the Treaty was enacted. The procedure for awarding a concession... is usually formalised and conducted in an administrative procedure which ends with an administrative decision. In the current circumstances...the Lease Agreements were agreed pursuant to a private tender, which cannot be construed as an administrative procedure or decision.*”³⁴³ The tribunal noted that “*the Lease Agreements for operating shops at Chopin Airport, with the accompanying duty-free status, granted BH Travel exclusive rights which only public authorities could grant. For the international law qualification of ‘concession’ for Treaty purposes, it is irrelevant whether or not the Lease Agreements would be qualified as ‘concessions’ under Polish domestic law.*”³⁴⁴

246 Second, PEL’s right to a concession is not a contingent right. The MOI provided that PEL agreed to carry out the PFS at its sole expense³⁴⁵ in consideration of which Mozambique promised that if it approved the PFS and if PEL decided to implement the Project through the exercise of its right of first refusal, Mozambique shall grant PEL a concession to implement the Project.³⁴⁶ This is clear on the face of the MOI, including:

³⁴² **CLA-309**, *Flemingo DutyFree Shop Private Limited v. the Republic of Poland*, UNCITRAL, Award, 12 August 2016, para. 591.

³⁴³ *Id.* at para. 261.

³⁴⁴ *Id.* at para. 591. (Emphasis added)

³⁴⁵ **Exhibit C-5A**, English Version of the MOI, Clause 1; **Exhibit C-5B**, Portuguese Version of the MOI, Clause 1; **Exhibit R-1**, Portuguese Version of the MOI, Clause 1; and **Exhibit R-2**, English Version of the MOI, Clause 1.

³⁴⁶ **Exhibit C-5A**, English Version of the MOI, Clauses 2(1) and 2(2); **Exhibit C-5B**, Portuguese Version of the MOI, Clause 2(2); **Exhibit R-1**, Portuguese Version of the MOI, Clause 2(2); and **Exhibit R-2**, English Version of the MOI, Clause 2(2).

- (a) Clause 1, which contained PEL’s obligation to carry out the PFS at its own expense and explicitly highlighted that the purpose of the PFS was to set out “*the basic terms and conditions for the granting of a concession by the Govt. of Mozambique*” (this is consistent in both PEL’s English language MOI and in Mozambique’s purported English language MOI).³⁴⁷
- (b) Clause 2, which contained Mozambique’s obligation to grant PEL the concession in respect of the Project, subject to Mozambique’s approval of the PFS and PEL’s decision to implement the Project through the exercise of its right of refusal. (This is also consistent in both PEL’s English language MOI and in Mozambique’s purported English language MOI.) Clause 2 reads as follows (crucially, the contents of Clause 2(2) are not disputed by Mozambique):

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

*2. After the approval of the pre-feasibility study PEL shall have the first right of refusal for the implementation of the project on the basis of the concession which will be given by the Government of Mozambique.”*³⁴⁸ (Emphasis added)

247 As a logical flipside to its commitment to award the concession directly to PEL, Mozambique granted PEL exclusivity rights in relation to the Project (and any substantially similar projects), committed not to grant rights in respect of the Project to any other party³⁴⁹ and to keep the information shared in relation to the Project confidential.³⁵⁰

248 There is no doubt that Mozambique approved the PFS and that PEL exercised its right of first refusal. This is unequivocally supported by the evidence on the record, and is not disputed by Mozambique. On 15 June 2012, Mozambique approved the PFS and asked that PEL exercise its right of first refusal:

³⁴⁷ **Exhibit C-5A**, English Version of the MOI, Clause 1; **Exhibit C-5B**, Portuguese Version of the MOI, Clause 1; **Exhibit R-1**, Portuguese Version of the MOI, Clause 1; and **Exhibit R-2**, English Version of the MOI, Clause 1.

³⁴⁸ **Exhibit C-5A**, English Version of the MOI; **Exhibit R-2**, English Version of the MOI.

³⁴⁹ **Exhibit C-5A**, English Version of the MOI, Clause 6; **Exhibit C-5B**, Portuguese Version of the MOI, Clause 6; **Exhibit R-1**, Portuguese Version of the MOI, Clause 6; and **Exhibit R-2**, English Version of the MOI, Clause 6.

³⁵⁰ **Exhibit C-5A**, English Version of the MOI, Clause 11; **Exhibit C-5B**, Portuguese Version of the MOI, Clause 11; **Exhibit R-1**, Portuguese Version of the MOI, Clause 11; and **Exhibit R-2**, English Version of the MOI, Clause 11.

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

a) Expressly exercise its right of first refusal;

*b) Negotiate with the CFMs the creation of a company to implement the project.”*³⁵¹ (Emphasis added)

249 PEL exercised such right, three days later, on 18 June 2012, in the following terms:

“...we would like to thank you for accepting the report.

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

*We would also like to inform you that we will proceed with CFM to incorporate an entity for implementation of the project as directed by you in your letter.”*³⁵² (Emphasis added)

250 The MOI thus provided for two conditions precedent to PEL being granted a legal right to a concession — not a contingent right.

251 In any event (*quod non*), the conditions precedent were all met well before the Arbitration was commenced.³⁵³ As the *Eureko v. Poland* tribunal noted, once the contingency is realised the right becomes a protected investment.³⁵⁴ Therefore, even if *arguendo* the two conditions precedent are viewed as contingencies, such contingencies had been realised and PEL’s right to a concession was an acquired or vested right within the reach of the Treaty and not a contingent right.

252 Further, the Respondent repeats its argument that the MOI rights are contingent because “*ultimately no concession agreement was ever awarded or signed.*”³⁵⁵

³⁵¹ **Exhibit C-11**, Letter from Minister Zucula of MTC to Kishan Daga of PEL accepting the Pre-Feasibility Study, dated 15 June 2012.

³⁵² **Exhibit C-12**, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding implementation of the project, dated 18 June 2012.

³⁵³ It is well established that for the purposes of establishing jurisdiction *in the absence of treaty provisions to the contrary, the relevant date for purposes of jurisdiction is the date of the institution of proceedings.* **CLA-310**, R Dolzer and C Schreuer, *Principles of International Investment Law*, 2nd edition (OUP 2012), pp. 38-39. See also **CLA-80**, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 31: “it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted.”

³⁵⁴ **CLA-128**, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, paras. 151-152: “an investor cannot be deprived of a contingent right within the reach of the Treaty as long as the contingency has not been realized. However, the preamble and substantive provisions of the First Addendum demonstrate clearly that the statement of intent which had been agreed by the parties in the SPA had now crystallized and become a firm commitment of the State Treasury.”

³⁵⁵ Reply on Jurisdiction, para. 826.

This argument ignores the fact that there was no uncertainty around Mozambique's determination to proceed with the Project. The contemporaneous record shows Mozambique treated the Project as a matter of priority to its infrastructure and as a matter of national strategic importance:

- (a) in MTC's letter to PEL, dated 11 January 2013, Minister Zucula wrote that "*the matter was taken to the attention of the Cabinet, and, since time was of major concern, the Government decided to look in the market for a partner who was willing to accept more participation of the Public Company CFM.*"³⁵⁶ (Emphasis added)
- (b) in MTC's letter to PEL, dated 18 April 2013, Minister Zucula wrote that "[t]he Council of Ministers, in its 10th Ordinary Session held on the date of 16 April 2013, **considering the urgency of these infrastructures, the national strategic interest, the time available and the fact that the tenderer has carried out all the feasibility and engineering studies, and that it is in the national interest that the project be accelerated** decided to invite this company to start the process with a view of carrying out those projects."³⁵⁷ (Emphasis added)

253 As explained by Professor Medeiros, the right of preference in the MOI refers to a situation in which "*a person (the obligor), if he wishes to conclude a certain transaction (the transaction or contract under preference), must do so with a certain person (the beneficiary or preference holder), provided that that person wishes to follow the conditions of the transaction in question (if he exercises the preference).*"³⁵⁸ There was no doubt that Mozambique wished to award a concession for the Project, and pursuant to the MOI, it was obligated to award that concession to PEL.

254 It follows that contrary to Respondent's allegations, the MOI itself and PEL's rights under it were not contingent.

255 Third, Respondent cannot seriously dispute that the MOI and PEL's rights under it have a financial value, as demonstrated in Section VIII of the Reply.

256 This is why Respondent is forced to refer to the alleged illegality of the MOI, which it contends, affects its financial value. Arguments as to legality of the MOI (to the extent they are relevant to this Tribunal's jurisdiction) are dealt with at paragraphs 291-303 below. It is worth noting here, however, that prior

³⁵⁶ **Exhibit C-19**, Letter from Minister Zucula of MTC to Kishan Daga of PEL reneging on MTC's commitment to award the concession to PEL, dated 11 January 2013.

³⁵⁷ **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

³⁵⁸ **CER-3**, Legal Opinion of Professor Rui Medeiros, para. 16.1; **CLA-28**, A. MENEZES CORDEIRO, *Tratado de Direito Civil*, VII, Coimbra, 2018, p. 462.

to Respondent filing its Reply on Jurisdiction, Ethos announced a new long-term financing partnership with TML, whereby Ethos will infuse USD 400 million into the Project.³⁵⁹ Carlos Santos, the CEO and President of Ethos, commented on Ethos’s investment in the Project as follows: “[t]he Project is to be one of the largest infrastructure projects in Africa with an estimated total investment cost of approximately USD 3 billion. Given the size and geographic importance of the corridor, the Project will unquestionably be a key agent of social and economic change for the benefit of affected communities and for the country as a whole.”³⁶⁰ Mr Virat Kongmaneerat, TML’s Executive Director, explained that “funding from Ethos” constituted a “vote of confidence ... in the viability of the Project”. He likewise commented that the Project was moving “forward with the resettlement and construction of the port” and would put “TML and Mozambique on the regional transportation map.”³⁶¹ It is telling that Respondent has chosen to conceal this information for the Tribunal, and instead claims that the Project is worthless.³⁶² Such allegations are belied by the facts, including the recent USD 400 million investment by Ethos.

257 Respondent also repeats its allegation that PEL’s rights under the MOI were contingent, this time arguing that if PEL had a right (*arguendo*), it would be a right to negotiate a direct award.

258 Here, Mozambique conflates PEL’s legal right to a direct award of a concession and the concession itself. As Professor Medeiros opines, “[t]he right of first refusal / direito de preferência and, also, the right to be granted a concession contract by direct award, both foreseen in the MoI, are rights that become fully effective and enforceable in law once contractually agreed conditions are confirmed, regardless of the need to define, at a later stage, the necessary and material terms of the concession.”³⁶³ The fact that Mozambique was not granted the Project concession (by virtue of Mozambique’s conduct) does not mean that its legal right to the direct award of a concession had no value.

259 Respondent finally disputes the manner in which Claimant’s quantum experts have determined the value of its investment. This is, of course, irrelevant to

³⁵⁹ **Exhibit C-343**, 360 Mozambique, *Ethos Asset Management Inc., USA announces major deal in Mozambique with Thai Mozambique Logistica, S.A., to finance the building of the Macuse port and rail infrastructure in the sum of \$400 million USD*, dated 19 November 2021.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² Reply on Jurisdiction, paras. 15-16.

³⁶³ **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Executive Summary, para. C. (Emphasis added)

the question of whether Claimant made a qualifying investment and accordingly is not discussed here.

260 Mozambique has therefore failed to rebut Claimant’s case that the MOI and PEL’s rights associated with it comprise a qualifying investment under Article 1(b) of the Treaty.

ii. Respondent does not rebut PEL’s case that, in any event, its know-how constitutes an “*investment*”

261 PEL demonstrated that it made qualifying investments in the form of 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.³⁶⁴ This, in turn, means that even if the Tribunal considers that Respondent’s objection to its jurisdiction *ratione materiae* in respect of the MOI and PEL’s right thereunder is substantiated, the Tribunal still ought to uphold its jurisdiction by virtue of the principle of the unity of the investment.³⁶⁵

262 Respondent takes issue with PEL’s first proposition on the basis that PEL has not demonstrated that the alleged know-how constituted “*intellectual property rights*” under Mozambican law for the purposes of Article 1(b)(iv) (“*intellectual property rights, in accordance with the relevant laws of the respective Contracting Party*”).³⁶⁶

263 Respondent’s objection is irrelevant because it mischaracterises PEL’s argument. PEL did not argue that its know-how fell within the scope of the example at Article 1(b)(iv) of the Treaty. Rather, PEL argued that its know-how is an “*asset*” for the purposes of Article 1(b) of the Treaty, which embraces “*everything of economic value, virtually without limitation.*”³⁶⁷ The intangible form of the “*thing*” of economic value or contribution matters not and typically includes know-how, which falls within the scope of such definition.³⁶⁸ PEL’s demonstration was supported by reference to three legal authorities:

(a) *Bayindir v. Pakistan* where the tribunal held that the general definition which referred to every kind of asset was possibly the broadest among

³⁶⁴ Reply, 531; SOC, paras. 256-259.

³⁶⁵ Reply, 532.

³⁶⁶ Reply on Jurisdiction, para. 823.

³⁶⁷ SOC, para. 256.

³⁶⁸ *Id.*

similar general definitions contained in BITs³⁶⁹ and agreed with Bayindir that its know-how, equipment, and personnel fell within the meaning of “*every kind of asset*.”³⁷⁰

- (b) *Deutsche Bank v. Sri Lanka*, which dealt with the concept of “*contribution*” for the purposes of the definition of investment under the ICSID Convention, where the tribunal noted that a contribution could take any form and was not limited to financial terms but also included know how.³⁷¹
- (c) *RSM Production Corporation v. Grenada I*, also dealing with the concept of “*contribution*” where the tribunal held that an investment “*may be financial or through work*,” including know-how or industry.³⁷²

264 Respondent does not take issue with the principle set out in these cases. It merely attempts to distinguish *Bayindir* in a footnote³⁷³ on the basis that Bayindir’s contribution was more significant than that of PEL in this case. It cites no authority to the effect that the significance or scale of the contribution ought to be taken into account in order for know how to qualify as investment.

265 Respondent has therefore failed to rebut PEL’s case that know-how is an asset, for the purpose of Article 1(b) of the Treaty.

266 While Respondent does not take issue with PEL’s description of its know-how, for the avoidance of doubt, it consists of (i) PEL’s conception of the Project, which was previously considered not to be feasible;³⁷⁴ (ii) PEL’s participation in the Preliminary Study, which it financed and convinced Mozambique to undertake;³⁷⁵ (iii) PEL’s expenditures under the PFS, including the site survey to identify the rail route and port location, PEL’s year-long study of the weather conditions at the potential port location,³⁷⁶ and the information and data transferred to the MTC and the CFM through the PFS, which was explicitly

³⁶⁹ **CLA-88**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 113.

³⁷⁰ *Id.* at paras. 114-116.

³⁷¹ **CLA-89**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 297.

³⁷² **CLA-92**, *RSM Production Corporation v. Grenada I*, ICSID Case No. ARB/05/14, Award, 13 March 2009, para. 249.

³⁷³ Reply on Jurisdiction, fn. 61.

³⁷⁴ Reply, paras. 138-155.

³⁷⁵ *Id.* at paras. 156-162.

³⁷⁶ *Id.* at para. 401.

protected by the operation of the confidentiality and exclusivity clauses in the MOI.³⁷⁷

267 As to PEL’s second proposition, Respondent contends that PEL cannot “bootstrap a potential concession...into an alleged ‘investment’” by virtue of the “holistic approach”.³⁷⁸ It refers to *Mytilineos*, on which it says Claimant relies, stating that this case insisted that the treaty is decisive in determining whether an investment exists³⁷⁹ and appears to make the same points about *Koch Minerals v. Venezuela*.³⁸⁰

268 The two authorities relied on by Respondent do not displace the principle of the general unity of the investment.

(a) Respondent quotes a passage of *Mytilineos*, which is inapposite. That passage clarifies that the fact that the parties expressly qualify certain business activities as an investment does not absolve the tribunal from scrutinizing whether such activities are covered by the definition in the relevant treaty.³⁸¹ Respondent also incorrectly contends that Claimant relied upon *Mytilineos* in relation to the principle of general unity of the investment.³⁸² It did not.

(b) *Koch Minerals* supports the existence of the general unity of the investment. In that case, the respondent state argued that an offtake agreement was not an investment for the purposes of the ICSID Convention because it was a pure sales contract.³⁸³ The respondent’s argument was rejected by the tribunal, which recalled the principle of general unity of the investment in unequivocal terms³⁸⁴ and concluded

³⁷⁷ SOC, para. 257(b).

³⁷⁸ Reply on Jurisdiction, para. 827.

³⁷⁹ *Id.* at para. 827.

³⁸⁰ *Id.* at fn. 62.

³⁸¹ Reply on Jurisdiction, para. 827 referring to **CLA-87**, para. 88. The relevant quote is in fact at para. 96 and reads as follows: “The provisions of these treaties, and the BIT in the present case, are decisive for the qualification as an “investment.” The express characterization of certain business activities as “investments” by the parties may be an indication of their intentions but cannot absolve the Tribunal from scrutinizing whether such activities are covered by the definition of “investment” under the BIT.”

³⁸² In paragraphs of the Reply referred to by Respondent (Reply on Jurisdiction, para. 827), Claimant quoted *Mytilineos* in support of its proposition that there are doubts as to whether the *Salini* criteria are relevant outside the ICSID context (para. 576).

³⁸³ **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, paras. 6.57-6.58.

³⁸⁴ *Id.* at para. 6.59: “Other arbitration tribunals have adopted the same holistic approach to the meaning of “investment” in Article 25(1) of the ICID Convention, without necessarily using that term or the similar term “unity of investment”. The Tribunal refers to the decisions in *Inmaris v. Ukraine*, where the tribunal considered the “claimed investments as component parts of a larger, integrated investment undertaking”; *Ambiente Ufficio v. Argentina*, where the tribunal stated that “when a tribunal is in presence of a complex operation, it is required to look at the economic substance of the operation in question in a holistic manner”; *ADC Affiliate v. Hungary*, where the tribunal looked “at the totality of the transaction as encompassed by the Project Agreements”; *Electrabel v. Hungary*, where the tribunal decided that “all the elements of the Claimant’s operation must be considered for the purpose of determining whether there is

that an offtake agreement was an inseparable part of the relevant project and thus formed part of the investment.³⁸⁵

269 Respondent does not dispute the other authorities quoted by Claimant in support of the principle of general unity of the investment. *Inmaris v. Ukraine* is of particular relevance to explain the manner in which tribunals apply this principle. In that case, the tribunal explained:

*“Accordingly, the Tribunal can step back to consider their claimed investments as component parts of a larger, integrated investment undertaking. It is not necessary to parse each component part of the overall transaction and examine whether each, standing alone, would satisfy the definitional requirements of the BIT and the ICSID Convention. For purposes of this Tribunal’s jurisdiction, it is sufficient that the transaction as a whole meets those requirements. Of course, exactly what rights (if any) were held by each specific company, whether any such specific rights were breached by Respondent’s actions, and whether or how such contractual breaches (if any) give rise to breaches of the Treaty, are questions that the Tribunal may need to take up on the merits. But they need not be answered at this stage, where the Tribunal need only determine the existence of a covered investment in the transaction as a whole.”*³⁸⁶ (Emphasis added)

270 In the present case, Claimant’s know-how is a qualifying investment which is part and parcel of the Project. It follows that Respondent does not rebut PEL’s case that even if Mozambique’s objection the Tribunal’s jurisdiction *ratione materiae* in respect of the MOI and PEL’s right thereunder succeeds (*quod non*), the Tribunal ought to uphold its jurisdiction by virtue of the principle of unity of the investment.

271 In light of the above, the entirety of PEL’s investment falls within the definition of the term “investment” in Article 1(b) of the Treaty.

an investment under Article 25”; and Chevron v. Ecuador, where it was said that “[i]nvestments must also be examined holistically and not separated into components.” It is thus not permissible to slice up an overall investment into its constituent parts, like a sausage, so as to contend that one part, isolated by itself alone, is not an “investment” whereas as an integrated part of the whole investment, it is.”

³⁸⁵ **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, paras. 6.60-6.67.

³⁸⁶ **CLA-81**, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, 8 March 2010, para. 92. See also Reply, para. 513(c) referring to SOC, para. 255 and **CLA-80**, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, 24 May 1999 para. 72; **CLA-82**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 428, 453; **CLA-83**, *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 27 September 2006, para. 331; **CLA-84**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.44.

2. Claimant's investment was in the territory of Mozambique

272 Claimant demonstrated that its investment was made in Mozambique's territory for the purposes of Article 1(b) of the Treaty in that:

- (a) The Project was to be developed in the territory of Mozambique and the MOI independently constituted an investment in the territory of Mozambique, based on the unequivocal investment treaty case law establishing that a contractual relationship with a state or a state entity creating value in the state constitutes an investment in the territory of such state.³⁸⁷
- (b) Respondent's objection that PEL's investment was not made in Mozambique's territory because there was no evidence that expenses were incurred in Mozambique rather than India was easily dismissed, as (i) it did not address the relevant treaty case law and (ii) in any event (and even though this is not the relevant test), there were expenses in respect of the Preliminary Study and the PFS incurred in Mozambique.³⁸⁸

273 In the Reply on Jurisdiction, Respondent does not engage with PEL's case. Instead, Mozambique makes three fallacious arguments, without quoting any authority in support.

274 First, Respondent does not dispute 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. Instead, it states that the MOI is an option, not an investment.³⁸⁹ This misses the point. The question under this heading is not whether the MOI is a qualifying asset but whether it is made in Mozambique's territory for the purposes of the Treaty.

275 Second, Mozambique continues to argue that there is no evidence of expenses in Mozambique.³⁹⁰ It does not explain or quote any authority to explain why such consideration forms part of the relevant test, which is dispositive of the

³⁸⁷ SOC, para. 262 quoting **CLA-93**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela II*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award, 30 April 2014, para. 130 ("A contractual right by its very nature has no fixed abode in the physical sense, for it is intangible. However, a lack of physical presence is not per se fatal to meeting the territoriality requirement; intangible assets, with no accompanying physical in-country activities, have been accepted as investments for the purposes of bilateral investment treaties by many tribunals.") and **CLA-81**, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, 8 March 2010, para. 124 ("an investment may be made in the territory of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself.")

³⁸⁸ Reply, paras. 536–538.

³⁸⁹ Reply on Jurisdiction, para. 700.

³⁹⁰ *Id.* at paras. 786–788.

issue. In any event, Mozambique cannot credibly dispute that PEL financed the Preliminary Study and the PFS,³⁹¹ which was then approved by the MTC after due consideration.

276 Third, Mozambique argues that the facts that PEL designed the railway route to evacuate mineral resources from Tete region and posted a person for a year at a potential port location to monitor the weather were *de minimis* actions, which must be disregarded because no documentary evidence was provided in this respect.

277 Again, Respondent provides no authority to support its contention that the expenses must be of a certain scale to qualify under the test it has concocted. This alone is fatal to Respondent's argument. Further and in any event, the PFS itself is documentary evidence that PEL designed the railway route and proposed a location for the port.³⁹²

278 PEL's investment was therefore made in Mozambique's territory for the purposes of Article 1(b).

3. Claimant's investment was made in accordance with Mozambican law

279 In its previous submissions, Claimant demonstrated that its investment was made in accordance with Mozambican law.³⁹³

280 Claimant also rebutted Respondent's three arguments regarding the alleged illegality of PEL's investment, demonstrating that they had been put forward with no regard to the well-established principles of investment law and were wrong as a matter of fact.

281 In its Reply on Jurisdiction, Respondent repeats the exact same arguments and does not engage with PEL's case. Its arguments are therefore only briefly addressed below.

- i. Respondent's objection based on PEL's alleged failure to disclose the fact of its temporary debarment by the NHAJ

282 In the Reply, PEL showed that Mozambique's unparticularised repetition of its argument on admissibility regarding PEL's alleged fraudulent concealment of

³⁹¹ **Exhibit C-200**, Email from Isaias Muhate of the MTC to Kishan Daga of PEL attaching work plan and fee proposal for the Preliminary Study, dated 26 February 2011.

