

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. 4

**Decision on Respondent's Stay
Application**

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

3 November 2021

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 30 October 2020 Claimant filed its Statement of Claim.
3. On 20 November 2020 Respondent presented a Motion for Bifurcation, to which Claimant responded on 4 December 2020. On 14 December 2020 the Tribunal issued Procedural Order No. 3, deciding to dismiss Mozambique’s Motion for Bifurcation and to join the jurisdictional objections to the merits and quantum.
4. On 19 March 2021 Respondent filed its Jurisdictional Objections and Statement of Defense. On 9 August 2021 Claimant submitted its Reply on the Merits and Response to Objections to Jurisdiction.
5. On 1 October 2021 the Tribunal received Respondent’s “Application for a stay and modification of the procedural timetable (and request for interim suspension of briefing and all deadlines pending the decision on this application)” [the **“Application”**].
6. On 7 October 2021 the Tribunal rejected Respondent’s request for an interim suspension of all deadlines pending the decision on the Application, after finding that there was no “good cause to amend the procedural timetable, since the Tribunal is simply expecting Claimant’s response to Respondent’s Application, which does not impact on Respondent’s preparation of its Rejoinder on the Merits and Reply on Jurisdiction”¹. The Tribunal nevertheless announced that it was minded “to grant Respondent a two-week extension of the deadline to submit the Rejoinder [on the Merits and Reply on Jurisdiction], and a corresponding extension to Claimant to file its Rejoinder on Jurisdiction”.
7. On 15 October 2021 Claimant filed its Response to Respondent’s Application [**“Response”**]. On that same day Respondent asked for an opportunity to reply to Claimant’s argument before the Tribunal’s ruling on the Application.
8. Pursuant to the Tribunal’s communication A 31, on 20 October 2021 Respondent submitted a Reply in support of its Application [**“Reply”**], and on 25 October 2021 Claimant submitted a Rejoinder to Respondent’s Reply [**“Rejoinder”**].
9. After carefully analyzing the Parties’ respective submissions, the Tribunal hereby issues the following procedural order with its Decision on Mozambique’s Application:

¹ Communication A 30.

PROCEDURAL ORDER NO. 4

10. 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

11. Mozambique submits that the present arbitration must be stayed until after the arbitral tribunal in the parallel proceeding No. 25334/JPA before the International Court of Arbitration of the International Chamber of Commerce [**“ICC Tribunal”** and the **“ICC Arbitration”**] determines the existence, validity, and scope of the Parties’ contractual rights under the Memorandum of Interest [**“MOI”**], given that Patel’s Treaty claims are premised and dependent on the validity of the MOI and its underlying contractual rights².
12. Mozambique argues that a stay is necessary to prevent a waste of time and resources given that the ICC Tribunal has uncontested jurisdiction over the local contractual law claims. Additionally, the ICC Tribunal might conclude that it also has jurisdiction to decide on the Treaty claims brought by Patel before this Arbitral Tribunal, as suggested by Mozambique³.

A. The Tribunal has the authority to stay proceedings and amend the procedural timetable

13. Mozambique contends that under Art. 15(1) of the Arbitration Rules of the United Nations Commission on International Trade Law 1976 [**“UNCITRAL Rules”**] the Tribunal has clear authority and discretion to stay proceedings as it considers appropriate, provided the Parties are treated with equality, have the opportunity to be heard, and do not suffer unreasonable delay. Respondent further asserts that in this case there are no limitations to these broad procedural powers⁴.
14. Moreover, Mozambique avers that pursuant to Procedural Order No. 1, the agreed-upon Terms of Appointment, and Art. 23 of the UNCITRAL Rules, the Tribunal can amend the procedural timetable at any time for “good cause”, either at the “reasonable request of any party” or on its own initiative⁵.
15. Mozambique also points out to the International Law Association Recommendations on *Lis Pendens* and Arbitration [**“ILA Recommendations”**] and to the *Cairn Energy PLC, Cairn UK Holdings Limited v. The Republic of India* case [**“Cairn”**], in which the tribunal developed a four-factor test to guide tribunals in exercising their power to stay the proceedings.

² Application, paras. 3 and 7; Reply, paras. 1 and 4.

³ Application, paras. 22-26.

⁴ Application, paras. 35-37.

⁵ Application, paras. 47-49.

