

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

AND

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

BETWEEN

PATEL ENGINEERING LIMITED

Claimant

and

THE REPUBLIC OF MOZAMBIQUE

Respondent

**CLAIMANT'S ADDITIONAL
SUBMISSION ON QUANTUM**

30 MAY 2022



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I. INTRODUCTION

- 1 Claimant hereby submits its Additional Submission on Quantum (“**Supplemental Quantum Submission**”), pursuant to Annex I *decies* of Procedural Order No. 1.
- 2 All capitalised terms, unless otherwise defined in this Supplemental Quantum Submission, have the meanings given to them in Claimant’s Reply on the Merits and Response to Objections to Jurisdiction, dated 9 August 2021 (“**Reply**”) and/or Claimant’s Rejoinder on Jurisdiction, dated 7 February 2021 (“**Rejoinder on Jurisdiction**”).
- 3 Mozambique’s breaches of the Treaty have caused PEL to lose the value of the rights afforded to it in the MOI, including the right of first refusal to implement the Project, the right to a direct award of a concession for the Project, as well as PEL’s rights to confidentiality and exclusivity.¹
- 4 At the same time, Mozambique received significant value from PEL’s work in conceiving of and developing the Project concept through the PFS:
 - a) PEL conceived a Project that will open a novel internal logistics corridor that will transform Mozambique’s prospects to transport and export coal and other cargo to the world. It unlocked the solution to Mozambique’s internal logistics constraints, including only having two existing ports in Beira and Nacala (both with limited capacity), which are distant from the Tete province, making transportation costly. Through the Project PEL conceived of, Mozambique will now have a new deep-water port at Macuse with capacity to accommodate the large vessels required to transport coal and other cargo for export, thereby enabling Mozambique and its population to reap the benefits of the country’s most important mineral resource;

¹ **Exhibit C-5A**, English version of the MOI, Clauses 2, 6, and 11. Clause 2(1) provides that ... “*the Govt. of Mozambique shall issue a concession of the project in favour of PEL.*” Clause 2(2) provides that “*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). Clause 6, entitled “*Exclusivity*”, provides *inter alia*, that “*MTC also agrees not to give any rights/authorization to party for the development/expansion of a port between Chinde and Pebane for similar objectives, nor for the development/expansion of any rail corridor from Tete to the province of Zambezia within the area referred under objective of the present memorandum.*” Clause 11, entitled “*Confidentiality*”, required the parties to “*keep all the data, documents, information, and share between them whether written or otherwise, including this MOI as confidential until the approval of the project.*”

- b) PEL generated interest in a Project that had initially been dismissed by the Government as unfeasible.² It believed in the Project and industriously turned to developing this game-changing logistics corridor into a reality in exchange for the right to implement the Project through a direct award of a concession to PEL should its PFS be acceptable to the Government; and
- c) The importance and value of the Project to Mozambique and its people is clear. ITD is now implementing PEL's Project through the TML Consortium, which expects to make over **USD 300 million a year** in profits from the Project by the fifth operational year.³ Mozambique will benefit handsomely from the Project via concession premiums, income taxes, and its 20% ownership in the Project. Ethos recently invested USD 400 million in the Project, which it described as a "*vote of confidence ... in the viability of the Project*".⁴ That the Project (including Phase 1, the port at Macuse, and Phase 2, the rail corridor) remains of national strategic importance is clear from the public statements of Ethos's CEO: "*The Project is to be one of the largest infrastructure projects in Africa with an estimated total investment cost of approximately USD 3 billion. Given the size and geographic importance of the corridor, the Project will unquestionably be a key agent of social and economic change for the benefit of affected communities and for the country as a whole.*"⁵ TML Executive Director Virat Kongmaneerat touted this major financing deal, noting that the "*Project can continue to move forward with the resettlement and construction of the port ... putting TML and Mozambique on the regional transportation map.*"⁶

5 But, as a result of its breaches, discussed at length in Claimant's previous submissions,⁷ Mozambique has rendered PEL's MOI right to implement the

² See SOC, para. 71; Reply, para. 139; CWS-1, Witness Statement of Mr Kishan Daga, paras. 15 and 24; CWS-2, Witness Statement of Mr Ashish Patel, para. 25; CWS-3, Second Witness Statement of Mr Kishan Daga, para. 10.

³ Exhibit R-42, Update of the TML 2015 Feasibility Study for the Moatize-Macuse Railway and Port Project, July 2017, p. 13.

⁴ Exhibit C-343, 360 Mozambique, Ethos Asset Management Inc., USA announces major deal in Mozambique with Thai Mozambique Logistica, S.A., to finance the building of the Macuse port and rail infrastructure in the sum of \$400 million USD, dated 19 November 2021.

⁵ Id. (Emphasis added).

⁶ Id. (Emphasis added).

⁷ SOC, Section V; Reply, Section VII.

Project entirely worthless. While Mozambique will be handsomely enriched through the Project, PEL has been left with nothing.

6 At an absolute minimum Mozambique should make “*full reparation*” for its breaches by compensating PEL for those contractual rights which it has lost. Thus, as agreed between the Parties and confirmed by the Tribunal, this submission sets forth an alternative valuation based on PEL’s loss of business opportunity due to the loss of its rights under the MOI.⁸

7 The valuations presented in this submission are meant as alternatives to Claimant’s earlier, primary quantum submission, and are not intended to supplant the valuations set forth therein.⁹ Claimant’s primary quantum case remains the same: the principle of “*full reparation*”¹⁰ is best satisfied by awarding damages based upon PEL’s expected profits for the entire Project using a DCF methodology. As noted in Claimant’s earlier submissions, given the nature of the promises Mozambique made in the MOI,¹¹ PEL had every reason to rely on those promises in undertaking the PFS in the legitimate expectation that, once PEL fulfilled its part of the bargain and the PFS was approved, PEL would be granted a concession to not only design, but to build and operate the Project.¹² Thus, as noted in Claimant’s previous submissions on quantum, “*full reparation*” requires a valuation based on the profits PEL could expect to gain over the entire lifetime of the Project.¹³ On this premise and methodology, Claimant’s experts at Versant have calculated a damages value of USD 156 million *ex post* and USD 78.2 million *ex ante*.¹⁴

8 Claimant’s secondary quantum case also remains the same: a valuation based upon PEL’s loss of chance to design, construct and operate the entire Project, as set out in Claimant’s Reply.¹⁵ As noted in Claimant’s prior submissions, if the Tribunal believes that it is too difficult to determine long-term profits for the entire Project, it may award damages on a basis that recognises PEL’s loss of a chance to make those profits.¹⁶ In the Reply, Claimant submitted a loss of

⁸ See, e.g., **Exhibit C-384**, Letter from Mr Basombrio of Dorsey & Whitney to the Tribunal regarding Parties’ agreement to have additional submissions (R-35), dated 23 February 2022; Procedural Order No. 1, Annex I *nonies*, dated 25 February 2022; Tribunal’s Correspondence A-44, dated 13 May 2022.

⁹ SOC, Section VI; Reply, Section VIII.

