

**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 LTD.,**

**Claimant,**

**-and-**

**REPUBLIC OF MOZAMBIQUE,**

**Respondent,**

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**RESPONDENT REPUBLIC OF MOZAMBIQUE'S RESPONSE TO CLAIMANT'S  
ADDITIONAL SUBMISSION ON QUANTUM**

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**26 August 2022**

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## I. INTRODUCTION

1. Respondent Republic of Mozambique (“Mozambique”) submits its Response to Claimant Patel Engineering Ltd.’s (“Claimant” or “PEL”) Additional Quantum Submission (“Add’l Quantum Subm.”).
2. Claimant’s original version of its damages – and this case – alleged that Claimant is entitled to a concession based upon the MOI (it is not), and that such a concession would have been expected to generate profits, leading to value Claimant would have received, but for Mozambique’s alleged breaches.
3. When Mozambique demonstrated the substantial flaws in Claimant’s damages claims – leading to a conclusion that Claimant has not been harmed at all by failing to receive a project that never happened under any version of events – Claimant attempted to modify its theory. Claimant advanced an additional three theories, all still based, in substance, on the notion that its alleged concession was “a virtual certainty,” and that lost profits, or the lost opportunity to earn profits, yielded a damages claim.
4. Now, when Mozambique has further demonstrated the fundamental flaws in four damages theories, Claimant has hired a new expert to advance damage theories five (and/or six). These damages theories are –if it is possible – even more flawed than previous theories, and they do nothing to correct previous flaws. If anything, these new theories only further highlight the fundamental problems – not just with Claimant’s damages – but with Claimant’s case.
5. Claimant’s new damages theories have done nothing to fix the fundamental flaws in its previous theories, and its case, including:
  - a. The MOI did not (and could not) provide PEL enforceable concession rights.
  - b. The alleged pre-concession rights to a coal-export project concept Claimant’s allege here have not been financed in the decade since the MOI and *lack any positive market value*.
  - c. PEL fraudulently claimed that the alleged “Project” was financially viable, when it is not, and was not.

- d. The subject “Project” has never been built, and *is not being built* because *it is not economically feasible*.
6. Instead, Claimant attempts to side-step these inconvenient but very fatal facts by attempting to apply a “release fee” or “negotiating damages” theory. Such a theory (really more of a non-useful tool in this instance) is not applicable, but even if it were, the non-viability of PEL’s proposal, the fact that even the winning bidder’s project has not been built, the lack of permissible, cognizable rights to the direct award of a concession are, among several other factors, still fatal to PEL’s claims.
7. Even ignoring all of the above, PEL’s new damages theory is strung together by taking entirely incorrect engineering opinions, layering on them complete abuses of those opinions by a financial “expert,” and, even then, rounding out the damages analysis by unsupported, sheer speculation as to what a hypothetical, imagined negotiation between PEL and Mozambique might have looked like.

## **II. PEL’S NEW DAMAGES THEORY DOES NOT AVOID THE IMMUTABLE PROBLEMS WITH PEL’S CLAIM FOR DAMAGES**

### **A. The Absurdly Wide Range of PEL’s Various Damages Claims Demonstrates the Sheer Speculation of PEL’s Damages**

8. As the Tribunal will recall, as recently as its 9 August 2021 Reply on the Merits, PEL claimed a wide array of possible damages, including:
  - a. \$156 million based upon an *ex post* DCF analysis; *see* ROM ¶ 1033.
  - b. \$49.3 million based upon an *ex ante* DCF analysis, inflating to \$78.2 million with interest; *see* ROM ¶ 1034.
  - c. \$140.4 million based upon alleged “lost chance” *ex post* damages; ROM ¶ 1036.
  - d. \$44.4 million based upon alleged “lost chance” *ex ante* damages, inflating to \$70.4 million with interest; *see* ROM ¶ 1036.
9. Mozambique thoroughly rebutted PEL’s damages submission, both in its Response, and in its Rejoinder, and those arguments will not be repeated in full here, but are incorporated by reference.

10. Apparently, however, PEL agreed that there was substantial weakness in its prior damage submissions, because it has now submitted still further damage theories. Notably, its previous damages expert, Versant Partners, is not part of the new theories, and indeed, PEL's new damages expert, David Dearman ("Dearman") of Ankura Consulting (Europe) Limited, makes a point of noting "I do not comment on [Versant's] approach and I have not reviewed the expert reports prepared by Versant underpinning the assessments of the loss adopting a discounted cashflow approach as they have no bearing on my report." **CER-8**, Ankura Expert Report ¶ 1.3.1.
11. Now, relying on Dearman, PEL alleges alternative damages theories ranging from \$10 million, plus an unidentified royalty, to \$143.7 million. *See* Add'l Quantum Subm. ¶ 41 (Table 7). That is, PEL has now presented a damages theory that asks this Tribunal to, literally, pick-any-number between roughly \$10 million and \$143.7 million.
12. Just the fact that PEL cannot identify the damages it requests of this Tribunal except within a range of \$10 million-to-\$156 million (including at the top-end Versant's flawed DCF analysis as well) demonstrates how wildly speculative PEL's damages are. Candidly, a methodology, or combination of methodologies, that have no more precision than to claim damages somewhere in a range of +/- \$146 million is not a valid basis for damages at all.
13. There is a reason for PEL's problem. There was never, and is not now, a concession or a coal-rail project as allegedly conceived of by PEL.

**B. PEL'S Erratic Damages Submissions Are Symptomatic of More Fundamental Problems with PEL's Claims**

14. There are fundamental flaws in PEL's claim that give rise to the repeat, erratic, and inconsistent damages claims.
  1. **Neither The MOI Nor The PFS Defined The Terms Of A Supposed Concession**
15. As Mozambique has previously noted, neither the MOI nor the PFS had the necessary content on which to award a direct concession. **RWS-4**, Zucula Second Witness Statement, ¶ 4.
  - 15.1. The PFS did not include a bid price, or other basic terms of a concession. *Id.* *See also* **RER-11**, Ehrhardt Expert Report, ¶¶ 82-88, 208-19.

- 15.2. The PFS did not include any information about concessionaire entities or partners, project costs, or other items. **RWS-4**, Zucula Second Witness Statement, ¶ 4. “[M]any fundamental commercial terms [are] not specified in the PFS or elsewhere.” *Id.*
- 15.3. PEL was also required, if it wished to *pursue* the project, to negotiate a project company, or joint venture, with CFM. *Id.*, ¶ 7. And “PEL did not successfully negotiate and form a project company with CFM.” *Id.*, ¶ 9. CFM was simply not interested in negotiating with PEL or investing in the project as suggested by PEL. *Id.*, ¶ 10.
- 15.4. PEL did not provide the offtake or other mining commitments necessary. *Id.*, ¶ 13.
- 15.5. PEL had not yet complied with economic, financial or environmental studies required by law. *See RER-11*, Ehrhardt Expert Report, ¶¶ 78, 141-164.
- 15.6. In addition to the above, PEL would have eventually been forced to disclose (as it now claims) that its own numbers were too preliminary to have been able to state that the project was actually “financially viable.” Such a disclosure in the course of any negotiations would have ended the discussions immediately. **RWS-4**, Zucula Second Witness Statement, ¶ 15.
16. The wild swings in PEL’s damages are directly attributable to this fundamental problem. There was no concession, and no terms of a concession, upon which to base damages.
17. Indeed, the lack of a project, or ongoing operations, was a principle reason why PEL’s attempts to use a DCF analysis are far too speculative to state a claim for damages is inappropriate. *See, e.g.*, SOD IX.D. and E.; Rejoinder, Section IX.D.

**2. The “Project” As Proposed By PEL Never Happened, and Even TML’s Coal-Rail Project Has Been Scrapped**

18. Even if the MOI or the PFS had been specific enough to define a “concession” to be awarded, PEL’s problems with its claim do not end there.
19. While PEL’s project proposal was not the same as the TML project to which PEL attempts to compare in previous submissions, the differences between the PEL project, on the one

hand, and the TML project on the other – increased capacity, longer rail, and a different gauge – would have made the TML version of the project *more likely* to generate profits.

