

**PCA Case No. 2020-21**

In the matter of an arbitration under the Arbitration Rules of the United Nations  
Commission on International Trade Law 1976

and

The Agreement between the Government of the Republic of India and the Republic of  
Mozambique for the Reciprocal Promotion and Protection of Investment dated  
19 February 2009

-between-

**PATEL ENGINEERING LIMITED**  
**(INDIA)**

Claimant

-and-

**THE REPUBLIC OF MOZAMBIQUE**

Respondent

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**TERMS OF APPOINTMENT**

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THE ARBITRAL TRIBUNAL

Prof. Guido Santiago Tawil (Arbitrator)  
Mr. Hugo Perezcano Díaz (Arbitrator)  
Prof. Juan Fernández-Armesto (Presiding Arbitrator)

REGISTRY

Permanent Court of Arbitration

ADMINISTRATIVE SECRETARY

Sofia de Sampaio Jalles

4 August 2020

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1. The present arbitration is subject to the Arbitration Rules of the United Nations Commission on International Trade Law 1976 [“**UNCITRAL Rules**”] and is administered by the Permanent Court of Arbitration [“**PCA**”].

## **I. THE PARTIES**

### **1. CLAIMANT**

2. The Claimant is PATEL ENGINEERING LIMITED [“**Patel**” or “**Claimant**”], a company established in accordance with the laws of India and the following contact details:

Patel Engineering Limited  
Attn: Kishan Daga, Director-Projects  
B261, Aver House  
Veera Desai Industrial Road, near Infinity Mall  
Off Link Road  
Andheri (west) Mumbai 400 053  
India  
E-mail: [kishan.daga@pateleng.com](mailto:kishan.daga@pateleng.com)

3. Claimant is represented in these proceedings by:

Ms. Sarah Z. Vasani  
Ms. Nathalie Allen  
Ms. Canelle Goldstein  
Ms. Natasha Chahal  
Ms. Francesca Seber  
ADDLESHAW GODDARD LLP  
Milton Gate  
60 Chiswell Street  
London EC1Y 4AG  
United Kingdom  
E-mails: [sarah.vasani@addleshawgoddard.com](mailto:sarah.vasani@addleshawgoddard.com)  
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[canelle.goldstein@addleshawgoddard.com](mailto:canelle.goldstein@addleshawgoddard.com)  
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Ms. Emilie Gonin  
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53-54 Doughty Street  
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Email: [e.gonin@doughtystreet.co.uk](mailto:e.gonin@doughtystreet.co.uk)

Ms. Sofia Martins  
Mr. Renato Guerra de Almeida  
Mr. Ricardo Saraiva

MIRANDA & ASSOCIADOS  
Av. Engenheiro Duarte Pacheco, 7  
Lisboa, 1070-100  
Portugal  
E-mails: [sofia.martins@mirandalawfirm.com](mailto:sofia.martins@mirandalawfirm.com)  
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Mr. António Veloso  
PIMENTA & ASSOCIADOS  
Av. Marginal 141  
Torres Rani Office Tower  
7th Floor, T2 Maputo  
Mozambique  
E-mail: [antonio.veloso@pimentalawfirm.com](mailto:antonio.veloso@pimentalawfirm.com)

2. **RESPONDENT**

4. The Respondent is the REPUBLIC OF MOZAMBIQUE [“**Mozambique**” or “**Respondent**”], with the following contact details:

Dr. Janfar Abdulai (Minister of Transport and Communications)  
Mr. Afonso Cipriano Jamisse (Head of the Minister’s Office)  
Mr. Fortunato Albrinho (National Director of International Relations)  
MINISTRY OF TRANSPORT & COMMUNICATIONS  
Av. Mártires de Inhaminga No. 336  
C. P. 276 Maputo  
Mozambique  
E-mails: [gabineteministro@mtc.gov.mz](mailto:gabineteministro@mtc.gov.mz)  
[jamisse\\_cipriano@yahoo.com](mailto:jamisse_cipriano@yahoo.com)  
[f.albrinho@hotmail.com](mailto:f.albrinho@hotmail.com)

Ms. Beatriz Buchili (Attorney-General)  
Mr. Angelo Matusse (Deputy Attorney General)  
ATTORNEY-GENERAL’S OFFICE  
121 Vladimir Lenin Avenue  
Maputo  
Mozambique  
E-mail: [pgr@pgr.gov.mz](mailto:pgr@pgr.gov.mz)  
[angelo.matusse@gmail.com](mailto:angelo.matusse@gmail.com)

5. Respondent is represented in these proceedings by:

Mr. Juan C. Basombrio  
DORSEY & WHITNEY LLP  
600 Anton Boulevard, Suite 2000  
Costa Mesa, CA 92626-7655  
United States  
E-mail: [basombrio.juan@dorsey.com](mailto:basombrio.juan@dorsey.com)

