

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

DISSENTING OPINION OF
PROFESSOR GUIDO SANTIAGO TAWIL

7 February 2024

1. The Tribunal has concluded, by majority, that Claimant has only made pre-investment expenditures that do not qualify as protected investments under the BIT and, therefore, that it lacks jurisdiction *ratione materiae* to adjudicate the claims submitted by PEL in this case¹.
2. I respectfully disagree with the view of my esteemed colleagues.
3. PEL was encouraged by Mozambique to invest in the country. It developed a project and, on 6 May 2011, entered into a binding agreement with the Government (the MOI) which, while obliging PEL to perform some tasks, provided Claimant with specific rights, including the alleged right to obtain the concession of the Project².
4. PEL prepared and submitted the PFS, which was approved by the MTS on 15 June 2012³. Although PEL informed Respondent three days later that it was exercising its right of first refusal⁴, the implementation of the project was not possible due to the negative of CFM (an entity of the Respondent) to invest in the Project and incorporate a company jointly with PEL as requested by the MTC when approving the PFS⁵.

¹ See Final Award, paras. 347, 385, 391, and 424.

² Clause 2 of the English version of the original MOI provided by PEL (Doc. C-5A) reads:

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 [technical and commercial viability] of this 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.** [Emphasis added]

³ Doc. C-11, MTC's letter dated 15 June 2012. Consistent with the idea that the MOI implemented a direct award procedure, the MTC's communication stated that: "[...] in order to pursue the project, Patel Engineering Ltd must: (a) Expressly exercise its right of first refusal; (b) Negotiate with the CFM the creation of a company to implement the project".

⁴ Doc. C-12, PEL's letter dated 18 June 2012.

⁵ Daga I, para. 85; Daga II, para. 101.

5. Later on, on 18 April 2013, PEL received an invitation from the Council of Ministers⁶ to “start the process with a view of carrying out these projects”, that initiated a process to directly negotiate the terms of the Project’s concession with PEL⁷.
6. PEL expressed its interest in participating in such process and provided the MTC with the requested bank guarantee in the amount of USD 3,115,000⁸. However, less than a month later and before PEL could present a statement, agreement, or take-or-pay memorandum with mining companies to initiate the negotiations, it was informed by the MTC, on 13 May 2013, that the Council of Ministers had decided not to proceed with the direct negotiation of the concession with PEL⁹.
7. There is no doubt that Claimant’s activities were aimed at obtaining a concession agreement, that Respondent assumed specific commitments to such end, and that both processes were frustrated for reasons foreign to PEL and allegedly attributable to Respondent (*i.e.*, the CFM decision not to invest in the Project and the Council of Ministers’ May Decision reversing the offer made to PEL less than a month before).

⁶ The Council of Ministers is Mozambique’s highest executive decision-making body. It is composed of the President, the Prime Minister and all of Mozambique’s ministers. See Doc. CLA 48a, Constitution of the Republic of Mozambique (as amended in 2018), Art. 201.

⁷ The MTC’s 18 April 2013 letter (Doc. C-29) states:

The Council of Ministers, in its 10th Ordinary Session held on the date of 16 April 2013, considering the urgency of these infrastructures, the national strategic interest, the time available and the fact that the tenderer has carried out all the feasibility and engineering studies, and that it is in the national interest that the project be accelerated, decided to invite this company to start the process with a view of carrying out those projects.

Therefore, the representatives of Patel Engineering Ltd. are invited to contact the Ministry of Transport and Communications, to begin this process, within seven days.

It is also requested that the company prepare for the project, within thirty days, a bank guarantee corresponding to zero point one per cent (0.1%) of the volume of the investment foreseen for the respective enterprise and keep it valid until the conclusion of the contract, at which time the same shall be returned to the contracted entity.

The company must also present a statement, agreement or *take or pay* memorandum with mining companies, in order to make the project in question feasible. [Emphasis added].

The April 2013 Council of Ministers’ Decision made no reference to the MOI.

⁸ Daga I, para. 129; Daga II, para. 141; Doc. C-33, PEL’s letter dated 9 May 2013.

⁹ Doc. C-34, MTC’s 13 May 2013 letter.