¹⁰ See e.g., **CLA-174**, The Factory At Chorzów (Claim for Indemnity) (The Merits) *Germany v. Poland*, Judgment, 13 September 1928; SOD para. 821; Reply para. 1041.

¹¹ **Exhibit C-5A**, English version of the MOI, Clauses 2, 6, and 11.

¹² SOC, paras. 91-94; Reply, paras. 164-241; Rejoinder, paras. 78-160.

¹³ SOC, para. 429; Reply, para. 1047.

¹⁴ Reply, Section VIII.A-B; **CER-5**, Second Versant Expert Report, Sections V and VI.

¹⁵ Reply, paras. 1081-1102.

¹⁶ *Id.* at Section VIII.C and para. 1091.

chance valuation based upon a reduced percentage of the DCF valuation for the entire life cycle of the Project. Based on a conservative estimate of that loss of chance, this amounts to USD 140.4 million *ex post* and USD 70.4 million *ex ante*.¹⁷

- 9 In this Supplemental Quantum Submission, Claimant provides the Tribunal with another alternative method to value the loss of PEL's rights under the MOI, based on the valuation premise of a lost business opportunity considering the rights provided in the MOI. Instead of a DCF or a percentage of a DCF methodology, this alternative submission looks to various data points to value what PEL's MOI rights would have been worth around June 2013, *i.e.*, after the Council of Ministers approved the direct award of the Project concession to PEL on 16 April 2013, but before Mozambique removed all value from those rights by reneging on that commitment and instead awarding the Project concession to ITD on 26 July 2013.
- 10 Claimant suggests that this Tribunal could use two alternative means to value these rights. First, Claimant puts forth a series of data points and estimated ranges of the lump sum amount that PEL would have accepted from Mozambique in exchange for walking away from its MOI rights. This theory assumes that, instead of breaching the MOI by putting the Project out to a public tender, Mozambique would have negotiated a lump sum payment to PEL in exchange for PEL releasing its MOI rights. As discussed in more detail below, looking at several factors of which PEL and Mozambique would have been aware in June 2013, our experts have provided a number of data points that the Parties likely would have considered when negotiating a lump sum payment for PEL to relinquish its valuable MOI rights. These data points cover a range between USD 15.6 million to USD 124.6 million. It will be for this Tribunal to determine which of these data points it finds most compelling, and what a fair, negotiated release fee would have been in June 2013.
- 11 Second, Claimant puts forth an objective, market-based valuation of the compensation to which PEL would have been entitled if PEL had been engaged by Mozambique merely to undertake the engineering work on the Project, and then had its services terminated after the PFS stage. While PEL maintains that its rights under the MOI went far beyond just the engineering aspects of the

¹⁷ Reply para. 1036; CER-5, Second Versant Expert Report, paras. 209-215.

Project and thus should include lost profits from the construction and operational phases, this valuation provides the Tribunal with a methodology to adopt if it finds that PEL's rights were more limited or that future profits from the construction or operational phase are too speculative. As discussed in more detail below, this valuation is between USD 18.7 million and USD 28 million, and represents a bottom floor of the amount to which PEL is entitled under the principle of "*full reparation*" under international law.

* * * * *

- 12 This Supplemental Quantum Submission, together with Exhibits **C-381** to **C-389** and Legal Authorities **CLA-75A** and **CLA-322** to **CLA-347**, is submitted on behalf of PEL.
- 13 The submission is also accompanied by the expert quantum report of Mr David Dearman of Ankura Consulting (Europe) Limited ("**Ankura**") (**CER-8**) ("**Ankura Expert Report**").
- 14 This remainder of the Supplemental Quantum Submission is structured as follows:
 - (1) **Section II** recaps some of the general principles of international law that are particularly relevant for this submission;
 - (2) **Section III** sets out PEL's case on the quantification of its MOI rights based upon a hypothetical negotiation between Mozambique and PEL in June 2013. It first covers the legal basis for this type of valuation, and then sets forth why, on the facts of this case, the Parties likely would have arrived at a lump sum within the range of data points presented;
 - (3) **Section IV** sets out PEL's case on the quantification of its MOI rights based on standard practices in the civil engineering industry and then sets forth why, on the facts of this case, the floor for damages is between USD 18.7 and USD 28 million;
 - (4) **Section V** summarizes the submission and briefly discusses the applicability of interest to these valuations; and
 - (5) **Section VI** contains the relief sought by Claimant.

II. THE TRIBUNAL HAS FLEXIBILITY TO ADOPT ANY SOUND VALUATION METHODOLOGY THAT PROVIDES FULL REPARATION FOR CLAIMANT’S LOST BUSINESS OPPORTUNITY

15 While the legal principles underlying quantum are extensively covered in Claimant’s previous submissions, for ease of reference, Claimant wishes to highlight two of the most relevant principles to this submission.

16 First, the *Chorzów* standard of “*full reparation*” does not limit this Tribunal to any particular valuation theory or methodology. Rather, the Tribunal has a “*large margin of appreciation in order to determine how an amount of money may ‘as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’*”¹⁸ Indeed, “*less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.*”¹⁹

17 Thus, tribunals in the past have not hesitated to adopt new valuation methodologies where they are particularly appropriate to the facts or circumstances of a case, even if they are relatively unused in investment treaty jurisprudence. Indeed, “*the absence of investment treaty jurisprudence – affirmative or negative – does not in itself constitute a valid ground for rejecting a valuation method if the Tribunal is otherwise convinced that it is sound to apply it in the present case.*”²⁰

18 Second, as several authorities have noted “*full reparation*” for a treaty breach requires more than just investment costs as “[p]arties do not enter into contracts involving risks in order to be repaid their costs.”²¹ Indeed, reparation that only consists of the costs of an investment places the claimant in the position it would have been in had the investment never been made. That is not what international law demands. Rather, *Chorzów* requires that the tribunal “*reestablish the situation which would, in all probability, have existed if that*

¹⁸ **CLA-120**, *Murphy v. Ecuador*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, para. 481. See also **CLA-105**, *Crystalex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 886; **CLA-347**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, para. 360.

¹⁹ **RLA-151**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, 28 March 2011, para. 264.

²⁰ **CLA-347**, *Tethyan v. Pakistan*, para. 360.

²¹ **CLA-277**, *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listrik Negara*, Final Award, 4 May 1999, para. 291, See also, e.g., **CLA-299**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award of 18 April 2017 and Decision on Rectification, dated 13 July 2017, para. 200.

act [i.e., the treaty breach] had not been committed.”²² In other words, *Chorzów* requires the Tribunal to consider the value derived from the prospect of future earnings when valuing a lost opportunity.

