PCA Case No. 2020-21

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

v.

THE REPUBLIC OF MOZAMBIQUE

Respondent

FINAL AWARD

ARBITRAL TRIBUNAL

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

ADMINISTRATIVE SECRETARY

Sofia de Sampaio Jalles

REGISTRY

Permanent Court of Arbitration
Túlio Di Giacomo Toledo

7 February 2024

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GLOSSARY OF TERMS AND ABBREVIATIONS

Administrative Costs	Fees and expenses of the arbitrators, of the appointing authority, of any other assistance required by the tribunal, and the expenses of the PCA, under paras. (a), (b), (c) and (f) of Art. 38 of the UNICTRAL Rules
Anway Dissenting Opinion	Dissenting opinion issued on 24 November 2022 by Mr. Stephen P. Anway in the ICC Arbitration between the Parties
April 2013 Council of Ministers' Decision	Decision of the Council of Ministers communicated by the MTC to PEL in a letter dated 18 April 2013
Art(s).	Article(s)
BIT or Treaty	Agreement between the Government of the Republic of India and the Republic of Mozambique for the Reciprocal Promotion and Protection of Investments, dated 19 February 2009
C I	Statement of Claim dated 30 October 2020
C II	Reply on the Merits and Response to Objections to Jurisdiction dated 9 August 2021
C III	Rejoinder on Objections to Jurisdiction dated 7 February 2022
C IV	Claimant's Additional Submission on Damages dated 30 May 2022
C SofC	Claimant's Statement of Costs dated 18 August 2023
CFM	Mozambican Directorate of Ports and Railways (*Portos e Caminhos de Ferro de Moçambique*)
Chaúque I and **II**	First and second witness statements of Mr. Luis Chaúque (RWS-1 and RWS-3)
Claimant or **PEL**	Patel Engineering Limited (India)
Claimant's English MOI	Claimant's original copy of its English version of the MOI
Costs of Arbitration	Costs of the arbitration pursuant to Art. 38 of the UNICTRAL Rules
CPHB	Claimant's Post-Hearing Brief dated 4 March 2023
Daga I and **II**	First and second witness statements of Mr. Kishan Daga (CWS-1 and CWS-3)
Doc.	Document
DPS	Document Production Schedules
Evaluation Committee	The MTC's Acquisition Management and Execution Office
First Stay Application	Respondent's Application for a Stay of Proceedings dated 1 October 2021
Hearing	Hearing in this matter held from 28 November to 3 December 2022 and from 5 to 6 December 2022 in Porto, Portugal
HT, Day [], p. [], l. []	Hearing transcript, page, line
IBA	International Bar Association
ICC Arbitration	The pending ICC arbitration between the Parties

ICC Arbitration Rules	The Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce
ICC Court	International Court of Arbitration of the International Chamber of Commerce
ICC Injunction	Procedural order issued by the ICC Tribunal on 24 November 2022
ICC Partial Award	Partial Award on Jurisdiction by the ICC Tribunal of 9 February 2022
ICC Tribunal	The tribunal seized of the Parties' dispute under the MOI and pursuant to the ICC Arbitration Rules
ICSID	International Centre for Settlement of Investment Disputes
ITD	Italian-Thai Development Company
ITD Proposal	Proposal of the Italian-Thai Development Company for the Acquisition of Contested Rights to Conceive, Design, Finish, Build, Operate and Transfer the Railway Line and the Port of Macuse dated June 2013
June 2012 Approval	Letter issued by the MTC to PEL on 15 June 2012
Legal Costs	Reasonable costs and expenses incurred by the "successful party" in the course of the arbitration, as well as the travel and other expenses of witnesses to the extent such expenses are approved by the tribunal, under paras. (d) and (e) of Art. 38 of the UNCITRAL Rules
May 2013 Council of Ministers' Decision	Decision of the Council of Ministers communicated by the MTC to PEL in a letter dated 13 May 2013
MOI	Memorandum of Interest dated 6 May 2011
Motion for Bifurcation	Respondent's Motion for Bifurcation dated 20 November 2020
MPD	Mozambican Ministry of Planning and Development
MTC	Mozambican Ministry of Transport and Communications
NAFTA	North American Free Trade Agreement
Notice of Arbitration	Notice of Arbitration dated 20 March 2020
P(p).	Page(s)
Para(s).	Paragraph(s)
Parties	Claimant and Respondent
Patel I and **II**	First and second witness statements of Mr. Ashish Patel (CWS-2 and CWS-4)
PCA	Permanent Court of Arbitration
PGS Consortium	PEL formed a consortium of companies to compete in the public tender
Portuguese MOI	Respondent's and Claimant's signed original document of the MOI in Portuguese
PPP	Public-private partnership
PPP Law	Law No. 15/2011, which entered into force on 10 August 2011
PPP Regulation	Decree no. 16/2012, of 4 June 2012

Pre-Feasibility Study	Pre-feasibility study prepared by Claimant for the Project pursuant to the MOI, dated April 2012
Preliminary Study	Preliminary Study to Assess Potential Port Locations in Zambezia, to Connect the Moatize Coal Mines By Rail, March 2011
Project	Proposed rail and port corridor between Macuse and Moatize
R I	Jurisdictional Objections and Statement of Defense dated 11 January 2021
R II	Rejoinder on the Merits and Reply to Objections on Jurisdiction dated 29 November 2021
R III	Respondent's Additional Submission on Damages dated 26 August 2022
R SofC	Respondent's Statement of Costs dated 18 August 2023
Respondent, **Mozambique** or the **Republic**	Republic of Mozambique
Respondent's English MOI	Respondent's scanned copy of its English version of the MOI
Response to Notice of Arbitration	Response to Notice of Arbitration dated 20 May 2020
RPHB	Respondent's Post-Hearing Brief dated 4 March 2023
Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
Second Stay Application	Respondent's Application for a Stay of Proceedings dated 7 March 2022
Secretary	Administrative Secretary to the Tribunal
Tender Documents	Tender documents issued by the MTC on 12 April 2013
Third Stay Application	Respondent's Application for a Stay of Proceedings dated 24 November 2022
TML	Thai Moçambique Logística, the project company created by ITD, the Zambezia Development Corridor and the CFM
TML Concession	Concession agreement signed between TML and the MTC on 19 December 2013
TML Project	Project conceived by TML
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law of 1976
USD	United States dollar
USMCA	United States-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
Zucula I and **II**	First and second witness statements of Mr. Paulo Zucula (RWS-2 and RWS-4)

TABLE OF CASES

Bayindir	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005	Doc. RLA-105
Fedax	*Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 5 ICSID Rep. 186 (2002), 11 July 1997	Doc. CLA-307
Flughafen	*Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014	Not on record
Global Trading	*Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010	Not on record
Gramercy	*Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Award, 6 December 2022	Not on record
Joy Mining	*Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004	Doc. RLA-53
KT Asia	*KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013	Not on record
MHS	*Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009	Not on record
Mihaly	*Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002	Doc. RLA-54
Nova Scotia	*Nova Scotia Power Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award Excerpts, 30 April 2014	Doc. RLA-58
OI	*OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015	Not on record
Quiborax	*Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplúnv. Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012	Doc. CLA-280
Raymond Charles Eyre	*Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, 5 March 2020	Not on record
Romak	*Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009	Doc. RLA-61
Salini	*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ABR/00/4, Decision on Jurisdiction, 16 July 2001	Doc. RLA-57
SGS	*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003	Not on record
White Industries	*White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011	Doc. CLA-146
Zhinvali	*Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003	Doc. RLA-56

I. INTRODUCTION

1. This is an *ad hoc* investment arbitration dispute subject to the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 [the "**UNCITRAL Rules**"] and to 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**" or "**BIT**"].

2. The dispute revolves around a project to develop a rail corridor in the Republic of Mozambique that was to span approximately 500 km and link Moatize, in the Tete province, to a new deep-water port in Macuse, in the Zambezia province.

1. THE PARTIES

1.1 CLAIMANT

3. The claimant is PATEL ENGINEERING LIMITED (INDIA), a company established pursuant to the laws of the Republic of India ["**Claimant**" or "**PEL**"]. Its contact details are:

Attn: Kishan Daga
Patel Estate, Jogeshwari (W)
Mumbai – 400 102
Maharashtra, India

4. Claimant is represented by:

Sarah Vasani
Lindsay Reimschussel (*since* 31 August 2022)
Daria Kuznetsova
Nicola Devine
Csaba Kovacs (*until* 31 August 2022)
CMS CAMERON MCKENNA NABARRO OLSWANG LLP
Cannon Place, 78 Cannon St
London EC4N 6AF
United Kingdom

Emilie Gonin (*from* 25 June 2020 *to* 22 May 2023)
Edward Ho (*since* 30 May 2022)
BRICK COURT CHAMBERS
7-8 Essex St, Temple
London WC2R 3LD
United Kingdom

Sofia Martins
Renato Guerra de Almeida
Ricardo Saraiva
MIRANDA & ASSOCIADOS

Av. Engenheiro Duarte Pacheco
Lisboa 7 1070-100
Portugal

António Veloso (*until* 28 November 2022)
PIMENTA & ASSOCIADOS
Av. Marginal 141
Torres Rani Office Tower
7th Floor, T2 Maputo
Mozambique

Nathalie Allen (*until* 25 October 2022)
Natasha Chahal (*from* 25 June 2020 *to* 12 September 2021)
ADDLESHAW GODDARD LLP
Milton Gate
60 Chiswell Street
London EC1Y 4AG
United Kingdom

1.2 RESPONDENT

5. The respondent is the REPUBLIC OF MOZAMBIQUE ["**Respondent**", "**Mozambique**" or the "**Republic**"]. Its contact details in this arbitration are:

MINISTRY OF TRANSPORT & COMMUNICATIONS
Av. Mártires de Inhaminga No. 336
C. P. 276 Maputo
Mozambique

ATTORNEY-GENERAL'S OFFICE
121 Vladimir Lenin Avenue
Maputo
Mozambique

6. Respondent is represented by:

Juan C. Basombrío
DORSEY & WHITNEY LLP
600 Anton Boulevard
Suite 2000
Costa Mesa, CA 92626-7655
United States

Theresa M. Bevilacqua (*since* 14 February 2022)
Daniel J. Brown (*since* 14 February 2022)
Lincoln Loehrke (*until* 11 December 2021)
Lindsey Schmidt (*until* 11 December 2021)
DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500

Minneapolis, Minnesota 55402
United States

7. Claimant and Respondent will collectively be referred to as the "**Parties**".

1.3 THE ARBITRAL TRIBUNAL

8. On 20 May 2020, Claimant appointed as arbitrator Professor Guido Santiago Tawil, whose contact details are[1]:

Guido Santiago Tawil
Ed. Aguas Azules II Ap. 003
Rbla Lorenzo Batlle Pacheco Pda. 32
20167-01236 Punta del Este, Maldonado
Uruguay

9. On 20 May 2020, Respondent appointed as arbitrator Mr. Hugo Perezcano Díaz, whose contact details are[2]:

Hugo Perezcano Díaz
180 Northfield Drive West, Unit 4
Waterloo ON N2L 0C7
Canada

10. On 18 June 2020, Professor Tawil and Mr. Perezcano Díaz appointed as Presiding Arbitrator Professor Juan Fernández-Armesto, whose contact details are:

Juan Fernández-Armesto
Armesto & Asociados
General Pardiñas, 102, 8° izda.
28006 Madrid
Spain

11. By letter of 15 June 2020, Professor Fernández-Armesto accepted his appointment as Presiding Arbitrator.

12. In the Terms of Appointment dated 4 August 2020, the Parties confirmed that they had no objection to the appointment of the arbitrators in respect of matters known to them at the date of signature of the Terms of Appointment[3].

[1] Claimant's letter dated 20 May 2020, para. 6.
[2] Respondent's letter dated 20 May 2020, p. 4.
[3] Terms of Appointment, para. 15.

2. ADMINISTRATIVE SERVICES

2.1 REGISTRY AND DEPOSITARY

13. In accordance with the Terms of Appointment[4], the Permanent Court of Arbitration ["**PCA**"] has provided administrative services in support of the Parties and the Tribunal, including by acting as registry and as depositary of funds.

14. The contact details of the PCA are as follows:

PERMANENT COURT OF ARBITRATION
Attn: Túlio Di Giacomo Toledo
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

15. The PCA and its officials are bound by the same confidentiality duties applicable to the Parties and the Tribunal in this arbitration[5].

2.2 ADMINISTRATIVE SECRETARY

16. With the consent of the Parties, and in accordance with the terms of the Terms of Appointment[6], the Tribunal appointed as Administrative Secretary [the "**Secretary**"]:

Sofia de Sampaio Jalles
Armesto & Asociados
General Pardiñas, 102, 8° izda.
28006 Madrid
Spain

17. The Secretary works for Armesto & Asociados, the same firm to which the Presiding Arbitrator belongs. Armesto & Asociados' professional activity is limited to acting as arbitrators. The Parties received the Secretary's *curriculum vitae* and declaration of independence and impartiality on 24 June 2020.

3. THE TREATY: DISPUTE RESOLUTION CLAUSE

18. 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 Investments, dated 19 February 2009 [previously defined as the "Treaty" or the "BIT"], regulates the dispute settlement mechanism for any dispute that arises between a host State and an investor of another member State:

[4] Terms of Appointment, para. 17.
[5] Terms of Appointment, para. 25.
[6] Terms of Appointment, para. 26.

"Article 9

Settlement of Dispute Between and 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 Investments 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."

4. APPLICABLE LAW

19. The dispute arises under Art. 9 of the Treaty. In accordance with Art. 9(3)(c)(iii) of the Treaty, the Tribunal shall decide this dispute in accordance with the provisions of the Treaty.

20. Pursuant to Art. 9(3)(c) of the Treaty and the Parties' agreement, the applicable procedural rules in this arbitration are the UNCITRAL Rules[7].

21. The Parties further agreed in the Terms of Appointment that (a) the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ["**Rules on Transparency**"] will apply to the present arbitration[8], and (b) 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[9].

[7] Parties' joint letter to the PCA of 27 May 2020; Terms of Appointment, para. 69.
[8] Terms of Appointment, para. 83.
[9] Terms of Appointment, para. 70.

II. PROCEDURAL HISTORY

1. COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

22. Claimant commenced these proceedings by Notice of Arbitration dated 20 March 2020 ["**Notice of Arbitration**"], in accordance with Art. 9(3)(c) of the Treaty and Art. 3 of the UNCITRAL Rules.

23. By letter dated 20 May 2020 ["**Response to Notice of Arbitration**"], Respondent acknowledged receipt of the Notice of Arbitration and responded to Claimant's proposals contained therein concerning the procedural details of this Arbitration.

24. Between May and June 2020, the Members of the Tribunal were appointed as described in paras. 8-11 *supra*.

25. By letter dated 24 June 2020, the Tribunal circulated draft terms of appointment to the Parties for their comments, *inter alia* proposing the appointment of Ms. de Sampaio Jalles as Secretary.

26. By e-mail of 25 June 2020, Claimant informed the Tribunal of the addition of new counsel.

27. By letter dated 26 June 2020, under the instructions of the Presiding Arbitrator, the PCA invited the Parties to submit electronic copies of the factual exhibits and legal authorities that accompanied to the Notice of Arbitration. On the same date, Claimant submitted copies of legal authorities CLA-1 to CLA-10 and factual exhibits C-1 to C-5 and C-7 to C-51.

28. On 29 June 2020, the Tribunal took note of the addition of new counsel by Claimant and confirmed it did not have any conflict with respect to their appointment. In the same communication, the Tribunal acknowledged receipt of Claimant's factual and legal exhibits accompanied to the Notice of Arbitration.

29. By e-mail dated 7 July 2020, the Parties jointly requested the Tribunal for an extension of the deadline to submit their comments on the draft terms of appointment circulated on 24 June 2022, and informed the Tribunal of their availability to hold a case management conference on 22 July 2020. In the same communication, the Parties agreed to the appointment of the Secretary.

30. On 8 July 2020, the Tribunal granted an extension of the deadline to submit comments on the draft terms of appointment.

31. On 10 July 2020, the Parties submitted to the Tribunal their agreed version of the draft terms of appointment and summaries of their claims and relief sought. On the same date, the Parties requested an extension of the deadline to agree on other procedural details concerning the procedural calendar – which the Tribunal granted. Additionally, Claimant disclosed that it had received third party funding from [redacted] in relation to its claim in this Arbitration.

32. On 17 July 2020, the Parties informed the Tribunal that they were unable to agree on a procedural timetable and submitted their respective proposals. On 22 July 2020, the Tribunal held a case management conference with the Parties by video conference to discuss procedural aspects of the case.

33. By letter dated 23 July 2020, the Tribunal informed the Parties that it would circulate a procedural timetable for the Parties' comments and reminded the Parties of the deadlines agreed during the case management conference for the submission of the Statement of Claim and submissions relating to bifurcation.

34. Following the circulation of a further draft for the Parties' comments, the Tribunal and the Parties signed the Terms of Appointment, which, *inter alia*:

- Fixed The Hague, the Netherlands, as the place of arbitration[10];
- Designated the PCA as Registry for the proceedings[11];
- Appointed Ms. de Sampaio Jalles as Secretary[12]; and
- Recorded the Parties' agreement that the Rules on Transparency will apply to the proceedings[13].

35. The Terms of Appointment were circulated on 10 August 2020 and were deemed to have been signed by the Parties and the Members of the Tribunal on 4 August 2020.

36. On 24 August 2020, the Tribunal circulated a draft Procedural Order No. 1, together with Annexes I to V, and invited the Parties' comments. By e-mails dated 4 and 10 September 2020, the Parties requested an extension to submit their comments on the draft Procedural Order No. 1. The Tribunal granted these requests.

37. On 17 September 2020, the Parties submitted their joint comments on the draft of Procedural Order No. 1 and the Procedural Timetable attached therein.

38. By letter dated 23 September 2020, the Tribunal acknowledged receipt of the Parties' joint comments on the draft Procedural Order No. 1 and decided on the different points that remained pending. On the same date and on 24 September 2020, Claimant requested the hearing on the merits to be held from 29 November to 3 December 2021. Respondent informed the Tribunal of its non-availability for a hearing on these dates.

39. By e-mail dated 25 September 2020, the Tribunal requested the Parties to fill up an online meeting scheduling tool with their respective availabilities in order to accommodate the hearing on merits to all Parties.

[10] Terms of Appointment, para. 80.
[11] Terms of Appointment, para. 80.
[12] Terms of Appointment, para. 26.
[13] Terms of Appointment, para. 83.