B. A stay is sensible and warranted in these circumstances

16. Respondent asserts that all stay requirements found in the UNCITRAL Rules and in non-binding persuasive authority (such as the ILA Recommendations and *Cairn*) are fully satisfied in the present circumstances⁶:
17. First, the existence, validity, and scope of the disputed rights under the MOI form the underlying basis for Patel’s Treaty claims. According to Mozambique, the MOI (if valid and binding) only offered Patel a *direito de preferência*, which is not an “investment” under Treaty jurisprudence, was in any event not breached, and would not give rise to the lost profit damages Patel seeks. Mozambique’s position on the MOI dispute is fatal for Patel’s position as to jurisdiction, liability, and damages in this UNCITRAL arbitration. Therefore, Mozambique contends that the resolution of the local contractual law dispute over Patel’s alleged “rights” under the MOI is material and fundamental to the outcome of this arbitration⁷.
18. Second, Mozambique argues that a temporary stay is sound case management as it would respect the Parties’ MOI arbitration agreement and mitigate the risk of conflicting decisions and cost inefficiencies. Respondent further claims that even if Patel suffers *any* material prejudice – which is difficult to ascertain – it does not outweigh the undeniable and paramount benefits of the stay of these proceedings⁸.
19. Third, each of the four factors identified and developed by the *Cairn* tribunal is met in the present case⁹:
20. *One*, a stay would not create an imbalance between the Parties or violate Patel’s right to equal treatment. Rather, the balance of convenience favors a stay since the prejudice caused to Mozambique in continuing this proceeding (given that the ICC Tribunal deciding the local law contractual dispute is a prerequisite to resolution of the Treaty claims) far outweighs whatever prejudice Patel may claim in suspending this arbitration¹⁰.
21. *Two*, a stay would not deprive Patel of the right to present its case. Patel may present its arguments before the ICC Tribunal on the local law contractual dispute, and thereafter, as appropriate, before this UNCITRAL Tribunal¹¹.
22. *Three*, a stay would not delay these proceedings unreasonably. The ICC Secretariat’s deadline for a final award in the ICC Arbitration is 29 April 2022. The suspension would thus last for a reasonable period of time according to arbitral jurisprudence¹².
23. *Four*, the outcome of the ICC Arbitration on the local contractual law dispute is a prerequisite to the outcome of this arbitration. It is necessary to establish the

⁶ Application, para. 50.

⁷ Application, paras. 20-21 and 51-67.

⁸ Application, paras. 68-76.

⁹ Application, paras. 77-79.

¹⁰ Application, paras. 80-83.

¹¹ Application, para. 84.

¹² Application, para. 85.

existence of Patel's alleged contractual rights under the MOI in order to assess any violation of Treaty rights¹³.

24. Finally, Mozambique submits that considerations of economy and efficiency strongly support an interim suspension of all deadlines in these proceedings until after this Tribunal decides on Mozambique's Application¹⁴.
25. In view of the above, Mozambique requests the Tribunal to stay the Arbitration until a final award is made in the ICC Arbitration¹⁵.

2. POSITION OF PATEL

26. Claimant submits that Respondents' Application to suspend the proceedings should be dismissed since Mozambique fails to justify it as a matter of law or fact¹⁶.
27. According to Patel, Mozambique filed the ICC Arbitration as a tactic to undermine and derail this arbitration, and to manufacture a potential challenge of this Tribunal's final award. Claimant sustains that the situation, which Mozambique claims creates a risk of inconsistent awards and cost inefficiencies, was deliberately created by the Respondent alone by filing the ICC Arbitration¹⁷.
28. Claimant avers that Mozambique fails to define the "local contractual law dispute" because there is no *genuine* contractual dispute before the ICC. Rather, Patel argues that Respondent's defense (exhibits, legal authorities, witness reports, etc.) is essentially identical in the two arbitrations¹⁸.
29. Patel points out that the ICC Tribunal suspended the entire timetable in the ICC Arbitration pending a decision on its jurisdiction over the so-called "Treaty-Claims"¹⁹. Patel sustains that this Application is the continuation of Respondent's obstructive tactics. Claimant notes that while in the ICC Arbitration Mozambique has sought to expediate the proceedings, in this UNCITRAL arbitration Mozambique has made every effort to delay the case²⁰.

A. Applicable legal principles

30. Claimant agrees with Respondent on the applicability of Art. 15(1) of the UNCITRAL Rules, the ILCA Recommendations, and the *Cairn* standard. Claimant notes, however, that Recommendation 6 – which deals with arbitral tribunals' discretion to stay their proceedings where the circumstances of the case do not fall within the other specific recommendations, and on which Respondent relies – should only be exercised very sparingly in exceptional circumstances²¹.