³⁹² **Exhibit C-6b**, Pre-Feasibility Study (Final and Complete), dated April 2012.

³⁹³ Reply, para. 540; SOC, paras. 254-260.

its temporary debarment by the NHAI, in the section of its pleadings on legality of the investment, was a non-starter:

- (a) Respondent’s argument ignored that the material time for the assessment of an investment’s legality for the purposes of jurisdiction was the time when the investment was made.³⁹⁴
- (b) Yet, PEL’s investment was made when it commissioned the Preliminary Study in February 2011 and when it entered into the MOI on 6 May 2011. That was *before* the temporary debarment took effect on 20 May 2011.³⁹⁵
- (c) Accordingly, even if *arguendo* the facts could give rise to an allegation of fraudulent concealment (*quod non*), this could not affect the legality of the investment, which was made *before* the temporary debarment.³⁹⁶
- (d) In any case, and for the avoidance of doubt, Professor Medeiros has also confirmed that PEL had no obligation to disclose its temporary debarment *vis-à-vis* the NHAI to Mozambique.³⁹⁷

283 In its Reply on Jurisdiction, Respondent rehashes its previous argument which remains unparticularised. It cross-refers to the section of its memorial on admissibility and notes, without more, that “*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.*”³⁹⁸

284 Although Respondent has not referred to any specific paragraph of its Reply on Jurisdiction, Claimant presumes the “*subject disclosures*” refer to information concerning PEL’s temporary debarment *vis-à-vis* the NHAI.

285 That argument still suffers from a fatal timing issue. Mozambique quotes a number of awards for the common ground principle that an investment will not be protected if it has been created in violation of national or international

³⁹⁴ Reply, paras. 545-547.
³⁹⁵ *Id.* at paras. 548-549.
³⁹⁶ *Id.* at para. 550.
³⁹⁷ *Id.*
³⁹⁸ Reply on Jurisdiction, para. 903.

law,³⁹⁹ and that an objection on this basis may go to jurisdiction or admissibility.⁴⁰⁰

286 In the section of its memorial on admissibility, Respondent also tries to circumvent the fact that PEL's investment was made before the temporary debarment went into effect on 20 May 2011. It introduces the idea that the time period of PEL's making of its investment spans from the beginning of April 2011 through, to a minimum, 15 June 2012 in light of: (i) PEL's commissioning of the Preliminary Study in the beginning of April 2011; (ii) the execution of the MOI on 6 May 2011; and (iii) the transfer of information leading up to the approval of the PFS and its approval on 15 June 2012.⁴⁰¹

287 Respondent does not displace the well-established principle, which is in fact supported by the authorities it quotes,⁴⁰² that the material time for the appreciation of the legality of an investment, for the purposes of jurisdiction, is the time when the investment is made. Respondent's attempt to rescue its objection by dealing with different alleged components of the investment separately, so as to expand the time when the investment was made, is unsupported by any authorities. This, in itself, ought to be dispositive of this argument.

288 What is more, there are authorities specifically taking the opposite approach. For example, the tribunal in *Mamidoil v. Albania* considered that it had to treat the different components of an investment as a whole for the purposes of the determination of the legality of such investment because it formed part of the same operation.⁴⁰³ In respect of the timing for the assessment of the legality of the investment it held that "[t]he decisive moment for the appreciation of the investment's substantive legality is when the investment is planned and made."⁴⁰⁴

³⁹⁹ Reply on Jurisdiction, para. 902 quoting **RLA-29**, *Gustav FJV Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 123-124.

⁴⁰⁰ Reply on Jurisdiction, para. 902 quoting **RLA-145**, *David Minnotte; Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014, para. 131, **RLA-30**, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 179 and **RLA-119**, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, para. 113.

⁴⁰¹ Reply on Jurisdiction, paras. 447-448.

⁴⁰² **RLA-29**, *Gustav FJV Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 127; **RLA-145**, *David Minnotte; Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014, para. 193; **RLA-119**, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013.

⁴⁰³ **RLA-37**, *Mamidoil Jetoil Greek Petroleum Products Société Anonyme SA v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, paras. 362-369.

⁴⁰⁴ *Id.* at para. 375.

289 Here, the different elements of PEL’s investment formed part of a whole, in that each element formed part and parcel of PEL’s plan to build and operate the Project. At the latest, PEL’s investment was planned and made when it entered into the MOI. PEL’s subsequent contributions to the Project were in the implementation of the MOI.

290 PEL’s investment was therefore made before its temporary debarment from participating in and bidding for projects with the NHAI in India. The temporary debarment is accordingly irrelevant for the determination of the legality of the investment for the purposes of jurisdiction. In any event, as explained at paragraphs 472-476, Respondent fails to rebut Professor Medeiros’ analysis according to which PEL had no duty to disclose its temporary debarment in India under Mozambican law. Accordingly, Respondent’s objection based on PEL’s alleged lack of disclosures therefore continues to fail.

ii. Respondent’s objection based on the alleged illegality of the MOI under Mozambican law continues to fail

291 In the Reply, Claimant demonstrated that Mozambique’s unparticularised repetition of its argument on admissibility regarding the alleged illegality of the MOI under Mozambican law, failed. This was because:

- (a) Mozambique is estopped from raising the illegality of an investment it had knowingly overlooked and endorsed.⁴⁰⁵
- (b) In any event, the execution of the MOI was not illegal under Mozambican law.⁴⁰⁶ As Professor Medeiros explains, 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.⁴⁰⁷

292 Respondent fails to address Claimant’s case. The single paragraph of the Reply on Jurisdiction dealing with the alleged illegality of the MOI for the purposes of the jurisdiction⁴⁰⁸ does not discuss estoppel.

293 It follows that Mozambique does not rebut the fact that it is estopped from arguing that PEL has not made a qualifying investment on the basis that the

⁴⁰⁵ Reply, paras. 553-556.

⁴⁰⁶ *Id.* at paras. 557-558.

⁴⁰⁷ *Id.* at para. 557.

⁴⁰⁸ Reply on Jurisdiction, para. 904.

MOI is allegedly contrary to Mozambican law, which is dispositive of the objection.

294 What is more, the Reply on Jurisdiction is even less particularised than the SOD as to why Respondent alleges that the MOI was contrary to Mozambican law. The relevant sentence states that “[i]f 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.”⁴⁰⁹ Yet, Respondent does not refer to any specific paragraph of the merits section, which only discusses the alleged illegality of the MOI under Mozambican law in passing in different subsections.⁴¹⁰

295 The argument is accordingly so unparticularised that it cannot constitute a rebuttal of Claimant’s case as presented in the Reply and supported by Professor Medeiros’ evidence, to which the Tribunal is referred.

296 Respondent’s objection to this Tribunal’s jurisdiction on the alleged basis that the MOI was contrary to Mozambican law therefore continues to fail.

iii. Respondent’s objection based on the fact that the MOI was not registered under the MIL remains unavailing

297 In the Reply, Claimant rebutted Respondent’s argument that PEL’s investment purportedly was illegal because the MOI was not registered under Article 22(1) MIL. In particular, PEL explained that:

(a) PEL was not required to register its investment as a condition of jurisdiction under the Treaty.⁴¹¹ It is well established that for a registration requirement to be interpreted as a condition for treaty protection, it must be express rather than inferred. That alone is dispositive of Mozambique’s argument.⁴¹²

(b) In any event (*quod non*), Mozambique is estopped from raising its registration objection now because it failed to raise it contemporaneously during PEL’s investment.⁴¹³

⁴⁰⁹ Reply on Jurisdiction, para. 904.

⁴¹⁰ *Id.* at paras. 1176.7, 1183.

⁴¹¹ Reply, paras. 559-564.

⁴¹² *Id.* at paras. 565-566.

⁴¹³ *Id.* at paras. 567-568.

- (c) In any event (*quod non*), the MIL’s registration requirement is only applicable to investors wishing to receive the benefits from such law.⁴¹⁴
- (d) In any event (*quod non*), even assuming that the registration was a requirement under Mozambican law, minor violations of the host state law do not preclude jurisdiction because they did not establish the illegality of the investment.⁴¹⁵

298 Respondent’s effort to maintain this argument is unavailing.

299 **First**, Respondent quotes Articles 1(b), 2, and 12(1) of the Treaty stating that PEL incorrectly argues that there is no requirement to register an investment as a condition of jurisdiction under the Treaty.⁴¹⁶ Yet, Mozambique fails to explain why PEL’s argument is wrong. It does not engage in any analysis of those Articles, let alone PEL’s analysis in the Reply. Nor does it discuss PEL’s proposition, supported by *Beijing Urban Construction Group Co. Ltd v. Yemen*, that for a registration requirement to be interpreted as a condition for treaty protection, it must be express rather than inferred.⁴¹⁷ PEL therefore refers the Tribunal to its analysis in the Reply, which stands unrebutted.

300 **Second**, Respondent does not dispute that a host state is estopped from raising violations of its own law as a jurisdictional defence when it knowingly overlooked them and endorsed an investment which was not compliant with its law. Instead, it states that Mozambique could not knowingly have endorsed PEL’s investment because the MIL provides for registration within 120 days of “the *decision authorizing the investment project*”.⁴¹⁸ It concludes that given that the MOI is not an “*investment*”, Mozambique could not have endorsed it and thus be estopped.⁴¹⁹ This argument is circular: Respondent asserts its desired conclusion (*i.e.*, that the MOI is not an investment) without demonstrating it. In fact, Respondent has no response to the fact that it knowingly endorsed the MOI (i) by signing it at an official signing ceremony, (ii) initially abiding by the MOI including by approving the PFS and asking PEL to exercise its right of first refusal, and (iii) by not raising the issue of the MOI’s registration at any point before this Arbitration, even when it started to

⁴¹⁴ Reply, at paras. 569-570.

⁴¹⁵ *Id.* at paras. 571-572.

⁴¹⁶ Reply on Jurisdiction, para. 909-911.

⁴¹⁷ Reply, para. 565 and **RLA-62**, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, paras. 45-46.

⁴¹⁸ Reply on Jurisdiction, paras. 913-914.

⁴¹⁹ *Id.*

breach the promises it made to PEL under it.⁴²⁰ Accordingly, PEL's case that Mozambique is estopped from raising the argument that PEL did not register its investment stands unrebutted.

301 **Third**, Mozambique does not respond to PEL's two alternative arguments (summarised immediately above at paragraph 297(c) and (d)), which therefore also stand unrebutted. Instead, Respondent seeks to draw a conceptually flawed comparison with *Tamini v. Oman*, which it says PEL failed to distinguish.⁴²¹ This is incorrect. In the SOD, Respondent referred to *Tamini* in the context of this Tribunal's jurisdiction *ratione personae*.⁴²² PEL made the point that the case was inapposite because it discussed jurisdiction of a tribunal *ratione temporis*.⁴²³ Respondent now contends that *Tamini* is relevant to the question of this Tribunal's jurisdiction *ratione materiae* in relation to the question of the impact of the failure to register an investment on its qualification as an investment.

302 Respondent's recycled reference is also inapposite to this question. There was no question of legality of the investment for the purposes of jurisdiction *ratione materiae* in *Tamini*. In that case, the alleged investment consisted of two lease agreements and physical infrastructure and equipment. The tribunal held that these were all investments for the purposes of its jurisdiction *ratione materiae*.⁴²⁴ However, the tribunal found that it lacked jurisdiction *ratione temporis* over one of the lease agreements, which was rendered null and void prior to the entry into force of the relevant treaty.⁴²⁵ This was because one of the parties to such agreement failed to register itself in the commercial register in Oman, which meant that it had no legal presence in Oman and thus no capacity to enter into contracts in Oman.⁴²⁶ Respondent's objection that PEL's investment was illegal (and thus not a qualifying investment) because the MOI was not registered under the MIL therefore continues to fall flat.

303 It follows that Respondent has failed to demonstrate that PEL's investment was illegal. Conversely, PEL's investment was made in accordance with the law for the purposes of Article 1(b) of the Treaty.

⁴²⁰ Reply, para. 568.

⁴²¹ Reply on Jurisdiction, paras. 915-917.

⁴²² SOD, paras. 427-438.

⁴²³ Reply, paras. 501(c).

⁴²⁴ **RLA-70**, *Tamini v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, paras. 275-282.

⁴²⁵ *Id.* at para. 285.

⁴²⁶ *Id.* at paras. 294-312.

4. To the extent they are relevant, Claimant’s investment meets the *Salini* criteria

304 In its submissions, PEL demonstrated that to the extent the *Salini* criteria are relevant outside the ICSID context, PEL’s investment meets such criteria.⁴²⁷ Respondent’s latest attempt to rebut PEL’s case in this respect consists of rehashing its previous argument and using fallacious arguments without properly engaging with PEL’s case.

- i. Claimant’s presentation of the relevance and the contents of the *Salini* criteria was correct

305 PEL showed in its previous submissions that the relevance of the *Salini* criteria outside the ICSID context remains controversial.⁴²⁸ In the Reply on Jurisdiction, Respondent does not address the two authorities quoted by PEL in support of this proposition.⁴²⁹ Instead, it quotes one authority where the *Salini* criteria were applied in an ICSID Additional Facility case, and brushes aside doubts as to the criteria’s applicability outside the ICSID context as a “*rabbit hole of academic discussion.*”⁴³⁰ PEL reiterates that if this (or any tribunal operating outside the ICSID context) Tribunal were to refuse jurisdiction on the basis that an investment does not meet the *Salini* criteria, it would need to address and alleviate these doubts.

306 In its Reply, PEL further noted that it appeared to be common ground that the *Salini* criteria could be *indicia* indicating the presence of an investment as opposed to mandatory criteria.⁴³¹ This is not disputed by Respondent.

307 Finally, PEL demonstrated that based on an erroneous presentation of *Phoenix Action*, Respondent wrongly sought to tack on two additional elements to the so-called *Salini* test, *i.e.*, whether an investment was made in accordance with the law and in good faith.⁴³² In its Reply on Jurisdiction, Respondent refused to correct its error and instead persists in wrongly adding two elements to the *Salini* criteria quoting in support an inapposite passage of *Phoenix Action*,⁴³³ which deals with “*all the requirements for an investment to benefit from the*

⁴²⁷ SOC 274-276; Reply, 574-590.

⁴²⁸ Reply, paras. 574-575, 576.

⁴²⁹ *Id.* at para. 576 and fn. 701.

⁴³⁰ Reply on Jurisdiction, para. 831.

⁴³¹ Reply, paras. 574-575, 576.

⁴³² *Id.* at para. 577. The four factors comprising the *Salini* test are: (i) a contribution of money or other assets of economic value, (ii) a certain duration, (iii) an element of risk, and, more controversially, (iv) a contribution to the host State’s development.

⁴³³ Reply on Jurisdiction, para. 832-833.

international protection of ICSID.”⁴³⁴ As explained by PEL in the Reply, the passage of *Phoenix Action* dealing with the *Salini* criteria confirms that at their highest, they consist of four and not six elements.⁴³⁵

308 The questions of whether PEL’s investment was made in accordance with the law and in good faith are therefore not dealt with in this section but in Section V regarding legality and admissibility of the investment.

ii. As a matter of fact, PEL’s investment meets the four *Salini* criteria

309 **First**, PEL demonstrated that it contributed money and other assets of economic value in the form of its financial contributions to finance the Preliminary Study and the PFS; and know-how and human resources including in the fields of geology, and engineering and through the identification and development of a concept that was previously deemed infeasible.⁴³⁶ The economic value of PEL’s contribution was demonstrated by the facts that Mozambique deemed the Project to be in the “*national strategic interest*” and then appropriated PEL’s know-how as the basis to run a public tender for a USD 3.115 billion Project, which continues to move forward today.⁴³⁷

310 Respondent has nothing to say in response. True to its never say die approach, Respondent nonetheless manages, at the expense of logic and accuracy, to come up with an argument which consists of rehashing the erroneous argument that PEL’s undertakings only amounted to pre-investment activities which do not qualify as an “*investment*” under international law.⁴³⁸ This argument, which has no relevance to the question of whether PEL contributed money and other assets of economic value, is addressed in the appropriate section at paragraphs 334-347 below. Respondent, accordingly, does not rebut PEL’s case that its investment meets the first *Salini* criterion.

311 **Second**, PEL showed that for the purposes of its duration, the economic operation of an investment is to be considered holistically. Here, it was envisaged to be a long-term investment (*i.e.*, a year to convince Mozambique to conduct the Preliminary Study, 12 months to complete the PFS, the

⁴³⁴ **RLA-33**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 114.
⁴³⁵ Reply, para. 577 quoting **RLA-33**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 83.
⁴³⁶ Reply, para. 579.
⁴³⁷ *Id.*
⁴³⁸ Reply on Jurisdiction, paras. 838-843.

construction of the Project was to take place over 6 years and the Project concession was envisaged to have a 30-year term).⁴³⁹

312 PEL also rebutted Respondent's case that PEL's investment consisted of the PFS alone, which, according to Mozambique, did not meet the alleged minimal length for an investment of 2 to 5 years. Claimant explained (i) that its investment did not consist of the PFS in isolation and (ii) that, in any event, it was now well established that the duration for an investment referred to in *Salini* should not be mechanically applied referring to *Romak v. Uzbekistan* and *Doutremepuich v. Republic of Mauritius*.⁴⁴⁰

313 True to form, Respondent repeats its previous case without addressing Claimant's response. It does not dispute the principle that the economic operation of an investment must be viewed holistically, yet it continues mischaracterise PEL's investment as being limited to the PFS only. Respondent further relies upon its own failure to grant PEL's concession to argue that the Project never proceeded to the construction phase and thus, the investment does not meet the alleged minimal length. As to the alleged minimal length itself, Respondent does not address *Romak* and *Doutremepuich*. Respondent, accordingly, does not rebut PEL's case that its investment meets the second *Salini* criterion.

314 **Third**, PEL demonstrated that the Project entailed investment risks, including that the PFS would deem the Project infeasible or that that MTC would not approve the PFS.⁴⁴¹ Respondent does not appear to dispute the definition of investment risk set out in the Reply, *i.e.*, not a pure commercial risk but a situation in which the investor could not predict the outcome of the transaction.⁴⁴²

⁴³⁹ Reply, para. 582.

⁴⁴⁰ Reply, para. 584 and **CLA-94**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 225 (“*The Arbitral Tribunal does not consider that, as a matter of principle, there is some fixed minimum duration that determines whether assets qualify as investments. Short-term projects are not deprived of ‘investment’ status solely by virtue of their limited duration. Duration is to be analyzed in light of all of the circumstances, and of the investor’s overall commitment.*”); **CLA-284**, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, para. 141 (“*In order to meet the relevant test, any contribution to the host State must also be of a certain duration. There is a rather sterile debate as to how long is enough to meet the duration requirement. It has been posited as generally accepted that the required duration would be a period of at least two years. However, the application of this requirement should not be excessively rigorous and the relevant duration is to be assessed in all the circumstances. This criterion excludes short-term economic activity, or assets used in that context, such as one-time sales transactions that do not face investment-specific risk.*”)

⁴⁴¹ Reply, paras. 585-589.

⁴⁴² *Id.* at para. 587.

- 315 However, Respondent contends that PEL cannot establish a risk but instead merely shows a loss of opportunity to make a different investment⁴⁴³ and relies on a commercial risk that the parties may default.⁴⁴⁴ This argument is hard to follow. That the PFS could have deemed the Project infeasible and that the MTC could have chosen not to approve the Project, are archetypal situations in which PEL as the investor could not have predicted the outcome of the transaction with any certainty. It is not a loss of opportunity to make a different investment and has nothing to do with default of a party.
- 316 Perhaps realising that its argument is unsustainable, Respondent simply repeats its circular argument that because there was no investment, there could be no risk in respect of such investment.⁴⁴⁵ This is founded on yet another repetition of Mozambique’s allegation that PEL’s investment was not an investment under international law because it consisted of pre-investment activities.⁴⁴⁶ This argument, which has no relevance to the question of whether PEL’s investment entailed risks, is addressed in the appropriate section at paragraphs 334-347 below.
- 317 Finally, Respondent confirms PEL’s interpretation of the right of first refusal under the MOI as entailing “*the unilateral option of walking away even after the PFS was approved*”, which it takes to show that PEL took no investment risk because it could control its expenses.⁴⁴⁷
- 318 At the outset, it is remarkable that after it disputes over pages of submissions PEL’s interpretation of its right of first refusal under the MOI, Respondent is content to adopt PEL’s interpretation when it suits its case. Further and in any event, the fact that PEL had a right of first refusal *after* the PFS was approved does not undermine the fact that the PFS could have found the Project not to be feasible and not been approved by the MTC, both of which were tangible investment risks. Accordingly, Respondent fails to rebut PEL’s case that its investment meets the third *Salini* criterion.
- 319 **Fourth**, PEL demonstrated the Project was a quintessential example of a project contributing to the economic development of the host state, which was explicitly recognised in Recital C of the MOI, and on the website of TML

⁴⁴³ Reply on Jurisdiction, para. 852.

⁴⁴⁴ *Id.* at para. 853.

⁴⁴⁵ *Id.* at paras. 850, 859.

⁴⁴⁶ *Id.* at paras. 854, 859.

⁴⁴⁷ *Id.* at para. 860.

which ultimately was granted PEL's Project.⁴⁴⁸ PEL further noted that Mozambique benefitted from the PFS and PEL's know-how which it used *inter alia* to organise the tender and pursue the Project, in breach of the MOI.⁴⁴⁹ The private equity fund that recently invested USD 400 million in the Project in November 2021, described the Project as “one of the largest infrastructure projects in Africa” that would “unquestionably be a key agent of social and economic change for the benefit of affected communities and for the country as a whole.”⁴⁵⁰

320 Respondent has precious little to say in response. It merely relies on its own breaches of the MOI to argue that there was no contribution to Mozambique's development because Mozambique granted the concession to ITD.⁴⁵¹ It does not even address Recital C of the MOI. Mozambique further contends that PEL's know-how was used for the tender just as that of the other bidders.⁴⁵² This is incorrect. As PEL has demonstrated in the Reply, Mozambique used its PFS to organise the tender,⁴⁵³ not that of any other participant. Mozambique finally repeats its circular argument that because there was no investment, there could be no contribution to the development of the host state.⁴⁵⁴ This again is founded on its “pre-investment” argument, which is addressed in the appropriate section at paragraphs 334-347 below. Respondent, accordingly, does not rebut PEL's case that its investment meets the fourth *Salini* criterion. PEL's investment therefore meets all four *Salini* criteria.

5. To the extent the existence of PEL's investment ought to be assessed in light of other investment treaty cases, PEL has made a qualifying investment

321 Claimant demonstrated that without justifying the relevance of the cases it relied on, Respondent had erroneously argued that PEL's investment was a “mere option”, which would not qualify as an investment for the purposes of such cases.⁴⁵⁵ In its Reply on Jurisdiction, Respondent dedicates 30 pages of

⁴⁴⁸ Reply, para. 590.

⁴⁴⁹ *Id.*

⁴⁵⁰ **Exhibit C-343**, 360 Mozambique, *Ethos Asset Management Inc., USA announces major deal in Mozambique with Thai Mozambique Logistica, S.A., to finance the building of the Macuse port and rail infrastructure in the sum of \$400 million USD*, dated 19 November 2021.

⁴⁵¹ Reply on Jurisdiction, paras. 864-865.

⁴⁵² *Id.* at para. 866.

⁴⁵³ Reply, paras. 380-392.

⁴⁵⁴ Reply on Jurisdiction, para. 867.

