PCA Case No. 2020-21

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

and

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

-between-

PATEL ENGINEERING LIMITED (INDIA)

Claimant

-and-

THE REPUBLIC OF MOZAMBIQUE

Respondent

PROCEDURAL ORDER NO. 3

Decision on the Motion for Bifurcation

THE ARBITRAL TRIBUNAL

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

REGISTRY

Permanent Court of Arbitration

ADMINISTRATIVE SECRETARY

Sofia de Sampaio Jalles

14 December 2020

WHEREAS

1. This arbitration arises between Patel Engineering Limited ["**Patel**" or "**Claimant**"] and The Republic of Mozambique ["**Mozambique**" or "**Respondent**"]. Hereinafter, Claimant and Respondent shall be jointly referred to as the "**Parties**".

2. On 10 August 2020 the Parties received the consolidated version of the Terms of Appointment, which were deemed to have been signed by the Parties and the Arbitrators on 4 August 2020.

3. On 14 October 2020 the Tribunal issued Procedural Order No. 1, on the conduct of the arbitration and the procedural timetable, after consulting with the Parties.

4. Pursuant to the procedural timetable, on 30 October 2020 Claimant filed its Statement of Claim. On 20 November 2020 Respondent submitted a Motion for Bifurcation of the jurisdictional questions from the merits and damages [the "**Motion**"]. On 4 December 2020, Claimant presented its Response to Respondent's Motion [the "**Response**"].

5. Pursuant to paras. 14 and 15 of Procedural Order No. 1, the Tribunal reserved the right to ask the Parties for a new round of submissions once it had received Claimant's Response; if, on the other hand, the Tribunal found that it was sufficiently briefed on the issue of bifurcation, it would issue its Decision on Bifurcation by the date established in Annex I to Procedural Order No. 1.

6. After deliberations, the Tribunal finds that it has been sufficiently briefed. Given that there is no need for further submissions of the Parties, the Tribunal hereby issues its Decision on Bifurcation:

PROCEDURAL ORDER NO. 3

7. The Arbitral Tribunal will start by summarizing the positions of Respondent (**1.**) and Claimant (**2.**) and then adopt its decision (**3.**).

1. POSITION OF MOZAMBIQUE

8. Mozambique submits that the bifurcation of the jurisdictional questions from the merits and damages is the efficient, economical and a sensible approach to this case[1].

A. Criteria for bifurcation

9. Mozambique explains that under the Arbitration Rules of the United Nations Commission on International Trade Law 1976 ["**UNCITRAL Rules**"], the Tribunal has the power to bifurcate jurisdictional questions. According to Mozambique, tribunals generally inquire whether the jurisdictional objections[2]:

- Are "*prima facie* serious and substantial",
- Can "be examined without prejudging or entering the merits", and
- "If successful [would] dispose of all or an essential part of the claims made".

B. There are substantial jurisdictional questions

10. According to Mozambique, these factors favor the bifurcation of jurisdiction in the present proceedings[3], given that there are substantial jurisdictional questions:

- Whether Patel made an investment (**a.**),
- Whether the Parties contractually agreed to ICC arbitration (**b.**),
- Whether in the 2011 Memorandum of Interest ["**MOI**"] the Parties chose to proceed before the ICC in the case of claims arising under the Agreement between the Government of the Republic of India and the Republic of Mozambique for the Reciprocal Promotion and Protection of Investment ["**BIT**"] (**c.**),
- Whether this UNCITRAL proceeding should yield to the ICC arbitration (**d.**), and
- Whether Patel exhausted its remedies in Mozambique (**e.**).

[1] Motion, p. 1.
[2] Motion, p. 7, referring to Doc. RL-2 [*Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No 8 on Bifurcation, 14 April 2014, at para. 109].
[3] Motion, p. 8.

a. First Objection: whether Patel made an investment

11. Mozambique notes that Patel asserts that in 2011 it entered into a MOI with Mozambique, pursuant to which Patel was allegedly provided a right of first refusal to enter into a concession to build a railroad/port in Mozambique. Thereafter, a dispute arose whether Mozambican law required the public tender of the project. To resolve the matter, Patel organized a consortium and agreed to participate in a 2013 public tender. In such tender, Patel was provided a point bidding advantage to account for the MOI. After Patel's consortium did not win, Patel abandoned the consortium and reverted to insisting on its alleged right of first refusal[4].