¹³ Application, para. 86.

¹⁴ Application, paras. 91-92.

¹⁵ Application, para. 97(b).

¹⁶ Response, para. 4.

¹⁷ Response, paras. 5 and 10-19.

¹⁸ Response, paras. 20-26.

¹⁹ Response, paras. 27-33.

²⁰ Response, paras. 34-39.

²¹ Response, paras. 40-52.

B. The circumstances of the case militate against a stay of this arbitration

31. According to Patel, Mozambique has not sufficiently proven that the circumstances of the case meet the test proposed by the *Cairn* tribunal:
32. First, a stay would create an imbalance between the Parties, and/or cause material prejudice to Patel, thereby violating the Parties' right to equal treatment. It would only reward Mozambique's obstructive tactics and prevent Patel from advancing its Treaty claims, which are only before this Tribunal²².
33. Second, a stay would deprive Patel of the right to present its case since the ICC Arbitration is currently suspended indefinitely and to date, Treaty claims are only considered by this Tribunal²³.
34. Third, a stay would unreasonably delay the UNCITRAL Arbitration. The Parties do not know with certainty when the proceedings before the ICC Tribunal will be resumed and the assumption that a suspension will only delay these proceedings by a few months is unfounded²⁴.
35. Fourth, the outcome of the ICC Arbitration is not material to the outcome of this arbitration. This Tribunal is not bound by any findings of the ICC Tribunal and is completely independent. Each tribunal has been appointed under different instruments of consent and deals with different causes of action²⁵.
36. In view of the above, Claimant invites the Tribunal to deny Respondent's Application. It further asks the Tribunal to order Respondent to pay all the costs incurred by Claimant in connection with the Application²⁶.

3. DECISION OF THE ARBITRAL TRIBUNAL

A. The Tribunal is empowered to stay the proceedings

Art. 15(1) of the UNCITRAL Rules

37. The Parties do not dispute that the Tribunal has the power to stay the proceedings and to amend the procedural timetable, provided the Parties' equality of arms and due process rights are respected. According to the Parties²⁷, this power stems from Art. 15(1) of the UNCITRAL Rules, which establishes that:

“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.”

²² Response, paras. 54-63; Rejoinder, para. 6.

²³ Response, paras. 64-68; Rejoinder, para. 4.

²⁴ Response, paras. 69-71; Rejoinder, para. 5.

²⁵ Response, paras. 72-83; Rejoinder, paras. 2-3.

²⁶ Response, para. 84.

²⁷ Application, paras. 35-56; Response, para. 40.

Rules in force in the arbitration

38. Furthermore, the Parties agreed in the Terms of Appointment that the arbitration would be conducted in accordance with a procedural timetable, which would be established by the Tribunal in a procedural order and that²⁸:

“[...] [t]he Tribunal may modify such Procedural Timetable at any time, after consultation with the Parties.”

39. Likewise, Procedural Order No. 1 establishes that the procedural timetable may be amended for “good cause” at the request of a Party or on the Tribunal’s own initiative²⁹.

ILA Recommendations

40. The Parties also concur that when deciding on Mozambique’s Application the Tribunal may be guided by the ILA Recommendations³⁰. Recommendation no. 1 provides that a tribunal that considers itself to be *prima facie* competent should proceed with the arbitration and determine its own jurisdiction, regardless of any other proceedings pending before another arbitration tribunal involving the same parties and substantially the same issues – so-called “Parallel Proceedings”³¹:

“1. An arbitral tribunal that considers itself to be *prima facie* competent pursuant to the relevant arbitration agreement should, consistent with the principle of competence-competence, proceed with the arbitration (‘Current Arbitration’) and determine its own jurisdiction, regardless of any other proceedings pending before a national court or another arbitral tribunal in which the parties and one or more of the issues are the same or substantially the same as the ones before the arbitral tribunal in the Current Arbitration (‘Parallel Proceedings’). Having determined that it has jurisdiction, the arbitral tribunal should proceed with the arbitration, subject to any successful setting aside application.” [Emphasis added]

41. Nevertheless, recommendation no. 2 contains an exception to the above principle³²:

“2. Nevertheless, in the interest of avoiding conflicting decisions, preventing costly duplication of proceedings or protecting parties from oppressive tactics, an arbitral tribunal requested by a party to decline jurisdiction or to stay the arbitration on the basis that there are Parallel Proceedings should decide in accordance with the principles set out in paragraphs 3, 4 and 5 below.”