Mr. Lincoln Loehrke  
Ms. Lindsey Schmidt  
DORSEY & WHITNEY LLP  
50 South Sixth Street, Suite 1500  
Minneapolis, MN 55402  
United States  
E-mails: [loehrke.lincoln@dorsey.com](mailto:loehrke.lincoln@dorsey.com)  
[schmidt.lindsey@dorsey.com](mailto:schmidt.lindsey@dorsey.com)

6. Claimant and Respondent shall jointly be referred to as the “**Parties**”.
3. **POWERS OF ATTORNEY AND CHANGE OF REPRESENTATIVES**
7. Claimant and Respondent have designated their representatives and legal advisers identified above as being authorized to act on their behalf in this arbitration.
8. To the extent they have not already done so, the Parties shall confirm these designations either by providing a copy of the powers of attorney or letters of representation granted to their representatives.
9. In the event of any change by a Party in the designation or contact details of any of its representatives or legal advisers, that change shall be notified promptly in writing to opposing counsel, to the Tribunal and to the Registry. The Tribunal reserves the right to exclude the participation of any representatives from any hearing or other meeting where their participation has not been duly notified sufficiently in advance of that hearing or meeting.

## **II. THE ARBITRAL TRIBUNAL AND ADMINISTRATIVE SERVICES**

1. **CONSTITUTION OF THE ARBITRAL TRIBUNAL**
10. On 20 May 2020 Claimant appointed Professor Guido Santiago Tawil as first arbitrator<sup>1</sup>. Prof. Tawil’s contact details are the following:

Prof. Guido Santiago Tawil  
Ed. Aguas Azules II Ap. 003  
Rbla Lorenzo Batlle Pacheco Pda. 32  
20167-01236 Punta del Este, Maldonado  
Uruguay  
E-mail: [arb-gtawil@arb-chambers.com](mailto:arb-gtawil@arb-chambers.com)

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<sup>1</sup> Claimant’s letter of 20 May 2020, para. 6.

11. On 20 May 2020 Respondent appointed Mr. Hugo Perezcano Díaz as second arbitrator<sup>2</sup>. Mr. Perezcano Díaz's contact details are the following:

Mr. Hugo Perezcano Díaz  
180 Northfield Drive West, Unit 4  
Waterloo ON N2L 0C7  
Canada  
E-mail: [hugo.perezcano@iiuris.com](mailto:hugo.perezcano@iiuris.com)

12. On 18 June 2020 Prof. Tawil and Mr. Perezcano Díaz appointed Prof. Juan Fernández-Armesto as Presiding Arbitrator pursuant to Art. 7(1) of the UNCITRAL Rules, and his contact details are the following:

Juan Fernández-Armesto  
ARMESTO & ASOCIADOS  
General Pardiñas 102, 8º izda.  
28006 Madrid  
Spain  
Email: [jfa@jfarmesto.com](mailto:jfa@jfarmesto.com)

13. The Parties confirm that the members of the Tribunal have been validly appointed in accordance with the Treaty and the UNCITRAL Rules. They also confirm that they waive any objection to the constitution of the Tribunal and to the appointment of the members of the Tribunal in respect of matters known to them at the date of signature of these Terms of Appointment.
14. The members of the Tribunal confirm that they are and shall remain impartial and independent of the Parties. The members of the Tribunal confirm that they have disclosed, to the best of their knowledge, all circumstances likely to give rise to justifiable doubts as to their impartiality or independence and that they will without delay disclose any such circumstances that may arise in the future.
15. The Parties confirm that they have no objection to the constitution of the Tribunal on the grounds of conflict of interest or lack of independence or impartiality in respect of matters known to them at the date of signature of these Terms of Appointment.
16. All notifications arising in the course of the arbitration addressed to the Tribunal shall be made to the abovementioned addresses.

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<sup>2</sup> Respondent's letter of 20 May 2020, p. 4.

2. **ADMINISTRATIVE SERVICES**

A. **Registrar and Depositary**

17. The Parties agree that the Arbitration shall be administered by the Permanent Court of Arbitration<sup>3</sup>. Accordingly, the PCA shall act as Registry and shall administer the proceedings on the terms set forth in this section.
18. In consultation with the Tribunal, the PCA Secretary-General shall designate a legal officer of the International Bureau to act as Registrar and Secretary to the Tribunal.
19. The Registry shall maintain an archive of filings of correspondence and submissions.
20. The Registry shall manage Parties' deposits to cover the costs of the arbitration, subject to the Tribunal's supervision.
21. If needed, the PCA shall make its hearing and meeting rooms in the Peace Palace in The Hague, or any hearing space provided under any PCA Host Country Agreement, available to the Parties and the Tribunal at no charge. Costs of catering, court reporting, or other technical support associated with hearings or meetings shall be borne by the Parties.
22. Upon request, the staff of the PCA shall carry out administrative tasks on behalf of the Tribunal, the primary purpose of which would be to reduce the costs that the Tribunal would otherwise incur. Work carried out by PCA staff shall be billed in accordance with the PCA's schedule of fees. PCA fees and expenses shall be paid in the same manner as the Tribunal's fees and expenses.
23. The contact details of the Registry are as follows:  
  
