

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

RESPONDENTS' COST SUBMISSION

18 August 2023

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I. Introduction

1. Respondents Republic of Mozambique and Mozambique Ministry of Transport and Communications (together, “Mozambique”) respectfully submit this Cost Submission and requests that the Tribunal award Mozambique its fees and costs in this arbitration proceeding pursuant to Article 42 of the UNCITRAL Arbitration Rules. Mozambique specifically requests that the Tribunal order PEL and PEL’s litigation funder to pay Mozambique’s attorneys’ fees and costs in defending this arbitration proceeding, including Mozambique’s expert witness fees and costs, in the amount of US\$3,902,774.36, plus post-award interest until paid. Mozambique further requests that PEL and PEL’s litigation funder be ordered to pay Respondents’ portion of the Tribunal’s fees, as included in the above amount.

II. Allocation of the Costs of the Arbitration Proceedings

2. The UNCITRAL Arbitration Rules provide that the costs of arbitration shall be borne by the unsuccessful party(ies), and shall be fixed by the Tribunal in its final award or other decision on costs.¹ The term “costs” is defined to include the fees and expenses of the Tribunal, including the costs of any transcription or other services required by the Tribunal, as well as the reasonable costs for legal representation, expert witnesses, and witnesses of the parties.²
3. Mozambique’s costs in defending this arbitration fall into several general categories including but not limited to legal representation fees of lead counsel, expert witness fees, travel expenses, document discovery, vendor costs (such as photocopying, preparation of hearing bundles, and similar disbursements), and amounts paid to the Tribunal.
4. As detailed below, Mozambique’s costs have been allocated and broken out into phases of the procedure as request by the Tribunal in Procedural Order No. 7. The attached page of costs reflects a reasonable division by Phase/Function, given the overlap both in time and substance. For example, research and fact-gathering regarding jurisdictional issues was relevant to both the Motion to Bifurcate and the Statement of Defense. Fees and costs have

¹ UNCITRAL Arbitration Rules, Article 42; *see also* CLA-1, Mozambique-India BIT, Article 10(5) (providing that the tribunal may apportion costs at its discretion).

² *Id.*, Article 40.

been assigned to the Phase/Function to which the particular work was most predominantly focused at the time and have not be double-counted. In a small number of instances, work descriptions for legal fees reflected efforts that would have included work specifically relevant to either the PCA and ICC proceedings in the same entry. Those few entries (less than 3.5% of the total legal fees in the Statement of Costs) have been reasonably apportioned between the two proceedings and have not been double-counted.

A. Mozambique Should Be Awarded Its Fees and Costs as the Prevailing Party

5. To be considered the prevailing party Mozambique need only prevail on *one* of its objections to jurisdiction or to prevail against PEL’s claims on the merits.³ In instances where a Tribunal has accepted the respondent’s preliminary objections, it is “fair to leave the Respondent totally harmless and indemnified of the entirety of the arbitration costs.”⁴
6. Even where the claimant and respondent each prevail on some of respondent’s objections to jurisdiction, the respondent’s success on *any* jurisdictional objection—which is necessarily fatal to claimant’s claims in the proceeding—is “the more significant” determination of success for the purposes of apportionment of costs.⁵ In such cases, Tribunals have held that, a claimant’s failure to “meet the basic jurisdictional requirements” and failure to “satisfy the *prima facie* test of a treaty claim” are sufficient for allocation of the entirety of the arbitration costs against the claimant.⁶
7. Here, Mozambique has demonstrated no treaty jurisdiction exists for multiple reasons. *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. The five principal reasons no treaty jurisdiction exists include: (a)

³ *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (March 5, 2011) (“*Alps v. Slovak Republic*”), at ¶ 263, attached in Respondents’ Statement of Costs Appendix at Appx. 1.

