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

CLAIMANT'S POST-HEARING BRIEF

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I. INTRODUCTION

Claimant submits its post-hearing brief pursuant to Procedural Order No 7.[1]

1. The hearing both confirmed and bolstered Claimant's case. Witness and expert testimony established that PEL is an experienced company that presented a game-changing project to Mozambique. Mozambique saw "*a lot of potential*" in PEL as "*a development partner*" for a rail corridor and deep-water port.[2] PEL expended millions to prove up its concept pursuant to the parties' contractual bargain on the understanding that they would mutually move towards a direct award of the concession. Only then, based upon an admitted unilateral, *post hoc* re-interpretation of the MOI language, did Mozambique stonewall Claimant, give it the run around, and co-opt PEL's intellectual property as the basis for a public tender. Then, on 16 April 2016, Respondent cancelled its ongoing tender and commenced negotiations for a concession agreement with PEL because it deemed it to be in "*the national strategic interest*" to give PEL a direct award. Only two weeks later, under the influence of unnamed "*stakeholders*", Mozambique reversed course again, cancelled the direct award procedure it had just commenced with PEL, and reinstated the tender. These actions are textbook breaches of the BIT's FET standard and require compensation.

2. The hearing only diminished Respondent's written defences. Just as importantly, testimony at the hearing underscored the lack of credibility in two of Mozambique's experts and all of its fact witnesses. For instance, Mr Mendonça received over USD 20 million from Mozambique for past work and admitted to pending tender applications with Mozambique.[3] Ms Muenda "*did not deem*" her decade of engagements as a legal expert for Mozambique and Dorsey & Whitney as well as her prior counsel work for the Respondent[4] "*exceedingly relevant*" to her role as an independent expert.[5]

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[1] The Tribunal should not understand the absence of specific facts or legal arguments in this pleading as any waiver or concession. All capitalised terms, acronyms, and abbreviations, unless otherwise specified, have the meanings set forth in Claimant's previous pleadings. Claimant's references to pleadings are also references to legal authorities, expert reports, witness statements, and factual exhibits cited therein, as the page limit was insufficient to list each individual reference in the footnotes. Those pleadings are Claimant's Notice of Arbitration dated 20 March 2020 ("**NoA**); Claimant's Statement of Claim dated 30 October 2020 ("**SoC**"); Claimant's Reply on the Merits and Response to Objections to Jurisdiction dated 9 August 2021 ("**Reply**"); Claimant's Rejoinder on Objections to Jurisdiction dated 7 February 2022 ("**Rej. Jx**."); and Claimant's Additional Submission on Quantum dated 30 May 2022 ("**Cls. Add'l Quant**.").

[2] Tr. 573:8-573:22 (Mr Zucula: "*We looked at PEL as a development partner which would, together with Mozambique, develop a corridor for Macuse. . . . It was a partner where we saw a lot of potential to, together, do things for the benefit of Mozambique. . .*").

[3] Tr. 981:4-982:10.

[4] Tr. 1691:17-1696:3.

[5] Tr. 1695:14-20.

3. Similarly, both Mr Chaúque and Mr Zucula's testimony raised numerous red flags. Based upon Mr Chaúque's lack of English proficiency,[6] the incomprehensible Portuguese in his written statements,[7] and the fact that he did not even adequately review his second witness statement,[8] it is doubtful whether Mr Chaúque, a current civil servant,[9] had much, if any, input into or control over the contents of his written testimony. Indeed, he admitted his written testimony was the result of an "*attempt to bring a consensual text*".[10] Mr Zucula's credibility is also dubious. Not only does he have a track record of corruption and money laundering convictions,[11] but given that several of these criminal proceedings are ongoing, Mr Zucula's freedom is entirely reliant upon the Republic's good graces.[12]

II. THIS TRIBUNAL HAS JURISDICTION; PEL'S CLAIMS ARE ADMISSIBLE

A. Rationae Personae: PEL Is an Investor under BIT Art. 1(c)

4. As a company incorporated in India, PEL satisfies the definition of "*investor*" in BIT Articles 1(c) and 1(a).[13] Respondent incorrectly claims that to satisfy the definition of "*investor*" a company must also have made an "*investment*".[14] Respondent's attempt to add extra-textual requirements to the BIT definition is unfounded. Its conflation of jurisdiction *rationae personae* and jurisdiction *rationae materiae* is unsupported by the BIT and international law.[15]

5. Respondent incorrectly claims that PEL waived its right to bring Treaty claims.[16] Yet, any waiver of Treaty rights must be explicit.[17] Here there is no evidence of assignment or waiver of any of PEL's rights, let alone an explicit waiver of its Treaty rights.[18]

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[6] *See, e.g.*, Tr. 727:16-19; 731:20-24; 733:18-23.
[7] *See, e.g.*, Tr. 722:10-734:8.
[8] Tr. 733:20-735:11.
[9] Tr. 720:13-23.
[10] Tr. 730:16-18.
[11] *See, e.g.*, CLA-356; Reply ¶¶ 55-56; Rej. Jx. ¶¶ 22, 507, 525.
[12] Tr. 696:20-697:1 (noting the criminal proceedings are "*ongoing*"). Mr Zucula also continues to receive payments from Respondent as a retired civil servant. *See* Tr. 551:25-552:2. Mr Zucula's designation of the Republic's lawyers as "*my lawyers*", and the Republic's Counsel's approval of Mr Zucula's withdrawal of his bribery allegations is also troubling. *See* Tr. 705:14-24; 707:3-5.
[13] CLA-1 Art. 1(c) ("*any national or company of a Contracting Party*"), Art.1(a) (defining "*Companies*" as "*Corporations, firms, and associations incorporated or constituted or established under the laws in force in any part of either of the Contracting Party*"). *See also* NoA ¶ 78; SoC ¶ 252-253; Reply ¶¶ 496-497; Rej. Jx. ¶ 197.
[14] *See, e.g.*, Statement of Defence ("**SoD**") ¶¶ 427-438; Respondent's Rejoinder on the Merits and Reply to Objections on Jurisdiction ("**Rej. Mer**.") ¶¶ 871-875.
[15] *See, e.g.*, Reply ¶¶ 498-501; Rej. Jx. ¶¶ 199-200.
[16] *See, e.g.*, SoD ¶¶ 442-450; Rej. Mer. ¶¶ 876-900.
[17] Reply ¶¶ 502-508; Rej. Jx. ¶¶ 201-217; H-1 p. 144; Tr. 127:24-129:19.
[18] Reply ¶ 503; Rej. Jx. ¶¶ 201; CWS-3 ¶¶ 128-134; CWS-5 ¶¶ 17-21; H-1 p. 143; Tr. 127:24-129:19.

B. Rationae Materiae: PEL Made an Investment under BIT Art. 1(b)

6. The starting and ending point to determine if PEL made a qualifying "*investment*" is BIT Article 1(b). PEL's investment in Mozambique fits squarely within that provision.

1. PEL's Investment Meets the Definition of "Investment" in the BIT

7. First, BIT Article 1(b) expansively defines investment to include "*every kind of asset established or acquired*" before providing a non-exhaustive list of examples including "*rights . . . to any performance under contract having a financial value*" and "*business concessions conferred by law or under contract*".[19] Here, PEL's investment in Mozambique included: (i) contractual rights under the MOI that had financial value, including the right to a direct award of the concession and the right of first refusal to implement the project; (ii) the direct award of the concession granted by the Council of Ministers; (iii) valuable know-how transferred to Mozambique with PEL's concept and the proprietary knowledge in the PFS; and (iv) funds contributed for the Preliminary Study and the PFS.[20] These fall under the broad chapeau of Article 1(b). Further, under the unity of investment theory, the Tribunal should adopt a holistic approach and consider the operation of PEL's entire investment.[21]

8. All of Respondent's objections that PEL's investment does not satisfy the BIT definition of "*investment*" are legally and factually unfounded and should be summarily rejected. The investment was within the territory of Mozambique—it included contractual rights with the State, funds paid in Mozambique for the Preliminary Study, funds expended for the PFS which included work done in Mozambique, and intellectual property and know-how provided to the State.[22] Further, Respondent's proposed interpretation of Article 1(b) as a hierarchy[23] or an exhaustive list[24] is wrong and contradicted by the plain wording of the BIT, the VCLT, and general principles of investment law.[25] Respondent's reliance upon jurisprudence interpreting the ICSID Convention[26] should also be rejected; but even if the *Salini* factors were relevant to a non-ICSID case (*quod non*) they are squarely met here.[27]

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[19] CLA-1 Art. 1(b)(iii) and 1(b)(v). *See also* NoA ¶¶ 79-80; SoC ¶¶ 254-256; Reply ¶¶ 513-539; Rej. Jx. ¶¶ 218-241. *See also* H-1 pp. 107-108; Tr. 106:25-110:4.
[20] NoA ¶ 81; SoC ¶¶ 257-263; Reply ¶¶ 510, 513-534; Rej. Jx. ¶¶ 242-266.
[21] SoC ¶ 255; Reply ¶¶ 532-533; Rej. Jx. ¶¶ 267-271; Tr. 108:15-23.
[22] SoC ¶¶ 261-263; Reply ¶¶ 535-539; Rej. Jx. ¶¶ 272-278.
[23] Rej. Mer. ¶¶ 809-812.
[24] *See, e.g.*, Tr. 185:4-186:9.
[25] Rej. Jx. ¶¶ 226-241.
[26] *See e.g.*, Tr. 192:18-193:18.
[27] SoC ¶¶ 274-276; Reply ¶¶ 574-590; Rej. Jx. ¶¶ 304-320.