42. While recommendations no. 3 and 4 deal with parallel court proceedings, recommendation no 5 provides that the second tribunal seized should decline jurisdiction or stay the proceedings in certain cases³³:

²⁸ Terms of Appointment, paras. 74-75.

²⁹ Procedural Order No. 1, para. 8.

³⁰ Application, para. 40; Response, para. 43.

³¹ Doc. RLA-143, p. 83.

³² Doc. RLA-143, p. 84.

³³ Doc. RLA-143, p. 84.

“5. Where the Parallel Proceedings have been commenced before the Current Arbitration and are pending before another arbitral tribunal, the arbitral tribunal should decline jurisdiction or stay the Current Arbitration, in whole or in part, and on such conditions as it sees fit, for such duration as it sees fit (such as until a relevant determination in the Parallel Proceedings), provided that it is not precluded from doing so under the applicable law and provided that it appears that:

- the arbitral tribunal in the Parallel Proceedings has jurisdiction to resolve the issues in the Current Arbitration; and
- there will be no material prejudice to the party opposing the request because of (i) an inadequacy of relief available in the Parallel Proceedings; (ii) a lack of due process in the Parallel Proceedings; (iii) a risk of annulment or non-recognition or non-enforcement of an award that has been or may be rendered in the Parallel Proceedings; or (iv) some other compelling reason.” [Emphasis added]

43. Recommendation no. 6, on the other hand, deals with the tribunal’s residual discretion to stay the proceedings, in cases that do not qualify as “Parallel Proceedings”, under certain conditions³⁴:

“6. Also, as a matter of sound case management, or to avoid conflicting decisions, to prevent costly duplication of proceedings or to protect a party from oppressive tactics, an arbitral tribunal requested by a party to stay temporarily the Current Arbitration, on such conditions as it sees fit, until the outcome, or partial or interim outcome, of any other pending proceedings (whether court, arbitration or supra-national proceedings), or any active dispute settlement process, may grant the request, whether or not the other proceedings or settlement process are between the same parties, relate to the same subject matter, or raise one or more of the same issues as the Current Arbitration, provided that the arbitral tribunal in the Current Arbitration is:

- not precluded from doing so under the applicable law;
- satisfied that the outcome of the other pending proceedings or settlement process is material to the outcome of the Current Arbitration; and
- satisfied that there will be no material prejudice to the party opposing the stay.” [Emphasis added]

The Cairn four-factor test

44. Finally, both Parties agree³⁵ that when deciding on the stay of the proceedings, the Tribunal may also find guidance in the four-factor test identified by the *Cairn* tribunal. The *Cairn* tribunal, “bearing in mind that a stay is an exceptional remedy and that for it to be granted the applicant must provide compelling reasons to show that it is warranted”, considered the following factors³⁶:

³⁴ Doc. RLA-143, p. 84.

³⁵ Application, para. 44; Response, paras. 50 and 53.

³⁶ Doc. RLA-141, para. 114.

- Whether the stay creates an imbalance between the parties, or causes material prejudice to one of the parties, thus violating their right to equal treatment;
- Whether the stay amounts to depriving a party from the right to present its case;
- Whether the stay delays the proceedings unreasonably; and
- Where the stay is premised on the finalization of other pending proceedings, whether the outcome of the other pending proceedings is material to the outcome of the arbitration.

B. Background to Respondent's Application

45. Before making its decision, the Tribunal will recall some relevant procedural elements to Mozambique's Application.
46. On 20 March 2020 Patel filed a Notice of Arbitration against Mozambique, under the UNCITRAL Rules and pursuant to the Agreement between India and Mozambique for the reciprocal promotion and protection of investment [previously defined as the "Treaty"].
47. Two months later, on 20 May 2020, Mozambique (and the Mozambique Ministry of Transport and Communications) filed a Request for Arbitration with the ICC against Patel under the arbitration agreement contained in the MOI³⁷, giving rise to the ICC Arbitration.
48. Although this Tribunal, once constituted, encouraged the Parties to consolidate the UNCITRAL arbitration and the ICC Arbitration under a single proceeding, the Parties were not able to agree on such consolidation.
49. Therefore, both the UNCITRAL and the ICC Arbitrations proceeded in parallel³⁸.
50. On 4 August 2020 the Parties and this Tribunal signed the Terms of Appointment, in which Mozambique manifested its understanding that³⁹:

"This dispute must be resolved in the ICC arbitration which can also address any Treaty claims or the ICC arbitration must be concluded first because it pertains to the existence of underlying rights. Notwithstanding the Terms of Appointment, Respondent disputes that the arbitration clause in the Treaty governs this dispute, and by signing these Terms does not waive this contention."