⁴⁵⁵ Reply, para. 591-611.

its submissions to repeat this frivolous argument,⁴⁵⁶ which it also rehashes elsewhere in its submissions.⁴⁵⁷

322 This argument continues to fail. Respondent does not explain the relevance of the cases it relies upon, which in any event are distinguishable from the case at hand. Respondent’s purported analysis of the cases is also tainted by its continued mischaracterisation of the MOI as an “option” or a “contingent” document, and its failure to analyse the other components of PEL’s investment.

i. The relevance of the cases relied on by Respondent remains unexplained

323 PEL demonstrated in the Reply that Mozambique’s argument should be rejected outright as it had not shown why the ICSID cases interpreting the notion of “investment” under Article 25 of the ICSID Convention were relevant to this Tribunal’s jurisdiction.⁴⁵⁸ PEL further explained that the two authorities Respondent quoted purportedly in support of its contention were off point:

324 The passage of *Phoenix Action* relied upon by Respondent neither referred to the definition of investment, nor to the fact that ICSID cases concerning the definition of investment constitute a general principle of law.⁴⁵⁹

325 The passage of *Joy Mining* relied upon by Respondent did not state that investment treaty tribunals in general must consider the notion of investment under the developing jurisprudence. Rather, it was an analysis of the term “investment” under the relevant treaty,⁴⁶⁰ and then under Article 25 of the ICSID Convention.⁴⁶¹

326 In its Reply on Jurisdiction, Respondent repeats its argument by reference to the exact same decisions without any elaboration as to how they support its contention that ICSID decisions defining the concept of investment under the

⁴⁵⁶ Reply on Jurisdiction, paras. 661-762.

⁴⁵⁷ *Id.* at paras. 841-843, 855-859.

⁴⁵⁸ Reply, paras. 594-596.

⁴⁵⁹ **RLA-33**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 77 (“Also, international agreements like the ICSID Convention and the BIT have to be analysed with due regard to the requirements of the general principles of law, such as the principle of non-retroactivity or the principle of good faith, also referred to by the Vienna Convention. This has been stated for the WTO law stemming from the Marrakech Agreements of 1994: “States in their treaty relations, can contract out of one, more or in theory, all rules of general international law (other than those of jus cogens), but they cannot contract out of the system of international law. As soon as States contract with one another, they do so automatically and necessarily within the system of international law.” This has been stated also with force by the Appellate Body of the WTO Dispute Settlement Mechanism in its first rendered decision, where it stated: “The General Agreement is not to be read in clinical isolation from public international law”.)

⁴⁶⁰ **RLA-53**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004), paras. 45-47.

⁴⁶¹ *Id.* at paras. 48-ff.

ICSID Convention are relevant in the case at hand.⁴⁶² These decisions continue to be inapposite.

327 Respondent’s only elaboration on its previous argument is to assert that “*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*”.⁴⁶³ Respondent’s only attempted justification for this assertion is that PEL relies on ICSID cases in its submissions on jurisdiction *ratione personae*, specifically *Koch Minerals* — which Respondent wrongly states PEL refers to in respect of the holistic approach to interpreting the meaning of investment.⁴⁶⁴

328 This is a non-sequitur. The fact that PEL relies on ICSID cases to assist with the interpretation of the Treaty does not mean that the definition of “*investment*” under the ICSID Convention is relevant to the jurisdiction of this Tribunal. To the extent Respondent’s argument that PEL’s alleged “*option*” does not qualify as an investment is founded on ICSID cases (all but one case quoted by Respondent are ICSID cases), it should accordingly be rejected outright.

ii. Respondent continues to mischaracterise the MOI as an “*option*” or “*contingent*” and is mostly silent on the other components of PEL’s investment

329 **First**, in the Reply, PEL explained that Respondent appeared to conflate the MOI, which is a binding and enforceable contract, with its operation, which included 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).⁴⁶⁵

330 Respondent nonetheless continues to make the same confusion. It argues that the MOI provided “*PEL with a right in the nature of an option (that is a rights of preference/direito de preferencia or, assuming arguendo, a contingent right of first refusal)*”.⁴⁶⁶ This is justified by the fact that these rights were “*entirely*

⁴⁶² Reply on Jurisdiction, para. 665-666.

⁴⁶³ *Id.* at fn. 44.

⁴⁶⁴ PEL relies upon **CLA-86**, *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017 as well as the UNCITRAL case **CLA-87**, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, 8 September 2006, in support of its proposition that a broadly worded chapeau such as the one in the Treaty referring to “*every kind of asset*” embraces everything of economic value, virtually without limitation. (Reply, para. 513(b)).

⁴⁶⁵ Reply, para. 599.

⁴⁶⁶ Reply on Jurisdiction, paras. 661 and 668.

dependent on the fulfilment on the conditions specified in the MOI”.⁴⁶⁷ What Respondent suggests is that a contract which includes conditions precedents to certain rights cannot generate an investment. This novel proposition is neither supported by the Treaty, nor by any authority quoted by Respondent (as to which *see* section iii immediately below), which is dispositive of the issue.

331 Apparently aware of the weakness of its argument, Respondent creates further confusion by suggesting that the MOI is an “*option*” or a “*contingent*” document by reference to:

- (a) Its own interpretation of the MOI as merely granting PEL a 15% scoring preference.⁴⁶⁸
- (b) In the alternative, PEL’s interpretation of its right of first refusal as allowing PEL to decide whether or not to implement the Project, which turns the entire MOI into an option,⁴⁶⁹ and leads Respondent to the extraordinary conclusion that “*PEL calls the MOI an ‘option’ on multiple occasions.*”⁴⁷⁰
- (c) As a further alternative, the fact that even on PEL’s case, the concession would yet to have been negotiated.⁴⁷¹
- (d) As yet another alternative, the alleged non-binding nature of the MOI itself, which is said to have been “*an agreement to agree*”, as it could not have granted a concession to PEL.⁴⁷²

332 None of the above four points establishes that the MOI was an option or a contingent document, as Respondent contends. Its arguments conflate the legal right to a concession, which was one of PEL’s right under the MOI (subject to two conditions precedent), and the granting of the concession itself:

- (a) The alleged 15% scoring preference that Respondent says was granted to PEL under the MOI (*quod non*), does not render the MOI optional or contingent.

⁴⁶⁷ Reply on Jurisdiction, paras. 661, 668, 679, 681, 690-691.

⁴⁶⁸ *Id.* at paras. 681-682, 698.

⁴⁶⁹ *Id.* at paras. 688, 680, 692, 693.

⁴⁷⁰ *Id.* at para. 688.

⁴⁷¹ *Id.* at paras. 696, 697.

⁴⁷² *Id.* at paras. 680, 684.

- (b) Nor does the fact that PEL had a right of first refusal giving it the option to decide whether or not to implement the Project transform the MOI into an option. The exercise of PEL's right of first refusal was a condition precedent to its right to the direct award of a concession agreement.
- (c) As for the fact that the MOI was not a concession agreement, which is common ground, this does not make the MOI an option or a contingent document. The fact that the MOI was not the final legal instrument in the process of granting a concession for the Project does not turn PEL's corresponding rights as to its participation in the Project optional or contingent on subsequent events. Subject only to the two conditions precedents (*i.e.*, Mozambique's approval of the PFS — which reflected its will to proceed with the Project — and PEL's decision to implement the Project through the exercise of its right of refusal), Mozambique was bound to realise its obligation to proceed with the direct award process with PEL (which implies also not putting the concession out to a public tender).
- (d) Respondent's incorrect argument as to the alleged non-binding nature of the MOI — which is addressed further in the fact section at paragraphs 83-91 above, also does not make the MOI an option or a contingent document. It is yet another iteration of Respondent's confusion of the MOI, which is a binding agreement, with the concession agreement itself.

333 **Second**, Respondent remains mostly silent in respect of the other components of PEL's investment. It merely describes PEL's PFS and the know-how PEL transferred to Mozambique as pre-investment activities and expenditures in connection with the MOI.⁴⁷³ However, it does not explain the reason why the PFS and the transfer of know-how are pre-investment activities rather than investments. Nor does it say anything about PEL's right to exclusivity and confidentiality under MOI, no doubt because it cannot describe such rights as "*contingent*" or "*optional*". It follows that contrary to Mozambique's argument, PEL's investment is neither contingent, nor optional (whatever Respondent contends it to mean).

⁴⁷³ Reply on Jurisdiction, para. 723.

- iii. In any event, the cases referred to by Mozambique are distinguishable
- 334 It is common ground that there is a line of ICSID cases finding that pre-investment activities and expenditures do not constitute covered investments. In this respect, the sentence in the academic paper Respondent refers to,⁴⁷⁴ which is not exhibited properly, refers to two ICSID cases, namely *Mihaly v. Sri Lanka* and *PSEG v. Turkey*.⁴⁷⁵ As explained in the Reply, these two cases, as well as the other cases quoted by Respondent, are easily distinguishable. The pivotal concern in those cases was whether the agreement relied upon by the investor was binding:
- (a) In *Mihaly*, the tribunal found that the claimant’s investments did not qualify for protection under the ICSID Convention because the three agreements between the claimant and the government presented by the claimant as investments did not contain any binding obligation.⁴⁷⁶ The pivotal consideration in the tribunal’s conclusion was that the three agreements all explicitly stated that they did not constitute a binding obligation on any party. Later decisions, including *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*, confirmed that lack of explicit intent to create any binding obligation upon the parties was decisive in *Mihaly*.⁴⁷⁷
 - (b) The tribunal in *PSEG v. Turkey* found that a concession contract comprised a qualifying investment. It explicitly distinguished *Mihaly* and *Zhinvali* on the basis that, contrary to these cases, a contract had been entered into and become effective.⁴⁷⁸
 - (c) The *Zhinvali v. Georgia* tribunal reached the same conclusion as the tribunal in *Mihaly* because it found no express or constructive consent to the treatment of the claimant’s development costs as an “investment.”⁴⁷⁹
 - (d) The other cases of some relevance quoted by Respondent relate to non-binding contracts. In *FW-Oil*, the pivotal point was that the relevant

⁴⁷⁴ Reply on Jurisdiction, para. 669; **RLA-130**, Barton Legum, Investment Treaty Arbitration Review (Law Business Research Ltd. 2020).

⁴⁷⁵ **RLA-130**, has the wrong page of the relevant review re-exhibited as **CLA-311**, The Investment Treaty Arbitration Review: Covered Investment, Can Yeğinsu, dated 18 June 2021, fn. 48.

⁴⁷⁶ Reply, paras. 601-603.

⁴⁷⁷ *Id.* at para. 604.

⁴⁷⁸ *Id.* at para. 606.

⁴⁷⁹ *Id.* at para. 605.

agreements were all drafted “subject to contract”. Likewise, in *Generation Ukraine*, the tribunal found that the Protocol of Intentions was not an investment, in that it did not purport to generate legally enforceable rights and obligations. As for *Genin*, it was completely inapposite, in that the investment consisting of a licence agreement, in respect of which Respondent’s objection was found not to withstand scrutiny.⁴⁸⁰

335 By contrast, and as further explained in the Reply, in the present case, the MOI is a binding agreement. This is supported by the content of the MOI itself, Respondent’s own acknowledgment that the MOI required PEL to complete the PFS, and the circumstances in which the MOI was entered into (*i.e.*, the official signing ceremony).⁴⁸¹ It is also supported by Mozambican law whereby (i) the MTC had the power to grant PEL a right to a direct award to a concession; (ii) the MOI was not an agreement to agree; and (iii) Respondent’s argument that the MOI misses the material terms of the concession conflates the right to a concession with the concession itself.⁴⁸²

336 In its Reply on Jurisdiction, Respondent appears to have understood that it will not succeed in demonstrating that the MOI did not contain any binding obligations such that it fell within the scope of pre-investment activities as in the cases discussed at paragraph 334 above. However, Respondent has not abandoned the argument. Instead, it relies on a two-prong strategy as an attempt to change the narrative.

337 First, Respondent ignores the pivotal concern in *Mihaly*,⁴⁸³ *PSEG Global*,⁴⁸⁴ and *Zhinvali* (*i.e.*, whether the agreements relied on by the investors were binding agreements).⁴⁸⁵ Instead, it reasserts their relevance essentially by insisting that the MOI was not a concession agreement and accordingly the expenses engaged under the MOI were pre-investment activities that PEL agreed to cover.

338 This argument misses the point. The relevant consideration is that the MOI was not a pre-investment activity *because* it was a binding contract granting PEL rights, including a legal right to the direct award of a concession in respect

⁴⁸⁰ Reply, para. 607 and fn. 738.

⁴⁸¹ *Id.* at paras. 175-177.

⁴⁸² Reply, paras. 178-182 and **CER-6**, Second Legal Opinion of Professor Rui Medeiros, Section 3

⁴⁸³ Reply on Jurisdiction, paras. 724-733; 740-742.

⁴⁸⁴ *Id.* at paras. 710-719.

⁴⁸⁵ *Id.* at paras. 737-738, 758-760.

of the Project (subject to two conditions precedents which were fulfilled), exclusivity, and confidentiality rights. PEL only agreed to cover the costs of the PFS in exchange for such rights and assurances. That no concession was ultimately signed (by reason of Mozambique's own wrongful conduct) is irrelevant. The MOI bound Mozambique into a partnership with PEL, should it wish to proceed with the Project based on the PFS (which, as its approval of the PFS demonstrates, was Mozambique's decision). The ultimate necessity of a concession agreement and other ancillary instruments or measures for projects of this nature do not detract from that binding obligation of Mozambique under the MOI. In any event, PEL does not (and, due to Mozambique's wrongful conduct, cannot) rely on the concession agreement itself as its investment. Instead, PEL relies on being bestowed with acquired rights to realise its investments in the Project, including by the direct grant of the concession by Mozambique.

339 Elsewhere in its submissions, Respondent gives examples of cases where tribunals found that an investment existed where a project was built (*Salini*), a concession was granted (*Beijing Urban Construction Group*) or a construction contract existed (*Toto Construzioni*) and purports to distinguish the present case from these cases on the basis that no concession agreement was signed in the present case.⁴⁸⁶

340 This is an example of fallacious logic. Mozambique is essentially attempting to argue that PEL's investment is not a qualifying investment because the facts in this case are different from the facts that gave rise to a finding that there was an investment in other cases, or that in the cases cited by Mozambique, the tribunals reached an affirmative conclusion on the existence of an investment based on different facts. This argument lacks credibility.

341 Finally, the only non-ICSID case Mozambique cites to is *Nagel v. Czech Republic*.⁴⁸⁷ Mozambique correctly states that in *Nagel* the tribunal found that a cooperation agreement between the claimant and a Czech state-owned enterprise (the "SRa") did not constitute an investment even though the contract was binding under Czech law.⁴⁸⁸ However, the Tribunal's finding was based on the fact that the Czech Republic was not party to the relevant

⁴⁸⁶ Reply on Jurisdiction, paras. 855-857.

⁴⁸⁷ *Id.* at paras. 761-762.

⁴⁸⁸ **RLA-77**, *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, paras. 303-320.

agreement⁴⁸⁹ and more importantly, that the government had made no undertaking that Mr Nagel would be granted a licence. The tribunal found the investor could “do no more than hope that his cooperation with State-owned Czech company SRa would increase his chances to become involved in the operation of GSM in the Czech Republic”.⁴⁹⁰ The tribunal concluded that the cooperation agreement was not an asset for the purposes of the relevant treaty because it could not even at the very least create a legitimate expectation of performance in the future.⁴⁹¹ Of further relevance was the fact that the SRa could not make an undertaking that it would not accept a decision by the government to award the licence to another company,⁴⁹² and that the agreement did not oblige the parties to make any financial contributions.⁴⁹³

342 In the present case, the MTC entered into the MOI on behalf of the government of Mozambique, which had the obligation to grant PEL a direct award of a concession if the two conditions precedent were complied with. This undoubtedly created a legitimate expectation of performance in the future, which is the threshold described in *Nagel*. Further, the MTC had discretion to make such an undertaking on behalf of the government. What is more, the MOI required PEL to make financial contributions in the form of the preparation of the PFS.

343 Second, Respondent now relies on *Joy Mining v. Egypt*,⁴⁹⁴ *PSEG Global*,⁴⁹⁵ and *Mihaly*⁴⁹⁶ to argue that these cases established that an “option” is not an investment. However, neither *Joy Mining v. Egypt* nor *PSEG Global*⁴⁹⁷ establishes such a general principle, and in any event, both cases are distinguishable. *Mihaly*⁴⁹⁸ does not discuss the point at all. As explained above at paragraph 239, in *Joy Mining*, the tribunal considered whether a bank guarantee was an investment under the relevant treaty or an ordinary feature of a sales contract.⁴⁹⁹ Under the relevant treaty, it concluded that a bank guarantee was the latter, specifically because it was a contingent *liability*, in the sense that it could only potentially affect the day-to-day operations of *Joy*

⁴⁸⁹ **RLA-77**, *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, paras. 303-320, at paras. 321-324.

⁴⁹⁰ *Id.* at para. 326.

⁴⁹¹ *Id.* at paras. 301 and 326.

⁴⁹² *Id.* at para. 327.

⁴⁹³ *Id.* at para. 328.

⁴⁹⁴ Reply on Jurisdiction, paras. 670-676.

⁴⁹⁵ *Id.* at para. 677.

⁴⁹⁶ *Id.* at para. 841.

⁴⁹⁷ *Id.* at paras. 670-677.

⁴⁹⁸ *Id.* at para. 706.

⁴⁹⁹ **RLA-53**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para. 44.

Mining,⁵⁰⁰ as Egypt had merely failed to return such guarantee.⁵⁰¹ In its analysis of the notion of investment under the ICSID Convention, the tribunal also mentioned that the Egyptian Government had not affected the drawdown of the bank guarantee.⁵⁰² The tribunal did not establish any general rule to the effect that “options” or “contingent rights” are not investments.

344 In the case at hand, the MOI is not an ordinary feature of a sale contract. Nor is the MOI an “option” or a “contingent document”. Unlike in *Joy Mining* where Egypt had merely failed to return a bank guarantee but not effected the drawdown on it, both PEL and Mozambique had taken steps to abide by the MOI. What is more, PEL had enforceable rights under the MOI, including the right to exclusivity and confidentiality as well as a right to a direct award of a concession, subject to two conditions which were fulfilled.

345 As for the *PSEG Global* tribunal, it found that it lacked jurisdiction over the claims of the North American Coal Corporation (“NACC”), one of the claimants, because NACC participated in the mining project as an auxiliary to PSEG but was not a signatory to any contract with the Turkish government⁵⁰³ and PSEG was the only company that could be considered linked to such government.⁵⁰⁴ The tribunal further considered that the Memorandum of Understanding signed between NACC and PSEG, conferring NACC the option to acquire ownership interest in the project company by means of a shareholders agreement to be negotiated later was not an investment.⁵⁰⁵ It held that “options such as this particular one can not, in the view of the Tribunal, be interpreted as an “investment”” while acknowledging that “different circumstances from those which obtain in the present case may lead to a different conclusion.”⁵⁰⁶ Contrary to NACC, PEL entered into a binding contract with the government. There was no doubt that PEL was linked to Mozambique. There was no option to secure participation in a project with another project company. *PSEG Global* is therefore distinguishable.

346 As discussed above, *Mihaly* dealt with three agreements between the claimant and the government presented by the claimant as investments, which did not

⁵⁰⁰ **RLA-53**, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para. 44.

⁵⁰¹ *Id.*

⁵⁰² *Id.* at para. 61.

⁵⁰³ **RLA-55**, *PSEG Global Inc., The North Am. Coal Corp. & Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, para. 188.

⁵⁰⁴ *Id.* at para. 191.

⁵⁰⁵ *Id.* at paras. 188-189.

⁵⁰⁶ *Id.* at para. 189.

contain any binding obligation. It did not deal with any “option” or “contingent right”.

347 It follows that Respondent has failed to prove the relevance of the cases it relies upon to the case at hand. Further and in any event, to the extent the Tribunal considers that Mozambique has established the relevance of the cited cases (*quad non*), the allegation that PEL’s investment does not qualify under such cases because PEL’s investment is an “option” is wrong as a matter of fact and law.

6. A treaty dispute has arisen in relation to PEL’s investment

348 Mozambique continues to deny the incontrovertible proposition that a treaty dispute has arisen in relation to PEL’s investment.

349 In the Reply, PEL demonstrated that whether Mozambique exercised its sovereign power was not a threshold question for the definition of the dispute for the purposes of this Tribunal’s jurisdiction *ratione materiae*. Rather, tribunals 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.⁵⁰⁷ This was supported by the very decisions relied on by Mozambique, including *Abaclat and Others. v. Argentine Republic*, of which PEL quoted the following passage:

*“In this context, it is to be recalled that according to generally accepted practice, the task of the Tribunal at the stage of determining whether it has jurisdiction to hear a claim under an investment treaty merely consists in determining whether the facts alleged by the claimant(s), if established, are capable of constituting a breach of the provisions of the BIT which have been invoked. In performing this task, the Tribunal applies a prima facie standard, both to the determination of the meaning and scope of the relevant BIT provisions invoked as well as to the assessment of whether the facts alleged may constitute breaches of these provisions on its face. In the words of the tribunal in Saipem v. Bangladesh: — If the result is affirmative, jurisdiction [ratione materiae] will be established, but the existence of breaches will remain to be litigated on the merits.”*⁵⁰⁸

350 PEL also showed that the other passages of decisions quoted by Respondent in the SOD were inapposite (i) *Toto Construzioni* related to the tribunal’s specific

⁵⁰⁷ Reply, para. 615.

⁵⁰⁸ **RLA-64**, *Abaclat and Others. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 303. See also **RLA-65**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 537-540.

jurisdiction to deal with an allegation of delay in respect of expropriation; (ii) *Consortium RFCC v. Morocco, Generation Ukraine, Inc. v. Ukraine* and *Waste Management, Inc. v. The United Mexican States* dealt with the merits of those cases; and (iii) *Republic of Argentina v. Weltover, Inc* was a United States Supreme Court Decision.⁵⁰⁹

- 351 In the Reply on Jurisdiction, Respondent ignores PEL’s submissions. Instead, Mozambique quotes a passage of *Abaclat* which deals with the specific circumstances of that case, *i.e.*, whether the claimant’s claim under the security bounds were qualifying claims⁵¹⁰ (and the corresponding passage of *Ambiente Ufficio* which cross-refers to *Abaclat*).⁵¹¹
- 352 Respondent also makes the point, directly contradicted by *Abaclat* and *Ambiente Ufficio*, that because this case has advanced to the hearing stage, there is no longer a *prima facie* standard.⁵¹²
- 353 Respondent finally repeats its inapposite references to the exact same decisions as those quoted in the SOD, without addressing the Reply.⁵¹³ These remain inapposite for the very reasons set out in the Reply.
- 354 Respondent misunderstands the *prima facie* test. The assessment of whether there is a *prima facie* breach of the Treaty applies for the purposes of jurisdiction. It goes without saying that the determination of whether there was a breach on the merits is not on *prima facie* basis. As the *Convial v. Peru* tribunal noted, for the purposes of a jurisdictional analysis, it is sufficient to ascertain if the alleged acts are capable of constituting a breach of the invoked treaty and the matter of the exercise of sovereign powers is part of the merits analysis:

“el Tribunal, convencido de que en la determinación de su competencia debe hacer un análisis de las pretensiones sin decidir las en el fondo, no abordará en este momento la cuestión relativa a determinar si la terminación del Contrato por la parte pública contractual, elemento central de la disputa, constituye o no un acto de Estado de los llamados iure imperi, cuestión ampliamente debatida más adelante [..]. Basta en este momento determinar si los actos de la MPC, de imperio o no, cuestión que será resuelta después, así como los

⁵⁰⁹ Reply, para. 615, fn. 744.

⁵¹⁰ Reply on Jurisdiction, para. 765. See also **RLA-64**, *Abaclat and Others. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 316-326.

⁵¹¹ **RLA-65**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 541-549.

⁵¹² Reply on Jurisdiction, para. 766, fn. 55.

⁵¹³ *Id.* at paras. 767-773.