- 19 Further, this requirement to consider future earnings applies even if future income streams are considered too speculative for an income-based valuation methodology. Indeed, as noted by the *Bilcon* tribunal, the prospects of future earnings are relevant as they inform the value of a claimant’s lost opportunity:

*“No reasonable business person would spend [significant sums] on an opportunity whose value does not exceed that amount by some reasonable margin. As the Gemplus tribunal has noted, even where income-based approaches are inappropriate in view of the uncertainty of future income streams, the prospect of future earnings must not be disregarded entirely. Such prospects inform the value of the opportunity that a claimant has lost.”*²³

- 20 Applying those principles to this case, Claimant urges the Tribunal to embrace flexibility and openness to varying valuation methodologies and to ensure that its chosen valuation methodology and premise are in full comport with *Chorzów*. While valuing lost opportunity is “*particularly difficult*” and “*cannot be a rigorous scientific, mathematical, or forensic exercise*,”²⁴ the Tribunal should not award a damages figure that fails to account for the full benefit of the bargain struck in the MOI. Otherwise “*an incentive would be created which is contrary to contractual morality: obligors would generally find it in their interest to breach contracts which turn out to be valuable to their co-contractant.*”²⁵

III. PEL WOULD LIKELY HAVE ACCEPTED A LUMP SUM IN EXCHANGE FOR WALKING AWAY FROM ITS RIGHTS UNDER THE MOI

- 21 One way in which the Tribunal could value PEL’s lost opportunity to benefit from its contractual rights is to determine the amount to which PEL and Mozambique would have agreed in a hypothetical negotiation around June

²² **CLA-174**, *The Factory at Chorzów (Claim for Indemnity) (The Merits) Germany v. Poland*, Judgment, 13 September 1928, p. 47.

²³ **CLA-322**, *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 288; see also **CLA-323**, *Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, paras. 13-75 (“*the Claimants’ shares in the Concessionaire must be valued by reference (inter alia) to the Concessionaire’s reasonably anticipated loss of future profits*”); see also **CLA-75A**, S. Ripinsky and K Williams, *Damages in International Investment* (BIICL 2008) (excerpt), p. 291: “*A chance of making a profit is an asset with a value of its own, and that compensation for the loss of a chance is an alternative to the award of lost profits proper in cases where the claim has failed to prove the amount of the alleged loss of profit with the required degree of certainty, but where the tribunal was satisfied that the loss in fact occurred*”).

²⁴ **CLA-299**, *Gavazzi*, paras. 223-224.

²⁵ **CLA-277**, *Himpurnia*, para. 291.

2013 where Mozambique provided PEL with a lump sum to cede its rights under the MOI. This appears as the most relevant date because this was after the Council of Ministers approved the direct award of the concession to PEL on 16 April 2013, but before Mozambique reneged on that commitment and instead awarded the concession to ITD on 26 July 2013.

A. *Many National Courts Award Damages for the Infringement of a Right Based Upon a Hypothetical Negotiation Between the Parties for the Use of that Right*

22 Courts that have employed hypothetical negotiating damages have done so under similar legal standards to the *Chorzów* standard. For example, in *Wrotham Park*,²⁶ a property developer built houses on a lot adjacent to the claimant's land in breach of a restrictive covenant. While the new development did not reduce the value of the claimant's property, the court found that the claimant's rights under the covenant had still been breached. Because, similar to the *Chorzów* standard, "[t]he general rule would be to measure damages by reference to that sum which would place the plaintiffs in the same position as if the covenant had not been broken," and it was not feasible to tear down the violating buildings, the court decided that an appropriate measure of damages would be to award "such a sum of money as might reasonably have demanded by the plaintiffs from Parkside as quid pro quo for relaxing the covenant."²⁷

23 Further, awarding damages by reference to the amount a respondent would reasonably have agreed to pay a claimant for the use of a contractual or other right is common in several national legal systems. For example:

- (1) It is routine in intellectual property cases for a respondent who has wrongfully exploited a claimant's intellectual property to pay damages on the basis of a 'reasonable licence fee' or a 'reasonable royalty'.²⁸ The claimant's loss is quantified as the amount which the respondent would have agreed to pay the claimant to use the intellectual property

²⁶ **CLA-324**, *Wrotham Park Estate Co. Ltd v. Parkside Homes Ltd. and Others* [1974] 1 W.L.R. 798.

²⁷ **CLA-324**, *Wrotham Park Estate Co. Ltd v. Parkside Homes Ltd. and Others* [1974] 1 W.L.R. 798, p. 815. Some commentators have described the damages awarded in this case compensation for lost opportunity. See **CLA-325**, Robert J. Sharpe, S.M. Waddams, Damages for lost opportunity to bargain, *Oxford Journal of Legal Studies* 277 (1982), pp. 290-297.

²⁸ See e.g., **CLA-326**, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (excerpt), Article 13(1)(b). In German law, see: **CLA-327**, German Trademark Act, 1 January 1995, Section 14(6) (excerpt); **CLA-328**, German Patent Act, 16 December 1980, Section 139(2) (excerpt). In Spanish law, see: **CLA-329**, Spanish Trademark Act, 14 January 2019, Article 43.2(b) (excerpt); **CLA-330**, Spanish Patent Law, 1 April 2017, Article 74.2 (excerpt). In Romanian law, see: **CLA-331**, Government Emergency Ordinance No. 100/2005, 14 July 2002, Article 14.2(b) (excerpt). In English law see: **CLA-332**, J. Edelman (et al.), *McGregor on Damages* (21st ed., 2020) at para. 14-002 (excerpt); **CLA-333**, *Reformation Publishing v. Cruiseco* [2018] EWHC 2761 (Ch) at para. 45 where Nugee J. said that the award of damages assessed as a 'reasonable licence fee' was "...a standard way to assess damages for infringement of intellectual property rights."

rights had it negotiated with the claimant to use such rights, rather than wrongfully using them without permission.

- (2) Damages based on a hypothetical negotiation to exploit a right are also often awarded for the invasion of rights to tangible or immoveable property.²⁹ As noted by Lord Shaw, in such circumstances “*the law ought to yield a recompense under the category or principle, as I say, either of price or of hire.*”³⁰ For example, “[i]f A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: ‘Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.’”³¹ But, in fact A has suffered a loss — he has been deprived of the opportunity to benefit from the economic value of the use of his horse.³² Damages can therefore be measured as the amount to which A and B would have agreed that B would have paid to ride the horse for the duration and purpose for which he took it.
- (3) In contractual breach cases, the UK Supreme Court has also authorized awarding damages based upon the amount to which the parties would hypothetically have agreed for the defendant to pay the claimant to release it from a contractual obligation. In *Morris-Garner v. One Step (Support) Ltd*³³ the UK Supreme Court provided authoritative guidance about this form of compensatory damages, as summarized by Lord Reed:

“Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was

²⁹ **CLA-334**, *Pell Frischmann Engineering Ltd v. Bow Valley Iran Ltd* [2009] UKPC 45 at para. 48(1) per. Lord Walker.

³⁰ **CLA-335**, *Watson Laidlaw & Co Ltd v. Pott, Cassels and Williamson* 1914 S.C. (H.L.), p. 31.

³¹ *Id.*

³² See **CLA-336**, *Morris-Garner v. One Step (Support) Ltd* [2018] UKSC 20, para. 30.