40. On 14 October 2020, the Tribunal issued Procedural Order No. 1, providing a Procedural Timetable (*i.e.*, Annex I to Procedural Order No. 1) and rules for the conduct of the arbitration, including document production and the redaction of privileged, confidential, and politically or institutionally sensitive information in documents. Procedural Order No. 1 further provided that the PCA will assume the role of the "repository" foreseen under the Rules on Transparency with respect to this arbitration[14].

41. Following an invitation to the Parties for their comments, on 14 December 2020 the Tribunal issued Procedural Order No. 2, concerning the Procedure for the Redaction of Confidential and Protected Information. It established the procedure for the redaction of confidential and protected information under Art. 7 of the Rules on Transparency prior to publication of any document.

42. On 17 December 2020, the Presiding Arbitrator made an additional disclosure to the Parties. No comments were received on this disclosure.

2. WRITTEN PLEADINGS, BIFURCATION REQUEST, AND DOCUMENT PRODUCTION

43. On 30 October 2020, Claimant filed its Statement of Claim ["**C I**"], together with:

- Exhibits C-5A, C-5B, and C-54 to C-195;
- Legal authorities CLA-11 to CLA-78;
- Witness statements CWS1 and CWS2; and
- Expert reports CER-1 to CER-3.

44. On 20 November 2020, Respondent submitted a Motion for Bifurcation of the jurisdictional questions from the merits and damages [the "**Motion for Bifurcation**"], together with:

- Exhibits R-1 to R-3; and
- Legal authorities RL-1 to RL-9.

45. On 4 December 2020, Claimant filed its Response to Respondent's Motion for Bifurcation, together with legal authorities CLA-179 to CLA-196.

46. On 10 December 2020, Claimant informed the Tribunal that it had identified errors after the filing of the Statement of Claim and submitted an amended Statement of Claim. Claimant further shared updated copies of (a) exhibit C-6 (*i.e.*, the Pre-Feasibility Report), considering that the version submitted together with the Notice of Arbitration was a draft version of the document, and (b) legal authorities CLA-66 and CLA-75.

[14] Procedural Order No. 1, para. 146.

47. On 14 December 2020, the Tribunal issued Procedural Order No. 3, (a) dismissing Respondent's Motion for Bifurcation, (b) joining the jurisdictional objections to the merits and quantum phases, and (c) directing the Parties to follow the timetable set out in Scenario B of Annex I to Procedural Order No. 1.

48. On 16 December 2020, the Tribunal confirmed that it had never received a copy of exhibit C-6 and directed the Claimant to file the draft version of the Pre-Feasibility Report as C-6a and the final version of the Pre-Feasibility Report as C-6b. On 18 December 2020, the Claimant notified compliance with this request.

49. On 9 January 2021, the Parties informed the Tribunal of their agreement to adjust the Procedural Timetable in light of disruptions caused by the Covid-19 pandemic.

50. On 11 January 2021, the Tribunal issued Annex I *bis* to Procedural Order No. 1, containing the Amended Procedural Timetable, in accordance with the Parties' agreement.

51. On 19 March 2021, Respondent filed its Jurisdictional Objections and its Statement of Defense ["**R I**"], together with:

- Exhibits R-4 to R-47;
- Legal authorities RLA-1 to RLA-125;
- Witness statements RWS-1 and RWS-2; and
- Expert reports RER-1 to RER-5.

52. On 23 March 2021, the Parties informed the Tribunal of their agreement to modify the document production schedule. Accordingly, on the same date, the Tribunal issued Annex I *ter* to Procedural Order No. 1, containing the Amended Procedural Timetable as agreed by the Parties.

53. After identifying some errors in its Jurisdictional Objections and Statement of Defense, on 26 March 2021, Respondent filed a corrected version of its submission.

54. On 10 May 2021, the Parties filed their respective Document Production Schedules ["**DPS**"], pursuant to Procedural Order No. 1.

55. By letter dated 11 May 2021, Respondent objected to Claimant's DPS, arguing that Claimant had violated Procedural Order No. 1. On 12 May 2021, the Tribunal invited Claimant's comments on Respondent's objections. By letter dated 13 May 2021, Claimant submitted its comments on Respondent's objections to Claimant's DPS. On the same date, Respondent submitted further comments.

56. On 17 May 2021, the Tribunal decided on Respondent's objections to Claimant's DPS, finding that Claimant had breached the Tribunal's instructions in Procedural Order No. 1, and granted Respondent the opportunity to present a rebuttal to Claimant's replies to Requirements R1 to R3 in Claimant's DPS. Accordingly, the

Tribunal amended the Procedural Timetable, as per Annex I *quarter* to Procedural Order No. 1.

57. On 21 May 2021, Respondent submitted its rebuttal comments, pursuant to the Tribunal's order of 17 May 2021.

58. On 31 May 2021, the Tribunal issued its decision to each of the Parties' document production requests, and issued an Amended Procedural Timetable, as Annex I *quinquies* to Procedural Order No. 1.

59. On 14 June 2021, the Parties submitted affidavits referenced in para. 78 of Procedural Order No. 1.

60. On 29 June 2021, Claimant applied to the Tribunal to decide on Claimant's request to access the originals of the Memorandum of Interest dated 6 May 2011 ["**MOI**"]. Respondent submitted a response to Claimant's request on 1 July 2021, indicating that it had been unable to locate the original MOI. On 2 July 2021, the Tribunal took note of Respondent's inability to locate the documents.

61. On 20 July 2021, Claimant submitted a request to the Tribunal to amend the Procedural Timetable. On the same date, Respondent opposed Claimant's request.

62. On 23 July 2021, the Tribunal partially granted Claimant's request of 20 July 2021, and issued Annex I *sexies* to Procedural Order No. 1.

63. On 9 August 2021, Claimant submitted its Reply on the Merits and Response to Objections to Jurisdiction ["**C II**"], together with:

- Exhibits C-4a and C-196 to C-338;
- Legal authorities CLA-48a and CLA-197 to CLA-300;
- Witness statements CWS-3 and CWS-4; and
- Expert reports CER-4 to CER-7.

64. By letter dated 20 September 2021, Respondent informed the Tribunal of Claimant's alleged failure to produce documents ordered by the Tribunal in Respondent's Document Production Request No. 53. Following the invitation from the Tribunal to provide comments, Claimant responded to Respondent's allegations by letter of 23 September 2021. On the same date, Respondent provided further comments.

65. On 24 September 2021, the Tribunal reminded Claimant of its obligation to produce documents and required it to provide an update to the Tribunal and Respondent by 28 September 2021.

66. By e-mail of 28 September 2021, Claimant informed the Tribunal that it had applied to the Supreme Court of India to obtain certified copies responsive to Respondent's Document Production Request No. 53, and provided further updates on the status

of said application during the course of October and November 2021. On 30 November 2021, Claimant informed the Tribunal that the documents requested from the Supreme Court of India were no longer available, and confirmed it had no further documents to produce.

3. FIRST STAY APPLICATION

67. On 1 October 2021, Respondent filed an application for a stay of the present proceedings ["**First Stay Application**"] pending the issuance of a final award in the parallel arbitration before an arbitral tribunal [the "**ICC Tribunal**"] constituted under the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce [the "**ICC Court**" and the "**ICC Arbitration Rules**"], brought by Mozambique and the Ministry of Transport and Communications ["**MTC**"] against PEL under the MOI [the "**ICC Arbitration**"][15]. The Application included a request for the suspension of all deadlines while this Tribunal decided on the Application. On the same date, Respondent filed exhibits R-57 to R-63 and legal authorities RLA-135 to RLA-143.

68. On 4 October 2021, the Tribunal invited Claimant's comments on the First Stay Application.

69. On 5 October 2021, Claimant opposed Respondent's First Stay Application, and asked for an extension to respond to it. On the same date, Respondent reiterated its request for an interim suspension of the Arbitration and requested an extension for the submission of its Rejoinder on the Merits and Reply on Objections to Jurisdiction. On 7 October 2021, Claimant opposed Respondent's time extension request. On the same date, the Tribunal rejected Respondent's request for an interim suspension and partially granted Claimant's requested extension to respond to the First Stay Application.

70. On 15 October 2021, Claimant filed its Response to the First Stay Application, together with exhibits C-336 to C-339.

71. Following a request from Respondent, on 18 October 2021, the Tribunal granted both Parties the opportunity to file a reply and a rejoinder on the First Stay Application.

72. On 20 October 2021, Respondent submitted its Reply to Claimant's Response to the First Stay Application, together with exhibit R-64. On 25 October 2021, Claimant submitted a Rejoinder to Respondent's Reply.

73. On 3 November 2021, the Tribunal issued Procedural Order No. 4, rejecting the First Stay Application. The Tribunal also granted an extension for the submission of the remaining memorials, and issued Annex I *septies* to Procedural Order No. 1, reflecting the modifications made to the Procedural Timetable.

[15] ICC Case No. 25334/JPA.

74. Following a request from the Tribunal, on 5 November 2021, Claimant corrected the numbering of exhibits cited in its Response to the First Stay Application. It further submitted copies of exhibits C-339 to C-342.

4. ADDITIONAL WRITTEN SUBMISSIONS AND PRE-HEARING MATTERS

75. On 3 November 2021, Respondent requested an additional extension of the deadline for the submission of its Rejoinder on the Merits and Reply on Jurisdiction. On 8 November 2021, Claimant opposed this request.

76. On 11 November 2021, the Tribunal granted Respondent an additional week to file the Rejoinder on the Merits and Reply to Objections on Jurisdiction and a corresponding one week to Claimant to submit its Rejoinder on Objections to Jurisdiction. The Tribunal amended the other relevant procedural deadlines (*i.e.* Annex I *octies* to Procedural Order No. 1).

77. On 29 November 2021, Respondent submitted its Rejoinder on the Merits and Reply to Objections on Jurisdiction ["**R II**"], together with:

- Exhibits R-65 to R-91;
- Legal authorities RLA-144 to RLA-159;
- Witness statements RWS-3 and RWS-4; and
- Expert reports RER-6 to RER-12.

78. By letter dated 2 February 2022, the Tribunal invited the Parties to indicate whether they would prefer that the hearing take place in person or via video conference.

79. On 7 February 2022, Claimant submitted its Rejoinder on Objections to Jurisdiction ["**C III**"], together with:

- Exhibits C-343 to C-380; and
- Legal authorities CLA-19A, CLA-48B, CLA-50A, CLA-64A, CLA-65A, CLA-67A, and CLA-301 to CLA-321.

80. On 14 February 2022, the Parties submitted their respective notifications listing the fact and expert witnesses they intended to call for examination at the hearing.

81. On 15 February 2022, the Parties informed the Tribunal that they were considering postponing the hearing dates and asked the Tribunal to indicate its availability between April and June 2022.

82. On 17 February 2022, the Tribunal informed the Parties of its availability in the months of June and July 2022.

83. On 24 February 2022, the Parties informed the Tribunal that Respondent's lead counsel would be unable to attend the hearing scheduled for 4-8 April 2022 due to

health reasons. The Parties expressed their preference that the hearing take place in person over the course of eight consecutive working days. Claimant further requested that the Tribunal allow it to submit an additional submission on damages valuation, with Respondent requesting that it be provided equal opportunity to respond to such submission. In response, the Tribunal informed the Parties that it would be available to hold the hearing from 5 to 9 September 2022 and from 28 November to 9 December 2022.

84. On the same date, the Tribunal held a Procedural Meeting via video conference. Following discussions between the Parties and the Tribunal, the Tribunal decided to postpone the hearing and reschedule it for the period from 28 November to 4 December 2022 [the "**Hearing**"]. The Parties further agreed that the Hearing would take place in Portugal. The Tribunal also granted Claimant's request to submit an additional submission on damages valuation and allowed Respondent to submit its response, in April and June 2022 respectively. Further, the Tribunal issued, on 25 February 2022, an amended version of the procedural calendar (*i.e.* Annex I *nonies* to Procedural Order No. 1), recording the new Hearing dates.

5. SECOND STAY APPLICATION

85. On 24 February 2022, Respondent informed the Tribunal that on 9 February 2022, the ICC Tribunal had issued its partial award on jurisdiction in the ICC Arbitration, together with the Separate Opinion of Mr. Stephen Anway [the "**ICC Partial Award**"][16].

86. On 7 March 2022, Respondent submitted a new application for a stay of the proceedings, reiterating that this arbitration should be suspended until the ICC Tribunal issues a final award on the merits [**"Second Stay Application**"].

87. On 21 March 2022, Claimant submitted its response to Respondent's Second Stay Application. On the same day, Respondent informed the Tribunal of the status of the ICC Arbitration.

88. On 12 April 2022, the Tribunal rejected Respondent's Second Stay Application, noting that the circumstances had not changed since the decision on the First Stay Application, despite the issuance of the ICC Partial Award.

6. FURTHER DOCUMENT PRODUCTION AND WRITTEN SUBMISSIONS

89. On 6 April 2022, Claimant requested that the Tribunal order Respondent to produce the Proposal of the Italian-Thai Development Company [the "**ITD**"] for the Acquisition of Contested Rights to Conceive, Design, Finish, Build, Operate and Transfer the Railway Line and the Port of Macuse dated June 2013 [the "**ITD Proposal**"], which was the subject of its Document Request No. 21, under a confidentiality protocol.

[16] Doc. R-92.

90. On 14 April 2022, Respondent submitted its response to the Document Request concerning the ITD Proposal alongside Respondent's privilege log dated 14 June 2021.

91. On 19 April 2022, the Tribunal granted Claimant and Respondent the opportunity to file a reply and rejoinder on the Document Request concerning the ITD Proposal, which they did on 20 April 2022 and 25 April 2022, respectively.

92. On 28 April 2022, the Tribunal, by majority, decided to reject Claimant's Document Request concerning the ITD Proposal and reserved its right to revisit this decision after the Hearing, should it determine that the ITD Proposal was necessary for its determination of the outcome of the case.

93. On the same date, Claimant requested an extension of the deadline for the submission of its additional submission on damages valuation. On 29 April 2022, Respondent submitted its comments on Claimant's request for an extension, which were followed by additional comments from both Parties.

94. On the same date, the Tribunal granted Claimant an additional 30 days to submit its additional submission on damages valuation and a corresponding period of time to Respondent to submit its response. The Tribunal noted that a reasoned decision would follow.

95. On 13 May 2022, the Tribunal issued its reasoned decision to grant Claimant's request for an extension, along with Annex I *decies* reflecting the Amended Procedural Timetable. On the same date, Respondent objected to the Tribunal's decision and reserved its right to make additional submissions once it received Claimant's additional submission on damages valuation.

96. On 18 May 2022, Claimant informed the Tribunal that Respondent had filed its sixth application under the ICC Arbitration to enjoin Claimant from proceeding with the present arbitration, reserving its right to claim costs based on the Respondent's actions.

97. On 20 May 2022, Respondent objected to Claimant's communication to the Tribunal, reiterating its allegation that Claimant wrongfully continued to pursue the present arbitration despite the jurisdictional finding in the ICC Arbitration.

98. On 30 May 2022, Claimant submitted its Additional Submission on Quantum ["**C IV**"], together with:

- Exhibits C-381 to C-389;
- Legal authorities CLA-75A, and CLA-322 to CLA-347; and
- Expert report CER-8.

99. On 10 June 2022, Respondent submitted a motion objecting to Claimant's introduction of two additional expert witness reports, along with the expert report included as an attachment therein, and the supplemental submission on quantum.

100. On 17 June 2022, Claimant submitted its response to Respondent's motion, together with exhibits C-390 and C-391, and legal authorities CLA-348 to CLA-351.

101. On the same date, Claimant notified the Tribunal that the tribunal in the ICC Arbitration had issued a procedural order requesting additional pleadings on whether Claimant should be enjoined from proceeding with the present arbitration. Claimant submitted a copy of its submission in the ICC Arbitration dated 15 June 2022, in which it opposed Mozambique's application to enjoin PEL from proceeding with the present arbitration.

102. On 7 July 2022, the Tribunal dismissed Respondent's motion of 10 June 2022, *inter alia* allowing the Additional Submission on Quantum and admitting into the record the corresponding expert reports.

103. On 26 August 2022, Respondent submitted its Response to Claimant's Additional Submission on Quantum ["**R III**"], together with expert reports RER-13, RER-14, and RER-15 and the experts' corresponding exhibits.

104. On 29 August 2022, the Tribunal decided to adopt a cut-off date for submissions regarding procedural incidents, other than submissions regarding the organization of the Hearing, to allow all participants to prepare for the Hearing.

105. On 29 August 2022, Respondent notified the Tribunal that the ICC Tribunal would be holding a hearing regarding its motion to enjoin PEL from proceeding with the present arbitration, also notifying of the possibility of submitting one or two additional motions *in limine*.

106. On 1 September 2022, the Tribunal reiterated that it had established a cut-off date (29 August 2022) for the Parties to present new submissions in order to fully allow all participants to prepare for the Hearing and to preserve procedural efficiency. The Tribunal further noted that it would grant both Parties, at the beginning of the Hearing, an opportunity to orally submit any new issues, which may have arisen after the cut-off date.

7. HEARING PREPARATIONS

107. On 28 April 2022, the PCA informed the Parties that the Tribunal had decided to hold the Hearing in Porto, Portugal.

108. On 6 October 2022, the PCA sent a letter to the Tribunal and the Parties concerning the organization of the Hearing and other logistical arrangements. On 10 October 2022, the Tribunal circulated to the Parties draft Procedural Order No. 5 governing the organization of the Hearing and invited the Parties to submit their comments.

109. On 13 October 2022, Claimant provided its comments on the PCA's communication of 6 October 2023 concerning the organization of the Hearing. On the same day, Respondent submitted its comments on the same communication. On 19 October 2022, the Parties submitted their joint comments on draft Procedural Order No. 5.

110. On 21 October 2022, Respondent submitted a letter identifying its witnesses who are expected to appear at the Hearing in person and virtually. On the same date, Claimant sent a letter listing its witnesses who are anticipated to testify remotely at the Hearing.

111. On 25 October 2022, the Tribunal and the Parties held a Pre-Hearing Conference via video-conference.

112. On 28 October 2022, Respondent indicated the names of its attendees at the Hearing in addition to the witnesses it previously identified, and listed the witnesses who are likely to make use of simultaneous interpretation between English and Portuguese. On the same date, Claimant submitted the list of its participants for the Hearing, as well as the name of its witness who will require interpretation at the Hearing.

113. On 3 November 2022, the PCA circulated on behalf of the Tribunal a draft press release to inform the general public about the Hearing and invited the Parties' comments on the draft.