12. Mozambique finds that, before reaching the merits of Patel's claims, the Tribunal must determine whether the purported right of first refusal, the MOI and/or the expenditures related to the preparation of a feasibility study, constitute an "investment" sufficient for there to be jurisdiction *ratione materiae*. In Respondent's view, they do not:

13. First, there are doubts as to whether the MOI and a right of first refusal are an investment. According to various tribunals, a MOI is merely an expression of interest and does not constitute an investment[5]. Mozambique submits that in the present case the MOI did not compel Patel or the Mozambican Ministry of Transport and Communications ["**MTC**"] to enter into a concession. The MOI contained several conditions precedent that had to be satisfied before it became a binding commitment and Patel was free not to exercise its option. Mozambique finds that the MOI is like a memorandum of understanding, which, according to the findings of the tribunal in *PSEG Global*, is not an investment[6].

14. Second, Mozambique contends that there are also substantial questions as to whether the expenditures made by Patel in connection with the MOI – including those incurred in preparation of the feasibility study – constitute an investment[7]. Mozambique avers that such expenditures are not an investment because the concession never came to fruition. Mozambique finds that even if Patel were to have a contract claim under local law (*quod non*), that type of claim is not protected under the BIT[8].

15. Third, Mozambique invokes the *Salini* factors and points out that an investment requires a substantial contribution by the investor, for a certain duration, the existence of an operational risk, a certain regularity of profit for the investor, and a contribution to the economic development of the host State[9]. According to Respondent, applying these factors in the present case, one finds that this is a

[4] Motion, pp. 1 and 5.
[5] Motion, p. 9, referring to Doc. RL-5 [*PSEG Global Inc., The North American Coal Corp., and Konya Ilgin Elektrik Üretim ve Ticaret Ltd. Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5 Decision on Jurisdiction, 4 June 2004, para. 176.]
[6] Motion, pp. 9-10.
[7] Motion, pp. 10-11, referring to Doc. RL-6 [*Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, paras. 48-50].
[8] Motion, p. 11.
[9] Motion, p. 11, referring to Doc. RL-7 [S*alini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52].

pre-concession, pre-investment contractual dispute, involving the validity of the MOI and Patel's belated claims over a completed public tender[10]:

- The preparation of a feasibility study is not a substantial contribution to Mozambique, lacks sufficient duration and contains no operational risk;

- Likewise, there is no profit arising from the MOI itself and the MOI did not provide a contribution to Mozambique's economic development.

16. Fourth, there is a question whether the MOI is an investment for the purposes of Art. 1(b)(iii) of the BIT, given that the MOI is exploratory and conditional, and not a "right to money"; it also does not have financial value[11]. Furthermore, Art. 1(b)(v) of the BIT does not apply either, given that no concession was conferred by Mozambique to Patel by law or under contract[12].

17. Lastly, Mozambique submits that Patel never registered as a foreign investor in Mozambique pursuant to Art. 22, Section 1 of the Mozambique Investment Law[13]. Given that the BIT defines investments as those made "in accordance with the national laws of the Contracting Party in whose territory the investment is made", Patel cannot be considered an investor[14].

b. Second Objection: whether the Parties contractually agreed to ICC Arbitration

18. Mozambique argues that the MOI's arbitration agreement provides for arbitration under the ICC Rules in Mozambique[15]. The agreement is valid, enforceable and severable from the question of the MOI's validity[16]. From Mozambique's perspective, Patel intentionally violated the MOI's arbitration agreement when it filed this UNCITRAL arbitration. Mozambique further notes that the ICC Rules are sufficiently broad to permit arbitration of investment treaty claims[17].