³³ *Id.* at para. 91. *The use of an imaginary negotiation can give the impression that negotiation damages are fundamentally incompatible with the compensatory purpose of an award of contractual damages. Damages for breach of contract depend on considering the outcome if the contract had been performed, whereas an award based on a hypothetical release fee depends on considering the outcome if the contract had not been performed but had been replaced by a different contract. That impression of fundamental incompatibility is, however, potentially misleading. There are certain circumstances in which the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset. The imaginary negotiation is merely a tool for arriving at that value. The real question is as to the circumstances in which that value constitutes the measure of the claimant's loss. 92. As the foregoing discussion has demonstrated, such circumstances can exist in cases where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement...The claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. The defendant has taken something for nothing, for which the claimant was entitled to require payment.”*

infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment.”³⁴

- (4) Valuing damages based on a hypothetical negotiation is also recognized as a form of compensatory damages in contractual breach cases in Singapore.³⁵

24 Damages based upon a hypothetical negotiation have also been entertained in at least one previous international arbitration against a State. In *Enron v. Nigeria*, the parties had signed a power purchase agreement that would have permitted the claimant to build and operate electricity generation facilities. The claimant alleged Nigeria and other defendants had breached the agreement and prevented it from developing the project. Claimant sought damages on several alternative bases including “*damages quantified according to the amount the [Respondents] would hypothetically have been willing to pay to be released from their obligations under the [contract at issue].*”³⁶ The tribunal ultimately determined that a “*loss of chance analysis*” was appropriate for the case at hand, but determined that, on the facts of the case before it, a purchase offer provided a more “*stable figure from which to work*” in calculating the loss of chance.³⁷ Importantly for present purposes, the tribunal did not reject the general applicability of damages based upon a hypothetical negotiation as a measure of reparation, and indeed opined that, had it chosen that option, it probably would have arrived at a similar figure.³⁸

25 English courts have used a hypothetical negotiation to value damages in a case that has several parallels to this one. In *Mahmood v. The Big Bus Company*³⁹ the claimant had approached the defendant, a double-decker tour bus company in London, about operating a similar sightseeing bus company in Dubai. After a series of meetings where the business plan was discussed, the parties signed a contract entitled “*Heads of Terms*” that contemplated a further joint venture agreement between the parties and in the meantime, *inter alia*, required the

³⁴ **CLA-336**, *Morris-Garner v. One Step (Support) Ltd* [2018] UKSC 20, para. 95(10); *see also* paras. 91-92 (noting that these damages are compensatory in nature).

³⁵ **CLA-337**, *Turf Club Auto Emporium PTE Ltd v. Yeo Boong Hua* [2018] SGCA 44, para. 271.

³⁶ **CLA-338**, *Enron Nigeria Power Holding Ltd v. (1) Lagos State Government (2) Federal Republic of Nigeria (3) Power Holding Company of Nigeria*, ICC Case No. 14417/EBS/VRO/AGF, Final Award, 19 November 2012, para. 47.iii.

³⁷ *Id.* at paras. 116, 128.

³⁸ *Id.* at para. 128.

³⁹ **CLA-339**, *Mahmood v. The Big Bus Company*, [2021] EWHC 3395 (QB).

London-based company to keep written information shared with the defendant confidential, and not to ‘circumvent’ the claimant before the formal joint venture was concluded. Ultimately, the London-based company breached its obligations by terminating its lease and license agreements with the Dubai-based company and creating a rival company in Dubai. The result was that the claimant was cut out of the Dubai tour bus business.⁴⁰

- 26 Due to the nature of the breaches and the loss in question, the English High Court awarded negotiating damages as an appropriate way to value the Claimant’s lost opportunity. The Heads of Terms had protected:

“the Claimant’s idea for a Dubai-based tourist bus business and his initial contacts and information; it provided that protection by effectively affording the Claimant a right of veto over the Defendant entering into a tourist bus business in Dubai without his involvement. That was the valuable asset lost by the Defendant’s breach of clause 7 and its value is capable of being measured by identifying a hypothetical release fee payable by the Defendant to release the anti-circumvention or veto right.”⁴¹

- 27 One element that runs through these cases is an underlying sense that fairness and justice require some form of compensation for the claimant, even when more commonly-used valuation methodologies show no or incommensurable financial loss was suffered. For example, in *Wrotham Park*, the claimant could not point to a specific diminution in the value of its property caused by the new buildings,⁴² and in Mr Mahmood’s case, the veto right was clearly an important part of Mr Mahmood’s bargain but the business was in its early stages.⁴³ Thus, these compensatory damages based upon a hypothetical negotiation step in and fill the gap when the claimant has lost “*a valuable asset created or protected by the right which was infringed*” but there are no or limited “*pecuniary losses which are measurable in the ordinary way.*”⁴⁴

- 28 Against that background, if the Tribunal concludes that the appropriate way for Mozambique to make “*full reparation*” for its breaches is to compensate PEL for the value of its contractual rights that have been rendered worthless by Mozambique’s breaches, then the *Chorzów* standard would be satisfied by

⁴⁰ **CLA-339**, *Mahmood v. The Big Bus Company*, [2021] EWHC 3395 (QB), para. 141.

⁴¹ *Id.* at para. 153; see also para. 150 (noting that “...negotiating damages are not to be seen as some separate head of loss or remedy but merely as a tool for arriving at the value of the claimant’s loss in particular, applicable circumstances”).

⁴² **CLA-324**, *Wrotham Park Estate Co. Ltd v. Parkside Homes Ltd. and Others* [1974] 1 W.L.R. 798.

⁴³ **CLA-339**, *Mahmood v. The Big Bus Company*, [2021] EWHC 3395 (QB).

⁴⁴ *Id.* at paras. 151, 153 (quoting **CLA-336**, *Morris-Garner* paras. 92-93).

valuing that loss on a basis of a hypothetical negotiation between Mozambique and PEL in or around June 2013.

- (1) First, as noted by the court in *Wrotham Park*, the legal standard underlying this manner of valuing damages is similar to that in *Chorzów* — a desire to place the claimant in the position it would have been in absent the breach. Indeed, in at least one arbitration against a State, this methodology for calculating damages was considered, and was not found inapplicable or inappropriate.
- (2) Second, as the Singapore Court of Appeal and the UK Supreme Court have recognised, these types of damages are compensatory in nature, and are just another way to measure the loss to the claimant of a valuable asset.⁴⁵ They are not a claim for some unusual head of loss or remedy – they are just a means to measure the value of contractual rights. Since they are simply a form of compensatory damages aimed at valuing and replacing with monetary damages contractual rights which have been lost, they are entirely consistent with, and fall squarely within, the *Chorzów* standard.
- (3) Third, it would be appropriate in this case for the Tribunal to award damages on this basis. Here, Mozambique’s breaches have rendered PEL’s contractual rights under Clauses 2, 6, and 11 of the MOI valueless, which has in turn caused the loss of valuable assets belonging to PEL protected by those rights. These clauses of the MOI protected PEL’s idea for the Project, which it had brought to Mozambique; its technical know-how, ideas and information which it had also presented to Mozambique; and all of its work in commissioning the Preliminary Study and preparing the PFS. Just as Mr Mahmood came to Big Bus with a valuable idea and know-how which the Heads of Terms protected by giving him a veto right, so too PEL came to Mozambique with a valuable idea, know-how, confidential information, and ultimately two well-researched and prepared studies detailing the Project, which were protected by the rights in Clauses 2, 6, and 11 of the MOI. In both cases, hypothetical negotiated damages are an

⁴⁵ **CLA-337**, *Turf Club Auto Emporium PTE Ltd v. Yeo Boong Hua* [2018] SGCA 44; para. 271; **CLA-336**, *Morris-Garner v. One Step (Support) Ltd* [2018] UKSC 20, paras. 91-92.

appropriate way to value the assets which have been lost as a result of the respondent's breaches of their obligations.