114. On 4 November 2022, the Parties submitted their respective comments on the PCA's correspondence of 6 October 2022 concerning Hearing logistics. On the same date, the Tribunal issued Procedural Order No. 5, which included a tentative Hearing agenda.

115. On 7 November 2022, Claimant proposed amendments to the draft press release circulated by the PCA.

116. On 8 November 2022, Claimant requested clarification from the Tribunal regarding procedural matters relating to the Hearing, which was provided by the Tribunal on 16 November 2023.

117. On 9 November 2022, the PCA noted that no comments had been received from Respondent regarding the draft press release. Accordingly, on 10 November 2022, the PCA published on its website a press release in English and in Portuguese, informing the public about the Hearing and arrangements that had been put in place for members of the public to attend it.

118. On 18 November 2022, Claimant asked leave from the Tribunal to refer to additional documents at the Hearing and submitted copies of the proposed exhibits.

119. On 19 November 2022, Respondent objected to Claimant's request of 18 November 2022. On the same date, Claimant submitted its response to Respondent's objection.

120. On 22 November 2022, the Tribunal informed the Parties that it would postpone its decision on Claimant's request of 18 November 2022 to the end of the first Hearing-day. On the same date, Claimant wrote to the Tribunal regarding the Hearing agenda and the order of examination of the witnesses. Respondent submitted its comments thereafter.

121. On 23 November 2022, Respondent submitted further comments on the Hearing agenda and the availability of one of its experts to attend the Hearing in person. On the same date, Claimant submitted its response to Respondent's comments, which was followed by a reply from Respondent.

122. The Tribunal issued its decision on the Claimant's request of 18 November 2022 to refer to additional documents at the Hearing at the end of the first Hearing day, on 28 November 2022[17].

8. THIRD STAY APPLICATION

123. On 24 November 2022, Respondent transmitted to the Tribunal a copy of a procedural order issued by the ICC Tribunal on the same date [the "**ICC Injunction**"], together with a new application for a stay of the present proceedings ["**Third Stay Application**"]. On the same date, Claimant sent to the Tribunal a copy of the dissenting opinion to the ICC Injunction, authored by co-arbitrator Stephen P. Anway from the ICC Tribunal ["**Anway Dissenting Opinion**"].

124. On 25 November 2022, the Tribunal confirmed that the Hearing would take place and that the Third Stay Application would be discussed at the beginning of the Hearing.

125. At the start of the Hearing on 28 November 2022, Respondent raised a point of order, reiterating that the Tribunal should grant its Third Stay Application[18]. Later, Claimant submitted its views on the Third Stay Application and reiterated that the Tribunal should reject the Third Stay Application and, thus, proceed with the Hearing[19].

126. The Tribunal issued its decision on the Third Stay Application during the Hearing on 28 November 2022, rejecting the Third Stay Application, declaring that its right to establish its own jurisdiction was unfettered by the ICC Injunction, and ordering that the Hearing and the present arbitration proceed as scheduled. The Tribunal further noted that it would render in due course a reasoned written statement explaining the Tribunal's decision[20]. Respondent reserved its rights and stated that it would proceed with the Hearing under protest[21].

[17] HT, Day 1, p. 246, l. 16 to p. 248, l. 11.
[18] HT, Day 1, p. 7, l. 22 to p. 30, l. 2.
[19] HT, Day 1, p. 30, l. 23 to p. 42, l. 2.
[20] HT, Day 1, p. 42, l. 18 to p. 44, l. 2.
[21] HT, Day 1, p. 45, l. 12 to p. 45, l. 23.

127. On 30 November 2022, the Tribunal issued Procedural Order No. 6, providing its reasons for its decision to reject the Third Stay Application and proceed with the Hearing.

128. On 2 December 2022, following an application from Claimant, the Tribunal issued Procedural Order No. 6 *bis*, which replaced Procedural Order No. 6, to account for an addendum to the ICC Injunction and an additional dissenting opinion issued on 29 November 2022 by Mr. Anway in the ICC Arbitration. The Tribunal maintained its prior ruling in regard to Respondent's Third Stay Application.

9. HEARING

129. The Hearing was held from 28 November to 3 December 2022 and from 5 to 6 December 2022 at the *Palácio da Bolsa* in Porto, Portugal.

130. The following persons attended the Hearing:

The Arbitral Tribunal:
Juan Fernández-Armesto (Presiding Arbitrator)
Guido Santiago Tawil
Hugo Perezcano Díaz

For Claimant:
Kishan Daga
Party Representative & Factual Witness

Sarah Vasani
Lindsay Reimschussel
Daria Kuznetsova
CMS Cameron McKenna Nabarro Olswang LLP

Baiju Vasani
20 Essex Chambers

Sofia Martins
Renato Guerra de Almeida
Ricardo Saraiva
Miranda & Associados

Edward Ho
Brick Court Chambers

Ashish Patel (*by video conference*)
Factual Witness

Rui Medeiros
Kiran Sequeira
Paul Baez
David Dearman
Andrew Comer (*by video conference*)

For Respondent:
Angelo Matusse
Party Representative

Juan Basombrio
Theresa Bevilacqua
Daniel Brown
Dorsey & Whitney LLP

Luis Amandio Chaúque
Paulo Francisco Zucula
Factual Witnesses

Teresa F. Muenda
Jose Tiago de Pina P. de Mendonça
Daniel Flores
Larry Dysert
David Ehrhardt (*by video conference*)
Mark Lanterman (*by video conference*)
Mark Songer (*by video conference*)
Expert Witnesses

David Baxter (*by video conference*)
Gerard Laporte (*by video conference*)
Expert Witnesses

Administrative Secretary:
Sofia de Sampaio Jalles

Registry:
Túlio Di Giacomo Toledo (PCA)

Court Reporters:
Laurie Carlisle
Diana M. Burden

Interpreters:
Manuel Santiago Ribeiro
Cristóvão Tomás Bach Andersen Leitão
Lara Cristina Jerónimo Duarte

131. The Hearing was open to the public.

10. POST-HEARING SUBMISSIONS

132. On 12 December 2022, the Tribunal directed the Parties to discuss and propose the deadlines for the correction of the Hearing transcripts, the post-hearing briefs, and submissions on costs.

133. On 20 December 2022, the Parties submitted their proposed timeline for the post-hearing procedure.

134. On 23 December 2022, the Tribunal issued Procedural Order No. 7, providing directions to the Parties on the post-hearing procedure.

135. On 27 January 2023, the Parties submitted their proposed corrections to the Hearing transcripts together with a list of disputed corrections and redactions. The Parties also agreed to mark portions of Mr. Zucula's testimony at the Hearing as confidential.

136. On 6 February 2023, the Tribunal issued its decision on the disputed corrections and redactions to the Hearing transcripts.

137. On 7 February 2023, in response to an invitation from the Tribunal to establish a supplementary deposit of USD 300,000, Respondent requested (i) that "PEL pay Mozambique's half of the supplementary deposit", and (ii) "confirmation that any payments Mozambique may make to the PCA in the future do not constitute a waiver of any of Mozambique's rights or arguments with respect to jurisdiction or PEL's violation of the ICC injunction".

138. On 11 February 2023, Claimant opposed Respondent's request of 7 February 2023. It further noted that Respondent had filed in the ICC Arbitration an unsolicited

"Updated Damages Statement", seeking to submit claims for damages which included "all fees and expenses incurred in the UNCITRAL Arbitration" and "offset [of] damages against any adverse UNCITRAL Award". Claimant submitted a copy of that submission in the ICC Arbitration as exhibit C-408.

139. On the same date, the Court Reporters circulated the corrected Hearing transcripts ["**Hearing Transcript**" or "**HT**"].

140. On 13 February 2023, the Tribunal ordered Claimant to make a substitute payment for Respondent's share of the supplementary deposit, in accordance with Art. 41(4) of the UNCITRAL Rules. The Tribunal further confirmed that any deposit payment made in this case would not be deemed by this Tribunal to be a waiver of any of the Parties' rights or arguments in relation to the Tribunal's jurisdiction or PEL's alleged violation of its obligation in the ICC Arbitration.

141. On 16 February 2023, the Parties informed the Tribunal that they had agreed to extend the deadline to submit the post-hearing briefs and refrain from citing or including hearing materials from the hearing in the ICC Arbitration that took place on 20-24 February 2023. The Parties further asked the Tribunal to confirm this agreement. On the following day, the Tribunal confirmed the Parties' agreement.

142. On 19 February 2023, Claimant asked for additional time until April 2023 to make the substitute payment ordered by the Tribunal on 13 February 2023.

143. On 21 February 2023, the Tribunal ordered Claimant to make the substitute payment by 13 March 2023 and directed the Parties to make a new supplementary deposit by 3 April 2023.

144. On 4 March 2023, the Parties submitted their respective post-hearing briefs ["**CPHB**" and "**RPHB**"].

145. On 17 March 2023, PCA acknowledged receipt of the substitute payment requested by the Tribunal on 13 February 2023.

146. On 7 April 2023, PCA noted that it had not yet received the supplementary deposit requested by the Tribunal on 21 February 2023.

147. On 13 April 2023, Claimant requested an extension until 15 May 2023 to transfer its share of the supplementary deposit to the PCA.

148. On 18 April 2023, Tribunal granted Claimant's request for additional time and directed it to make a substitute payment for Respondent's share of the supplementary deposit by 15 May 2023.

149. On 16 May 2023, PCA acknowledged receipt of Claimant's share of the supplementary deposit requested by the Tribunal on 21 February 2023.

150. On 23 May 2023, Claimant asked for an extension until 7 July 2023 to make a substitute payment for Respondent's share of the supplementary deposit and asked

whether the Tribunal had questions for the Parties, and, if not, to set a deadline for the Parties' submissions on costs.

151. On 29 May 2023, Tribunal (i) granted the time extension requested by Claimant to make the substitute payment, and (ii) confirmed it had no additional questions for the Parties. Nevertheless, the Tribunal noted that it would wait for Claimant to pay the outstanding share of the deposit before fixing the date for the Statements of Costs.

152. On 7 July 2023, the PCA acknowledged receipt of Claimant's substitute payment and confirmed that the supplementary deposit requested by the Tribunal on 21 February 2023 had been paid in full. On the same date, the Tribunal invited the Parties to submit their respective Statements of Costs by 31 July 2023.

153. On 10 July 2023, the Parties jointly requested for an extension of time until 18 August 2023 to submit their respective Statements of Costs. On 11 July 2023, the Tribunal approved this request.

154. On 18 August 2023, the Parties filed their respective Statements of Costs [respectively, for Claimant and Respondent, "**C SofC**" and "**R SofC**"]. Claimant marked certain of its exhibits and an expert report as confidential and stated that the C SofC should be redacted for publication.

155. On 19 September 2023, Claimant submitted its proposed redactions to its C SofC [the "**SofC Redacted**"], Index to Claimant's Factual Exhibits, and Schedule of Costs.

156. By letter of 28 September 2023, Respondent objected to Claimant's proposed redactions, arguing that they are untimely and improper, and reserved "all rights regarding the inappropriate new evidence submitted with [the SofC]". On the following day, the Tribunal invited Claimant to provide comments on Respondent's letter.

157. On 6 October 2023, Claimant provided its comments on Respondent's letter of 28 September 2023, requesting the Tribunal to order the PCA to publish the redacted version of C SofC, Index to Claimant's Factual Exhibits, and Schedule of Costs.

158. On 27 November 2023, the Tribunal issued Procedural Order No. 8 granting Claimant's request to redact certain excerpts of the C SofC and its annexes.

159. On 20 January 2024, Claimant informed the Tribunal that the ICC Tribunal expects to submit its draft award to the ICC Court by 29 February 2024.

160. On 24 January 2024, the Tribunal took note of the Claimant's correspondence of 20 January 2024. The Tribunal further noted that it had finalized its deliberations and that an electronic copy and original paper copies of its decision, signed by the arbitrators in counterparts, would be communicated to the Parties. Finally, the Tribunal declared the proceedings closed.

III. FACTUAL BACKGROUND

161. This arbitration was initiated by Patel Engineering Limited, an India-based engineering company[22], against the Republic of Mozambique, for alleged breaches of the Indian-Mozambique BIT, in relation to Claimant's alleged pre-concession rights over a tentative coal-export project in Mozambique.

1. THE PROJECT

162. The project consisted in creating a rail line that would run from a site reportedly rich in coal reserves near Moatize, in the Tete province, rich in coal reserves, to a location near the village of Macuse, a coastal village in the Mozambique Channel. The project also envisioned the construction of a port infrastructure near Macuse, from which coal could be exported [the "**Project**"][23].

163. In early 2011 Claimant engaged the Ministry of Planning and Development [the "**MPD**"] and the Ministry of Transport and Communication [previously defined as the "**MTC**"] of the Government of Mozambique to discuss the proposed Project and enquire whether the Government was interested in entering into a public-private partnership ["**PPP**"][24].

164. In the course of these discussions, Minister Paulo Zucula, of the MTC, expressed interest in the Project and required PEL to commission a preliminary study that would determine the appropriate location for the port infrastructure. The Minister informed PEL that the preliminary study should involve the participation of officials from the MTC and its costs should be covered by PEL[25].

165. In March 2011 two MTC specialists, Dr. Isaias Abreu Muhate and Mr. Jafar M.C. Ruby, issued a 30-page "**Preliminary Study**"[26], acknowledging PEL's "contribution and support" to the study and concluding that a port in Macuse would enjoy "comparative advantages" over the other locations surveyed[27].

166. Thereafter, Minister Zucula confirmed that the next step would be for PEL and Mozambique to enter into a memorandum of interest [previously defined as the "**MOI**"] for Claimant to carry out a pre-feasibility study in relation to the Project [the "**Pre-Feasibility Study**"][28].

[22] Doc. C-162, p. 6.
[23] Doc. C-4A, internal p. 4; Daga I, para. 16; C I, para. 57.
[24] Daga I, para. 21; Zucula I, para. 3; Doc. C-199; HT, Day 3, p. 570, ll. 14-18 (Zucula). *See* also Doc. C-55; Doc. C-3.
[25] Daga I, paras. 21-25; Daga II, paras. 15-17.
[26] Doc. C-4A.
[27] Doc. C-4A, internal p. 21. *See* also Daga I, para. 31.
[28] Daga I, para. 33; Daga II, para. 22; Patel I, para. 35. *See* also HT, Day 3, p. 573, ll. 11-22 and p. 604, ll. 16-19 (Zucula).

2. THE MOI

167. On 6 May 2011 PEL and the MTC signed a six-page MOI, in which PEL undertook to carry out the Pre-Feasibility Study for the Project within 12 months[29], at its own cost[30]. If the study proved the technical and economical pre-feasibility of the Project, the Government would initiate the next phase, concerning the negotiation and eventual award of a concession contract, where PEL would enjoy a "*direito de preferência*" (in the Portuguese version of the MOI) or "first right of refusal" (in the English version of the MOI) for the development of the Project[31].

168. The Parties have presented the following signed copies of the MOI:

- PEL's and Mozambique's respective signed original MOI in Portuguese – both being identical [the "**Portuguese MOI**"][32];
- Mozambique's scanned copy of the English version ["**Respondent's English MOI**"][33], which represents a literal translation of the Portuguese MOI; this is a scanned copy of another copy of the MOI (not of an original copy[34]); and
- PEL's original copy of the English version ["**Claimant's English MOI**"][35], which differs from the other versions in several key terms, including Clause 2(1).

A. Different versions of the MOI

169. A parenthesis must be opened at this stage concerning the different versions of the MOI on the record of these proceedings – a point of much contention between the Parties throughout the arbitration.

170. The evidence shows that PEL – assisted by its Mozambican legal counsel to ensure compliance with Mozambican law[36] – produced the first drafts of the MOI in English, with the goal of obtaining a "30-year concession from the time the rail and port are operational"[37] to be granted to PEL "after the feasibility study"[38].

171. But the Mozambican Government required the MOI to be signed in Portuguese[39] and, thus, on 18 April 2011 Claimant produced a first version of the MOI translated into Portuguese[40].

[29] Doc. C-5A; Doc. R-2, Clause 3.
[30] Doc. C-5A; Doc. R-2, Clause 4.
[31] Doc. C-5A; Doc. R-2, Clause 2.
[32] Doc. C-5B and Doc. R-1.
[33] Doc. R-2.
[34] HT, Day 4, p. 751, l. 17 to p. 752, l. 3 (Chaúque).
[35] Doc. C-5A.
[36] Daga I, para. 35; Patel I, para. 34.
[37] Doc. C-220.
[38] Doc. C-201, Attachment, p. 1.
[39] C I, paras. 105-106; R I, para. 43; Daga I, para. 38; Doc. C-5A; Doc. C-5B.
[40] Daga II, para. 28; Doc. C-202.

172. Throughout April and May the parties negotiated the text of the MOI. And on 5 May 2011 representatives of the Parties met to agree on a final Portuguese text[41]. A "final revised version" of the Portuguese MOI was sent to PEL in the early morning of 6 May 2011 by Mr. Rafique Jusob, the head of the Mozambican Centre for Promotion of Investments, who noted that PEL had to "finalize the English version accordingly"[42]. PEL was satisfied with this "final revised version"[43], which corresponds, by and large, to the text of Claimant's English MOI[44].

173. At 11 am on 6 May 2011 the Parties' representatives convened to sign the MOI, but Minister Zucula had to delay the meeting[45]. At the Hearing, PEL explained that when the parties eventually signed the MOI, around 6 pm on that same 6 May 2011, PEL's Portuguese-speaking advisor was no longer present[46]. Respondent's representatives presented four copies of the MOI for signature: two in Portuguese and two in English. In this arbitration PEL says that Respondent's representatives confirmed at the meeting that both the English and Portuguese copies were the latest versions containing the terms agreed[47]. Both Parties then signed two copies of each version[48].

174. But the Portuguese MOI that was signed by the Parties differs in several key provisions from the "final revised version" circulated by Mr. Rafique in the early hours of 6 May 2011 – and corresponds literally to Respondent's English MOI. None of the Parties has been able to explain exactly what happened between the morning of 6 May 2011 and that same afternoon; yet it is clear that a new version of the Portuguese MOI was prepared and eventually signed by both Parties.

175. Mr. Kishan Daga, PEL's representative (who does not speak Portuguese), does not deny that he signed the Portuguese MOI but denies that he ever signed Respondent's English MOI[49]. Minister Zucula, in turn, has recognized that his signature in Claimant's English MOI is authentic[50].

176. Although Mozambique's public officials have recognized under oath that all documents signed by the MTC are filed in the Minister's office, Mozambique has failed to marshal an original copy of its English MOI and has offered no satisfactory explanation for this failure[51].

