PCA CASE NO. 2020-21

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

AND

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

Between:

PATEL ENGINEERING LTD.

Claimant

-and-

REPUBLIC OF MOZAMBIQUE and MOZAMBIQUE MINISTRY OF TRANSPORT AND COMMUNICATIONS

Respondents

RESPONDENT REPUBLIC OF MOZAMBIQUE'S POST-TRIAL BRIEF

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3 March 2023

Juan C. Basombrío
Dorsey & Whitney LLP
600 Anton Boulevard, Suite 2000
Costa Mesa, California 92626 U.S.A.
Telephone: 1-714-800-1405
basombrio.juan@dorsey.com

Theresa Bevilacqua
Daniel J. Brown
Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402 U.S.A.
Telephone: 1-612-340-2600
bevilacqua.theresa@dorsey.com;
brown.daniel@dorsey.com

Counsel for Claimants Republic of Mozambique and Mozambique Ministry of Transport and Communications

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I. THE MOI'S ARBITRATION CLAUSE LIMITS THIS TRIBUNAL'S JURISDICTION

- The MOI's arbitration clause encompasses all disputes arising out of the MOI. R-92; R-94; C-5A, C-5B, R-1, R-2.
- After this hearing, it is now clear that the adjudication of PEL's treaty claims are dependent on how the parties underlying contractual disputes are resolved.
- The ICC Partial Award resolved that the ICC has exclusive jurisdiction over the contract disputes, and that Award is final and binding on PEL per the ICC arbitration rules. R-92; R-94; Tr. 26:4-27:2.
- *Kompetenz kompetenz* is not a blank check, as the Tribunal cannot disregard prior adjudications between the parties. Tr. 161:5-162:5.
- This Tribunal must refrain from issuing a final award until after the ICC Tribunal issues its final award, and the parties are able to comment on and this Tribunal is able to consider the effect of that award on this proceeding.

II. THIS TRIBUNAL LACKS TREATY JURISDICTION

- The Tribunal must now decide its jurisdiction, and all of the record evidence compels the conclusion that no treaty jurisdiction exists. *See generally*, MZ's Jurisdictional Objections and Statement of Defense (19 Mar. 2021) ("SOD"), at ¶¶ 166-454; MZ's Rejoinder on the Merits and Reply to Objections on Jurisdiction (29 Nov. 2021) ("Rejoinder"), at ¶¶ 661-1087; MZ's Motion for Bifurcation (20 Nov. 2020), at 8-18.

A. The MOI is Not an Investment Under the Bilateral Investment Treaty

- Article 1(b)(v) of the Investment Treaty between India and Mozambique requires that investments be established or acquired, including in the case of business concessions, which must be conferred by law or under contract. RLA-1. PEL and its legal expert concede the MOI is not a concession and does not grant a concession. *See* Rejoinder at ¶ 817; PEL's Reply on the Merits (9 Aug. 2021) ("Reply), at ¶ 1081; PEL Opening Tr. 71:6-20; Medeiros Tr. 1574:22-1575-5; 1577:6-12.
- As to the other definition, "[e]ven if a claim to return of performance … has a financial value [Art 1(b)(iii)] it cannot amount to re-characterizing as an investment dispute a dispute which in essence concerns a contingent liability." RLA-53, *Joy Mining v. Egypt*, ICSID at ¶¶ 45-47.

B. The MOI is Not an Investment Under International Law

- A conditional contract is not an "investment" under international law. RLA-53, *Joy Mining v. Egypt*, ICSID at ¶¶ 45-47 ("To conclude that a contingent liability is an

asset under Article 1(a) of the Treaty and hence a protected investment, would really go far beyond the concept of investment, even if broadly defined, as this and other treaties normally do."). *See* SOD, at ¶¶ 362-419; Rejoinder, at ¶¶ 661-870.

1. The MOI is a preliminary and a conditional contract. PEL gets a "*direito de preferência*" if the PFS is approved. If the project is not viable, the parties negotiate another MOI.

- The witness statements and hearing have conclusively established that the MOI is both a **preliminary** and a **conditional** contract. Rejoinder, at 661-870; RWS-1 at ¶¶ 7-17, 23-24; RWS-2 at ¶¶ 5-10; RWS-3 at ¶¶ 16-22; RWS-4 at ¶¶ 3-7; RER-6 at ¶¶ 19-23; RER-11 at ¶¶ 92-107; Medeiros Tr. 1575-1578; Muenda Tr. 1680:19-1682:4; 1722; 1737-1738.
- PEL's own expert concedes: "The MOI has **no other goal** than being a **preliminary** contract." Medeiros Tr. pp. 1572-1573.
- "An experienced entity would not have thought it had a legally enforceable agreement based only on a MOU or even a term sheet." **RER-11**, Ehrhardt Expert Report, ¶¶ 106-107.
- PEL admits that the MOI was "**subject to conditions** …." (Reply ¶ 48); and "**subject to the fulfilment of certain conditions."** *Id*. ¶¶ 180 and 557.
- PEL's Kishan Daga admits the **contingent** nature of the MOI. CWS-1 at ¶¶ 39-40; CWS-3 ¶ 65.

C. PEL's Pre-Investment Activities and Expenditures are Not an Investment

- "[P]re-investment and development expenditures" are not an "'investment' in the absence of the consent of the host State to the implementation of the project." RLA-54, *Mihaly v. Sri Lanka*, ICSID at ¶ 60. Rejoinder, at ¶¶ 723-743; SOD, at 388-93, 930; *see also* RLA-53.
- Expenditures during the "exclusivity period" were not an "investment," because "Respondent expressly insisted that all expenses involved in pushing the Project forward were for the Claimant's account." RLA-56, *Zhinvali v. Georgia*, ICSID at ¶¶ 410-411. SOD, at ¶ 399; Rejoinder, at ¶ 738.
- PEL expressly agreed to undertake the Preliminary Study and the Pre-Feasibility study at its own expense. Daga Tr. 294 13-16; R-1 and R-2 at clauses f., 1 and 4.