B. The Hypothetical Negotiation Is Presumed to Be Ex Ante, Party-Specific, and Around the Time of the Date of Breach

29 English law provides a fairly substantial body of guidance on how the Tribunal should go about determining the specific lump sum amount upon which the Parties would have agreed.⁴⁶ The relevant principles are:

- (1) First, damages are to be assessed liberally, with the object to compensate the claimant and not to punish the respondent. Where damages are difficult to assess with precision, the tribunal should make the best estimate it can, having regard to all the circumstances of the case and dealing with the matter broadly, with common sense and fairness. In some cases, not much in the way of accuracy is to be expected bearing in mind all the uncertainties of quantification.⁴⁷ This principle is, of course, one well known to international investment tribunals as, “[i]t is well settled that the fact that damages cannot be settled with certainty is no reason not to award damages when a loss has been incurred.”⁴⁸
- (2) Second, the tribunal should assume that each party would have made reasonable use of their bargaining position, the information available to the parties, and the commercial context. This is based upon the parties' specific circumstances rather than a hypothetical claimant or hypothetical respondent. However, certain party-specific information is not material. In particular, the parties' financial circumstances are not material — an impoverished respondent cannot avoid an assessment of a significant sum on the basis that it would not be able to afford the payment. Further, any character traits, such as whether a party is easy going or aggressive, are disregarded. Also, the fact that one or both parties would not in practice have agreed to make a deal is irrelevant.

⁴⁶ See e.g.: **CLA-340**, *Force India Formula One Team v. Malaysia Racing* [2012] EWHC 616 (Ch), para. 386; **CLA-341**, *32 Red v. WHG (International)* [2013] EWHC 815; **CLA-342**, *Henderson v. All Around the World Recordings* [2014] EWHC 3087 (IPEC); **CLA-333**, *Reformation Publishing v. Cruiseco* [2018] EWHC 2761 (Ch); **CLA-343**, *The Kennel Club Limited v. Micro-ID Limited* [2019] EWHC 1639 (IPEC); **CLA-344**, *Original Beauty Technology Company Ltd v. G4K Fashion Limited* [2021] EWHC 3439 (Ch).

⁴⁷ **CLA-344**, *Original Beauty Technology Company Ltd v. G4K Fashion Limited*, [2021] EWHC 3439 (Ch), para. 86.

⁴⁸ **CLA-345**, *Southern Pacific Properties v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, para. 215; **CLA-105**, *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 871; **CLA-299**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award of 18 April 2017 and Decision on Rectification, dated 13 July 2017, para. 218; **CLA-346**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019, para. 844.

For the purposes of quantifying ‘hypothetical release’ damages an agreement is, necessarily, assumed.

- (3) Finally, as a general rule, the assessment is to be made as at the date of the breach. However, the tribunal may, where there are good reasons, direct a departure from the norm, either by selecting a different valuation date or by directing that a specific post-valuation-date event be taken into account. For example, where there has been nothing like an actual negotiation between the parties, it is reasonable for the tribunal to look at the eventual outcome and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain.

C. PEL and Mozambique Would Have Considered Work Performed, Projected Fees and Profits, and the Value of the PFS to Mozambique in Their Hypothetical Negotiation

- 30 David Dearman of Ankura has noted that in order to give up its valuable MOI rights, PEL would at the very least have wanted to be compensated for the value of the work it had done including the value of the intellectual property underpinning PEL’s ideas, concept, and vision, as well as a percentage of the future income it expected to receive.⁴⁹ Indeed, it would be entirely illogical in any hypothetical negotiation for PEL to have accepted less than that, not least because there is no reason to suppose that PEL would have been willing to give up its rights without some benefit to its bargain.
- 31 Further, from Respondent’s perspective, it would have derived value from the content of the PFS. The PFS revitalized a project that Mozambique had written off as unfeasible and further provided a detailed enough scope and cost estimate that Mozambique had the necessary information to run a public tender for the Project. Further, being released from its obligations under the MOI was also valuable to Mozambique, as a release would have legally permitted Mozambique to pursue and finalize its public tender of the Project.⁵⁰
- 32 To this end, Ankura has provided a number of data points, described below, that would have been used by PEL and Mozambique as part of a hypothetical

⁴⁹ CER-8, Ankura Expert Report, Sections 3.1, 3.2 and 4.1.
⁵⁰ *Id.* at Section 3.3.

negotiation wherein PEL agreed to release its rights under the MOI in exchange for a lump sum payment.

(1) Engineering Consultant Fees

33 As discussed in more detail below,⁵¹ had PEL proceeded with the Project, at the very least, it would have expected to earn what an engineering consultant with design responsibility for the Project would have made. As described below, to give up that potential income, at the stage which the Project had reached at the date of breach, an engineering firm would generally expect to be paid the value of the work performed as well as a cancellation fee representing a percentage of future income.⁵² Given the Project budget here, that amounts to compensation of between USD 18.7 million and USD 28 million.⁵³ As discussed below, this metric on its own underestimates the value of PEL's rights under the MOI because it does not include PEL's expected profits from the subsequent construction and operation phases of the Project.⁵⁴ Thus, it represents an absolute minimum of the hypothetical release amount. PEL, which in any hypothetical negotiation would be giving up far more valuable rights (as PEL stood to gain not merely the fees of an engineering consultant from the Project, but the profits of a builder, owner, and operator), would not have given up its MOI rights for anything less than that amount.

(2) PEL's Settlement Offers

34 Second, on three occasions, PEL indicated its willingness to accept remuneration for its costs of the PFS in addition to a royalty fee based on a percentage of future profits. On 20 December 2013 and 18 February 2014, PEL requested "*compensation/damages of the amount of USD \$ 4,000,000 ... plus all other related costs as incurred by PEL including Royalties for identification of the project in 0.5% of investment.*"⁵⁵ This would amount at least to USD 19.575 million (excluding interest).⁵⁶ Later, on 18 August 2014, PEL requested "*compensation in the amount of US\$ 10,000,000.00 ... as damages plus all other costs incurred by PEL, including royalties for the identification of the*

⁵¹ See Section IV below.

⁵² *Id.*

⁵³ **CER-8**, Ankura Expert Report, Section 5.3.

⁵⁴ See Section IV below.

⁵⁵ **Exhibit C-219**, Letter from Kishan Daga of PEL to Gabriel Muthisse of the MTC regarding Macuse Rail and Port Project, dated 20 December 2013; **Exhibit C-46**, Letter from Sal & Caldeira Advogados LDA on behalf of PEL to the MTC regarding rejecting of PEL's claims for compensation, dated 18 February 2014.