Dr. Túlio Di Giacomo Toledo, Legal Counsel  
Mr. Luis Popoli, Case Manager  
PERMANENT COURT OF ARBITRATION  
Peace Palace  
Carnegieplein 2  
The Hague, 2517 KJ  
The Netherlands  
Tel.: +31 70 302 4261 (Dr. Toledo)  
+31 70 302 2840 (Mr. Popoli)  
Fax: +31 70 302 4167  
E-mails: [ttoledo@pca-cpa.org](mailto:ttoledo@pca-cpa.org)  
[lpopoli@pca-cpa.org](mailto:lpopoli@pca-cpa.org)
24. The appointment of the PCA as Registry shall not affect the legal place or geographical venue of the arbitration, the applicable procedural rules, or other aspects of the arbitral proceedings, which shall remain subject to these Terms of

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<sup>3</sup> Parties' joint letter to the PCA of 27 May 2020.

Appointment, any agreement between the Parties, and any determinations by the Tribunal.

25. The PCA and its officials are bound by the same confidentiality duties applicable to the Parties and the Tribunal in this arbitration.

**B. Administrative Secretary**

26. With the consent of the Parties, the Arbitral Tribunal appoints the following Administrative Secretary [the “**Secretary**”]:

Ms. Sofia de Sampaio Jalles  
ARMESTO & ASOCIADOS  
General Pardiñas, 102  
28006 Madrid  
Spain  
E-mail: [ssj@jfarmesto.com](mailto:ssj@jfarmesto.com)

27. The Secretary works for Armesto & Asociados, the same firm of arbitrators to which the Presiding Arbitrator belongs. Armesto & Asociados’ professional activity is limited to acting as arbitrators. The Parties received the Secretary’s *curriculum vitae*, declaration of independence and impartiality and written undertaking to act in accordance with the rules set forth in these Terms of Appointment on 24 June 2020.
28. The Members of the Tribunal will personally make all decisions required to adjudicate the merits of the present dispute and all procedural issues. To personally fulfill its decision-making functions, the Tribunal may draw on the help of the Secretary. The Secretary’s tasks will be performed upon the Tribunal’s specific instructions, under its direct supervision and responsibility, and will not release the Tribunal of any of its decision-making duties.
29. When instructed by the Presiding Arbitrator, on behalf of the Tribunal, the Secretary may perform the following tasks:
- Transmit communications and decisions;
  - Organize and maintain the case file;
  - Attend meetings, hearings and deliberations; take notes and keep time;
  - Summarize submissions, review evidence and authorities, conduct legal research, write notes or memoranda on factual and legal issues, prepare preliminary drafts of decisions or sections of awards, under the specific instruction and continuous control and supervision of the Presiding Arbitrator.
30. The Secretary shall be bound by the same duties of confidentiality, independence and impartiality as the members of the Tribunal and shall be subject to the same liability regime.



31. The Tribunal may remove the Secretary at its discretion. The Tribunal will remove the Secretary if she ceases to work for Armesto & Asociados. The Tribunal may appoint a substitute, by submitting to the Parties the substitute's *curriculum vitae* and declaration of independence and impartiality and written undertaking to act in accordance with the rules set forth in these Terms of Appointment.

### **III. COMMUNICATIONS**

32. The Parties agree that their submissions and all other notifications and communications between them or among the Tribunal shall be transmitted by electronic mail to the email addresses of counsel for the Parties as identified in paragraphs 3 and 5 above.
33. Any Party shall immediately notify in writing the other Party and the members of the Tribunal of any change in its address, contact information and/or representatives. Failing such notification and confirmation of receipt by the Presiding Arbitrator of the Tribunal, all communications sent to the above addresses shall be deemed valid.
34. The Parties agree that the periods of time agreed by them or fixed by the Tribunal shall start to run on the day following the date on which a notification or communication is made in accordance with this section and that, if the first or last day of the relevant period of time granted is an official holiday or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall begin to run at the beginning of the first following business day or expire at the end of the first following business day. For the purpose of these proceedings, Saturdays and Sundays should be considered non-business days.
35. The Parties and their representatives shall not engage in any oral or written communications with the members of the Tribunal *ex parte* in connection with the subject-matter of the arbitration.
36. The Parties shall send copies of correspondence between them to the Tribunal and the Registry only if such correspondence relates to a matter where the Tribunal is required to take action or to abstain from acting or if it gives notice of a relevant event of which the Tribunal and the Registry should be apprised.