20. Unfortunately, however, as Mr. Chauque explains, the TML project is not being built because it is not economically feasible. **RWS-3**, Chauque Second Witness Statement, ¶ 12. The TML Consortium could not finance the project at any time after the 2013 tender—even with the support of ITD, Mota-Engil and Chinese state-owned entities (with much greater relevant experience and far deeper resources than PEL). *Id.*, ¶ 13.
21. Given the existing, current, and projected state of the coal export market, and the utilization and improvements made to both the Beira and Nacala rail/port corridors, the TML Consortium will not be proceeding as planned with a deep sea coal port and rail corridor, *because its economics cannot be justified at present*. Rather, TML will only seek to proceed with the development of a modest general cargo port at Macuse. A simple, general cargo port, with no rail line for coal export, certainly was not the Project allegedly conceived by PEL. *Id.*, ¶ 14.
22. Simply put, the PEL proposal is not being built by anyone, and has never been shown to be financially viable. The TML proposal, though better than the PEL proposal (and better than the PGS consortium public tender bid), has not been built by anyone and is currently financially non-viable. Neither project forms a basis for a valid damages claim.
23. The fact that PEL cannot identify its damages are directly attributable to this problem as well: since there is no coal-rail project being built at all, there is no value (and certainly no provable value) to an alleged concession for a project that never happened.

### **3. PEL’s Own May 2012 Financials Demonstrated That Its Proposed Project Was Not Financially Viable, Contrary To PEL’s Fraudulent Representations**

24. As Mozambique has previously demonstrated, financial information presented by PEL in May 2012 demonstrated that the project proposed by PEL was not financially viable. *See* SOD ¶¶ 834-42 (citing **RER-4**, Flores Expert Report (Quadrant Economics), ¶¶ 36-37).
25. Even PEL claims (now), and contrary to its representations in 2012, “[T]he terms of the concession were unknown.” Reply ¶¶ 1121. “A detailed financial evaluation would be



required, as part of a bankable feasibility study, to demonstrate the Project's potential economic viability." *Id.*

26. Of course, PEL never presented a bankable feasibility study, and the now-dated feasibility study eventually developed by TML has not led to a viable project.
27. The most fundamental failing, therefore, of any damages claim is the simple fact that PEL's own financials in 2012 did not demonstrate a viable project. PEL cannot have been harmed by allegedly failing to receive an award of a non-viable project. Indeed, as discussed below, PEL's new damages submission is really an effort to create a mirage of injury where none exists.
28. In all events, the scattershot efforts at damages are a direct result of this fundamental problem: even PEL's 2012 numbers do not show a viable project.

#### **C. PEL's New Damages Theories Do Not Solve PEL's Prior Flaws**

29. As the Tribunal will recall, Mozambique previously established that PEL's DCF-based damages claims are highly speculative, demonstrate zero damages on any of numerous reasonable assumptions, and are not permitted in all events under controlling precedent. *See, e.g.*, SOD Section IX.D. and E.; Rejoinder Section IX.
30. International case law is replete with decisions refusing to award future profits in projects without a history of operations and profits. *See* Rejoinder ¶ 1395 (and citations therein). To be clear, however, PEL's flaws are not merely doctrinal. DCF analyses are not permitted in such instances because in the absence of evidence of a profitmaking activity, damages are too speculative. *See id.* ¶ 1399 (citing **CLA-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 875. But the burden to prove damages with a reasonable certainty is not removed simply because PEL abandons a DCF analysis.
31. Whether PEL uses a DCF analysis, or any other methodology, PEL must still confront this simple fact: the concession to which it claims entitlement is non-viable and never happened. Nowhere does PEL's new submission even allude to these facts, let alone account for them.

### III. PEL'S NEW DAMAGE THEORY BEARS NO RELATIONSHIP TO PEL'S OWN CLAIMS, INVITES RAMPANT GUESSING, IS BASELESS ON ITS OWN TERMS, AND ENTIRELY FLAWED IN ALL EVENTS

#### A. PEL's New "Negotiating Damages" Theories

32. In an apparent effort to avoid the fact that PEL's own proposed "project" was non-viable, PEL purports to provide two alternate theories of damages based upon what PEL calls a "release fee," and UK courts term "negotiating damages." *See, e.g., Morris-Garner v. One Step (Support) Ltd.* [2018] UKSC 20, ¶ 3.
33. By way of summary, PEL supposes that it can avoid the discussion of the alleged value of the concession it claims it was owed by imagining instead a hypothetical scenario in which PEL and Mozambique negotiated a "release fee" for PEL's claimed rights under the MOI in or about 2013.
34. That is, PEL supposes that if one were to imagine PEL, and Mozambique, both acting reasonably, in a negotiation regarding the MOI, such a thought experiment might help reveal what amount Mozambique might have paid, and PEL might have accepted, to drop its claimed rights under the MOI.
35. Even at the outset, the concept of a hypothetical negotiated release fee is more than problematic in this case. The parties have diametrically opposing views of what rights were even granted by the MOI, and PEL's version of the rights it claims under the MOI are illegal under Mozambiquan law. PEL hid its blacklisting from Mozambique. *See, e.g., Rejoinder Section III.* And even though PEL claimed it had a viable project, in fact, the project financials demonstrated a non-viable project. *See, e.g., SOD ¶¶ 834-42.; RER-4, Flores Expert Report (Quadrant Economics), ¶¶ 36-37 RER-11, Ehrhardt Expert Report ¶¶ 165-172.* It is impossible to see, therefore, how reasonable parties would have come to a favorable conclusion involving paying PEL any money at all.
36. In all events, PEL ignores all of the above, and instead supposes that it can identify "data points" for the imagined negotiations by reference to the following:
  - a. PEL takes its own self-serving, but baseless and unsupported, monetary demands against Mozambique as a "floor";

- b. PEL re-imagines its PFS as having allegedly conferred an absolutely fanciful \$1.5 billion in what it refers to as “de-risking” value (for a project that has never been built and is not financially viable!) and supposes that an objective negotiation would have paid PEL based upon some portion of such fanciful “de-risking”; and
  - c. PEL further re-imagines its alleged contract right not as an alleged direct award of a concession, but as an engineering consultancy (which has never been alleged) for which it should have been paid percentage-based remuneration (which does not exist), and which Mozambique would have then used to pay a (equally non-existent) break-up fee (again, for a project that has never been built and is not financially viable).
37. The problems with PEL’s new theory are several, but can be generally categorized as follows:
- a. Even if otherwise recognized as a theory of damages, “negotiating damages” do not apply to this matter;
  - b. Even if “negotiating damages” applied this matter, the “data points” PEL proposes bear no relationship to even the alleged rights claimed by PEL;
  - c. Even if “negotiating damages” applied to this matter, the “data points” PEL proposes suffer from other egregious flaws and are unusable;
  - d. Even if “negotiating damages” applied to this matter, and one ignored the flaws in PEL’s supposed “data points,” other more salient “data points” would result in zero damages even under PEL’s new theories.

**B. “Negotiating Damages” Do Not Apply To This Matter**

38. Although PEL provides a scattershot of jurisdictions in which some version of “negotiating damages” are permitted, PEL does nothing to actually compare those cases to the facts alleged in this case, or demonstrate why any of those cases are authoritative. As noted above, Mozambique does not have an English common law tradition; nor is there any

instructive BIT treaty case cited by PEL<sup>1</sup> applying such a damages theory to a BIT treaty claim.

39. A “negotiating damages” theory is, candidly, antithetical to burdens imposed by international damages jurisprudence. PEL itself previously identified that its task as valuing the alleged concession (however poorly PEL actually accomplished this). Now, however, PEL uses the concept of “negotiating damages” to imagine value considerations, rather than attempt to prove any actual loss.
40. Although PEL relies heavily on UK jurisprudence, PEL fails to apprise the Tribunal that, in fact, the recent UK Supreme Court decision in *Morris-Garner, supra*, expressly limited the contract cases to which “negotiating damages” apply even in UK jurisprudence.
41. In *Morris-Garner*, the UK Supreme Court reviewed the genesis of “negotiating damages,” and observed, applicable to this case, “[D]ifficulties [in proof of damages] do not justify the abandonment of any attempt to measure loss. . . .” *Morris-Garner*, ¶ 74 (quotation marks omitted). “It is also necessary to recognise that the assessment of a hypothetical release fee is itself a difficult and uncertain exercise.” *Id.*, ¶ 74. “Such imaginary negotiations have become increasingly elaborate, and a host of questions can emerge as to the basis on which they should be hypothesised.” *Id.* “The artificiality of the exercise can be a further problem.” *Id.* ¶ 75.
42. “[T]he premise of the hypothetical negotiation - that a reasonable person in the claimant’s position would have been willing to release the defendant from the obligation in return for a fee - breaks down in a situation where any reasonable person in the claimant’s position would have been unwilling to grant a release. . . .” *Id.* Likewise, where a reasonable respondent would be unwilling to pay for the release, an imaginary negotiation breaks down, and the thought exercise is of no value.