19. Mozambique explains that it submitted a request for arbitration, dated 20 May 2020, against Patel, pursuant to the MOI's arbitration agreement and the ICC Rules [the "**ICC Arbitration**"][18]. Mozambique finds that Patel must bring its BIT claims in

[10] Motion, pp. 1, 5-6 and 11-12.
[11] Motion, p. 12, referring to Art. 1(b)(iii) of the BIT, which according to Respondent defines an investment as "rights to money or to any performance under contract having a financial value".
[12] Motion, p. 12, referring to Art. 1(b)(v) of the BIT, which according to Respondent provides that investments include "business concessions conferred by law or under contract".
[13] According to Respondent, Art. 22, Section 1 of the Mozambique Investment Law requires that a "foreign investor, within one hundred and twenty (120) days counted from the date of notification of the decision authorizing the investment project, shall register the undertaking involving direct foreign investment with the authority responsible for monitoring the inflow of capital, and register subsequently each actual capital import operation that takes place" [Motion, p. 12].
[14] Motion, p. 12.
[15] Motion, p. 6, referring to Doc. R-1 [MOI, Clause 10].
[16] Motion, p. 13.
[17] Motion, p. 13.
[18] Motion, p. 6.

the ICC Arbitration and that this Tribunal must respect and give effect to the Parties' arbitration agreement and selection of Mozambique as the place of arbitration[19].

c. Third Objection: whether the Parties elected under the BIT to proceed before the ICC

20. Mozambique further submits that there is a substantial jurisdictional question whether in the MOI the Parties chose to bring claims under the BIT before the ICC.

21. Mozambique notes that under the BIT the parties may agree to a particular mode of dispute resolution "in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial, arbitral or administrative bodies"[20]. According to Respondent, the ICC is an arbitral body recognized in Mozambique. Mozambique further points out that the MOI provides that[21]:

> "The arbitration will be governed by Mozambique law and the rules of the International Chamber of Commerce shall be followed."

22. Therefore, it can be argued that the Parties agreed in the MOI to submit their disputes under the BIT to ICC arbitration[22].

d. Fourth Objection: whether this proceeding should yield to the ICC Arbitration

23. Mozambique finds that there is a substantial jurisdictional question whether this UNICTRAL proceeding should be dismissed or stayed in deference to the pending ICC Arbitration[23].

24. Mozambique contends that this UNCITRAL proceeding is subsumed within the ICC Arbitration, where Mozambique and the MTC seek a relief which is substantially broader than the issues raised in this UNCITRAL proceeding, and which includes investment treaty questions[24]. Furthermore, Mozambique notes that Patel is participating in the ICC Arbitration and requesting relief on the merits, including an award that Mozambique and the MTC "have violated their obligations under the MOI"[25]. Therefore, Mozambique submits that the ICC Arbitration can determine all contract and BIT disputes among all parties, including the MTC.

25. In the alternative, Mozambique finds that the present arbitration should be suspended until the ICC Arbitration determines the validity of the MOI and contractual rights thereunder[26]. In the *Fraport* case, the tribunal accepted an objection to ICSID jurisdiction, holding that since the investment was contrary to local law, there was no investment under the treaty. Mozambique submits that if it

[19] Motion, p. 13.
[20] Motion, p. 14, referring to Doc. R-1 [MOI, Clause 10].
[21] Motion, p. 14, referring to Doc. RL-8 [Art. 9(2)(a) of the BIT].
[22] Motion, p. 14.
[23] Motion, p. 14.
[24] Motion, p. 15.
[25] Motion, p. 18.
[26] Motion, p. 18.

were found that the MOI violated Mozambican procurement law, there would be no protected investment under the BIT and the Tribunal would lack jurisdiction[27].

e. Fifth Objection: whether Patel exhausted remedies in Mozambique

26. Mozambique argues that, even if the Tribunal were to conclude that the ICC Arbitration does not encompass BIT claims, the Tribunal should still dismiss or suspend this arbitration. Pursuant to Art. 39 of Mozambican Law No. 15/2011 on Public Private Partnerships, disputes must be resolved pursuant to the terms of the parties' contract; and in the present case, the contract dispute has not yet been resolved in the ICC Arbitration[28].

27. Lastly, Mozambique avers that Patel's bid dispute should have been timely resolved utilizing the procedures for contesting bids under Mozambican procurement law. By trying to belatedly turn a procurement dispute into an investment treaty case, Patel seeks to impermissibly expand the scope of investor-State arbitration[29].