*demás hechos y supuestas violaciones del Tratado, tal como fueron presentados por las Demandantes, podrían constituir una violación del Tratado o no.”*⁵¹⁴

- 355 PEL showed in the Reply that in any event, its claims in this Arbitration were broader than a mere contract claim in that (i) the protagonists were broader than the mere counterparties to the MOI; (ii) the subject matter of the Arbitration was broader than a pure contractual claim; and (iii) even PEL’s claim under the Umbrella Clause (Article 3(4)) of the Mozambique-Netherlands BIT was not a pure contract claim, given the source of the obligation remained the Treaty and implicated sovereign conduct.⁵¹⁵
- 356 In the Reply on Jurisdiction, Respondent argues that the involvement of protagonists broader than the mere counterparties is no indication of the exercise of sovereign power and that any action by the MTC and the Council of Ministers were the same as a commercial counterpart.⁵¹⁶ This is no rebuttal. The involvement of state actors other than the contractual counterparty are in this case the archetypal indication of the exercise of a sovereign power. For instance, the CFM was involved at the request of the MTC, which could exercise its sovereign power to allow (or disallow) negotiations with the CFM.⁵¹⁷
- 357 What is more, it is the Council of Ministers, the highest executive decision-making body in Mozambique,⁵¹⁸ comprised of the President, Prime Minister, and all of Mozambique’s ministries including the Ministers of Foreign Affairs and Cooperation, Economy and Finance, Justice, National Defence, Industry and Commerce, Mineral Resources and Energy, and the MTC, among others,⁵¹⁹ which made the key decisions resulting in PEL’s deprivation of its rights under the MOI, which in turn constituted breaches of the BIT. These decisions were relayed to PEL by the MTC, which accordingly, did not act as a mere private contractual partner.

⁵¹⁴ **CLA-312**, *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013, para. 448. Unofficial English translation: “*the Tribunal, convinced that in the determination of its jurisdiction it must conduct an analysis of the allegations without deciding them on the merits, will not address at this moment the question relating to determining if the termination of the Contract by the public contracting body, the central element of the dispute, constitutes or not a so-called iure imperii act of the State, question amply debated below [...]. At this juncture it is sufficient to determine if the act of the [Callao Provincial Municipality], whether imperio or not, question which will be resolved later, as well as the other acts and allegations of the Treaty, as presented by the Claimants, could result in a violation of the Treaty or not.*”

⁵¹⁵ Reply, paras. 616-620.

⁵¹⁶ Reply on Jurisdiction, para. 774-781.

⁵¹⁷ Reply, para. 285.

⁵¹⁸ *Id.* at para. 354.

⁵¹⁹ **CLA-48a**, Constitution of the Republic of Mozambique, as amended by Law 1/2018, of 12 June 2018, Article 201.

358 The decisions themselves were not those of a mere contractual partner, as is clear from the justifications for such decisions as they appear in the documents contemporaneously issued by Mozambique. For example, the 18 April 2013 letter refers to the grant of the concession to PEL by direct award in the “*national strategic interest*”.⁵²⁰ It goes without saying that a private contractor does not have the discretion to make decision in the “*national strategic interest*”. In assessing ITD’s bid, Mozambique awarded ITD a higher score because of its proposal of an “*innovative special economic zone*.”⁵²¹ It is thus clear that, in renegeing on the MOI and deciding to put the Project out to a public tender and ultimately to award it to ITD, Mozambique regarded the Project as a strategic part of its public infrastructure development policy and exercised its sovereign powers accordingly. Mozambique’s impugned conduct was in blatant disregard not only of its obligations under the MOI, but, for present purposes, also in blatant disregard of its obligations under the Treaty.

359 It follows that there is a treaty dispute in relation to PEL’s investment.

C. The Tribunal Has Jurisdiction Ratione Temporis

360 PEL demonstrated in its previous submissions that this Tribunal has jurisdiction *ratione temporis*, in that its investment fell within the scope of investments protected by the “*sunset clause*” at Article 15(2) of the Treaty.⁵²²

361 In the SOD, Respondent put forward two of its most far-fetched objections, namely (i) that this Tribunal has no jurisdiction *ratione temporis* because there is no investment such that the sunset clause does not apply; and (ii) that PEL’s claim is barred by the “*doctrine of laches*”.⁵²³

362 As PEL showed in the Reply, Respondent’s first objection is, in fact, an objection to the Tribunal’s jurisdiction *ratione materiae*.⁵²⁴ Respondent nonetheless ignores PEL’s Reply and repeats its circular argument, which continues to fail for the very reasons set out in the Reply.⁵²⁵

363 As to Respondent’s second objection, which is an objection to the admissibility of PEL’s case and not to the Tribunal’s jurisdiction, PEL demonstrated that:

⁵²⁰ **Exhibit C-29**, Letter from Minister Zucula of MTC to PEL whereby the MTC invited PEL to begin to negotiations for a concession agreement for the Project, dated 18 April 2013.

⁵²¹ Reply on Jurisdiction, para. 313.2.

⁵²² SOC, paras. 280-283; Reply, para. 623-624.

⁵²³ SOD, Section IV(C) and paras. 611-622

⁵²⁴ Reply, paras. 623-633.

⁵²⁵ Reply on Jurisdiction, paras. 918-922.

- (a) It was founded on a reference to a 1997 article in the Virginia Law Review, advocating that the Anglo-American doctrine of laches should be applied by international tribunals while acknowledging that the international tribunals' authority to invoke such doctrine was "*hardly a settled issue.*"⁵²⁶
- (b) The only other authority referred to by Respondent was *Impregilo v. Argentina*⁵²⁷ which it had conflated with *Salini Impregilo v. Argentina*.⁵²⁸ The latter authority stood for the principle that in the absence of specific provision, a claim will not be held inadmissible on grounds of delay unless the respondent state has been clearly disadvantaged. The decisive factor was not the length of time elapsed but whether the respondent could have reasonably expected that the claim would no longer be pursued.⁵²⁹
- (c) As a matter of fact, Respondent had not demonstrated that it held any reasonable expectation that PEL would not pursue its case, such that Respondent's admissibility objection failed.⁵³⁰

364 In the Reply on Jurisdiction, Respondent has employed its repetition tactic to yet another level. Not only does it not address the Virginia Law Review article's express doubts as to the applicability of the doctrine of laches under international law, but it also does not correct its mistaken reference to *Impregilo v. Argentina* rather than *Salini Impregilo v. Argentina*.⁵³¹

⁵²⁶ **RLA-81**, A.R. Ibrahim, *The Doctrine of Laches in International Law*, 83 VA. L. Rev. 649, April 1997 (p. 2).

⁵²⁷ **RLA-82**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011.

⁵²⁸ **CLA-275**, *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018.

⁵²⁹ Reply, para. 626.

⁵³⁰ *Id.* at para. 627.

⁵³¹ Reply on Jurisdiction, para. 926 still referring to **RLA-82**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, paras. 88 and 89 which read: "88. *The Arbitral Tribunal finds it unlikely that this is what the parties to the BIT had in mind. For the Argentine Government, it must have been desirable to give its courts a first opportunity to resolve disputes with foreign investors. This benefit would of course not materialize if Article 8(3) were interpreted according to Alternative 1. 89. Moreover, the wording of Article 8(3) indicates that it contains a general condition for international arbitration, and there is no exception for the situation where there had been no domestic proceedings. If the intention had been to provide for such an exception, the wording would most probably have been different. An appropriate wording would then have been, for instance: If the dispute has not been submitted to the competent judicial or administrative courts in accordance with paragraph 2 above, or if the dispute, after having been submitted to these courts, has remained unresolved eighteen months after the commencement of proceedings before them, it may be submitted to international arbitration.*" The case on point is **CLA-275**, *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018, paras. 88-89, which read: "*The position has been summarised in the following terms: [A] case will not be held inadmissible on grounds of delay unless the respondent state has been clearly disadvantaged and tribunals have engaged in a flexible weighing of relevant circumstances, including, for example, the conduct of the respondent state and the importance of the right involved. The decisive factor is not the length of elapsed time in itself, but whether the respondent has suffered prejudice because it could reasonably have expected that the claim would no longer be pursued. 89. To conclude, extinctive prescription is recognised as a principle that can affect the right to bring proceedings under international law,¹⁴⁹ although it involves an issue of admissibility rather than jurisdiction. It is for the Tribunal to determine whether the passage of time in this case is such as to render Salini Impregilo's claim inadmissible, having regard to all the circumstances.*"

365 Respondent quotes a single new authority, *Confor & Tembec v. United States*, which it suggests recognised the existence of the doctrine of laches under international law. In fact, *Confor & Tembec* is authority to the contrary, as is clear from the very paragraph of the order quoted by Respondent, which is reproduced in full below:

*“Laches is an equitable defense asserted to bar the adjudication of stale claims. The doctrine is premised on the theory that a claim that is plagued with undue delay prejudices a defendant because evidence is no longer available to defend against the claim. Although Tembec defines laches as prohibiting a party’s “exercise of a right that has been delayed,” the authorities cited by Tembec all refer to the application of the principle in the context of claims, and refer to cases in which tribunals have applied the doctrine to claims. The Tribunal is not convinced that under international law this doctrine is appropriately invoked by a claimant to bar a procedural request for consolidation of claims. **The Tribunal notes that, in some legal systems, laches may bar requests for consolidation, as, for example, under New York law. However, the forms of equity known to Anglo-American common law do not form part of the corpus of public international law. While there is a borrowing of principles derived from domestic legal systems in public international law, this takes the form of general principles of law that do not necessarily replicate the rules of domestic law from which they derive their common origin.**”*⁵³² (Emphasis added)

366 The remainder of Respondent’s submissions on laches consists of its setting out its grievances about the document production process apparently in an attempt to shift the blame onto PEL for its own failure to produce documents that, by law, should be preserved in its national archives.⁵³³ This is not only wrong as a matter of fact, but also immaterial to the question of whether a claim is inadmissible on grounds of delay, for which Respondent must demonstrate that it could have reasonably expected that the claim would no longer be pursued. Respondent does not even attempt to do so. It follows that Mozambique has not rebutted PEL’s showing that this Tribunal has jurisdiction *ratione temporis*.

⁵³² RLA-80, *Confor & Tembec v. USA*, UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005, para. 165.
⁵³³ Reply on Jurisdiction, paras. 930-959.

D. *The Arbitration Clause in the MOI Does Not Affect the Jurisdiction of This Tribunal*

367 In its previous submissions, PEL demonstrated that the arbitration clause in the MOI did not affect the jurisdiction of this Tribunal by virtue of the well-established principle that an arbitration clause in a contract does not prevent an investor from commencing a treaty claim, as the causes of action are different.⁵³⁴ PEL further explained that Respondent was unable to establish a principle to the contrary and that Respondent's other arguments in relation to the ICC arbitration clause were not supported by any authorities, including those quoted by Respondent.⁵³⁵

368 In the Reply on Jurisdiction, Respondent nonetheless maintains all its objections which it repeats without even bothering to address the Reply. These objections are introduced by a slanted description of the interaction between this arbitration and the ICC proceedings, which distorts the procedural background and is apparently aimed at blaming PEL for the parallel proceedings, which Mozambique itself commenced.

369 The objections themselves are addressed in turn below. At the outset, however, PEL underscores that Respondent has chosen to put forward another 30-page section of weak objections, thereby forcing PEL to incur the costs in addressing them.

1. Respondent repeats its fallacious presentation of *Vivendi*

370 In its previous submissions, PEL showed that the well-established principle that an arbitration clause in a contract does not prevent an investor from commencing a treaty claim, as the causes of action are different, was first established by the *Ad Hoc* Committee in the seminal *Vivendi* decision and has since been widely adopted, including in very recent awards.⁵³⁶ PEL further demonstrated that Respondent's attempt to distinguish *Vivendi* on the basis that *Vivendi* dealt with an exclusive jurisdiction clause providing for the jurisdiction of local courts while the MOI contains an international arbitration clause was fallacious. Indeed, the reasoning in *Vivendi* was founded on the different causes of action under the contract and treaty, not on the nature of the dispute resolution mechanism contained in the underlying contract.⁵³⁷

⁵³⁴ SOC, 288-292; Reply, 630-633.

⁵³⁵ Reply, paras. 634-663.

⁵³⁶ Reply, para. 630; SOC, paras. 289-292.

⁵³⁷ Reply, para. 632.

Mozambique had not adduced a single authority establishing a principle to the contrary. What is more, Respondent's attempt at distinguishing *Vivendi* is further discredited by the fact that arbitral tribunals have applied the *Vivendi* principle where the exclusive jurisdiction clause in the underlying contract was an ICC arbitration clause.⁵³⁸

371 In the Reply on Jurisdiction, Respondent repeats its argument.⁵³⁹ Its only attempt at addressing the Reply is to comment that “*PEL calls Mozambique's analysis 'fallacious' and states Mozambique 'has not adduced a single authority to the contrary.'* *PEL needs to re-read Cambodia Power.*”⁵⁴⁰

372 This comment is incomprehensible. Mozambique has not even relied upon *Cambodia Power* in relation to the *Vivendi* principle. Mozambique has therefore not rebutted PEL's case that *Vivendi* applies to the present case, such that the arbitration clause in the MOI does not affect the jurisdiction of this Tribunal.

2. Respondent attempts covertly to circumvent Vivendi through two ill-conceived arguments

373 In a section of its Reply on Jurisdiction which does not discuss *Vivendi*, Respondent attempts to circumvent the case through the back door, by putting forward two ill-conceived arguments.

374 **First**, Respondent reproduces quasi-*verbatim* an argument it made in its application to stay this Arbitration.⁵⁴¹ It contends the ICC arbitration clause in the MOI deprives this Tribunal of jurisdiction because the “contractual law dispute” is fundamental to treaty jurisdiction, liability, and damages and, unlike this Tribunal's jurisdiction, the ICC tribunal jurisdiction is undisputed.⁵⁴²

375 PEL has already rebutted Respondent's case in the context of its reply to Respondent's stay application. It sets out below a summary of its response to Mozambique's argument for ease of reference.

376 In short, Mozambique's argument is based on a fundamental confusion between the undefined contractual dispute on which it contends that the ICC

⁵³⁸ See e.g. **CLA-313**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, para. 666.

⁵³⁹ Reply on Jurisdiction, paras. 1060-1066.

⁵⁴⁰ *Id.* at para. 1067.

⁵⁴¹ Mozambique's Stay Applications, paras. 52-57.

⁵⁴² Reply on Jurisdiction, paras. 987-1005.

tribunal has jurisdiction and the law applicable to such dispute.⁵⁴³ The fact that there may be some issues of municipal law, which are relevant to PEL's claims under the Treaty, does not mean that these issues can or must be determined by the ICC tribunal as opposed to this Tribunal. Respondent quotes no authority to the contrary.

377 Indeed, three of the authorities relied upon by Respondent relate to the law applicable by investment treaty tribunals as opposed to "contract disputes"⁵⁴⁴ as Respondent contends. The passage of *Emmis v. Hungary* quoted by Respondent⁵⁴⁵ relates to the existence of rights under domestic law for the purposes of assessing whether there was a protected right capable of expropriation under the relevant bilateral investment treaties.⁵⁴⁶ The passages of the Zachary Douglas treatise,⁵⁴⁷ and *F W Oil v. Trinidad and Tobago*⁵⁴⁸ are essentially to the same effect. The remainder of the authorities quoted by Respondent, *i.e.*, *Merill v. Canada*,⁵⁴⁹ *Feldman v. Mexico*,⁵⁵⁰ *Apotex*,⁵⁵¹ *Zhinvali v. Georgia*⁵⁵² are plainly irrelevant.

378 Respondent's factual argument suffers from the same conceptual flaw. It argues that the determination of whether PEL has any rights under the MOI and accordingly under the Treaty is part of the contractual dispute before the

⁵⁴³ Reply on Jurisdiction, at paras. 990-994.

⁵⁴⁴ *Id.* at para. 990.

⁵⁴⁵ *Id.*

⁵⁴⁶ **RLA-46**, *Emmis Int 7 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, para. 162.

⁵⁴⁷ Reply on Jurisdiction, para. 991; **RLA-136**, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, paras. 101, 102 and 110.

⁵⁴⁸ Reply on Jurisdiction, para. 994; **RLA-74**, *F-W Oil Interests Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006, para. 152.

⁵⁴⁹ Reply on Jurisdiction, paras. 992 and 999; **RLA-92**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID), Award, 31 March 2010, para. 142. The passage of *Merill v Canada* quoted by Respondent does not even refer to domestic law to determine whether Merill's investment is an investment as defined under the NAFTA treaty. The tribunal's comment about an investor not being able to recover damages for the expropriation of a right it never had, which Respondent quotes, is merely a reference to the fact that an investment must exist under NAFTA (paras. 139-142).

⁵⁵⁰ Reply on Jurisdiction, para. 993; **RLA-137**, *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paras. 117-134. The passage of referred to by Respondent is the analysis of whether Mexico's refusal of giving a tax rebate to Feldman constituted an expropriation of his right to export cigarettes. It does not even deal with the respective role of domestic and international law in this respect.

⁵⁵¹ Reply on Jurisdiction, para. 993; **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, paras. 207-218. The passage quoted by Mozambique sets out the findings of the tribunal regarding whether an Abbreviated New Drug Application ("**ANDA**") was "*property*" for the purposes of Article 1139(g) of NAFTA (para. 206). It essentially found that this was not the case because it was a mere application for revocable permission to export a product for sale as opposed to "*property*"; the relevant drugs were only tentatively approved by the Federal Drug Agency, such that it was not "*acquired property*" (paras. 209-215) and ANDA could not be compared to an application for export or import licence (paras. 216-218).

⁵⁵² Reply on Jurisdiction, para. 994; **RLA-56**, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, paras. 297-304. The passage quoted does not "*consider ... rules of interpretation under domestic law in determining whether alleged contract establishes a qualifying "investment" under Article 25(1)*", as Respondent contends. The tribunal in *Zhinvali* noted (i) that the questions of whether the necessary "consent" or the requisite qualifying investment under Article 25(1) were met in the case were a mixed question of Georgian national law and international law (paras. 296-301); and (ii) that it would apply the VCLT, which the tribunal had no reason to suspect was inconsistent Georgia's rules of interpretation for its own domestic law, as the rule of interpretation (paras. 302-308).

ICC tribunal, such that this Tribunal’s jurisdiction, as well as its findings on liability and quantum, are premised upon the findings of the ICC tribunal.⁵⁵³

379 Yet, this Tribunal has jurisdiction to determine whether PEL has made a qualifying investment under the Treaty, including as a matter of predicate fact under municipal law (to the extent relevant) without awaiting the determination of the “*contractual law dispute*” by the ICC tribunal. Respondent conflates the alleged jurisdiction of the ICC tribunal *ratione materiae* over the alleged contractual dispute, which Respondent itself has brought before the ICC tribunal, with the law applicable before the ICC tribunal and before this Tribunal. As for the questions of liability and quantum, they are plainly irrelevant to the Tribunal’s jurisdiction.

380 Likewise, Respondent’s reliance upon its own challenge to this Tribunal’s jurisdiction as a reason for it not to uphold its own jurisdiction, is a circular argument.

381 **Second**, Respondent contends that *SGS v. Phillipines* supports the principle that the ICC clause is more specific than the dispute resolution mechanism in the Treaty, such that this Tribunal lacks jurisdiction.⁵⁵⁴ Respondent’s novel interpretation of *SGS v. Phillipines* finds no support in the case. *SGS v. Phillipines*, which as explained by PEL in the Reply, has been heavily criticised,⁵⁵⁵ dealt with the question of the tribunal’s jurisdiction to determine an *umbrella clause claim* where the underlying contract contained a forum selection clause. The tribunal found that it had jurisdiction to determine such claim but stayed the arbitration pending the resolution of the contract claim in accordance with the forum selection clause.

382 Plainly, this has no relevance to a general argument that Respondent is seeking to make about some general, overarching priority of the ICC clause over the dispute resolution mechanism in the Treaty.

3. Respondent repeats its hopeless objection regarding the scope of the arbitration clause contained in the MOI

383 In the Reply, Claimant fully rebutted Mozambique’s three key arguments in support of its objection that this Tribunal lacks jurisdiction because the scope of the arbitration clause in Article 10 of the MOI is sufficiently broad to include

⁵⁵³ Reply on Jurisdiction, paras. 996-1002.

⁵⁵⁴ *Id.* at paras. 1007-1022.

⁵⁵⁵ Reply, paras. 959-965.

PEL's treaty claims. The Reply on Jurisdiction gives an impression of *déjà vu* with Respondent having essentially rehashed or repackaged its old arguments without addressing PEL's Reply.

384 **First**, Respondent repackages its first argument, contending that the MOI's arbitration clause is a broad clause akin to the standard ICC arbitration clause, which is sufficiently broad to cover treaty claims.⁵⁵⁶ Respondent does not explain by virtue of what principle its allegation that the arbitration clause in the MOI is sufficiently broad to cover treaty claims has any impact on the jurisdiction of this Tribunal. This is fatal to Respondent's argument.

385 In any event, Respondent's argument fails on the face of Clause 10. The clause only covers disputes "*arising out of this memorandum*", that is to say the MOI.⁵⁵⁷ What is more, Clause 10 of the MOI explicitly provides that "*...the arbitration will be governed by Mozambique law and the rules of the International Chamber of Commerce shall be followed ...*"⁵⁵⁸ Respondent does not explain how the Mozambican governing law clause is compatible with its argument that Clause 10 encompasses PEL's treaty claims.

386 As for the ICC standard clause referred to by Respondent, it is intended as guidance for parties wishing to refer their contractual disputes (as opposed to treaty claims) to ICC arbitration.⁵⁵⁹ This is clear on the face of the clause itself, which refers to "*all disputes arising out of or in connection with the present contract...*" and the guidance immediately above the standard clause which provides "*it is recommended that parties wishing to make reference to ICC Arbitration in their contracts use the standard clause below.*"⁵⁶⁰ In this context, Respondent's suggestion that the ICC adding provisions relating to investment treaty to the ICC arbitration rules while not amending the standard clause, demonstrates that the standard clause covers investment treaty claims,⁵⁶¹ does not withstand elementary scrutiny.

387 **Second**, Respondent's objection founded on *Cambodia Power* suffers from the same fatal flaw as its first argument, namely that Respondent does not explain why and by virtue of what principle its allegation that the ICC tribunal has jurisdiction over PEL's treaty claim has any impact on the jurisdiction of this

⁵⁵⁶ Reply on Jurisdiction, paras. 1029-1044.

⁵⁵⁷ **Exhibit C-5A**, English Version of the MOI; **Exhibit C-5B**, Portuguese version of the MOI.

⁵⁵⁸ *Id.*

⁵⁵⁹ Reply on Jurisdiction, para. 1043

⁵⁶⁰ **Exhibit C-350**, Printout of Standard ICC Arbitration Clause.

⁵⁶¹ Reply on Jurisdiction, para. 1043.

Tribunal. In any event, Respondent fails to rebut Claimant's case that *Cambodia Power* is inapt, in that it refers to the applicability of customary international law – not a bilateral investment treaty – in a contractual claim governed by English law.⁵⁶² Other than repeating its old argument, which were previously addressed in the Reply, Respondent purports to deny there is a difference between customary international and the BIT.⁵⁶³

388 Yet, Respondent does not even attempt to prove that the BIT reflects extensive and virtually uniform State practice and accordingly forms part of customary international law. Instead, Mozambique relies upon four passages of *Cambodia Power*, which do not demonstrate that the BIT forms part of customary international law. Three of them relate to the respondents' objection to the admissibility of the claimant's customary international law claims because they were not properly articulated in the request for arbitration.⁵⁶⁴ The last passage states that customary international law comprises a body of norms that established a minimum standard of protection for foreign investment. Of course, the tribunal did not equate the minimum standard of protection with any investment treaty, let alone the BIT.⁵⁶⁵

389 Respondent also quotes *Mondev v. USA*. This too does not advance its case. It presents as a finding of the tribunal a passage of *Mondev* that is in reality a summary of *Mondev*'s submissions. The passage does not equate any investment treaty — let alone the BIT — with customary international law; it

⁵⁶² Reply, paras. 636-639.

⁵⁶³ Reply on Jurisdiction, paras. 1051-1055.

