

The Arbitral Tribunal

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Dear Members of the Tribunal,

PCA CASE NO. 2020-21: PATEL ENGINEERING LTD (“CLAIMANT” OR “PEL”) V. THE REPUBLIC OF MOZAMBIQUE (“RESPONDENT” OR “MOZAMBIQUE”, TOGETHER THE “PARTIES”) (“ARBITRATION”), C-94

1. Pursuant to Article 36 of the UNCITRAL Arbitration Rules, and in light of the Tribunal’s extension of the deadline in Article 36 to 15 March,¹ Claimant requests the correction of errors in the Majority’s Final Award (the “**Award**”) and the Dissenting Opinion of Professor Guido Santiago Tawil (the “**Dissenting Opinion**”), both dated 7 February 2024.
2. This **Correction Letter** sets out the relevant paragraphs of the Award and Dissenting Opinion that should be revised and explains the reasons for Claimant’s proposed corrections.² The redlines of the Award and the Dissenting Opinion are attached to this letter.³

¹ Respondent confirmed its agreement to a short extension of one week for Claimant to file corrections contemplated by Article 36. *See*, email from Respondent’s counsel dated 8 March 2024. *See also* email from the Tribunal to the Parties dated 8 March 2024.

² The proposed corrections are marked in red.

³ *See* Annex 1, Redline of the Award; Annex 2, Redline of the Dissenting Opinion.

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I. Corrections to the Award

a) The Council of Ministers' Decision as a part of Claimant's Investment

3. The summary of Claimant's description of its "*investment*" in paragraphs 351 to 352 of the Award is inaccurate and incomplete. The Majority appears to rely upon descriptions of Claimant's investment from earlier pleadings. However, given that, as is common in arbitration, the parties' positions evolved throughout the course of the proceedings, the most accurate description of Claimant's position on the content of its investment is in Claimant's post-hearing brief ("**PHB**"), where Claimant submitted that:

*"its 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."*⁴

4. For example, when discussing whether PEL made an investment falling within the BIT's protective ambit, and considering Claimant's arguments in this regard, the Majority only addresses certain aspects of PEL's investment in isolation; specifically, the MOI and the Pre-Feasibility Study (the "**PFS**"). However, while the Majority discusses PEL's contractual "right" to a direct award in the MOI, it does not address **the actual direct award** the Council of Ministers granted to PEL on in April 2013 (the "**CM Decision**").
5. As Claimant explained in its written submissions and orally at the hearing, the CM Decision is central to Claimant's case on investment (and liability). Indeed, it is the *most critical piece of evidence* in Claimant's entire case. Even Respondent's counsel acknowledged at the hearing that the CM Decision was PEL's "*lynchpin*".⁵
6. Through the CM Decision, the highest governing body in Mozambique **granted PEL a direct award of the concession**.⁶ Thus, under Mozambican law, the CM Decision – in and of itself – vested PEL with rights having economic value which could not be taken

⁴ PHBs, para. 7. (Emphasis added). See also *id.* para. 58 ("As Prof. Medeiros explained, **this Council of Ministers decision conferred rights on PEL that could not be arbitrarily revoked.**") (Emphasis added); Tr. 1814:2-8 ("Mozambique's actions have, number one, robbed PEL of its valuable concept. Number 2, denuded PEL's valuable rights under the MOI of all value, and, number 3, destroyed PEL's rights to proceed with a direct award granted under the MOI and, critically, its right to a direct award of the project granted by the Council of Ministers.")

⁵ Tr. 1840:19.

⁶ See, e.g., Tr. 1579:14-24 ("[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 directo*, 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."); CER-6, para. 25.2 ("**There is also no doubt that the Council of Ministers expressly consented to the direct award of the concession in its 10th Ordinary Session, of 16 April 2013, regarding the PPP project set out in the MoI.**") (Emphasis added).

away without compensation:⁷ These rights were *independent of and in addition to* any contractual rights PEL received through the MOI. The importance of the CM Decision is patent in both PEL’s written and oral submissions.⁸