D. No Investment Exists Under the *Salini* Factors

- Pursuant to the typical *Salini* factors, an investment requires substantial contribution by the investor, of a certain duration in time, the existence of an operational risk to the

investor, a certain regularity of profit to the investor, and a contribution to the economic development of the host state. RL-7, *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 (Decision on Jurisdiction, 23 July 2001) at ¶ 52; *see also* SOD, at ¶¶ 400-19; Rejoinder, at 830-34; Motion for Bifurcation, at 11.

- No contribution in money or other assets. Pre-investment activities and expenditures do not qualify. RLA-130; RLA-54, *Mihaly Int'l Corp. v. Democratic Soclialist Repiblic of Sri Lanka*, ICSID No. ARB/00/2 (15 March 2022); RLA-56, *Zhinvali Development Ltd. v. Georgia*, ICSID No. ARB/00/1 (24 January 2003) ¶ ¶ 410-411.
- No investment of the required duration – typically 2 to 5 years. *Salini* at ¶ 53. Here, the MOI had a term of 12 months for PEL to provide the PFS.
- No investment risk. "It may be that any transaction involves … ordinary commercial [risk], but …the relevant risk is that which is specific to the investment which did take place, not the lost opportunity" to make an "investment." RLA-58, *Nova Scotia v. Venezuela*, ICSID at ¶ 105. There was no "investment risk," because PEL's expenditures and actions were "pre-investment activity." PEL took the risk it may not be awarded the concession, if it could not meet the conditions and win the public tender, but that is commercial risk. Here, there was no construction of any project by PEL, and no operation of any concession – no investment risk. RLA-61, *Romak S.A. v. Uzbekistan*, PCA No. AA280 (26 November 2009) ¶ 229.
- No contribution to the economic development of the host State exists. Unlike *Salini*, where "[t]he works were completed" after 36 months and the government took over the completed project, *id.* at ¶¶ 3 and 4, here there was no concession agreement between PEL and the MTC, and PEL has constructed nothing.
- The alleged investment was not in accordance with the laws of the host State. MOI cannot award a concession under PPP Law. RWS-1 at ¶¶ 23-24, 29, 49; RWS-2 at ¶ 5; RWS-3 at ¶¶ 16-29; RWS-4 at ¶¶ 3-9.
- No Bona fides exist. PEL did not make an investment. PEL constructed nothing. PEL merely submitted a bid in a public tender, which is not an investment. Further, PEL concealed its blacklisting/debarment – it was material. India Supreme Court held PEL is "not (commercially) reliable and trustworthy." PEL's balcklisting and failure to disclose the same also renders PEL's claims inadmissible. *See* H-2 at 103-108.

E. PEL was Not an Investor

- PEL did not make an investment as demonstrated above in Section II.A-D.

- PEL does not know and has no records regarding what alleged costs, if any, it incurred preparing the Preliminary Study, the PFS and the Public Tender Submission. Daga Tr. 295:6-296:25 (preliminary study); *see also* PEL's Response to Redfern Requests Nos. 10 (preliminary study), 38 (PFS) and 46 (PGS consortium public tender).
- The **real party-in-interest**, if one exists, is the PGS Consortium, not PEL alone. PEL formed a consortium with Grinrod and SPI, a Mozambican company, and participated in the public tender for the project. PEL's participation in the consortium destroys jurisdiction. Daga Tr. 505:22-506:16; C-37; C-61; C-62; C-190; R-23; R-30 through R-38; RLA-148 *ACP Axos v. Kosovo*, ICSID at ¶¶ 187-195 ("Axos *alone cannot avail itself of the rights*, if any, *belonging to the Consortium* formed by Axos and Najafi.").

III. MOZAMBIQUE PREVAILS ON THE MERITS

A. The Portuguese Version of the MOI Controls and Governs

- Portuguese is the official language of Mozambique, RLA-2 at Art. 10.
- The 2010 Procurement Law, Article 5 states that contracts with the Government must be in Portuguese, and if they are also entered in another language, the Portuguese language controls. RLA-3 at Art. 5; RER-2 at ¶ 3; Muenda Tr. 1676:4-1677:2; RWS-1 at ¶¶ 28-29; RWS-4 at ¶¶ 4, 12.
- There was a **meeting of the minds** between Mozambique's and PEL's Portuguese versions, which are identical (except for one formatting change) and were admittedly signed by both parties. CWS-1, at ¶ 46; CWS-1, at ¶ 10; RWS-2, at ¶ 4; C-5B; R-1; Patel Tr. at 376-377.
- Mozambique's English version is also consistent with the Portuguese versions, except only that the term *direito de preferência* was incorrectly translated in English. R-2; C-5B.
- PEL's English version is an outlier and must be rejected because it contains language not found in the other three versions. C-5A, at Clause 2.1.
- PEL had the Mozambican lawyers who helped draft the new 2011 PPP law (Sal & Caldeira) advising PEL on the MOI. Daga Tr. p. 310; CWS 1, at ¶ 36.
- Under these circumstances, a judge in a civil jurisdiction would undoubtedly conclude that the Portuguese version of the MOI controls because (1) Mozambique is a Portuguese-speaking country; (2) the Portuguese versions are consistent; and (3) the Portuguese versions were signed by the parties. A civil jurisdiction judge would be

guided **by the final contract** and would not consider prior drafts or arguments that a party did not understand what they were signing.