C. The jurisdictional objections are not intertwined with the merits

28. Mozambique argues that the above jurisdictional questions are not inextricably intertwined with the merits or damages: they relate to whether the MOI and expenditures constitute an investment, and whether this Tribunal should respect and enforce the Parties' arbitration agreement. Such questions are thus distinct from the merits (such as whether the MOI is valid, what are the substantive rights under the MOI, whether there was a breach of the MOI, whether there are investment treaty claims, and whether there are damages)[30].

* * *

29. Therefore, Mozambique requests that the Tribunal bifurcate the jurisdictional objections, since this is the most efficient and economical solution, which will allow the Parties and the Tribunal to save resources[31].

2. POSITION OF PATEL

30. Claimant submits that the Motion should be dismissed because procedural efficiency and fairness militate against the bifurcation of Respondent's jurisdictional objections in this case[32].

A. Criteria for bifurcation

31. Claimant argues that the Tribunal's discretion to bifurcate jurisdictional questions must be exercised with care, particularly where bifurcation could increase the time

[27] Motion, pp. 15 and 18, referring to Doc. RL-9 [*Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 23 July 2007, para. 19, 44, 46].
[28] Motion, p. 18.
[29] Motion, p. 19.
[30] Motion, pp. 19-20.
[31] Motion, p. 20.
[32] Response, para. 2.

and costs of the overall proceedings[33]. According to Claimant, fairness and procedural efficiency are determinant when considering a bifurcation application[34]. Procedural efficiency is even more *à propos* where the arbitration is seated in The Hague, as is the case here[35].

32. As to the factors that the Tribunal should consider when assessing the Motion, Patel argues that each case turns on its own circumstances, but that the factors identified in the *Glamis* case constitute helpful guidance[36]. Although Claimant does not disagree with the criteria put forward by Respondent, it argues that they are not "one-size-fit-all". Furthermore, Claimant notes that Mozambique relies on a low threshold to determine whether a jurisdictional objection is substantial; therefore, the Tribunal should prefer the standard formulated in *Glamis*[37].

B. Procedural efficiency and fairness militate against bifurcation

33. Patel finds that in the circumstances of this case, bifurcation would not promote procedural efficiency and economy. It would also be unfair for the Tribunal to grant Respondent's Motion[38].

34. Patel submits that Respondent's objections as to the existence and legality of the investment are intertwined with the merits and quantum, and require the Tribunal to consider a substantial amount of evidence at the jurisdictional stage[39]:

- The objection concerning the existence of an investment requires the Tribunal to review the vast majority of the documentary and witness evidence submitted in the Statement of Claim, including expert forensic evidence on the authenticity of the version of the MOI relied upon by Patel;

- The objection in respect of the legality of the investment requires the consideration of expert evidence on Mozambican law, that is also relevant to the merits of Patel's case.

35. As to Respondent's other objections, which essentially revolve around the parallel ICC Arbitration, they are so frivolous and contrived that it would be a waste of time and costs to deal with such objections on a preliminary basis. Patel finds that it would also be unfair for Mozambique to be permitted to benefit from its own procedural tactics[40]: Respondent and the MTC commenced the ICC Arbitration three months after this arbitration was commenced and almost two years after

[33] Response, paras. 14-18.
[34] Response, para. 18, referring to Doc. CLA-183 [*Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7, Procedural Order No. 4 – Decision on the Respondent's Application for Bifurcation, 19 April 2017, para. 78].
[35] Response, para. 19, referring to Art. 1036(3) of the Dutch Arbitration Act: "The arbitral tribunal shall guard against unreasonable delay of the proceedings and, if necessary, at the request of a party or of its own motion, take measures. The parties shall mutually be obliged to prevent unreasonable delay of the proceedings."
[36] Response, para. 20, referring to Doc. CLA-190 [*Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, paras. 10-11].
[37] Response, paras. 22-24.
[38] Response, para. 38.
[39] Response, paras. 3 and 29-33.
[40] Response, paras. 4 and 34-37.