⁴ *Alps v. Slovak Republic*, at ¶ 263. On the other hand, where a claimant prevails on jurisdiction and on the merits, but fails to establish an entitlement to all of its claimed damages, the tribunal may determine that there is no clear successful party. *See CLA-85, Chevron Corp. v. Ecuador*, PCA Case No. 2007-02/AA277, Final Award, August 31, 2011, at ¶ 376 (ordering that each side shall bear its own costs and divide tribunal costs evenly where “Claimants have been largely successful on jurisdiction and liability, but the Respondents have been mostly successful on damages”).

⁵ *Bacilio Amorrortu (USA) v. The Republic of Peru*, PCA Case No. 2020-11, Final Award on Costs (October 25, 2022) (“*Ammorortu v. Peru*”), at ¶ 38, attached in Respondents’ Statement of Costs Appendix at Appx. 2.

⁶ *Alps v. Slovak Republic*, ¶¶ 263-64.

the MOI is not an investment under the Bilateral Investment Treaty between Mozambique and India (*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; 1577:6-120; (b) the MOI, a preliminary and conditional contract, is not an investment under International Law (*see* RLA-53; SOD, at ¶¶ 362-419; Rejoinder, at ¶¶ 661-870); (c) PEL’s pre-investment activities in Mozambique are not an investment and PEL agreed to undertake those activities at its own expense (*see* RLA-54 at ¶ 60; Rejoinder, at ¶¶ 723-743; SOD, at 388-93, 930; R-1 and R-2 at clauses f., 1 and 4); (d) no investment exists under the *Salini* factors (*see* RL-7 at ¶ 52; SOD, at ¶¶ 400-19; Rejoinder, at 830-34; Motion for Bifurcation, at 11); and (e) PEL was not an investor, has no records and provided no evidence of what costs it incurred, and PEL is not the real-party-in-interest, having formed a consortium with two other companies to participate in the public tender. *See* 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); Daga Tr. 505:22-506:16; C-37; C-61; C-62; C-190; R-23; R-30 through R-38; RLA-148 at ¶¶ 187-195.

8. Further, 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 the hearing, it is clear that the adjudication of PEL’s alleged treaty claims was 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.
9. The UNCITRAL rules and prevailing practice make clear that a respondent should be made whole for its arbitration costs particularly where, as here, claimant’s claims have been “wrongly brought before an incompetent *forum*.”⁷ For these reasons, the Tribunal should allocate all costs of the arbitration to PEL and award Mozambique its fees and costs as the prevailing party.
10. Mozambique also prevails on the merits and on PEL’s complete and total lack of any non-speculative damages. With respect to the merits, all parties agree the MOI was not a concession and did not award PEL a concession agreement. At best, the most the MOI

⁷ *Alps v. Slovak Republic*, ¶ 268.

could confer under PEL's most favorable reading of the singular English-version is the right to direct negotiation of a concession in the future. But even the right to direct negotiate for a concession is not the equivalent of the right to a specific agreement or specific outcome of those negotiations. PEL was promised a *direito de preferência* in the MOI, not an "ajuste directo". PEL received the 15% *direito de preferência* scoring advantage in the public tender and lost. Mozambique thus fulfilled its obligation and did not breach the MOI. And, breach of a contract even if it existed, is not the equivalent of direct or indirect expropriation. RLA-103, at ¶ 175. Here, no expropriation exists. The right to negotiate is not something that can be expropriated. RLA-117 at ¶ 301. No did PEL demonstrate any breach of the Fair and Equitable Treatment standard as was its burden. *See* Respondent's Post-Trial Brief at Section III, pp. 4-11.

11. With respect to damages, PEL failed to present any evidence of any actual costs incurred in conducting the preliminary study or pre-feasibility study or the public tender submission. *See* 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).
12. With no basis in actual costs paid by PEL, it chose to pursue three different theories of alleged damages, with each one successively more speculative than any prior iteration and cannot serve as the basis of any award in favor of PEL. "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.
13. As demonstrated in summary above and throughout the pleadings and the hearing. Mozambique prevails on jurisdiction, prevails on the merits, and prevails on damages. Mozambique need only prevail on one to be considered the prevailing party. Because Mozambique prevails on all substantive points, the Tribunal may award Mozambique all costs in defending itself in this proceeding.