⁵⁶⁴ Reply on Jurisdiction, paras. 1051 and 1052, 1054 quoting **RLA-44**, *Cambodia Power Co. v. Kingdom of Cambodia, Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011, paras. 327-330, which refer to the claimant's objection as set out at para. 317. In these passages, the *Cambodia Power* tribunal held that by referring to principles of international investment law in the request for arbitration, the claimant had sufficiently articulated the fact that it wished to raise claims under customary international law. However, the tribunal made it clear that the claimant had yet to identify the specific rules of customary international law upon which it sought to rely: "*The Tribunal finds no basis for the Respondents' first objection to the Claimant's claim based on customary international law. In its Request, the Claimant sufficiently articulated that: "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". It is true that the Claimant's phrasing did not identify specific breaches on which it planned to base its claims. However, the Claimant made clear that it was seeking to raise claims under customary international law. At the stage of the Request for Arbitration, the Claimant is not required to set out its precise case by identifying the specific rules of customary international law upon which it sought to rely. This can be for a later stage when Parties exchange pleadings or memorials on the merits. Further, the 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. Therefore, the Tribunal finds that the Claimant sufficiently articulated in its Request that it was seeking to frame claims under customary international law.*" (Emphasis added)

⁵⁶⁵ Reply on Jurisdiction, para. 1053 referring to **RLA-44**, *Cambodia Power Co. v. Kingdom of Cambodia, Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011, paras. 334: "*Customary international law is inevitably relevant in the context of foreign investment (and ICSID arbitration), given that it comprises a body of norms that establish minimum standards of protection in this field. It is simply unrealistic to assume that the parties to a foreign investment contract such as those in question here would have intended to exclude such inherent protection by simply choosing an applicable national law.*"

merely states that customary law has been shaped *inter alia* by the conclusion of bilateral investment treaties.⁵⁶⁶ Respondent further refers to the ICJ Statute which enumerates sources of international law as including international conventions and treaties.⁵⁶⁷ It goes without saying that this does not establish every treaty, including the BIT, forms part of customary international law.

390 As a last-ditch attempt to save its argument Respondent contends that in any event, the arbitration in *Cambodia Power* which was similarly worded to the arbitration clause in the MOI was found to include “parties’ international law dispute”. Not only is this argument founded on a distortion of the rationale of *Cambodia Power*,⁵⁶⁸ it is also conceptually wrong in that it merges into one the different legal concepts of customary international law, international law, and the BIT.

391 **Third**, Respondent’s attempt to rescue its objection 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,⁵⁶⁹ falls flat. PEL demonstrated in the Reply that (i) the ICC was not Mozambique’s “*competent arbitral body*” for the purposes of Article 9(2) of the Treaty, in that Mozambique’s only recognised arbitral body is the Centre for Arbitration Conciliation and Mediation (the “**CACM**”); and (ii) Article 9 makes clear that the submission of a dispute for resolution before the host state’s “*competent judicial, arbitral or administrative bodies*” under Article 9(2) may only take place once the dispute has arisen and is subject to the agreement of both parties, which is not the case here.⁵⁷⁰

392 Respondent’s answer is to contend that Article 9(2) is ambiguous, and needs be interpreted in a broad manner in accordance with the “*internationally*

⁵⁶⁶ Reply on Jurisdiction, para. 1055. **RLA-149**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 102. The relevant passage, which comprises a summary of the claimant’s submissions, reads as follows: “...*The Claimant found “astounding” what it saw as the FTC’s view that a violation of a treaty may constitute treatment in accordance with international law. It submitted that the provisions of Article 1105 for “fair and equitable treatment and full protection and security” could not be read out of the Treaty by the FTC, and that those provisions governed the treatment that the Parties are obliged to extend to investors of another Party. Moreover, if those provisions were to be treated as affording investors no more than the minimum standard provided by customary international law, that law had to 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.*”

⁵⁶⁷ Reply on Jurisdiction, para. 1055.

⁵⁶⁸ The *Cambodia Power* tribunal found that it could hear a claim under customary international law in the context of a broad arbitration clause providing for English law as the applicable law. This was based on the tribunal’s findings that (i) customary international law may be applied independently of a choice of law clause; (ii) it forms part of the common law; (iii) one cannot find an intention to exclude customary international law from the mere choice of a domestic law as governing law; and (iv) the dispute resolution clauses were sufficiently broad to encompass customary international law claims. **RLA-44**, *Cambodia Power Co. v. Kingdom of Cambodia, Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011, paras. 332-337.

⁵⁶⁹ Reply on Jurisdiction, paras. 1068-1077.

⁵⁷⁰ Reply, paras. 640-645.

recognized strong policy in favor of arbitration”⁵⁷¹ such that the ICC “*also satisfies Article 9(2)*” because it has the same characteristics as the CACM.⁵⁷² Article 9(2) of the Treaty is not ambiguous: it designates Mozambique’s “*competent arbitral body*”. There is only one such body, namely the CACM. Furthermore, Article 9(2) of the Treaty must be interpreted in accordance with the VCLT, not a rule concocted by Respondent (*i.e.*, the “*internationally recognized strong policy in favor of arbitration*”)⁵⁷³ and no amorphous “*international policy in favour of arbitration*” exists.

393 As for the fact that the ICC and the CACM share some characteristics does not turn the ICC into Mozambique’s “*competent arbitral body*”.

394 Respondent’s argument that the arbitration agreement in the MOI is broad enough to encompass PEL’s treaty claims accordingly continues to fail.

4. Respondent revamped objection that PEL’s waived its rights to commence this arbitration is frivolous

395 In the Reply, PEL explained that for a waiver to be effective and estoppel to apply, the waiver in question must be clear and unambiguous, voluntary, unconditional, have been authorised, and the party relying upon it must have relied upon that agreement in good faith and to its disadvantage or to the advantage of the party making the statement. It noted that none of these conditions were satisfied in the present case and that Respondent had not even attempted to show that it met the test.⁵⁷⁴

396 In the Reply on Jurisdiction, Respondent contends that it meets the test because Clause 10 of the MOI is broad and its wording does not indicate any explicit exclusion of the Parties’ treaty dispute, which is also confirmed by the fact that “*there was negotiation of the MOI’s terms.*”⁵⁷⁵

397 This does not come close to meeting the standard which requires a clear and unambiguous, voluntary, unconditional statement. Clause 10 of the MOI does not refer to PEL’s treaty claims, nor to the BIT in general, let alone to any unambiguous intention by PEL to waive such claims. Respondent now further blends its request that this tribunal yield to the ICC Arbitration into the waiver

⁵⁷¹ Reply on Jurisdiction, para. 1073.

⁵⁷² *Id.* at paras. 1074-1076.

⁵⁷³ *Id.* at para. 1073.

⁵⁷⁴ Reply, paras. 646-650.

⁵⁷⁵ Reply on Jurisdiction, para. 1081.

section.⁵⁷⁶ This does not advance any of its arguments further. The cases quoted, which have been fully addressed at paragraphs 651 to 662 of the Reply, do not support Respondent's request. They also do not discuss waiver. It follows from the above that the arbitration clause in the MOI has no impact upon the jurisdiction of this Tribunal.

⁵⁷⁶ Reply on Jurisdiction, paras. 1083-1086.

V. **MOZAMBIQUE’S ALLEGATIONS AS TO THE INADMISSIBILITY OF PEL’S CLAIM REMAIN UNSUBSTANTIATED**

A. *Mozambique Has Moved Away from Its Allegation of Fraudulent Concealment While Nevertheless Maintaining Its Red Herring concerning PEL’s Temporary Debarment vis-à-vis the NHAI*

398 Mozambique has doubled down on its “*blacklisting*” red herring to hijack this case’s narrative. It continues to mischaracterise PEL’s temporary debarment by the NHAI, exaggerates its effects on PEL’s commercial activities, and concocts its *ex post facto* relevance and materiality to PEL’s claims to deprive PEL of its legitimate international investment law protection. Yet, it has tried to move the goalposts in one very material respect.

399 In its SOD, Mozambique originally framed its objection as one of fraudulent concealment:

*“PEL’s claims are rendered inadmissible (or, in the alternative, the Tribunal must decline jurisdiction) because PEL **fraudulently concealed** from the MTC and Mozambique that, contemporaneously with its dealings with the MTC and Mozambique, PEL had been blacklisted by the Indian Government in connection with a public infrastructure project, and had been adjudicated by the Indian Supreme Court to be ‘not commercially reliable and trustworthy.’”⁵⁷⁷ (Emphasis added)*

Mozambique’s reference to fraud in the SOD was no accident.

400 Likely in recognition of the forlorn battle it faces in providing clear proof of any unlawful conduct, let alone one that is fraudulent, Mozambique now seeks to reframe its evidentiary bar to a much lower standard in its Reply on Jurisdiction. It describes its latest objection as only that “*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*

⁵⁷⁷ SOD, para. 167, *see also* paras. 169, 208 and 235.

- *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.’*⁵⁷⁸ (Emphasis added)

401 In fact, Mozambique has come so far off its original SOD allegation of fraudulent concealment that its Reply on Jurisdiction states that “*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.*”⁵⁷⁹

402 This blithe hopping from one standard to another – from “*fraudulent concealment*” to “*failure to provide*” to “*intentional concealment*” to “*acting improperly*” – betrays Mozambique’s difficulty in articulating a cogent legal standard that both meets the high standard set by international law and fits the rather benign facts surrounding the temporary disbarment *vis-à-vis* the NHAI. Mozambique’s trouble in presenting its case is equally apparent when its legal authorities are examined: as demonstrated below, they are inapposite to its own (albeit varying) articulation of its allegations.

403 As submitted in its Reply and further elaborated below, Mozambique’s presentation of the facts concerning PEL’s temporary disbarment continues to be distorted and, in the absence of clear and convincing evidence, the actual conduct of PEL does not translate into violations of any of the legal standards pleaded by Mozambique. Ultimately, despite the more than 250 paragraphs of its Reply on Jurisdiction devoted to the temporary debarment, Mozambique fails to discharge its burden of proof and the Tribunal should dismiss its objection accordingly.

B. Mozambique’s Own International Legal Authorities Require It to Provide a Clear and Convincing Showing of a Serious Violation of Law

404 In paragraph 438 of the Reply on Jurisdiction, Mozambique discusses “*admissibility first, because if this Tribunal determines that PEL’s claims are inadmissible, it renders all other issues, like jurisdiction and the merits, moot.*”⁵⁸⁰ As Mozambique’s own legal authorities demonstrate, however, a tribunal cannot rule on the admissibility of a claim before considering the

⁵⁷⁸ Reply on Jurisdiction, para. 373.
⁵⁷⁹ *Id.* at para. 591. (Emphasis added)
⁵⁸⁰ *Id.* at para. 438.

jurisdictional issues. This is because the determination of the admissibility of a claim implies the exercise of a tribunal’s jurisdiction. By way of example, in *Achmea v. Slovak Republic II*, the tribunal stated 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.”⁵⁸¹ Indeed, this logical order is tacitly conceded by Mozambique, stating that “[w]hen 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.”⁵⁸²

405 Like jurisdiction, any admissibility analysis is guided by international law principles, including whether the investor violated the principle of good faith, acted fraudulently, or violated public policy.⁵⁸³ Despite Mozambique’s attempts to water down those standards beyond recognition, they are both clear and high. On a proper interpretation of the facts, and taking Mozambique’s allegation at its very highest, PEL failed to provide Mozambique with information that was publicly available, that Mozambique never deigned to seek or request, and upon which Mozambique has failed to show that it would have acted had it known. That cannot rise to the level of an international wrong for the purposes of an admissibility objection. This is clear, again, from the legal authorities relied upon by Mozambique.

406 To start with, Mozambique’s misleading reliance on *Inceysa v. El Salvador* that “*Inceysa acted improperly in order to be awarded the bid that made its investment possible*”⁵⁸⁴ does not assist Mozambique’s case, because that tribunal used the term “*acted improperly*” not “*in the absence of fraud*”,⁵⁸⁵ as Mozambique asserts, but in the context of its finding that the investor acted fraudulently: “*it is evident that its act had a fraudulent origin and, as provided by the legal maxim, »nobody can benefit from his own fraud.*”⁵⁸⁶

⁵⁸¹ **RLA-112**, *Achmea B.V. v. Slovak Republic II*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, para. 115, cited at para. 429 of the Reply on Jurisdiction.

⁵⁸² Reply on Jurisdiction, para. 430. (Emphasis added)

⁵⁸³ Reply on Jurisdiction, Section III.B. While in the cases discussed in this submission the tribunals considered the violation of international law principles in the context of jurisdiction, it cannot be said that once the analysis moves on to the admissibility of the claims the threshold is lowered.

⁵⁸⁴ Reply on Jurisdiction, paras. 567, 584 and 591.

⁵⁸⁵ *Id.* at para. 591.

⁵⁸⁶ **RLA-30**, *Inceysa Vallisoleantana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/24, Award, 2 August 2006, para. 242. (Emphasis added)

- 407 *Inceysa*, a case on which Mozambique relies heavily, involved systematic fraud in securing a contract with the Republic of El Salvador for the operation of vehicle inspection stations. Among others, “*during the proceedings it was proven that the Claimant had never carried out a vehicle inspection project as up until a few months before Inceysa participated in the Bid its main activity was selling women’s underwear and shoes.*”⁵⁸⁷ The tribunal found that “*Inceysa resorted to **fraud** to obtain a benefit that it would not have otherwise obtained.*”⁵⁸⁸
- 408 The tribunal in *Hamester v. Ghana*, a case also repeatedly relied upon by Mozambique, rejected the respondent’s illegality objection noting that “*there is insufficient basis for the Tribunal to conclude that there **was an overall scheme of deceit orchestrated by the Claimant in the initiation of its investment.***”⁵⁸⁹ Moreover, the *Hamester* tribunal noted that “[i]n any event, and more importantly, **even if the alleged scheme to inflate invoices was fully proven** – with details in respect of invoices for all deliveries of machinery or services –**the Tribunal would still not be prepared to analyse these practices as amounting to a fraud such as to deprive the Tribunal of its jurisdiction in the present case. [...] it was not established by the Respondent that Cocobod would not have entered into the JVA if it had known that Hamester was making a pre-profit on its contribution.**”⁵⁹⁰
- 409 The tribunal in *Plama v. Bulgaria*, yet another of Mozambique’s key authorities, concluded that “[t]he investment in Nova Plama was...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.**”⁵⁹¹
- 410 Finally, the majority tribunal in *Fraport v. Philippines*, again heavily cited by Mozambique, declined its jurisdiction *ratione personae* because “*Fraport*

⁵⁸⁷ **RLA-30**, *Inceysa Vallisoleantana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/24, Award, 2 August 2006, para. 117.

⁵⁸⁸ *Id.* at para. 255 (Emphasis added).

⁵⁸⁹ **RLA-29**, *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 136 (Emphasis added).

⁵⁹⁰ *Id.* at para. 137 (Emphasis added).

⁵⁹¹ **RLA-31**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 135 (Emphasis added).

*knowingly and intentionally circumvented the [Anti-Dummy Law] by means of secret shareholder agreements.”*⁵⁹²

- 411 Common to Mozambique’s authorities is that when an investor actively deceives the State about its identity, credentials, financials, or similar information, such as to induce the host State to allow an investment that it would not have otherwise allowed, the tribunal will not assert jurisdiction, or it will hold the claim inadmissible. These authorities show that the international law principles invoked by Mozambique can only be applied to serious intentional misconduct (whether that takes the shape of fraud, bad faith, or other wrongdoing). Inadvertent or minor acts or omissions by investors do not activate such international law principles.
- 412 For example, the tribunal in *Convia v. Peru* considered that an omission of information or the presentation of erroneous information by the investor in a public tender to acquire a concession, and the investor’s failure to comply with formalities, did not meet the illegality threshold:

*“El Tribunal no está convencido de que, aun asumiendo que los requisitos de la licitación pública no se hayan cumplido, dicho incumplimiento resulte en una violación de principios fundamentales del Estado Peruano, o en violaciones fundamentales de su régimen legal general y de inversiones. No hay evidencia en el proceso de que tales requisitos tengan una entidad tal que su incumplimiento pueda afectar la validez de la inversión para efectos jurisdiccionales de este Tribunal. Tampoco hay evidencia que los alegados requisitos de la licitación que no fueron cumplidos conduzcan o sean el producto de un fraude, lo cual llevaría sin duda a viciar internacionalmente la inversión para efectos de su protección (Inceysa c. El Salvador y Fraport c. Filipinas).”*⁵⁹³ (Emphasis added)

- 413 The reason for a consistently high bar for an illegality objection (whether in the context of jurisdiction or admissibility) is aptly described by Professor Cremades in his dissenting opinion in *Fraport v. Philippines* as follows: “*There is no question of impunity for the foreign investor. The foreign investor that commits a crime should go to jail or suffer the other penalties prescribed by*

⁵⁹² **RLA-32**, *Fraport AG Frankfurt Airports Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 401 (Emphasis added).

⁵⁹³ **CLA-312**, *Convia Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013, para. 410. Unofficial English translation: “*The Tribunal is not persuaded that, even assuming that the requirements of the public tender had not been met, the said violation results in a violation of the fundamental principles of the Peruvian State, or in fundamental violations of its general legal or investment regime. There is also no evidence that the alleged requirements of tender that had not been met lead to, or are the product of, a fraud, which would undoubtedly vitiate the investment internationally in terms of its protection.*”

law. However, it is equally mistaken to adopt an interpretation of a standard phrase in investment instruments in **a manner capable of leaving an investor without a remedy, and a Host State secure and immune in a gross violation of a Bilateral Investment Treaty.**⁵⁹⁴ Similarly, the *Kim v. Uzbekistan* tribunal, in setting out a principled approach for assessing the allegedly illegal conduct of the investor, found that the particularities of the investor’s alleged violation are key:

*“The Tribunal believes that the gravity of the law itself is a central part of the examination but not the sole focal point. It is not only the law, but the act of noncompliance (or in some wordings, the violation) that is key. The seriousness of the act is a combination of both the importance of the requirements in the law and the flagrancy of the investor’s noncompliance. The text or standing of the law – although central – does not in and of itself determine whether the legality requirement is triggered. Rather, the law must be considered in concert with the particulars of the investor’s violation. An investor may violate a law of some import egregiously or it may violate a law of fundamental importance in only a trivial or accidental way. Seriousness to the Host State is to be determined by the overall outcome, which will depend on the seriousness of the law viewed in concert with the seriousness of the violation.”*⁵⁹⁵
(Emphasis added)

414 In *Alvarez v. Panama*, the majority of the tribunal, endorsing the proportionality test set out in *Kim v. Uzbekistan*, noted that “[u]n principio general del Derecho exige que exista proporcionalidad entre la naturaleza de la infracción y la gravedad del castigo. La pérdida de la protección jurídica ius-internacional es un castigo severo, que además no permite modulación. Una sanción de este tipo sólo debe imponerse si la infracción cometida por el inversor extranjero es trascendente.”⁵⁹⁶ The majority tribunal then noted that the relevance of the infringed norm and the intention of the investor are the most appropriate criteria to establish the gravity of the alleged misconduct.⁵⁹⁷ In relation to the intention of the investor alleged to have engaged in illegal conduct, the majority tribunal listed the following assessment factors: “*la voluntad dolosa de transgredir la norma; la ignorancia*

⁵⁹⁴ **RLA-32**, *Fraport AG Frankfurt Airports Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, Dissenting Opinion of Mr Bernardo M. Cremades, para. 39 (Emphasis added).

⁵⁹⁵ **CLA-314**, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 398.

⁵⁹⁶ **CLA-315**, *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Final Award, 12 October 2018, para. 151 (Emphasis added). Unofficial English translation: “**there is a general principle of law which requires that there be proportionality between the nature of the offense and the severity of the punishment. The loss of international juridical protection is a severe punishment, which also does not allow modulation. Such a sanction should only be imposed if the offense committed by the foreign investor is significant.**”

⁵⁹⁷ *Id.* at para. 154.

buscada o negligente sobre el marco jurídico aplicable; la consciencia o inconsciencia de estar actuando antijurídicamente; la procedencia o improcedencia de otros eximentes o atenuantes”⁵⁹⁸

415 When considering serious illegality allegations, investment tribunals have equally applied a high standard of proof borne by the moving party, here Mozambique. For example, the *ConocoPhillips v. Venezuela* tribunal noted that “[i]t will [consider the respondent’s argument concerning the claimant’s abuse of corporate form] bearing in mind how rarely courts and tribunals have held that a good faith or other related standard is breached.”⁵⁹⁹

416 The tribunal in *Churchill Mining v. Indonesia*, considering forgery or fraud allegations in an admissibility context, noted that persuasive evidence is required to substantiate implausible factual allegations:

*“[in relation to allegations of forgery or fraud] the Tribunal considers that the Respondent carries the burden of proving forgery and fraud, which proof will be measured on a standard of balance of probabilities or intime conviction taking into account that **more persuasive evidence is required for implausible facts**, it being specified that intent or motive need not be shown for a finding of forgery or fraud but may form part of the relevant circumstantial evidence. The Tribunal will assess all the available evidence on record and weigh it in the context of all relevant circumstances.”*⁶⁰⁰ (Emphasis added).

417 Further, as noted in *Hamester*, “[t]he tribunal can only decide on **substantiated facts, and cannot base itself on inferences.**”⁶⁰¹

418 Finally, in *Inceysa*, the tribunal made its illegality findings based on “**clear and obvious evidence.**”⁶⁰²

419 Mozambique’s reference to Article 3.2.5 of the UNIDROIT Principles of International Commercial Contracts (2010)⁶⁰³ does not support its case as the referenced provision sets the bar high and Mozambique’s case does not meet

⁵⁹⁸ **CLA-315**, *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Final Award, 12 October 2018, para. 154: “the fraudulent intention to transgress the norm; the wilful or negligent ignorance about the applicable legal framework; the knowledge or unawareness of acting unlawfully; the relevance or irrelevance of other extenuating or aggravating circumstances.” (free translation)

⁵⁹⁹ **CLA-316**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, para. 275.

⁶⁰⁰ **CLA-317**, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, para. 244.

⁶⁰¹ **RLA-29**, *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 134 (Emphasis added).

⁶⁰² **RLA-30**, *Inceysa Vallisolelntana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/24, Award, 2 August 2006, para. 244 (Emphasis added).

⁶⁰³ Reply on Jurisdiction, para. 495.

that high threshold. According to the Commentary, “[w]hat entitles the defrauded party to avoid the contract is the ‘fraudulent’ representation or non-disclosure of relevant facts. Such conduct is fraudulent if it is intended to lead the other party into error and thereby to gain an advantage to the detriment of the other party.”⁶⁰⁴

420 As is clear from the facts before this Tribunal, Mozambique has failed to meet the high burden of proof established by international law to make good on its allegations of illegality. Accordingly, such illegality objections should be dismissed in their entirety.

C. *Mozambique Continues to Mischaracterise the Temporary Debarment and Grossly Overstate its Consequences*

421 As PEL explained at length in Section VI.A-B of the Reply, an objective account of the events surrounding PEL’s temporary debarment from NHAI projects belies Mozambique’s demonstrably false and/or intentionally misleading allegations. Unfortunately, Mozambique continues to raise those same allegations in its latest filing.

422 It is true, as Mr Banerji points out in paragraph 17 of his Second Opinion,⁶⁰⁵ that in advancing its challenge of NHAI’s temporary debarment decision before the Indian Supreme Court, PEL indicated its concern that “*the stigma would remain and have a very adverse effect on the business prospects of the petitioner.*” But this sentence must be considered for what it is: PEL’s Indian counsel’s advocacy made in the context of its endeavours to persuade the competent Indian court to overturn the NHAI’s decision. The Indian Supreme Court put the same potential concern in less partial terms: “[n]o doubt, the fact that [PEL] is blacklisted (for some period) by [NHAI] is *likely* to have *some* adverse effect on its business prospects.”⁶⁰⁶

423 Of course, neither PEL nor the Indian Supreme Court could have been in a position to speculate at that point in time on what adverse effect (if any) a sanction of limited scope such as the NHAI’s decision would have on PEL’s business. After all, neither was a crystal ball gazer. But by the time of the

⁶⁰⁴ RLA-128, UNIDROIT Principles of International Commercial Contracts (2010), p. 106.