Respondent had been notified of an investment dispute between the Parties under the BIT[41]. According to Patel, proof that the ICC Arbitration is a mere tactical maneuver aimed at undermining this arbitration is the fact that Mozambique and the MTC have no genuine claim in the ICC Arbitration, in which they essentially seek declaratory relief[42].

36. Patel further finds that Respondent's arguments on procedural efficiency and reducing unnecessary costs are contradicted by the fact that Respondent refused to consolidate both the ICC Arbitration and this proceeding in a single arbitration under either set of arbitration rules, with a seat in a neutral jurisdiction[43].

C. The objections are meritless and intertwined with the merits/quantum

a. First Objection: whether Patel made an investment

37. Patel finds that Mozambique's First Objection is meritless and intertwined with the merits, which means that there would be no procedural efficiency in bifurcating it.

38. First, Patel argues that it invested in an economic transaction aimed at developing a rail corridor and port in Mozambique, valued at USD 3.115 billion ["**Project**"]. According to Patel, its investment included[44]:

- The direct award of a concession to implement the Project and all the rights under the MOI associated with the Project (right of first refusal, exclusive right to develop the Project etc.);
- The value of the information and data transferred to Mozambique;
- The preliminary study conducted by Patel in 2011;
- The detailed prefeasibility study carried out by Patel during 2011-2012.

39. Patel submits that to determine Respondent's objection, the Tribunal must answer the question of what comprised Patel's investment, including what was agreed under the MOI. According to Patel, this is not a question that can be resolved on the face of the MOI, but will require the Tribunal to review extensive factual and expert evidence (including evidence on the history and implementation of the MOI, as well as on the authenticity of the English version relied upon by Claimant)[45].

40. Claimant finds that the question of what was agreed under the MOI is intertwined with the merits. The Tribunal must determine what was or not promised to Patel to decide Patel's claims that Respondent breached the Fair and Equitable Treatment standard and that Respondent indirectly expropriated Patel's contractual rights to a concession and to exclusivity[46].

[41] Response, para. 7.
[42] Response, para. 8.
[43] Response, paras. 10-13 and 36.
[44] Response, para. 42.
[45] Response, paras. 43-44.
[46] Response, para. 45.

41. In any case, Claimant argues that Respondent's objection is meritless as a matter of law. In the *PSEG Global* case, on which Respondent relies, the tribunal found that the concession agreement between PSEG and the Turkish government was a valid concession agreement, which constituted an investment. As to the decision on the memorandum of understanding, the circumstances of that case have nothing to do with the case at hand[47].

42. Second, Respondent's objection on the basis that expenditure made by Claimant in connection with the MOI does not constitute an investment is equally meritless. Claimant does not rely on expenditure in relation to the MOI as its investment. In any case, this goes to show that the determination of what was agreed between the Parties under the MOI is key to the determination of whether Claimant has made a qualifying investment[48].

43. Third, as to the *Salini* factors invoked by Respondent, this objection cannot be decided on the face of the MOI. The determination of what comprised Patel's investment and what was agreed under the MOI requires the Tribunal to consider substantial factual and expert evidence; it is also intertwined with the merits and quantum[49]. Patel notes that there is also considerable debate as to whether the *Salini* criteria are compulsory requirements or mere indicators of the possible existence of an investment. In any event, such criteria are met in the present case[50].

44. Fourth, Patel submits that its investment clearly falls within the scope of the definition of "investment" under the BIT, as demonstrated in the Statement of Claim. Patel further argues that its investment is much broader than Respondent tries to define it, and includes the information, data, studies, and know-how provided by Patel to Mozambique, without which Mozambique's largest infrastructure project to date would have been a non-starter[51].