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<sup>1</sup> PEL cites **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. as though that Tribunal approved of “negotiating damages” as a theory. To the contrary, *Enron* declined to reach the issue, instead using what it referred to as loss of chance damages after a robust analysis of that latter. *Id.* ¶ 128.

The result of the exercise may be an appearance of precision, but as Hildyard J commented in *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 (Ch), para 1199, “the exercise is artificial; and, despite the apparent precision of the figures and calculations deployed typically (and necessarily) on each side, it necessarily involves a question of impression ... it is to some considerable extent a ‘broad brush’.” *Id.*

43. These concerns, among others, led to the following conclusions by the *Morris-Garner* Supreme Court:
44. *Morris-Garner* held “negotiating damages” are permitted only in limited types of cases, such as a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement. *Id.* ¶ 92. The central feature of such claims are that “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.” *Id.* ¶ 92.
45. Nor is it an answer that PEL has attempted to characterize its alleged MOI rights in the alleged concession as an “asset.” As *Morris-Garner* cautioned:

It might be objected that there is a sense in which any contractual right can be described as an asset, or indeed as property. In the present context, however, what is important is that the contractual right is of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, *even in the absence of any pecuniary losses which are measurable in the ordinary way*. That is something which is true of some contractual rights, such as a right to control the use of land, intellectual property or confidential information, but by no means of all. *For example, the breach of a non-compete obligation may cause the claimant to suffer pecuniary loss resulting from the wrongful competition, such as a loss of profits and goodwill, which is measurable by conventional means, but in the absence of such loss, it is difficult to see how there could be any other loss.* *Id.* ¶ 93 (emphasis added).

46. As *Morris-Garner* makes clear, then, “negotiating damages” do not relieve PEL of its burden of proof, or render irrelevant, the fact that by conventional means, PEL cannot

demonstrate a profitmaking activity, or harm. Where, as here, there is no such proof of harm by available conventional means, PEL may not thereafter ignore such lack of proofs to imagine a hypothetical negotiation and claim damages on that basis.

**C. PEL’s Newly-Claimed Damages Do Not Even Purport To Determine The Value of the Alleged Concession (Let Alone The Value of Alleged Rights In The MOI).**

47. Not only does *Morris-Garner*, properly considered, reject the use of “negotiating damages” in this case (even if UK jurisprudence were otherwise applicable, which it is not), but *Morris-Garner* also highlights an additional failing of PEL’s theory. As *Morris-Garner* specified, even where one purports to use “negotiating damages,” loss is “measured by *determining the economic value of the asset in question.*” *Id.* ¶ 92 (emphasis added).
48. As alleged by PEL, the alleged “asset in question” (if any), is PEL’s alleged right to a direct award of a concession based on the MOI. The problem, of course, is that PEL’s “negotiating damages” theory would immediately beg the same question PEL is assiduously attempting to avoid: what is the economic value of the alleged rights to a direct award of a concession?
  - 48.1. Given that the direct award of the concession would be illegal under Mozambiquan law, *see, generally*, Rejoinder IX.C.1., and economic value of the alleged rights is zero. *Id.*
  - 48.2. Given that the MOI granted, at most, a *direito de preferência* in Mozambique’s PPP laws, *see id., e.g.*, ¶ 69-70, the economic value of the alleged right to a direct award is zero.
  - 48.3. Given that PEL’s own 2012 financials demonstrated that the project it proposed was non-viable, the economic value of the alleged right to a direct award is zero. *See, e.g.*, SOD ¶¶ 834-42.; **RER-4**, Flores Expert Report (Quadrant Economics), ¶¶ 36-37 **RER-11**, Ehrhardt Expert Report ¶¶ 165-172.
  - 48.4. Given that even the TML version of a “project” (by all accounts better developed than the PFS and PEL’s losing bid) has not been built, and the coal-rail portion of that project has been scrapped, the value of an unbuilt, abandoned project is zero.

- 48.5. Given that on any of several reasonable assumptions, the DCF analyses proposed by Versant Partners leads to zero damages, *see, e.g.*, SOD Section IX.E.; Rejoinder Section IX.G., the alleged right to a direct award is zero.
49. In an effort to sidestep these obvious flaws, PEL ignores its own allegations in order to value not the alleged right to a direct award of a concession (which has no value), but some other, imagined “data points” associated with (1) “de-risking” cost estimates on the proposed project, and (2) a percentage-based engineering consultancy contract PEL never had and has never alleged.
50. Both of these theories are dramatically flawed, as demonstrated below. The immediate point, however, is simply this: even if “negotiating damages” applied, the question would still remain: what was the economic value of the alleged rights in the MOI? PEL does not even attempt to answer that question in its current submission.

**D. PEL’s “Data Points” Are Fundamentally Flawed and Effectively Nonsense, Designed Only To Create A Mirage Of Value Where None Exists.**

51. Even assuming that a “negotiating damages” methodology were a proper measure of damages, and even assuming one could imagine a reasonable hypothetical negotiation between PEL and Mozambique, PEL’s new damages submission is still fundamentally flawed.
52. PEL’s damages submission is based upon two experts – Dearman, an accountancy expert from Ankura Consulting (Europe) Limited, and an engineering consultant named Andrew Comer (“Comer”).
53. Dearman identifies what he refers to as “data points” he claims would be relevant to a negotiation between PEL and Mozambique. Review of these “data points,” however, reveals that PEL is not entitled to damages under any theory.

**1. Dearman Makes No Effort To Value The Rights Allegedly Contained In The MOI (or Even the Alleged Concession) Itself.**

54. Ironically, the first data point Dearman identifies is the value of the concession itself, even calling this data point a “significant component” of the negotiations. *See CER-8*, Ankura Expert Report ¶ 3.2.3. Tellingly, however, Dearman then does nothing to attempt to substantiate the “potential profit” of the concession. *See CER-8*, Ankura Expert Report ¶

3.2.3. As Mozambique has previously demonstrated, the project proposed by PEL was not economically viable, and thus, this data point should have ended the matter.

**2. The Value Of The PFS In Enabling The Public Tender Does Not Support PEL's Claims of Damages.**

55. Next, Dearman claims to identify the value of the contents of the PFS as a data point.
56. Notably, however, Dearman does not – nor does the engineering consultant Comer – analyze the PFS for its actual content. As Mozambique has previously noted, the PFS was merely a preliminary stage study, with “limited technical detail,” and “no meaningful analysis of economic, commercial and environmental feasibility.” *See, e.g.*, Rejoinder ¶ 200; **RER-1**, Betar Expert Report at 61-62 (Conclusion A); **RER-6**, Betar Second Expert Report, §§ 5.1-5.3; **RER-11**, Ehrhardt Expert Report *passim*. For example (*id.*, Executive Summary ¶ 5(b)).
57. Nonetheless, Dearman claims that the PFS was of value to Mozambique for having permitted Mozambique to proceed with the public tender. *See CER-8*, Ankura Expert Report ¶ 3.3.3. However, Dearman does not attempt to quantify such a value. *Id.* Presumably, Dearman stops short of this valuation for one simple reason: PEL has failed or refused to provide any information as to the costs or time expended in preparing the PFS. *See Tribunal's Decision on the Republic of Mozambique's Requests for Document Production to Patel Engineering Limited*, requests 10, 38, 39, and 46 (PEL claiming that it “has conducted a search in respect of the documents and has not identified any responsive document”).
58. In all events, Dearman's claim that the PFS conferred value to Mozambique in enabling the PFS is unavailing. Assuming solely for the sake of argument, that Mozambique and PEL had negotiated at arm's length regarding alleged use of the PFS (a distinctly different query than the alleged value of the concession), Mozambique would have had no objective basis to pay PEL more than the cost of the PFS, or Mozambique could simply have obtained another PFS at similar cost without allegedly using the PFS at all.