### **IV. ARBITRATION AGREEMENT**

37. By Notice of Arbitration dated 20 March 2020 [**“Notice of Arbitration”**], Patel sought to initiate arbitration proceedings against Mozambique under the UNCITRAL Rules and Art. 9 of the Agreement between the Government of the Republic of India and the Republic of Mozambique for the Reciprocal Promotion and Protection of Investment, dated 19 February 2009 [the **“Treaty”**].

38. Art. 9 of the Treaty provides, in relevant part:

“ARTICLE 9

SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A  
CONTRACTING PARTY

1. Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

2. Any such dispute which has not been amicably settled within a period of six months may, if both Parties agree, be submitted:

(a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party’s competent judicial, arbitral or administrative bodies; or

(b) To international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

3. Should the Parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:

(a) If the Contracting Party of the investor and the other Contracting Party are both parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965 and the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes, such a dispute shall be referred to the Centre; or

(b) If both parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings; or

(c) to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:

(i) The appointing authority under Article 7 of the Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party.

(ii) The parties shall appoint their respective arbitrators within two months.

(iii) The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding for the parties in dispute.

(iv) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.

4. Any dispute arising out of action taken under Article 12 (Applicable Laws) and all pre-establishment disputes shall be excluded from the purview of international arbitration.”

According to Art. 3(2) of the UNCITRAL Rules, these arbitration proceedings are deemed to have commenced on 20 March 2020, the date on which Respondent received the Notice of Arbitration.

## **V. SUMMARIES OF THE PARTIES’ CLAIMS AND RELIEF SOUGHT**

39. At the Tribunal’s request<sup>4</sup>, each Party prepared a summary of its claims and relief sought. They are included below *verbatim*.
40. The purpose of the following summaries is to set out the general scope of the proceedings for the Arbitral Tribunal from each Party’s own perspective, without prejudice to any other or further allegations, arguments or contentions contained or to be made by either Party, whether in the pleadings or submissions already filed or in such submissions or arguments as will be made in the course of this arbitration.
41. No statement or omission in these summaries is to be interpreted as any waiver or admission by the Parties of any issue of fact or law, and the Parties are not expected to respond herein to what each other has summarized.

### **1. CLAIMANT’S CLAIMS AND RELIEF SOUGHT**

42. Claimant’s claims are presented in detail in its Notice of Arbitration dated 20 March 2020, which is incorporated by reference. In short, in early 2011, Claimant identified an opportunity in Mozambique to develop a rail corridor that was to span approximately 500 km and link Moatize in the mineral-rich Tete province to Macuse, where it planned to construct a new port along the Zambezia coast [the “**Project**”]. The Project concept was well-received by the Ministry of Transport and Communications [the “**MTC**”]. However, considerable detailed studies were required to ascertain the Project’s feasibility.
43. Based on specific assurances and commitments, the Respondent caused Claimant to invest considerable resources into the Project *inter alia* by pledging to issue a concession in favour of Patel for the Project’s implementation, and providing Patel with a right of first refusal to undertake the Project. On 6 May 2011, the Parties memorialised their respective commitments and obligations into a Memorandum of Interest [the “**MOI**”]. In summary, the MOI required Patel to undertake and complete a prefeasibility study [the “**PFS**”] for the Project at “its own cost and expense” within one year of signing the MOI. In exchange for Patel’s investment, and only in the event the MTC ultimately was satisfied with and approved the PFS, Clause 2(1) required the Respondent to “issue a concession of the project in favour

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<sup>4</sup> A 1.

of PEL.” The MOI also afforded additional rights to Patel, including a right of first refusal to implement the Project on the basis of a concession agreement.

44. These assurances provided Patel with confidence that, after sinking millions into the PFS, it would have the right to carry out the Project which had been its own invention (subject to MTC approval of the PFS). The specific rights and assurances in the MOI therefore induced Patel to invest in Mozambique, and formed the basis of its legitimate expectations when doing so.
45. On 15 June 2012, the MTC approved the PFS. According to such approval, to implement the Project, Patel only needed to:
  - (i) expressly exercise its right of first refusal (which it did on 18 June 2012); and
  - (ii) negotiate with Respondent’s state authority, Mozambique Ports and Railways [“CFM”] to create a project company to carry out the Project.
46. Patel made several unsuccessful efforts to engage with CFM but to no avail. It became clear that diverging positions existed between the CFM and the MTC regarding the Project’s future (although Patel was left in the dark as to the respective positions amongst the government ministries). The CFM evaded Patel’s repeated requests to move the Project forward, and both ministries lacked transparency in their dealings with Patel. Then, more than six months after it had approved the PFS and directed Patel to negotiate directly with CFM, the MTC reneged on its promise to award the concession to Patel and instead issued a public tender which was to be fraught with irregularities.
47. Faced with the prospect of losing the Project it conceived of and sunk millions into, Patel was forced to form a consortium to compete in the public tender. Its participation in the tender was expressly without “prejudice to the rights Patel is vested in as a result of the MOI”.
48. In parallel with its preparation for the public tender, Patel continued to petition Respondent to suspend the public tender, and to honour the commitments it made to Patel in the MOI, which had induced Patel to invest in Mozambique in the first place. This included, *inter alia*, imploring Prime Minister Vaquina to abide by the commitments undertaken by the Government in the MOI, and providing the Respondent with a legal opinion from a prominent Mozambican law firm confirming Patel’s interpretation of Mozambican law and the MOI.
49. On 18 April 2013, the MTC again changed its position and informed Patel that Respondent’s Council of Ministers had decided it was in the “national strategic interest” to permit Patel to begin negotiating towards the execution of the Project. In particular, the Council of Ministers “decided to invite [Patel] to start the [negotiation] process with a view of carrying out those projects” and invited “the representatives of [Patel] . . . to contact the [MTC], to begin this process, within seven days.” The MTC further requested Patel to provide a bank guarantee for 0.1%