B. PEL Unnecessarily Burdened the Time and Costs of the Arbitration Proceeding

14. An award of Mozambique's fees and costs is further appropriate because PEL has aggravated the time and costs of this arbitration proceeding through its conduct. It is

appropriate for the Tribunal to “take into account possible aggravation of costs” due to a party’s “unnecessarily burdening the time and costs of the proceedings.”⁸

15. Even where a party has prevailed on some of its claims or defenses, a tribunal may nonetheless award an apportionment of costs if the “prevailing” party was unsuccessful in asserting other arguments that “directly and unnecessarily imposed additional costs” on the opposing party.⁹
16. Mozambique’s costs are reasonable and explainable, while PEL’s insistence on this Tribunal and this Tribunals proceeding before the ICC resolved contractual disputes arising out of the MOI created waste of time, fees, and abused the process.
17. Early on in these proceeding, Mozambique moved to bifurcate jurisdiction from liability. If PEL had been more candid in its claims, explained that its “treaty” claims were dependent on its reading of the MOI and required an interpretation of the rights and obligations conferred by the MOI, as well as the fact that all alleged damages flowed from the alleged breach of the MOI, the vast majority of expense incurred by both parties in this PCA arbitration would have been avoided. PEL had the opportunity to agree to bifurcation, and instead it chose to oppose the request, and chose to intentionally obscure and intertwine issues related to the MOI with this Tribunal’s jurisdiction. Mozambique incurred \$45,286.56 in legal fees associated with its motion to bifurcate, as summarized on the attached chart in **Exhibit 1**.
18. After the Tribunal denied Mozambique’s request to bifurcate, Mozambique requested a stay so that it could enforce the parties’ exclusive forum selection clause in the MOI before the ICC. PEL chose to oppose that request, despite knowing it executed the MOI, that the forum selection clause in the MOI was binding, and that PEL’s claims before this Tribunal implicated the MOI and the exclusive jurisdiction of the ICC. PEL had every opportunity to be more candid and to reduce expenses before this Tribunal, but elected to proceed.

⁸ *Alps v. Slovak Republic*, ¶ 265.

⁹ *Amorrotu v. Peru*, at ¶¶ 37-38; see also **RLA-56**, *Zhinvali v. Georgia*, ICSID Case No. ARB/00/1, Award, Jan. 24, 2003, at ¶ 424 (ordering reimbursement of a party’s fees and costs which it “would not have incurred but for the [opposing party’s] irregular behavior”).

Mozambique incurred \$95,731.80 in fees related to its initial application to stay in October 2021. *See Exhibit 1.*

19. In February 2022, Mozambique obtained a Partial Award on Jurisdiction from the ICC Tribunal, which clearly stated the ICC is the exclusive forum for resolving all disputes related to the MOI. Mozambique then requested, again, a stay of the PCA proceedings. PEL resisted again, and instead obfuscated its own claims before this Tribunal as well as the Partial Award from the ICC, further increasing costs. Mozambique incurred \$15,604.34 in fees related to its Application to Stay based on the ICC's Partial Award on Jurisdiction. *See Exhibit 1.*
20. Mozambique then requested an injunction from the ICC tribunal in May 2022. The ICC issued an injunction on 24 November 2022 that prohibited PEL "from pursuing the determination of **any matters in dispute between the Parties arising out of the MOI** in any other forum, **even if only accessorially for the purpose of the adjudication of Treaty Claims.**" *Republic of Mozambique et al. v. Patel Engineering Ltd., ICC 25334/JPA/AJP, ICC Procedural Order No. 14 ("ICC Order") para. 101 (emphasis added).* Mozambique again requested PEL stop and refrain from pursuing claims arising out of the MOI before this tribunal, and PEL declined. *See R-61, 24 November 2022 Letter.* Mozambique incurred \$16,022.51 in fees related to requesting immediate relief in light of the ICC Injunction. *See Exhibit 1.*
21. At the start of the hearing on 28 November 2022, the Tribunal asked PEL whether it wished to proceed, and PEL chose to go forward, in violation of the injunction, and at its own peril.
22. PEL made the decision to proceed with its claims arising out of the MOI in the improper forum every time. It is PEL who increased and aggravated the costs of proceeding before this Tribunal, not Mozambique.
23. As demonstrated by the MOI, the ICC's Partial Award, and the ICC's Injunction – all of which PEL ignored, Mozambique has been in the right in enforcing the exclusive jurisdictional provision in the parties' agreement. Mozambique cannot be blamed or penalized by properly exercising its rights under the MOI, particularly where those rights have been affirmed and determined in Mozambique's favor on at least two occasions by the ICC.