8. The consequences of such decisions and the scope of rights that PEL alleges were illegitimately frustrated should have been, among many others, matters of debate in the present arbitration.
9. Through both the MOI and the April 2013 Council of Ministers' Decision, Respondent provided PEL with a particular status that had an economic value and clearly differentiated Claimant from prospective investors as those participating in the Public Tender. At the time of the bid, PEL had made different contributions to develop the Project¹⁰ and through Respondent's assurances in the MOI and the April 2013 Council of Ministers' Decision, what could be considered before as mere expectations crystallized into rights that had an economic value and should, in my view, be considered protected by the Treaty.
10. Such rights were *acquired* by PEL directly from Mozambique through the MOI and the April 2013 Council of Ministers' Decision and, in my view, qualify within the definition of "every kind of asset established or acquired" as investments protected by Article 1 (b) of the Treaty¹¹. The Treaty provides an ample definition of the protected investments and arbitral tribunals shall make no distinctions where the Parties to the Treaty have not.
11. PEL's investment process was by no means – following the wording of the *Nordzucker v. Poland* tribunal – "a mere intention to invest which existed only in the mind of the potential investor"¹². Mozambique was not only perfectly aware of such process but actively encouraged PEL and engaged in its investment process.

¹⁰ As part of its investment in the Project, Claimant mentioned "(i) the right to a direct award of a concession and the rights under the MOI associated with the Project; (ii) the transfer of information, data and know-how to Mozambique; (iii) PEL's input into and payment for the Preliminary Study; and (iv) the detailed PFS which Mozambique approved, and which later served as the basis for the irregular tender process which ultimately ended in the award of the Project to ITD" (C III, para. 218).

¹¹ Which include "in particular, though not exclusively ... (iii) rights...to any performance under contract having a financial value; (iv) intellectual property rights in accordance with the relevant laws of the respective Contracting Party [and] (v) business concessions conferred by law or under contract..." (Treaty, Art. 1 (b)).

¹² *Nordzucker v. Poland*, UNCITRAL, Partial Award on Jurisdiction, 10 December 2008, para. 185.

12. Needless to say, it is not my view that ordinary pre-investments activities shall *per se* be considered protected by investment treaties. PEL was not a simple participant in the Public Tender (as all the other bidders that participated in it) nor a prospective investor exploring potential opportunities. As mentioned before, initially through the MOI and later through the April 2013 Council of Ministers' Decision PEL was conferred with a different status from all other participants. Such special status had an economic value and allegedly encompassed certain rights.
13. Therefore, even if the Tribunal was to conclude that PEL's alleged rights do not qualify as a protected investment under the BIT (a view with which I do not agree), the active engagement of Mozambique in the promotion of its investment and the assurances provided to PEL during such process obliged Respondent to treat them fairly and equitably¹³ in accordance with Article 3 of the Treaty¹⁴.
14. The ICC Arbitration is of a contractual basis and clearly differs from the dispute before us, based on the alleged violations of the Treaty. While I expect that PEL will be

¹³ See similar conclusion arrived at by the *Nordzucker* tribunal:

Based on the above reasons, the Arbitral Tribunal finds that:

(1) the investments in the Szczecin and Gdansk Groups have not been admitted by Poland in accordance with its law and therefore as a matter of principle do not enjoy the protection of the BIT according to article 2 (1) second sentence;

(2) as Poland was aware of these intended or envisaged investments and had actually solicited them and actively followed and supervised the procedure for sale of the assets up to (the second before) the last step, Poland had not only an obligation to promote them as far as possible and to admit them in accordance with its law but also to treat them fairly and equitably in accordance with article 2(1) third sentence [...]

See *Nordzucker*, Partial Award on Jurisdiction, 10 December 2008, para. 218.

¹⁴ Article 3 of the Treaty provides:

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory, and admit such investments in accordance with its laws and policy.

(2) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.

granted a full opportunity to present its claims before the ICC Tribunal, it was this Treaty arbitration the natural fora in which such claims should have been discussed.

15. In light of the decision adopted by the majority to admit Mozambique's objection *ratione materiae*, and to render moot the remainder of the Parties' submissions on jurisdiction, liability, and quantum, I will issue no opinion concerning other matters raised by the Parties in this case.

[Signature page follows]

Date: 7 February 2024



Prof. Dr. Guido Santiago Tawil