of the prospective investment value, to be held until the conclusion of the agreement.

50. On 23 April 2013, Patel promptly responded in writing to “formally accept” the Government’s offer to commence negotiations for the concession without holding a public tender. Further seemingly positive steps were taken in the following days, with the MTC promising to provide a draft concession agreement and the parties scheduling their first direct negotiation meeting for 10 May 2013. In reliance on these steps, Patel provided the MTC with a bank guarantee for the equivalent of USD 3,115,000.63.
51. Then, on 13 May 2013, the MTC informed Patel that Mozambique had again changed its position. It instructed Patel to continue with the public tender — an astonishing reversal of a decision that had been made just 14 days earlier, in which the same governmental body authorised direct negotiations between Patel and the MTC as a matter of “national strategic interest”. In light of this, Patel was left with no choice but to participate in the public tender process.
52. In July 2013, the MTC awarded the Project to the Italian Thai Development Company, further to a sham tender process, which was riddled with irregularities. Respondent then disregarded Claimant’s challenges to the tender process and rejected its attempt to resolve this dispute amicably from 2013 through to 2015.
53. Claimant’s case is that Respondent’s conduct towards Claimant and its investment contravened Respondent’s obligations under the Treaty and under customary international law, including (but not limited to) its obligations to treat the Claimant’s investments fairly and equitably (Article 3), to accord its investments a treatment no less favourable than that which it accords to investments of investors of any third State (Article 4) and not to nationalise or expropriate (or take measures with effect equivalent to nationalisation or expropriation of) its investments except where this is done for a public purpose, in accordance with the law, on a non-discriminatory basis and the investor receives fair and equitable compensation (Article 5).
54. Claimant seeks declaratory relief, damages and compensation for all costs, losses, and liabilities it suffered as a result of Respondent’s breaches of its treaty obligations, in the terms set out at paragraphs 108 to 110 of the Notice of Arbitration.

## **2. RESPONDENT’S CLAIMS AND RELIEF SOUGHT**

55. The Republic of Mozambique has been unable to meet with its counsel in person because of the COVID-19 lock-downs and travel restrictions and, thus, this summary is preliminary. Respondent reserves all of its rights.
56. This dispute involves Claimant’s assertion that it is entitled to the direct award of a potential long-term concession to build and operate a port and railway in Mozambique, based on a preliminary six-page “Memorandum of Interest” [previously defined as “MOI”], signed in May 2011.

57. Respondent disputes jurisdiction in this proceeding. Instead, Respondent has brought an arbitration before the ICC in Mozambique pursuant to Clause 10 of the MOI, which states:

“The present document constitutes a memorandum of interest between the parties. Any dispute arising out of this memorandum between the parties shall be referred to arbitration. The arbitration will be governed by Mozambique law and the rules of the International Chamber of Commerce shall be followed. Each party will appoint one arbitrator and both of these appointed arbitrators will in turn appoint the presiding arbitrator. The venue of the arbitration shall be at the Republic of Mozambique.”

58. This dispute must be resolved in the ICC arbitration which can also address any Treaty claims or the ICC arbitration must be concluded first because it pertains to the existence of underlying rights. Notwithstanding the Terms of Appointment, Respondent disputes that the arbitration clause in the Treaty governs this dispute, and by signing these Terms does not waive this contention.
59. Respondent further contends that the various factors that commonly establish jurisdiction in international investment treaty arbitration are lacking in this dispute. For example, the MOI is not an investment and Claimant made no foreign investment in Mozambique. At best, the MOI provides an alleged right of first refusal, which constitutes merely an option.
60. This is not the appropriate forum to litigate and adjudicate what is, at its crux, a contractual dispute about the execution, alleged validity, alleged terms, interpretation and alleged breach of the MOI, and whether Respondent properly undertook and scored a public tender process under Mozambique’s procurement and public private partnership laws.
61. On the merits, Respondent denies the entirety of Claimant’s claims and of the relief sought. Respondent has not breached the MOI or violated Mozambican law or the Treaty. Claimant is entitled to no relief. Rather, Respondent is entitled to damages and relief against Claimant.
62. The MOI is void and unenforceable, or is a preliminary document, for several reasons:
- Claimant fraudulently induced Respondent to enter into the MOI. Claimant did not disclose that the India National Highways Authority and Supreme Court of India had adjudged Claimant to be “not commercially reliable and trustworthy” in the context of an India infrastructure project. Had these facts been disclosed, Respondent would have never signed the MOI or would have immediately terminated the MOI.
  - The MOI is merely a non-binding “agreement to agree,” under Mozambican law and as understood in international commerce and public-private partnership practice.