**3. PEL’s Self-Serving Offers Are Baseless, Unsupported, And Do Not Provide a Meaningful Data Point, Let Alone Evidence of Damages.**

59. Next, Dearman recounts that three times, PEL allegedly engaged in what it describes as offers PEL made to Mozambique on three occasions:

a. A demand totaling approximately \$19.575 million, based upon \$4 million, plus a royalty of .05%. (This demand was allegedly repeated twice.) *See CER-8*, Ankura Expert Report ¶ 3.4.2(a).

b. A demand for \$10 million, plus an unspecified royalty. *See id.*, ¶ 3.4.2(b).

60. First and foremost, neither Dearman nor PEL have offered any basis, analysis or methodology PEL used in making either of the above demands. These demands, standing alone, do not demonstrate PEL’s loss in any form or fashion. Moreover, the fact of these demands does not demonstrate that the demands were reasonable or could be substantiated – only that PEL was willing to make them.

61. Indeed, as Dr. Flores notes, if there is any probative value of these settlement demands at all, it is only that both Versant’s and Ankura’s \$140+ million demands are overblown and baseless. “In fact, Ankura’s ‘Release Damages’ are up to seven times higher than the compensation proposed by Patel in 2013 and 2014. This fact alone shows how Ankura’s various quantifications of alleged damages are highly speculative, grossly overstated, and unrepresentative of the reasonable outcome of any hypothetical negotiations between Claimant and Respondent.” *RER-14*, Third Flores Expert Report (Quadrant Economics) ¶ 24; *see also RER-13*, Third Betar Expert Report ¶ 5 (referring to the alleged offers made by PEL as demonstrating that the amounts presented by Dearman are “extemporaneous and speculative”).

**4. PEL’s Alleged Annual Profit Margins Do Not Provide A Meaningful Data Point.**

62. Dearman admits that he did not have visibility to PEL’s “anticipated profit margin for the Project.” *See CER-8*, Ankura Expert Report ¶ 4.2.2.

63. Ironically, of course, if one were asking whether PEL’s proposed project expected profits, the answer to that question is “no,” and has been fully reviewed in response to Versant

Partner's damages analysis. The fact, then, that Dearman claims not to have visibility to PEL's anticipated profit margins is dubious at best.

64. As a (wholly improper) surrogate for actual proof of profitmaking activity, Dearman indicates that he has reviewed PEL's consolidated annual reports for PEL's reported consolidated profit margins from 2009 through 2015. Dearman supposes that PEL would have *expected* a profit margin – calculated at a five-year average of pre-tax profit margin over PEL's entire business, multiplied times the costs of building the project. See **CER-8**, Ankura Expert Report ¶¶ 4.2.2 and 4.2.3. Dearman then multiplies that so-called potential profits number times certain factors, to arrive at claimed damages ranging from \$40.9 million to \$143.7 million." *Id.*, ¶¶ 4.2.6 - 4.2.8.
65. These alleged data points are nonsense. Even assuming PEL ever *expected* profit of \$40.9 million to \$143.7 million, PEL's subjective expectations are not proof of profits, or evidence of PEL's loss.
66. More specifically, Dearman improperly assumes that corporate pre-tax profit on an annual or aggregated annual basis can be used as an indicator of profit that may be generated by a single project. Dearman provides no statistical data regarding the financial information supporting the calculation of pre-tax profits and specifically does not address the contributions to corporate profit from development of rail projects of a similar type, size, and location as the proposed Project. See **RER-15**, Dysert Expert Report ¶ 126; see also **RER-14**, Third Flores Expert Report (Quadrant Economics) ¶29 ("profit margins reported by Patel in its financial statements bear no relation to what Patel could have expected to obtain from the Project").
67. PEL's average corporate profits derive from several lines of business over at least nine countries (and Mozambique is not listed among them), see **RER-15**, Dysert Expert Report ¶¶ 127-28. The averages fluctuate dramatically, *id.*, ¶¶ 129-131, strongly implying that individual profit margins for individual projects are hardly homogeneous. *Id.* There is simply no valid basis to assume that PEL's *average corporate profits* are indicative of any expected return on this project in Mozambique.
68. In addition, neither PEL nor Dearman make any effort to establish that their calculations of expected profit would be realized. Neither Dearman nor PEL address any aspect of risk

in his determination of profit margin, and wrongfully assume that during the hypothetical negotiations with Mozambique that any risk to realized profit will not become a topic of the negotiation. See **RER-15**, Dysert Expert Report ¶ 133.

69. Were still more needed, the assumptions behind Dearman’s calculations are inconsistent with the facts. In its previous submissions, PEL supported its damages calculations by claiming that PEL “intended to maintain a project management role in the Project, while retaining a qualified third-party EPC contractor to construct the Project and having Grindrod undertake the operation and maintenance (“O&M”) of the rail and port facilities.” Second Versant Report, ¶ 71. Now, however, by applying Patel’s historical profit margins to the expected cost of the Project, Dearman assumes that Patel would be the Project’s EPC contractor, not its operator. See **RER-14**, Third Flores Expert Report (Quadrant Economics) ¶ 30. Clearly, both facts cannot be true.
70. Nor is this inconsistency merely a matter of dueling expert theories. Theories may be presented in the alternative, but facts cannot be. And while PEL has wrongfully claimed entitlement to a concession, even PEL has never claimed that it was entitled to its corporate-average pre-tax profit margin in building the project. To the contrary, both PEL and Versant claimed the value of the project – and the theory of damages – lay in PEL’s ownership interest of a successful, profitmaking project.
71. Dearman’s average corporate-profit analysis bears no relationship even to an alleged version of PEL’s rights under the MOI, and must be disregarded.

##### **5. Dearman’s “De-Risking” Data Points Are Wrong In Every Way.**

72. In what is perhaps the most bizarre portion of PEL’s new damages submission, PEL, relying on Dearman and its new engineering consultant, Comer, attempts to value what it refers to as “de-risking” obtained by the PFS report.
73. Understanding PEL’s argument – and the massive inaccuracies in PEL’s argument – requires further background.
74. AACE RP No. 98R-18 is a published recommended practice addressing engineering deliverables in the road and rail transportation industry. Mozambique’s expert, Larry

Dysert, was among the primary contributors to RP No. 98R-18. See **RER-15**, Dysert Expert Report ¶ 9.<sup>2</sup>

75. Contrary to Comer’s opinion, the recommended practice expressly states:

The overall purpose of this recommended practice is to provide the road and rail transportation infrastructure industries with a project definition deliverable maturity matrix which is not provided in 17R-97. *Id.* ¶ 26-27.

76. As Dysert further summarizes, “the purpose of RP No. 98R-18 is to identify the maturity of the planning and design deliverables required to support estimate preparation for each class of estimate.” *Id.* ¶ 33.

77. One of the features of RP No. 98R-18 is to provide Classifications to assist in defining the level of maturity required for each deliverable, for the estimate classes that range from Class 5 (with the least maturity or definition of required deliverables) to Class 1 (with the highest maturity of required deliverables). *Id.* ¶ 28. That is, an engineering cost estimate at Class 5 is less developed than an engineering cost estimate at Class 4, and so on, all the way to Class 1.

78. RP No. 98R-18 also provides certain Expected Accuracy Ranges for cost estimates depending upon which Classification the cost estimate may be. By way of example, and using a Table reproduced from Dearman’s Report, the Expected Accuracy Ranges for Class 5 cost estimates and Class 4 cost estimates look something like this:

**Table III-1: Duplication of Table 3 in Mr. Dearman’s Expert Report**

Category	Class 5	Class 4
High Range	+30% to +100%	+20% to +50%
Low Range	-20% to -50%	-15% to -30%

<sup>2</sup> In fact, Dysert has been an active member of AACE International (“AACE”) since 1990. He is a founding member of the AACE International Technical Board responsible for development of all AACE technical products and publications, including AACE recommended practices. He is a past Vice-President and Chair of the AACE Technical Board, serving in those positions for a combined total of 20 years. He is a Primary Contributor (author) for fourteen AACE recommended practices (including RP No. 98R-18) and a Contributor to over thirty other AACE recommended practices. *Id.* Dysert’s full qualifications are included with his Report.