⁶⁰⁵ RER-8, Second Expert Report of Mr Gourab Banerji, para. 17. Mr Banerji appears to have acted as the lead counsel in the Indian court proceedings in which PEL challenged its NHAI’s temporary debarment decision. Mr Banerji’s opinion on this issue is therefore entirely subjective and biased against PEL’s interests as his allegedly ‘independent’ opinion continues to be in line with his position as counsel before the Indian Supreme Court. Mr Banerji’s testimony in the present Arbitration is tainted by self-serving bias, does not constitute an ‘independent’ expert opinion, and should be ignored *in limine*.

⁶⁰⁶ RLA-21, *Patel Engineering Ltd. v. Union of India & Anr.* No. 23059, dated 11 May 2011, para. 25 (Emphasis added).

Indian Supreme Court’s decision (*i.e.*, 11 May 2012) commercial reality had spoken: PEL was awarded over half a billion dollars’ worth of infrastructure contracts by other Indian public authorities.⁶⁰⁷ It is perhaps unsurprising that it was business as usual for PEL because, as the Delhi High Court explained, the NHAI’s order “*is not a debarment qua any third party*”.⁶⁰⁸ Ultimately, therefore, the NHAI’s temporary disbarment proved to be just that — a temporary blip in PEL’s work for the NHAI that did not impinge on the vast majority of its other work, either locally or globally. Ultimately, it did not affect PEL’s ongoing relationship with the NHAI either. As explained in the Reply, NHAI and the MoRTH (of which the NHAI is a part) continued to qualify PEL to bid for their own projects after the temporary debarment had expired and, on 13 November 2014, the MoRTH even awarded a USD 45 million highway project to PEL.

424 Nor can anything more be made of the Indian Supreme Court decision itself. Mozambique cites the Court for determining that PEL was “*not commercially reliable and trustworthy*”⁶⁰⁹ and labels this choice of words “*the most relevant and material part of the Indian Supreme Court Judgment.*”⁶¹⁰ The phrase is repeated no less than 57 times in the Rejoinder on Jurisdiction. Mozambique goes as far as stating that “[*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.*”⁶¹¹ This mantra is a poignant illustration of Mozambique’s patent manipulation of the facts.

425 In fact, as Mozambique admits in the few instances where it does not distort the citation from the judgment,⁶¹² the Indian Supreme Court stated as follows:

“23. From the impugned order it appears that [NHAI] came to the conclusion that; (1) [PEL] is not reliable and trustworthy **in the context of a commercial transaction**; (2) by virtue of the dereliction of [PEL], [NHAI] suffered a huge financial loss; and (3) the dereliction on the part of [PEL] warrants exemplary action to “curb any practice of ‘pooling’ and ‘mala fide’ in future”.

24. We do not find any illegality or irrationality in the conclusion **reached by [NHAI]** that [PEL] is not

⁶⁰⁷ Reply, paras. 682-683.

⁶⁰⁸ Reply, para. 682; **RLA-20**, *Patel Engineering Limited v. Union of India and Another*, SCC Online Del 3193 (2011), para. 24 (Emphasis added).

⁶⁰⁹ Reply on Jurisdiction, paras. 3, 195, 373, 378, 379, 380, 384, 388, 398, 399, 400, 402, 403, 404, 407, 415, 451, 456, 457, 460, 461, 464, 465, 466, 469, 476, 486, 490, 514, 516, 518, 536, 539, 547, 559, 562, 564, 573, 575, 581 and 587.

⁶¹⁰ *Id.* at para. 404.

⁶¹¹ *Id.* at para. 399.

⁶¹² *Id.* at paras. 398, 403, 464, and 547.

*(commercially) reliable and trustworthy in the light of its conduct in the context of the transaction in question [...]*⁶¹³
(Emphasis added)

426 It is clear on the face of the above cited wording that the Indian Supreme Court simply upheld as not “*illegal*” and not “*irrational*” **NHAI’s conclusion** that PEL was not (commercially) reliable and trustworthy in the light of its conduct in the context of the one specific transaction in question.

427 To be even more precise, the Indian Supreme Court (1) referred back to NHAI’s *own commercial determination* in the context of its arbitrariness analysis; and (2) pointed out that such determination was neither illegal nor irrational (a) *in light of* [PEL]’s impugned conduct (b) *in the context* of the transaction. This is a far cry from the Court *itself* weighing the evidence and impugning PEL’s business practices or holding, or even insinuating, that PEL *generally* was not commercially reliable and trustworthy. And whether one customer of PEL considered it not commercially reliable and trustworthy at that time due to a procurement dispute between them would have to be weighed against dozens of other PEL customers with whom PEL has had and continues to have long-term relationships of trust.

428 As the author Kahneman writes, in his seminal *Thinking, Fast and Slow*, “[a] *reliable way to make people believe in falsehoods is frequent repetition, because familiarity is not easily distinguished from truth.*”⁶¹⁴ Mozambique can take a statement out of its context 57 times, but repetition *ad nauseam* does not make the statement true.

429 Thus, properly construed, a reasonable business executive would have understood the Indian Supreme Court’s statement for what it meant when read in its surrounding context. Conversely, no reasonable business executive would have read the above court statement as commenting on PEL’s business practices *beyond* the transaction in question and *vis-à-vis* NHAI.

430 Equally, as bidding terms and conditions vary in every project, it would be inappropriate to extrapolate any legally tenable conclusion from the temporary debarment by the NHAI that can be safely applied to other projects involving PEL. For example, as the Indian Supreme Court’s judgment noted, the bid documents there “*stipulated that a bidder, by submitting a bid, ‘shall be*

⁶¹³ RLA-21, *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059, 11 May 2012, para. 24.
⁶¹⁴ Exhibit C-351, Daniel Kahneman, *Thinking Fast and Slow*, Penguin Books 2012, p. 62.

*deemed to have acknowledged and confirmed' that [NHAI] will "suffer loss and damage on account of withdrawal" of the bid or 'for any other default by the bidder during the period of bid validity. "'*⁶¹⁵

431 Indeed, the NHAI's temporary debarment of PEL and the related court proceedings do not bear similarity to the case at hand and no inference can or should be made based on such facts *vis-à-vis* PEL's business practices generally or the legality of PEL's conduct in relation to Mozambique specifically. It is a *non sequitur* that the nature of the NHAI project, *i.e.*, "*a government infrastructure project related to transportation*"⁶¹⁶ makes it necessarily comparable, and thus material, to the MTC's transportation project. Infrastructure projects, while sharing a public interest, are invariably driven by different political considerations and, as stated above, the terms and conditions are project-specific.

432 To begin with, Mozambique did not even entertain the Project until PEL conceived it from green field stage.⁶¹⁷ Further, the MOI did not involve a competitive tender scenario. As Mr Baxter, PEL's PPP expert notes, "*[i]t is important to recognize that there is no one-size-fits-all approach to PPP procurement. It is very much dependent upon each relevant government or agency to decide how it wishes to run its procurement programs.*"⁶¹⁸ In relation to unsolicited proposals such as PEL's, Mr Baxter notes that "*what is innovative to each government is specific to that government at that point in time and its infrastructure wants and needs.*"⁶¹⁹

433 Tribunals are rightly reluctant to extrapolate or infer any factual findings from past events in a rule-exception context because it comports a large risk of a false positive finding. The majority tribunal in *Teinver v. Argentina* found that the facts of domestic criminal proceedings in Spain, the investor's home jurisdiction, were not indicative of a *modus operandi* of the investor and were irrelevant to the arbitration, either on jurisdiction or merits, because the alleged evidence of "*similar fact*" involved different parties, facts, and circumstances:

...Respondent says that "the events in Spain constitute the same manoeuvres performed at the Airlines" and that

⁶¹⁵ **RLA-21**, *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059, 11 May 2011, para. 13.

⁶¹⁶ Reply on Jurisdiction, para. 388.

⁶¹⁷ See, for example, **Exhibit C-20**, Letter from Kishan Daga of PEL to Minister Zucula, regarding *Implementation of Rail Corridor from Moatize to Macuse and Port to Macuse*, dated 22 January 2013.

⁶¹⁸ **CER-7**, Expert Report of Mr David Baxter, para. 101.

⁶¹⁹ *Id.* at para. 109.

*“criminal and insolvency proceedings in Spain prove that fraudulent concealment or disposal of assets have been usual practice, a modus operandi, of the business group to which the Claimants belong.” Respondent suggests that this conduct demonstrates that the same conduct occurred in the facts of this case. In the Tribunal’s view, this is not correct. It would be inappropriate to attribute to Claimants evidence of “similar fact” based on findings of courts in other proceedings, involving different parties, facts and circumstances. This is particularly the case where the various criminal allegations relate to events alleged to have occurred well after the relevant period of Claimants’ investment in Argentina. Each Party must prove the facts it alleges before this Tribunal and the findings of other courts or tribunals will only be of limited, if any, assistance in that regard.”⁶²⁰
(Emphasis added)*

434 Similarly, NHAI’s temporary debarment decision and the ensuing court proceedings involved different parties, facts and circumstances and are thus irrelevant to the issue of PEL’s conduct in these proceedings. The temporary debarment did not affect PEL’s continued bidding and/or engagement in Indian government transportation projects of national importance. PEL’s general commercial reliability or trustworthiness was not called into question by the Indian Supreme Court or otherwise and was not impacted by NHAI’s decision to debar PEL from its own projects from 20 May 2011 to 20 May 2012. Mozambique’s attempts to manipulate the facts and infer such dramatic consequence from a project-specific, limited sanction for PEL’s business prospects fall flat.

D. Temporary Debarment was Neither Relevant Nor Material to the Project And Has No Effect on PEL’s Claims

435 Despite Section VI.C of Reply, in which PEL explained why the temporary debarment is irrelevant to this Arbitration,⁶²¹ Mozambique continues to contend that the Indian court judgments concerning PEL’s challenge of the NHAI’s debarment decision “*were relevant and material to MTC’s decision of whether PEL could be relied upon and trusted as a PP partner on the subject public infrastructure project in Mozambique.*”⁶²²

436 Mozambique provides the following *ex post facto* alleged reasons why: (1) the NHAI project also involved a public transportation project and PEL reneged

⁶²⁰ CLA-318, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, para. 368.

⁶²¹ Reply, Section III.A. PEL refers the Tribunal to Section VI.C of its Reply in which it explained why the temporary debarment is irrelevant to this Arbitration.

⁶²² Reply on Jurisdiction, paras. 461.

on its bid after it was declared winner;⁶²³ (2) the Delhi High Court Judgment was relevant and material to the MTC's decision whether PEL was a suitable PPP partner;⁶²⁴ (3) the Indian Supreme Court Judgment was relevant and material to the MTC's decision whether PEL was a suitable PPP partner;⁶²⁵ and (4) "*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.*"⁶²⁶ Stripping back the bluster, Mozambique appears in essence to make two arguments: (1) a *qualitative* argument concerning PEL's alleged lack of suitability for the project in light of (a) the NHAI's temporary debarment decision; (b) the Delhi High Court Judgment, and (c) the Indian Supreme Court Judgment; and (2) a *temporal* argument that the alleged concerns deriving from the NHAI decision and related Indian court judgments overlapped in time with PEL's making of its investment.

437 Mozambique's proposed test for establishing relevance and materiality, namely whether *it* would have found PEL to be a reliable and trustworthy partner had *it* known of the NHAI's decision and the Indian court judgments, is subjective, self-serving, and susceptible to hindsight bias. It is only in paragraph 466 of the Reply on Jurisdiction that Mozambique asserts, without any evidence, that "[i]t 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.'" Quite the opposite. Indian government agencies continued to accept bids and award contracts to PEL following its temporary debarment, and PEL's relationship with the NHAI continued after the debarment ended. Besides, Mozambique does not even attempt to explain why the reason given for PEL's temporary debarment by the NHAI would apply to a government agency considering an USP such as that of PEL.

438 Mozambique and its Indian law expert repeatedly state that a temporary debarment "*brings the person's character into question.*"⁶²⁷ Similarly, Mr

⁶²³ Reply on Jurisdiction, paras. 461

⁶²⁴ *Id.* at paras. 462-463.

⁶²⁵ *Id.* at paras. 464-469.

⁶²⁶ *Id.* at paras. 470-477.

⁶²⁷ *Id.* at paras. 490, 547, 579 and 637.

Ehrhardt, Mozambique’s PPP expert, by reference to the World Bank USP Guidelines, labels a temporary debarment as “*criteria that will be used to assess the reputation and integrity of the USP proponent.*”⁶²⁸

439 As the Indian Supreme Court itself noted, depending on the circumstances, a temporary debarment *may* have an adverse effect on the business and/or reputation of a sanctioned company. This is, however, not axiomatic in all circumstances. In PEL’s case, considering also that PEL did not believe that it committed “*any bad acts like fraud or corruption*” *vis-à-vis* the NHAI⁶²⁹ and the NHAI or the Indian Courts did not reach a positive conclusion that PEL had acted in bad faith,⁶³⁰ there was no actual reputational harm. This is borne out by what happened to PEL’s business and reputation *in reality*.

440 Even assuming the NHAI decision and the Indian court judgments called into question PEL’s character or professional integrity (*quod non*), character is a subjective trait (meaning that an alleged character deficit entails a subjective evaluation) and integrity similarly entails a value-based moral or ethical judgment. Matters concerning business ethics which do not transgress into a violation of the law of the host State or international public policy have no import on a tribunal’s jurisdiction or the admissibility of the investor’s claims.

441 The *Hamester* tribunal considered the respondent’s argument whether the claimant’s overstated figures and its presentation of false invoices to the JV partner and the JV in relation to machinery that was to be transferred to the JV under the Joint Venture Agreement was a scheme by the claimant to defraud its partner.⁶³¹ The tribunal noted that “[*it*] can only decide on substantiated facts, and cannot base itself on inferences.”⁶³² It then found that “*there is no conclusive evidence proving that [the JV partner] would not have entered into the joint-venture had it known that some of the figures were overstated. In other words, there is no proof that the alleged fraud was decisive in securing the JVA*”⁶³³ and “*there is insufficient basis for the Tribunal to conclude that there was an overall scheme of deceit orchestrated by the Claimant in the initiation*

⁶²⁸ RER-11, Expert Report of Mr David Ehrhardt, para. 180.

⁶²⁹ CWS-3, Second Witness Statement of Mr Kishan Daga, para. 177.

⁶³⁰ RLA-21, *Patel Engineering Ltd. v. Union of India & Anr.*, No. 23059, 11 May 2011, para.24: “Whether the decision of [PEL] is bona fide or mala fide, requires a further probe into the matter, but, the explanation offered by the petitioner does not appear to be a rational explanation.”

⁶³¹ RLA-29, *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 130.

⁶³² *Id.* at para. 134.

⁶³³ *Id.* at para. 135 (Emphasis added).

of its investment.”⁶³⁴ The *Hamester* tribunal concluded that “*Hamester’s practices might not be in line with what could be called ‘l’éthique des affaires,’ but, in the Tribunal’s view, they did not amount, in the circumstances of the case, to a fraud that would affect the Tribunal’s jurisdiction. The Tribunal sees the over-statement of invoices as an issue bearing upon the balance of equities between the two parties, rather than the existence itself of the contract or the investment.*”⁶³⁵

442 Similarly, Mozambique’s iterations of professional character or integrity issues could raise, at most, business ethics issues, which do not engage legal rules or principles of Mozambican or international law.

443 Industry best practices do not take any further the supposed ethical questions raised by Mozambique. Claimant’s PPP expert Mr Baxter notes in relation to industry best practices:

*“It is important to recognize that there is no one-size-fits-all approach to PPP procurement. It is very much dependent upon each relevant government or agency to decide how it wishes to run its procurement programs. For this reason, there is also no single “best practice” – like a code or statute – that the Tribunal can use as a guide. Rather, there are several governments and institutions like the World Bank that have written comprehensive guidance documents on how to address USPs. But at the end of the day, if a specific government desires to run a USP procurement in a different way to an “international best practice” of any particular institution, then there is nothing to stop that government from doing so (subject to any prohibition in its own domestic law).”*⁶³⁶
(Emphasis added)

444 Accordingly, in the absence of a binding legal duty, there is nothing to stop a USP proponent from approaching a USP procurement in a different way to an “international best practice”.

445 Mr Ehrhardt states that “[a]ccording 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.”⁶³⁷ That may have been the case if the parties would have agreed to adhere to international best practices. There is nothing in the record to suggest that approach. Quite

⁶³⁴ **RLA-29**, *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 136.

⁶³⁵ *Id.* at para. 138 (Emphasis added).

⁶³⁶ **CER-7**, Expert Report of Mr David Baxter, para. 101.

⁶³⁷ **RER-11**, Expert Report of Mr David Ehrhardt, para. 181.

the opposite, Mr Daga testifies that “[t]he *Government never asked me for any such information* [i.e., an information request that would have required the disclosure of the temporary debarment] *during the negotiation of the MOI, nor did it request any warranty or other contractual term requiring PEL to confirm such matters. Had it done so, I would have provided the information, along with an explanation of the issues and the limited scope of the temporary debarment.*”⁶³⁸ In the absence of any direct evidence, Mozambique hastily deduces intention of concealment from Mr Daga’s mere knowledge of the temporary debarment: “*Mr. Daga confirms that the concealment by PEL was intentional, because Mr. Daga admits he had knowledge of the blacklisting.*”⁶³⁹ This is of course an unwarranted inference, which cannot form the basis of any factual finding of fraud.

446 Mr Ehrhardt refers to Article 13 of the PPP Law which lists the principles of “*integrity and reliability*” among the principles to be observed for all PPPs.⁶⁴⁰ Professor Medeiros has explained that the MOI is “*not a legal act materially and objectively subject to the legal rules governing PPP.*”⁶⁴¹

447 In any event, even if public procurement or PPP rules were to apply (*quod non*), it would have been incumbent upon the MTC, as an organ of Mozambique, to comply with any such applicable rules (and/or with international best practices) and request integrity information from PEL upon entering into the MOI. Mr Ehrhardt, Mozambique’s PPP expert, notes that “[*he*] *would also have expected Mozambique to do its own integrity due diligence.*”⁶⁴² Mr Ehrhardt later adds, pointing to the World Bank Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects, that “[*i*]n *finalizing a concession contract, [he] would expect the government to check the qualifications of the concessionaire, and to do its integrity due diligence, as would be best practice.*”⁶⁴³ PEL can only assume that Mozambique did its due diligence and determined PEL to be meet its criteria as it never asked for additional due diligence directly from PEL or made such matters a condition of their contractual arrangements.

⁶³⁸ CWS-3, Second Witness Statement of Mr Kishan Daga, para. 178 (Emphasis added).

⁶³⁹ Reply on Jurisdiction, para. 569.

⁶⁴⁰ RER-11, Expert Report of Mr David Ehrhardt, para. 58(e).

⁶⁴¹ CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 55.2.

⁶⁴² RER-11, Expert Report of Mr David Ehrhardt, para. 16.

⁶⁴³ *Id.* at para. 217.

- 448 Even assuming, as Mr Ehrhardt opines,⁶⁴⁴ that there was a shared responsibility between PEL and Mozambique in relation to due diligence on PEL’s professional integrity (which PEL denies given its position on the irrelevance and immateriality of the temporary debarment), the investor should not be held to a higher standard than the host State. As the tribunal in *Micula v. Romania I* noted, “investors should [not] be held to a higher standard than the government. Investors are entitled to believe that the government is acting legally.”⁶⁴⁵ Therefore, if a host State fails to discharge its part of the responsibility, it cannot ignore its own failure and use the investor’s perceived part of the shared responsibility as a sword to defeat the investor’s claims.
- 449 In determining the relevance and materiality of the NHA I decision and the related Indian court decisions, PEL proposes that the Tribunal adopt an objective test, anchored in contemporaneous evidence (or in any event evidence originating *in tempore insuspecto*, namely before the start of this Arbitration), rather than in *ex post facto* hypothetical statements and/or speculative assumptions by Mozambique or its witnesses made in the Arbitration.
- 450 This objective test is consistent with the approach of various investment treaty tribunals as to the avoidance of hindsight. The majority tribunal in *Glencore v. Colombia* noted in the context of an assessment relevant to the merits of the case that “[a]rbitral tribunals, sitting comfortably in the future, with full knowledge of the supervening events, must take the individual circumstances of each decision into consideration and avoid the temptation of using hindsight as the basis for assessing reasonableness.”⁶⁴⁶ In a jurisdictional context, the tribunal in *Nova Scotia v. Venezuela II* noted that “it is the alleged investment at the time of its inception that should be considered, not the impact that the investment has ultimately had.”⁶⁴⁷
- 451 The supervening event in this case is Mozambique’s after-the-event, made-for-arbitration investigation into PEL’s business in India, and its so-called “discovery” of publicly available information. Mozambique has employed such information to make a mountain out of a mole hill in this Arbitration, to

⁶⁴⁴ **RER-11**, Expert Report of Mr David Ehrhardt, paras. 15 and 16.

⁶⁴⁵ **CLA-319**, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 706.

⁶⁴⁶ **CLA-320**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 1458.

⁶⁴⁷ **CLA-93**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela II*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award, 30 April 2014, para. 130, cited at para. 262 of SOC.

attempt to discredit PEL's claims, and to deflect the attention of the Tribunal from Mozambique's own substantive violations of international law.

452 Mozambique's strategy can readily be dismissed if one examines the contemporaneous evidence (or indeed the lack thereof) concerning the relevance and materiality that Mozambique *itself* attributed *at the relevant time* to what now self-servingly labels the suitability of PEL as a PPP partner.

453 As explained below, two of the legal authorities heavily relied on by Mozambique (*i.e.*, *Inceysa* and *Fraport*) also show that tribunals resort to objective, contemporaneous criteria to determine the relevance and materiality of information to the assessment of the legality of the investor's conduct in making the investment.

454 In *Inceysa* the tribunal noted that "*Inceysa submitted false and incorrect financial information during the Bidding process. This behavior is extremely serious because financial condition is one of the main elements taken into account to adjudicate a bid and particularly the one that gave rise to this arbitration. Consequently, the falsities and imprecisions of the information submitted by Inceysa are a clear violation of one of the pillars of the Bid itself.*"⁶⁴⁸

455 The *Inceysa* tribunal further considered whether the false information presented by the investor concerning its own financials, experience and capacity were relevant and material to El Salvador's decision to award the bid to Inceysa. It answered that question affirmatively, finding that such information comprised "*essential pillars that led EL Salvador to award the bid to [the investor]*" or "*important provisions that governed the bid*".⁶⁴⁹ It was on this basis that the tribunal concluded that Inceysa could not benefit from "*an investment made clearly in violation of the rules of the bid in which it originated.*"⁶⁵⁰ In so finding, the tribunal placed emphasis on "*[t]he clear and obvious evidence of the violations committed by Inceysa during the bidding process.*"⁶⁵¹ Accordingly, the *Inceysa* tribunal resorted to the contemporaneous, objective criteria of the rules governing the bid (rather than subjective, *ex post facto* statements or assumptions made during the course of

⁶⁴⁸ **RLA-30**, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 110. (Emphasis added)

⁶⁴⁹ *Id.* at paras. 118 and 124. (Emphasis added)

⁶⁵⁰ *Id.* at para. 244. (Emphasis added)

⁶⁵¹ *Id.* at para. 244. (Emphasis added)

the arbitration) to find 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.*”⁶⁵²

456 In *Fraport v. Philippines*, the tribunal considered whether a *secret* shareholders’ agreement concerning the management and control of its shareholding investment in the Philippines was designed to overcome a mandatory prohibition on the structuring of such investments found in the so-called Anti-Dummy Law of the Philippines. The tribunal concluded that “*[t]here is no indication in the record that the Republic of the Philippines knew, should have known or could have known of the covert arrangements which were not in accordance with Philippine law when Fraport first made its investment.*”⁶⁵³

457 In examining the investor’s conduct, the *Fraport* tribunal found relevant both the fact that the Philippines could not have known about the investor’s covert arrangements, and the fact that the investor knowingly and intentionally violated Filipino law when making its investment:

*“Fraport, concluded that the only plausible way for its equity investment to prove profitable was to arrange secretly for management and control of the project in a way which the investor knew were not in accordance with the law of the Philippines. [...] Thus the violation could not be deemed to be inadvertent and irrelevant to the investment. It was central to the success of the project.”*⁶⁵⁴

*Fraport knowingly and intentionally circumvented the [Anti-Dummy Law] by means of secret shareholder agreements. As a consequence, it cannot claim to have made an investment “in accordance with law”. Nor can it claim that high officials of the Respondent subsequently waived the legal requirements and validated Fraport’s investment, for the Respondent’s officials could not have known of the violation. Because there is no “investment in accordance with law”, the Tribunal lacks jurisdiction racione materiae.”*⁶⁵⁵ (Emphasis added)

458 The *Fraport* tribunal thus considered that *at the time of the making of the investment* the shareholders’ agreement deemed to have violated the Filipino laws was not known and *could not have been known* to the Philippines. The

⁶⁵² RLA-30, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 237.