B. Under Mozambique's PPP Law, a Direito de Preferência Means a Bidder Receives a 15% Margin (Preference) in a Public Tender

- There is no dispute that the parties envisioned and understood that the MOI would be governed by the PPP Law once enacted. *See* CER-3, at ¶¶ 37-46; CWS-1, at ¶ 89; RWS-2, at ¶ 3.
- When Zucula sent the June 2012 letter approving the PFS, the PPP law was in force. C-11; RLA-6.
- It is undisputed that Article 13 of the PPP Law sets for the legal framework for PPP contracting in Mozambique and that the proposed Project is subject to the PPP law. CLA-65A and RLA-6. **Article 13(5)** unambiguously establishes that the term **"direito de preferência" means a right and margin of 15%** provided to the proponent of an **unsolicited proposal** in connection with the public tender.
    1. **The General Legal Framework for PPP Contracting is the Public Tender** (Article 13(1) of the PPP Law CLA-65A and RLA-6).
    2. **Ajuste Directo is a Limited Exception and Last Resort Alternative to a Public Tender** (*Id*. at 13(3)).
    3. **Ajuste Directo May Follow a Tender if No Bidder or the Winning Bidder Withdrawals from the Public Tender** (*Id*. at 13(4)).
    4. **The PPP Law Expressly Defines a Direito de Preferência as a 15% Scoring Advantage in a Public Tender** (*Id*. at 13(5)).
- Prof. Medeiro also translates the term as a "right of preference." *See* Legal opinion at ¶ 15 ("My analysis will focus only on the right of preference, typical of the Portuguese-speaking world.").
- PEL's legal counsel in Mozambique, Sal & Caldeira, helped draft the new PPP law, advised PEL in negotiating the MOI, and advised PEL on how to participate in the public tender and how to exercise its direito de preferência in the public tender. CWS-1 at ¶ 36; C-51. The legal opinion provided by Sal & Caldeira to PEL, dated 9 March 2013, mistranslates "direito de preferência" to "right of first refusal." Nonetheless, it also concludes that in order for PEL to exercise its "right of first refusal" it must submit a "bid" in the public tender: "PEL has expressed its intention to exercise its right of first refusal … but has not yet submitted its bid **in order to actually exercise that right** as provided for in Article 13(5) of the PPP law." C-51 at p.4.

- Direito de preferência clearly provides PEL with a 15% scoring advantage, and nothing more. RLA-6 at Article 13(5). Direito de preferência does not mean a direct award. That is a different concept: ajuste directo. RLA-6 at Article 13(3).

C. At Best, The Portuguese Version of the MOI Provided PEL Only a Direito de Preferência

- The Portuguese version of the MOI (1) provided PEL with the opportunity to submit a Pre-feasibility study (PFS) at its own cost; (2) provided the Government with the opportunity to approve or reject the PFS; (3) if the PFS was approved, PEL would receive a direito de preferência; and (4) if the PFS was not approved, the parties would negotiate a new MOI for a different project. C-5B; R-1.
- Therefore, **sole object of the MOI** is for PEL to prepare a PFS and for the MTC to approve or reject it, and if approved, PEL gets a 15% scoring advantage in the public tender. C-5B; R-1.
- The Portuguese version of the MOI is internally consistent and a holistic review clearly demonstrates that it is centered on the preparation of the PFS.
- The MOI does not identify any specific location for the port or railway, and merely states that the parties are interested in exploring a corridor from Tete to the Zambezia coast (C-5B and R-1, recitals a, d, & f).
- The objective of the MPI is for PEL to undertake the PFS *at its own cost*. (C-5B and R-1, Clause 1).
- The rest of the MOI's clauses demonstrate the sole object of the MOI is for PEL to prepare and for the MTC to approve or reject the PFS:
    - Clause 3 – Period to complete PFS
    - Clause 4 – Costs of PFS to be borne entirely by PEL
    - Clause 5 – Assistance by MTC in preparing PFS
    - Clause 6 – Exclusivity only prior to approval of the PFS
    - Clause 7 – If project is not viable, a new MOI
    - Clause 8 – Mozambican law applies
    - Clause 9 - Typical anti-corruption clause
    - Clause 10 – Any dispute arising out of the MOI goes to ICC arbitration
    - Clause 11 – Confidentiality related to the PFS
    - Clause 12 – Language of MOI.

D. It is Undisputed that the MOI Does Not Award a Concession

- The MOI **only uses the term *direito de preferência***. C-5B at 2.2; Tr. p. 1645.
- The MOI **does not use the term *ajuste directo***. Medeiros Tr. p. 1644-1645.
- Minister Zucula testified that, under the MOI, if PEL was unable to reach agreement with CFM, "**a tendering procedure would ensue** where PEL would have **an advantage vis-á-vis other possible competitors**, **the so-called *direito de preferência*** in the memorandum." Zucula Tr. p. 605. "If Patel enters the public tender contest, **it has a *direito de preferência* expressed as 15 points or 15 per cent**." Zucula Tr. p. 623.
- Importantly, the MOI **terminates/ends** upon two alternative events: (1) PFS is approved and PEL receives direito de preferência; and (2) PFS is rejected and the parties negotiate a new MOI. C-5B and R-1.

E. Mozambique's English Version of the MOI is Identical to Both Portuguese Versions Excepts that it Improperly Translates Direito de Preferência to "Right of First Refusal"

- Direito de preferencia is a legal term of art under Mozambican law. RER-2 at ¶ 11; Muenda Tr. 1677, 1680-1683.
- The proper translation would be right of preference, not right of first refusal, which is a common law concept. CER-1, ¶ 15; Medeiros Tr. 1643-1644.

F. PEL's English Version of the MOI is Internally Inconsistent, Different from All Other Versions and Makes No Sense

- The language found only in PEL's English version of Clause 2.1 introduces concepts not found in the two Portuguese and Mozambique's English versions:
- No other version of the MOI references a working group.
- No other version of the MOI references assessing an appropriate site for the port and finalizing a rail route.
- No other version of the MOI contains a cross reference to Clause 7.
- No other version of the MOI contains a reference to awarding a concession to PEL.
- PEL's English version of Clause 2.1 has additional language stating: "once the **terms under Clause 7** of this memorandum are **approved**, the Govt. of Mozambique **shall issue a concession** of the project in favour of PEL." C-5A.
- However, PEL's English version of **Clause 7 is the same** as all other versions of Clause 7 and states that **if the project** is deemed technologically or commercially ***unviable***, then the parties will negotiate **a new MOI**. *Compare* C-5A *with* C5-B, R-1 and R-2.