45. Lastly, Patel argues that it is well-established that failure to register an investment, even if such registration is required by law, is not sufficient for a finding that an investment has not been made in accordance with the law[52].

b. Second Objection: whether the Parties contractually agreed to ICC Arbitration

46. Patel agrees that the ICC Rules may be appropriate to govern a BIT dispute – in fact, Patel has offered that the two arbitrations be consolidated under the ICC Rules. However, Respondent conflates the issue of the arbitration rules with that of jurisdiction, suggesting that the ICC tribunal has jurisdiction to hear this claim[53]. Patel submits that this is incorrect:

[47] Response, para. 47.
[48] Response, paras. 49-51.
[49] Response, paras. 52-53.
[50] Response, para. 54.
[51] Response, paras. 57-58.
[52] Response, para. 60, referring to Doc. CLA-87 [*Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, para. 146].
[53] Response, para. 62.

- Clause 10 of the MOI only covers claims arising out of the MOI, not disputes arising out of violations of the BIT, which contains a separate dispute resolution agreement;

- The law applicable to the MOI is Mozambique law, not international law;

- Tribunals appointed under an arbitration clause contained in a contract have no basis to uphold their jurisdiction under a separate arbitration agreement contained in an investment treaty; *a contrario*, treaty tribunals routinely hold that they have jurisdiction to hear claims arising out of a breach of contractual obligations where a breach of an umbrella clause is invoked.

47. Accordingly, the only tribunal that has jurisdiction to hear both arguments under the MOI and under the BIT is this Tribunal[54].

c. Third Objection: whether the Parties elected under the BIT to proceed before the ICC

48. Patel finds that Mozambique's Third Objection is meritless for three reasons:

49. First, the Parties' agreement to submit disputes arising out of the MOI to ICC arbitration is not an agreement for the purposes of Art. 9(2)(a) of the BIT, which clearly refers to a dispute under the Treaty, and not to a contractual dispute[55]. Claimant's claim is for breach of the Treaty, not of the MOI. In contrast, Clause 10 of the MOI only covers disputes "arising out of this Memorandum"[56].

50. Second, Art. 9(2)(a) of the BIT contemplates that the parties' agreement as to dispute resolution must be subsequent to their failure to settle the dispute amicably. In the present case, the negotiation period started seven years after the MOI was entered into. Therefore, the parties to the MOI could not have contemplated that their investment dispute, which would arise seven years later, would be covered by Clause 10 of the MOI[57].

51. Third, the Parties were aware of the BIT (which had entered into force in 2009) at the time they executed the MOI in May 2011. Yet, the Parties did not exclude a resort to the BIT in Clause 10 of the MOI. This shows that Clause 10 of the MOI only covers disputes "arising out of" the MOI and not investment disputes[58].

d. Fourth Objection: whether this proceeding should yield to the ICC Arbitration

52. Patel argues that "it is difficult to see how [Respondent's Fourth Objection] is a proper jurisdictional objection"[59].

[54] Response, para. 63.
[55] Response, paras. 65-66.
[56] Response, para. 66.
[57] Response, para. 67.
[58] Response, para. 68.
[59] Response, paras. 69-71.

53. Claimant notes that the ICC Arbitration was commenced by Mozambique after Claimant commenced this arbitration, the request for arbitration in the ICC Arbitration reads as a response to the arguments raised by Patel in this arbitration, and Mozambique and the MTC have essentially sought declaratory relief in the ICC Arbitration, including relief aimed at depriving this Tribunal of jurisdiction over Claimant's claims[60].

54. Claimant further observes that Respondent suggests that bifurcation would be appropriate in that it would allow time for the ICC tribunal to reach a decision. Patel argues, however, that the purpose of bifurcation is not to have another tribunal decide issues before this Tribunal[61].

55. Lastly, Patel avers that Respondent should have made the argument that, if the MOI violated Mozambican law, Claimant had failed to make a protected investment, with its objection on the existence of the investment. Respondent, however, chose not to do so, because it knows that the argument on the legality of the MOI is intertwined with the merits and will require the Tribunal to examine substantial expert evidence on Mozambican law. In other words: Respondent's objection is not suited to bifurcation[62].

e. Fifth Objection: whether Patel exhausted remedies in Mozambique

56. Patel finds that Mozambique's Fifth Objection is not only hard to follow, but also does not appear to be a proper jurisdictional objection[63].

57. Patel notes that the BIT does not contain any requirement that an investor exhaust local remedies before bringing a claim under the BIT[64].