⁵⁶ **CER-8**, Ankura Expert Report, para. 3.4.2(a).

project.”⁵⁷ While Mr Dearman notes the royalty in this latter offer is not specified, it is higher than the earlier offer of 19.575 million.⁵⁸

(3) Contractor Fees

35 The third data point is PEL’s estimated profit on the construction portion of the Project. Looking at PEL’s consolidated annual reports from 31 March 2009 to 31 March 2015, Mr Dearman has calculated three different five-year pre-profit tax margins for the consolidated PEL group, ranging from 6.15% to 2.78%.⁵⁹ The profit margins from 2009-2013 were definitely known to PEL by June 2013, and it is highly likely that PEL also had visibility over its profit margin for 2014 by that date, and may have had a sense of its 2015 margin.⁶⁰ Applying those profit margins to the Project budget, we see a range of expected profits from USD 86.6 million to USD 191.6 million.⁶¹ Applying two different factual scenarios for PEL’s projected share of the Project (47.22% or 75%), Mr Dearman calculates that as of June 2013, PEL would have expected profits in the range of **USD 40.9 million** to **USD 143.7 million**.⁶² Again, PEL intended to do much more than construct the Project; it also intended to earn significant future profits from the operational phase. However, PEL’s expected profits from constructing the Project provide another helpful data point that PEL and Mozambique would have used to negotiate a lump sum payment around June 2013.

(4) The PFS Provided Significant Value to Mozambique

36 Fourth, as PEL explained in the Reply, Mozambique used PEL’s concept, the PFS, and the know-how developed by PEL to organise and run a public tender.⁶³

- a) The details of Mozambique’s description of the public tender match PEL’s proposals related to the Project. The press article dated 22 November 2012 announcing the public tender mentioned Mozambique’s launch of a public tender “*to build a 525 kilometre railroad from Tete province to Macuse, in Zambézia province, and a*

⁵⁷ **Exhibit R-57**, Letter from Kishan Daga of PEL to Mr Gabriel Muthisse of the MTC, dated 18 August 2014.

⁵⁸ **CER-8**, Ankura Expert Report, para. 3.4.2(b).

⁵⁹ *Id.* at para. 4.2.2.

⁶⁰ *Id.* at para. 4.2.1.

⁶¹ *Id.* at para. 4.2.5.

⁶² *Id.* at paras. 4.2.6-4.2.7 and Table 2 at p. 20.

⁶³ Reply, paras. 380-392.

port with capacity to handle 20 million tons of coal per year.”⁶⁴ The article described PEL’s Project, as PEL initially considered having a 525-kilometre railroad from the Tete province to Macuse port, the precise figure of 516 kilometres was included in the PFS.⁶⁵

- b) The MTC’s Tender Notice inviting the expression of interest was based on PEL’s PFS. It set out that “[t]he Government of the Republic of Mozambique intends, through the Ministry of Transport and Communications intends [sic] to promote the construction of a railway line of about 516km from the Moatize Macuzi, and the construction of a port terminal in Macuzi...”⁶⁶ The PFS concerned the “development of 25 million ton per year handling capacity Port at Macuze and approximately 516Km standard gauge Rail Corridor from Macuse to Moatize”.⁶⁷ It would have been impossible to calculate an exact distance of 516 kilometres without conducting the detailed route study, and then appropriating PEL’s work product for purposes of the tender.⁶⁸
- c) Correspondence from the MTC to the bidders also confirms that Mozambique appropriated PEL’s PFS to run the public tender. On 3 May 2013, the MTC sent a letter to the bidders notifying them that certain documents were available for consultation.⁶⁹ MTC’s letter referred to the documents contained in the PFS.⁷⁰

37 By using the PFS for its tender, Mozambique was able to reap several benefits for which it has yet to compensate PEL:

- a) Mozambican law requires both a PFS and feasibility study to be completed prior to the launch of a tender.⁷¹ The studies can either be prepared by the public agency or by a private party (in the context of an unsolicited proposal). The tender documents are then prepared based on the information contained in the feasibility study. Thus, without PEL’s work product, there would have been no tender.

⁶⁴ **Exhibit C-235**, Article “Mozambique Launches US\$2 billion international tender for railroad project”, Macauhub Rail-port News, dated 22 November 2012.

⁶⁵ **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 160

⁶⁶ **Exhibit C-236**, MTC’s Notice inviting to submit the expression of interest, dated 30 January 2013.

⁶⁷ **Exhibit C-6b**, Prefeasibility Study, dated 2 May 2012.

⁶⁸ **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 162.

⁶⁹ **Exhibit C-61**, Letter from MTC to tender participants, dated 3 May 2013.

⁷⁰ **CWS-3**, Second Witness Statement of Mr Kishan Daga, para. 165.

⁷¹ **CLA-64**, Decree No. 16/2012, dated 4 June 2012, Articles 9, 10, and 11. See also **CER-6**, Second Legal Opinion of Professor Rui Medeiros, paras. 13.1, 13.3, and 55.3.3.

b) Further, the PFS permitted Mozambique to gain the many benefits of a public tender identified by Mozambique’s PPP expert, Mr Ehrhardt, including:

- a. driving value for money, as competitive bidding decreases the price of services the bidders are offering;⁷²
- b. providing Mozambique with a range of options from which to choose, including from several experienced entities;⁷³
- c. arriving at clarity, predictability, and transparency on the concession award;⁷⁴ and
- d. preserving an appearance of impartiality by opening a project to public tender.⁷⁵

38 In any hypothetical negotiation, PEL would unquestionably have wanted to be compensated for the value which its work provided to Mozambique.⁷⁶ As Mr Dearman explains in the Ankura Expert Report, by providing better definitions and more reliable cost estimates upon which Mozambique could base its tender for the Project, PEL “*de-risked*” the Project for Mozambique.⁷⁷ This level of de-risking is a proxy for the amount to which Mozambique benefitted from PEL’s contribution to the Project.⁷⁸

39 One way in which to quantify the “*de-risking*” is with reference to the Association for the Advancement of Cost Engineering guidelines (“**AACE Guidelines**”).⁷⁹ These guidelines attribute a level of accuracy of a project’s estimated cost based upon the evolution of the project’s definition and scope. The more mature and defined the project, the more accurate the cost estimate is likely to be.⁸⁰

40 As explained by Mr Comer, thanks to PEL’s work on the PFS, the Project was moved from the bottom of Class 5 — with 0% of a project maturity level — to the upper end of Class 5 or lower end of Class 4 — with a project maturity level between 1% and 15%.⁸¹ As an indirect shareholder in the Project, Mozambique benefitted from this Project advancement to the tune of between

⁷² **RER-11**, Expert Report of David Ehrhardt, para. 42.

⁷³ *Id.* at para. 304.

⁷⁴ *Id.* at para. 247.

⁷⁵ *Id.* at para. 44.

⁷⁶ **CER-8**, Ankura Expert Report, Section 3.3.

⁷⁷ *Id.* at Sections 3.3 and 4.3.

⁷⁸ *Id.* at para. 4.3.13.