- Therefore, pursuant to Clauses 2.1 and 7 of PEL's English version, PEL is awarded the concession only if it is found to be "techno commercially unviable." SOD, at ¶¶ 80-81, 466; Rejoinder, at ¶ 131; RWS-2 at ¶¶ 13-16.

G. Mozambique Approved the PFS, PEL Exercised its Direito de Preferência, and PEL Negotiated with CFM

- In approving the PFS, Minister Zucula provided PEL with two options: (a) exercise its *direito de preferência* and/or to negotiate with CMS. (**C-11**). Bottom line: PEL got both chances. Zucula Tr. 626:23-628:24.
- PEL responded to Minister Zucula's 15 June 2012 letter by exercising its "right of preference" and asking to negotiate directly with CFM. (**C-12**).
- PEL first tries to negotiate with CFM in the Summer 2012 but fails to reach agreement on a joint venture.
- CFM and PEL disagreed on their percentage participation in a joint venture.
- Had there been agreement, it would have been ***the joint venture*** that would have been awarded a concession by ajuste direito, not PEL itself. Zucula Tr. at 626-628, 648-649.

1. The MTC Could Not Order CFM to Enter a Contract or Joint Venture with PEL

- It is undisputed that PEL tried to negotiate with CFM. It is also undisputed that notwithstanding Mr. Daga's amazing memory of a single conversation with a CFM representative a decade after the fact, CFM knew about the PFS, knew about PEL's proposal and was present at the meeting on 9 May 2012, and even provided input to Mr. Daga. It is simply not credible for Mr. Daga to now claim that CFM knew nothing about the proposed project. But knowing about the project and forcing CFM to enter a commercial transaction with PEL are *very* different things. SOD, at ¶¶ 623, 662, 670-72; Rejoinder, at ¶¶ 560, 954.
- CFM knew about the project, but the MTC was in no way required to make CFM enter a contract with PEL. The MTC could not force CFM to enter a contract with PEL. *Id.*
- It is commonplace that governments create entities with their own juridical personalities in order **to carry out commercial transactions**, like CFM. These business entities are commonly owned by the State, their officers are appointed by the State, they are provided policy direction by the State, but they enjoy **financial and administrative autonomy** over their **day-to-day business**, like CFM. Zucula Tr. p.

663:2-3 ("CFM has administrative and financial autonomy. I can't force them to anything.")

- There is absolutely **no evidence that CFM is an alter ego of the MTC**, which allow piercing of CFM's corporate veil. To the contrary, the evidence establishes CFM's independence in that it declined, for its own reasons, to enter into a JV with PEL even after the MTC recommended PEL and CFM engage in such discussions.
- Article 33(1)(a)(i) of the PPP Law does not cap CFM's participation in a JV at 20%. The provision referenced by both Mr. Daga and Prof. Medeiros limits only the amount a state-owned entity can ***guaranty*** of the ***portion of stock reserved*** for sale on the stock market for Mozambican individuals. The very next subsection expressly forecloses the argument made by PEL and allows for public or consortium participation in ***any amount negotiated*** and expressly stated in the contract: "the opportunity for Mozambican public or private legal entities to participate in the enterprise's share capital or the consortium's capital, under the terms that the parties negotiate and agree on, ***without prejudice*** to the provisions of . . .subparagraph *a)* above." CLA-65A and RL-6 at Article 33(1)(b) (emphasis added).

2. The MTC Properly Proceeded to the Public Tender Process

- After PEL **failed to negotiate with CFM**, and pursuant to the PPP Law, the MTC proceeded with the tender process, and provided PEL with its direito de preferência margin of 15%. SOD, at ¶ 13-14; RLA-6.
- PEL **accepted the 15% scoring advantage** and participated in the tender through the PGS Consortium (which includes a Mozambican entity, destroying treaty jurisdiction regardless of it not being a claimant). SOD, at ¶¶ 22, 65-66; Rejoinder, at ¶¶ 1199-1200.
- An **independent jury** (not the MTC) scored and adjudicated PEL in last place, and thereupon the Government properly awarded the concession to the winning bidder. SOD, at ¶ 456; Rejoinder, at ¶¶ 1216, 1232.
- PEL did not exhaust the administrative appeal process in the tender and also failed to challenge the tender result in court, and cannot do so here. SOD, at ¶ 456, 583-85; Rejoinder, at ¶¶ 1226-27.

3. The Council of Ministers Did Nothing Wrong

- During the course of the public tender, PEL repeatedly insisted that it should be provided a direct award, writing multiple letters to the MTC, the Prime Minister of Mozambique, the Indian Minister for External Affairs in New Delhi, the High

Commissioner of Mozambique in India (who then writes to Mozambique's Ministry of Foreign Affairs). C-380 (citing C-20, C-23, C-28, C-266); Daga Tr. at 506-507.

- In order **to provide PEL fair and equitable treatment**, the MTC approached the Council of Ministers and requested that PEL be provided a contemporaneous opportunity to again try to reach agreement with CFM. Note that PEL's talks with CFM had begun nine months earlier. Zucula Tr. at 675-679.
- The MTC Minister communicated to PEL that it was being provided another such opportunity, subject to two conditions: (1) a bank guarantee; and (2) some written letter, agreement or take or pay memorandum from mining company off-takers.(C-29).
- PEL provided the guarantee, but failed to meet the second condition, and the guarantee was then released. Daga Tr. 511-512; Rejoinder, at ¶¶ 274-75; R-27.
- **Critically, the foregoing means that even of the Council of Minister's statements are interpreted as guidance to explore "ajuste directo," they still do not bring this dispute within treaty jurisdiction, because PEL made no investment in response to the Council of Ministers' statements.**
- Moreover, governments should have the **flexibility** to provide options such as this without fear of that they will be subjected to a treaty arbitration.

