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,

RESPONDENT REPUBLIC OF MOZAMBIQUE'S APPLICATION FOR A STAY AND MODIFICATION OF THE PROCEDURAL TIMETABLE (AND REQUEST FOR INTERIM SUSPENSION OF BRIEFING AND ALL DEADLINES PENDING DECISION ON THIS APPLICATION)

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TABLE OF CONTENTS

I. INTRODUCTION

1. As this Tribunal is aware, there is a pending ICC Arbitration (No. 25334/JPA) between the parties, in addition to this UNCITRAL Arbitration. Respondent Mozambique made a motion to bifurcate the jurisdictional issues in this UNCITRAL Arbitration. Claimant PEL opposed bifurcation arguing that the jurisdictional issues should be decided with the merits. This UNCITRAL Tribunal agreed and deferred deciding jurisdiction to the merits hearing.

2. PEL (the Respondent in the ICC Arbitration) then brought a motion to stay the ICC Arbitration. However, the ICC Tribunal refused to stay, holding that it has jurisdiction over the parties' local law contractual dispute pursuant to the parties' compulsory arbitration agreement in the subject Memorandum of Interest ("MOI").[1]

3. In this UNCITRAL arbitration, PEL's international law claims clearly are dependent on the validity of the MOI and the existence of contractual rights under the MOI – issues that will be decided in the ICC Arbitration pursuant to the parties' compulsory arbitration agreement in the MOI. Therefore, this UNCITRAL arbitration must be stayed until after the ICC Tribunal determines the parties' contractual rights under the MOI.

4. PEL cannot complain about the stay of this UNCITRAL Arbitration until after the ICC Tribunal makes its determinations on the underlying local law contractual issues. As noted, Mozambique made a motion to bifurcate the jurisdictional issues in this UNCITRAL Arbitration so that this UNCITRAL Tribunal could decide these jurisdictional issues first. Notwithstanding that Article 21(4) of the UNCITRAL Rules specifies that "[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question," PEL stubbornly opposed the motion to bifurcate, seeking to delay determination of the jurisdictional issues. *See* PO3 ¶¶ 30 *et seq*. Indeed, PEL asserted that the jurisdictional objections before this Tribunal *were intertwined with the merits of the MOI*

[1] Also pursuant to Claimant's motion to stay, the ICC Tribunal is in the process of deciding whether it has jurisdiction over the parties' international law dispute. Respondent will update this Tribunal after the ICC Tribunal reaches a decision. However, regardless of the outcome of that decision, it does not change the basis for this application – that the ICC Tribunal has concluded that it has jurisdiction over the parties' local law contractual dispute pursuant to the parties' compulsory arbitration agreement in the MOI.

dispute, including "what was agreed to under the MOI," "expert evidence on Mozambican law," and the "authenticity of the version of the MOI relied upon by Patel." *Id*. ¶¶ 34, 39-40. PEL contended that relative to the MOI dispute, it was also necessary to "determine what was or not promised to Patel to decide Patel's claims that Respondent breached the Fair and Equitable Treatment ["FET"] standard and that Respondent indirectly expropriated Patel's contractual rights to a concession and to exclusivity." *Id.* ¶ 40. On 14 December 2020, this Tribunal accepted PEL's arguments that the jurisdictional objections were inextricably intertwined with merits. *Id.* ¶ 65. Without addressing the substance of any jurisdictional objections, the Tribunal joined the jurisdictional objections to the merits and quantum. *Id.* ¶ 67.

5. But, then, PEL decided to put these jurisdictional issues before the ICC Tribunal through its motion to stay the ICC Arbitration. In the ICC Arbitration, PEL acknowledged that it had no objections to the ICC Tribunal's jurisdiction over the local law contractual claims, but nonetheless sought to stay the ICC Arbitration until after this UNCITRAL Tribunal issued a final award. PEL's strategy, however, backfired on PEL, because the ICC Tribunal has concluded that it has jurisdiction over the parties' local law contractual dispute pursuant to the parties' compulsory arbitration agreement in the MOI, and has denied PEL's requested stay.