9. PEL's investment did not require a final, signed concession agreement to qualify as an "*investment*" under the BIT.[28] Nor are PEL's MOI rights "*contingent*" or a "*mere option*". The MOI was binding as a matter of Mozambican law,[29] with mandatory language throughout.[30] The two contractual conditions precedent to PEL's right to a direct award (which are legally distinct from contingent rights[31]) were fulfilled by June 2012, meaning that *all* of PEL's MOI rights had fully vested before the first FET breach—the CFM stonewall.[32] And there was nothing "*contingent*" about the Council of Ministers' express grant of a direct award to PEL on 16 April 2013.[33]

10. Second, PEL's investment was made in accordance with Mozambican law.[34] The BIT contains no registration requirement.[35] Ms Muenda agreed that "*it is not mandatory to register as a foreign investor for purposes of the Foreign Investment Law.*"[36] In any event, given Mozambique endorsed PEL's investment, it cannot retroactively claim PEL had to register.[37]

11. There was also nothing illegal or *ultra vires* in Mr Zucula signing the MOI. The MTC had full legal authority to enter into the MOI.[38] Mozambican law permits this type of contract.[39] Mr Chaúque agreed that "*only contracts that entail public expenditure are subject to ... approval from the administrative court*", and the MOI "*did not entail any public expenditure*".[40] In any event, Minister Zucula signed the MOI "*On Behalf of Government of Mozambique*".[41] Thus, any failure by Mr Zucula to obtain necessary domestic approvals is not a defence to international law liability.[42]

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[28] Reply ¶¶ 516-533; Rej. Jx. ¶¶ 244-245, 258.
[29] Reply ¶¶ 175-176, 591-609, 764, 979, 999-1004; Rej. Jx. ¶¶ 242-254, 321-347; Tr. 69:23-70:25; 1575:6-10 (Prof Medeiros: "*Preliminary contracts are also binding. The law does not assign binding nature merely to final contracts...*").
[30] *See, e.g.*, Reply ¶¶ 175-176, 764; Rej. Jx. ¶¶ 83, 87.
[31] *See, e.g.*, Reply ¶¶ 599-609; Rej. Jx. ¶¶ 16, 246-254, 329-347.
[32] Reply ¶¶ 267, 1084; Rej. Jx. ¶¶ 251-254, 258, 321-347; Tr. 80:3-7; 109:14-110:1; 1581:22-1582:2 (Prof Medeiros: "*At this second moment, from that point in time when the direito de preferência is exerted, the State is bound to progress toward a concession contract*."). *See also infra* ¶¶ 46-54.
[33] C-29; Reply ¶ 362. *See also infra* ¶¶ 55-62.
[34] SoC ¶¶ 264-272; Reply ¶¶ 540-573; Rej. Jx. ¶¶ 279-303.
[35] Reply ¶¶ 559-566; Rej. Jx. ¶¶ 297-299.
[36] Tr. 1689:7-17; 1699:18-22 (Ms Muenda admitting that no registration is needed). *See also* Tr. 577:22-25 (Mr Zucula admitting that it is not necessary for investors to go to the CPI (*i.e.*, register) before investing in Mozambique); *See also* Reply ¶¶ 569-570; Rej. Jx. ¶¶ 297-303.
[37] Reply ¶ 567; Rej. Jx. ¶ 300.
[38] Reply ¶¶ 557-558, 999-1000; Rej. Jx. ¶¶ 291-296, CER-3 § 6.
[39] CER-3, Executive Summary ¶¶ A1-A2 and § 2.
[40] Tr. 744:21-745:20 (Mr Chaúque admitting that no administrative court approval was required for the MOI). *See also* CER-6 Executive Summary ¶¶ J-K, §§ 3.5-3.6.
[41] C-5A at 6. This language is also present in Respondent's English version of the MOI. *See* R-2 at 8.
[42] CLA-177 Art. 7 ("*The conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity,* ***even if it exceeds its authority or contravenes instructions***.") (emphasis added); RLA-32 ¶ 346

2. PEL's Temporary Debarment Has No Impact on this Tribunal's Jurisdiction or the Admissibility of PEL's Claims

12. Respondent's arguments stemming from PEL's temporary debarment, whether related to jurisdiction or admissibility, are without merit and should be wholly rejected.[43]

13. The temporary debarment is entirely irrelevant to jurisdiction.[44] Legality for purposes of jurisdiction is assessed at the investment's inception.[45] Here, PEL's investment commenced with its funding of the Preliminary Study in early 2011 and continued with the signing of the MOI on 6 May 2011.[46] The temporary debarment occurred ***after*** these dates. Thus, even if (*quod non*) PEL's failure to voluntarily disclose the temporary debarment during the PFS approval in 2012 or during the tender process in 2013 somehow violated Mozambican law,[47] that would have no impact on this Tribunal's jurisdiction.

14. Nothing related to the temporary debarment impacts the admissibility of PEL's claims either. For admissibility to be impacted, Mozambique would need to show that PEL had a legal duty to disclose the temporary debarment and that the failure to disclose was material.[48] Neither condition is satisfied here.

15. In any event, Respondent misconstrues and overstates the temporary debarment and the subsequent Indian litigation, making a mountain from a molehill.[49] After PEL acknowledged a calculation error in its bid, it declined a letter of award for the miscalculated price and forfeited its circa USD 3 million dollar bid security.[50] On 20 May 2011, *after* the MOI was executed, NHAI imposed a 12-month debarment that applied only to NHAI projects; no other agency in India was involved.[51] PEL challenged the debarment in civil court as it felt the debarment was overly harsh as the bid documents had specified that the penalty for declining an award was forfeiting the security, and PEL had willingly done that.[52] No criminal action was ever taken against PEL; PEL was never accused of fraud. The Indian courts never found

("*Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.*"); CLA-286 ¶ 146; Reply ¶¶ 552-556.

[43] SoC ¶¶ 264-272; Reply ¶¶ 543-550, 664-717; Rej. Jx. ¶¶ 398-511.

[44] Reply ¶¶ 544-550; Rej. Jx ¶¶ 477-504.

[45] Reply ¶¶ 546-547, 666; Rej. Jx. ¶¶ 286-290, 477-480.

[46] SoC ¶ 257; Reply ¶¶ 548-550; Rej. Jx. ¶¶ 282-290.

[47] SoC ¶¶ 266-270; Reply ¶¶ 548-550, 694-703; Rej. Jx. ¶¶ 472-476, 485-500.

[48] Reply ¶¶ 667, 694-706; Rej. Jx. ¶¶ 501-502.

[49] Reply ¶¶ 669-689; Rej. Jx. ¶¶ 421-434, 465-467.

[50] Reply ¶¶ 670-672; Tr. 110:9-22, 163:19, 165:8; C-326; C-327; C-328; C-330.

[51] *See, e.g.*, RLA-20 ¶ 24 ("*It is not a debarment qua any other party*"); Reply ¶ 675.

[52] SoC ¶ 266(c); Reply ¶¶ 674-679; C-195.

PEL to be unreliable or untrustworthy.[53] Thus, Respondent's claims that the Supreme Court "*convicted*" PEL or "*held*" that PEL was unreliable or untrustworthy are false.[54] Those statements are not the courts' findings, but rather summaries of ***NHAI's*** conclusions.[55]

16. The debarment had limited impact, if any, on PEL's business. Other Indian public agencies continued to contract with PEL during the debarment to the tune of USD 500 million, and NHAI recommenced working with PEL as soon as the debarment ended.[56] As Respondent's expert acknowledged, it "*naturally or logically follows*" that none of the many agencies that continued to work with PEL considered the debarment an impediment.[57]

17. There is no evidence that Mozambique ever requested information about PEL's temporary debarment at any time, directly or indirectly.[58] The MOI was signed before the debarment. The PFS approval was in June 2012, after the debarment ended.[59] The tender documentation in 2013 asked about current sanctions, not past ones.[60]

18. Nothing in Mozambican law required PEL to voluntarily disclose the debarment.[61] Mr Baxter testified it was Mozambique's responsibility to "*do due diligence*" or "*ask those specific questions*".[62] Mr Ehrhardt and Prof. Medeiros agreed.[63] Mr Zucula admitted that the MTC was "*comfortable*" that it had "*asked PEL all the questions* [it] *needed to sign the MOI*".[64] Indeed, given Mozambique's history with ITD and others, there is no evidence to suggest that Mozambique would have acted differently had it known about the debarment.[65]

19. In sum, Respondent's claim boils down to PEL not voluntarily disclosing publicly available information[66] that Mozambique never asked for and that Mozambique failed to demonstrate it would have acted upon. This is nowhere near the type of wrongdoing in the cases upon

[53] Reply ¶¶ 684, 690; Rej. Jx. ¶¶ 423-427, 434.
[54] *See, e.g.*, SoD ¶¶ 2, 68-72, 109, 123, 167, 195-197; Rej. Mer. ¶¶ 7.11, 195, 379.
[55] RLA-21 ¶ 24; Rej. Jx. ¶¶ 424-427. Further, as Respondent touted at the hearing, the "*factual statement*" that it submitted as a purported legal opinion came from an attorney who represented NHAI in the court cases and thus can hardly be seen as an impartial opinion. Tr. 204:20-25.
[56] Reply ¶¶ 682-689.
[57] Tr. 1097:20-25. *See also* Tr. 1099:19-23.
[58] Reply ¶¶ 699, 702, 704-706; Rej. Jx. ¶¶ 445-447, 475-476, 484.
[59] C-11.
[60] Rej. Jx. ¶¶ 486-500; Reply ¶ 702; CWS-3 ¶¶ 179-180.
[61] Reply ¶ 694-703; Rej. Jx. ¶¶ 442-447, 463-464, 472-476, 501-504.
[62] Tr. 876:4-877:12.
[63] RER-11 ¶ 16; CER-6 ¶¶ Q, 70-70.3.
[64] Tr. 576:4-7.
[65] Rej. Jx. ¶¶ 484-500, 513. Indeed, Mozambique's decision to contract with ITD suggests the opposite. *See* Rej. Jx. ¶¶ 512-524; H-2 pp. 120-121.
[66] *See, e.g.*, RER-11 ¶ 16 ("*A cursory search would have revealed that PEL had been blacklisted . . .*").

which Respondent relies.[67] In these circumstances, the "*harshness of the sanction of placing the investment outside of the protections of the BIT*" is unwarranted.[68]

3. Respondent Has Withdrawn Its Bribery Allegation

20. At the hearing, Mr Zucula "*remove*[d]" his accusation of "*a bribery attempt*" by Mr Daga.[69] Accordingly, Respondent's allegation of bribery should be dismissed.