H. No Direct or Indirect Expropriation Exists

- A commercial contract claim is not the same as "expropriation" sufficient to sustain a treaty claim. **"**The Tribunal concludes that it is one thing to expropriate a right under a contract and **another to fail to comply with the contract**. **Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation.** In the present case **the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum**." **RLA-103**, *Waste Management, Inc. v. United Mexican States*, ICSID No. ARB(AF)/00/3 (30 April 2004), ¶ 175.
- "[**A] right to formal negotiations cannot be subject to expropriation**." **RLA-117**, *Oxus Gold PLC v. Uzbekistan*, Ad Hoc Arb. at ¶ 301. "Finding that a right to mere formal negotiations" of a concession agreement "could be subject to expropriation ... would lead to transforming an obligation **to do something to a certain standard** ... into an obligation **to achieve a certain result**." *Id.*

- Mozambique did not directly or indirectly expropriate, enacted no legal or regulatory changes, nor took any sovereign action to affect PEL's alleged contractual rights in the MOI. SOD, at ¶¶ 766-818.
- PEL must assert its contract claims in the ICC arbitration. Rejoinder, 965-76.

I. No Breach of the Fair and Equitable Treatment ("FET") Standard Exists

- An FET "determination must be made in light of the **high measure of deference** that international law generally extends to **the right of domestic authorities to regulate matters within their own borders**." **RLA-86**, *S.D. Myers, Inc. v. Canada*, UNCITRAL at ¶ 263.
- Mozambique also did not treat PEL in an "unjust and arbitrary" manner. **The MTC provided to PEL the 15% scoring advantage** called for by Mozambican law where a bidder has a "direito e margem de preferência." Article 13(5) of the 2011 PPP Law, CLA-65A, RLA-6. This was a **reasonable (and correct) interpretation** of the Mozambican PPP law by the MTC at the time the PFS was approved on 15 June 2012 – ten months after the PPP Law went into effect.
- The MTC and Council of Ministers provided PEL with **opportunities to reach agreement with CFM**, but PEL was **unable to do so**, further confirming that the public tender had to continue under the PPP law.
- There was **no sovereign act impairing** of PEL's rights under the MOI, as PEL can (and must) assert breach of contract claims in the **ICC arbitration**.
- In sum, the fundamental flaw in PEL's claims, regardless of the standard invoked under the MZ-India BIT, is that **PEL mistakenly claims a violation on the basis that a "certain result" was not achieved** – that PEL was not awarded the concession, whether under the MOI, as a direct award, or pursuant to the public tender.
- However, "[f]inding that a right to mere formal negotiations" of a concession agreement "could be subject to expropriation ... would lead to transforming an obligation to do something to a certain standard **... into an obligation to achieve a certain result**." RLA-117, *Oxus Gold v. Uzbekistan*, Ad Hoc Arb. at ¶ 301. The result is and should be no different under an FET standard.
- Yet, that is what PEL improperly asks this Tribunal to do – to award to PEL what it could not achieve in its talks with CFM or participation in the public tender. PEL's request must be squarely rejected.
- The MFN claim also fails because there was no breach.

IV. PEL'S DAMAGES CLAIMS MUST BE REJECTED

A. The Tribunal Does Not Have Jurisdiction Over The Damages Claims As Presented By PEL

The damages testimony presented by PEL itself demonstrates the lack of the Tribunal's jurisdiction to award the damages claimed.

- PEL damages expert Mr. Dearman claimed to be valuing the "obligations under the MOI" from Mozambique's alleged perspective and the "rights under the MOI" from PEL's perspective. H-10 at p. 5; *see also* Dearman Tr. 1232:4-1233:14. PEL damages expert Mr. Sequiera specifically presented a damages analysis on the express difference between the dispute that "[PEL] entitled to the rights to develop and operate the Concession" versus "[t]he MOI did not give Claimant the rights to the Concession." H-9 at p. 12; Sequeira Tr. 1145:12-18. *See also* PEL Closing Tr. 1812:21-1817:25 (expressly seeking damages based upon "contractual rights in the MOI").
- Disputes arising out of the MOI are subject to the exclusive jurisdiction of the ICC Tribunal, *see, supra*, Section I.

B. The MOI At Most Provided For A Direito de Preferência, Which PEL Already Received

- The MOI provided for a direito de preferência – a term of art under Mozambican PPP law that means a 15% scoring advantage. *See, supra,* Section III.B. PEL received the scoring advantage in the public tender. The scoring advantage does not result in the certainty of winning a public tender, and there are no damages to be awarded based upon losing a public tender, even with the scoring advantage. RER-4 ¶ 17.
- "[A]n investor cannot recover damages for the expropriation of a right it never had." RLA-92, Merrill & Ring Forestry L.P. v. Canada, UNCITRAL (31 March 2010) at ¶ 142.
- In all events, PEL did not even attempt to provide a damages analysis based upon an alleged wrongdoing associated with the public tender, or quantify any such damages.

C. PEL's Damages Claims Are Baseless, Entirely Speculative, and Unsupported by Applicable Law

Even if the Tribunal ignored the undisputed fact that the MOI is not a concession and does not grant the right to a concession, PEL's damages claims are baseless for at least five reasons, each of which alone are sufficient to wipe out PEL's claims.

1. PEL's Own 2012 Financials Show PEL's Proposed Project Was Not Viable

- PEL's original PFS did not contain any financials demonstrating cash flow or financial viability. In May 2012, after request from Mozambique, PEL provided a cover letter and financials. C-9.
- The PFS would not have been approved without the appropriate financials. SOD, at ¶¶ 840-42; Rejoinder, at ¶¶ 1350-53; RWS-4, Zucula Second Witness Statement ¶ 15.
- PEL claimed at the time that the financials demonstrated the "clear idea that even in worst case scenario" the proposed project "is financially viable even without considering the multiple growths." C-9.
- PEL's claims that the May 2012 financials demonstrated financial viability are false.
    - The May 2012 financials are missing a discount rate. When one includes any reasonable discount rate, the May 2012 financials demonstrate that the project is not viable. *See* RER-4, p. 15; *see also* Flores Tr. 1289:1-1290:15.
- As demonstrated through Mr. Patel, PEL's expert Mr. Sequeira, and Dr. Flores, PEL's 2012 financials are not and cannot be dismissed as a "worst case scenario." It cannot be "worst case" to assume:
    - A zero percent tax rate
    - 100% efficiency (utilization)
    - No concession fee
    - Maximum tons
    - No cost overruns
    - Debt rate, and projected debt