6. Accordingly, this UNCITRAL Tribunal must stay this UNCITRAL proceeding until the ICC Tribunal[2] makes its determination about the parties' underlying contractual rights (the deadline to issue the ICC award is April 2022, while this UNCITRAL Tribunal is not scheduled to hold the merits hearing until April 2022).

7. A stay of this UNCITRAL proceeding clearly is required because PEL's international law claims (under the India-Mozambique BIT or "Treaty") are dependent on the existence of underlying contractual rights under the MOI which will be adjudicated by the ICC Tribunal. If these disputed rights do not exist under domestic Mozambican law, there is

[2] The ICC Tribunal is composed of international arbitrators including President Prof. Dr. Jan Kleinheisterkamp and Co-arbitrators Mr. Eduardo Silva Romero and Mr. Stephen P. Anway. Its neutrality is unquestioned and no member of the ICC Tribunal hails from Mozambique.

no investment, no Treaty jurisdiction, no Treaty liability, and no damages. At the very least, the lack of rights under the MOI substantially guts PEL's international law claims.

8. In these compelling circumstances, a stay of this UNCITRAL proceeding should and must issue. This UNCITRAL Tribunal has broad authority to stay its proceedings. The very same authorities that PEL cited in its ICC stay application confirm this UNCITRAL Tribunal's power to stay and, in fact, demonstrate that a stay is required in this UNCITRAL proceeding, particularly given the aforementioned decision of the ICC Tribunal which is unquestionably binding on PEL.

9. Importantly, Mozambique currently has a deadline of **8 November 2021** to submit its Rejoinder on the Merits and Reply to Objections to Jurisdiction.[3] Depending on how the ICC Tribunal rules, this may either eliminate the need for all or much of that work and/or affect such briefing substantially. Accordingly, in order to prevent a potential significant waste of time and resources, Mozambique requests that this UNCITRAL Tribunal *immediately suspend the deadlines (including all briefing deadlines) in this UNCITRAL proceeding until after it decides Mozambique's application to stay this proceeding*.[4]

II. BACKGROUND

A. Mozambique Filed The ICC Arbitration Pursuant To The MOI, And Sought To Resolve The Parties' Dispute As To The Existence, Validity, And Scope Of MOI "Rights" Per The Agreed-Upon ICC Arbitral Agreement.

10. As more fully described in Mozambique's Statement of Defense ("SOD"), *see* SOD ¶¶161-165; 301-361. Mozambique initiated an ICC Arbitration in Mozambique against PEL,

[3] Notably, in its 332-page Reply on the Merits, PEL has improperly submitted substantial new evidence and raised multiple new arguments, as well as introduced statements from new factual and expert witnesses, introduced approximately 250 new exhibits, and even raised new damages methodologies and increased its purported damages claims by $40 million, which will require substantial additional work, which would be a wasted effort if there is no valid MOI.

[4] Given that the merits hearing in this UNCITRAL proceeding is not scheduled until April 2022, there is plenty of time for the Tribunal to reinstate the briefing deadlines if it denies this application, and thus there would be no prejudice to PEL in issuing this interim suspension. Of note, PEL had no objection to the ICC Tribunal issuing an interim suspension of deadlines as it considered PEL's Stay Application.

seeking declaratory and other relief on the parties' dispute arising out of the MOI. Mozambique and the MTC duly filed the ICC Arbitration pursuant to the arbitration agreement in Clause 10 of the MOI, which is severable from the MOI and requires arbitration under ICC Rules in Mozambique:

> "The present document constitutes a memorandum of interest between the parties. *Any dispute arising out of this memorandum* between the parties shall be referred to arbitration. The arbitration will be *governed by Mozambique law and the rules of the International Chamber of Commerce shall be followed*. Each party will appoint one arbitrator and both of these appointed arbitrators will in turn appoint the presiding arbitrator. The *venue of the arbitration shall be at the Republic of Mozambique*."