[41] Daga I, para. 42.
[42] Doc. C-204; HT, Day 2, p. 407, l. 6 to p. 410, l. 12.
[43] HT, Day 2, p. 414, l. 12 to p. 415, l. 12 (Daga).
[44] *See* Doc. C-204; H-17, pp. 17-20.
[45] HT, Day 2, p. 410, l. 4 to p. 411, l. 24 (Daga).
[46] HT, Day 2, p. 413, l. 15 to p. 415, l. 1 (Daga).
[47] Daga I, para. 45; HT, Day 2, p. 411, ll. 4-24 (Daga).
[48] Daga I, para. 46.
[49] HT, Day 2, p. 438, ll. 22-23 (Daga).
[50] HT, Day 3, p. 586, l. 9 to p. 587, l. 3 (Zucula).
[51] HT, Day 3, p. 582, l. 17 to p. 583, l. 13 (Zucula); HT, Day 4, p. 751, ll. 11-23 (Chaúque).

B. The terms of the MOI

177. Why is the previous discussion relevant? Because the Parties disagree on the applicable version of the MOI:

- While PEL relies on Claimant's English MOI;
- Mozambique contends that the controlling documents are the Portuguese MOI and Respondent's English MOI.

a. Undisputed provisions

178. The key (and undisputed) terms of the MOI are the following:

- PEL shall carry out the Pre-Feasibility within 12 months[52], at its own cost[53];
- The MTC shall provide the information and permissions necessary for PEL to undertake the Pre-Feasibility Study[54];
- The MTC agrees that – during the preparation of the Pre-Feasibility Study and up to its approval – it will not solicit other studies for the feasibility of the Project from third parties; and it will abstain from granting to third parties any rights or authorizations for the implementation of the key infrastructures of the Project[55];
- The parties agree to keep all information exchanged, including the MOI, confidential until the approval of the Project[56];
- If the Project[57] is found "techno commercially unviable"[58], the parties agree to sign a new memorandum for a similar project; and
- Any dispute arising out of the MOI is subject to ICC arbitration seated in Mozambique[59].

b. Disputed Provision

179. Clause 2 of the MOI governs the MTC's approval of the Pre-Feasibility Study and the consequences that follow such approval.

180. The English versions of the MOI are drafted in different terms:

[52] Doc. C-5A; Doc. R-2, Clause 3.
[53] Doc. C-5A; Doc. R-2, Clause 4.
[54] Doc. C-5A; Doc. R-2, Clause 5.
[55] Doc. C-5A; Doc. R-2, Clause 6.
[56] Doc. C-5A; Doc. R-2, Clause 11.
[57] See Doc. C-5A; Doc. R-2, Clause 6 and 7: "[…] the corridor from Tete to the province of Zambezia within the area referred under objective of the present memorandum."
[58] Doc. C-5A; Doc. R-2, Clause 7.
[59] Doc. C-5A; Doc. R-2, Clause 10.

Respondent's English MOI and the Portuguese MOI

181. Respondent's English MOI provides the following[60]:

> "1. **PEL** shall carry out a pre-feasibility study (PFS) within 12 months and will submit to the government for the respective approval.
>
> 2. After the approval of the prefeasibility study **PEL** shall have the first right of refusal for the implementation of the project on basis of the concession which will be given by the Government of Mozambique".

182. The Portuguese MOI aligns with Respondent's English MOI[61]:

> "*1. A PEL realizará um estudo de pré-viabilidade (EPV), dentro de 12 meses que submeterá ao Governo para a respectiva aprovação.*
>
> *2. Aprovada a pré-viabilidade do empreendimento, a PEL terá o direito de preferência para implementação do projecto na base da Concessão a ser outorgada pelo Governo*".

183. The documents on which Respondent relies, thus, state that, once the Pre-Feasibility Study is approved, Claimant will have a "first right of refusal" (in Portuguese, a "*direito de preferência*") to implement the Project "on basis of the concession which will be given by the Government of Mozambique".

Claimant's English MOI

184. Clause 2 of Claimant's English MOI states that[62]:

> "1. **PEL** shall carry out a prefeasibility study (PFS) on the basis of the report of the working group for assessing the appropriate site of the port and to finalize the rail route thus ensuring that once the terms under Clause 7 of the memorandum are approved, the Govt. of Mozambique shall issue a concession of the project in favour of **PEL**.
>
> 2. After the approval of the prefeasibility study **PEL** shall have the first right of refusal for the implementation of the project on basis of the concession which will be given by the Government of Mozambique".

185. The document on which Claimant relies, thus, states that, once the Pre-Feasibility Study is approved, the Government:

- "shall issue a concession" for the Project in favor of PEL; and simultaneously,
- PEL shall have a "first right of refusal" (in Portuguese a "*direito de preferência*") to implement the Project "on basis of the concession which will be given by the Government of Mozambique".

[60] Doc. R-2, Clause 2(1). *See* also Zucula I, paras. 11-16.
[61] Doc. C-5B; Doc. R-1.
[62] Doc. C-5A, Clause 2.

3. THE PRE-FEASIBILITY STUDY

186. A year after signing the MOI, in May 2012, PEL presented the results of its Pre-Feasibility Study to technical and commercial personnel from the MTC, the MPD, the Ministry of Finance, the Directorate of Ports and Railways, and the Government's chosen entity for participation in the Project, the Mozambican State-owned railroad operator ["**CFM**"][63]. Eventually, after some technical clarifications[64], on 15 June 2012, the MTC informed Claimant that it had approved the Pre-Feasibility Study [the "**June 2012 Approval**"], and that[65]:

> "[…] in order to pursue the project, Patel Engineering Ltd. must:
>
> (a) Expressly exercise its right of first refusal;
>
> (b) Negotiate with the CFMs the creation of a company to implement the project."

187. On 18 June 2012 PEL expressed to the MTC its desire to execute the Project by "expressly exercis[ing] [its] right of preference", and informed that it would engage the railroad operator CFM to incorporate an entity for the implementation of the Project[66].

188. Between June and August 2012 PEL approached the CFM to negotiate the terms of the partnership and the subsequent negotiation and signature of a concession agreement[67]:

> "We would like to request you [CFM] to kindly let us know how we can proceed further in regard to the formation of SVP between PATEL and CFM for the above-mentioned project. We shall be highly obliged to receive your advice letter for formation of SVP so that we can enter into the second phase of the project for discussion and signing of concession agreement as per MOI […]."

189. However, a deal never materialized, because the CFM did not have sufficient funds to invest and therefore could not pay for the 20% equity stake in the Project that Claimant was offering[68].

4. THE START OF THE PUBLIC TENDER

190. Claimant was not the only company interested in developing the Project.

[63] Daga I, para. 78; Doc. R-8.
[64] Daga II, para. 75; Doc. C-8; Doc. C-9; Doc. C-10.
[65] Doc. C-11. *See* also HT, Day 3, p. 605, l. 25 to p. 606, l. 3 (Zucula).
[66] Doc. C-12; Daga I, para. 76.
[67] Doc. R-13.
[68] Daga I, para. 85; Daga II, para. 101.

191. Other mining and construction companies submitted to the Government their own PPP proposals to develop similar projects[69].

192. In August 2012 the Prime Minister of Mozambique instructed the creation of a "Working Group composed of the Ministers of the Economic Area" (including, *inter alia*, the MTC and the Ministry of Mineral Resources), to address all proposals made in a consistent manner and offer a solution on how the project should be adjudicated[70]. The Working Group acknowledged that[71]:

- There had been six "manifestations of interest" for the development of the main infrastructure of the Project from six different companies: Rio Tinto, PEL, Micaune Investment, Jindal Mozambique Minerals, Euroasian Natural Resources Corporation and China Road and Bridge Corporation[72]; and

- The Government required a "consistent and coherent positioning" and should not respond in isolation to the individual proposals, but rather "analyze all the manifestations of interest"[73].

193. The conclusions of the Working Group were that[74]:

- All "pre-feasibility studies of the proposals submitted" should be collected; and

- The Government should launch a public tender, which was the standard regime for PPP contracting under Law No. 15/2011 [the "**PPP Law**"][75] and Decree No. 16/2012 [the "**PPP Regulation**"], which had been recently adopted on 4 July 2012[76].

194. In November 2012 the Mozambican Government and the CFM announced in the press their intention to initiate an international public tender for the Macuse railway and port project[77].

195. On 28 November 2012 PEL wrote to Minister Zucula explaining why it considered it should be awarded a direct concession for the Project on the basis of the MOI and the Pre-Feasibility Study it had prepared proving the viability of its proposed Project[78].

196. Claimant's efforts to revert the Government's decision to initiate a public tender continued through January 2013, when PEL requested a meeting with Minister

[69] Doc. C-59; Doc. C-230, para. 7.
[70] Doc. C-230, para. 1.
[71] Doc. C-230.
[72] Doc. C-230, para. 7.
[73] Doc. C-230, para. 7.
[74] Doc. C-230, para. 9.
[75] Doc. RLA-6 (POR); Doc. CLA-65A (ENG).
[76] Doc. RLA-7 (POR); Doc. CLA-64 (ENG).
[77] Daga II, para. 111; Doc. C-231; Daga II, para. 159; Doc. C-235.
[78] Doc. C-18; Daga I, para. 91.

Zucula to discuss, *inter alia*, the creation of a joint venture with the CFM and the direct award of the project to that joint venture[79].

197. On 11 January 2013 the MTC communicated to Claimant that a public tender would be organized; and that, as Claimant had been unable to forge a partnership with CFM for a direct award, Claimant's right of preference pursuant to the MOI and the PPP Law would be materialized through a scoring advantage in the public tender[80].

198. On 30 January 2013, Respondent published a request for expressions of interest to acquire the rights of concession for the Project[81]. Over twenty companies submitted expressions of interest[82].

199. PEL decided to form a consortium with Grindrod Limited and SPI, through which it could participate in the public tender [the "**PGS Consortium**"][83]; and on 8 March 2013 the PGS Consortium submitted an expression of interest[84], in which it stated that the PGS Consortium's participation in the public tender did not constitute a waiver of PEL's rights under the MOI[85].

200. Ultimately, the MTC invited six companies to participate in the public tender, including the PGS Consortium[86].

201. On 12 April 2013 the MTC issued to the six participants the "**Tender Documents**"[87] and established a deadline of 29 May 2013 for the submission of technical and financial proposals[88].

5. THE APRIL 2013 COUNCIL OF MINISTERS' DECISION

202. Although the public tender had been put in motion, only one week later, on 18 April 2013 the Council of Ministers took the opposite decision: based on the "urgency" of the infrastructure and its "national strategic interest" it "decided to invite" PEL – as the tenderer that had prepared the Pre-Feasibility Study – to "start the process with a view of carrying out these projects"[89] [the "**April 2013 Council of Ministers' Decision**"]. Minister Zucula sent a communication to Claimant informing it of the Decision. The Council of Ministers thus, decided to initiate a process to directly negotiate the terms of the concession of the Project with PEL. To start the negotiations, PEL was required, within 30 days, to[90]:

[79] Doc. C-232; Daga II, para. 114.
[80] Doc. C-19, p. 2.
[81] Doc. C-236.
[82] Claimant states that 21 companies submitted expressions of interest, whereas Respondent places the number at 25. *See* C I, para. 203; R I, para. 116; Doc. R-22; Doc. R-23.
[83] Daga I, para. 123; Daga II, para. 124; Doc. C-60.
[84] Doc. R-24; Daga I, para. 124.
[85] Doc. R-24.
[86] *See* C II, para. 204.
[87] Doc. C-27; Daga I, para. 125.
[88] Doc. C-27.
[89] Doc. C-29.
[90] Doc. C-29.

- Provide a bank guarantee amounting to 0.1% of value of the Project; and

- Present a statement, agreement, or take-or-pay memorandum with mining companies.

203. On 23 April 2013 PEL responded to the MTC and formally accepted the offer to commence negotiations as per the terms of the April 2013 Council of Ministers' Decision[91].

204. On 9 May 2013 Claimant provided the MTC with the required bank guarantee, in the amount of USD 3,115,000[92]. But before PEL could present a statement, agreement or take-or-pay memorandum with mining companies to initiate the negotiations with the MTC, the Government reconsidered the direct negotiations approach and decided to continue with the ongoing public tender process.

6. THE MAY 2013 COUNCIL OF MINISTERS' DECISION

205. Indeed, less than one month after inviting PEL to engage in direct negotiations, the Government pulled back on its offer – without offering any explanation of its change of opinion. On 13 May 2013 the MTC sent Claimant a new communication stating that, after hearing several stakeholders of the Project and reviewing the legal and regulatory PPP framework, the Council of Ministers had come to the conclusion that the public tender was the correct option for adjudicating the Project [the "**May 2013 Council of Ministers' Decision**"][93]. The MTC encouraged PEL to continue in the bidding, where it would enjoy a "preference right from the 15 percentage points stipulated by Law", and proceeded to return Claimant's bank guarantee, posted just some days before[94].

206. PEL protested against this decision, to no avail[95]. The public tender, thus, continued its course.

7. THE RESULT OF THE PUBLIC TENDER

207. On 27 June 2013, the PGS Consortium – led by PEL – submitted its financial and technical proposals within the tender process[96].

208. In the competitive tender process, Claimant's consortium enjoyed a 15% scoring advantage with respect to the other bidders during the evaluation process of the offers[97].

209. Despite that initial lead, PGS Consortium's offer proved not to be sufficiently attractive, pursuant to the technical and economical parameters set in the Tender

[91] Doc. C-30.
[92] Daga I, para. 129; Daga II, para. 141; Doc. C-33.
[93] Doc. C-34.
[94] Doc. C-34.
[95] Doc. C-35; Doc. R-28; Daga I, paras. 133-134; Daga II, para 144.
[96] Daga I, para. 140; Daga II, para. 147; Doc. C-37.
[97] Doc. C-234.

Documents and evaluated by the MTC's Acquisition Management and Execution Office ["**Evaluation Committee**"] in charge of scoring the bidders.

210. On 15 July 2013 the Evaluation Committee issued its concluding report, ranking in the first place the offer made by ITD. PGS Consortium's proposal was graded as the third preferred option[98].

211. The PGS Consortium made several informal complaints to the MTC regarding the tender process[99]; but ultimately, on 27 August 2012 the MTC gave final confirmation to the PGS Consortium that there being no pending "*recursos*" (or appeals) the tender was adjudicated to ITD[100]. And on the following day, the PGS Consortium filed a formal administrative appeal against the tender process[101]. But the MTC informed the PGS Consortium that there had been no inconsistency in its application of the tender scoring provisions[102].

212. Subsequently, on 18 February 2014, the Mozambican law firm Sal & Caldeira Advogados, Lda. sent a letter to the MTC on behalf of PEL, in which it claimed compensation up to USD 4 million in connection with the results of the tender[103].

8. THE TML PROJECT

213. Having been adjudicated winner of the tender on 27 August 2013[104], ITD created a project company ["**TML**"] to develop its own version of the Project [the "**TML Project**"]. TML is comprised of[105]:

- ITD, with a 60% interest;
- The Zambezia Development Corridor, with a 20% interest; and
- The CFM, with a 20% interest.

214. Throughout the fourth quarter of 2013, TML and the MTC negotiated the terms of a concession agreement, that was finally signed in December 2013 [the "**TML Concession**"][106]. The TML Concession has a term of 30 years, with an option to extend it for an additional 10 years[107].

[98] Doc. C-234.
[99] Doc. C-63; Doc. C-40; Doc. R-33; Doc. C-41; Doc. C-42; Doc. R-36.
[100] Doc. C-44.
[101] Doc. C-45; Doc. R-38.
[102] Doc. C-66.
[103] Doc. C-46, R-40.
[104] Doc. C-44.
[105] Doc. C-126.
[106] Doc. C-125, p. 145; Doc. C-126. *See* also Doc. R-42, p. 30.
[107] Doc. C-125, p. 145 ; Doc. R-42, p. 30.

215. In September 2015 TML completed its own pre-feasibility study for the TML Project[108], and nearly two years later, in July 2017, it finalized its feasibility study[109].

216. The last information on the record is that in 2018 TML was trying to secure funding from Chinese lenders[110]. But the reality is that to this day no rail corridor has been built linking Moatize to Macuse. The Project has never been implemented, and in view of the diminishing importance of coal in the international energy market, there are little prospects that it will ever be built.

9. ARBITRATION PROCEEDINGS

217. Claimant's attempts to resolve the dispute with Mozambique amicably between 2013 and 2015 were unsuccessful[111]. On 25 June 2018 PEL notified Mozambique of the existence of an investment dispute under the Treaty, but informed that it remained open to settle the dispute amicably[112].

218. The Parties engaged in settlement negotiations, to no avail[113]. Therefore, on 20 March 2020 PEL filed a Notice of Arbitration against the Republic, claiming that Mozambique's conduct towards Claimant and its investment contravened Respondent's obligations under the BIT and under customary international law, and seeking declaratory relief, damages and compensation[114].

The ICC Arbitration

219. Two months later, on 20 May 2020, Mozambique (together with the MTC) filed a Request for Arbitration with the ICC Court against PEL under the arbitration agreement contained in Clause 10 of the MOI[115], thus giving rise to the ICC Arbitration[116].

220. Although this Tribunal, once constituted, encouraged the Parties to consolidate the UNCITRAL arbitration and the ICC Arbitration under a single proceeding, the Parties were not able to agree on such consolidation – the stumbling block being that Mozambique did not agree to seat the arbitration in a neutral jurisdiction[117].

221. The result was that both the UNCITRAL and the ICC Arbitrations proceeded in parallel. As explained in more detail in section II *supra*, Mozambique filed three Applications for the stay of the present proceedings, until the ICC Tribunal could determine the existence, validity, and scope of the Parties' contractual rights under

[108] Doc. R-42, pp. 20 *et seq*.
[109] Doc. R-42; Doc. C-125, p. 145.
[110] Doc. C-130.
[111] Doc. C-49, para. 47. *See* also Terms of Appointment, para. 52.
[112] Doc. C-49.
[113] Notice of Arbitration, paras. 102-103.
[114] Notice of Arbitration; Terms of Appointment, paras. 53-54.
[115] Clause 10 provides for ICC Arbitration with a seat in the Republic of Mozambique (Doc. C-5A; Doc. R-2).
[116] Terms of Appointment, para. 57.
[117] Procedural Order No. 4, para. 48.

the MOI – which this Tribunal rejected. Mozambique also requested and obtained the ICC Injunction, issued by the ICC Tribunal, with the purpose of derailing the present procedure.