C. Rationae Temporis: This Dispute Falls under Article 15(2) of the BIT

21. Article 15(2)'s sunset clause extends the BIT's protections for 15 years to investments made prior to 21 March 2020.[70] PEL made its investment in 2011.[71] Respondent's *ratione temporis* objection conflates jurisdiction *ratione temporis* with jurisdiction *ratione materiae* and should be rejected.[72] The doctrine of laches is also inapplicable to this dispute as Respondent's own legal authority admits: "*forms of equity known to Anglo-American common law do not form part of the corpus of public international law*".[73]

D. This Tribunal's Jurisdiction and Authority Are Unfettered

22. As this Tribunal has already held on at least three occasions, the contract arbitration has no impact on this Tribunal's ability to decide its own jurisdiction.[74] Nothing in the MOI's arbitration clause impedes this Tribunal's ability to decide the merits of PEL's treaty claims.[75]

III. MOZAMBIQUE IS INTERNATIONALLY RESPONSIBLE FOR THE ACTIONS OF THE COUNCIL OF MINISTERS, THE MTC, AND CFM

23. "[T]*he Council of Ministers is the [G]overnment under Mozambican law*".[76] The MTC is a State Organ.[77] Mr Zucula was the Minister over the MTC at the relevant time.[78] As a matter of international law, Mozambique is responsible for all actions by the Council of Ministers and the MTC and for Mr Zucula's actions in his capacity as Minister, even if those actions contravened domestic law or exceeded their delegated authority.[79]

[67] Reply ¶¶ 708-711; Rej. Jx. ¶¶ 405-420, 453-461, 481-483; H-2 p. 118.
[68] CLA-314 ¶ 404; *see also id.* ¶ 396; CLA-315 ¶ 151; H-2 p. 119; Tr. 115:16-117:14.
[69] Tr. 706:13-14.
[70] CLA-1 Art. 15(2).
[71] SoC ¶¶ 280-283; Reply ¶¶ 623-627; Rej. Jx. ¶¶ 363-366.
[72] Reply ¶ 624; Rej. Jx. ¶ 362.
[73] RLA-80 ¶ 165. *See also* Reply ¶¶ 625-627; Rej. Jx. ¶¶ 363-366.
[74] Procedural Order No 6 *bis*; Procedural Order No 4; Tribunal's Correspondence A39, dated 12 April 2022.
[75] *See, e.g.*, SoC ¶¶ 288-292; Reply ¶¶ 630-663; Rej. Jx. ¶¶ 367-397.
[76] Tr. 667:4-7. *See also* CLA-48 Art. 200.
[77] CLA-177 Art 4.
[78] Tr. 675:14-23; C-5A at 6; C-5B at 6.
[79] *See, e.g.*, CLA-177 Art. 7. *See also id.* Art. 3 and commentary.

24. Mozambique is also internationally responsible for CFM's actions under ILC Articles 5 and 8.[80] Domestic corporate law principles such as "*piercing the veil*" [81] are inapposite.

25. Under Article 5, a State is internationally responsible for the actions of any entity "*empowered by the law of that State to exercise elements of the governmental authority ... provided the ... entity is acting in that capacity in the particular instance*".[82] Here, in addition to its general function as "*the government's arm for railways and ports*,"[83] Mozambique delegated governmental authority to CFM when it designated CFM as PEL's public partner for the PPP. In Mozambique, the purpose of a PPP is to provide goods or services that the State is otherwise "*obliged to make available*".[84] In its 18 June 2012 letter, the MTC informed PEL that it had designated CFM as the public partner for the PPP project with PEL.[85] The public partner in the PPP can either be the State or a public entity that "*stands in the shoes of the government for that purpose*".[86] Mr Zucula explained that when the Government decides a project is a "*number one priority* [then] *CFM must get onboard*".[87] Indeed, CFM as the public partner must have always been the plan, as Mr Chaúque testified that the MTC did not even have a budget to "*make an economic offer*" to PEL to form a joint venture to implement the Project.[88]

26. Thus, CFM's subsequent actions post-designation—its blatant misrepresentations to Mr Daga[89] and its refusals to even discuss terms with PEL for months[90]—took place in its capacity as the State's designated public partner and fall squarely within Article 5.

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[80] CLA-177.
[81] *See, e.g.*, Tr. 157:4-14 (Respondent's counsel referring to "*piercing the veil*" and "*alter ego*" theories of US Corporate law).
[82] CLA-177 Art. 5.
[83] Tr. 611:15-19 (Mr Zucula). *See also* Tr. 1584:13-1585:1 (Prof Medeiros explaining that SOEs like CFM are the "*arm or hand of the State*.").
[84] CLA-65A Art. 2.2(a).
[85] C-11. *See also* Tr. 497:6-14 (Mr Daga: "[I]*t was told by Ministry of Transport to me that see, you have to go and negotiate with CFM to become SPV partner. So I thought that ... CFM has been nominated by the government as SPV partner, which is required. In the public-private partnership government has to nominate some company, some entity, to participate in the project. So I thought CFM is one which has been nominated by the government*."); Tr. 655:2-7 (Mr Zucula agreeing that PEL understood "*that they should enter into a negotiation with CFM as a designated partner under the PPP structure*"); Tr. 659:19-23 (Mr Zucula agreeing that "*The PPP Law states that you designate CFM to step into the shoes of the government. You are meant to designate CFM. You have to act*."); Tr. 654:4-7.
[86]Tr. 644:23-645:11 (Mr Zucula agreeing that an SOE appointed by the State to be the Public Partner "*stands in the shoes of the government*" for the purpose of the PPP). *See also* CLA-65A (definition of "*Public Partner*").
[87] Tr. 650:1-8.
[88] Tr. 840:4-9.
[89] CWS-1 ¶¶ 85-86, 99; CWS-3 ¶¶ 88-101; SoC ¶ 369.
[90] CWS-1 ¶¶ 87-89; CWS-3 ¶¶ 88-101; Reply ¶¶ 799, 802; Rej. Jx. ¶¶ 15, 178-187.

27. Alternatively, Mozambique is responsible for CFM's actions under Article 8 because they were "*on the instructions of, or under the direction or control of*" Mozambique.[91] Per CFM's enabling statute, admitted during Mr Chaúque's examination,[92] CFM acts in subordination or under the aegis of the MTC.[93] Mozambique appoints all but one of CFM's board members.[94] Mozambique approves CFM's activity plans, program contract, and budget.[95] CFM cannot form a joint venture without Mozambique's approval.[96] "*CFM must get onboard*" priority Government projects.[97] Thus, CFM's actions (and omissions) during negotiations with PEL were conducted on Mozambique's instructions and under its direction or control.[98]

IV. MOZAMBIQUE VIOLATED THE TREATY

28. For a summary of the facts relevant to the dispute, Claimant refers the Tribunal to Claimant's chronology, C-380.[99] The facts are also covered extensively in Claimant's pleadings.[100] Due to space limitations, Claimant will only discuss the facts most relevant to establishing Respondent's two primary FET breaches. Those same facts also support Claimant's claims for expropriation and violation of the umbrella clause.[101]

A. PEL Brought Mozambique a Game-Changing Concept

29. PEL brought Mozambique a game-changing project concept. Mozambique's existing coal evacuation infrastructure was "*unreliable and inefficient*."[102] While Mozambique may have had some hazy future idea to build some sort of port somewhere in the Macuse area and knew that it would be beneficial to evacuate more coal from its reserves, there is no evidence that Mozambique had already thought of anything like PEL's proposed rail-to-deep water port,

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[91] CLA-177 Art. 8 ("*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*.").
[92] Tr. 792:17-793:9 (admitting Decree No 40/94 as CLA-353).
[93] CLA-353 Art. 4 ("*Os CFM . . . exercem a sua actividade na subordinação do* [MTC]"). *See also* Tr. 792:11-25.
[94] CLA-353 Art. 5 (appointment of CFM board); Tr. 611:15-19.
[95] CLA-353 Arts. 24, 25, 26, 27.
[96] CLA-353 Art. 3(2); Tr. 795:1-7.
[97] Tr. 650:1-8.
[98] Indeed, according to Mr Chaúque, MTC's project study office was "*supposed to take it forward*" and assist with the SPV negotiations. Tr. 787:12-790:3
[99] The sequence of events in the chronology appears to be mutually agreed between the Parties. At the hearing, Respondent promised the President that it would review C-380 and confirm if it agreed with its contents. Tr. 211:23-212:9. While Respondent did not explicitly agree, it implicitly did so during Mr Daga's examination when it extensively relied upon the Chronology to set forth the sequence of events related to the dispute. *See* Tr. 500:2-507:17.
[100] *See, e.g.*, NoA ¶¶ 10-76; SoC ¶¶ 50-245; Reply ¶¶ 110-492; Rej. Jx. ¶¶ 58-193.
[101] *See, e.g.*, SoC ¶¶ 398- 407, 419–423; Reply ¶¶ 901-937, 971-993. For a discussion of the legal aspects of the expropriation and umbrella clause claims, *see, e.g.*, SoC ¶¶ 380-397; 408-418; Reply ¶¶ 897-900, 942-970.
[102] Tr. 1137:11-24 (Mr Sequeira). *See also, e.g.*, Tr. 1165:22-1166:3; CWS-1 ¶¶ 12, 14; CWS-3 ¶¶ 4.

Tete-to-Macuse corridor.[103] Mr Chaúque testified that Respondent's plans had no "*reference to the location*" of the port or a rail line.[104] Mr Zucula admitted that the government strategy Respondent has repeatedly cited in RLA-15 was "*not the Macuse corridor*" but a line "*more focused on farming products*" "*that could also be used for coal*".[105] Indeed, Mozambique's arguments in this case acknowledge that the Project was PEL's concept, as PEL wouldn't have been entitled to a 15% scoring bonus under the PPP Law otherwise.[106]

30. PEL's Project was in Mozambique's national strategic interest.[107] As Mr Mendonça said, only "*the most important projects go to the Council of Ministers*".[108] And Mr Zucula brought the Project before the Council of Ministers "*a number of times*".[109]

B. The MOI Granted PEL a Right of First Refusal to Implement the Project, the Right to a Direct Award of the Concession, and Exclusivity

31. The MTC signed the MOI based upon the results of the PEL-funded Preliminary Study.[110] The MOI provided that PEL would further prove up its valuable concept in exchange for the right to a direct award of a concession if the MTC approved the PFS and PEL exercised its right of first refusal to implement the Project.