  Flores Tr. 1290:16-1292:4.
- Indeed, the only so-called "worst-case" assumption made in the May 2012 financials was that debt would be paid off as fast as possible – hardly a worst case assumption at all. In all events, assumptions regarding paying debt versus equity investors do not affect the cash flows of the project; it was non-viable. Flores Tr. 1289:14-1290:6.
- Now, PEL's counsel and its expert agree that the only way to determine financial viability of PEL's proposed project would be to conduct a detailed financial evaluation, which was never done. PEL Reply ¶ 1121; Sequeira Tr. 1213:24-1215:24.
    - "Given that there was no concession agreement available at the time this preliminary projection was prepared, the terms of the concession were also unknown. **A detailed financial evaluation would be required**, as part of a bankable feasibility study, **to demonstrate the Project's potential economic viability**." PEL Reply ¶ 1121 (emphasis added).

- In sum, PEL obtained approval of the PFS on the basis of a false and baseless assertion that the project was demonstrated "financially viable."
- Without the proper approval of the PFS, the MOI was (still) contingent under any theory, and there was no investment.

2. TML's Project, Even if Considered Comparable, Has Been Substantially Altered and Will Not Be Built

- The economics to not justify the coal rail project neither as proposed by PEL nor as awarded to TML in the public tender.
    - ITD's public financial statements explain the current lack of any progress on a rail to deep-water port line: "During 2020, the subsidiary's management has revised its business plan to develop the project by separate as 2 phases, Phase 1 is the development of general cargo the seaport at Macuse and Phase 2 is the construction of the Railway and Deep-Sea port." QE-66 p. 28.
    - "Management of subsidiary will start Phase 2 development when the economics of the project can be justified." QE-65 p. 96.
    - The economics do not exist to justify PEL's proposed project. Flores Tr. 1420:18-1421:23.
- In 2012 and 2013, buy-in from mining companies was identified as essential by both PEL and Mozambique – without the mining companies, there is no viable project. C-6b, p. 115; C-29, p.2, 4.
- A decade later, no rail project or deep water port exist, nor does a timetable for starting construction, nor does any buy-in from mining companies. C-405.
- Jindal's 2012 plan to ramp up capacity has not happened. Flores Tr. 1275:6-19; H-11, p. 6.
- Rio Tinto bought into Benga for $3.9 billion and sold it to ICVL in 2014 for $50 million, in one of the most disastrous acquisitions in the miner's history. Flores Tr. 1275:20-1276:19; H-11, p. 7.
- In January 2021, Mitsui announced that it was selling its stake in the Nacala corridor for $1. H-11, pp. 6-7, 9-10.
- There is no reason to guess or suppose that Mozambique's coal mines' economic issues would suddenly and certainly be solved by a $3.115B spend.
- Mozambican coal would not be competitive internationally given the projected tariffs assumed by TML's feasibility study for Mozambican metallurgical coal compared to

other option on the international market, such as Australia. H-12 p. 55; RER-9 ¶¶190-191; C-290, p. 9); Flores Tr. 1276:20-1280:25.

- These results are not surprising; PEL's own financials showed that the project, even as it proposed, was non-viable. There can be no damages without a viable project. *See*, *e.g.*, Rejoinder ¶¶ 335-340; 1367-1375.

D. PEL's Array of Damages Theories Cannot Satisfy PEL's Burden to Prove Alleged Damages

- "Claimants have the burden of proof of the merits of their claims, including the alleged damages." **RLA-42**, *Caratube*, ICSID Case No. ARB/13/13 at ¶ 307. Using two experts, suggesting a half-dozen theories, and dozens of "data points," does not satisfy PEL's burden.

1. PEL's Damages Based on Discounted Cash Flows ("DCF") Analyses are Impermissible and Speculative

- The underlying methodology of all five of Claimant's expert's Versant damages numbers is a DCF analysis.
- DCF analysis is **impermissible** in a case such as this one, where there was no concession, and the project **was never operative**. *See* **RLA-28**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, ¶¶ 119-20; *see*, *e.g.*, SOD ¶¶ 827-831; Rejoinder ¶¶ 1369-1421.
- Where future profits are "**merely possible**" and not "probable," an award based on future profits **cannot** be made. *See* **RLA-150**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. 407 ARB/87/3, Award (27 June 1990), ¶¶ 104, 108.
- In sum, given the lack of a project even remotely resembling PEL's proposed project, any profit-based analysis (DCF or otherwise) would be not only speculation, but counter to known facts.

2. PEL's Ex-Ante Valuation is Flawed

- Ex-ante analyses are supposed to value the project based upon information just before the time of the alleged breach.
- The **financial information** available from the time of the alleged breach is **PEL's own 15 May 2012** projections, C-9, shows the project is not viable. Flores Tr. 1288:22-1289:17; H-11, p. 20; Rejoinder ¶¶ 1348-1366.
- In all events, Versant also makes improper assumptions in its ex ante analysis. *See, e.g.*, H-11, pp. 32-35.

    - Versant improperly assumes a tariff for coal of $39 per ton; any tariff below $36 per ton **eliminates Versant's ex ante damages entirely** RER-9 ¶ 135.
    - Versant **improperly rejects PEL's own 2012 estimates** of its cost of operation. If Versant adopted PEL's own 2012 estimates of its cost of operation, **Versant's ex ante damages are eliminated entirely**. RER-9 ¶ 138; H-11, p. 35.
    - Cost overruns of more than 12% **eliminate Versant's ex ante damages entirely**. RER-9 ¶ 142-43; H-11, p. 35.
    - Three years of delay in construction **eliminate Versant's ex ante damages entirely**. RER-9 ¶ 142-43; H-11, p. 35.
- Regarding cost overruns in particular, **according to PEL's own expert**, the project stage for cost estimates at the time of the PFS reveals that the $3.115B cost estimates were still subject to massive risks of cost overruns. PEL's expert Mr. Comer agrees that in light of AACE 98R-18, the total for the $3.115B project "**could go up to 4-point something billion**" or an increase of 40% or more. Comer Tr. 922:24-924:14. *See also* LRD-8, p. 2. At as little as a 12% cost overrun, PEL's project is not financially viable based on PEL's 2012 financials. C-9; H-11, p. 35; RER-9, fig. 5.