79. These cost estimate accuracy ranges “generically represent the expected accuracy that may be achieved 80% of the time across multiple projects.” “[T]he Expected Estimate Accuracy Ranges in RP No. 98R-18 (and in all AACE estimate classification recommended practices) are not to be applied to a specific project estimate.” *Id.* ¶ 93.
80. With this background, PEL’s argument proceeds as follows:
- The 2012 PFS represents an engineering cost estimate.
  - (Mis-) using AACE RP No. 98R-18, Comer opines that the “project” moved from a Class 5 “project” to something between Class 5 and Class 4 with the PFS. *See CER-8*, Ankura Expert Report, Appendix C (Comer Report), ¶ 3.4.9.3.
  - Dearborn, using Comer’s opinion, takes the above accuracy ranges, and calculates the following (by way of slightly simplified summary), *see CER-8*, Ankura Expert Report ¶¶ 4.3.10-4.3.13:
    - The project was meant to cost \$3.1 billion.
    - On the above accuracy ranges, before the PFS, the project was subject to a risk of 100% cost overruns, or \$3.1 billion in overruns.
    - On the above accuracy ranges, after the (allegedly Class 4) PFS, the project was subject to a risk of (“only”) 50% cost overruns, or \$1.55 billion in overruns.
    - Dearborn (and PEL) therefore conclude that Mozambique received at least an astounding \$1.55 billion in “de-risking” value based on the PFS. *See CER-8*, Ankura Expert Report ¶ 4.3.12.
81. As Betar explains, “[t]his concept for engineering fees calculation based on ‘de-risking’ is completely unknown in Mozambique, and in our opinion, this approach is abusive and did not make sense taking into account the rule which an Engineer shall adopt on a Project,” *RER-13*, Third Betar Expert Report ¶ 6.

Fundamentally, as an Engineer, we are not compensated for “de-risking” a project. The “de-risking of a Project may be a consequence of the Engineering work – that obviously will increase

the accuracy of the data along the design elaboration – but shall not be one of the indicators for remuneration. It is a fundamental Engineer duty to technically define the Project as accurately as possible in each stage and with the available information, aiming to produce outputs that allow the client, in this case the Republic of Mozambique, to estimate costs and to then refine those estimates through more and more detailed phases of project development, design, build and possibly operation. Performing the fundamental duty of an Engineer should never be used to create a windfall for an engineering outfit, as results from Dearman’s model, where the projected costs are so wildly variable, and simply performing the most fundamental duty of an Engineer would result in windfall profit for PEL. *Id.* ¶ 7.

82. In all events, the theory is an abuse of the AACE guideline on which it relies, wrong even in their application, and absolutely blind to the fact that the project as proposed was non-viable.

**(a) AACE Guidelines Cannot Be Used To Estimate Accuracy Or Risk Of PEL’s Proposed Project**

83. The Expected Estimate Accuracy Ranges in RP No. 98R-18 do not (and are not intended to) describe the accuracy of a particular estimate, or the risk of cost overruns for any particular project. *See RER-15*, Dysert Expert Report ¶ 93. Indeed, AACE publications repeatedly warn against using the Classifications or the Expected Estimate Accuracy Ranges to assess or quantify project risk precisely as Dearman and PEL have attempted to do here.

83.1. RP No. 98R-18 itself states:

While a target range may be expected for a particular estimate, the accuracy range should always be determined through risk analysis of the specific project and should never be pre-determined. *Id.* ¶ 95 (quoting C-381, RP No. 98R-18 pp. 7-8 of 26).

83.2. In describing why the estimate accuracy ranges indicated in RP 98R-18 cannot be applied to a specific estimate, the RP states:

In addition to the degree of project definition, estimate accuracy is also driven by other systemic risks such as:

- Level of familiarity with technology.
- Unique/remote nature of project locations and conditions and the availability of reference data for those.
- Complexity of the project and its execution.
- Quality of reference cost estimating data.
- Quality of assumptions used in preparing the estimate.
- Experience and skill level of the estimator.
- Estimating techniques employed.
- Time and level of effort budgeted to prepare the estimate.
- Market and pricing conditions.
- Currency exchange.
- Regulatory, community, and landowner risks.
- Third parties, including utility owners.

Associated betterments (for cities, local jurisdictions, third parties, etc.).

- Political risks and bias (see later discussion). *Id.* ¶ 96 (quoting C-381, RP No. 98R-18, pp. 6-7 of 26).

83.3. RP No. 98R-18 indicates that systemic risks such as those above are a primary driver of risk during the early stages of project definition (such as for a Class 5 estimate); however, as project definition progresses, then project-specific risks (such as potential risk events and conditions) become more prevalent. *Id.* ¶ 97. “Whether an estimate is Class 5 or Class 4 (or another estimate class), risks other than the level of project definition also affect determination of estimate accuracy,

which prevents the estimate accuracy ranges identified in RP No. 98R-18 (or any other estimate classification RP) from applying to a specific project estimate.” *Id.* ¶ 98.

- 83.4. The Appendix to RP No. 98R-18 specifically cautions against the precise misuse of RP No. 98R-18 committed by Dearman here:

“Despite the verbiage in the RP, often, there are still misunderstandings that the class of estimate, as defined in the RP above [RP No. 98R-18], defines an expected accuracy range for each estimate class. This is incorrect. The RP clearly states that “while a target range may be expected for a particular estimate, the accuracy range should always be determined through risk analysis of the specific project and should never be predetermined.” Table 1 and Figure 1 in the RP [which identifies the expected accuracy range for typical variation in low and high ranges at an 80% confidence level] are intended to illustrate only the general relationship between estimate accuracy and the level of project definition.

As indicated in the RP, estimate accuracy should be determined through a risk analysis for each estimate.” *Id.* ¶ 99-100 (quoting C-381, RP No. 98R-18 p. 24 of 26).

“Individual estimates should always have their accuracy ranges determined by a quantitative risk analysis study that results in an estimate probability distribution.” *Id.* (quoting C-381, RP No. 98R-18 p. 25 of 26).

- 83.5. Another AACE publication, RP No. 104R-19 further warns against using AACE practice recommendations to determine risk (as Dearman has done here). As Dysert explains:

RP No. 104R-19 includes a section specifically addressing the relation between estimate accuracy and estimating classification. In discussing the indicated expected estimate accuracy ranges in



the estimate classification recommended practices, Section 2.5 of RP No. 104R-19 states:

Note that these +/- percentage measures associated with an estimate class are intended as rough indicators of the accuracy trend provided the company and project are well managed and no major risks occur. These are merely a useful simplification given the reality that every individual estimate will be associated with a unique probability distribution explaining its unique level of uncertainty and risk that must be determined through a quantitative risk analysis for each particular estimate. *Id.* ¶ 102 (quoting **LRD-003** p. 12 of 20).

In Section 2.6: Estimate Accuracy and Risks, RP No. 104R-19 states:

Although level of project definition (generally correlated with percent of engineering complete) is an important determinant or risk driver of estimate accuracy, there are many other uncertainty and risk drivers that also affect accuracy. In respect to risk quantification methods, AACE International defines three main types of risks: systemic, project-specific, and escalation (including currency where applicable). All must be considered. Keeping in mind that expected estimate accuracy is an expression of an estimate's predicted closeness to the final actual value; anything included in that final actual, be it the result of general uncertainty, risk conditions and events, price escalation, currency or anything else within the project scope, is something that estimate accuracy measures must communicate in some manner. With that in mind, ***it should be clear why standard accuracy range values are not***

*applicable to individual estimates.* *Id.* ¶ 102-03 (quoting **LRD-003** p. 12 of 20) (emphasis in Report).

83.6. Were still more needed, PGD-01, AACE’s guidance document to cost estimate classification also states:

It is worth repeating that accuracy range does not determine the class, nor does the class determine the accuracy. **Accuracy can only be determined through QRA [Quantitative Risk Analysis].** *Id.* ¶ 94 (quoting **LRD-004**, AACE Professional Guidance Document No. PGD-01 (emphasis added)).

84. In summary, Mr. Dearman’s assertion that estimate accuracy for a specific project can be determined based upon RP No. 98R-18, is refuted by the very RP on which Dearman purports to rely. It is also refuted by PGD-01 and RP 104-19. *Id.* ¶ 104.

85. Because RP No. 98R-18 cannot be used the way Dearman attempts to use it, it also follows that Dearman’s calculations, based on the improper use of RP No. 98R-18, are meaningless in attempting to describe risk, or so-called “de-risking.”