- The parties offer different versions of the MOI with conflicting terms, demonstrating a lack of meeting of the minds on material terms. Mozambique's version is correct.
  - The MOI was entered into without the requisite governmental approvals required by Mozambican law and, as interpreted by Claimant, conflicts with Mozambique's procurement laws. The MOI cannot constitute a private public partnership agreement for the project under Mozambican law, does not address the material requirements that must be negotiated for such a project, and therefore is not binding.
63. Even if the MOI were considered to be valid, Claimant breached the MOI and did not comply with the MOI's requirements including by failing to satisfy the conditions precedent to a concession agreement (such as reaching a separate, mutually satisfactory agreement with the Ports and Railways Company and establishing project feasibility in other respects). Claimant changed its assertions of rights under the MOI, taking contradictory positions. Claimant acknowledged the MOI, if interpreted to require a direct award to Claimant, would have violated Mozambican law. Through its actions and blacklisting, Claimant also breached Mozambican law and failed to maintain its qualification for participating or seeking participation in the project. Respondent did not breach the non-binding MOI.
64. By participating in the public tender through a consortium, Claimant abandoned, waived and released any rights under the MOI or otherwise. This consortium led by Claimant participated in the eventual lawful public tender process for the project. The tender process was reasonably conducted by Respondent's Ministry of Transport and correctly scored. In the public tender, Claimant's consortium was afforded a scoring points advantage to account for Claimant's alleged rights under the MOI. This constituted a settlement or accord and satisfaction of the dispute over the MOI. The Consortium associated with Claimant came in third place in the public tender, even after being awarded the scoring points advantage. After losing, Claimant abandoned its consortium partners and returned to its prior assertion that the MOI was binding instead and that only Claimant was entitled to be awarded the project, regardless of the outcome of the public tender.
65. Claimant also could not have exercised the MOI's alleged first right of refusal. There was no such right. A right of refusal also is contrary to the public tender process required through enactment of Mozambique's public private partnership law. In any event, Claimant did not match the terms of the ultimate winning bidder (which winner was selected through the public tender process and found to be superior on both technical and financial metrics).
66. Since 2011, the global market for coal has changed. The project as proposed by Claimant was and is commercially infeasible, for those and other reasons. Under the MOI, even if it were valid, this commercial infeasibility absolved Respondent of any obligation to award the project to or go forward with Claimant. Claimant has no damages. Claimant seeks illusory and speculative profits on a project that was never negotiated nor came to fruition. Claimant has dramatically changed its position on damages and improperly seeks a windfall.

67. Finally, Claimant has made false and defamatory public statements about Respondent with respect to the project and its procurement process, causing substantial injury to Respondent, for which Respondent is entitled to recover damages against Claimant.

## **VI. APPLICABLE RULES**

### **1. APPLICABLE SUBSTANTIVE RULES**

68. The Tribunal shall decide this dispute in accordance with the Treaty<sup>5</sup>.

### **2. APPLICABLE PROCEDURAL RULES**

69. The applicable procedural rules in this arbitration are the UNCITRAL Rules, in accordance with Art. 9(3)(c) of the Treaty and the Parties' agreement<sup>6</sup>.
70. The Parties also agree that the Tribunal may be guided by the provisions of the International Bar Association [“**IBA**”] Rules on the Taking of Evidence in International Arbitration adopted by the IBA Council on 29 May 2010 and the IBA Guidelines on Party Representation in International Arbitration adopted by the IBA Council on 25 May 2013.
71. In order to ensure effective case management, the Arbitral Tribunal, after consulting with the Parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the Parties or any imperative rules applicable to the proceedings.
72. A failure by any Party to object promptly to any non-compliance with non-imperative rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such Party to make such an objection, unless such Party can show that, under the circumstances, its failure to object was justified.
73. The Tribunal is empowered to issue and amend procedural orders, after consulting the Parties, on specific procedural issues if and when needed. Procedural orders shall be signed and issued by the Presiding Arbitrator alone after consultation with his co-arbitrators. In cases of urgency or if a co-arbitrator cannot be reached in a timely manner, the Presiding Arbitrator may take procedural decisions on his own, subject to revision, if any, by the full Tribunal.