IV. RELIEF SOUGHT

1. CLAIMANT'S RELIEF SOUGHT

222. PEL asked for the following relief in its Statement of Claim[118]:

> "482 PEL reserves its right to introduce, *inter alia*, further claims, arguments, evidence, fact witnesses, experts and damages valuations.
>
> 483 For the reasons set out in PEL's Statement of Claim, PEL requests that the Tribunal:
>
> a. FIND that this Tribunal has jurisdiction over PEL's claims;
>
> b. FIND that Respondent has breached its obligations towards PEL under the Treaty;
>
> c. ORDER Respondent to compensate PEL for the loss of its investment arising from Respondent's violations of the Treaty, with such reparation being in the form of monetary compensation in an amount to be determined by the Tribunal, but in any event, no less than USD 115.3 million;
>
> d. ORDER Respondent to pay all costs incurred by PEL in connection with these arbitration proceedings, including the costs of the arbitrators and the Permanent Court of Arbitration, as well as all legal costs and other expenses incurred by PEL (including, *inter alia*, the fees of their legal counsel, experts, and consultants, and fees associated with third party funding);
>
> e. ORDER Respondent to pay interest at a rate to be determined by the Tribunal on any compensation and/or arbitration and/or legal costs and expenses awarded to PEL by the Tribunal in its Final Award or any other award issued in the course of this arbitration; and
>
> f. ORDER such further or alternative relief as the Tribunal shall consider just or appropriate."

223. Claimant requested the following relief in its Reply[119]:

> "1152 For the reasons set out above, PEL requests that the Tribunal:
>
> (a) DECLARE that it has jurisdiction over all the claims presented by Claimant in this Arbitration;
>
> (b) DECLARE that all the claims presented by Claimant in this Arbitration are admissible;

[118] C I, paras. 482-483.
[119] C II, para. 1152.

(c) DECLARE that Respondent has breached Article 3(2) and/or Article 5 of the Treaty and/or Article 3(4) of the Mozambique/Netherlands BIT;

(d) ORDER that Respondent pay compensation to Claimant in the sum of ***USD 156 million***, or such amount that is just;

(e) ORDER that Respondent pay all the costs incurred by Claimant in connection with this Arbitration proceeding, including the costs of the arbitrators and of the Permanent Court of Arbitration, legal costs and other expenses (including but not limited to those of counsel, experts, consultants, and fees associated with third party funding);

(f) ORDER that Respondent pay pre- and post- award interest at a rate to be determined by the Tribunal on any compensation and/or arbitration costs ex and/or legal costs awarded to Claimant; and

(g) ORDER such further relief as the Tribunal considers appropriate."

224. In its Rejoinder on Objections to Jurisdiction and in its Post-Hearing Brief, PEL reiterated the requests set forth in its Reply[120].

2. RESPONDENT'S REQUEST FOR RELIEF

225. Respondent requested the following relief in its Statement of Defense[121]:

"940. Based on the foregoing, Respondent is entitled to and seeks an Award, as follows:

940.1 Dismissing PEL's claims as inadmissible or, alternatively, declining jurisdiction;

940.2 Sustaining Respondent's objections to jurisdiction;

940.3 In the alternative, dismissing Claimant's case on the merits;

940.4 Awarding Claimant no damages;

940.5 Ordering that PEL and its litigation funder pay Respondent's attorneys' fees and all costs and expenses; and

940.6 Granting Respondent such further or other relief as the Tribunal shall deem to be just and appropriate."

226. In its Rejoinder and in its Post-Hearing Brief, Respondent reiterated the requests set forth in its Statement of Defense[122].

[120] C III, para. 527; CPHB, para. 77.
[121] R I, para. 940.
[122] R II, para. 1601; RPHB, p. 21.

V. DISCUSSION

227. In this arbitration PEL submits that the Republic breached the BIT by failing to award PEL the concession contract to build the Project. Claimant says that it entered into the MOI with the Government of Mozambique with the purpose of conducting the Pre-Feasibility Study and developing the concept of the Project; and in exchange, the Government agreed to grant the concession for the Project directly to PEL. Claimant asserts it spent millions of USD preparing the Pre-Feasibility Study that proved that the Project was viable and established the technical and economic terms for obtaining the concession[123].

228. However, after the Government approved the Pre-Feasibility Study, Mozambique took Claimant "on a roller-coaster of contradictory and unlawful decisions"[124]: promising first that it would abide by its commitment to grant the concession directly to PEL; but then organizing a public tender, in breach of Claimant's exclusive right to the concession contract; thereafter, the Council of Ministers offered again a direct award to PEL, only to reverse its decision a few weeks later on the basis of unfounded reasons.

229. PEL seeks a compensation of USD 156 million, which allegedly equates to PEL's lost profits caused by Respondent's refusal to grant Claimant the concession contract.

230. Respondent rejects any wrongdoing under international law and makes six jurisdictional objections[125], the most relevant of which is that Claimant held no protected "investment" under the BIT[126]. Claimant was not awarded a concession contract, and thus, it did not design, finance, build or maintain any infrastructure in Mozambique.

231. The Republic adds that PEL is making a speculative claim, on the basis of a preliminary agreement that solely governed the preparation of a Pre-Feasibility Study. The Republic never guaranteed that it would award PEL the concession contract. At best, Claimant had an option to negotiate the adjudication of the concession or enjoy a scoring advantage in a public tender. Respondent says that the Tribunal should not permit Claimant's attempt to extend the protection of the BIT to the pre-award and pre-concession activities that PEL conducted in Mozambique. To rule otherwise would create new international standards for procurement disputes that would allow any unsuccessful bidder to claim disproportionate amounts of damages when a project is awarded to another contractor.

[123] *See* Notice of Arbitration, paras. 18-19; Terms of Appointment, paras. 42-44.
[124] C II, para. 6.
[125] Respondent's six jurisdictional objections are that: (i) Claimant made no "investment" under the BIT; (ii) this is a contractual dispute; (iii) Claimant is not an investor under the BIT; (iv) the BIT was denounced and that it is not enforceable in the present case; (v) Claimant failed to exhaust local remedies; and (vi) PEL's claims are barred due to its fraudulent and illegal conduct.
[126] Terms of Appointment, para. 59.

232. Ultimately, Respondent argues, this is not the appropriate forum to adjudicate what is, in essence, a contractual dispute about the execution, alleged validity, alleged terms, interpretation and alleged breaches of the MOI[127].

233. At the outset of this case the Tribunal dismissed Respondent's Motion for Bifurcation, on the basis that Mozambique's main objection, on the existence of a protected investment, was an issue inextricably intertwined with the merits. The Tribunal found that to properly adjudicate this objection, the Tribunal could not simply rely on the facts as pleaded by PEL but would have to review and analyze a significant amount of evidence to make its own findings. Therefore, the Tribunal saw no gains in bifurcating this objection from the merits[128].

234. After a full briefing of this case, the Tribunal is now in a position to render its decision: the Tribunal will address the *ratione materiae* objection first and will conclude that Claimant did not have a protected investment under the BIT; and thus, it has no standing to bring this claim.

235. The Tribunal clarifies that it could not have been able to render this decision without hearing the Parties' full case. As anticipated in the decision on bifurcation, the determination of the *ratione materiae* objection is inextricably intertwined with the merits and required the Tribunal to evaluate all the evidence brought before it.

236. The Tribunal's findings with respect to Mozambique's *ratione materiae* objection render the remainder of the Parties' submissions on jurisdiction, liability and quantum, moot and, as a result, the Tribunal will not address them.

237. In the following sections, the Tribunal will set out the legal rules relevant to its decision (**1.**), summarize the Parties' positions with respect to the objection (**2.**), and will then adopt a decision concluding that Claimant's activities in Mozambique are not covered under the scope of the BIT and that the Tribunal lacks jurisdiction to adjudicate the case (**3.**).

1. THE RELEVANT LEGAL RULES

238. This Tribunal has been constituted under the UNCITRAL Rules, pursuant to Art. 9 of the BIT and as agreed by the Parties as set out in the Terms of Appointment[129].

239. Art. 21 of the UNCITRAL Rules defines the Tribunal's authority to decide on its own jurisdiction:

> "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement."

240. Consequently, the Tribunal has the power to decide on its own jurisdiction.

[127] Terms of Appointment, para. 60.
[128] Procedural Order No. 3, para. 65.
[129] *See* Terms of Appointment, para. 69.

241. As regards the applicable rules of law, Art. 33 of the UNCITRAL Rules states that:

> "The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

242. In this case, in accordance with Art. 9(3)(c)(iii) of the Treaty[130]:

> "The arbitral award shall be made in accordance with the provisions of this Agreement […]."

243. The adjudication of the jurisdictional objection requires the interpretation of the BIT, and both Parties have referred to the Vienna Convention on the Law of Treaties ["**VCLT**"] and specifically to its Art. 31, which has been accepted as a codification of customary international law and which reads as follows[131]:

> "Article 31 – General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended."

244. The Parties have also made reference to numerous arbitral awards. These decisions do not constitute a formal source of international law, do not have a binding character and are mere "sources of inspiration, comfort or reference to arbitrators"[132]. That said, the Tribunal finds value in following convincing and consistent case law.

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[130] Doc. CLA-1.
[131] Doc. CLA-5.
[132] Doc. RLA-61, *Romak*, para. 170. *See* also Doc. RLA-105, *Bayindir*, para. 76.

2. THE PARTIES' POSITIONS

2.1 CLAIMANT'S POSITION

245. Claimant says that it held a protected investment in the form of[133]:

- The right to a direct award of the concession to implement the Project, by virtue of the MOI, the Government's decision to approve the Pre-Feasibility Study and the April 2013 Council of Ministers' Decision; and, as an ancillary right, it had the first right of refusal, that consisted in Claimant's prerogative to accept developing the Project and sign the concession agreement – or refuse to do so, in which case the Government could offer the Project to third parties;

- The valuable know-how transferred to the State with PEL's Project concept, contained in the Preliminary Study and the Pre-Feasibility Study.

246. PEL says that its investment falls within the broad chapeau of Art. 1(b) of the BIT that protects "every kind of asset established or acquired, including changes in the form of such investment in accordance with the national laws of the Contracting Party in whose territory the investment is made", and in particular, within the non-exhaustive list of assets, that include[134]:

- "business concessions conferred by law or under contract" (Art.1(b)(v));

- "rights to money or to any performance under contract having a financial value" (Art. 1(b)(iii)); and

- "intellectual property rights, in accordance with the relevant laws of the respective Contracting Party" (Art. 1(b)(iv)).

247. Claimant says that the Republic mischaracterizes PEL's investment as "contingent" rights or an "option"; but this is a flawed argument. The MOI is a binding contract, which includes certain rights and obligations – such as the right to the direct award of a concession, subject to the approval of the Pre-Feasibility Study and PEL exercising its right of first refusal[135]. Additionally, as a logical flipside to its commitment to award the concession, Mozambique[136]:

- Granted PEL exclusivity rights in relation to the Project;

- Committed not to grant rights in that respect to any other party; and

- Committed to keep the information shared in relation to the Project confidential.

[133] C I, paras. 95-96, 257; C II, paras. 163, 510; C III, para. 218; CPHB, para. 7.
[134] C II, para. 513; C III, para. 222.
[135] C II, para. 599; C III, paras. 246, 199, *et seq*.; CPHB, paras. 31, 41-42.
[136] C III, para. 247.

248. PEL says that it is undisputed that on 12 June 2012 Mozambique approved the Pre-Feasibility Study and some days later, on 18 June 2012, PEL exercised its right of first refusal, definitively acquiring its right to the concession[137].

249. Additionally, there was nothing "contingent" about the April 2013 Council of Ministers' Decision, which expressly granted a direct award to PEL[138].

250. Claimant submits that, while it is true that PEL did not physically sign a concession agreement (due to Respondent's breach of the BIT), Claimant did "establish" or "acquire" an immediate and direct right to a concession, that became vested in PEL once Mozambique approved the Pre-Feasibility Study and PEL exercised its right to the direct award of the Project concession[139].

251. Claimant says that there was nothing "contingent" about PEL's vested right to be awarded the concession[140].

252. But even if the Tribunal were to consider that Claimant's right to the concession was "contingent" – because it did not sign a concession agreement – and that contingent assets fall outside the scope of the BIT[141], Claimant submits that the Tribunal should view the totality of Claimant's activities holistically as a unitary investment. In other words, the Tribunal should avoid "surgically separat[ing]" the protected assets under the BIT (such as Claimant's rights under the MOI, know-how, the Pre-Feasibility Study and Preliminary Study) from non-covered assets (the contingent concession) and regard the investment operation as a whole. This is particularly required in this case because Respondent's failure to sign the concession is the root of Respondent's objection to the jurisdiction of the Tribunal and also constitutes the core aspect of its delict under the BIT[142].

The position of Claimant's expert regarding the rights conferred by the MOI

253. PEL has submitted two legal opinions of Prof. Rui Medeiros regarding the rights conferred by the MOI.

254. Prof. Medeiros concludes – based on Claimant's English MOI and the conduct of the Parties – that the MOI grants a "right of preference" that should be interpreted as PEL's right to a direct award of the concession, once the Pre-Feasibility Study is approved, and[143]:

- The "*direito de preferência*" as understood under Mozambican law does not require the existence of third-party bids, and therefore, cannot mean a quantitative advantage in a tender process; and

[137] C III, paras. 248-251; CPHB, para. 9.
[138] CPHB, para. 9.
[139] C II, paras. 517-518; C III, para. 244.
[140] C II, para. 521.
[141] C II, para. 532.
[142] C II, para. 533.
[143] CER-6, Medeiros II, paras. A-D.

- The behavior of the Parties after the execution of the MOI confirms that they understood that the MOI granted PEL the right to a direct award.

2.2 RESPONDENT'S POSITION

255. The Republic says that the definition of investment in Art. 1(b) of the BIT provides that "the term 'investment' means every kind of asset established or acquired […]". Thus, the Contracting States established the limitation that, for particular assets to qualify as protected investments, they had to be "established" or "acquired" as opposed to contingent or optional rights, that fall within the category of non-covered pre-investment activities[144].

256. This limitation is particularly relevant in the present case because the potential investment under discussion was a concession contract that never came to fruition; and the requirement that the investment be "established" or "acquired" is reinforced in the case of concession agreements, as per Art. 1(b)(v) of the BIT, which only protects "business concessions *conferred* by law or under contract"[145].

257. In the Republic's view, the MOI is a preliminary and contingent contract that sets forth the requirements or conditions under which PEL and Mozambique may enter into a PPP in the form of a concession contract[146].

258. Respondent says that, when the MTC approved the Pre-Feasibility Study on 12 June 2012, it provided Claimant with two options[147]:

- To exercise its "*direito de preferência*" consisting of a 15% margin in a public tender; and/or

- To negotiate with CFM the creation of a joint venture, which could potentially have been awarded the concession by "*ajuste directo*".

259. PEL opted to pursue both options[148]:

260. First, it sought negotiations with the CFM, but failed to reach an agreement. Respondent says that it was only if PEL and the CFM had reached an agreement, then the joint venture of PEL and CFM would have been granted the concession by "*ajuste directo*" (but the concession would have never been awarded through "*ajuste directo*" solely to PEL, without the CFM).

261. Second, after the failed negotiation, the MTC proceeded with the tender process, pursuant to the PPP Law. PEL participated in the public tender and exercised its "*direito de preferência*" margin of 15%. However, an independent jury (not the

[144] R I, para. 367.
[145] R I, paras. 368-369.
[146] RPHB, pp. 2 and 5-7. *See* also R I, paras. 385-387; R II, para. 661.
[147] RPHB, p. 8, citing to Doc. C-11.
[148] RPHB, pp. 8-9.

MTC) scored PEL's bid in last place, and the Government awarded the concession to the bidder with the highest score[149].

262. Before the public tender was finalized, on 18 April 2013, the Government went even further and granted PEL another chance to enter into an agreement with the CFM, in order to obtain the concession through "*ajuste directo*", subject to two conditions[150]:

- That PEL provide a bank guarantee; and

- That PEL sign a written letter, agreement or take-or-pay memorandum with mining company off-takers.

263. Claimant failed to comply with the second requirement and, therefore, no further negotiations ensued[151].

264. In light of the above, Respondent sustains that Claimant had at best a contingent contract[152], an option[153], or a "mere agreement to agree"[154] and that the conditions to award the concession were never met. This is why Mozambique never awarded PEL the concession contract. Therefore, Claimant never "established" or "acquired" a concession "conferred by law or under contract"[155].

265. All expenditures and efforts by PEL in connection to the MOI are not an investment – they are instead pre-investment activities that, at best, may give rise to a contractual dispute[156].

The position of Respondent's expert regarding the rights afforded by the MOI

266. The Republic submitted two legal opinions of Ms. Teresa F. Muenda, who expressed her views on the nature of the rights conferred by the MOI – an agreement which, in the expert's opinion, is governed by and must be interpreted in accordance with Mozambican law[157].

267. Ms. Muenda agrees with Respondent that the MOI does not constitute a direct and definitive award of the concession contract; but rather a contingent contract that establishes a "*direito de preferência*"[158].

[149] RPHB, p. 9.
[150] RPHB, p. 10; Doc. C-29.
[151] RPHB, p. 10.
[152] R II, paras. 661-679; RPHB, pp. 2, 5-7.
[153] R I, para. 362. *See* also Terms of Appointment, para. 59.
[154] R I, para. 362.
[155] R I, paras. 373-375.
[156] R I, paras. 388, 391.
[157] RER-2, Muenda I, p. 2, paras. 1-2.
[158] RER-2, Muenda I, p. 6, para. 11(e); RER-7, Muenda II, p. 2.

268. Ms. Muenda offered two alternative interpretations of what constitutes such "*direito de preferência*"[159]:

- In 2011, when the Parties entered into the MOI, the PPP Law was not in force; the only reference in the Mozambican legal regime to a "*direito de preferência*" was the one in Art. 414 of the Civil Code; therefore, in that context, PEL's right consisted in a "*direito potestativo de, aceitando o cumprimento dos elementos da oferta vencedora, celebrar o contrato na posição de concessionária*";

- Once the PPP Law came into effect in 2012, PEL's right under the MOI "transformed" into a "*direito e margem de 15%*".

3. THE TRIBUNAL'S DECISION

269. There is no dispute regarding the fact that Mozambique never awarded PEL a concession to develop the Project. What the Parties discuss is whether Claimant's rights enshrined in the MOI, together with its expenditures and activities (prior to Mozambique's decision to award a concession to ITD/TML, and not to Claimant) are covered investments under the BIT.