**(b) Even if RP No. 98R-18 Could Be Used To Describe Risk Or Accuracy, Comer Is Incorrect Classifying the PFS. In Fact, Proper Classification Of The PFS Reveals Just How Lacking The PFS Was.**

86. Even assuming that AACE RP No. 98R-18 could be used as Dearman does, it would also be key to Dearman’s “de-risking” analysis to demonstrate that the project moved, so to speak, from Class 5 to Class 4 based on the PFS. That is, central to Dearman’s analysis is Comer’s opinion that “the PFS sits within the lower end of Class 4.” *See CER-8*, Ankura Expert Report, Appendix C (Comer Report), ¶ 3.4.9.3.

87. Again, Dearman and Comer misuse and misstate RP No. 98R-18, and ignore AACE publications, in an effort to quantify that the project progressed based upon the PFS.

88. Cost estimate classification is a detailed analysis, and while the details are telling, they are fully described in Dysert’s Report, *see RER-15*, Dysert Expert Report Section 3.1, and need not be repeated here. Rather, the principles of Classification analysis will suffice to demonstrate why PEL’s project does not move, so to speak, from Class 5 to Class 4 based on the PFS.

89. As Dysert explains, Comer (wrongfully) treats the classification of cost estimates as a continuum under RP No. 98R-18, and supposes that if the PFS meets some indicia of a Class 4 estimate, it may be considered “on the lower end of Class 4.” See **RER-15**, Dysert Expert Report ¶ 48-49. Comer’s treatment is contrary to AACE practices. *Id.*
90. Dysert, explains, quoting AACE publication PGD No. 01:
- A characteristic of class is that it is intended as a threshold (not continuous) metric, i.e., a class level is not achieved until all key deliverables reach the desired class level of definition or status (there is not a Class 3.5). *Id.* ¶ 51 (quoting **LRD-0004** (p. 3 of 10)).
91. Therefore, Mr. Comer is incorrect to assert that the rail portion of the PFS Estimate based on the PFS “sits within the lower end of Class 4.” Either an estimate meets the requirements and expectations of a Class 4 Estimate, or it doesn’t. *Id.* ¶ 52.
92. Nor can there be any reasonable argument that the PFS “substantially meets” a Class 4 estimate. As Dysert reviews Comer’s analysis, even Comer identifies only 13 out of 49 categories (27%) as allegedly supporting a Class 4 estimate in the rail portions of the PFS, *id.* ¶ 54, and only 10 out of 49 categories (20%) as allegedly supporting a Class 4 estimate in the port portions of the PFS. *Id.* ¶ 68.
93. Indeed, Dysert’s own review of the PFS takes further issue with many of these categories, *id.*, 56-57; 69-71, and Dysert also identifies dozens of Class 4 deliverables missing from the PFS. See *id.* ¶ 58-60; 72-74.¶
94. In sum, the PFS does not provide the project maturity required of a Class 4 estimate. There is no “movement,” so to speak, with the PFS, from a Class 5 “project” to a Class 4 “project.” Comer’s analysis is invalid, and Dearman’s calculations, even if they were otherwise permissible under the RP No. 98R-18, have no basis in engineering fact.
95. If anything, the only engineering fact demonstrated by Comer’s attempts to apply RP No. 98R-18 is that the PFS remained a thoroughly underdeveloped, incomplete *prefeasibility* study, and did not and could not have formed the basis of an alleged right to a concession.

**(c) Dearman’s and Comer’s cost-based analysis ignores the fact that the project was not financially viable as proposed.**

96. In addition to the above points, which already render Dearman’s “de-risking” analysis invalid in its entirety, it must also be noted that RP No. 98R-18 focuses, by its terms, on cost estimates. The “risk” that Dearman claims to quantify (however wrongly) is only risk associated with cost overruns. Nothing in Dearman’s analysis acknowledges any level of risk associated with a non-viable project (or any financial or operational risk at all).
97. The absurdity of Dearman’s “de-risking” analysis is further highlighted when one considers that even TML’s version of a project has not been built. That is, even if one assumes that the PFS made some costs more certain or accurate, no value is conferred on Mozambique, because even if the coal-rail project costs are somewhat more accurate or certain after the PFS, the costs have still proven to be too expensive to justify the project compared to its expected return.

**6. Dearman’s Attempt To Value PEL’s Damages As A Portion Of A Percentage-Based Engineering Consultancy Is Incorrect.**

98. Next, Dearman, in combination with Comer, attempts to create a hypothetical negotiating data point by characterizing PEL’s claimed interest as akin to a percentage-based engineering consultancy. Dearman imagines that if PEL had entered into an engineering consultancy, it could have been on a percentage basis, and using Comer’s input, claims that percentage could have been 4%-6% of costs. Dearman then embellishes this amount by further imagining that PEL would have enjoyed both an inception stage fee of at least 5% of the 4%-6%, and an early termination fee of 10% of the 4%-6%. **CER-8**, Ankura Expert Report Section 5.3.
99. This theory fails for several reasons, but most fundamentally because each of these assumptions is entirely speculative, and directly contrary to the facts, even as alleged by PEL. PEL claims – albeit wrongly – to have been entitled to a direct award of a concession, and the value of that alleged right would have depended (as already opined by Versant) upon (1) building, (2) a successful project, (3) realizing profits, (4) from which PEL derived value. PEL does not allege that the parties ever negotiated or contemplated a standalone engineering consultancy for PEL, on any terms, much less based upon 4%-6% of the

overall costs of the proposed project (which at that point were only a one-page estimate). Nor was there ever any discussion or contemplation of termination fees or inception fees.

100. Whatever else PEL imagines it gains by trying to hypothesize about a release negotiation between Mozambique and PEL, PEL offers no basis at all to suppose
- a. that PEL would have valued the alleged rights in the MOI as an engineering consultancy, in which
  - b. PEL foisted onto Mozambique all risk associated with the project while PEL enjoyed a risk-free fee, and
  - c. Mozambique nonetheless agreed to pay PEL a percentage of costs irrespective of the viability of the project, or whether the project was built or not.
101. Quite simply, PEL is not entitled to substitute a different contract for its alleged rights under the MOI, and propose that it be awarded damages on such other, non-existent contract. Indeed, there is no theory, in international law, treaty jurisprudence, or contract, in which this Tribunal could be heard to award damages to PEL for a contract it never discussed and never had, simply because PEL asks this Tribunal to imagine what PEL might have proposed in negotiations with Mozambique.
102. Moreover, even if PEL's effort to create a hypothetical percentage-based engineering consultancy out of whole cloth were otherwise permissible, the theory would still be improper, for several reasons.

**(a) Percentage-Based Engineering Contracts Are Not the Practice In Mozambique**

103. Not only did PEL never claim or allege that it was ever entitled to a percentage-based engineering consultancy, such contract structures are not the practice in Mozambique. **RER-13**, Third Betar Expert Report ¶ 15-16.

As Consultant Engineers who have worked extensively in Mozambique on public and private engineering projects, we [Betar] can attest that in Mozambique the adoption of a percentage basis flat fee for compensating engineering firms are not the practice. Traditional practice for Engineering Consultants remuneration are the "time and costs basis", as can be proved,

for instance, by the typical Consultancy Tender documents that are issued by Government entities. Sometimes, a “Lump Sum (Fixed Price)” approach may be adopted, subject however to the previous submission of the Consultancy Quotation and agreement between the parties. *Id.*

104. Comer’s statement that “consulting fees are typically around 4% to 7% of the overall project budget,” is not supported by “experience” in Mozambique, and there are no guidance documents applicable to Mozambique cited by Comer. *Id.* ¶ 17.

105. Nor is it an answer, as Comer and Dearman suggest, to cite South African guidance in an effort to demonstrate Mozambiquan practice. As Betar explains:

[W]hile South Africa is geographically close to Mozambique it is a completely different country with different cultural, economic and legal systems. Both countries are sovereign nations, and whatever guidelines South Africans may have developed about Consultancy fees, they are not used in Mozambique. Mozambique has its own rules and those rules included the preference in tender scoring mentioned as in result of “*direito de preferência*” stated in MOI, for instance. *Id.* ¶ 21.

106. Similarly, there is no Mozambiquan guidance, and no Mozambiquan practice, supporting the substantial “early termination fee” supposed by Dearman. *Id.* ¶ 22.