3. PEL's Ex-Post Valuation is Flawed

- Ex-post analyses are supposed to value the project based upon current information.
- PEL ignores the most relevant, obvious current information, however: no project resembling PEL's proposed project has been or will be built.
- In all events, PEL's ex-post damages analysis advanced at the hearing is wholly incorrect. Mr. Sequiera **purports to redo** PEL's ex post DCF analysis, using some assumptions from a 2017 TML feasibility study relating to TML's project and whether TML's project is bankable.
- Using the TML 2017 Feasibility Study is fundamentally incorrect. Lenders do not rely on the cost-estimates or cost-benefit analyses of project promoters, and require their own consultants conduct an independent study. QE-82, p. 6; C-395.
- The 2017 TML feasibility study was last updated more than five years ago and "**does not reflect the current status and crumbling prospects of the Project**." **RER-9**, ¶ 77.
- The problems with using the TML feasibility study are **not** just general concerns.
    - The TML project is not comparable to the PEL proposed project.

    - The TML project was **longer** (nearly 20% longer) and **better** (more than 30% more capacity per year), for approximately the **same price**. Exhibit R-42 at 4.
    - The project proposed by PEL in the PFS was a 516 km line between Moatize and Macuse. Exhibit R-7.
    - On the other hand, the TML project in 2017 envisioned a total of 611 km, extending TML's project 129 km to unlock an additional thermal coal rich area not included in any version of PEL's MOI or PFS. Exhibit R-42 at 7.
    - The TML assumed (albeit unrealistically) 33 million tons of coal per year. Exhibit R-42 at 4. PEL's project proposed 25 million tons of coal per year. C-8.
    - TML assumed that its extra rail length would serve mines not even reached by PEL's proposal. Exhibit R-42 at 7.
    - The project proposed by PEL assumed standard gauge rail lines, while TML assumed cape gauge rail construction to ensure compatibility with Mozambique's existing rail system. Exhibit R-42 at 7.
    - The port solution developed by PEL had not actually finalized the location of the port, and assumed a massive 1,500 m quay. Exhibit R-7.
- Despite all of the supposed "comfort" of the feasibility study, the project envisaged has never been built. Only a small cargo port is being built. Flores Tr. 1281:21-1287:21; QE-99.
- "The severity of the impact that reasonable corrections produce on Versant's analysis **unambiguously shows** that Versant's DCF valuation **cannot be relied upon** to quantify damages in this case and **should be rejected**." **RER-4**, ¶ 138
    - For instance, lowering Versant's assumed throughput of 30 Mtpa to 25 Mtpa – the throughput that Versant uses in its *ex ante* valuation and that PEL used in its May 2012 financial projections – eliminates Versant's ex post damages entirely, all else being the same. *See* H-11, p. 27; RER-9 ¶¶ 81-99.
    - In the financial projections that PEL submitted to Mozambique in May 2012, Patel projected average operating and maintenance costs at 63%

of revenues. This assumption eliminates Versant's *ex post* damages entirely, all else being the same. *See* H-11, p. 27; RER-9 ¶¶ 81-99..

- Cost overruns of as little as 22% eliminate all damage, all else being equal. RER-9, Figure 3; H-11, pp. 25-30.

E. PEL's Damages Based on So-Called Loss of Chance are Conceptually and Factually Flawed

- Loss of chance is just a speculative DCF multiplied times an assumption from counsel. Mr. Sequeira simply applied a percentage (90%) to his own DCF analysis to arrive at the "loss of chance" figure. Sequeira Tr. 1218:1-17.
- Layering more speculation on top of a DCF which is already highly sensitive and speculative is simply not allowed. "[A] discounted cash flow analysis is inappropriate in the present case because the [project] was never operative and any award based on future profits would be wholly speculative." RLA-28, *Metalclad*, ICSID Case No. ARB(AF)/97/1 at ¶¶ 121-22; *see also* CLA-105, *Crystallex*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 875.
- In sum, at their core, **all** of these theories are based upon attempting to estimate lost profits, using a DCF model, **for a concession that never happened.**

F. PEL's So-called Negotiation Damages are Flawed, Even More Speculative, and Inconsistent with PEL's Other Damages Theories

- To be clear, there is no legal basis to PEL's "negotiation damages" theory to a BIT treaty or Mozambican contract claim. This damages theory is just that – a theory invented by PEL's counsel because no non-speculative basis for assessing quantum exists. Rather than admit the lack of any non-speculative quantum analysis, PEL invented a new, even more speculative and unproven "negotiation damages" number.
- Although the negotiated release fee approach is patterned after **inapplicable** UK law, **even UK law warns against the speculative danger of this approach**.
- "[D]ifficulties [in proof of damages] **do not justify** the abandonment of any attempt to measure loss. . . ." "It is also necessary to recognise that the assessment of a **hypothetical** release fee is itself **a difficult and uncertain** exercise." "Such **imaginary negotiations** have become increasingly elaborate, and a host of questions can emerge as to the basis on which they should be hypothesised." "The **artificiality of the exercise** can be a further problem." ***Morris-Garner v. One Step (Support) Ltd.* [2018] UKSC 20, 74-5.**