- a. As explained in the Reply on the Merits, “*after the decision had been made to award the concession directly to PEL in April 2013, it was unlawful under Mozambican law to reverse such decision*”.⁹
- b. Prof. Medeiros confirmed that the CM Decision expressly granted PEL the direct award and that right could not have been revoked without compensation:
 - i. “*On 16 April 2013, the Government, pursuant to Article 13 (3) of Law no. 15/2011, acknowledged that it was in a situation which justified, in the light of public interest, the recourse to direct award*”.¹⁰
 - ii. “*There is [...] no doubt that the Council of Ministers expressly consented to the direct [a]ward of the concession in its 10th Ordinary Session, of 16 April 2013, regarding the PPP project set out in the MoP*”.¹¹
 - iii. The CM Decision “*undeniably constitute[d] an act establishing rights*” and “[a]cts establishing rights cannot be freely revoked”.¹²
- c. As summarised by Professor Juan Fernández-Armesto, both the MTC and PEL believed the next phase of procurement, that is “*a “negociação directa”[,] was envisaged*” by the CM Decision and proceeded accordingly.¹³

In short, as Claimant’s counsel reiterated at the hearing, the CM Decision “*put PEL in the same position as the winner of any public tender would have been in and gave PEL an irrevocable right to proceed with concluding a concession agreement with Mozambique*”.¹⁴

⁷ On 16 April 2013, in its 10th Ordinary Session, the Council of Ministers discussed “*the possibility of concluding an ajuste directo*” with PEL. At the meeting, the Council of Ministers decided (“*decidiu*”) that “*considering the urgency 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*”. PEL was asked to provide a bank guarantee within 30 days that would be valid “*until the conclusion of the [concession] contract*”. It was also told to start negotiating offtake agreements. See C-29.

⁸ Statement of Claim, para. 334; Claimant’s Reply on the Merits and Response to Objections to Jurisdiction, para. 926.
⁹ Claimant’s Reply on the Merits and Response to Objections to Jurisdiction, para. 926.

¹⁰ CER-3, para. E7. See also Tr. 1579:14-24 (“[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 directo*, 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.”).
¹¹ CER-6, para. 25.2.

¹² CER-3, para. E9. See also CER-3, para. 46 (“*Acts establishing rights may not be freely revoked, as expressly set out in Article 136 (1) (b) of Law no. 14/2011, of 10 August 2011*”); CER-3, para. 49 (“**The revocation of the act performed by the Council of Ministers on 18 April 2013 is, therefore, an unlawful revocation of an act establishing rights, such revocation being vitiated by illegality**”).

¹³ Tr. 1813:14-15.

¹⁴ Tr. 1813:21-22.

7. In light of the above, paragraphs 346, 351 and 352 should be amended as follows:

a. Paragraph 346:

Claimant says that it holds a protected investment in the form of

~~*—a right to the direct award of a concession, created by a contract—the MOI—and certain Government decisions, plus*~~

~~*- 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,*~~

~~*- the direct award of the concession (“adjudicação”) granted by the Council of Ministers in April 2013 – via a decision that gave PEL a vested right under Mozambican law that could not be withdrawn unilaterally without compensation,*~~

~~*- valuable know-how transferred to Mozambique with PEL’s concept and the proprietary knowledge contained in the Pre-Feasibility Study, plus*~~

~~*- funds contributed for the Preliminary Study and the PFS.*~~

Respondent counters that Claimant only made pre-investment expenditures that do not qualify as protected investments under the BIT.

b. Paragraph 351:

~~*Claimant disagrees—does not disagree with these observations. Its argument is different. It avers that:*~~

~~*- It had a contractual right, enshrined in the MOI, to be awarded the concession of the Project, that became vested once Respondent approved the Pre-Feasibility Study and PEL exercised its right of first refusal by agreeing to proceed with the Project on 18 June 2012; and*~~

~~*—The content of the Pre-Feasibility Study constituted valuable intellectual property;*~~

~~*- It was granted a direct award through the Council of Ministers’ Decision of April 2013, i.e., a right to implement the Project via a concession agreement that was to be negotiated in good faith with the Government;*~~

~~*- It had valuable know-how in the form of PEL’s Project concept and proprietary knowledge contained in the Pre-Feasibility Study, which PEL transferred to Mozambique and Mozambique appropriated to launch its public tender; and*~~

~~*- It had contributed funds for the Preliminary Study and the Pre-Feasibility Study.*~~

c. Paragraph 352:

In Claimant’s view, these “assets”, would be protected under:

- Art. 1(b)(iii) of the BIT, which extends protection to “rights to money or to any performance under contract having a financial value”; ~~and~~

- Art. 1(b)(iv) of the BIT, which includes “intellectual property rights, in accordance with the relevant laws of the respective Contracting Party”¹⁵; *and/or*

- Art. 1(b)(v) of the BIT, which includes a “business concession [...] conferred by law or under contract”.