107. The lack of guidance or practice supporting Comer’s and Dearman’s percentage-based fees and early termination fee concepts are important for two reasons. First, Dearman and Comer are simply supplying baseless conjecture contrary to the facts of this case, and the practice in Mozambique. Second, when one recalls that this entire thought exercise relates to a hypothetical negotiation between PEL and Mozambique, Comer’s and Dearman’s assumptions are completely irrelevant. Given that there is no practice in Mozambique for entering into the imagined percentage-based contract supposed by Comer and Dearman, there can be no reason to hypothesize that Mozambique would have negotiated a supposed “release fee” on that basis.

108. Of course, this latter point further highlights the conjectural nature of PEL’s entire damages submission. PEL now wishes it had negotiated a different contract, and improperly seeks

to have this Tribunal – under the guise of a treaty claim – both imagine and enforce a contract that never existed and would not exist in Mozambique. The Tribunal is not empowered to do so.

**(b) PEL Baselessly Selects One Speculative Form of Remuneration, While Ignoring All Others.**

109. Dearman himself acknowledges that in many cases, consultants do apply time-based fees. *See CER-8*, Ankura Expert Report ¶ 5.2.12. Moreover, there are many different engineering fees structures, *see RER-15*, Dysert Expert Report ¶ 141, and no particular reason or basis for PEL to claim that one fee structure should be assumed over all others.
110. There is, for instance, no more reason to assume a percentage-based fee structure than there is to assume a cost-plus contract, a lump sum contract, or a fixed or guaranteed maximum contract. *See id.* Tellingly, picking any one of these types of contracts is just as speculative, and just as baseless, as Dearman supposing that PEL would be entitled to negotiate on the basis of a percentage-based fee.

**(c) Dearborn Shamelessly And Obviously Overstates The Engineering Remuneration On The Proposed Project, As PEL's Own Estimates Demonstrate.**

111. Even if a percentage-based engineering remuneration could provide a “data point,” the amounts used by Dearman are demonstrably overstated. While the cost estimate in the PFS is inadequate, *see, e.g., RER-13*, Third Betar Expert Report ¶ 10; *RER-15*, Dysert Expert Report ¶ 78 (no BOE document provided as part of the PFS), the cost estimate does actually contain a line item for “Engineering Studies and design consultancy.” That line item is estimated at \$107 million. *See RER-13*, Third Betar Expert Report ¶ 9, 14. Dearman’s engineering remuneration estimates, on the other hand, are between \$124.6 million and \$186.9 million, meaning that Dearman’s estimates overstate engineering remuneration by about \$17.6 million - \$79.9 million. The large differences between Dearman’s estimates now, and the estimates provided by PEL at the time, reveal Dearman’s analysis as speculative and abusive. *See id.* ¶ 14.
112. Moreover, as Dr. Flores observes, the guidance relied upon by Dearman and Comer, properly viewed, suggests that, if anything, a 4% remuneration would be a maximum,

rather than a “conservative” estimate. *See* **RER-14**, Third Flores Expert Report (Quadrant Economics) ¶ 54; *see also* **RER-13**, Third Betar Expert Report ¶ 24. This observation is supported by the fact that PEL’s original estimates were less than 4%. (And it has not been demonstrated that all, or even any, of these amounts would have been paid to PEL if the project had ever happened. *See* **RER-14**, Third Flores Expert Report (Quadrant Economics) ¶ 55.)

113. To compound matters still further, Dearman improperly multiplies his imagined 4%-6% remuneration fees times costs that already include the engineering estimates themselves. **CER-8**, Ankura Expert Report fn. 133 and 134. Dearman also improperly multiplies his imagined 4%-6% remuneration fees times costs that appear operational, such as rolling stock, and contingency amounts, both of which are incorrect. *See* **RER-13**, Third Betar Expert Report ¶ 23.a. and b.
114. Even assuming any validity to the exercise, and holding all else constant, if one rejects Comer’s and Dearman’s speculative 4%-6%, and the improper multiplication noted above, and instead uses PEL’s own contemporaneous project engineering cost estimates, Dearman’s negotiating data point reduces from Dearman’s range of USD 18.7 million to USD 28.0 million, to simply \$16.1 million ( $\$107 \text{ million} \times 5\% + \$107 \text{ million} \times 10\%$ ). *See* **RER-14**, Third Flores Expert Report (Quadrant Economics) ¶ 47.
115. There is, of course, no reason to hypothesize that Mozambique would have paid 100% of that amount on such a disputed claim (even assuming there was a basis for such a claim, and there is not). Indeed, the MOI specified that the costs of the PFS were to be borne by PEL, and there was no other contract supposing that PEL was owed inception fees, termination fees, or any percentage-based remuneration. Nonetheless, if there were any “data point” to be gleaned from Dearman’s analysis in this regard (and there is not), it could only be that any hypothetical negotiations would have been between \$16 million and zero.
116. There are additional difficulties with Dearman’s percentage-based remuneration analysis, which need not be repeated here, but which are detailed in the accompanying reports.



**E. While Dearman’s “Data Points” Are Fundamentally Flawed, PEL Ignores Much More Relevant “Data Points” Negating Any Claim For Damages**

117. As the above makes clear, Dearman’s data points do not provide a valid basis to imagine that Mozambique would have paid PEL the “release fee” claimed by PEL.
118. To the extent “negotiating damages” apply at all, however, there are other “data points” that would be relevant. Indeed, PEL concedes that “negotiating damages” are not based upon “a hypothetical claimant or hypothetical respondent,” but rather on “the parties’ specific circumstances.” Add’l Quantum Subm. ¶ 29(2). Without attempting to be exhaustive:
- 118.1. For instance, the direct award of the concession is illegal under Mozambiquan law. Whether PEL refuses to accept that conclusion or not, Mozambique could not be hypothesized to grant value to PEL for alleged contract rights that are illegal.
- 118.2. PEL did not “conceive” of a coal-rail or port, or prove it viable, and the winning bidder’s proposal was far different, and better, than the “project” PEL proposed.
- 118.3. PEL had already agreed to undertake the PFS at its own cost. Attempting in hypothetical subsequent negotiations to claim entitlement to payment for alleged value conferred in the PFS is inconsistent with that agreement.
- 118.4. PEL hid from Mozambique the fact that it had been blacklisted. If one is to imagine a hypothetical negotiation in which both sides are acting reasonably, presumably, PEL would disclose in that negotiation that it had been blacklisted. The fact of PEL’s blacklisting would have, however, caused the termination of any negotiations in all events.
- 118.5. PEL falsely claimed that the project it proposed was economically viable when it was not. If one is to imagine a hypothetical negotiation in which both sides are acting reasonably, presumably, PEL would disclose that its “cash flow” projections in May 2012 were merely a “worst case scenario,” and “cannot be relied upon as an accurate assessment of future profits.” Reply ¶¶ 1119-1121. Presumably PEL would have disclosed that in 2012, PEL was not even trying to

provide reliable financials in 2012 because “there was no concession agreement available at the time this preliminary projection was prepared.” “[T]he terms of the concession were unknown.” Reply ¶¶ 1121. “A detailed financial evaluation would be required, as part of a bankable feasibility study, to demonstrate the Project’s potential economic viability.” *Id.* If PEL had disclosed such facts in a hypothetical, reasonable negotiation, the discussions would have (quite reasonably) ended then and there.

118.6. Moreover, after PEL’s participation in, loss in, and failure to appeal the public tender, any hypothetical negotiation would have included the fact that PEL had waived its rights to dispute the results of the public tender.

119. In addition to all of the above, if one imagines that PEL were conducting a reasonable, good faith negotiation, presumably PEL would have admitted then what its new damages experts attempt to claim now: The PFS was a very preliminary document. The PFS was no more specific than to conclude that there was an 80% chance, on the information provided thus far, that the project could have cost overruns of somewhere between \$1.5 billion and \$3.1 billion. At the PFS stage, the project could still cost as much as \$6.2 billion, based upon (Dearman’s view of) AACE guidance. The project was not financially viable even at a cost of \$3.1 billion; at a cost of \$6.2 billion, the project would – if ever built – be a political and financial disaster.

120. These data points, much more than Dearman’s improper and incorrect data points, result in a determination of zero damages.

#### **IV. PEL’S NEW DAMAGES THEORY IS FACTUALLY INCOMPATIBLE WITH PEL’S CASE AND CLAIMS**

121. At its core, PEL’s new damages claim admits the fallacies that underlay PEL’s claim in this case.

122. The PFS was not, contrary to PEL’s assertions, a significant, well-developed engineering document. It was, at best, a Class 5 estimate, with dozens of holes in project maturity – just on the cost side.