⁶⁵³ RLA-32, *Fraport AG Frankfurt Airports Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 347. (Emphasis added)

⁶⁵⁴ *Id.* at para. 398. (Emphasis added)

⁶⁵⁵ *Id.* at para. 401.

agreement was disclosed in the arbitration only “*during the hearing on jurisdiction and liability, at the President’s request and insistence.*”⁶⁵⁶

459 There are no violations of principles of law here whatsoever like those in *Inceysa* and *Fraport*: Mozambique is unable to prove a positive misrepresentation case and the fact that Mozambique itself found the information concerning PEL’s temporary debarment shows that there was nothing secret or concealed about such information. Quite the opposite, the information was publicly available to anyone who was interested to search. Indeed, Mozambique’s own PPP expert states that “***I would also have expected Mozambique to do its own integrity due diligence. A cursory search would have revealed that PEL had been blacklisted, and that the Supreme Court of India had linked PEL’s name to behaviour which it considered would promote ‘unwholesome practices’.***”⁶⁵⁷

460 Nor was the fact that PEL did not inform Mozambique of the threatened or actual blacklisting a fundamental pillar in why it was awarded its contractual rights. Unlike *Inceysa* and *Fraport*, where the claimants acted in the way they did to obtain the concessions because they were ineligible to do so without their unlawful acts, here PEL was a perfectly legitimate contractor with the full capability and legal right to complete the Project. The decision of one of PEL’s customers due to a procurement dispute to put PEL on hold for a year for further contracts with that customer cannot detract from that central tenet, that places this case light years away from *Incesya*, *Fraport*, and others.

461 Like the evidentiary approaches of the *Inceysa* and *Fraport* tribunals, this Tribunal is invited to search for contemporaneous, objective criteria *at the time of PEL making its investment* (or in any event *in tempore insuspecto*) to determine if the MTC would have ceased all further dealings with PEL had it known about the NHAI’s temporary debarment decision and/or the related court decisions. Mozambique’s reference to international PPP best practices⁶⁵⁸ does not take its case any further, because, as Mozambique’s own expert admits, Mozambique did not follow such best practices at least in relation to conducting its own integrity due diligence.⁶⁵⁹

⁶⁵⁶ **RLA-32**, *Fraport AG Frankfurt Airports Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 322.

⁶⁵⁷ **RER-11**, Expert Report of Mr David Ehrhardt, para. 16.

⁶⁵⁸ Reply on Jurisdiction, para. 528.

⁶⁵⁹ **RER-11**, Expert Report of Mr David Ehrhardt, para. 16.

462 Up to (and including) the conclusion of the MOI, the relevant contemporaneous, objective evidence is to be searched for in the MOI (such as a term requiring PEL to warrant such matters). Equally, appropriate inferences should be drawn from the absence of such evidence. Following the MOI and in relation to the tender eventually organised by the MTC, the relevant contemporaneous, objective evidence can be found in the Tender Documents.

463 The question to be answered based on a contemporaneous, objective record is what relevance and materiality (if any) did Mozambique *itself* attribute *at that time* (and not self-servingly in the Arbitration) to a temporary civil law sanction of PEL in another country.

464 The MOI does not contain (whether explicitly or implicitly) any terms that may be said to govern Mozambique's assessment of the suitability of PEL as a PPP partner. The Claimant repeats its submissions made in this regard at paragraphs 704-706 of the Reply.

465 In paragraph 705 of the Reply, PEL submitted that the temporary debarment "*did not prevent PEL from contracting with any other public authorities in India (or elsewhere)*".⁶⁶⁰ This prompted an accusation by Mozambique that PEL "*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.*"⁶⁶¹

466 Mozambique once again ignores the context of PEL's statements. PEL underscored the limited nature of the NHAI's temporary debarment decision and its consequential ability to enter into contracts with other public authorities during and after the temporary debarment *vis-à-vis* the NHAI. In that context, PEL has made no false representations to the Tribunal.

467 It is true that in December 2015, the Water Resources Department of the State of Jharkhand disqualified PEL from a circa. USD 21.7 million project on the basis that the tender conditions required that interested bidders should not have been blacklisted for the last 5 years. Evidently, this was a consequence of the specific conditions of the tender rules applicable for that specific project.

⁶⁶⁰ See similar statements in paras. 675 and 682 of the Reply.
⁶⁶¹ Reply on Jurisdiction, Section III.A.3.

Clearly, this singular episode⁶⁶² does not detract from the overall truthfulness and accuracy of the statement that the temporary debarment by NHAI did not affect PEL's ability to enter into contracts with other public authorities. As noted above, this is proven by the fact that PEL was awarded over half a billion dollars' worth of infrastructure contracts by Indian public authorities during the one-year period in which it was temporarily debarred by the NHAI and later qualified for, and/or was awarded, projects by the NHAI and MoRTH.

468 Upon entering into the MOI, Mozambique, acting through the MTC, made a business decision and a legally binding decision to accept PEL as its PPP partner without (i) seemingly conducting its own integrity due diligence in advance of the MOI, and/or (ii) requesting PEL to provide contractual representations and warranties as to any aspects that might have been relevant and material to its suitability as a PPP partner. Alternatively, it is equally plausible that Mozambique did conduct due diligence on PEL and found nothing untoward in what it discovered.

469 As a public contracting party, Mozambique was an experienced negotiator in similar projects. In this regard, the *Glencore v. Colombia* tribunal considered the respondent's allegation that the claimants had secured their investment through bad faith and deceit.⁶⁶³ The tribunal found relevant the fact that the Respondent had every opportunity to request information from, and to question information provided by, the investor:

“The evidence on the record does not support Respondent’s proposition that Prodeco [co-claimant investor] deliberately misrepresented the economic situation of the Project or tried to conceal information from Ingeominas.

*The Tribunal is persuaded that Prodeco and Ingeominas negotiated the Eighth Amendment extensively, **in good faith, and at arm’s length.** The negotiations, which involved two entities with **ample experience in the coal sector**, were held for a period of over 20 months, during which there were **multiple meetings and exchanges of proposals.** Throughout*

⁶⁶² In its desperate attempt to taint PEL's reputation before this Tribunal, in fn. 33 of the Rejoinder on Jurisdiction, Mozambique refers to a press article entitled “*Brinhanmumbai Municipal Corporation (BMC) authorities decided to blacklist Jogeshwari-based Patel Engineering.*” (Exhibit R-47). In reality, the octroi evasion allegations referenced in that article were based on a third-party allegation that was found to be frivolous (see Exhibit C-352, Letter from Complainant (Brinhanmumbai Municipal Corporation) to Court of Mumbai, dated 23 January 2012) and the Indian court closed the case. PEL continued to do business with BMC (see table entitled “*Sampling of Projects Awarded to PEL by Indian Public Authorities During the NHAI Temporary Debarment Period (i.e., from 20 May 2011 to 20 May 2012)*” in para. 682 of the Reply). More recently, PEL reportedly achieved a tunnel boring record in a BMC project (Exhibit C-353, NBM&CW Infra Construction & Equipment Magazine, *BMC with Patel Engineering completes tunnelling of MCGM Water Tunnel Project in record time*, dated 1 February 2022).

⁶⁶³ **CLA-320**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 855.

*the negotiations, Ingeominas had every opportunity to request information and to question the information provided by Prodeco. There is no evidence that Prodeco failed to address any request submitted by Ingeominas.*⁶⁶⁴
(Emphasis added)

470 In light of these considerations and in the absence of any contemporaneous evidence showing otherwise, Mozambique must either be deemed to have been satisfied with the suitability of PEL as a PPP partner, or must be deemed to have waived its right to claim that relevant and material integrity information that Mozambique itself could have found was not disclosed to it at the time.

471 In any event, as set out in paragraph 476 below, the MOI was concluded on 6 May 2011 whereas the NHAI did not communicate its decision to debar PEL temporarily until some two weeks later, on 20 May 2011.

472 Ms Muenda, the Respondent’s Mozambican law expert, states that “*PEL was previously aware (or at least should have been aware), that a proceeding could mean that a penalty could be applied or not.*”⁶⁶⁵ Ms Muenda opines that, pursuant to Article 227 of the Mozambique Civil Code, PEL “*had the duty to provide such information at the time of signing the MoF.*”⁶⁶⁶

473 The Claimant reiterates that Article 227 of the Mozambique Civil Code applies exclusively to pre-contractual liability (*culpa in contrahendo*), and does not lead to the invalidity of the transaction, but rather to an obligation of indemnity.⁶⁶⁷ Further, and as explained by Professor Medeiros, “[t]he duty of information considered by authors and case law as comprised by **Article 227 does not require full and absolute disclosure of any and all information. It is limited to information that may impact on consent but even then, such duty only arises only if the party claiming such right fulfilled its obligation of self-information, and in cases where there is lack of symmetry between the parties.**”⁶⁶⁸ Importantly for present purpose, Professor Medeiros emphasis that “*the principle of good faith only imposes a duty to inform when the party claiming the right [here, Mozambique] has fulfilled its duty to self-inform.*”⁶⁶⁹

⁶⁶⁴ **CLA-320**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, paras. 856-857.

⁶⁶⁵ **RER-7**, Second Legal Opinion of Ms Teresa Muenda, para. 106 (Emphasis added).

⁶⁶⁶ *Id.* at para. 106.

⁶⁶⁷ Reply, paras. 697-698; **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 69.

⁶⁶⁸ **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. Q. *See also* para. 70 (Emphasis added).

⁶⁶⁹ *Id.* at para. 70.2.1

474 In this regard, Ms Muenda’s view⁶⁷⁰ that under Article 227 of the Mozambique Civil Code, a full and absolute duty of disclosure exists and that any failure to fully disclose may impact upon consent because, otherwise, there would be no protection of consumers, is both flawed and inapposite. As Professor Medeiros opines, “[o]ne cannot consider a sovereign State, which performs public functions, an economically weak subject, suffering from a lack of symmetry in the contract and needing protection. Quite the contrary, it is a hallmark characteristic of administrative contracts that the public party is in a superior bargaining position.”⁶⁷¹ A contract granting a right to the direct award of an infrastructure concession contract concluded between a sovereign and an investor has nothing to do with consumer protection.

475 Furthermore, and even assuming that the NHAI’s threat of a temporary debarment were relevant and material information at the time of the MOI’s conclusion (*quod non*), PEL acted in good faith under Mozambican law in not informing the MTC of a pending administrative and then judicial procedure in India that may or may not have led to an actual temporary debarment.⁶⁷² Again, to the extent that it was concerned about any potential sanction, as a pre-condition to its consent to the MOI, the MTC could have requested from PEL a representation to the effect that, to the best of PEL’s knowledge and after due inquiry, no existing or *threatened* civil sanction existed against it. Had the MTC requested such information (which it did not), PEL could have explained its conduct *vis-à-vis* the NHAI, explained that it had not committed any illegality in withdrawing its bid, that it objected to the threatened temporary debarment as unjust and unwarranted, and that it had requested the NHAI to withdraw its show cause notice, failing which, PEL intended to “*approach the appropriate forum of seeking justice.*”⁶⁷³ On these bases, no reasonable business executive could have been expected to volunteer any information about a threatened temporary debarment in one of its many tendered or pending projects against which the company in question was exercising its right to be heard. Such information could not have been, and was not, relevant and material to the Project PEL was pursuing in Mozambique.

⁶⁷⁰ RER-7, Second Legal Opinion of Ms Teresa Muenda, para. 111.

⁶⁷¹ CER-6, Second Legal Opinion of Professor Rui Medeiros, para. 70.2.3.2.

⁶⁷² *Id.* at para. U.

⁶⁷³ Exhibit C-330, Letter from Patel Engineering Ltd to Mr M. P. Rana, NHAI regarding *Reply to show Cause Notice*, dated 1 March 2011.

476 As for Ms Muenda’s opinion that PEL had the duty to provide such information, in the alternative, at least as soon as the fact was consummated, on 20 May 2011 (*i.e.*, two weeks *after* the conclusion of the MOI),⁶⁷⁴ PEL reiterates that (1) the duty of information arising out of Article 227 of the MCC only arises in the context of pre-contractual negotiations;⁶⁷⁵ (2) the MOI did not provide for a continuing obligation to disclose any such issues,⁶⁷⁶ and (3) at no time did Mozambique ever request disclosure of information that included the NHAI’s temporary debarment during the limited period between 20 May 2011 and 20 May 2012.⁶⁷⁷

477 Following the conclusion of the MOI, there is no room for a discussion on the relevance and materiality of the NHAI’s temporary debarment to the extent that matter may concern the tribunal’s jurisdiction *ratione materiae*. This is because the tribunal’s jurisdiction *ratione materiae* must be determined by reference to the conclusion of the MOI, which preceded the NHAI’s temporary debarment. PEL’s position in this regard is set out in paragraphs 544-550 of its Reply.

478 The MOI constitutes the instrument by which Mozambique accepted PEL’s investments. Mozambique attempts to insert artificial granularity in the timeline of PEL’s investments.⁶⁷⁸ This granular approach has no support in law or in fact. As submitted in the Reply, the unity of the investment theory requires the Tribunal to view PEL’s investment holistically.⁶⁷⁹

479 PEL recalls that “[its] 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.”⁶⁸⁰ These four components are either regulated by a single instrument, *i.e.*, the MOI (in the case of (i)(ii) and (iv)) or are superseded by, and integrated into, the MOI (in the case of (iii)). They are necessary building blocks of the same investment operation, which crystallised in PEL’s rights under the MOI. PEL’s subsequent performance of its obligations (or indeed its exercise of the corresponding rights) under the MOI, resulting in the transfer of information,

⁶⁷⁴ **RER-7**, Second Legal Opinion of Ms Teresa Muenda, para. 106.

⁶⁷⁵ Reply, para. 701.

⁶⁷⁶ *Id.* at para. 704.

⁶⁷⁷ *Id.* at para. 702.

⁶⁷⁸ Reply on Jurisdiction, para. 535.

⁶⁷⁹ Reply, para. 532.

⁶⁸⁰ *Id.* at para. 510.

data and know-how to Mozambique and in the detailed PFS, were simply an expression of *pacta sunt servanda*.

480 In any event, Mozambique’s argument that “[t]he 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”⁶⁸¹ does not assist its feeble attempt to establish a duty of disclosure beyond the MOI’s conclusion. As noted in the Reply,⁶⁸² the NHAI decision and related court judgments were already public and, until 11 May 2012, when the Indian Supreme Court issued its decision (*i.e.*, just a working week before the expiry of the temporary debarment), PEL was fighting the issue before the courts to vindicate its position. PEL was still awaiting the final resolution of its challenge of the NHAI’s temporary debarment decision when it submitted the PFS to the MTC (*i.e.*, on 2 May 2012) and when it presented the results of the PFS to the Government (*i.e.*, on 9 May 2012). By the time the MTC approved the PFS (*i.e.*, on 15 June 2012), the temporary debarment period had expired. Mozambique alleges that PEL’s letter to the MTC, dated 5 October 2012, referred to PEL’s “*vast experience*” with highway infrastructure projects without mentioning the temporary debarment by NHAI.⁶⁸³ Mozambique does not explain its leap from industry experience (which was the subject of the cited reference) to an expired civil sanction. Its statement that “*NHAI blacklisting...is part of the ‘experience that PEL has accumulated in the development of Infrastructure projects’*”⁶⁸⁴ is a rhetorical manoeuvre that conflates two distinct meanings of the word ‘experience’: “*knowledge or skill in a particular job or activity, which you have gained because you have done that job or activity for a long time*” and a word used to refer to “*past events, knowledge, and feelings that make up someone’s life or character.*”⁶⁸⁵ Contemporaneous evidence concerning Mozambique’s public tender for the same Project in 2013 suggests that Mozambique would not have been concerned by a civil law sanction that expired by that time. Therefore, Mozambique cannot plausibly suggest *ex post facto* that it would have withdrawn PEL’s right to a direct award of the concession granted by the MOI or would not have proceeded to the further stages of the Project.

⁶⁸¹ Reply on Jurisdiction, para. 536.

⁶⁸² Reply, para. 704.

⁶⁸³ Reply on Jurisdiction, para. 563.

⁶⁸⁴ *Id.* at para. 575.

⁶⁸⁵ **Exhibit C-354**, Printout of Collins Dictionary, definition of the word ‘*experience*’.

481 Mozambique’s submission that the relevant threshold is whether the temporary debarment *could* have led to Mozambique’s withdrawal from the Project is a misguided extrapolation from *Plama v. Bulgaria*. As explained in the Reply, that case is inapposite because it involved an investor who had fraudulently misrepresented its financial assets.⁶⁸⁶ The *Plama* tribunal noted that “[*it was*] persuaded that Bulgaria **would not have given its consent to the transfer of Nova Plama’s shares to PCL had it known it was simply a corporate cover for a private individual with limited financial resources: Given the strategic importance of the Refinery and the significant number of employees and creditors, the managerial and financial capacities of the acquirer were a natural concern to the Bulgarian authorities.**”⁶⁸⁷ Mozambique had not established, based on contemporaneous evidence, that the integrity of PEL, and more importantly a civil sanction such as the NHAI’s temporary debarment, were a natural concern to Mozambique.

482 *Plama* involved a post-privatisation scenario in which the investor sought the consent of Bulgaria’s Privatisation Agency to a transfer of shareholding in the privatised refinery business. The full paragraph of the *Plama* award from which Mozambique extracted what it calls a “*low threshold*”⁶⁸⁸ states:

*Claimant contended that it had no obligation to disclose to Respondent who its real shareholders were. This may be acceptable in some cases but not under the present circumstances in which the State's approval of the investment was required as a matter of law and dependant on the financial and technical qualifications of the investor. If a material change occurred in 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.*⁶⁸⁹ (Emphasis added)

483 It is clear from the above full citation that the *Plama* tribunal was not intent on establishing any low threshold for the violation of the principle of good faith by the withholding of information concerning the investor’s shareholding. On the contrary, the tribunal has found that (1) the lack of obligation to disclose may be acceptable in some cases; (2) Bulgarian law required the State’s

⁶⁸⁶ Reply, para. 711(a).

⁶⁸⁷ **RLA-31**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 133 (Emphasis added).

⁶⁸⁸ Reply on Jurisdiction, para. 578.

⁶⁸⁹ **RLA-31**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 145.

approval of the investment; (3) that approval was dependent on the financial and technical qualifications of the investor; (4) if a material change occurred in the investor's shareholding that could have an effect on the host State's approval, the principle of good faith dictates that the investor informs the host State of such change; and (5) intentional withholding of such material change is contrary to the principle of good faith. In its usual fashion, Mozambique extracted only (5), ignoring the other inextricably linked findings of the *Plama* tribunal. Even in that extrapolation, Mozambique fails to substantiate, by contemporaneous evidence, why a temporary debarment in India is a *material* change in PEL's investment in Mozambique that *could* have had an effect on Mozambique's approval of PEL's investment.

484 Mozambique effectively puts forward a straw man when it asserts that “[f]ishing 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”.⁶⁹⁰ Had a civil law sanction been a concern to it, Mozambique could have just simply asked PEL or could have done its independent investigation in India, the home jurisdiction of PEL. There was no need to fish around the world.

485 PEL reiterates that a temporary debarment or any similar civil law sanction was simply not an issue in relation to which Mozambique had any interest. Had it been important, then Mozambique would have sought an answer at the relevant time or required PEL to warrant to such issues in the MOI or to have a continuing obligation to disclose any such issues on an ongoing basis.⁶⁹¹ The implementation of the MOI offered several first-hand opportunities (which Mozambique appears to accept, be it in relation to PEL's alleged duty to disclose)⁶⁹² for Mozambique to probe PEL about its integrity, if it so wished. For example, on 9 May 2012, PEL presented the results of the PFS during the meeting to representatives from the MTC, the CFM, the Ministry of Planning and Development, the Ministry of External Affairs, the Ministry of Mining, and the Ministry of Finance.

⁶⁹⁰ Reply on Jurisdiction, para. 514.

⁶⁹¹ Reply, para. 704.

⁶⁹² Reply on Jurisdiction, para. 552.

- 486 As noted above, in relation to the 2013 tender eventually organised by the MTC, the relevant contemporaneous, objective evidence as to the relevance and materiality of the temporary debarment is found in the tender rules.
- 487 PEL reiterates that it was Mozambique’s unlawful conduct that compelled PEL to participate in the 2013 tender, under protest and expressly without prejudice to its right to a direct award.⁶⁹³ Before turning to the issue of the relevance and materiality of the temporary debarment in the Tender Documents, PEL addresses briefly the allegation that it concealed its side letter with the PGS Consortium⁶⁹⁴ from MTC and “*its intent to fraudulently induce the MTC to allow PEL to participate in the contest with a scoring advantage.*”⁶⁹⁵ As noted in paragraph 503 of the Reply, the side letter with SPI and Grindrod specifically referred to PEL’s rights under the MOI.⁶⁹⁶ The 15% scoring advantage was conferred by the applicable Mozambican law (*i.e.*, at the time of the tender, the PPP Law and the PPP Regulations). In other words, by law, PEL, as the proponent of an USP, would always benefit from the 15% scoring advantage in a public tender process. Once again Mozambique cries wolf: PEL did not conceal that its participation in the 2013 tender was without prejudice to its rights under the MOI. Quite the opposite, as explained in paragraph 342 of the Reply, the expression of interest letter submitted by the PGS Consortium on 8 March 2013 expressly reserved PEL’s rights under the MOI.⁶⁹⁷ This fact alone is fatal to Mozambique’s allegation of fraudulent concealment of PEL’s intention of inducing the MTC to allow it to participate in the contest with a scoring advantage, whilst not intending to honour the results if the consortium lost.
- 488 Mozambique asserts that the Tender Notice issued by the MTC required the bidder to certify it has “*not been disqualified from conducting commercial activities*” and that NHAI’s temporary debarment and the related Indian court judgments are evidence that PEL “*had ‘been disqualified from conducting commercial activities with the NHAI.*”⁶⁹⁸ Mozambique asserts that PEL has presented no evidence that, in response to the Tender Notice, PEL made the disclosures.

⁶⁹³ CWS-3, Second Witness Statement of Mr Kishan Daga, paras. 131 and 145.

⁶⁹⁴ Exhibit C-233, Side Letter between PEL, SPI, and Grindrod, dated 8 March 2013.

⁶⁹⁵ Reply on Jurisdiction, para. 381.

⁶⁹⁶ Reply, para. 503.

⁶⁹⁷ Exhibit C-26, Letter from Kishan Daga of PEL to Minister Zucula of MTC regarding *submitting an Expression of Interest for the Project*, dated 8 March 2013.

⁶⁹⁸ Reply on Jurisdiction, para. 381.

489 Mozambique’s interpretation of the Tender Notice is wrong: a temporary
debarment does not respond to a request to state whether the interested party
had been “*disqualified from conducting commercial activities*” and
Mozambique’s *ex post facto* tag “*with the NHAF*” is self-serving.

490 Clause 2.3 of the Tender Notice relied upon by Mozambique,⁶⁹⁹ reads, in full,
as follows: “*Have not been declared bankrupt or disqualified from conducting
commercial activities*”.