1. PEL's English MOI Is an Authentic Original Document; Respondent's English MOI Raises Too Many Questions

32. PEL's English MOI (C-5A) is an authentic original document. Mr Zucula confirmed his wet ink signature.[111] The Tribunal felt the embossed seal overlaying that signature.[112] Respondent could not explain how "*Patel could have accessed the seal*".[113] The chain of custody is undisputed—Claimant produced scans of both documents into PEL's system only three days after execution without any hint of alteration or tampering.[114] Myriad other similarities with PEL's undisputed Portuguese MOI cumulatively establish a virtual certainty that PEL's

[103] *See, e.g.*, SoC ¶¶ 3, 7; CWS-3 ¶¶ 10, 12; Tr. 266:25-267:9; 270:2-5; 277:3-18 (Mr Daga discussing early conversations with Mozambican officials).
[104] Tr. 741:1-7.
[105] Tr. 561:2-562:10. *See also* Tr. 557:12-558:13 (Mr Zucula stating that the government's plans to build another port were to enhance trade from all of the SADC countries with Asia).
[106] Tr. 742:13-743:2. *See also* Rej. Jx. ¶¶ 75-77.
[107] C-29.
[108] Tr. 1029:6-7.
[109] Tr. 648:4-676:11 (Mr Zucula testifying that the Project would have gone before the Council of Ministers "*a number of times*").
[110] SoC ¶¶ 81-85; CWS-1 ¶ 33; Tr. 289:22-290:3; 293:1-294:9.
[111] Tr. 586:24- 587:3 ("*This signature is mine.*"); *See also* Tr. 758:10-13 (Mr Chaúque confirming the Minister's signature).
[112] Messrs. LaPorte and Songer agreed the seal appears authentic. Tr. 1453:8-12; 1462:15-19 (Mr LaPorte); Tr. 1551:23-1552:4 (Mr Songer). *See also* SoC ¶¶ 130; Reply ¶¶ 75, 88.
[113] Tr. 766:14-19 (Mr Chaúque responding to question from Prof. Tawil).
[114] *See, e.g.,* Reply ¶¶ 82-83; CWS-3 ¶¶ 38-39; Tr. 1465:17-25 (Mr LaPorte); Tr. 1488:14-119; 1489:2-5; 1511:1-7 (Mr Lanterman).

English MOI is authentic.[115] Those include undisputed[116] findings that the two have identical paper, printer, toner, signature ink, and stamp ink[117] with no sign of manipulation, page substitution or any other tampering.[118]

33. Conversely, without an original document, there are simply too many questions about Mozambique's English MOI (R-2) for the Tribunal to rely upon it. First, Mr Daga is adamant that Mozambique's English MOI is "*not the MOI which I have signed*."[119] Second, Mozambique has failed to produce an original that it was required by law to preserve.[120] Mr Chaúque said that the originals were "*filed in the minister's office*".[121] Mr Zucula was adamant that "*there has to be an original copy somewhere*".[122] Yet after "*two years*" of searching[123] Mozambique claims it cannot locate the original.[124] It has not even provided the Tribunal with the "*dossier*" on its search.[125] Adverse inferences are appropriate.[126]

34. Third, Respondent has not even provided the Tribunal with the best evidence in its possession. It did not produce the "*paper copies*" Mr Chaúque allegedly found,[127] even though they could provide more information.[128] Respondent has also failed to evidence "*when they were scanned into any system*", suggesting they were not scanned near the date of execution.[129]

35. Fourth, there are troubling discrepancies between R-2 and the other MOI versions. The font on every page except the cover is an entirely different typeface and size.[130] There is a large gap just below the clause Respondent challenges, "*far larger than any gap in the Portuguese MOI*."[131] The scan quality is significantly degraded compared to the scan quality of Mozambique's Portuguese MOI. Scans created at the same time from copies made at the same

[115] SoC ¶¶ 130-132; Reply ¶¶ 74-75, 86-89; Tr. 1452:13-17; 1469:18-23 (Mr LaPorte).
[116] Mr Songer does not dispute Mr LaPorte's analysis of any of these factors. RER-12 ¶ 5; Tr. 1558:8-12; 1535:3-17 ("*I do agree with Mr LaPorte's findings that PEL's English and Portuguese wet ink versions appear to be original.*").
[117] Reply ¶ 88; CER-4 § E; RER-12 ¶ 5; Tr. 1455:20-24; 1456:11-13; 1457:20-25; 1459:4-8; 1461:24-1462:5.
[118] SoC ¶ 130; Reply ¶¶ 75, 88; Tr. 1465:7-10.
[119] Tr. 438:22-23. *See also* Tr. 434:8-10; 434:17-18; 437:9-21.
[120] CER-6 § 6; Reply ¶¶ 90-92; Decision on Claimant's Document Production Schedule ("DPS") at 8.
[121] Tr. 751:10-12. *See also* Tr. 746:18-20; 751:7-752:18 (Mr Chaúque stating "*we couldn't find the originals*").
[122] Tr. 582:21-583:13. *See also* Tr. 584:3-5 (Mr Zucula confirming that "*originals go to the archives*").
[123] Tr. 752:6-18. *See also* Tr. 761:1-7.
[124] Tr. 752:6-18.
[125] Tr. 761:6-13. *See also* Tr. 751:7-752:18; 761:1-762:7.
[126] PO 1 ¶ 79; Reply ¶¶ 31-40; DPS at 8-9.
[127] Tr. 751:17-23.
[128] Tr. 1482:7-14.
[129] Tr. 1501:3-12 (Mr Lanterman: "*I was not given access to any servers maintained by Mozambique … I asked for access to computers of both Mozambique and PEL, and I was told that they were not available.*"). *See also* Tr. 1466:1-4 (Mr LaPorte).
[130] SoC ¶ 117; CER-1 ¶¶ 22-23, 56-61; CER-4 ¶¶ 11, 79; Tr. 1470:23-1471:8 (Mr LaPorte); Tr. 1518:2-1519:3 (Mr Lanterman).
[131] Tr. 1470:11-19 (Mr LaPorte). *See also* CER-1 ¶¶ 56-57; CER-4 ¶¶ 66, 79, 83.

time should be similar in quality. As Mr LaPorte testified, this difference in scan quality raises additional questions.[132] And the Tribunal cannot see any "*crookedness in the printing*" or other evidence of embossing on the scan to verify it as a final, official document.[133] In short, absent an original document, it is impossible to "*do a proper examination to determine the authenticity*" of Mozambique's English MOI's.[134]

36. Respondent's new "*mistake*" theory[135]—that both English MOIs were signed on 6 May 2011—is highly implausible. First, there is no evidence of a prior draft with a Clause 2.1 anything like Respondent's English MOI. Second, it assumes the person printing the execution copies of the MOI printed two different computer files. This is a very different scenario than a "*carriage return*" between printing the same file twice, as apparently happened with the Portuguese MOIs.[136] Third, it assumes the staff preparing the copies did not notice and that all three signatories initialled every single page of the original MOIs and yet somehow not one of them noticed "*two different kinds of fonts*" or the fact that Mozambique's English version was two pages longer then PEL's.[137] Fourth, it assumes that PEL just happened to walk away with the English version that matched its understanding of the bargain.[138] Finally, after all of these implausible events, PEL repeatedly quoted Clause 2.1 from C-5A in *inter partes* correspondence. Not once did the Ministry ever claim "*this clause is not there*."[139]

2. PEL's English MOI Is the Best Evidence of the Parties' Bargain

37. C-204 is the last document on record before the MOI's execution on the evening of 6 May. The attached Portuguese version incorporates points discussed with Minister Zucula,[140] which were reviewed by another Mozambican official, Mr Rafique Jusob.[141] The Parties intended to

[132] Tr. 1471:13-20 ("[W]*hy is the quality of* [the Portuguese scan] *so different than Mozambique's English MOI? This makes it a situation where it's possible that information, signatures, initials, could have been copied and pasted from the Portuguese MOI and then put back into the English MOI. We can't make that determination*."). *See also* CER-1 ¶ 43; Tr. 1471:1-1472:2.
[133] Tr. 1464:10-22 (Mr LaPorte).
[134] Tr. 1472:24-25 (Mr LaPorte). *See also, e.g.*, Tr. 1456:5-8 (no paper examination); Tr. 1460:23-1461:4 (no analysis of writing ink); Tr. 1462:6-9 (no analysis of stamp ink); Tr. 1463:15-20 (no franking seal analysis possible); Tr. 1464:17-19 (no franking seal visible). *See also, e.g.*, RER-12 p. 9; Tr. 1552:17-24.
[135] *See, e.g.*, Tr. 760:1-18.
[136] Tr. 1527:15-19 (Mr Lanterman: "*It doesn't necessarily mean that it's two files. It means perhaps that the first document printed and then the carriage return occurred, making the change*."). *See also* Tr. 1798:1-12.
[137] Tr. 437:9-21 (Mr Daga).
[138] Tr. 1798:13-18.
[139] Tr. 432:9-20 (Mr Daga). *See also* Tr. 602:21-603:3 (Mr Zucula agreeing that if PEL "*was citing provisions in the MOI that did not exist, that would be pointed out to it by the ministry*"). *See also* C-35; C-219; C-266; Reply ¶¶ 69-73.
[140] C-204 ("*Consideramos neste draft todos os pontos que descutimos S. Excia., o Ministro*"). *See also* Tr. 534:6-12.
[141] C-204 ("*Please find hereby attached the final revised version with my corrections and editing on the portuguese version*"); Tr. 594:12 (Mr Zucula: "*Mr Rafique was the head of an agency*").

"*finalize the English version accordingly*".[142] This appears to have happened. The only changes between C-204 and PEL's executed English version are minor with no impact on the substance of the Parties' bargain:

a. Recital (g)'s reference to a non-existent working group was removed;
b. Clause 3.3. was moved to Clause 2.2 with no change to the wording;
c. The title of Clause 7 was changed to reflect its contents; and
d. Clause 10 was edited to reflect the Parties' agreement that any contractual arbitration would be governed by Mozambican, rather than English law.[143]

38. These changes are fully consistent with Mr Daga's testimony that small changes were made the morning of 6 May.[144] Then, after Mr Prabhu reviewed the two final versions, he told Mr Daga "*it is the same, nothing is new now, we can sign it*".[145] Mr Prabhu was not in attendance when the MOIs were executed and Mozambique did not inform Mr Daga that the Portuguese version he signed had been changed. Instead, Mr Daga was told that the Portuguese MOI was "*the same thing*" Mr Prabhu confirmed to him earlier as matching PEL's English version.[146]

39. There is no explanation for the change in Clause 2.1 of the executed Portuguese MOI. No previous draft contains that language. Nothing explains this unilateral change.[147]

40. In any event, the Parties agreed both versions have equal value.[148] Clause 2.1 of the English MOI supplements and does not conflict with the Portuguese MOI.[149] Respondent's arguments that the Portuguese should prevail lack legal merit. Portuguese as the official language of Mozambique does not override the Parties' contractual freedom.[150] Ms Muenda agreed the MOI is not one of the contractual categories subject to the public procurement rules.[151] In short, PEL's Original English MOI represents the best evidence of the Parties' bargain and Claimant invites the Tribunal to rely upon it.