270. Essentially, PEL avers that it held the following "assets" that are protected under the BIT:

- Under the MOI and pursuant to the Government's decision to approve the Pre-Feasibility Study, Claimant had the right to obtain a direct award of the concession contract to implement the Project; Claimant's right to a direct award is confirmed by the April 2013 Council of Ministers' Decision; and, as an ancillary right, Claimant had a first right of refusal under the MOI, that consisted in Claimant's prerogative to accept developing the Project and to sign the concession agreement, or to refuse, in which case the Government could offer the Project to third parties; and

- The valuable know-how transferred to the State with its Project concept, contained in the Preliminary Study and the Pre-Feasibility Study.

271. Mozambique views the situation differently: it says that the MOI was a preliminary and contingent contract that set forth the requirements or conditions under which PEL and Mozambique could enter into a PPP in the form of a concession contract. PEL undertook to carry out the Pre-Feasibility Study at its own costs, and in exchange Mozambique agreed to grant Claimant a "*direito de preferência*", which constituted either of:

- A right to engage in direct negotiations with CFM, in order to constitute a joint venture that could eventually be awarded a concession contract; or

[159] HT, Day 8, pp. 1734-1736, 1785 (Muenda).

- A 15% scoring advantage in a public tender.

272. The Republic says that Claimant failed to reach an agreement with CFM. Then, the Government put in place a public tender, in which Claimant enjoyed a 15% scoring advantage; but eventually, an independent jury scored PEL's bid in last place, and the Government awarded the concession to the bidder with the highest score. In these circumstances, PEL failed to make an investment in Mozambique.

273. The Tribunal is called upon to establish the proper meaning of the term "investment" as used in the BIT and to decide whether Claimant's activities and rights qualify as such. To perform this task the Tribunal will:

- Establish the definition of investment in the BIT (**3.1**);

- Analyze whether the BIT presupposes an objective and inherent concept of investment and conclude that it does (**3.2**);

- Explore the boundaries of the objective and inherent concept of investment (**3.3**); and

- Apply its findings to the facts of the present case (**3.4**).

274. Lastly, the Tribunal will make some final considerations regarding the case (**3.5**).

3.1 THE DEFINITION OF INVESTMENT IN THE BIT

275. The definition of investment is contained in Art. 1(b) of the BIT[160]:

> **"Article 1**
> **Definitions**
>
> For the purposes of this Agreement:
>
> […] (b) The term "investment" means every kind of asset established or acquired, including changes in the form of such investment in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:
>
> (i) movable and immovable property as well as others rights such as mortgages, liens or pledges;
>
> (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company;
>
> (iii) rights to money or to any performance under contract having a financial value;

[160] Doc. CLA-1.

> (iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;
>
> (v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals. […]"

276. But this is not the only relevant provision. Art. 1(e) of the BIT defines a fundamental element of an investment, the capacity to generate a return[161]:

> "(e) The term "returns" means the monetary amounts yielded by an investment such as profit, interest, capital gains, dividends, royalties and fees."

277. Art. 7(1) of the BIT then provides rules regarding the "[t]ransfer of Investments and Returns"[162]:

> "(1) Each Contracting Party shall permit all funds of an investor of the other Contracting Party related to an investment in its territory to be freely transferred, without unreasonable delay and on a non-discriminatory basis. Such funds may include:
>
> (a) Capital and additional capital amounts used to maintain and increase investments;
>
> (b) Net operating profits including dividends and interest in proportion to their share-holdings;
>
> (c) Repayments of any loan including interest thereon, relating to the investment;
>
> (d) Payment of royalties and services fees relating to the investment;
>
> (e) Proceeds from sales of their shares;
>
> (f) Proceeds received by investors in case of sale or partial sale or liquidation;
>
> (g) The earnings of citizens/nationals of one Contracting Party who work in connection with investment in the territory of the other Contracting Party."

3.2 IS THERE AN INHERENT MEANING OF INVESTMENT?

278. Respondent suggests that the concept of investment has a deeper meaning which transcends the mere definition contained in the BIT: to determine whether an "asset" falls within the protection of the BIT the Tribunal must examine whether it has the inherent characteristics of an investment. In order to do so, Mozambique proposes that the Tribunal apply the so-called *Salini* test[163].

[161] Doc. CLA-1.
[162] Doc. CLA-1.
[163] R I, paras. 400-401.

279. PEL, on the other hand, suggests that the Tribunal should adhere to a literal interpretation of the BIT, and refrain from applying the *Salini* test to derive the inherent characteristics of an investment. Such approach is only applicable in the ICSID context, and is, thus, not relevant in this case[164].

280. The Tribunal agrees with Respondent that there must be an inherent meaning of investment, which underlies the definition of "investment" as set-forth in the BIT; and does not share Claimant's suggestion that the meaning of investment is contingent on the applicable forum or arbitration rules. That said, the Tribunal is also skeptical of the utility of applying the *Salini* test to assess whether a particular asset possesses the inherent characteristics of an investment[165].

281. The Tribunal's position is supported by the following arguments:

a. Irrelevance of the forum

282. First, the Tribunal recalls that under Art. 9 of the BIT the investor enjoys the option to have any investment dispute adjudicated by arbitration under the ICSID Convention (if the Contracting Parties are both parties to the ICSID Convention), under the ICSID Additional Facility (if the disputing parties agree), or alternatively, pursuant to the UNCITRAL Rules[166]. The claimant thus has the option to select whether it prefers to pursue an institutional or *ad hoc* arbitration to adjudicate the dispute with the host State.

283. Does this choice have any influence on the concept of protected investment?

284. In the Tribunal's opinion, the term "investment" in Art. 1(b) of the BIT cannot have different meanings depending on the forum where the dispute is to be adjudicated[167]. It must have a unique meaning, irrespective of the forum and the arbitration rules that the claimant elects. To understand otherwise would lead to the untenable result that a procedural feature, freely chosen by the investor, impacts on the tribunal's jurisdiction and on the material scope of protection.

b. Interpretation under Art. 31 of the VCLT

285. Second, an interpretation of the BIT, in accordance with Art. 31 of the VCLT, supports the conclusion that not every legal relationship involving the investor can be labelled as investment; rather, there must be an inherent meaning of investment, with a set of features, which such legal relationship must meet to deserve protection under the BIT.

286. Pursuant to Art. 31 of the VCLT[168]:

[164] C II, paras. 574-576.
[165] *See* para. 306 *infra*.
[166] Doc. CLA-1.
[167] Doc. RLA-61, *Romak*, paras. 194, 207; Doc. RLA-58, *Nova Scotia*, para. 80.
[168] Doc. CLA-5.

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

287. The starting point is thus the ordinary meaning of the terms contained in Art. 1(b) of the BIT. This provision offers a succinct definition, stating that investment[169]:

> "[…] means every kind of asset established or acquired, including changes in the form of such investment in accordance with the national laws of the Contracting Party in whose territory the investment is made."

288. The Treaty defines "investment" as an "asset" – a very wide concept which encompasses items with a certain value, which, if held by a merchant, can be represented as a credit in the merchant's balance sheet[170].

289. After this simple definition, the Treaty adds an open list of five categories of assets, which "in particular, though not exclusively" constitute investments[171]:

- Categories (i) and (iv) refer to certain rights *in rem* (e.g., ownership, mortgages, liens or pledges) over movable or immovable property, including intellectual property rights;

- Category (ii) concerns certain type of securities, in the form of "shares in and stock and debentures of a company and any other similar forms of participation in a company"; this includes the paradigmatic form of equity investment, where an investor creates or acquires a lasting interest, normally associated to control, in an enterprise located in the host State;

- Category (iii) refers to "rights to money or to any performance under contract having a financial value"; and

- Category (v) mentions "business concessions" conferred pursuant to domestic law, in particular, those related to the "search for and extract[ion of] oil and other minerals".

290. Since the list in Art. 1(b) is non-exhaustive, there must be assets, not mentioned in that list, which also qualify as investments – the reason being that they meet the requirements inherent in the concept of investment. The paradigmatic example is the creation by a protected investor of a branch or permanent establishment in the host State, which carries out entrepreneurial activity.

291. The reverse also holds true: an asset, by the mere fact that it is mentioned in any of the categories listed in Art. 1(b), does not automatically become a protected

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[169] Doc. CLA-1.

[170] *See* the definition of "asset" in *Black's Law Dictionary*: "1. An item that is owned and has value. 2. (*pl*.) The entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and goodwill. 3. (*pl*.) All the property of a person (esp. a bankrupt or deceased person) available for paying debts or for distribution." (Garner, B. A., & Black, H. C., *Black's Law Dictionary*, 9th ed. St. Paul (2009), p. 134).

[171] Doc. CLA-1, Art. 1(b).

investment; for this to happen it is again necessary that the inherent features of an investment are met.

292. This argument can best be proven by a *reductio ad absurdum*[172]: assume a citizen of one Contracting Party who is entitled to collect a pension from the other Contracting Party to the Treaty. Such citizen does indeed hold "rights to money" in the territory of the other State. Even though "rights to money" is mentioned in category (iii) of the non-exhaustive list of forms of investments, the right to collect a pension cannot be deemed an investment protected under the BIT, the main reason for this being that the object and purpose of the Treaty is to foster "greater investments by investors of one State in the territory of the other State"[173] (as stated in its preamble) – not to protect the collection of pension rights.

c. Conclusion

293. Summing up, the fact that an asset is not mentioned in the non-exhaustive list of Art. 1(b) does not affect the fact that it may be an investment. Conversely, the mere fact that an asset falls within one of the categories included in the non-exhaustive list of Art. 1(b) does not necessarily imply that it can be considered as a protected investment. An additional requirement must be met: the asset must indeed qualify as an investment, by meeting the objective and inherent features which are shared by all investments[174].

294. A note of caution: this conclusion does not mean that the contracting parties to a BIT do not have the possibility to clarify whether specific categories of assets are or not protected under that specific treaty. This is especially relevant in the case of loans and bonds: contracting parties can exclude certain classes of loans (*e.g.*, short term loans) and include others (*e.g.*, sovereign debt)[175]. But the fact that the contracting parties to an investment treaty enjoy certain flexibility in defining the scope of protection, does not detract from the notion that there are common features that define an investment, and that all protected investments must meet these features.

295. In the next section (**3.3**), the Tribunal will further develop the requirements which cause an asset to qualify as a protected investment.

d. Case law

296. Case law supports this conclusion.

297. The tribunal in *Nova Scotia* noted that[176]:

[172] *See OI*, Award, para. 218.
[173] Doc. CLA-1.
[174] Doc. RLA-61, *Romak*, para. 180; Doc. CLA-280, *Quiborax*, para. 214. *See* also *KT Asia*, Award, para. 165; *Global Trading*, Award, para. 43; see also *OI*, Award, para. 218.
[175] See also *Gramercy*, Award, paras. 205-215, which makes reference to the Peru-United States Free Trade Agreement, Annex 10-F entitled "Public Debt".
[176] Doc. RLA-58, *Nova Scotia*, para. 80.

> "No matter what the forum, the ordinary meaning of investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for examination of the inherent features of an investment."

298. In the *Romak* case, an arbitration conducted under the BIT between the Swiss Confederation and the Republic of Uzbekistan and pursuant to the UNCITRAL Rules, the tribunal was faced with the task of determining whether a wheat supply agreement constituted a protected investment. In its reasoning, the tribunal concluded that[177]:

> "[…] the term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk. The Arbitral Tribunal is further comforted in its analysis by the reasoning adopted by other arbitral tribunals […] which consistently incorporates contribution, duration and risk as hallmarks of an 'investment.' By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of "investment," the fact that it falls within one of the categories listed in Article 1 does not transform it into an 'investment.' In the general formulation of the tribunal in *Azinian,* '*labeling.… is no substitute for analysis*'." [Emphasis in the original]

3.3 DETERMINATION OF THE INHERENT MEANING OF INVESTMENT

299. What is then the inherent meaning of the term investment?

300. This issue is one of the *quaestiones vexatae* of investment arbitration. And it is a question to which there is no clear answer, because the term "investment" is not, in its origin, a legal concept: it was imported from the economic and financial realms, in which it refers to the economic process of conversion of money into productive property, in the expectation of a return. The process which economists label "investment" encompasses a wide variety of activities in which the investor contributes capital (and sometimes also know-how and other intangibles), hoping to earn a future return over a certain period. For economists the investment can result from an investor:

- Exploiting an enterprise,
- Exploiting real estate,
- Owning a portfolio of shares or bonds,
- Holding certain types of loans, or
- Operating a concession or other long-term contract in the host State.

301. Legally speaking, investments are formalized (*inter alia*) by the creation of a branch, by the incorporation of or capital increase in a local company, by the

[177] Doc. RLA-61, *Romak*, para. 207 (footnotes omitted).

acquisition of ownership or other rights *in rem* over property, by the subscription of shares or debentures or by the execution of various types of contracts.

302. The purpose of investment treaties is to foster foreign investment. An expansive approach to the concept of investment permits that a wider range of activities enjoy protection (if invested by a protected investor and assuming that the territoriality requirements are met). But this expansive approach provokes a conceptual difficulty: there is no single legal concept (be it ownership, contract, corporation, branch, *etc.*) capable of encompassing these assorted legal relationships. Thus, treaties often opt for an open definition plus a non-exhaustive list of examples – an approach which may simplify drafting, but which creates a grey area of situations, in which tribunals must decide, with little guidance from the treaty wording, whether an asset qualifies or not as an investment.

The *Salini* test

303. To solve these difficulties, tribunals have developed lists of traits, which help them decide whether assets constitute protected investments. The best-known catalogue is the so-called *Salini* test, which refers to four characteristics[178]:

- Contributions;
- Duration of performance;
- Risk of the transaction; and
- Contribution to the economic development of the host State.

304. The *Salini* test arose in the context of an ICSID arbitration involving a construction contract, and the tribunal found that such contract indeed gave rise to a protected investment.

305. To be helpful, the application of any test should lead to analogous results, whatever the class of asset analyzed. But a blind application of the *Salini* test to different classes of assets seems to yield inconsistent results.

306. If the *Salini* test is chosen as yard stick for defining investments, no common profile seems to emerge that can be applied uniformly to all classes of assets. Equity investment, debentures, ownership of real estate, concession contracts, construction contracts – each category seems to have its own and unique profile of contribution, risk and duration, and thus the *Salini* features are of limited assistance in trying to establish an objective and inherent concept for all classes of investment.

307. How to solve the difficulty?

308. The Tribunal feels that the better approach in this case is to proceed in two steps: first to break up the analysis, taking as a starting point the classes of protected

[178] Named after the award in Doc. RLA-57, *Salini*, paras. 52-57, although used before that in Doc. CLA-307, *Fedax*, para. 43, to which the *Salini* decision alludes.

"investments", which can be deduced from the non-exhaustive list provided for in the BIT, and in a second step to seek common features within each category.

309. In the present case, there are two classes of alleged "investments" which are potentially relevant: equity investment in an enterprise (**A.**) and investment in the form of contracts (**B.**). The Tribunal will also consider a related category of legal relationships, so-called "pre-investment activities", which are especially relevant in the present case (**C**.).

A. Investment in an enterprise

310. Investment in the equity of an enterprise implies the acquisition by a foreign investor of a lasting interest, frequently associated with control, in an enterprise located in the host State (an enterprise being an organization incorporating labor and capital and producing goods or services to be sold on the market). Equity investments are usually formalized by:

- Creating a local branch or permanent establishment (a form not explicitly mentioned in the non-exhaustive list of Art. 1(b) of the BIT); or

- Taking or acquiring a capital participation in a local corporation (*i.e.*, Art. 1(b)(ii) of the BIT: "shares in and stock […] of a company and any other similar forms of participation in a company").

311. The acquisition of equity in an enterprise represents the paradigmatic form of investment, which treaties seek to foster and encourage; in general, this type of investments meets the inherent features of investment – normally, no further investigation (applying the *Salini* criteria or any other) would be necessary[179].

B. Investments in the form of contracts

312. The situation is different in those cases where the alleged investment is formalized as a contract or as rights deriving from a contract (as opposed to an equity investment)[180]. Arts. 1(b)(iii) and (v) of the BIT include among the admitted forms of investment two contractual situations:

- "(iii) rights to money or to any performance under contract having a financial value"; and

- "(v) business concessions conferred by law or under contract, including concessions to search for and extract[ion of] oil and other minerals".

[179] See also *OI*, para. 224. Equity investments are routinely mentioned in the non-exhaustive lists of investments contained in bilateral investment treaties.
[180] Certain contractual investments – *e.g.*, concessions – can result in the investor creating an enterprise in the host State, and then section (A.) would also be relevant.

a. Discussion

313. The issue whether contracts qualify or not as investments has most frequently been discussed in the context of construction, services and concession agreements signed with the host State or with one of its agencies.

314. On certain occasions, tribunals have found (frequently by applying the *Salini* test) that medium or long-term construction contracts[181], service contracts[182] or concession contracts[183] constitute protected investments. In most of these cases, the investor, in complying with the contract, performed an entrepreneurial activity in the host State (often by incorporating a branch or a subsidiary), hiring local staff and contributing its own capital, assets and know-how.

315. But this is not always the case. On certain occasions tribunals have held that contracts performed in the host country do not give rise to protected investments[184]. And rightly so: the mere fact that contractual rights are included in the non-exhaustive list of assets in Art. 1(b) of the BIT does not necessarily imply that the rights deriving from each and all contracts are protected investments.

316. To give an example of special relevance in the present case: Art. 1(b)(iii) includes in the list of assets which can constitute investments "rights to money or to any performance under contract having a financial value". But this inclusion does not imply that every contract where the performance by one party has a financial value (*e.g.*, the contract for the sale of a tractor) constitutes an investment. The Tribunal has already found that the rights in question must have the inherent features shared by all investments[185].

b. The inherent features of investments

317. In the Tribunal's opinion, the common features of investments can be discerned from a careful review of the wording of the BIT:

- Under Art. 1(b) of the BIT, investments must be "assets" – in accordance with its ordinary meaning, an item which is owned and has value[186];

- Art. 1(e) foresees that investments made by an investor are expected to produce "returns", normally in the form of "profit, interest, capital gains, dividends, royalties and fees"; and

- Furthermore, Art. 7(1)(a) refers to "[c]apital and additional capital amounts used to maintain and increase investments", and includes contributions

[181] Doc. RLA-57, *Salini*; Doc. CLA-146, *White Industries*.
[182] *See* Doc. CLA-289, referring to *SGS*; *see* also *MHS*.
[183] *See* also *Flughafen*.
[184] Doc. RLA-53, *Joy Mining*, which held that a contract involving two phases (one concerned with the replacement of equipment in a mining project located in Egypt's Western Desert, and the second entailing the engineering, design and supply of a new longwall system) was not an investment.
[185] *See* para. 293 *supra*.
[186] Garner, B. A., & Black, H. C., *Black's Law Dictionary*, 9th ed. St. Paul (2009), p. 902.

transferred by the investor into the host State to establish, maintain or increase an investment.