58. In any event, Patel argues that to the extent Mozambique is suggesting that the MOI's arbitration agreement somehow precludes Patel from commencing a treaty claim, the objection is also meritless: it is a well-established principle that an exclusive jurisdiction clause in a contract does not prevent an investor from commencing a treaty claim, as the causes of action are different[65].

* * *

59. In view of the above, Patel requests that the Tribunal dismiss Respondent's Motion and order Respondent to pay all costs incurred by Patel in connection with this Motion, including interest[66].

[60] Response, para. 71.
[61] Response, para. 73.
[62] Response, paras. 74-76.
[63] Response, paras. 78-79.
[64] Response, para. 80.
[65] Response, para. 79, referring to Doc. CLA-102 [*Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 86-116].
[66] Response, para. 81.

3. ANALYSIS OF THE ARBITRAL TRIBUNAL

A. Criteria for bifurcation

60. Both Parties agree[67] that the Tribunal has discretion to bifurcate jurisdictional questions, *inter alia*, pursuant to Art. 15(1) of the UNCITRAL Rules[68].

61. The case law cited by the Parties shows that arbitral tribunals generally consider the following three-factor test when deciding whether to grant bifurcation[69]:

- Whether the jurisdictional objections raised are *prima facie* serious and substantial;

- Whether any objection to jurisdiction, if granted, will result in a material reduction of the proceedings at the next phase, or would dispose of all or an essential part of the claims; and

- Whether bifurcation is impractical, in that the jurisdictional issue is too intertwined with the merits, making it very unlikely that there will be substantial savings in time or cost.

B. Analysis

62. The Parties agree that the bifurcation of jurisdictional objections from merits and quantum has one main goal: to increase the procedural efficiency and economy of the proceeding. Indeed, if a jurisdictional objection is successful, bifurcation will allow for an early termination of the arbitration, sparing the time and cost required to adjudicate the merits and quantum.

63. The Parties disagree, however, whether such goal will be attained in the present case:

- While Respondent finds that bifurcation will maximize procedural efficiency, given that the jurisdictional objections are serious and substantial, and can be decided without going into the merits,

- Claimant submits that procedural efficiency militates against bifurcation, because two of Mozambique's jurisdictional objections are intertwined with the merits and will require the Tribunal to review substantial evidence; as to the remaining objections, they are so frivolous that it would be a waste of time and costs to deal with such objections on a preliminary basis.

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[67] Motion, p. 7; Response, para. 14.

[68] Art. 15(1) UNCITRAL Rules: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

[69] Doc. CLA-195 [*Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2, para. 49]; Doc. CLA-190 [*Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, para. 12(c)]; Doc. RL-2 [*Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No 8 on Bifurcation, 14 April 2014, para. 109].

64. After carefully analyzing Mozambique's objections to jurisdiction in light of the above criteria and in the interests of procedural economy and efficiency, the Tribunal decides not to bifurcate the proceedings.

65. The Tribunal finds that Respondent's First Objection, on the existence of a protected investment, is inextricably intertwined with the merits, Claimant and Respondent holding opposing views as to the occurrence of the relevant facts. To properly adjudicate the First Objection, the Tribunal cannot simply rely on the facts as pleaded by Claimant but will have to review and analyze a significant amount of evidence, including witness and expert evidence, in order to make its own findings. In these circumstances, the Tribunal finds that a short, bifurcated procedure is not appropriate for the proper adjudication of the First Objection.

66. Considering the Tribunal's decision on the First Objection, the Tribunal decides to join the remaining Objections to the merits.

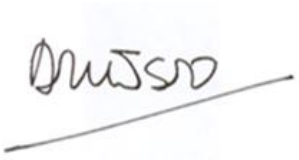
C. Decision

67. In view of the above, the Arbitral Tribunal decides to:

- Dismiss Mozambique's Motion for Bifurcation;
- Join the jurisdictional objections to the merits and quantum; and
- Direct the Parties to follow the procedural timetable set out in Scenario B of Annex I to Procedural Order No. 1.

Place of Arbitration: The Hague, Netherlands

Date: 14 December 2020



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Juan Fernández-Armesto
President of the Arbitral Tribunal