3. Mozambique Approved the PFS in Full Understanding that It Was Pursuing a Procurement via Direct Award.

[142] C-204.
[143] *Compare* C-204 *with* C-5A. *See also* Tr. 587:10-592:7; H-17 pp. 17-20.
[144] CWS-3 ¶ 32. *See also* Tr. 425:24-426:20 (discussing that PEL requested clause 3.3 be moved to clause 2.2).
[145] Tr. 414:12-415:1. *See also* Tr. 429:5-11.
[146] Tr. 415:8-12.
[147] Tr. 62:13-63:8.
[148] C-5A cl. 12; C-5B cl. 12.
[149] Reply ¶¶ 248-249, 1004; Rej. Jx. ¶ 156; CER-3 ¶¶ 20.2-25; CER-6 ¶ 35.
[150] Reply ¶ 248; CER-6 ¶¶ 41.4-42.
[151] Tr. 1744:14-1745:8 (agreeing the MOI is neither a "*public works contract*", a "*contract for supply of goods*", *or a* "*contract for provision of services to the State*."). *See also* CER-6 ¶¶ 36.3, 37 and 41.

41. The Parties manifested their intent that PEL would be granted a direct award if all conditions precedent were met in both versions of the MOI. Ms Muenda stated the objective in Clause 1, identical in all versions, is "*a prefeasibility study for a later granting of a concession, as long as prerequisites are met*".[152] Clause 2.2, also identical, states that if the Government approved the PFS, PEL had a *direito de preferência* to implement the project on the basis of a concession.[153] As Mr Baxter explained, governments should state "*from the very beginning, the onset*" "*whether the project would be awarded directly or through a public tender*".[154] Here, the MOI details a "*USP procurement through a direct award*".[155] Prof. Medeiros confirmed that the MOI's *direito de preferência* to implement the project meant that if PEL exercised it, PEL "*would be given the award*."[156]

42. That the parties agreed to a direct award procurement process also makes commercial sense. As Mr Daga testified, PEL would not have expended the funds for the PFS unless it had "*guarantees from Mozambique that, yes, projects will be given to you*."[157] A potential scoring bonus that only existed in an unenacted draft bill was hardly a guarantee. This is also supported by the interplay between Clauses 2 and 7 (in both PEL's English MOI and C-204).[158] Clause 7 states that if the PFS is not approved, PEL has the chance to "*invest again and do the second study*".[159] However, if the PFS is approved, Clause 7 is not triggered and PEL's *direito de preferência* vests under Clause 2.[160] Commercially, it only makes sense for PEL to waive its Clause 7 right to try another project if PFS approval meant PEL would have the right to implement the approved project. As Mr Daga explained, a tender was too uncertain a procurement process as "*you may get, you may not get*."[161] Granting PEL exclusivity rights was also a logical flipside of a direct award.[162]

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[152] Tr. 1749:4-6. *See also* C-5A cl. 1; C-5B cl.1 (stating the objective is "*to undertake the prefeasibility study … under a Public Private Partnership defining the basic terms and conditions for the granting of a concession by the Govt. of Mozambique to PEL for the construction and operation of the project*.").
[153] C-5B cl. 2.2. *See also* C-5A cl. 2.2.
[154] Tr. 850:2-21. *See also* Tr. 886:8-10.
[155] Tr. 850:25-851:6 (Mr Baxter).
[156] Tr. 1624:18-22. *See also* RER-2 ¶ 11(e); Tr. 1719:17-25 (Ms Muenda confirming that a "*direito potestativo*" is a "*unilateral right that cannot be opposed and depends merely on the decision of the holder of that right to exercise it, if and when asked to do so*.").
[157] Tr. 400:25-401:9. *See also* Tr. 398:7-12; 400:4-7.
[158] C-5A cl. 2 and 7; C-204 cl. 2 and 7.
[159] Tr. 417:18-419:19.
[160] C-5A cl 2. *See also* Tr. 417:18-419:19.
[161] Tr. 505:20-21. *See also* C-56 (summary of remarks from President of Mozambique in December 2011 that suggests at that time Mozambique intended an "*Indian company*" would be the one implementing the project after the pre-feasibility study was completed).
[162] C-5A cl. 6; SoC ¶¶ 321.d, 402; Reply ¶¶ 165, 191, 236-241, 760, 975-979; Rej. Jx. ¶¶ 78, 139-144, 247.

43. Whatever the merits of the PFS and the additional technical and financial that PEL presented in May 2012,[163] Mozambique was satisfied. PEL submitted additional financial information about debt repayment[164] at Mozambique's request, using inputs Mozambique provided.[165] Mozambique's technical experts at CFM reviewed the PFS[166] and "*nothing limited*" Mozambique's ability to pose follow-up questions or ask for additional information[167] or to "*retain outside assistance*" to evaluate PEL's materials.[168] Mozambique "*reviewed* [PEL's information] *for one month and then they approved the* [PFS]".[169] According to Mr Zucula, Mozambique had "[n]*o problem whatsoever*" with the information provided in the PFS.[170]

44. Mozambique's approval letter, C-11, shows an intention to pursue procurement via a direct award to PEL. First, as Mr Zucula confirmed repeatedly at the hearing, Mozambique approved the PFS "*in the context of clause 1*" of the MOI, which discusses granting PEL a concession in exchange for a PFS.[171] Second, Mozambique told PEL that to move forward with the Project, it must ("*deve*") exercise its *direito de preferência* ***and*** negotiate a vehicle to implement the project.[172] These were not alternatives.

45. Mozambique gave these directives at a time when there was no tender[173] and no sign that a tender had ever been discussed between the Parties.[174] Directing PEL to form an SPV with CFM to implement the Project only makes sense if Mozambique intended to grant PEL a direct award. Similarly, requesting PEL to exercise its right of first refusal only makes sense if it is a right to implement the project.[175] A tender scoring bonus is "*a statutory right*"[176] that does not need to be exercised. Indeed, PEL's responses show that PEL was exercising its right

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[163] *See, e.g.*, C-6b; C-7; C-8.
[164] C-8; *See also* Tr. 383:8-19; 392:5-25.
[165] *See, e.g.*, Tr. 381:21-382:2 ("*all of the operational figures for revenue and costs, operational costs, were provided by CFM through Daga*").
[166] Tr. 612:25-613:14 (Mr Zucula). *See also* Tr. 566:1-567:15.
[167] Tr. 613:17-20 (Mr Zucula).
[168] Tr. 613:21-616:2 (Mr Zucula). *See also* Tr. 1007:21-1009:4; 1022:21-:1023:5 (Mr Mendonça confirming similar things).
[169] Tr. 392:12-22 (Mr Patel). *See also* C-11; Tr. 1021:20-23 (Mr Mendonça: "*I cannot say the government was wrong* [in approving the PFS]"); Tr. 445:8-23; 472:5-9 (Mr Daga discussing presentation of PFS and response); Tr. 154:1-2 (Respondent's Counsel: "*We're not denying that PFS was approved*.").
[170] Tr. 614:21-615:6. *See also* Tr. 573:8-22 (Mr Zucula: "*I don't think there was ever any conflict between the ministry and PEL which undermined their competence. We never questioned, as far as I can recall, the technical competence of PEL*); Tr. 385:16-25 (Mr Patel: "*We were not asked to do an* [NPV] . . . *The government at the time had four weeks to review the model. They had no comments*."); CWS-3 ¶¶ 72-79.
[171] Tr. 605:25-606:3. *See also* Tr. 616:10-12.
[172] C-11. *See also* Tr. 628:25-629:16, 630:16-21 (Mr Zucula admitting that there is no "or" in C-11 and "*deve*" means "*must*"); Tr. 784:9-785:4 (Mr Chaúque confirming the same).
[173] *See* Tr. 784:21-25 ("*Was there any tender at this time? Chaúque: Not yet…*").
[174] *See, e.g.*, CWS-1 ¶¶ 95-96; CWS-3 ¶¶ 64, 69, 121; Tr. 503:8-12 (Mr Daga); Tr. 636:11-640:1 (Mr Zucula).
[175] *See infra* ¶ 53.
[176] *See, e.g.*, Tr. 1726:23-25 (Ms Muenda). *See also* Tr. 785:1-4 (Mr Chaúque).

to implement the Project and that PEL understood CFM had been "*nominated by the government*" [177] as the "*designated partner under the PPP structure*."[178] That Mozambique never challenged PEL's understanding, or mentioned the possibility of a tender to PEL until six months later, in January 2013, is critical.[179]

C. Mozambique's First FET Breach: The CFM Stonewall

46. Shortly after exercising its right of first refusal, PEL asked the MTC for an official notice that CFM was the public partner in the PPP, and to specify who at CFM was responsible for negotiating the SPV.[180] The MTC did not respond for months.[181] The MTC also ignored PEL's repeated requests for assistance with CFM, for drafts and templates of the concession agreement, and PEL's attempts to move past the roadblocks the MTC and CFM created.[182] During June 2012 to January 2013, Mozambique's actions and omissions were arbitrary, inconsistent, non-transparent, in bad faith, and frustrated PEL's legitimate expectations in violation of BIT Article 3(2).[183]

47. First, the MTC's contradictory statements about authorising negotiations with CFM demonstrate arbitrary, bad faith conduct. Mr Zucula claims that it was "*not* [his] *role to facilitate or 'authorize' CFM to negotiate with a prospective private partner*".[184] However, as a matter of CFM's bylaws and the PPP law, Mozambique was required to provide "*authorisation*" for CFM's participation in a PPP joint venture.[185] At one point, Mr Zucula told PEL he had "*instructed*" CFM to negotiate with PEL,[186] but only a month or two later, he failed to provide any written confirmation of this authorisation.[187]

48. Second, CFM's conduct itself violated the FET standard. As Mr Zucula admitted, the CFM chairman's claims that he knew nothing about the Project were "*unlikely to be true*"[188] given

[177] Tr. 497:6-14 (Mr Daga).
[178] Tr. 655:2-7 (Mr Zucula); *See also* Tr. 633:13-19 (Mr Zucula); C-12.
[179] CWS-1 ¶¶ 26, 39, 78; CWS-3 ¶¶ 66, 69, 121; Tr. 637:1-639:2 (discussion of no contemporaneous record of any tender discussion in June 2012).
[180] C-13. *See also* Tr. 494:6-16 (Mr Daga).
[181] C-13; C-16; SoC ¶¶156-159.
[182] C-13; C-15; C-16; C-17; C-18; C-232; SoC ¶¶ 169-180; Reply ¶¶ 280-298.
[183] Given that the Parties appear to largely agree on the legal aspects of the FET standard, Claimant refers the Tribunal to SoC ¶¶ 293-315 and Reply ¶¶ 732-754 for a discussion of the applicable legal standard.
[184] RWS-4 ¶ 10.
[185] Tr. 794:24-795:7 (Mr Chaúque). *See also* CLA-65A (definition of Public Partner); CLA-353 Bylaws Art. 3(2); Tr. 659:19-23 (Mr Zucula agreeing that "*The PPP Law states that you designate CFM to step into the shoes of the government. You are meant to designate CFM. You have to act*.").
[186] Tr. 494:20-24 (Mr Daga). *See also* CWS-1 ¶ 84; Tr. 493:1-8.
[187] C-16; C-13.
[188] Tr. 656:13-657:7. *See also* Tr. 447:4-7 (Mr Daga discussing meeting with CFM pre-PFS); Tr. 493:25-494:3 (Mr Daga discussing presentation by Mr Ruby to CFM); Tr. 491:20-493:3 (Mr Daga explaining his first meeting with CFM and their presence at the PFS presentation and site visit).