123. The PFS did not demonstrate project viability (contrary to PEL's fraudulent assertions) – according to Dearman, it could not even accurately estimate costs within at least \$1.5 billion dollars.
124. PEL cannot or will not demonstrate even what it spent on the PFS, but neither Mozambiquan law nor treaty jurisprudence will permit PEL to turn the MOI and the PFS (underdeveloped such as the PFS now admittedly was) into an imagined windfall.
125. PEL's "negotiating damages" theory is a speculative, baseless effort to evade the fact that PEL has suffered no damages for allegedly failing to receive a concession that was never – under any version – built.

## V. CONCLUDING SUMMARY REGARDING PEL-CLAIMED DAMAGES

126. Despite at least six damages theories, PEL has not ever attempted or purported to actually state a value for its alleged rights (alleged or otherwise) under the MOI. PEL has improperly attempted to value TML's concession (not its own proposal) with two DCF-based analyses. PEL has improperly attempted to value an alleged "lost opportunity" to TML's concession, again with DCF-based analysis, and a purely speculative 90% lost opportunity factor. Now, PEL has improperly attempted to value corporate-level profit expectations, alleged "de-risking," and the alleged value of an engineering consultancy it never had. But none of these efforts purport to value PEL's rights under the MOI, upon which it bases its claims.

### A. PEL Is Not Entitled To Damages For The *Direito de Preferência*; PEL Received The *Direito de Preferência*

127. The MOI contained, at most, a *direito de preferência*, and PEL received that *direito de preferência*. PEL still lost the public tender, and failed to appeal that public tender in a timely manner. PEL is not entitled to damages for having received the *direito de preferência*, or for having lost the public tender.
128. The damages inquiry should end there: Mozambique provided the *direito de preferência*, and there can be no damages owed.

**B. Even If The MOI Contained A Claimed Right To A Direct Award Of A Concession, Such An Award Would Be Illegal, And Of Zero Value.**

129. Even if the MOI contained an alleged right to a direct award of a concession (it did not), such an award would be illegal. An illegal contract cannot have value; nor could PEL seriously claim a right to enforce an illegal contract, and there can be no damages owed.

**C. Even If The MOI Contained A Claimed Right To A Direct Award Of A Concession, And Such An Award Were Not Illegal, No Damages Are Owed For Alleged Failure To Award A Non-Viable, Unbuilt Project.**

130. Even if one assumed that the MOI contained a claimed right to an award of a direct concession, the project PEL proposed in the PFS was not financially viable.

131. In May 2012, PEL belatedly provided financial information requested by Mozambique, and although PEL falsely claimed at the time that such information confirmed that PEL's proposal was "financially viable," the data actually demonstrates that the project as proposed was not financially viable.

131.1. PEL committed fraud in claiming that the financials it provided supported the project as financially viable.

131.2. One need go no further than PEL's submissions *in this case* to demonstrate the fraud. PEL *agreed* in this case that "the terms of the concession were unknown." Reply ¶¶ 1121. "A detailed financial evaluation would be required, as part of a bankable feasibility study, to demonstrate the Project's potential economic viability." *Id.*

132. In all events, the value of PEL's proposed project, based on PEL's own, contemporaneous financial information, is zero. *See* SOD ¶¶ 834-42 (citing **RER-4**, Flores Expert Report (Quadrant Economics), ¶¶ 36-37).

133. Even the coal-rail project as envisioned by the winning bidder has not been built, and the value of a non-existent, unbuilt project is zero.

**D. PEL Is Not Entitled To An Alleged Value Of TML's Project.**

134. Having failed to demonstrate (or even attempt to demonstrate) the value of the “concession” as proposed by PEL, PEL instead claimed damages based upon a DCF-based analysis of TML’s project.
135. TML’s project is materially different, and substantially better, than the project PEL proposed, and the MOI does not grant, under any version of events, PEL a right to TML’s project.
136. In all events, TML’s coal-rail project has not been built either, and there is no damage to be awarded on that basis either.

**E. PEL's DCF-Based Damages Claims Are Speculative, Improper, and In All Events Demonstrate Zero Damages.**

137. Next, regardless of whether PEL purported to value its alleged concession, or TML’s project, PEL’s DCF-based damages analyses are speculative and improper.
138. Well-settled and voluminous precedent holds that DCF-based analyses are not appropriate where there is no history of profitmaking operations, and there is no such history here. Indeed, any version of the project has been scrapped as proposed.
139. When one corrects PEL’s experts’ DCF-based analysis with any of numerous improper, speculative assumptions, even PEL’s analyses would reduce to zero damages.
140. PEL is not aided by attempting to add further inputs, change inputs, or add *ex ante* analyses. In fact, the wide gaps between PEL’s experts’ damages amounts further demonstrate the speculative and improper nature of the claimed damages.

**F. PEL's So-Called Lost Opportunity Damages Are Merely Baselessly Discounted Versions Of Already Improper DCF-Based Analyses.**

141. In an effort to shore up improper DCF-based analyses, PEL next offers so-called “lost opportunity” damages.
142. Lost opportunity damages are not appropriate here, but even if they were, PEL’s so-called “lost opportunity” damages are not proper in all events. PEL has merely taken its already improper, speculative DCF-based amounts, and multiplied them by baseless, speculative,

and overstated percentage factors purporting to claim that there was a 90% chance (a “virtual certainty”) PEL would have been awarded and operated a profitable concession.

143. A speculative, flawed DCF-analysis, multiplied by a speculative, flawed percentage, is still just a speculative, flawed amount.

**G. PEL Failed Or Refused To Provide Evidence Of Any Time Or Cost Associated With the PFS.**

144. Having failed to offer any permissible evidence of a viable, profitmaking project, or of any actual damage, PEL also failed or refused even to establish a direct damage associated with the alleged cost or time spent in completing the PFS.

**H. PEL Abandons The Pretext Of Attempting To Prove Damages, And Asks This Tribunal To Imagine Negotiations And Pick-A-Number.**

145. Now, finally, in the current submission, PEL abandons any pretext of proof that it has been harmed by having allegedly been deprived of a non-viable, unbuilt project.
146. PEL’s inability to prove harm or damage does not excuse PEL from the burden of demonstrating such harm or damage.
147. PEL has cited no treaty arbitration precedent supporting the notion that PEL, disappointed about not receiving a concession, can simply claim that its PFS (which it agreed to provide at its cost) was “valuable” to Mozambique, and seek damages on that basis. Less still, having failed to prove harm or damages, may PEL simply ask this Tribunal to imagine negotiations, and pick-a-number. Were this Tribunal to accept PEL’s invitation to imagine such damages, every bidder or entity providing an unsolicited proposal would later simply claim that its bid or proposal was somehow “value-added” and claim negotiating damages. Similarly, were this Tribunal to accept PEL’s consolidated corporate pre-tax profits as evidence, every entity would simply attach its annual reports to an arbitration demand, and claim that it “expected” to negotiate for its average profits.
148. In all events, PEL’s desperate attempt to create still more bites at the damages apple is thoroughly flawed.
- 148.1. Corporate pre-tax profits history is not evidence of damages on this alleged project in Mozambique.

148.2. PEL's de-risking theory is debunked by the very engineering principles upon which PEL's experts purports to rely.

148.3. PEL's attempt to restate its claim as a percentage-based engineering consultancy only serves to highlight contract rights *PEL did not have*; PEL is not entitled to damages on a contract it did not have, and which is overblown by PEL in all events.

**I. In The End, PEL's Numerous, Divergent, Inconsistent, And All Improper Damages Theories Are Only Indicative Of The Fundamental Weakness Of PEL's Case.**

149. Ultimately, the most important takeaway from PEL's scattershot of damages theories is two-fold. First, PEL plainly is not confident in any of its theories (and with good reason). Second, the inconsistent, indeterminate analyses demonstrate what has been true all along: neither the MOI nor the PFS granted a concession, and neither define the terms of a concession from which one could pretend to calculate damages. The wild swings and flailing efforts of PEL and its damages experts are the result of alleged rights in a project that did not exist, was not viable, and has not been built.

150. PEL's damages claims – on any and all bases – should be denied.

**VI. INCORPORATION BY REFERENCE**

151. Given PEL's expressed intent to call two damages experts at the hearing in this matter, Mozambique reserves and incorporates all previous responses and rejoinders to damages.

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Respectfully submitted,



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