⁷⁹ **CER-8**, Ankura Expert Report, paras. 4.3.2-4.3.8.

⁸⁰ **CER-8**, Appendix C, Expert Input of Andrew Comer, para. 3.2.3; **CER-8**, Ankura Expert Report, para. 4.3.3.

⁸¹ **CER-8**, Appendix C, Expert Input of Andrew Comer, paras. 3.4.9 and 3.4.10.

USD 311.5 million and USD 498.4 million.⁸² Ankura concludes that the Parties likely would have sought to include a portion of the “*de-risked value*” in hypothetical negotiation damages, although Ankura believes that it would not have been more than 50% of the de-risked value.⁸³ It is the Tribunal’s task to consider what percentage of the de-risked value the Parties would have agreed in their negotiations. Mr Dearman has provided a range of data points showing that between 5-25% of the de-risked value amounts to compensation from USD 15.6 million⁸⁴ to USD 124.6 million.⁸⁵

(5) The PFS provided significant value to Mozambique

41 In conclusion, looking at all of these data points provides the Tribunal with several points of reference it can use to estimate the amount which PEL would have accepted from Mozambique in exchange for its rights under the MOI. These data points reflect the various elements the Parties would have considered at the negotiating table around June 2013: (1) the value of the compensation due to PEL for the PFS plus PEL’s future planned engineering design work; (2) the additional value contributed by PEL having conceived of the Project idea; (3) the ‘know how’ and Project advancements the PFS provided to Respondent; (4) the value inherent in the rights granted to PEL in the MOI (*e.g.*, the right of first refusal, the right to a direct award of the concession, and confidentiality and exclusivity rights); and (5) the potential profit margin which PEL would have earned over the construction phase of the Project. The range of these relative values are helpfully summarized in the Ankura Expert Report.⁸⁶

Table 7 – My calculated range of value of the Release Damages

Claim Value	Value of the Release Damages	
	Low	High
De-Risked Value (assuming between 5% and 25% of de-risked value)	USD 15.6 million	USD 124.6 million
Fee based on PEL’s profits foregone	USD 40.9 million	USD 143.7 million
Early Termination Fee (Inception Stage Fee plus Cancellation Fee)	USD 18.7 million	USD 28.0 million
PEL’s offers to Mozambique	USD 19.575 million	USD 10.0 million plus royalty

⁸² CER-8, Ankura Expert Report, para. 4.3.14.

⁸³ *Id.*

⁸⁴ USD 15.6 million is one of the data points representing the “*de-risked*” value. However, as discussed above and below, in hypothetical negotiations PEL would have been unlikely to accept any amount less than USD 18.7 million. *See* para. 33 above and Section IV below.

⁸⁵ CER-8, Ankura Expert Report, para. 4.3.15.

⁸⁶ CER-8, Ankura Expert Report, Table 7 at p. 31.

IV. AN OBJECTIVE, MARKET-BASED VALUATION OF CLAIMANT'S RIGHTS TO DESIGN THE PROJECT IS BETWEEN USD 18.7 AND 28 MILLION

42 Another way in which this Tribunal could assess PEL's rights in the MOI as of June 2013 is to value PEL's lost opportunity to continue with the Project by looking objectively at the engineering consultancy market, rather than at the unique aspects of the agreement between PEL and Mozambique wherein PEL undertook the PFS at its own cost and risk in exchange for the right of first refusal to implement the entire Project through the direct award of a concession. In other words, the Tribunal could value PEL's lost opportunity to proceed with the Project by looking at what an engineering firm would have expected to receive had Mozambique directly engaged the firm for the Project as envisioned, but then terminated its services after the PFS stage was completed.

43 Claimant views this valuation as falling short of "*full reparation*" given that PEL had the reasonable expectation of profits from the construction and operational phases of the Project, not just design work. However, if the Tribunal feels that PEL's rights were uncertain, or that PEL's future work on the Project would have been more limited even absent Respondent's breaches, this objective market data provides the Tribunal with a helpful benchmark that does not include lost profits from the construction or operational aspects of the Project.

44 As Claimant's civil engineering expert, Andrew Comer, explains in his report, a common method for determining engineering fees after the initial "*planning phase*" is to calculate them as a percentage of the overall Project budget.⁸⁷ There are, of course, other methods for calculating fees that are dependent on numerous factors, such as how defined the project scope is at the time the firm is engaged, whether the firm is engaged for an entire project or only a discrete phase, and client preferences for fixed fees.⁸⁸ However, according to Mr Comer, when the engineering firm has plans to undertake additional work on the project beyond the design phase, such as construction work, operational work, or maintenance, the parties "*attach greater importance to working relationships.*"⁸⁹ In that case it is "*especially likely*" for compensation for all

⁸⁷ CER-8, Appendix C, Expert Input of Andrew Comer, paras. 2.4.1-2.4.2.; See also CER-8, Ankura Expert Report, paras. 5.2.10-5.2.13.

⁸⁸ See generally CER-8, Appendix C, Expert Input of Andrew Comer, paras. 2.2-2.4.

⁸⁹ Id. at para. 2.4.2.

engineering work starting from the inception phase to be based upon a percentage of the project's total cost.⁹⁰

45 As Mr Comer explains, PEL had the “*expectations of long-term benefits (in constructing and operating the Project) rather than simply promoting an initial set of engineering studies.*”⁹¹ Thus, for PEL, and other firms in similar positions “*it would be an accepted industry practice for a client and an engineering firm to agree that all engineering work from the inception phase would be remunerated on the basis of an agreed percentage of the overall project cost.*”⁹²

46 In Mr Comer's experience, “*civil and structural engineering, transport and environmental consultancy fees for a large-scale project like that contemplated here*” generally amount to between 4% and 7% “*of the overall project budget.*”⁹³ Within that range, multiple factors can either raise or lower the percentage applied. For example: (1) due to economies of scale, the larger the project budget, the lower the overall percentage applied; (2) the more complex the type of engineering work required due to project conditions, the higher the percentage used; (3) the more types of engineering consulting inputs required (*e.g.*, environmental assessments, transport planning, sustainability assessments, etc), the higher the percentage fee a firm will charge; (4) the risk profile of the investment area and project risks will increase the percentage; (5) finally, the percentage fee used will generally be higher if there are less firms competing for the work than if several firms are being considered.⁹⁴ To this end, there are guidelines published to help determine the appropriate percentage fee to charge.⁹⁵

47 While Mr Comer was unable to locate guidance documents specifically for Mozambique, he has helpfully provided the official 2013 Guideline of Services and Processes for Estimating Fees for Registered Engineering Professionals in neighbouring South Africa (“**2013 RSA Guidelines**”).⁹⁶ These guidelines provide assistance in calculating the fee percentage that applies to a project of this size, and given their application in a similar market, could be helpful for

⁹⁰ CER-8, Appendix C, Expert Input of Andrew Comer, para. 2.4.2.

⁹¹ *Id.* at para. 2.4.4.

⁹² *Id.* at para. 2.4.5.

⁹³ *Id.* at para. 2.5.3.

⁹⁴ *Id.* at paras. 2.5.3.1-2.5.3.4.