24. PEL increased the expense of these PCA proceedings in other ways, including requesting leave to submit a third damages submission, In seeking leave to file an unusual, third damages submission, PEL was again unclear as to why it was necessary, and less than candid about the scope and bounds of the third damages theory. PEL promised not increase its quantum, but Mozambique was required to police PEL’s submissions including up to the moment of providing hearing demonstratives from Mr. Dearman. PEL also indicated it was only providing damages calculation, but appended to a quantum expert’s report an engineering opinion. The totality of PEL’s supplemental, third damages submission required Mozambique to then hire another expert to refute the speculative nature and incorrect application of recommended engineering practices. Mozambique incurred \$88,875.13 in legal fees and \$99,586.00 in expert witness fees and disbursements related to responding to PEL’s third damages submission. *See Exhibit 1.*
25. Therefore, even if PEL were to prevail on *some* of its claims, apportionment of costs would be appropriate if it “has only achieved a relative, rather than an absolute, measure of success.”¹⁰ Here, PEL cannot achieve an “absolute measure of success” for all of the reasons stated above.
26. Therefore, even if PEL were to prevail on each of Mozambique’s objections to jurisdiction *and* establish that it is entitled to some relief on the merits, PEL should be required to bear the costs of the arbitration with respect to Mozambique properly and efficiently enforcing its contractual right to have the ICC determine all disputes arising from the parties’ MOI. PEL should also be forced to bear Mozambique’s costs in responding to PEL’s third, speculative, and improper damages submission.

C. PEL and its litigation funder should be ordered to pay the fees and costs

27. As detailed in Mozambique’s Amended Statement of Defense and Rejoinder, both PEL and its litigation funder should be ordered to pay Mozambique’s arbitration fees and costs.¹¹

¹⁰ *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Final Award (November 9, 2016), at ¶ 31, attached in Respondents’ Statement of Costs Appendix at Appx. 3.

¹¹ *See* Amended Statement of Defense (“SOD”), March 25, 2021, at ¶¶ 935-39; Rejoinder on the Merits and Reply on Objections to Jurisdiction (“Rejoinder”), November 29, 2021, at ¶¶ 1586-1600.

28. As Mozambique has submitted, this issue is controlled by UK law because the funding is taking place in the UK.¹² Pursuant to the UK Code of Conduct for Litigation Funders, PEL's litigation funder is required to meet any liability for adverse costs from an order of the Tribunal.¹³ A litigation funder's liability to pay the costs of the successful party is further supported by UK common law.¹⁴
29. As PEL's litigation funder has enabled and collaborated with PEL to pursue its claims against Mozambique, both PEL and its litigation funder must share the liability of paying Mozambique's fees and costs of arbitration.

III. Calculation of Interest

30. Both parties have taken a position on the issues of pre-award and post-award interest at the hearing and in the parties' submissions. Mozambique's submissions are summarized briefly herein. For additional detail, Mozambique refers the Tribunal to the expert reports and testimony of Dr. Daniel Flores, and other submissions.¹⁵

A. PEL Is Not Entitled to Any Interest

31. As discussed in Mozambique's Rejoinder and the testimony of Dr. Flores, PEL has not proven its entitlement to any damages and, even to the extent that it could prove any underlying damages, PEL has not presented any evidence in support of its claim for interest on its purported damages.¹⁶ To the extent that PEL were entitled to any damages at all, such damages would be limited to the cost-based methodology, and PEL disqualified itself from presenting any admissible evidence as to the amount of such costs or the applicable interest rate.
32. Even with respect to PEL's belated attempt to add an *ex ante* DCF analysis, PEL's interest claims are improper because there was never any concession agreement or project entitling

¹² See SOD, ¶ 935; Rejoinder, ¶¶ 1592-94.