- The problems with "negotiation damages" are even broader than those recognized under the UK release fee quoted above. Here, no profits are ever guaranteed on the project. And no project as envisaged by PEL or TML is actually being built. In assessing the hypothetical negotiation damages, PEL's expert Mr. Dearman did not consider the factual or legal issues in the case. Dearman Tr. at 1248:7-1248:5.
- Mr. Dearman concedes that "**it is not possible** to attribute a **specific monetary value** to each of these individual [supposed data points]. **It would have depended on the negotiating position of each of PEL and Mozambique**. . ." CER-8, p. 17
- Dearman simply picked arbitrary numbers between $15.6 million and $143.7 million – that is the definition of speculation.
- Dearman (who has no engineering background) relied on PEL's expert Comer to attempt to quantify "de-risking" of the project. Comer, however, grossly misapplies AACE Recommended Practices 98R-18 to attempt to claim that the PFS "de-risked" the project, when it did not. *See* Dysert Tr. 1110:13-1128:19.
    - The accuracy of project costs "**should always be determined** through risk analysis of the **specific project** and should **never be pre-determined**. *Id.* ¶ 95 (quoting **C-381**, RP No. 98R-18 pp. 7-8 of 26).
    - Note that these +/- percentage measures associated with an estimate class **are intended as rough indicators** of the accuracy trend provided the company and project are well managed and no major risks occur. These are **merely a useful simplification** given the reality that every individual estimate will be associated with a unique probability distribution explaining its unique level of **uncertainty and risk** that **must be determined through a quantitative risk analysis** for each particular estimate. *See* **RER-15**, ¶ 102 (quoting **LRD-003** p. 12 of 20).
- In short, the PFS did not "de-risk" the project, and there is no basis to conclude that damages are owed under such a theory.

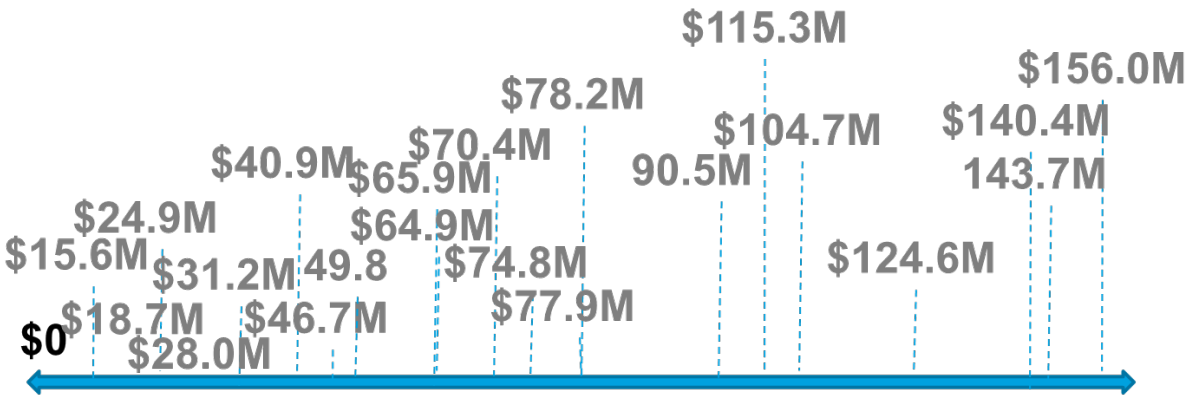
G. Dearman's Damages Analysis Only Proves That The Project Was Not Viable And No Damages Are Owed

- The only thing that PEL's expert Dearman's damages theory **does** accomplish is that it **disproves PEL's theory of the case**.
- PEL claims that its award of a concession was a "virtual certainty" and PEL wants millions in lost profits. Reply ¶ 1099.

- If Comer is **believed**, however, even **after** the PFS, the $**3.115 billion project was subject to cost overruns** of as much as 50%, or **another $1.5 billon.** Comer Tr. 921:11-924:22.
- Any cost overrun greater than 12% reduces PEL's ex ante **damages to zero**, all by itself. RER-9 ¶ 142-43.
- Any cost overrun greater than 22% reduces PEL's ex post **damages to zero**, all by itself. RER-9 ¶ 153; Fig. 3.
- Dearman unwittingly verifies that **at the time of the PFS, PEL's alleged project was not remotely detailed enough to be projected as viable**.

H. PEL Has Not Satisfied Its Burden Regarding Damages, And Refused To Submit Any Non-Speculative Basis For An Award

- "Claimants have the burden of proof of the merits of their claims, including the alleged damages." **RLA-42**, *Caratube*, ICSID Case No. ARB/13/13 at ¶ 307.
- Throwing out 20 "data points" possibilities does not satisfy PEL's burden.



- If any compensation were due to PEL, looking at the non-recoverable costs incurred in connection with the MOI is the only non-speculative way to quantify compensation. RER-9, ¶ 47.
- However, in this case, PEL agreed to bear the cost of the PFS itself.
- Moreover, PEL has failed or refused to submit any evidence of its costs of the PFS.
- Mozambique has not breached the Treaty, or the MOI. Even if it had, PEL has no damages.

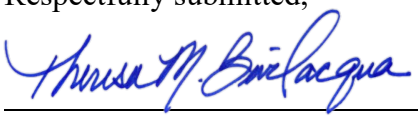
V. RELIEF REQUESTED BY MOZAMBIQUE

Based on the foregoing, Mozambique is entitled to and seeks an Award, as follows:

- Dismissing PEL's claims as inadmissible or, alternatively, declining jurisdiction;
- Sustaining Mozambique's objections to jurisdiction;
- In the alternative, dismissing PEL's case on the merits;
- Awarding PEL no damages;
- Ordering that PEL and its litigation funder pay Mozambique's attorneys' fees and all costs and expenses; and
- Granting Respondent such further or other relief as the Tribunal shall deem to be just and appropriate.

Dated: 3 March 2023

Respectfully submitted,



Juan C. Basombrío
Dorsey & Whitney LLP
600 Anton Boulevard, Suite 2000
Costa Mesa, California 92626 U.S.A.
Telephone: 1-714-800-1405
Email: basombrio.juan@dorsey.com

Theresa M. Bevilacqua
Daniel J. Brown
Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402 U.S.A.
Telephone: 1-612-492-6614
Email: bevilacqua.theresa@dorsey.com
brown.daniel@dorsey.com

Counsel for Respondent
Republic of Mozambique