⁹⁵ *Id.* at para. 2.5.4.

⁹⁶ **Exhibit C-382**, Engineering Council of South Africa, Guideline Professional Fees, Government Gazette No. 36529, 3 June 2013.

this Tribunal in quantifying the expected engineering fees for the Project. Further, the 2013 RSA Guidelines provide guidance on how engineering costs are generally spread out across the phases of a project (which corroborates Mr Comer's estimate) and provide guidance on how to compensate an engineering firm whose services are terminated before its scope of work has been completed.⁹⁷

48 Applying Mr Comer's expertise as well as the 2013 RSA Guidelines that were in effect in June 2013 to the Project, the following numbers emerge:

- (1) Based on the Project's projected cost of USD 3.115 billion, the 2013 RSA Guidelines state the civil engineering fees should be compensated at a rate of at least 4% of the overall budget.⁹⁸ Mr Comer explains that, given the risks specific to the Project and the additional services PEL would need to provide, he could see that fee going as high as 6%.⁹⁹ This means that a civil engineering firm would have expected to receive at least USD 124.6 million in fees for the Project and potentially up to USD 186.9 million.¹⁰⁰
- (2) As Mr Comer has explained, while PEL did not complete all of the design engineering work required to bring the Project to fruition, PEL's work on the PFS was largely within the "*inception*" phase of the 2013 RSA Guidelines and also included work across two other phases.¹⁰¹ All together PEL's engineering work in the PFS constitutes around 5% of the engineering costs included in the Project budget.¹⁰² Thus, a civil engineering consultancy firm undertaking the entire Project on a percentage basis would have expected to receive between USD 6.2 million and USD 9.3 million of the total fee for the same amount of work done by PEL as of June 2013.¹⁰³
- (3) Further, under the 2013 RSA Guidelines, if the engineering firm's services are terminated prior to completion of all the work for which it was engaged, the firm can expect to be compensated for "*services*

⁹⁷ **Exhibit C-382**, 2013 RSA Guidelines, Clauses 4.3.6 and 4.3.7.

⁹⁸ See **Exhibit C-382**, 2013 RSA Guidelines, Figure 4-1 at p. 34 (showing a minimum fee of 4%).

⁹⁹ **CER-8**, Appendix C, Expert Input of Andrew Comer, para. 2.6.5.

¹⁰⁰ **CER-8**, Ankura Expert Report, para. 5.3.1.

¹⁰¹ **CER-8**, Appendix C, Expert Input of Andrew Comer, para. 2.6.7.

¹⁰² **CER-8**, Appendix C, Expert Input of Andrew Comer, para. 2.6.7. The 2013 RSA Guidelines provide a cost breakdown for all fees after the "*planning*" phase, they fail to include the percentage normally taken up by the "*planning phase*" (see **Exhibit C-382**, 2013 RSA Guidelines, Clause 4.3.6 (which starts at the "*inception*" phase); Clause 4.2 (saying time based fees are recommended for the planning phase).

¹⁰³ **CER-8**, Ankura Expert Report, para. 5.3.2.

*performed, plus a surcharge of one tenth of the full fee which would have been payable to the consulting engineer had his services been completed in terms of his engagement.”*¹⁰⁴ Using the Project budget, and Mr Comer’s estimated 4-6% percentage fee range, an engineering firm that had signed on to undertake the entire Project, but had its services terminated after the PFS, would have expected to be compensated between USD 6.2 million and USD 9.3 million for its work to date, plus at least an additional USD 12.5 to USD 18.7 million cancellation fee, for a total of **USD 18.7 million to USD 28 million.**¹⁰⁵

49 Once again, this market-based valuation represents an absolute minimum value for PEL’s MOI rights, and does not fully match the *full reparation* standard under *Chorzów*. The MOI entitled PEL to much more than the engineering fees for the Project, and this figure fails to incorporate at all any expected profits from the construction and operational phases of the Project.

V. CONCLUSION

50 Fairness and the *Chorzów* standard require that PEL receive “*full reparation*”, or in other words, an amount that places PEL in the circumstances it would have been in had Mozambique not breached the Treaty. Here, PEL’s investment included valuable rights, set forth in the MOI, including a right of first refusal, rights to design, construct, and operate the Project pursuant to a concession directly awarded to PEL, and exclusivity and confidentiality rights. As discussed above, and especially in these circumstances “*full reparation*” must reflect the full benefit of the bargain struck between PEL and Mozambique, whether that is under a DCF methodology, a loss of chance to pursue the entire Project, or the range of values approximating lost business opportunity set forth in this submission.

51 Further, if the Tribunal decides to award damages on the basis of a hypothetical negotiation or other basis for a lump sum pay out in June 2013, “*full reparation*” mandates that Claimant be awarded pre-award interest running “*from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.*”¹⁰⁶ Claimant’s quantum expert Secretariat

¹⁰⁴ **Exhibit C-382**, 2013 RSA Guidelines, Clause 4.3.7; **CER-8**, Appendix C, Expert Input of Andrew Comer, para. 2.6.8.
¹⁰⁵ **CER-8**, Ankura Expert Report, para. 5.3.3.

¹⁰⁶ **CLA-177**, ILC, “*Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*”, in Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 36, Comment 21; Article 38; *See also* SOC, paras. 480-481.

(formerly Versant) has already provided evidence to the Tribunal that an interest rate of US Prime plus 2% is a reasonable commercial rate.¹⁰⁷ Claimant has not calculated the interest due on each data point in this submission given the large number of data points and the fact that the ultimate amount to be awarded will be based upon the Tribunal's factual findings. However, Claimant's experts are available to assist the Tribunal in calculating the interest owed for any particular damages amount if the Tribunal determines that such assistance is needed.

52 In conclusion, Claimant invites the Tribunal to think carefully about how best to compensate PEL for its loss. PEL's primary case is still lost profits under a DCF methodology. However, the legal and factual points in this submission, provide the Tribunal with additional guidance it can use to determine the amount that will put PEL in the position it would have been in had Mozambique honoured its treaty obligations. Justice and *Chorzów* require that PEL be compensated for the loss of its opportunity to pursue the rights guaranteed in the MOI. Further, PEL's compensation should reflect the substantial value of PEL's contributions to a Project that will soon provide Respondent with millions via concession premiums, income taxes, and its 20% ownership interest in the largest infrastructure project in Mozambican history.

¹⁰⁷ Reply, para. 1080; CER-5, Second Versant Expert Report, para. 215.

VI. PRAYER FOR RELIEF

53 For the reasons set out above (and in the SOC and the Reply), Claimant respectfully requests that the Tribunal:

- (a) **ORDER** that Respondent pay compensation to Claimant in a sum that recognises PEL's loss of its valuable rights in the MOI, and restores PEL to the position it would have been in, had Mozambique honoured its Treaty obligations;
- (b) **ORDER** that Respondent pay all the costs incurred by Claimant in connection with this Arbitration proceeding, including the costs of the arbitrators' fees 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);
- (c) **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 and/or legal costs awarded to Claimant; and
- (d) **ORDER** such further relief as the Tribunal considers appropriate.

Respectfully submitted on 30 May 2022 by

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