51. On 14 October 2020, after extensive consultation with the Parties, the Tribunal issued Procedural Order No. 1 and the procedural timetable. And on 14 December

³⁷ Doc. R-3.

³⁸ However, the Parties do not argue that these are "Parallel Proceedings" for the purposes of Recommendation 5 of the ILA Recommendations (Response, para. 46; Doc. R-63, para. 83).

³⁹ Terms of Appointment, para. 58 (Summary of Mozambique's claims and relief sought).

2020 the Tribunal issued Procedural Order No. 3, dismissing Mozambique's Motion for Bifurcation.

52. On 20 July 2021, once Claimant's Reply on the Merits was due, the Tribunal was informed that on 21 June 2021 Patel had filed an application to stay the ICC Arbitration until a final award in this arbitration was made⁴⁰. On 16 August 2021 the ICC Tribunal rejected Patel's stay application⁴¹.
53. Thereafter, on 1 October 2021 Mozambique filed its Application in the present arbitration, requesting a stay of the proceedings until the ICC Tribunal makes its final award on the basis that⁴²:
 - The ICC Tribunal has refused to stay the ICC Arbitration and has held that it has jurisdiction over the Parties' local law contractual dispute under the MOI;
 - Patel's Treaty claims are dependent on the validity of the MOI and the existence of contractual rights under the MOI – issues that are pending decision in the ICC Arbitration; and
 - The ICC Tribunal may also determine Patel's Treaty claims in the ICC Arbitration and, thus, the present arbitration must be stayed until the ICC Tribunal issues a final award.

C. A suspension of the proceedings is not warranted

54. After duly examining the applicable legal standards and the Parties' positions, the Tribunal considers that there is no good cause to amend the procedural timetable and to stay the proceedings, for several reasons.
55. First, the Parties chose to proceed with two parallel arbitrations. Despite being aware of the existence of these two arbitrations, the Parties agreed on a procedural calendar for this arbitration, over a year ago. The Parties have been complying with this calendar so far. There seems to be no material change of circumstances that warrants a stay of the agreed calendar. In particular, the fact that the ICC Tribunal rejected Patel's stay application in the ICC Arbitration has no bearing over the procedural calendar in this arbitration.
56. Second, the stay suggested by Mozambique is equivalent to a *sine die* suspension of the proceedings. Although under the ICC Rules the ICC Tribunal should issue a final award by April 2022, there is no guarantee that such award will be issued by said deadline. Even if it were, the proposed suspension would unreasonably delay the proceedings, considering that the hearing in this arbitration is scheduled to take place precisely in April 2022. Nothing in the applicable legal standards provides for a *sine die* suspension of an ongoing arbitration, particularly when the procedural timetable has been agreed between the Parties and the Tribunal for over a year.

⁴⁰ Communication C-17, para. 5.

⁴¹ Doc. R-59.

⁴² See Section 1 – Position of Mozambique *supra*.

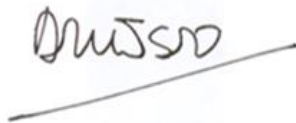
57. Third, the Tribunal shares the view of the ICC Tribunal that despite the overlap between the two proceedings, a stay of these proceedings pending a decision by another tribunal, constituted on the basis of a different agreement, is not justified⁴³. In the Tribunal's view, the respective causes of action appear to be quite different, considering not only that one proceeding is based on the Treaty and the other one on the MOI, but also that, although the same parties are involved in both arbitrations, their corresponding roles as claimant and respondent are reversed.

* * *

58. For the above reasons, the Tribunal decides to dismiss Mozambique's Application. The Tribunal reserves a decision on the costs of this procedural incident to a future award.
59. As already anticipated in communication A 30, the Tribunal grants Respondent an additional two weeks to file its Rejoinder on the Merits and Reply on Jurisdiction, and a corresponding extension to Claimant to submit its Rejoinder on Jurisdiction. Please find attached Annex I *septies* to Procedural Order No. 1, which reflects the amended procedural timetable.

Place of Arbitration: The Hague, Netherlands

Date: 3 November 2021



Juan Fernández-Armesto
President of the Arbitral Tribunal

Enc.: - Annex I *septies* to Procedural Order No. 1

⁴³ Doc. R-59.