CFM's prior involvement in the Project. CFM also expressed complete disinterest in the Project,[189] despite Mr Zucula's claim that for a government priority project, "*CFM must get onboard*"[190] and despite CFM's subsequent participation in a joint venture with ITD for the Project in which it purportedly had no interest.

49. Third, Mozambique blatantly violated the MOI's exclusivity provision when it entertained a bid for the Project from Rio Tinto.[191]

50. Fourth, Mozambique failed to respond to any of PEL's requests for assistance.[192] As Prof. Medeiros explained, after designating CFM as the SPV partner, the State should "*ensur*[e] *that the negotiation is at least adequate to the principles of good faith*".[193] Mozambique failed to do so here. Despite Mr Chaúque's claim that the MTC's Project Study Office was "*supposed to take* [negotiations with CFM] *forward*",[194] during the entire course of PEL's attempts to negotiate with CFM, and despite at least six different letters from PEL seeking to move the Project forward,[195] the record shows only one belated communication from the MTC that did not even respond to PEL's request.[196] The MTC's failures to assist PEL in any way continued despite the MTC's clear understanding that CFM "*didn't want the project*",[197] and despite PEL's offer to "*put* [its] *own equity*" to form the SPV and transfer some of that equity to any entity the MTC nominated.[198] The MTC also ignored PEL's repeated requests for a template agreement,[199] even though it was "*natural that* [Mr Zucula] *would hand over a template of what would be a concession*".[200]

51. Fifth, Mozambique used its own stonewalling tactics as the rationale for its decision to renege on the rights granted to PEL in the MOI and co-opt PEL's intellectual property for a public tender. Mozambique's 11 January 2013 letter claimed that PEL's failure to reach an agreement with CFM, and in particular PEL's failure to offer more than a 20% stake in the joint venture,

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[189] *See, e.g.*, Tr. 497:23-498:4 (Mr Daga: "[I]*n the second meeting he told me very clearly that I do not have that kind of money. If I would have had that kind of money, I would have completed my existing project*.").
[190] Tr. 650:1-8.
[191] C-379 p. 8 ("*The Macuse line has two bidders, Patel Engineering Ltd and Rio Tinto*."); SoC ¶¶ 144-145; Reply ¶¶ 148, 301-304, 891; Tr. 457:7-458:4 (Mr Daga); C-59; C-230.
[192] SoC ¶¶ 159, 358-359; Reply ¶¶ 285; 838-839.
[193] Tr. 1584:20-1585:1.
[194] Tr. 787:12-790:3.
[195] *See, e.g.*, C-13; C-14; C-15; C-17; C-18; C-232.
[196] C-16.
[197] Tr. 661:24-662:5 (Mr Zucula). *See also, e.g.*, Tr. 501:14-21; 499:19-500:1 (Mr Daga: "*I got entire reply in a negative side, which also I have communicated to Ministry of Transport, Mr Zucula*.").
[198] Tr. 501:14-21 (Mr Daga). *See also* C-17.
[199] C-14; C-15; C-17; C-18.
[200] Tr. 708:3-5 (Mr Zucula).

forced Mozambique to "*look in the market*" for a higher equity stake.[201] Mr Zucula confirmed that had PEL offered CFM more than 20%, the PPP "*would have been successful*".[202] But neither the MTC nor CFM ever asked PEL for more than PEL's initial 20% offer;[203] rather, CFM told PEL it wanted no part of the project at all.[204] In the PPP with ITD, CFM's equity stake is 20%, further evidencing the equity stake claim was merely an excuse to stonewall PEL.[205]

52. Finally, the 11 January 2013 letter is the first of Respondent's many *post hoc* reinterpretations of PEL's MOI rights.[206] According to that letter, in June 2012, a year after the MOI was executed, Mozambique first told PEL that the *direito de preferência* in Clause 2.2 could be fulfilled either as a direct award if PEL successfully negotiated with CFM *or* as a scoring bonus in a tender.[207] But the MOI says nothing about forming a strategic partnership with CFM as a condition precedent to PEL's right to implement the project;[208] nor does it mention a tender. Further, there is nothing on the record to contradict Mr Daga's testimony that this letter "*was the first time I was informed that this is the intention of the ministry that they are going for the tender*".[209]

53. Respondent's *post hoc* attempts to re-interpret the MOI's *direito de preferência* as something other than a right of first refusal have only become more convoluted, inconsistent, and unfounded since its January 2013 letter. At times Mozambique claimed the *direito* only applied when there was a tender and "*doesn't apply when you have a direct award*",[210] contrary to the principle of *effet utile*, and contrary to the language differences between the PPP Law and Regulations and the MOI.[211] At other times, Mozambique claimed it applied "*in*

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[201] C-19 ¶ 3. *See also* Tr. 663:21-664:11 (Mr Zucula agreeing that "*you're going to the market so that you can get more equity for CFM*").
[202] Tr. 665:3-10.
[203] CWS-1 ¶¶ 97-106; Tr. 528:4-13.
[204] SoC ¶¶ 167, 187-189; CWS-1 ¶ 99; CWS-3 ¶ 116. *See also* Tr. 498:9-14 (Mr Daga: "*When he was not ready for 20 per cent, even what was the point* [of offering a higher equity stake], *and when he is saying clearly that I do not have that kind of money with me*.").
[205] SoC ¶¶ 239-240, 330, 353; Reply ¶¶ 314, 477.
[206] Both Mr Chaúque's witness statement and his testimony at the hearing confirm the *post hoc* nature of this interpretation. *See* RWS-3(T) ¶ 19 ("[T]*he position of the MTC* ***later*** *was that the MOI's preemptive right could materialize as the 15% preemptive right in the public tender*.") (emphasis added); Tr. 777:10-14 ("*[W]e had to find a way to give them an advantage and that's what we did … the … 15 per cent*.").
[207] C-19 ¶ 1.
[208] C-5A; C-5B. *See also* Tr. 813:21-813:1 (Chaúque confirmed that there was no need for a joint venture with CFM at the time of the Council of Minister's direct award in April 2013).
[209] Tr. 503:8-12. *See also* C-20; CWS-1 ¶¶ 95-96, 101-106; Tr. 504:17-20.
[210] Tr. 189:6-190:25. *See also, e.g.*, Tr. 779:3-6 Chaúque ("*Should there be a direct award . . . there is no direito de preferência to apply*.").
[211] RLA-6 Art. 13(5) ("*direito e margem de preferência de 15% na avaliação das propostas*"); CLA-64 Art. 14(3) ("*margem de preferência de 15% na avaliação das propostas*"). *See also* Tr. 120:22-123:15. Further, the public

the event that PEL prevailed in the public tender".[212] Sometimes it was a right of first refusal that "*disappeared*" once the PPP Law came into effect,[213] or potentially "*transformed*" into a scoring bonus.[214] As this Tribunal noted, and as Ms Muenda eventually agreed, all of these competing positions are nonsensical as "*when a new law comes into force, prior rights remain in place*".[215] The simple explanation is the correct one. The *direito de preferência* in the MOI is a right of first refusal to implement the Project, and "*from that point in time when the direito de preferência is exerted, the State* [wa]*s bound to progress toward a concession contract*".[216]

54. In short, Mozambique falsely claimed that PEL's attempts to follow its own directions were inadequate and then used that pretext to take away PEL's vested contractual right to a direct award of the Project concession and use PEL's know-how and intellectual property to launch a tender. That is a textbook FET breach.

D. Mozambique's Second FET Breach: The Council of Ministers' U-Turn

55. After Mozambique reneged on PEL's MOI right to a direct award, Mozambique then used PEL's PFS as the basis for the Tender,[217] without permission and without compensation.[218] PEL formed a consortium and participated in the tender under protest, fully reserving its MOI rights.[219] It also continued to pursue those reserved rights.[220]

56. Then, "*in the middle of a tender*",[221] Mozambique changed course. On 16 April 2013, in its 10th Ordinary Session, the Council of Ministers discussed "*the possibility of concluding an ajuste directo*" with PEL.[222] By this point, many of the attendees had interacted with PEL.[223] At the meeting, the Council of Ministers decided ("*decidiu*")[224] that "*considering the urgency*"

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procurement rules in effect when the MOI was signed do not refer to a "*direito de preferência*" but only to a "*margem de preferência*" and only apply to domestic bidders. *See, e.g.*, CLA-41; CLA-67; Tr. 770:10-774:20 (Mr Chaúque); Tr. 956:2-957:13 (Mr Mendonça); Tr. 1725:12-24 (Ms Muenda).

[212] RWS-2 ¶¶ 6, 18. *See also, e.g.*, Tr. 617:22-621:14 (Mr Zucula).

[213] Tr. 1736:19-22 (Ms Muenda). *See also* Tr. 1729:2-1731:8 (Ms Muenda). But this is incorrect as a matter of Mozambican law, given that the PPP Law in no way revoked the Civil Code. *See* RLA-132 Arts. 7, 12.