8. Omitting the CM Decision from the Award’s description of the investment appears to have impacted other aspects of the Majority’s reasoning.
9. First, the omission of the direct award from the analysis of PEL’s “investment” in paragraphs 354 to 384 of the Award is particularly significant because the CM Decision granted a **non-contractual** right that exists independently of the MOI and thus does not fall within the ICC Tribunal’s jurisdiction.¹⁵ Accordingly, this Tribunal was the **only arbitral forum** available to Claimant to address the violations of the rights it gained through the CM Decision.
10. Second, the Majority’s reasoning incorrectly analyses Claimant’s investment in isolated and incomplete parts, (*i.e.*, the MOI is considered separately from the PFS). Yet, the omission of the most critical component of PEL’s investment – the direct award granted by the CM Decision – makes it unclear if the Majority’s *ratio* remains the same.
11. Finally, while the Majority mentioned Claimant’s argument that “*the Tribunal should view the totality of [its] activities holistically as a unitary investment*” and “*should avoid ‘surgically separat[ing]’ the protected assets under the BIT ... and regard the investment operation as a whole*”,¹⁶ it omitted this argument from its analysis in section 3 of the Award. Again, this omission causes Claimant to query whether correction is needed to the *ratio*.

¹⁵ See, e.g., Claimant’s Reply on the Merits and Response to Objections to Jurisdiction, paras. 616-618 (“*PEL alleges that Respondent breached the FET standard by the conduct of the MTC, the CFM and the Council of Ministers, which reneged on the commitments made to PEL to directly award it the Project concession, made inconsistent and non-transparent decisions, conducted themselves arbitrarily, and failed to act in good faith. It involves not only claims relating to the promises made in the MOI, but also claims relating to the conduct of the public tender process, which was riddled with irregularities, lacked transparency, and destined for a pre-determined outcome. The tender process is not even mentioned in the MOI (and hence, axiomatically, cannot be part of a purely contractual dispute)*”); Claimant’s Rejoinder on Objections to Jurisdiction, paras. 18-19; Claimant’s Rejoinder to Respondent’s Reply in Support of its Application for Stay of the Proceedings, para. 7 (“*PEL’s Treaty claims are both distinct from and broader than the purported “contract dispute” in the ICC Arbitration*”). This is a key reason why PEL has no affirmative claims before the ICC Tribunal. See PEL’s PHBs (ICC proceedings), para. 25.

¹⁶ Award, para. 252.

b) “Undisputed” Observations

12. The Majority incorrectly states that it is “*undisputed*” that “*Mozambique never awarded the concession for the Project to PEL*”.¹⁷ On the contrary, Claimant has disputed this repeatedly in its submissions. It is undisputed that the parties never signed the finalised, concession contract, but a finalised concession agreement is an entirely separate matter from awarding the concession as a matter of Mozambican procurement law.
13. Claimant repeatedly demonstrated that the Council of Ministers awarded the concession to PEL on 16 April 2013.¹⁸ The entire sequence of events, from PEL conceiving the Project, funding the Preliminary Study, signing the MOI, preparing the PFS, to the CM Decision granting the direct award, tracks the procurement steps outlined in the PPP Regulations, duly adapted for a procedure in which there is a direct award procurement rather than a competitive public tender.¹⁹
14. Specifically, the CM Decision directly corresponded with the “*adjudicação*” phase of the procurement procedure set forth in the PPP Law and Regulations and, once that direct award was granted, it could not be arbitrarily revoked.²⁰ Thus, after the CM Decision, Mozambique was legally obligated to proceed to the next phases of the procedure (“*negociação*”).²¹ And indeed, Mozambique commenced the *negociação* phase. It invited PEL to negotiate and provide a bank guarantee, and scheduled inter-ministerial meetings,²² only to reverse course abruptly, purport to revoke the direct award, and then ultimately grant the same concession to another party.
15. Given the above, Claimant requests the Tribunal to amend the Award as follows:
 - a. Paragraph 269:

There is no dispute regarding the fact that Mozambique never ~~awarded PEL a concession to develop the Project~~ signed a finalised concession

¹⁷ Award, para. 350.

¹⁸ See PHBs, paras. 7, 9, 56-59; Claimant’s Reply on the Merits and Response to Objections to Jurisdiction, paras. 362, 905(d).