## **VII. PROCEDURAL TIMETABLE**

74. The arbitration shall be conducted in accordance with the Procedural Timetable, which shall be established by the Arbitral Tribunal in a procedural order.

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<sup>5</sup> Art. 9(3)(c)(iii) of the Treaty.

<sup>6</sup> Parties' joint letter to the PCA of 27 May 2020.



75. The Tribunal may modify such Procedural Timetable at any time, after consultation with the Parties.

### **VIII. LANGUAGE**

76. The Parties agree that the language of the Arbitration will be English.
77. However, documents which are originally in Portuguese (such as agreements, exhibits, correspondence, laws, etcetera) may be submitted and cited in Portuguese, with full or partial translations at the option of the submitting party. If a party desires to submit any full or partial translations, it may do so without the need of a certified translation. The Tribunal also may request full or partial translations of specific written materials it may deem necessary.
78. The Parties further agree that all hearings will be conducted in English, but translation will be provided between English and Portuguese at hearings where Portuguese speaking parties participate and when Portuguese speaking witnesses and/or experts provide testimony.
79. Any procedural orders, partial awards and/or the final award shall be in English. The Parties agree to cooperate in this regard to address unanticipated issues involving languages.

### **IX. PLACE OF ARBITRATION**

80. The Parties agree that the legal place (seat) of the arbitration shall be The Hague, the Netherlands, and that hearings shall be conducted at the arbitration facilities of the PCA, unless they are conducted remotely<sup>7</sup>.
81. In accordance with Art. 16(2) and (3) of the UNCITRAL Rules, the Tribunal may meet at any location it considers appropriate for deliberations. The Tribunal may also hold meetings and non-evidentiary hearings by telephone or video-conference.
82. Irrespective of the place where an award is signed, it will be deemed to have been made at the legal place of the arbitration, which is The Hague, Netherlands.

### **X. TRANSPARENCY**

83. The Parties agree that the UNCITRAL Rules on Transparency will apply to these proceedings.

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<sup>7</sup> Parties' joint letter to the PCA of 27 May 2020.

## **XI. QUORUM AND DECISIONS OF THE TRIBUNAL**

84. A quorum shall be constituted by all three members of the Tribunal. Unless the Parties otherwise agree, a quorum shall be required for all hearings and all meetings of the Tribunal.
85. Decisions of the Tribunal shall be made by a majority of the arbitrators. In the case of questions of procedure, when there is no majority or when the Tribunal so authorizes, the Presiding Arbitrator may decide alone, subject to revision, if any, by the Tribunal.
86. Any award shall be signed by the Tribunal in the required number of counterparts.

## **XII. IMMUNITY FROM SUIT**

87. The Parties shall not seek to make any member of the Tribunal, any member of the Registry, the Secretary or any other person appointed by the Tribunal liable in respect of any act or omission in connection with any matter related to this arbitration.
88. Neither Party shall require any member of the Tribunal, any member of the Registry, the Secretary or any other person appointed by the Tribunal to be a party or witness in any judicial or other proceedings arising out of or in connection with this arbitration.

## **XIII. REMUNERATION**

89. The Tribunal shall be remunerated at the rate of USD 375 per hour for all work carried out in connection with the arbitration, and USD 3,000 per day for hearings that are longer than four hours, plus VAT, if applicable<sup>8</sup>.
90. The members of the Tribunal shall be remunerated in the amount of 50% of their fees for each day reserved for a hearing or meeting, based on an eight hour day, in respect of any hearing or other meeting for which they are asked to reserve more than one day and that is cancelled, or postponed by more than one week, by one or both of the Parties within four weeks from the first day of such hearing or meeting.
91. The members of the Tribunal shall be reimbursed for all disbursements and charges reasonably incurred in connection with the arbitration, including but not limited to travel expenses, telephone, fax, delivery, printing, and other expenses.
92. The members of the Tribunal may bill for reimbursement of disbursements and charges as and when they are incurred, with supporting documents in respect of any

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<sup>8</sup> The Parties have agreed this rate by reference to the rates established by ICSID.

such disbursements or charges and may submit to the Registry periodic bills in respect of fees.

93. All fees and expenses should be paid from the deposited amount upon presentation of a quarterly invoice by the Arbitrators. The Tribunal may withhold any award or decision until such fees and expenses have been paid.
94. The Secretary will be remunerated directly by the Presiding Arbitrator, without causing any additional cost to the Parties, save that the Secretary will be entitled to the reimbursement of justified reasonable personal disbursements for attending hearings and meetings.