[214] Tr. 1734:11-1736:5 (Ms Muenda). *See also* Tr. 1787:1-10 (Ms Muenda).

[215] Tr. 1790:8-12 (Ms Muenda). *See also* Tr. 1786:4-6 (Mr Perezcano).

[216] Tr. 1581:14-1582:2 (Prof Medeiros). *See also, e.g.*, Tr. 368:14-18; 491:15-16; 1720:22-1721:4; 1721:21-25; 1722:21-1723:5; 1729:18-21; 1735:9-17; 1738:22-24.

[217] *See* C-236; C-61; SoC ¶ 338; Reply ¶¶ 380-392; Rej. Jx. ¶ 218; CWS-3 ¶¶ 158-167.

[218] CER-7 ¶¶ 121, 139.d, 174-175.

[219] SoC ¶¶ 28, 191-210, 222; Reply ¶¶ 332-353, 411; Rej. Jx. ¶ 487; H-1 p. 143.

[220] SoC ¶¶ 191-210; Reply ¶¶ 332-353.

[221] Tr. 687:14-16 (Prof Tawil). *See also* Tr. 685:22-686:25 (Mr Perezcano).

[222] Tr. 1766:10-14 (Ms Muenda: "*I understand that there was still the tender procedure under way* [in April 2013], *and this was a window that the government had decided to look through into the possibility of concluding an ajuste directo*. . ."). *See also* Tr. 821:2-11 (Mr Chaúque noting that the second meeting decided "*there would not be cancellation of the public tender*");

[223] H-2 p. 89. *See also* Tr. 93:4-13.

[224] C-29. *See also* Tr. 810:2-9.

of the Project, "*the national strategic interest*" and the fact that PEL had carried out all feasibility and engineering studies, to invite PEL to "*negotiations of the terms of the concession for the Port of Macuse*".[225] PEL was asked to provide a bank guarantee within 30 days that would be valid "*until the conclusion of the* [concession] *contract*".[226] It was also told to start negotiating offtake agreements.[227]

57. The letter communicating the Council of Minister's decision to PEL perfectly tracks the direct award process set forth in the PPP Law and Regulations. The PPP Law permits "*negotiations and direct award*" "*in ponderous and duly substantiated situations*" upon the "*express authorization*" of the Council of Ministers.[228] And the entire sequence of events from PEL conceiving the project, funding the Preliminary Study, signing the MOI, preparing the PFS, to the Council of Minister's 16 April direct award decision followed by an invitation to PEL to negotiate and provide a bank guarantee tracks the procurement steps outlined in the PPP Regulations, duly adapted for a direct award.[229]

58. As Prof. Medeiros explained, this Council of Ministers decision conferred rights on PEL that could not be arbitrarily revoked.[230] Both the MTC and PEL believed "*a negociacão directa was envisaged*" by the 16 April decision and proceeded accordingly.[231] An inter-ministerial technical team was assembled, PEL and the MTC scheduled meetings, PEL provided the bank guarantee, and the MTC promised PEL a template concession contract.[232]

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[225] C-29. *See also* Tr. 682:10-16 (President: "[T]*he way I read* [C-34] - *is saying that the 10th Session had initiated what he calls 'negociacão directa' and that now there is a decision, a formal decision, from the Council of Ministers saying that the correct way, 'opcão correcta', is the tender*.").
[226] C-29.
[227] *Id.* As Mr Daga explained, "*no mining company will give any letter of confirmation of take-off agreement to a party who does not have* [a concession] *contract in their hand*." Tr. 512:8-15. But in any event, given the 90-day period for negotiations under the law, and the fact that PEL's negotiations were cut short after only two weeks, PEL cannot be faulted for any failure to provide an offtake agreement in such a short timeframe. *See, e.g.*, CLA-64A Art. 21(5); Tr. 817:11-14 (Chaúque).
[228] CLA-65A Art. 13(3).
[229] CLA-64A Art. 9, 17(3), 33(1); Rej. Jx. ¶¶ 171-173, 189-190. *See also* Tr. 1579:14-24 (Prof Medeiros: "[T]*he act by the Council of Ministers dated April 16th . . . is relevant because clearly, the government at council applied article 13(3) of the law on PPPs, the one that exceptionally allows recourse to ajuste direito, the Council of Ministers provided grounds for their decision to have recourse to the solution provided for by 13(3), and according to the stages leading to a PPP listed in the PPP regulation, listed the successive steps, namely instructed that negotiations should ensue with the proper parties*."); Tr. 1777:1-8 (Ms Muenda confirming the Government can "*dispense with the stages of conception, definition of basic orienting principles, and preparation of technical, environmental and economic financial studies*" in a direct award scenario); Tr. 1758:25-1759:9 (Ms Muenda confirming that an invitation to negotiate concession terms occurs after a direct award); Tr. 684:17-685:4; 801:21-811:6; 1650:18-1651:5; 1653:7-13.
[230] SoC ¶ 334; Reply ¶ 926; CER-3 ¶¶ 43-46.
[231] Tr. 693:11-694:15 (President).
[232] C-30; C-31; C-32; C-33. *See also* Tr. 511:9-17; 816:6-9; 833:12-834:3 (Mr Chaúque: "*the template . . . was what we were going to make available to Patel so that during the negotiation, . . ., we could work thereon*").

59. But shortly after the award decision, Mozambique breached the Treaty again with the Council of Ministers' U-Turn. On 30 April 2013 at its 12th Ordinary Session, after hearing from unnamed stakeholders who were "*public and private entities interested in the project*",[233] the Council of Ministers reversed course and decided there was "*no place for direct negotiation with*" PEL.[234] PEL's direct award had been taken away.[235]

60. Curiously, Mozambique waited several weeks before informing PEL of the Council's U-turn. On 9 May 2013, over a week after stripping PEL of its rights, Mozambique accepted PEL's USD 3.1 million bank guarantee.[236]

61. Mozambique has "*never given an explanation*" about this *volte face*.[237] Its failure to produce any documentary evidence merits adverse inferences. The Council of Ministers is the "[G]*overnment*".[238] They were discussing a USD 3 billion project of national significance. A secretariat is tasked with recording its meetings; there are agendas, notes, and the meeting minutes are archived as matter of law.[239] These materials were provided to dozens of meeting attendees. Mozambique's claim that it cannot locate any material *at all* related to these two meetings[240] is highly implausible, if not outright impossible.

62. In the end, Mozambique improperly revoked rights it had granted, and then through an irregular tender process awarded the project to ITD.[241] While Mr Mendonça claims that it is "*normal to go on and back* [on] *some decisions made by the government*" in Mozambique,[242] this inconsistent, arbitrary conduct by a State is also undoubtedly a breach of FET.[243]

V. PEL IS ENTITLED TO REPARATION FOR MOZAMBIQUE'S TREATY BREACHES

63. PEL's game-changing concept of a rail to deep-water port from Tete to Macuse was incredibly valuable. There were serious discrepancies between the production capacity of the Tete mines

[233] Tr. 822:22-823:6 (Mr Chaúque). *See also* Tr. 826:8-17. The only reason for these "*stakeholders*" to be concerned would be if the 10th Session had granted PEL a direct award. Otherwise, there was no reason for them to object.
[234] C-34. *See also* Tr. 514:20-515:5.
[235] *See, e.g.*, Tr. 681:2-682:18; 694:9-15. This likely prevented the government from publishing the award decision. *See, e.g.*, Tr. 817:11-14 (Mr Chaúque confirming negotiation period is 90 days); Tr. 1761:20-1762:16 (Ms Muenda).
[236] C-33.
[237] Tr. 540:16-24 (Mr Daga).
[238] Tr. 667:4-7 (Mr Zucula).
[239] Reply ¶¶ 37, 323-324; CLA-271; CLA-272; CLA-273; CLA-274; Tr. 672:22-674:17 (Mr Zucula confirming existence of secretariat, agendas and minutes); Tr. 819:18-820:2 (Mr Chaúque testifying about "*notes that were sent directly to the Prime Minister's office*" that have not been produced).
[240] DPS p. 36.
[241] SoC ¶¶ 223-237, 238, 371, 421; Reply ¶¶ 8, 380-475, 618, 817, 989.
[242] Tr. 1027:20-1028:2. *See also* Tr. 1028:12-23; 1030:3-10.
[243] SoC ¶¶ 293-423; Reply ¶¶ 718-1030.

and actual production levels due to transportation constraints.[244] But nobody had thought a Port in Zambezia was feasible.[245] That is until PEL proved up its Project—a route that would only cost about half the cost of using the Beira line and around a third the cost of using the Nacala line.[246] If the Project had no value, Mozambique would have simply awarded it to PEL, taken a commission and watched it fail. If the Project had no value, mining companies would not have expressed an interest, and no one would have tendered.[247]

64. PEL's rights to a direct award of this megaproject, conferred in the MOI and solidified in the Council of Ministers' decision,[248] were also incredibly valuable. Indeed, everyone at the time thought so. If the Project had no value, Rio Tinto would not have submitted its own proposal.[249] If the Project had no value, 21 companies would not have expressed interest in the tender.[250] If the direct award granted to PEL by the Council of Ministers had no value, unnamed stakeholders would not have pressured the Council of Ministers to revoke PEL's direct award.[251] All these entities saw the Project as much more profitable than PEL's worst-case scenario 2012 financials.[252]

65. The TML bankable study, conducted by a "*highly credible entity with significant experience*",[253] shows that the Project was valuable, with hundreds of millions in profits per year.[254] And as recently as 2021, before last year's jump in coal prices, funders viewed this Project as valuable too.[255]

66. It is also unquestionable that Mozambique's Treaty breaches removed all value from PEL's investment. It appropriated PEL's concept and provided it to other bidders as the basis for the tender.[256] It took away PEL's rights to a direct award of the concession.[257] While Mozambique will be handsomely enriched through the Project, PEL has been left with nothing.