¹⁹ It seems that Mozambique’s repeated attempts to conflate the MOI with a concession contract, as well as an unfortunate tendency by both parties to use the term “*direct award*”, to refer to *both* a type of procurement procedure (*ajuste direto*) and a specific phase within Mozambique’s procurement procedure (*adjudicação*), may have created some confusion as to what a direct award entails and the Council of Minister’s role in granting a direct award. See, e.g., CLA-64A Art. 9, 17(3), 33(1); CLA-65A Art. 13(3); Tr. 1779:18-1780:6 (Ms. Teresa F. Muenda clarifying the difference between “*ajuste direto*” and “*adjudicação*” after a question by Mr Hugo Perezcano Díaz). For an explanation of the procurement process, see PEL’s PHBs (ICC proceedings), paras. 67-73.

²⁰ See para. 6 above. See also PHBs, para. 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*”); PEL’s PHBs (ICC proceedings), para. 72 (“*In the direct award procedure, once the proposal presented by the selected proponent has been analysed and evaluated, the concession is awarded (in Portuguese, adjudicação). [...] [T]his is precisely what happened on 18 April 2013.*”).

²¹ See, e.g., Tr. 1758:25-1759:9 (Ms Muenda confirming that an invitation to negotiate concession terms occurs after a direct award); Tr. 1579:14-24 (“*[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 directo, 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.*”); CER-3, para. E9.

²² C-29.

agreement with PEL. What the Parties discuss is whether Claimant's rights enshrined in the MOI, together with its expenditures and activities (prior to Mozambique's decision to award a concession to ITD/TML, and not to Claimant) and the direct award and ensuing rights the Council of Ministers granted PEL in April 2013 are covered investments under the BIT.

b. Paragraph 348:

There are two preliminary ~~(and undisputed)~~ observations concerning certain key features of the Project:

c. Paragraph 350:

~~Second, Mozambique never awarded the concession for the Project to PEL; although Claimant asserts that Mozambique's Council of Ministers granted PEL a direct award of the concession, there was no law passed or contract signed between PEL and Mozambique pursuant to which PEL was actually conferred a business concession. Therefore, Claimant never obtained (for the purposes of Art. 1(b) of the BIT) a "business concession [...] conferred by law or under contract".~~

d. Paragraph 351:

Claimant ~~disagrees does not disagree with these observations. Its argument is different.~~ It avers that: [...]

c) The MOI

16. The Majority incorrectly summarises Claimant's principal argument in relation to the MOI when it states that "*Claimant submits that the MOI was a contract entered into with Mozambique which had a financial value, and that, as such, it represented a protected investment under the BIT*".²³ While Claimant does contend that the MTC granted PEL valuable rights in the MOI, PEL's argument in this regard is that, once the conditions precedent contained in the MOI were satisfied by June 2012 (*i.e.*, the approval of the PFS by Mozambique and PEL's exercise of its right of first refusal), PEL's rights under the MOI vested. Those vested rights, in conjunction with the other components of PEL's investment in Mozambique, were protected under the BIT.²⁴ Given this subtle, albeit key, difference, paragraph 367 should be amended as follows:

*Art. 1(b)(iii) of the BIT extends protection to "rights to money or to any performance under contract having a financial value". Claimant submits that the MOI was a contract entered into with Mozambique **granting rights which, once vested, had a financial value.**, ~~and that, as such, it Those vested rights, along with the direct award of the concession granted by the~~*

²³ Award, para. 367.

²⁴ See PHBs, para. 9.

Council of Ministers, valuable know-how transferred to Mozambique with PEL's concept and the proprietary knowledge in the PFS, and funds contributed for the Preliminary Study and the PFS, represented a protected investment under the BIT.

d) Negotiations with the CFM

17. The Majority's description of PEL's purported negotiations with the CFM is likewise inaccurate. The Award states that PEL and CFM "sat down" and had "a few rounds of negotiations".²⁵ This is wrong, and Claimant is not aware of anything in the record that suggests that PEL and CFM had any negotiations, let alone "rounds" of them. Rather, the undisputed evidence demonstrates that PEL never had a chance to engage in any negotiations with the CFM, as their in-person interactions were limited to two meetings. At the first meeting, CFM claimed to have no knowledge of the Project, a fact which was demonstrably false.²⁶ At the second meeting, the CFM said it had no interest in the Project and refused to negotiate.²⁷
18. Initially, Mr Daga of PEL wrote to the MTC asking to whom he could contact at the CFM "for the formation of [the] SPV".²⁸ As he "did not get a reply", he decided to start "with [his] own contacts".²⁹ That is how he secured an appointment with CFM Chairman Mr Mualeia "in the first week of August 2012".³⁰ At the meeting, Mr Mualeia informed Mr Daga that the CFM had not been instructed by the Mozambique Ministry of Transport and Communication (the "MTC") to negotiate with PEL, that he had never seen the PFS, and that he was not even "aware of the project".³¹ Following that meeting, Mr Daga sent the PFS, as well as a letter from the MTC approving the PFS, to Mr Mualeia.³² He also arranged a further meeting for the end of August.³³ But rather than negotiate in good faith at that second meeting, Mr Mualeia informed PEL "categorically that CFM did not have

²⁵ Award, paras. 349 and 388.