#### **XIV. DEPOSITS**

95. In accordance with Art. 41 of the UNCITRAL Rules and in order to ensure sufficient funds for the Tribunal's fees and expenses, the Parties shall establish an initial deposit of EUR 200.000 (i.e., EUR 100.000 from each side). The deposit shall be made by wire transfer to the PCA within 30 days of each Party's signature of these Terms of Appointment to the following account:

Bank: ABN Amro Bank N.V.  
Gustav Mahlerlaan 10  
1082 PP Amsterdam  
The Netherlands

Bank Identifier Code (BIC): ABNANL2A

Account number: 0480 4373 51 [EUR]  
0533 5127 51 [USD]

IBAN: NL56 ABNA 0480 4373 51 [EUR]  
NL56 ABNA 0533 5127 51 [USD]

Beneficiary: Permanent Court of Arbitration

Reference: 2020-21 (Claimant/Respondent)

96. The PCA will review the adequacy of the deposit from time to time and, at the request of the Tribunal, may invite the Parties to make supplementary deposits in accordance with Art. 41(2) of the UNCITRAL Rules.
97. Any transfer fees or other bank charges will be charged by the PCA to the deposit. No interest will be paid on the deposit.
98. The unused balance held on deposit at the end of the arbitration shall be returned to the Parties as directed by the Tribunal.

## **XV. VAT**

99. To the extent that Value Added Tax ["VAT"] (or any other indirect tax) may be due on the Arbitrators' fees under the applicable tax rules, the Parties undertake to pay such VAT at the prevailing rate upon submission of an invoice addressed to them by the Arbitrators or the Secretary.
100. Upon an invitation by the Tribunal, the Parties shall promptly pay an advance on the VAT amount which is likely to be due.

## **XVI. REPRESENTATIONS**

101. The persons acting on behalf of Claimant and Respondent represent to the other Party and to the Tribunal that they are duly authorized to sign these Terms of Appointment on behalf of the entities which they represent, in accordance with either the power of attorney, or by the Party directly signing these Terms of Appointment, and that these Terms of Appointment are hereby validly adopted by the Parties.
102. In witness whereof, the Terms of Appointment shall be signed by each Party and member of the Arbitral Tribunal in counterparts. Such counterparts shall be scanned and communicated by e-mail to each Party, member of the Arbitral Tribunal and the PCA. Such scanned counterparts shall have the same force and effect as originals.

## **XVII. EFFECTIVENESS**

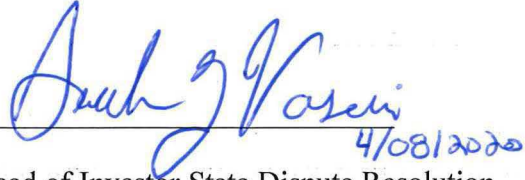
103. The provisions of these Terms of Appointment are in full force and effect on and from the date indicated on their cover page.

Place of arbitration: The Hague (Netherlands)

Signed as of 4 August 2020

CLAIMANT  
**PATEL ENGINEERING LIMITED**

Name of representative: Sarah Z. Vasani



Title: Partner for Addleshaw Goddard, Head of Investor State Dispute Resolution  
\_\_\_\_\_

Date and description of power of attorney: Power of Attorney given on 7 July 2020  
by Patel Engineering Limited, signed by Mr Rupen Patel, Chairman and Managing  
Director, and witnessed by Ms Shobha Shetty, Company Secretary & Compliance  
Officer \_\_\_\_\_

RESPONDENT  
**THE REPUBLIC OF MOZAMBIQUE**

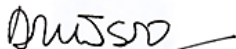
Name of representative: Juan C. Basombrio

  
7 AUGUST 2020

Title: Partner for Dorsey & Whitney LLP, Head of International Arbitration and Litigation

Date and description of power of attorney: Power of Attorney given to Juan C. Basombrio, partner, Dorsey & Whitney LLP, executed on 30 July 2020 by Republic of Mozambique, and signed by Beatriz Buchili, Attorney General of the Republic of Mozambique.

THE ARBITRAL TRIBUNAL

A handwritten signature in black ink, appearing to read "J. Fernández-Armesto", written over a light blue rectangular highlight.

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Juan Fernández-Armesto  
Presiding Arbitrator

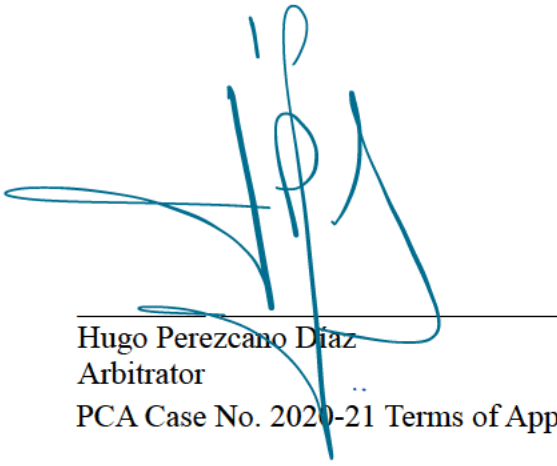
Date: 4 August 2020

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Guido Santiago Tawil  
Arbitrator

Date:





Hugo Perezcano Díaz  
Arbitrator  
PCA Case No. 2020-21 Terms of Appointment

Date: August 4, 2020