491 This provision refers plainly to situations of insolvency or similar events. At
no point in time was PEL declared insolvent or otherwise prevented from
carrying out its normal commercial activity. It was simply prevented, for one
year, from *contracting* with a specific public entity in India.

492 The argument that Mozambique attempts to extract from Clause 8.1(g) of the
“*Bidding Documents*”⁷⁰⁰ is also entirely without merit.

493 The Tender Documents refer to the Public Procurement Rules (Decree
15/2010).⁷⁰¹ Clause 8(1) essentially replicates the legal requirements set forth
in Article 21 of Decree 15/2010,⁷⁰² which refers to impediments to
participation in a tender procedure.

494 In particular, Clause 8(1)(g) replicates Article 21(1)(g) of the Public
Procurement Rules, which states the following:

*“1. Bids submitted by competitors found to be under one of the
following situations, will not be accepted: g) A person,
whether a natural person or legal entity, that has defrauded
the State or been involved in fraudulent company bankruptcy
or in receivership or bankruptcy proceedings.”*⁷⁰³

495 This provision of the Public Procurement Rules has nothing to do with any
scenario of temporary debarment. Instead, it refers to situations in which the
bidder has defrauded the State.

⁶⁹⁹ Reply on Jurisdiction, para. 606 and **Exhibit C-24**, Tender Notice entitled “*Application of Participants and Fulfillment*” dated March 2013.

⁷⁰⁰ Reply on Jurisdiction, para. 601 and **Exhibit C-27**, Tender Documents issued to six pre-qualified companies, dated 12 April 2013.

⁷⁰¹ **Exhibit C-27**, Tender Documents issued to six pre-qualified companies, dated 12 April 2013, p. 6; **CLA-67A**, Decree No. 15/2010 of 24 May 2010.

⁷⁰² While the Tender Documents mention Article 112, this is most certainly a typo as the relevant provision is found in Article 21.

⁷⁰³ **CLA-67A**, Decree No. 15/2010 of 24 May 2010, Article 21(1)(g).

496 Unsurprisingly, Mozambique has failed to indicate the provision that captures temporary debarments for an unlawful act in the contracting procedure: Clause 8(1)(c), which replicates Article 21(1)(c) of the Public Procurement Rules.

497 Clause 8(1)(c) reads as follows: “*That has been sanctioned by anybody or institution of the State, with prohibition from contracting by reason of practice of an illicit act in contractual procedures, for the period of validity of the sanction*”.⁷⁰⁴

498 Article 21(1)(c), in turn, states the following: “*1. Bids submitted by competitors found under one of the following situations, will not be accepted: c) A natural or legal person, convicted by any State body or institution with the prohibition to contract as a result of an unlawful act carried out in a contracting procedure, for the duration of the penalty.*”⁷⁰⁵

499 It follows that the Tender Documents illustrate that, when it considered an issue to be relevant and material, Mozambique expressly conditioned eligibility (or, to use Mozambique’s preferred term, suitability) to integrity information, but even in that case, it chose to limit the professional integrity impediment temporally (“*for the period of validity of the sanction*”) and to those sanctions that were imposed by the State of Mozambique itself for an *illicit* act in procurement proceedings.⁷⁰⁶

500 It is simply not credible for Mozambique now to plead that for awarding the same Project to PEL directly (rather than through a public tender), it would have applied significantly more stringent criteria in the exercise of its discretion.

E. PEL Was Not Obligated to Disclose the Temporary Debarment to Mozambique

501 Mozambique’s arguments concerning PEL’s alleged duty of disclosure (regardless of the alleged source of such duty) is a repetition of its arguments on the relevance and materiality of the temporary debarment. This is presumably because the whole premise of Mozambique’s construct on the duty

⁷⁰⁴ **Exhibit C-27**, Tender Documents issued to six pre-qualified companies dated 12 April 2013.

⁷⁰⁵ **CLA-67A**, Decree No. 15/2010 of 24 May 2010. (Emphasis added)

⁷⁰⁶ **CER-6**, Second Legal Opinion of Professor Rui Medeiros, para. 67.3 and **Exhibit C-27**, Tender Documents issued to six pre-qualified companies on 12 April 2013, Clause 8.1(c).

of disclosure is that the duty extends only to “*relevant and material information concerning the investor.*”⁷⁰⁷

502 PEL has pleaded extensively why the temporary debarment is irrelevant and immaterial to this Arbitration: its arguments on the requirement of a *legal* duty are at paragraphs 694-703 of the Reply.

503 Mozambique asserts that in its Reply PEL did not dispute that its claims are inadmissible based on unjust enrichment. This is incorrect. As the *Inceysa* tribunal noted in relation to the concept of unjust enrichment: “[*t*]he written legal systems of the nations governed by the Civil Law system recognize that, when the cause of the increase in the assets of a certain person is illegal, such enrichment must be sanctioned by preventing its consummation.”⁷⁰⁸ Much of PEL’s Reply was devoted to establishing that PEL did not commit any illegality in making its investments. Therefore, the necessary premise of the concept of unjust enrichment falls away.

504 PEL concludes by *borrowing* and *paraphrasing* the words of Professor Cremades: “*There has certainly been plenty of smoke in this arbitration. However, if the actions of PEL and Mozambique, the terms of the MOI and Mozambique law, are studied carefully, then the smoke disperses and reveals that there is no bullet, no victim and no crime.*”⁷⁰⁹

F. Mozambique’s Unfounded Bribery Claim Provides No Basis for the Inadmissibility of PEL’s Claim

505 PEL refers to its submissions at paragraphs 53-59 and 707 of the Reply in relation to Mozambique’s unsubstantiated bribery allegation.

506 Mozambique makes the fanciful allegation that “*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.*”⁷¹⁰

507 Mozambique’s allegation is based solely on the self-serving witness statement of Minister Zucula, whom the Maputo City Court has sentenced to ten years imprisonment in September 2021 for his part in a bribery scandal arising from

⁷⁰⁷ Reply on Jurisdiction, para. 379.

⁷⁰⁸ **RLA-30**, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 254.

⁷⁰⁹ **RLA-32**, *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, Dissenting Opinion of Bernardo M. Cremades, para. 35 (adapted and paraphrased).

⁷¹⁰ Reply on Jurisdiction, para. 644.

the purchase of two Embraer aircrafts by LAM, the flag carrier of Mozambique.⁷¹¹

508 Mr Daga has denied the bribery allegation in the following categorical terms: “*I never offered him a bribe. I also never said that I would “help him out” if he came to India. **This is all completely made up.***”⁷¹² Therefore, Mozambique’s statements that Mr Daga does not deny the Mr Zucula’s unfounded allegations are just another pie in the sky. In any event, it is highly improbable, to the point of fanciful, to even suppose that Mr Zucula might be able to recall in March 2021 (*i.e.*, the time of Mr Zucula’s written testimony) what Mr Daga might have said to him in May 2012 (*i.e.*, the time of the domestic flight to which Mr Zucula refers).

509 The standard of proof for bribery allegations is understandably high. As the tribunal in *Fraport v. Philippines II* stated, “*considering the difficulty to prove corruption by direct evidence, the same may be circumstantial. However, **in view of the consequences of corruption on the investor’s ability to claim the BIT protection, evidence must be clear and convincing** so as to reasonably make-believe that the facts, as alleged, have occurred.*”⁷¹³

510 Mozambique has not put forward any clear and convincing evidence in support of its bribery allegation. As submitted at paragraph 57 of the Reply, “*the allegation is also considerably weakened by the fact that no contemporaneous report of the alleged bribery attempt was ever made.*”⁷¹⁴ The tribunal in *Glencore v. Colombia* considered and dismissed Colombia’s bribery allegations noting that “*the Colombian criminal prosecutor and the Colombian criminal courts, which have a much higher capacity for investigation than this Arbitral Tribunal, have not initiated an investigation into the alleged corrupt practices surrounding [the agreement alleged to have been procured by bribery] either in tempore insuspecto or even after the start of this arbitration.*”⁷¹⁵

⁷¹¹ **Exhibit C-355**, All Africa, *Mozambique: Embraer Bribe - Ten Years for Former Transport Minister*, dated 13 September 2021.

⁷¹² **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 175 (Emphasis added).

⁷¹³ **CLA-321**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 479 (Emphasis added).

⁷¹⁴ Reply, para. 57.

⁷¹⁵ **CLA-320**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 738.

511 Mozambique's further allegations concerning PEL's purported violation of the MOI's anti-corruption clause or Mozambique's anti-corruption law are simply not borne out by the facts and are denied.

VI. MOZAMBIQUE RED HERRING STRATEGY EXPOSES ITS DOUBLE STANDARDS ON PROFESSIONAL INTEGRITY

512 Mozambique, based solely on the *ex post facto* statements of Minister Zucula and MTC legal counsel Mr Chauque, would have this Tribunal believe that, had it known about PEL's temporary debarment by the NHAI at that time, it would have ceased any further dealings with PEL.⁷¹⁶

513 In fact, not a shred of evidence exists indicating that Mozambique or its relevant ministries harboured any contemporaneous interest in, or concern about, a limited temporary debarment like the one at issue with the NHAI. The fact that professional integrity was not at the forefront of Mozambique's agenda is apparent also from examining the integrity record of ITD, the eventual beneficiary of the Project of which Mozambique deprived PEL.

514 ITD's professional integrity record was (and, as more recent events concerning its CEO and largest shareholder demonstrate), is far from impeccable. Had Mozambique bothered to conduct a thorough investigation, it would have found that ITD and its long-time Chairman of the Board, Premchai Karnasuta, (who also is listed as a member of the Board of Directors of TML, the joint venture implementing the Project)⁷¹⁷ have a consistent track record of bribery and corruption scandals implicating public works projects internationally, dating back a few decades.

515 By way of example only, ITD benefitted from a rigged bid as part of Thailand's largest construction project throughout the 1990s and 2000s: the creation of a new international airport at Nong Ngu Hao (later renamed Suvarnabhumi airport). In September 1996, the New Bangkok International Airport Co. ("NBIA"), a state entity managing the project, announced a tender for major land reclamation and landfill contracts. In November 1996, the NBIA received 19 bids, evaluated them, and declared ITD the winner, all within the same month. There was an immediate outcry, and corruption allegations against the NBIA followed. Many losing bidders alleged that the tender's terms of reference had been written to favour ITD. For example, 13 of the 19 were immediately disqualified by a stipulation that the concessionaire must have

⁷¹⁶ Reply on Jurisdiction, paras. 3, 379, 456, 472, 473, 558; **RWS-2**, Witness Statement of Mr Paulo Francisco Zucula, para. 24; **RWS-1**, Witness Statement of Mr Luis Amandio Chauque, paras. 25-27.

⁷¹⁷ **Exhibit C-356**, Printout of Thai Mocambique Logisica S.A. website.

installed five million metres of prefabricated vertical drains within a three-year period before entering the bidding contest.

- 516 The losing bidders lodged formal complaints with the Council of State, which concluded that the tender was unfair. In late 1997, the Council of State and the Attorney General ordered the NBIA to void ITD's contract. Notwithstanding this, the contract went ahead, reportedly because the Ministry of Transport feared a lawsuit from ITD. Furthermore, some of the losing bidders filed charges with the Counter Corruption Committee against NBIA and ITD, after it emerged that ITD's winning bid had been inflated from THB 3 billion to THB 4 billion.⁷¹⁸ The bid inflation charges resulted in criminal proceedings that only concluded in November 2015, when Thailand's Supreme Court confirmed five-year jail sentences for Priti Hetrakul and Pramal Hutasing, who were the NBIA's managing director and deputy director at the time of the award.⁷¹⁹
- 517 Most of ITD's work on Suvarnabhumi was conducted through a consortium named ITO Joint Venture ("**ITO**"), of which ITD owned 40 percent. The other members comprised the Japanese construction conglomerates Takenaka Corporation and Obayashi Corporation. According to contemporary Thai media reporting on bidding rounds conducted in 2000, many international contractors decided against bidding for the contracts because it was apparent that the bidding process would be rigged in favour of politically-well connected local firms. As the Bangkok Post reported on 9 August 2000, "*[m]any giant contractors do not want to risk their money by competing in a contest because they know the result already.*"⁷²⁰
- 518 ITD, through the aforementioned joint venture, built most of the Suvarnabhumi airport, including its foundations, passenger terminal, concourses, runways, aircraft bays, underground transport tunnels, luggage conveyor systems, and electricity pipelines.⁷²¹ ITD also won a THB 2.1 billion (c. USD 51 million) contract to build a hotel at Suvarnabhumi airport without a legally mandated tender, on the basis that an award to ITD would be completed more quickly because it was already working across the project site.

⁷¹⁸ **Exhibit C-357**, The Strait Times, *New Bangkok airport can't take off yet*, dated 17 December 1999.

⁷¹⁹ **Exhibit C-358**, The Nation, *Supreme Court jails pair for 5 years each for Suvarnabhumi bid rigging*, dated 11 November 2015.

⁷²⁰ **Exhibit C-359**, Bangkok Times, *Focus / Corruption at Nong Ngu Hao*", dated 9 August 2000.

⁷²¹ **Exhibit C-360**, Bangkok Post, *CENSURE DEBATE: 'Clear bias' in contracts for new airport*, dated 20 May 2004.

- 519 ITD’s close association with the widespread corruption during the construction of Suvarnabhumi airport damaged domestic trust in the firm. This demonstrates the immediate context of ITD’s business development push in Africa, where it had not previously undertaken public construction works.
- 520 ITD was no stranger to temporary debarments either. In November 1997, the Governor of Bangkok, Bhichit Rattakul, debarred ITD from conducting future public works for the municipality of Bangkok for a period of six months.⁷²² The Governor accused ITD of “*lacking social responsibility*”, citing numerous violations of safety standards during its construction of an elevated trainline, and failing to implement pollution control measures. Mr Karnasuta reportedly lobbied the deputy governor to have this debarment overturned.⁷²³ In February 1988, municipal authorities censured ITD again for failing to improve safety standards at its sites. An ITD spokeswoman contested the claims and said that ITD continued to receive invitations to tender for municipal projects despite the temporary debarment.⁷²⁴
- 521 Further, between 2004 and 2005, Thailand’s Transport Ministry threatened to temporarily debar ITD at least three times for falling behind schedule on the construction of Suvarnabhumi airport.⁷²⁵
- 522 By way of a further example of ITD’s involvement in corruption scandals, in January 1997, Ernesto Maceda, the President of the Senate of the Philippines, accused ITD of committing the “*grandmother of all scams*” in a land reclamation deal in Manila Bay negotiated between 1994 and 1995.⁷²⁶ ITD and its CEO Mr Premchai Karnasuta (who is listed on the Board of Directors of the TML Consortium which is executing the Project) were accused of paying up to PHP 2.8 billion (then USD 107 million) in kickbacks to Filipino politicians to facilitate the transaction. ITD was the leader of a consortium that owned Amari Coastal Bay Corp (“**Amari**”), which in early 1995 won a project to develop 158 hectares of reclaimed land from the Philippines’ Public Estates Authority (“**PEA**”). ITD purchased the land from the PEA at the “*shameless, giveaway*” rate of PHP 1,250 (c. USD 475) per square metre, even though

⁷²² **Exhibit C-361**, Bangkok Post, *TRANSPORT - Italian-Thai says it feels ill-treated*, dated 27 December 1997 and, **Exhibit C-362**, Bangkok Post, *TRANSPORT - City warns Ital-Thai about sites*, dated 3 February 1998.

⁷²³ **Exhibit C-361**, Bangkok Post, *TRANSPORT - Italian-Thai says it feels ill-treated*, dated 27 December 1997.

⁷²⁴ **Exhibit C-362**, Bangkok Post, *TRANSPORT - City warns Ital-Thai about sites*, dated 3 February 1998.

⁷²⁵ **Exhibit C-363**, Business Day Thailand, *NBIA to start on time, ITD receives warning*, dated 9 July 2004; **Exhibit C-364**, The Nation, *Slow-coaches at new airport told they face blacklisting*, dated 13 January 2005; **Exhibit C-365**, Thai News Service, *Thailand: Who will pay for the delay to the opening of the new airport?*, dated 3 August 2005

⁷²⁶ **Exhibit C-366**, Bangkok Post, *Development dispute – Ital-Thai denies fraud in Manila Bay Project*, dated 17 January 1997.

adjacent plots were being sold at PHP 90,000 (c. USD 34,000) per square metre.⁷²⁷ ITD and Mr Karnasuta were accused of paying up to PHP 2.8 billion (then USD 107 million) in kickbacks to Filipino politicians to facilitate the transaction.⁷²⁸ In a Resolution from the Supreme Court of the Philippines dated 11 November 2003, Supreme Court Justice Antonio Carpio strongly condemned the behaviour of Amari and ITD as follows: “[t]he private entity that purchased the reclaimed lands [Amari] for [PHP]1.894 billion expressly admitted before the Senate Committees that it spent [PHP] 1.754 billion [USD 67 million] in commissions to pay various individuals for “professional efforts and services in successfully negotiating and securing” the contract. **By any legal or moral yardstick, the [PHP] 1.754 billion [USD 67 million] in commissions obviously constitutes bribe money.**”⁷²⁹ (Emphasis added)

523 Apart from bribery, ITD was accused of violating various other Filipino laws during the Manila Bay scandal. For instance, Filipino company law dictated that 60 percent of foreign joint-ventures were required to be held by Filipino-owned companies. Ernesto Maceda, the Senate President, alleged that ITD in fact owned 70 percent of the Amari venture, and was therefore “constitutionally barred from acquiring land in the country.”⁷³⁰ PEL notes that this circumstance is redolent of the illegality scenario in *Fraport v. Philippines*.

524 More recently, Mozambique’s integrity due diligence would have identified (or continuing representations, if given for the operation of the concession, would have revealed) that ITD’s CEO and largest shareholder was convicted in criminal proceedings in Thailand and is currently incarcerated for the attempted bribery of a public official. Mr Premchai Karnasuta (who is also listed as TML’s Chairman),⁷³¹ was implicated in a wildlife poaching incident in Thailand and, as part of that incident, he was convicted of attempted bribery of a public official in June 2019.⁷³² The Supreme Court upheld sentences previously handed down by an appellate court for Karnasuta’s illegal poaching of protected wildlife in a nature reserve in 2018. On 8 December 2021,

⁷²⁷ **Exhibit C-367**, *Government Procurement, Bidding and Award of Contracts – The Amari and Benpres Scandals*, The Industrial Anatomy of Corruption, Vol 5, No. 1, January-June 2001, p. 57.

⁷²⁸ **Exhibit C-367**, *Government Procurement, Bidding and Award of Contracts – The Amari and Benpres Scandals*, The Industrial Anatomy of Corruption, Vol 5, No. 1, January-June 2001, p. 57.

⁷²⁹ **Exhibit C-368**, *Francisco I. Chavez, Petitioner, v. Public Estates Authority and Amari Coastal Bay Development Corporation*, Supreme Court Resolution G.R. No. 133250, dated 11 November 2003. (Emphasis added)

⁷³⁰ **Exhibit C-366**, Bangkok Post, *Development dispute – Ital-Thai denies fraud in Manila Bay Project*, dated 17 January 1997.

⁷³¹ **Exhibit C-356**, Printout of Thai Mocambique Logisica S.A. website.

⁷³² **Exhibit C-369**, Khaosod, *Premchai sentenced to jail for bribery in black panther case*, dated 11 June 2019.

Premchai Karnasuta was sentenced to three years and two months imprisonment by the Supreme Court of Thailand.⁷³³

- 525 Finally, Minister Zucula, Mozambique’s key public official dealing with the Project who has submitted two witness statements in these proceedings, not only was not interested in actively pursuing any professional integrity due diligence, but it turns out that he himself is mired in bribery scandals concerning public projects, and has exhibited a willingness to use his public office for personal gain. On 13 September 2021, the Maputo City Court sentenced former Minister Zucula to ten years’ imprisonment for corruption in relation to the purchase of two aircrafts from the Brazilian aerospace company Embraer in 2009.⁷³⁴ In an attempt to circumvent anti-money laundering checks, the intermediary of Minister Zucula incorporated a company in São Tomé e Príncipe, a West African island nation, called Xihivele Consultoria e Serviços Lda (“**Xihivele**”). Xihivele reportedly only served as a vehicle for the bribe.⁷³⁵ Xihivele’ literally means “*steal it*” in Shangana (Zucula’s native language).⁷³⁶ This is only one of numerous corruption and misconduct scandals that had featured Minister Zucula as its main protagonist.⁷³⁷
- 526 By its after-the-fact contrived insistence on its alleged integrity concerns, Mozambique effectively asks the Tribunal to uphold a double standard.

⁷³³ **Exhibit C-370**, Bangkok Post, *Supreme Court sentences Premchai to 3 years 2 months in prison*, dated 8 December 2021.

⁷³⁴ **Exhibit C-355**, AllAfrica, *Mozambique: Embraer Bribe - Ten Years for Former Transport Minister*, dated 13 September 2021.

⁷³⁵ **Exhibit C-371**, Savana, “*Xihivele (rouba-lhe a valer)*”, dated 2 December 2016 and **Exhibit C-372**, Club of Mozambique, “*Watch: Zimba’s bank account closed for suspected fraud – AIM report*”, dated 6 March 2020.

⁷³⁶ **Exhibit C-371**, Savana, “*Zimba e Viegas nas malhas da corrupção internacional*”, dated 2 December 2016.

⁷³⁷ On 25 March 2020, the Judicial Court of the Municipal District of Nhlamankulu in Maputo found Minister Zucula guilty of paying undue remuneration to public officials in 2009. Mr Zucula was sentenced to 14 months in prison, which was commuted to a fine of MZN 1.9 million (approximately USD 26,000 at the time). **Exhibit C-373**, Carta de Moçambique, *A outra “maka” de Paulo Zucula*, dated 21 February 2019 and **Exhibit C-374**, Deutsche Welle, *Moçambique: Ex-ministro dos Transportes condenado a 14 meses de prisão*, dated 25 March 2019. On 4 June 2019, Mr Zucula was arrested in the Odebrecht case and the corrupt payments were made between 2011 and 2014. That case concerned Odebrecht’s participation in the construction of the Nacala airport in Mozambique. **Exhibit C-375**, Notícias, “*Subornos da Odebrecht*”: *Paulo Zucula novamente detido*, dated 5 June 2019, **Exhibit C-376**, AllAfrica, *Mozambique: Zucula Remains in Preventive Detention*, dated 7 June 2019, **Exhibit C-377**, Portal de Angola, *Tribunal mantém prisão preventiva de Zucula*, dated 8 June 2019 and **Exhibit C-378**, *United States of America v. Odebrecht S.A.*, Plea Agreement, United States District Court Eastern District of New York, Case 1:16-cr-00643-RJD, filed 21 December 2016, paras. 61-62.

VII. PRAYER FOR RELIEF

527 For the reasons set out above (and in the SOC and the Reply), Claimant respectfully requests that the Tribunal:

- (a) **DECLARE** that it has jurisdiction over all the claims presented by Claimant in this Arbitration;
- (b) **DECLARE** that all the claims presented by Claimant in this Arbitration are admissible;
- (c) **DECLARE** that Respondent has breached Article 3(2) and/or Article 5 of the Treaty and/or Article 3(4) of the Mozambique-Netherlands BIT;
- (d) **ORDER** that Respondent pay compensation to Claimant in the sum of *USD 156 million*, or such other amount that is just;
- (e) **ORDER** that Respondent pay all the costs incurred by Claimant in connection with this Arbitration proceeding, including the costs of the arbitrators and of the Permanent Court of Arbitration, legal costs and other expenses (including but not limited to those of counsel, experts, consultants, and fees associated with third party funding);
- (f) **ORDER** that Respondent pay pre- and post- award interest at a rate to be determined by the Tribunal on any compensation and/or arbitration costs ex and/or legal costs awarded to Claimant; and
- (g) **ORDER** such further relief as the Tribunal considers appropriate.

Respectfully submitted on 7 February 2022 by

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