²⁶ See CWS-1, para. 65 ("On 9 May 2012, [PEL] presented the results of the PFS to technical and commercial personnel from the MTC and CFM [...]"); CWS-3, para. 70 ("The results of the PFS were presented on 9 May 2012 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, which demonstrated the importance of the Project to Mozambique, and the fact that all necessary decision makers were present."); CWS-3, para. 76 ("On 17 May 2012, Mr Ruby from the MTC [...] gave a presentation to the CFM regarding the Preliminary Study, the MOI, the PFS, and the MTC's recommendations."); Tr. 492:9-14 (Mr Mualeia's contention that he was not aware of the Project "was a shock for [Mr Daga] because on 9th of May [2012] in the presentation, CFM engineering director and other people were present. After that [PEL] had two, three meetings in CFM office with [CFM's] technical and commercial people, and [PEL] has discussed with them [the details of the Project]."). See also C-7, Power Point presentation entitled "Pre feasibility study for development of 25 MTPA handling capacity Port at Macuze and approx. 516 Km standard gauge Rail Corridor from Macuze to Moatize" given by PEL to the MTC and CFM on 9 May 2012.

²⁷ See PHBs, paras. 46-51; Statement of Claim, paras. 167, 187-189.

²⁸ Tr. 491:23.

²⁹ Tr. 491:24-25.

³⁰ CWS-1, para. 80.

³¹ Tr. 492:4-8. As set out above, this statement was patently false.

³² CWS-1, para. 82.

³³ CWS-1, para. 85.

*sufficient funds to implement CFM’s existing projects, let alone to invest further funds into PEL’s Project”.*³⁴

19. Claimant is not aware of any evidence contradicting Mr Daga’s descriptions of these meetings, nor of any evidence of additional meetings between CFM and PEL to negotiate the concession agreement. Thus, it is wrong to say that there were “*negotiations*” between PEL and the CFM to implement the Project at any time (whether before or after the CM Decision). Accordingly, paragraphs 349 and 388 should be amended as follows:

a. Paragraph 349:

First, PEL never created an enterprise (either in the form of a branch or a subsidiary) located or incorporated in Mozambique, with the purpose of developing the Project (or, for that matter, with any other purpose). Claimant was asked by the Government to create a joint venture company in Mozambique, in which the CFM (the Mozambican rail operator) would participate as a junior partner; but ~~CFM refused to negotiate and after a few rounds of negotiations,~~ the initiative stalled and the plans never materialized – there was pre-investment activity (e.g., discussions on whether to create a local corporation), but no investment.

b. Paragraph 388:

Upon signature of the MOI, PEL then prepared at its own expense a Pre-Feasibility Study to determine – albeit preliminarily – the viability of the Project. The Pre-Feasibility Study was approved by Mozambique and PEL ~~approached sat down with~~ the CFM to negotiate a joint venture – but ~~no agreement was reached.~~ the CFM refused to negotiate with PEL. Thereafter, Mozambique decided to launch a public tender to award a concession for the Project. Albeit under protest, PEL decided to participate in this tender.

e) ICC proceedings

20. The Majority also incorrectly states in the Award that Claimant has a “*full opportunity*” to solve its “*contractual*” dispute in the ICC arbitration.³⁵ This is untrue both due to the fact that the most critical components of PEL’s claim are not contractual in nature, and are therefore outside the ICC Tribunal’s jurisdiction, and further because PEL no longer has the ability to raise new contractual claims in the ICC arbitration.
21. First, PEL did not raise any affirmative claims in the ICC proceedings because, *inter alia*, Mozambique’s conduct and PEL’s investment as a whole, exceeded the MOI’s scope.³⁶

³⁴ CWS-1, para. 85.

³⁵ Award, para. 391.