318. The common features of an investment are thus:

- A contribution of capital or equivalent value made by the investor;
- The ownership of, or entitlement to, an asset with value, located in the host State, that results from such contribution;
- An asset which is expected to produce a return, in the form of "profit, interest, capital gains, dividends, royalties and fees"; and
- A certain duration.

319. Normal commercial contracts, where money is paid as a simple *quid pro quo* against delivery of goods or services, do not meet these features; investments, however, involve a capital outlay for the establishment or acquisition of an asset, which is expected to generate returns in due course.

320. Long-term construction contracts or concession contracts will normally meet these requirements: the investor contributes capital, machinery, intellectual property or other economic resources into the host State, in the expectation of a future profit which will accrue over time.

C. Pre-investment activities

321. There is an additional category of legal relationships that merit attention.

322. An investment frequently requires that a prospective investor perform certain pre-investment activities, *i.e.*, that the investor accomplish certain tasks and incur certain costs in preparation of a (future) investment; these are typically activities and expenditures incurred in:

- Negotiating the investment;
- Securing financing;
- Obtaining the necessary governmental authorizations or permits; or
- Performing preparatory works, such as engineering or legal or environmental studies on the feasibility of a project.

323. Most of these pre-investment activities are simply factual, and only require the participation of the investor (*e.g.*, the request of an administrative authorization).

324. But in other occasions these activities may take the legal form of a contract (*e.g.*, a memorandum of intent to acquire shares, or a contract with a local engineering firm to carry out a feasibility study). The question, again, is whether these contracts are

protected under the BIT, simply because they fit within the terms of Art. 1(b)(iii): "rights to money or to any performance under contract having a financial value".

a. General rule

325. The answer is that pre-investment activities, even if formalized under certain contracts, are generally not protected as investments under international investment agreements. As Professor Schreuer notes[187]:

> "Steps preparatory to an investment will not by themselves be accepted as an investment […]."

326. The reason is that as a rule pre-investment activities do not possess the features of an investment identified by the Tribunal: they do not entail a contribution, which results in the establishment or acquisition of an asset, which in turn is expected to produce a return for the benefit of the investor over an extended period of time.

327. As the term itself suggests, pre-investment activities are tasks performed or costs incurred by the investor, prior to and with the purpose of preparing an investment; their aim is to facilitate the subsequent capital contribution, which will set in motion the establishment or acquisition of the asset in the host State. The expected result of the pre-investment activity is not the direct obtention of "returns" (*i.e.*, "profit, interest, capital gains, dividends, royalties and fees"), but rather the establishment or acquisition of an asset, and this asset in turn will set in motion the generation of "returns".

328. Disputes can and do arise in the pre-investment phase: negotiations can be frustrated by improper State conduct, administrative authorizations can be denied for arbitrary or discretionary reasons, or the prospective investor can be unlawfully prevented from making an investment[188]. In these situations, however, the investment has not yet materialized, the protection of the BIT is not available, and the investor must resort to contractual or extracontractual remedies under municipal law.

Case law

329. This conclusion is supported by investment case law.

330. As stated by the tribunal in *Mihaly*[189]:

> "It may be and the Tribunal does not have to express an opinion on this, that during periods of lengthy negotiations even absent any contractual relationships obligations may arise such as the obligation to conduct the negotiations in good faith. These obligations if breached may entitle the innocent party to damages, or some other remedy. However, these remedies

[187] Schreuer, C. H., *et al*, *The ICSID Convention – A Commentary*, 2nd ed. (2009), p. 134, para. 175.
[188] Heiskanen, V., "Of capital import: the definition of 'investment' in international investment law", in *Protection of Foreign Investments through Modern Treaty Arbitration – Diversity and Harmonization*, A. Hoffmann ed., ASA Special Series No. 34, May 2010.
[189] Doc. RLA-54, *Mihaly*, para. 51.

> do not arise because an investment had been made, but rather because the requirements of proper conduct in relation to negotiation for an investment may have been breached."

331. And the tribunal in *Raymond Charles Eyre* concluded[190]:

> "[…] more than potential is necessary. There must have been substantive commitments and arrangements entered into, involving specific commitments and financial costs, all of which would entail both certain risks as well as possible benefits. The Tribunal can find only that the Hotel Project remained at best aspirational at the time […] Consequently, [claimant's] contributions rose only to the pre-investment level and he did not face the operational risk necessary for the Hotel Project to qualify as a protected investment […]."

b. Exceptions

332. The vast majority of investment treaties do not provide for the protection of pre-investment activities or so-called "pre-establishment rights"[191]. The investor is expected to assume the costs of the pre-investment activities and the risk that the tentative project will not materialize. The State does not guarantee the recovery of expenditures with pre-investment activities[192].

333. There are, however, exceptions.

334. For instance, the North American Free Trade Agreement ["**NAFTA**"], and its successor, the United States-Mexico-Canada Agreement of 2020 ["**USMCA**"], do allow for the protection of pre-investment activities. Indeed, Art. 1339 of the NAFTA provides that:

> "investor of a Party means […] a national or an enterprise of such Party, that seeks to make, is making or has made an investment." [Emphasis added]

335. Thus, it seems that the Contracting Parties to NAFTA had the intention of protecting all phases of the formation of an investment – including the phase when an investor "seeks to make" or is in the process of "making" an investment.

336. A similar language was incorporated into Art. 14.1 of the new USMCA, that defines "investor" as a person who:

> "[…] attempts to make, is making, or has made an investment […]"

337. And footnote 3 of this provision clarifies that:

> "For greater certainty, the Parties understand that, for the purposes of the definitions of "investor of a non-Party" and "investor of a Party", an investor "attempts to make" an investment when that investor has taken concrete action

[190] See also *Raymond Charles Eyre*, paras. 301-302.
[191] *UNCTAD Series on International Investment Policies for Development – Investor State Disputes arising from Investment Treaties: A Review*, UN, New York, 2005, pp. 31-32.
[192] Doc. RLA-56, *Zhinvali*, paras. 406-408, 411.

> or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for a permit or license." [Emphasis added]

338. Summing up, the general rule is that pre-investment activities fall outside the scope of protection of the treaty, except if the language of the treaty provides otherwise.

c. Does the Indian-Mozambique BIT protect pre-investment activities?

339. Art. 1(b) of the BIT states that[193]:

> "(b) The term "investment" means every kind of asset established or acquired, including changes in the form of such investment in accordance with the national laws of the Contracting Party in whose territory the investment is made […]." [Emphasis added]

340. Art. 2 of the BIT goes on to describe its scope[194]:

> "This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations, whether made before or after the coming into force of this Agreement. It shall however not be applicable to claims or disputes which occurred prior to its entry into force." [Emphasis added]

341. The terms of the BIT, construed in accordance with Art. 31(1) of the VCLT ("in good faith in accordance with the ordinary meaning to be given to the terms of the treaty"[195]), support the conclusion that pre-investment activities that have not been consolidated into an investment, are not protected:

342. First, pursuant to Art. 1(b), an "asset" to be protected must be "established or acquired"; the use of the simple past tense is significant, as it indicates that the investment has already occurred. There is no wording in the Treaty extending the protection to preceding activities, performed by the investor when seeking to establish or acquire its investment.

343. Second, pursuant to Art. 2, the scope of protection of the BIT only extends to "investments made". Once again, the use of the simple past tense shows that the protection extends to a consolidated investment, and not to activities that pertain to the process of making an investment.

344. In sum, the language of the BIT suggests that the Contracting Parties had no intention of protecting pre-investment activities made by investors prior to the actual establishment or acquisition of the investment.

[193] Doc. CLA-1.
[194] Doc. CLA-1.
[195] Doc. CLA-5.

3.4 APPLICATION TO THIS CASE

345. The Tribunal must now apply its findings to the present case.

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

- a right to the direct award of a concession, created by a contract – the MOI – and certain Government decisions, plus

- valuable know-how contained in the Pre-Feasibility Study[196].

Respondent counters that Claimant only made pre-investment expenditures that do not qualify as protected investments under the BIT[197].

347. The Tribunal, after carefully studying the Parties' submissions, the evidence marshalled and weighing the countervailing legal arguments, concludes that PEL never held an asset that qualifies as an investment for purposes of this specific BIT between India and Mozambique.

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

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

350. Second, Mozambique never awarded the concession for the Project to PEL; there was no law passed or contract signed between PEL and Mozambique pursuant to which PEL was actually conferred a business concession[198]. Therefore, Claimant never obtained (for the purposes of Art. 1(b) of the BIT) a "business concession […] conferred by law or under contract".

351. Claimant does not disagree with these observations. Its argument is different. It avers that:

- It had a contractual right, enshrined in the MOI, to be awarded the concession of the Project, that became vested once Respondent approved the Pre-Feasibility Study and PEL exercised its right of first refusal by agreeing to proceed with the Project on 18 June 2012[199]; and

[196] C I, paras. 95-96, 257; C II, paras. 163, 510; C III, para. 218; CPHB, para. 7.
[197] R I, paras. 4, 21, 295, 362, *et seq*.; R II, paras. 4, 662, *et seq*.
[198] PEL recognizes this in its submissions (C II, para. 518; C III, para. 244).
[199] C I, paras. 258-259; C II, para. 518; C III, paras. 222, *et seq*., 244-250.

- The content of the Pre-Feasibility Study constituted valuable intellectual property[200].

352. In Claimant's view, these "assets", would be protected under:

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

- Art. 1(b)(iv) of the BIT, which includes "intellectual property rights, in accordance with the relevant laws of the respective Contracting Party".

353. The Tribunal has already established that a mechanic application of the terms of the BIT is not sufficient to establish that a certain "asset" qualifies as an investment[201]. Only assets that have the inherent characteristics of an investment may enjoy protection under the BIT. *Pro memoria*, these characteristics, of special relevance for investments in the form of contractual rights, are[202]:

- A contribution of capital or equivalent value made by the investor;

- The ownership of, or entitlement to, an asset with value, located in the host State, that results from such contribution;

- An asset which is expected to produce a return, in the form of "profit, interest, capital gains, dividends, royalties and fees"; and

- A certain duration.

354. Do the Pre-Feasibility Study (**A.**) and/or the MOI (**B.**) meet the inherent features of an investment?

A. <u>The Pre-Feasibility Study</u>

355. Art. 1(b)(iv) includes among the list of assets which can constitute investments "intellectual property rights, in accordance with the relevant laws of the respective Contracting Party". PEL argues that it contributed the funds necessary to carry out the Pre-Feasibility Study, plus the know-how and human resources in the field of geology and engineering that served to identify and develop the Project and that this constituted an investment[203].

356. The Tribunal disagrees.

[200] C I, paras. 258-259; C II, para. 579; C III, paras. 261-263.
[201] *See* section V.3.2 *supra*.
[202] *See* para. 318 *supra*.
[203] C II, para. 579.

a. Certain factual uncertainties

357. There are significant factual uncertainties regarding the funds actually contributed by Claimant, and the use by Mozambique of the know-how developed by Claimant and formalized in the Pre-Feasibility Study.

Capital contribution

358. The only monetary contribution made by Claimant consisted in the payment of the costs and expenses incurred in the preparation and execution of the MOI, and subsequent elaboration of the Pre-Feasibility Study.

359. But Claimant failed to point to any evidence in the file regarding the actual amount expensed by PEL.

360. The only figure referred to (and only incidentally) is a sum of USD 4 million, mentioned in a letter sent by PEL on 18 February 2014[204], after the Government of Mozambique had granted the concession to TML. In that letter Claimant requested compensation for damages suffered, in the amount of USD 4 million (plus a "royalty" for the identification of the Project of 0.5% of the investment)[205].

361. The letter is simply an averment: Claimant has not drawn the Tribunal's attention to any evidence which corroborates the figure of USD 4 million. In the document production phase Mozambique requested, and the Tribunal ordered, the exhibition of documents proving such expenses[206]. Claimant failed to submit any such documents. And at the Hearing, Mr. Daga, the officer of PEL leading the Project in Mozambique, confirmed that PEL had no records containing this information and that he could not recall the exact figure of such expenses[207].

362. Whatever the costs actually incurred by PEL in the execution of the MOI and preparation of the Pre-Feasibility Study, it would seem that, from a contractual point of view, Claimant has in any case waived its right to recover these amounts from Mozambique. Clause 4 of the MOI, whose wording is not disputed by the Parties, provides that[208]:

> "The direct costs necessary to conduct the feasibility study shall be entirely borne by PEL."

363. Thus, the Tribunal finds that there was no capital contribution.

Intellectual property rights

364. Claimant has also failed to prove that it contributed or developed "intellectual property rights, in accordance with" Mozambican law. There is no evidence that

[204] Doc. C-46. *See* also C I, para. 237.
[205] Doc. C-46, p. 3.
[206] Respondent's DPS, Request Nos. 10, 18, 38, 46.
[207] HT, Day 2, pp. 295-297 (Daga).
[208] Doc. C-5A; Doc. R-2, Clause 4.

"the concept of the Project", which Claimant allegedly developed, constitutes an asset protected under municipal intellectual property law. Furthermore, Claimant has pointed to no evidence that Mozambique irregularly transmitted to ITD/TML any proprietary information contained in the Pre-Feasibility Study. The record shows that TML, the consortium that was eventually awarded a concession contract, prepared its own feasibility study in 2015[209] and, two years later, a more elaborate bankable feasibility study[210].

b. Discussion

365. Be that as it may, even assuming, *arguendo*, that PEL had incurred significant expenses in the preparation and execution of the MOI and that in the Pre-Feasibility Study it developed intellectual property, protected under Mozambican law, these actions never transcended the threshold of pre-investment activity performed in the expectation of a future investment.

366. Such future investment – which once made would have enjoyed protection under the BIT – was to consist in the concession for the construction of a railway and ancillary port facilities, would imply the incorporation of an enterprise in Mozambique and would require the contribution of substantial amounts of capital – a concession which, alas, PEL never obtained. The planned investment was the concession, and Mozambique never awarded such concession to PEL. Claimant's activities remained at the level of pre-investment.

B. <u>The MOI</u>

367. Art. 1(b)(iii) of the BIT extends protection to "rights to money or to any performance under contract having a financial value"[211]. Claimant submits that the MOI was a contract entered into with Mozambique which had a financial value, and that, as such, it represented a protected investment under the BIT[212].

a. A preliminary issue

368. The Parties do not dispute that the MOI was executed. But there are three different versions of the contract, which show deviations from each other: there are two different English versions (one in possession of PEL and the other in the hands of the Republic) and one single version in Portuguese (in possession of both Parties):

- Claimant invokes the English MOI in its possession[213], which shows significant differences with the version held by Mozambique[214]; Claimant says that, in accordance with the wording of this version of the contract, once the Government had approved the Pre-Feasibility Study (as it actually did),

[209] Doc. R-42, pp. 20, *et seq*.
[210] Doc. R-42; Doc. C-125, p. 145.
[211] Doc. CLA-1.
[212] C I, paras. 257, *et seq*.; C II, paras. 518-522; CPHB, para. 7.
[213] Doc. C-5A.
[214] *See* section III.2.B.b *supra*.

PEL was entitled to a direct award, or in the terminology of the PPP Law, an "*ajuste directo*"[215];

- Respondent, in turn, invokes the English MOI in its possession[216] and says that the contract established at best a contingent right: once the Government approved the Pre-Feasibility Study, PEL was entitled to negotiate with the CFM the terms of a joint venture, and if these negotiations succeeded, the joint venture would be directly awarded the concession; if unsuccessful, there would be a public tender, and PEL would be entitled to a 15% scoring advantage[217].

369. The Parties have engaged in an extensive discussion of what rights were afforded by the MOI to PEL. This is a contractual dispute regarding the interpretation, scope and content of the MOI, which falls outside the jurisdiction of this Tribunal. Indeed, Clause 10 of the MOI clearly establishes that any dispute "arising out of" the MOI is subject to ICC arbitration, seated in Mozambique[218].

370. Thus, for the purposes of its analysis, the Tribunal will accept *pro tem* Claimant's interpretation as regards the content of the MOI (which grants a maximum scope of rights to Claimant): once the Government had approved PEL's Pre-Feasibility Study, PEL was entitled to an "*ajuste directo*" of the concession.

b. Discussion

371. The question that the Tribunal must answer is whether a contract of this nature – which incorporates the obligation by the purported investor to carry out a preliminary study, at its own cost, against the promise by the State of the direct award of a concession, if the study is accepted – constitutes a non-protected pre-investment activity or whether the legal relationship has sufficiently matured so as to constitute a protected investment.

372. In the Tribunal's opinion, even assuming that the MOI entails a right to an "*ajuste directo*", it is a contract lacking the inherent features necessary to be considered an investment under the BIT. The Tribunal finds the following reasons compelling:

(i) <u>No contribution</u>

373. <u>First</u>, under the MOI, Claimant's side of the bargain was to prepare and submit a Pre-Feasibility Study. This was the only input that PEL undertook to deliver. In the preceding sub-section, the Tribunal has already established that the Pre-Feasibility Study *per se* only amounted to pre-investment activity, with the aim of facilitating the eventual awarding of the concession – which would, indeed, constitute a protected investment. And, as previously established, under Clause 4 of the MOI

[215] *See* section V.2.1 *supra*.
[216] Doc. R-2.
[217] *See* section V.2.2 *supra*.
[218] Doc. C-5A; Doc. R-2, Clause 10.

the costs of this pre-investment activity do not seem recoverable – even if the Government decided not to proceed with the Project.

(ii) No certainty that the concession would be awarded

374. Second, it is true that under the MOI (as interpreted by Claimant), Respondent assumed the obligation to carry out an "*ajuste directo*" of the concession in PEL's favor. But this obligation did not guarantee that PEL would actually obtain the concession: the administrative process was at a very early stage, and was subject to a number of conditions, which created significant uncertainties.

375. The first uncertainty was that once Mozambique had approved the Pre-Feasibility Study, PEL was required to negotiate with the CFM the creation of a joint venture[219] – a condition which PEL accepted on 18 June 2012[220]. A failure to reach such agreement (and the evidence shows that CFM was reluctant to enter into such joint venture) would in any case jeopardize the direct award of the concession.