¹³ See Rejoinder, ¶ 1594; R-90, at § 10.

¹⁴ See SOD, ¶¶ 936-38; Rejoinder, ¶¶ 1595-99; **RLA-124**, *Arkin v. Borchard Lines Ltd. and Others*, EWCA Civ. 655 (26 May 2005); **RLA-125**, *Moorview Development Ltd. & Others v. First Active PLC & Others*, IESC 33 (27 July 2018).

¹⁵ See **RER-4**; **RER-9**; Transcript at 1266-1435 (3 December 2022); see also Rejoinder, ¶¶ 1559-77.

¹⁶ See Rejoinder, ¶¶ 1559-77.

PEL to income. Even if the Tribunal were to award nominal damages to PEL for its investment claims, any such damages would be inherently speculative and uncertain.

33. Neither the UNCITRAL rules nor any authority supports the application of interest to speculative damages.¹⁷ Even as to post-award interest, the Tribunal must consider the facts and circumstances.¹⁸ Here, the absence of any agreement providing for interest, the lack of ascertainable actual damages, and the entirely speculative and uncertain nature of PEL's alleged lost profits, make the award of any type of interest (whether pre- or post-award) fundamentally unjust.
34. PEL has failed to establish that it is entitled to any interest (either pre- or post-award) on any of its entirely speculative and improper claims for damages. For these and the reasons articulated in the submissions of Mozambique and its expert, no interest is applicable to any of PEL's supposed damages.

B. Post-Award Interest Should Be Applied at the U.S. Treasury Rate

35. During the hearing, the parties' experts addressed the Tribunal's questions regarding the "fair and equitable rate" applicable to any post-award interest pursuant to the Mozambique-India BIT.¹⁹ With respect to any post-award interest properly awarded, the parties are in agreement that a reasonable commercial rate should apply,²⁰ and such rates are routinely applied in the same manner to any award of fees and costs.²¹
36. As articulated in the testimony of Dr. Flores, the application of a risk-free rate of interest is common and appropriate for a variety of equitable and economic reasons.²² Mozambique requests that the Tribunal order that post-award interest at the U.S. Treasury rate, as recommended by Dr. Flores, be applied to any award of fees and costs.

¹⁷ See UNCITRAL Rules, Article 38, cmt. 8; Rejoinder, ¶¶ 1568-71.

¹⁸ *Id.*

¹⁹ See Transcript at 1428-36 (3 December 2022).

²⁰ See Transcript at 1428-36 (3 December 2022).

²¹ See *Amorrortu v. Peru*, ¶ 40 (applying interest at the rate of 1% above 6-month LIBOR commercial lending rate for US dollars to costs award); see also *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. Maharashtra Power Development Corporation Ltd, Maharashtra State Electricity Board and the State of Maharashtra*, ICC Award No. 12913/MS (Final Award) (27 April 2005), attached in Respondents' Statement of Costs Appendix at Appx. 4.

²² See Transcript at 1405-08; 1432-35 (3 December 2022).

IV. Conclusion

37. For the foregoing reasons, Mozambique respectfully requests that the Tribunal order PEL and PEL's litigation funder to pay Mozambique's attorneys' fees and costs in defending this arbitration proceeding, including Mozambique's expert witness fees and costs, in the amount of US\$3,902,744.36, with post-award interest accruing at the short-term U.S. Treasury rate until receipt of payment of all amounts determined by the Tribunal.
38. Mozambique further respectfully requests that the Tribunal deny PEL's request for fees and costs.

Dated: 18 August 2023

Respectfully submitted,



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