³⁶ See, e.g., Claimant’s Reply on the Merits and Response to Objections to Jurisdiction, paras. 616-618 (“*PEL alleges that Respondent breached the FET standard by the conduct of the MTC, the CFM and the Council of Ministers, which reneged on the commitments made to PEL to directly award it the Project concession, made inconsistent and non-*

For example, and as noted above, the Council of Minister’s grant to PEL of a direct award of the concession in April 2013 was not contractual, and its revocation of PEL’s direct award violated both contractual and non-contractual rights. Indeed, Mozambique has maintained in the ICC arbitration that the CM Decision is unrelated to PEL’s MOI rights.³⁷ Accordingly, it is not possible for PEL to access justice for Mozambique’s grant – and subsequent arbitrary revocation – of PEL’s direct award through the CM Decision.

22. Second, and as PEL informed the Tribunal prior to its issuance of the Award, all issues of liability already have been pled and argued in the ICC proceedings. Indeed, the hearing on the merits was over a year ago and the ICC Tribunal expects to issue its award on liability imminently.³⁸ As a result, PEL is left with no alternative forum to access justice for the totality of wrongs committed by Mozambique.
23. Given the above, Claimant requests the Tribunal to amend paragraph 391 as follows:

In sum: Claimant conducted several activities in Mozambique with the goal of obtaining a concession, but such activities never surpassed the pre-activity threshold and never matured into a protected investment. Ultimately, PEL has a pre-investment dispute vis-à-vis Mozambique, ~~and the proper forum to solve such dispute is a contractual ICC Arbitration, where the Parties should have a full opportunity to resolve their contractual claims.~~

II. Corrections to the Dissenting Opinion

24. Paragraph 4 of the Dissenting Opinion contains two typographical errors. First, “MTC” is incorrectly referred to as “MTS” in the first line. Second, the word “negative” in English is generally used as an adjective rather than as a noun as it is used in line 4, although Claimant appreciates that in Spanish it can be used to mean a refusal or denial. Accordingly, Claimant suggests that paragraph 4 should be amended as follows:

PEL prepared and submitted the PFS, which was approved by the MTSC on 15 June 2012. Although PEL informed Respondent three days later that it was exercising its right of first refusal, the implementation of the project was not possible due to the ~~negative~~ refusal of CFM (an entity of the

transparent decisions, conducted themselves arbitrarily, and failed to act in good faith. It involves not only claims relating to the promises made in the MOI, but also claims relating to the conduct of the public tender process, which was riddled with irregularities, lacked transparency, and destined for a pre-determined outcome. The tender process is not even mentioned in the MOI (and hence, axiomatically, cannot be part of a purely contractual dispute”); Claimant’s Rejoinder on Objections to Jurisdiction, paras. 18-19; Claimant’s Rejoinder to Respondent’s Reply in Support of its Application for Stay of the Proceedings, para. 7 (“PEL’s Treaty claims are both distinct from and broader than the purported “contract dispute” in the ICC Arbitration”).

³⁷ See, e.g., Mozambique’s PHBs (ICC proceedings), paras. 211-212, (part of a section called “bullying the council of ministers into “another chance” is not a right arising from the MOI” and noting that “the [CM Decision] does not reference that MOI at all.”).

³⁸ On 20 January 2024, Claimant notified this Tribunal that the ICC Tribunal expects to submit its award for scrutiny to the ICC Court by 29 February 2024. Since then, the ICC Tribunal extended this deadline to 29 March 2024.

Respondent) to invest in the Project and incorporate a company jointly with PEL as requested by the MTC when approving the PFS.

25. Professor Tawil, like the Majority, notes “that PEL will be granted a full opportunity to present its claims before the ICC Tribunal”. While we believe Professor Tawil is referring only to PEL’s contractual claims rather than any Treaty claims, as explained above, due to the procedural phase of the ICC arbitration, this is incorrect.³⁹ Accordingly, paragraph 14 of the Dissenting Opinion should be amended as follows:

The ICC Arbitration is of a contractual basis and clearly differs from the dispute before us, based on the alleged violations of the Treaty. ~~While I expect that PEL will be granted a full opportunity to present its claims before the ICC Tribunal, i~~ It was this Treaty arbitration the natural fora in which such claims should have been discussed.

III. Conclusion

26. In accordance with Article 36(1) of the UNCITRAL Rules, Claimant respectfully requests the Tribunal to correct paragraphs 269, 346, 348, 349, 350, 351, 352, 367, 388 and 391 of the Award and paragraphs 4 and 14 of the Dissenting Opinion, as set out above, and further to consider if, in light of these corrections to Claimant’s representation of its case, further corrections are required for paragraphs 354 to 383.

Yours faithfully,



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³⁹ See para. 22 above.

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