376. The second uncertainty was that the administrative process was at a very early stage.

377. Art. 9 of the PPP Regulation established the "*fases do processo*" of contracting a PPP, in general (*i.e.*, whether it is through public tender, direct award, or other methods)[221]:

> *"1. O processo completo do empreendimento compreende, em regra, as seguintes fases:*
>
> *a) Concepção;*
> *b) Definição dos princípios básicos orientadores;*
> *c) Elaboração dos estudos de viabilidade técnica, ambiental e económico-financeira;*
> *d) Promoção da iniciativa do empreendimento e lançamento do respectivo concurso;*
> *e) Análise e avaliação das propostas dos concorrentes;*
> *f) Adjudicação;*
> *g) Negociação;*
> *h) Aprovação do empreendimento e do respectivo projecto de investimento;*
> *i) Celebração do contrato;*
> *j) Passagem do empreendimento;*
> *k) Implementação;*
> *l) Gestão, exploração e manutenção;*
> *m) Monitoria e avaliação;*
> *n) Devolução".*
>
> *2. A entidade responsável pela tutela sectorial pode dispensar a observância das fases previstas nas alíneas a) a c) do número anterior, quando a proposta do projecto do empreendimento contenha toda a informação exigível nos termos das referidas alíneas e em condições tais que permitam a análise e*

[219] Doc. C-11.
[220] Doc. C-12.
[221] Doc. RLA-7 (POR); Doc. CLA-64 (ENG).

> *avaliação, nos termos previstos nos artigos 19 e 32 do presente Regulamento, da proposta desse empreendimento*." [Emphasis added]

378. Art. 17.3 of the PPP Regulation states that, the procedure of "*ajuste directo*" comprises the same phases described in Art. 9, adapted due to the fact that there is no public tender[222]:

> "[…] *compreende as fases previstas no artigo 9 deste Regulamento, com a devida adaptação relativamente ao não lançamento do concurso*."

379. During the Hearing, the Parties' experts discussed how Art. 9 applied in case of "*ajuste directo*". They agreed that[223]:

- Step "d) *Promoção da iniciativa do empreendimento e lançamento do respectivo concurso*" did not apply to the "*ajuste directo*"; and that in step "e) *Análise e avaliação das propostas dos concorrentes*" the "*Análise e avaliação*" refers to a single proposal; and

- All other phases apply to both proceedings.

380. Therefore, even assuming that Claimant under the MOI had the right to an "*ajuste directo*", the following steps of the process remained outstanding[224]:

> "[…]
>
> *g) Negociação;*
> *h) Aprovação do empreendimento e do respectivo projecto de investimento;*
> *i) Celebração do contrato* […]".

381. In other words: even after the approval of the Pre-Feasibility Study, the actual investment – the awarding of the concession with the "execution of the contract" – still required the "negotiation" of the terms between the State and the prospective investor (including elements so important as duration and determination of concessionary fees) and a final "approval" by the State and by the investor – who at all times retained the right to abandon the Project.

No expectation of returns

382. Third, and finally, a fundamental characteristic of all investments is that the contribution is made in the expectation of "returns", which Art. 1(e) of the BIT defines as "profit, interest, capital gains, dividends, royalties and fees"[225].

383. The purpose of the MOI and Pre-Feasibility Study was not to generate "returns" for the benefit of Claimant, but to give Claimant the opportunity to obtain a concession for the construction of the Project, subject to multiple conditions (that it entered into a joint venture with the national railroad company, that it accepted the terms

[222] Doc. RLA-7 (POR); Doc. CLA-64 (ENG).
[223] HT, Day 7, pp. 1652-1654 (Medeiros); HT, Day 8, pp. 1752-1759 (Muenda).
[224] Doc. RLA-7 (POR); Doc. CLA-64 (ENG).
[225] Doc. CLA-1.

and conditions of the concession, that it reached agreement with the shippers of the coal, that it did not exercise its right to withdraw from the Project…). The return would only come at a later stage, once Claimant had actually obtained the concession – and it is only at this stage when Claimant could be said to hold a protected investment under the Treaty.

*** * ***

384. In light of the above, the Tribunal concludes that the MOI and the Pre-Feasibility Study do not possess the inherent characteristics of an investment. The MOI and the Pre-Feasibility Study constitute paradigmatic pre-investment activities, which, as previously discussed[226], are not protected by the India-Mozambique BIT.

3.5 FINAL CONSIDERATIONS

385. All things considered, the Tribunal concludes that Claimant held no investment for the purposes of Art. 1(b) of the Treaty, and, accordingly, that the Tribunal does not have *ratione materiae* jurisdiction over PEL's claims.

386. The Tribunal has not reached this decision lightly. It has considerable sympathy for PEL's frustration: PEL signed the MOI with Mozambique, with the intention of making a significant capital contribution for the development of the country. Inexplicably, there are two English versions of the MOI with significant differences. Claimant has proven beyond any doubt that the English version in its possession was duly signed by both parties; but this version is different from the Portuguese MOI, which was also signed by both. It was Respondent who was responsible for the preparation of the execution copies and who organized the signing ceremony at the Ministry – and Respondent has failed to provide any satisfactory explanation for its inability to locate its own original English MOI.

387. In any event, there was no satisfactory explanation either for the differences between PEL's English MOI and both Portuguese versions.

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

389. But Mozambique then changed its opinion: in April 2013 the Council of Ministers took the decision of inviting Claimant to engage in direct negotiations of the terms of a concession that could be granted directly to PEL. The Government invited PEL to post a guarantee worth several million USD and to obtain commitments from the mining companies which would provide the coal to be shipped. PEL complied with the first condition and was in the process of securing the commitments.

[226] *See* section V.3.3C.c *supra*.

390. But less than a month thereafter, in May 2013, the Council of Ministers made a U-turn and changed its opinion: without providing any satisfactory explanation other than stating that it had spoken with "several stakeholders" and that it had reviewed the legal and regulatory PPP framework, the Government opted to continue with the public tender and directed PEL to participate in it, putting an end to any expectation of a direct negotiation of the concession.

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

VI. COSTS

392. In this final section, the Tribunal will establish and allocate the costs of this arbitration ["**Costs of Arbitration**"]. The Tribunal will first determine the applicable rules (**1.**) and then analyze each category of Costs of Arbitration: the fees and expenses of the arbitrators and the PCA, and other Tribunal costs (**2.**), and the fees and expenses incurred by the Parties for their defense in the arbitration (**3.**). The Tribunal will finally make its decision (**4.**).

1. APPLICABLE RULES

393. Arts. 38 to 40 of the UNCITRAL Rules govern the determination and allocation of the Costs of Arbitration. Art. 38 of the UNCITRAL Rules provides the general rule that the Tribunal shall fix the Costs of Arbitration in its award. These Costs are composed of[227]:

> "(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
>
> (b) The travel and other expenses incurred by the arbitrators;
>
> (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague."

394. Thus, the Costs of Arbitration include:

- The fees and expenses of the arbitrators, of the appointing authority, of any other assistance required by the tribunal, and the expenses of the PCA, under paras. (a), (b), (c) and (f) of Art. 38 [the "**Administrative Costs**"];
- The reasonable costs and expenses incurred by the "successful party" in the course of the arbitration, as well as the travel and other expenses of witnesses to the extent such expenses are approved by the tribunal, under paras. (d) and (e) of Art. 38 [the "**Legal Costs**"].

[227] Art. 38 of the UNCITRAL Rules.

395. Furthermore, Arts. 40(1) and (2) of the UNCITRAL Rules establish that:

> "1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable." [Emphasis added]

396. It follows that, in principle, the Costs of Arbitration shall be borne by the losing party; nevertheless, the Tribunal enjoys ample discretion to apportion the Costs differently, if it considers that it is reasonable to do so considering the circumstances of the case.

2. ADMINISTRATIVE COSTS

397. In accordance with Art. 41 of the UNCITRAL Rules, the Parties deposited the equivalent of **USD 1,234,719** with the PCA as an advance for the Administrative Costs, as follows:

- Claimant's deposits: **EUR 100,000** (which was converted into **USD 117,779.30** upon receipt) and **USD 850,000**; and

- Respondent's deposits: **EUR 100,000** (which was converted into **USD 116,939.70** upon receipt) and **USD 150,000**.

398. Pursuant to the Terms of Appointment, the fees of the members of the Tribunal were determined 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 were longer than four hours, plus VAT, if applicable. In addition, 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[228].

399. The fees and expenses of the Arbitral Tribunal are hereby fixed as follows:

- Professor Guido Santiago Tawil: USD 216,093.50 (fees) and USD 11,907.17 (expenses);

- Mr. Hugo Perezcano Díaz: USD 197,062.50 (fees) and USD 7,052.32 (expenses); and

[228] Terms of Appointment, paras. 89-91.

- Professor Juan Fernández-Armesto: USD 246,538.52 (fees) and USD 4,563.68 (expenses).

400. Pursuant to the Terms of Appointment, Ms. Sofia de Sampaio Jalles was appointed as Administrative Secretary and is entitled to the reimbursement of justified reasonable personal disbursements for attending hearings and meetings[229]. Ms. De Sampaio Jalles' expenses in this arbitration amount to USD 2,391.27.

401. Furthermore, the Parties agreed that the PCA would administer this arbitration and that the PCA's administrative tasks would be billed in accordance with the PCA's schedule of fees[230]. The PCA's fees amount to USD 162,857.17 and its expenses amount to USD 5,689.01.

402. Other administrative costs, including the costs of bank transactions, printing, courier, live transcription, AV/IT support, interpretation, and all other expenses relating to the proceedings, amount to USD 162,129.50.

403. Based on the above figures, the combined Administrative Costs – *i.e.*, costs covered in paras. (a), (b), (c) and (f) of Art. 38 of the UNCITRAL Rules – amount to USD 1,016,284.64. This amount shall be deducted from the deposit established by the Parties. Since Claimant deposited a significantly larger share of the advance on costs, the unexpended balance of USD 218,434.36 shall be returned to Claimant, subject to any associated bank transfer or exchange fees.

3. LEGAL COSTS

404. On 18 August 2023, the Parties submitted their Statements of Costs [previously defined, respectively, for Claimant and Respondent, "**C SofC**" and "**R SofC**"]. With regard to paras. (d) and (e) of Art. 38 of the UNCITRAL Rules, the Parties' claims for Legal Costs are set out below.

3.1 CLAIMANT'S POSITION

405. Claimant requests compensation for all the costs and expenses of the arbitration, including Administrative and Legal Costs, as well as its third-party funding's costs and expenses[231].

406. Claimant submits that it has incurred [redacted] and [redacted] Claimant asks that Mozambique be ordered to bear in full these costs both if Claimant is considered the successful[233] or the unsuccessful party[234].

[229] Terms of Appointment, paras. 26-31, 94.
[230] Terms of Appointment, para. 22.
[231] C SofC, para. 25(a).
[232] C SofC, para. 1.
[233] C SofC, para. 4.
[234] C SofC, paras. 5-7.

407. Primarily, Claimant argues that under the UNCITRAL Rules a party can be considered successful – for the purposes of costs allocation – when it "generally prevailed in the overall outcome" of the proceedings, even though it may not have succeeded in every specific claim brought. PEL should be considered to have met such standard, since it has proven the jurisdiction of the tribunal and a breach of the BIT[235].

408. Alternatively, in the case that Claimant would not be considered the successful party, Respondent's conduct justifies a departure from the general standard of "costs follow the event". Thus, the Arbitral Tribunal should still award PEL all the costs borne in connection with the present proceedings[236]. More specifically, *inter alia*, Respondent has[237]:

- Launched a parallel contractual arbitration;
- Raised various groundless jurisdictional and admissibility objections;
- Refused to cooperate in the document production phase; and
- Refused to pay the PCA's deposit.

409. Moreover, if Claimant is awarded any sum in these proceedings, either by being awarded costs or damages, PEL asks to be refunded the success fee of its counsel and the fees of the third-party funder[238].

410. Additionally, PEL requests to be awarded pre- and post-award interest on any costs allocated in its favor, with a rate fixed either at the US prime plus 2% or Respondent's cost of borrowing[239].

3.2 RESPONDENT'S POSITION

411. Mozambique asks that Claimant and its third-party funder[240] be ordered to pay all the costs incurred by Respondent in connection with the present proceedings, including all Administrative and Legal Costs[241]. Respondent submits that it has incurred **USD 3,902,744.36** in Legal Costs[242].

412. Primarily, based on Art. 40 of the UNCITRAL Rules, Mozambique considers that the costs of the arbitration should be borne by the unsuccessful party. In order to

[235] C SofC, para. 4.
[236] C SofC, para. 5.
[237] C SofC, para. 6.
[238] For a more detailed quantification of such costs, see C SofC, para. 14 and the table of possible outcomes in C SofC, para. 15.
[239] C SofC, para. 23.
[240] R SofC, paras. 27-29.
[241] R SofC, para. 25.
[242] R SofC, para. 1.

prevail, it argues that it would only need to succeed in one of its jurisdictional objections[243].

413. Alternatively, even if Claimant were to succeed partially or even on all the jurisdictional objections and be entitled to some relief on the merits, PEL should bear the costs of the present proceedings related to:

- The contractual issues arising out of the MOI, since the jurisdiction regarding said matters lies with the ICC Tribunal[244]; as well as

- The costs associated with Claimant's third damages submission, considered to be purely speculative by Respondent[245].

414. Regarding these two aspects, Mozambique argues that the Tribunal should take into account the aggravation on costs due to the unnecessary burdening of the proceedings created solely by Claimant, who should therefore bear the related costs[246].

415. Additionally, Respondent asks to be granted post-award interest accruing at the short-term U.S. Treasury rate until receipt of payment of all costs awarded to it[247].

4. THE TRIBUNAL'S DECISION

416. Both Parties have requested an award on costs, each arguing that the Tribunal should adopt the "costs follow the event" criterion but recognizing that the Tribunal is free to depart from such principle and to take into account the particular circumstances of the case.

417. The Tribunal's analysis was limited to one jurisdictional objection and ultimately Respondent is the successful party, since the Tribunal has recognized that it lacks jurisdiction to adjudicate the case.

418. The Tribunal, however, in the exercise of its broad discretion under Art. 40 of the UNCITRAL Rules, decides to depart from the principle that costs follow the event and to order each Party to bear its own Costs. In reaching this decision the Tribunal finds the following reasons compelling:

419. First, the Tribunal recognizes that there was a genuine dispute between the Parties as to the existence or non-existence of an investment. To reach this difficult decision the Tribunal had to analyze and consider the Parties' submissions in full, and all the evidence available on the record. In other words, the briefing by the Parties on matters other than the *ratione materiae* jurisdictional objection was not in vain and the start of this arbitration was legitimate.

[243] R SofC, paras. 5-6.
[244] R SofC, paras. 16-23.
[245] R SofC, para. 24.
[246] R SofC, paras. 14-16 and 26.
[247] R SofC, para. 37.

420. Second, the Tribunal is bound to take into account Respondent's conduct. The Tribunal understands that Mozambique was not satisfied with the start of this UNCITRAL arbitration. Mozambique chose to start a parallel ICC Arbitration, arguing that this would be a more appropriate forum to solve the dispute. That may well be the case, but this did not entitle Mozambique to repeatedly try to derail these proceedings, by filing multiple requests for stay or by asking for an anti-arbitration injunction from the ICC Tribunal.

421. Respondent has also failed to cooperate in this arbitration by not paying a part of its share of the proceedings. Good faith requires parties to participate in arbitration proceedings willingly and to share the costs of the arbitration proceedings, even when they dispute the jurisdiction of the Tribunal.

422. In view of the above, the Tribunal orders each Party to bear its own Legal Costs and to split equally the Administrative Costs.

423. The Administrative Costs amount to USD 1,016,284.64. Considering that Claimant has paid a larger share of the Administrative Costs, the unexpended amount of the deposit shall be returned to Claimant (in the amount of USD 218,434.36) and Respondent is ordered to reimburse Claimant in the amount of USD 241,202.62. This amount should be paid by Mozambique within one month of this award, and from that date on will accrue interest at the United States prime rate plus 2%[248].

[248] C II, paras. 1080, 1152(f); CPHB, para. 75; C SofC, paras. 23, 25(b).

VII. DECISION

424. In light of the above, the Tribunal, by majority:

1. Declares that it lacks jurisdiction to adjudicate the claims submitted by Patel Engineering Limited;

2. Orders that each Party shall bear its own Legal Costs;

3. Orders that the Administrative Costs shall be split equally between the Parties, with the consequence that the Republic of Mozambique shall reimburse Patel Engineering Limited in the amount of USD 241,202.62; the Republic shall pay this amount within one month from the date of this award, and from that date any unpaid amount shall accrue interest at the United States prime rate plus 2%;

4. Orders that the unexpended balance of the deposit held by the PCA shall be returned to Patel Engineering Limited in the amount of USD 218,434.36; and

5. Dismisses all other prayers for relief.

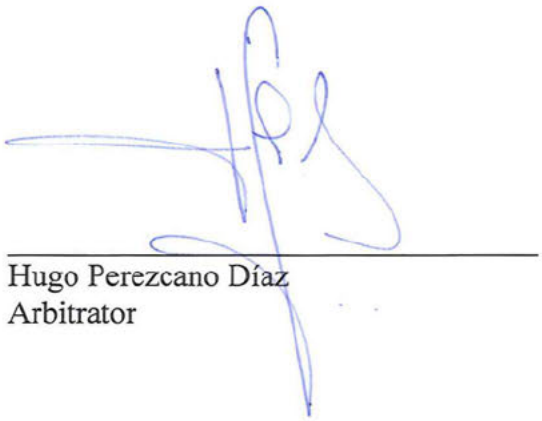
425. The Tribunal has taken these decisions by majority, Arbitrator Mr. Hugo Perezcano Díaz and Presiding Arbitrator Professor Juan Fernández-Armesto voting in favour. The dissenting Arbitrator, Professor Guido Santiago Tawil, explains his position in a dissenting separate opinion, which is attached.

[Signature pages follow]

Place of Arbitration: The Hague, the Netherlands.
Date: 7 February 2024

Guido Santiago Tawil
Arbitrator
(subject to the attached Dissenting Opinion)

Place of Arbitration: The Hague, the Netherlands.
Date: 7 February 2024



Hugo Perezcano Díaz
Arbitrator

Place of Arbitration: The Hague, the Netherlands.
Date: 7 February 2024

Juan Fernández-Armesto
Presiding Arbitrator