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[244] SOC ¶5; Reply ¶ 2; CWS-1 ¶¶ 12-14; CWS-4 ¶ 5; CER-2 ¶¶ 51, 64, 66; CER-5 ¶ 115. *See also* Tr. 265:1-6; 1136:15-19; 1137:11-24.
[245] RLA-15 p. 7; SoC ¶¶ 4, 7, 68-77, 263; Reply ¶¶ 138-155; Rej. Jx. ¶¶ 60-77; CWS-1 ¶¶ 15, 24; CWS-2 ¶ 25; CWS-3 ¶¶ 10-11.
[246] H-9 p. 5. *See also* C-88 pp. 104 and F-52; C-290 p. 9; CER-5 ¶ 95, Appendix F.1; Tr. 1135:11-1140:6.
[247] SoC ¶¶ 140-141; CWS-1 ¶¶ 56-60; CWS-2 ¶¶ 18-19; Tr. 387:3-12; 455:22-456:5; 461:13-17.
[248] *See supra* ¶¶ 31-45, 56-58.
[249] C-59; C-230; SoC ¶ 144; Reply ¶¶ 301-304; CWS-1 ¶ 59; CWS-3 ¶ 105; Tr. 457:7-24; 458:21-459:3.
[250] C-25; SoC ¶ 203; Tr. 1143:12-1144:2; 1815:22-1816:2.
[251] *See supra* ¶ 59.
[252] C-8; CWS-4 ¶¶ 19-33. *See also* Tr. 383:13-19; 1066:4-1088:14.
[253] Tr. 1147:1-7 (Mr Sequeira). *See also* Tr. 1186:20-1187:7; 1330:1-7
[254] R-42 p. 13; CER-2 ¶ 184, Appendix C.1. *See also* Tr. 1144:1-2.
[255] C-343; Cls. Add'l Quant. ¶ 4.c.
[256] *See supra* ¶¶ 46-54. *See also* C-236; C-61; SoC ¶ 338; Reply ¶¶ 380-392; Rej. Jx. ¶ 218; CWS-3 ¶¶ 158-167.
[257] *See supra* ¶¶ 46-62; SoC ¶¶ 180-190, 216-222; Reply ¶¶ 305-325, 372-379.

67. PEL is entitled to compensation for these breaches as a matter of international law.[258] As an absolute minimum, PEL is entitled to "*full reparation*".[259]

68. Claimant's primary valuation is an *ex post* DCF valuation of USD 156 million. As Secretariat explained, investors in "*pre operational infrastructure projects*" "*universally*" value those projects using the DCF method.[260] This makes a DCF the best estimate of the FMV of PEL's rights to implement the Project. Several tribunals have awarded DCF for early-stage projects where the data is reliable and conservative.[261]

69. Secretariat's *ex-post* DCF is reliable and conservative.[262] It is based upon a bankable feasibility study that both sides agree was prepared by some of the most experienced companies in this sector.[263] Further Secretariat's assumptions and calculations with this data, such as adding an additional 30% to operating and maintenance costs, a 10% contingency for CAPEX cost overruns, and a discount rate supported by experts, are realistic and extremely conservative.[264] Respondent has failed to explain why any of these assumptions or calculations would require adjustment. For example, its critiques on the discount rate lack any academic support and its supposed "*reasonableness checks*" are inapposite.[265]

70. The Project is certainly not "*dead*" as Respondent likes to claim. The most recent evidence on record, statements from the concession holder on 11 August 2022, shows that the Project is going forward and that TML intends to implement both the port and rail project components.[266] The price of coal is higher than it was in 2013 and is predicted to stay high for the next several years, making it more likely that TML will receive additional funding.[267] If the Project were truly dead, Mozambique as a part-owner in the Project through CFM, should surely have more concrete evidence than a few sentences in ITD's publicly-available consolidated financials.[268] That they have not produced anything more is telling.

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[258] NoA § F; SoC § VI; Reply § VIII.
[259] NoA ¶¶ 96-99; SoC ¶¶ 425-442; Reply ¶¶ 1031-1044, 1094; Cls. Add'l Quant. ¶ 6.
[260] Tr. 1145:24-1146-7. *See also* H-9 p. 13.
[261] *See, e.g.*, SoC ¶¶ 434-442; H-1 p. 156.
[262] Tr. 1146:19-25; 1191:13-15. *See also* H-9 pp. 14-24. CER-2 § VI; CER-5 § V .
[263] Tr. 1330:1-7 (Dr Flores); Tr. 1144:25-1145:5; 1184:18-1185:5 (Mr Sequiera).
[264] *See, e.g.*, CER-5 ¶ 181 (30% markup is appropriate); Tr. 1149:7-19 (10% contingency for CAPEX overruns is sufficient); Tr. 1149:24-1150:7; 1150:15-153:8 (discount rate is appropriate).
[265] CER-5 ¶¶ 144, 156-183; H-9 p. 24; Tr. 1153:17-1155:15 (reasonableness checks inapposite). *See also* Tr. 1391:9-1397:25 (discount rate critiques not supported by Prof. Damodaran).
[266] C-405. *See also* C-127; C-284. While Dr Flores's claim at the hearing that the 15 August 2022 auditor's note attached to the ITD financials post-dates TML's 11 August 2022 video is technically correct, the auditor appears not to have reviewed any information that post-dates 30 June 2022. *See* QE-100 at 1 (listing material reviewed).
[267] H-9 pp. 6, 10; Tr. 1144:3-1145:10; 1168:6-8.
[268] RER-9 ¶¶ 13-21.

71. PEL's secondary case is its *ex ante* DCF valuation of USD 78.2 million. This information is based upon the PFS, the same technical information that led 21 separate companies to bid for the Project and "*stakeholders*" to lobby the government to revoke PEL's direct award.[269] It also led TML to promise a USD 10 million concession premium (USD 5 million upon signing and USD 5 million over the course of the Project) before undertaking any feasibility study.[270]

72. PEL's third case is a loss of chance.[271] PEL undoubtedly suffered a loss. But if the Tribunal is uncertain about the terms of the Concession Agreement or how it would have operated, it can instead award compensation for PEL's lost "*chance of making profit*".[272] PEL has proposed reducing the DCF to account for any uncertainties. The percentage employed is up to the Tribunal, although PEL has proposed a 10% reduction.[273]

73. The final method PEL proposed to quantify the rights it lost in the summer of 2013, is negotiating damages. Under this valuation, the Tribunal assumes that, rather than breaching the Treaty by stripping PEL's of its rights, Respondent and PEL agreed on a release fee in exchange for PEL's rights to implement the Project.[274] Negotiating damages clearly satisfy the *Chorzow* standard—they are compensatory damages aimed at placing PEL where it would have been absent Respondent's breaches.[275] This method requires the Tribunal to make the best estimate it can based upon all the information available to it.[276] It does not require exact precision, and "*the fact that damages cannot be settled with certainty is no reason not to award damages when a loss has been incurred*."[277]

74. Here, there are several data points the Tribunal can be confident the Parties would have used in a hypothetical negotiation in the summer of 2013. PEL's actual settlement offers of USD 25.175 million are the best evidence of how PEL valued its rights.[278] Taking them as PEL's opening position, and assuming that PEL would have accepted a lower offer of 75% of its asking price, puts damages at USD 18.89 million. The amount that PEL would have accepted if Respondent had hired PEL as the engineer for the Project and then terminated PEL's

[269] *See supra* ¶¶ 55-62.
[270] C-38 p.3; C-125 p. 145; R-42; CER-5 ¶ 199; H-9 p. 10.
[271] *See, e.g.*, Reply ¶¶ 1081-1102; Cls. Add'l Quant. ¶ 8.
[272] CLA-75A p. 291; *See also* RLA-151 ¶¶ 246-251; CLA-294; CLA-287 ¶ 3.225; CLA-323 ¶¶ 13-75; CLA-322 ¶ 288; CLA-299 ¶¶ 223-224; Reply ¶¶ 1081-1102; Tr. 137:14-145:21; 1826:1-1831:4.
[273] Reply ¶ 1102.
[274] Cls. Add'l Quant. ¶ 10.
[275] Cls. Add'l Quant. ¶¶ 21-29.
[276] Cls. Add'l Quant. ¶ 29.
[277] CLA-345 § 215. *See also* CLA-105 ¶ 871; CLA-299 ¶¶ 218, 224; CLA-346 ¶ 844; RLA-151 ¶¶ 246-251; CLA-277 ¶ 291.
[278] C-46; C-219; R-57; Cls. Add'l Quant. ¶ 34.

services after the PFS stage corroborates the reliability of PEL's settlement offers. Mr Comer's undisputed opinion is that the PFS was at least 5% of the overall engineering work.[279] PEL estimated that the post-PFS engineering fees would have been USD 107 million.[280] That provides an estimate that PEL's work on the PFS to that point was worth at least USD 5.63 million.[281] Further, given that PEL would have also been giving up its rights to future profit from the Project, a reasonable cancellation fee of 10% brings the total amount PEL would likely have accepted from Respondent in exchange for its rights to no less than USD 16.9 million.[282]

75. PEL is entitled to pre-award interest for every valuation method except the *ex post* DCF, and is entitled to post-award interest. As Mr Sequeira explained, Mozambique's proposed risk-free rate would undercompensate PEL for its loss—it does not account for "*the opportunity cost of money*" and "*does not align*" with general trends in investor state awards.[283] PEL has suggested US prime plus 2% for both pre-and post-award interest,[284] but does not disagree with the logic behind Dr Flores's statements that Respondent's cost of borrowing is also an appropriate measure of interest as an award against it is similar to holding sovereign debt.[285]

76. PO 7 specifies further submissions on costs. For now, Claimant notes that, should the Tribunal award an amount towards the lower end of Claimant's damages calculations, it should also consider costs allocations as this will be critical to ensure that justice is done.

VI. PRAYER FOR RELIEF

77. For the reasons set out above (and in Claimant's previous pleadings and at the Hearing), Claimant respectfully requests that the Tribunal grant the relief requested in paragraph 1152 of its Reply.

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[279] CER-8, Appendix C ¶ 2.6.7.
[280] C-6b p. 124.
[281] H-10 p. 17.
[282] H-10 p. 17; CER-8, Appendix C ¶ 2.6.8.
[283] Tr. 1160:8-1161:25. *See also* Tr. 1436:3-9.
[284] *See, e.g.*, Reply ¶ 1080; Cls. Add'l Quant. ¶ 51; CER-5 ¶ 215.
[285] Tr. 1435:25-1436:9 (Mr Sequeira: "*based on his own logic where you would switch from the date of award to a post-award interest rate that equals the Respondent's cost of debt, which is far higher than the US risk-free rate*."); Tr. 1438:2-7 (Mr Sequeira: "[Dr Flores is] *saying is that it's better to have a damages award in hand than to have a sovereign bond of a country, so, in other words, that same logic is saying that the sovereign bonds are more risky than a damages award against a state*.").