Exhibit R-2, MOI, Clause 10 (emphasis added).

11. Mozambique commenced the ICC Arbitration shortly after PEL escalated the parties' disagreement and commenced this UNCITRAL proceeding. Mozambique did so to enforce the Parties' agreed-upon dispute resolution procedure—and ensure the parties' dispute arising out of the MOI was resolved quickly and efficiently, before a jurisdictionally-unquestioned Tribunal, in the location agreed to by the parties. *See* SOD ¶¶ 161-165; 301-361; *see also e.g.,* ICC Statement of Claim ("ICC SOC"), **R-61**, ¶¶ 5.

12. Mozambique's actions in commencing the ICC Arbitration under Clause 10 of the MOI were consistent with the parties' contemporaneous understanding of how the dispute should be resolved. On 18 August 2014, after all material events that gave rise to this purported claim, PEL notified Mozambique "of its intention to refer the dispute on the above project to arbitration" and increased its earlier $4 million demand to US$10 million. **R-57**. PEL threatened that if Mozambique did not pay, it would "commence arbitration proceedings, *as provided for in Clause 10 of the MOI.*" *Id.* at 2 (emphasis added).

13. Thus, until PEL commenced this UNCITRAL proceeding, the parties agreed that ICC arbitration was the appropriate arbitral mechanism if a dispute escalated to arbitration. The ICC Rules seek to resolve disputes within six months, making it sensible choice for PPP procurement disputes where expediency is important. *See* **R-58**, ICC PO2 ¶ 3(vi). The parties' agreement to a Mozambique seat was likewise sensible and efficient for disputes

involving a proposed 30-year, USD$3 billion PPP project in Mozambique, and an important deal point for Mozambique.

14. PEL ignored the parties' agreed-upon dispute resolution procedure. Instead, four years after acknowledging that Clause 10 of the MOI controlled, on 25 June 2018, the English law firm Addleshaw Goddard wrote to the MTC, as counsel for PEL. For the first time, PEL threatened a claim under the Mozambique-India BIT, seeking a windfall of US$100-200 million. SOD ¶ 157.

15. For months, the parties engaged in settlement efforts (PEL was represented by counsel and the MTC and Mozambique acted *without counsel*), and were going to meet in Portugal in March, 2020, when the MTC and Mozambique decided that it had become prudent to retain counsel. However, because Mozambique and the MTC had just recently retained the undersigned counsel (Dorsey & Whitney LLP), and based on the coronavirus pandemic and the prohibitions against travel instituted by Mozambique and the United States (Dorsey is based in the United States), Mozambique and the MTC proposed to PEL that the parties enter into a standstill agreement without prejudice for a "brief postponement" until Dorsey could be brought up to speed and meet with its clients, and a safe meeting in Portugal could be planned. However, PEL unreasonably rejected the standstill proposal. SOD ¶¶ 158-159.

16. PEL aggravated the dispute seeking to take advantage of the start of the coronavirus pandemic, where there was much uncertainty and the alternatives to manage arbitration used today were not in place. On 20 March 2020, despite PEL being advised that Mozambique and the MTC were unable to meet with their newly retained counsel due to COVID travel restrictions, PEL's English lawyers hurriedly served the UNCITRAL Notice of Arbitration. PEL raced to serve that ad hoc arbitration claim, refusing to provide any time for new counsel Dorsey to learn the case and meet with its clients. *Id*

17. In light of PEL's actions, Mozambique commenced the ICC Arbitration. Mozambique sought, among other things, to have the parties' core dispute concerning the MOI resolved quickly and efficiently by the parties' agreed-upon arbitral mechanism.

18. Prompt resolution of the local contractual law dispute—by a neutral, swift, international ICC Tribunal whose jurisdiction over the local contractual law dispute is uncontested and not subject to unresolved Treaty jurisdiction complexities—furthers efficient resolution and could resolve case-dispositive questions also in this UNCITRAL arbitration.

19. The crux of the Parties' dispute relates to the existence, validity, and scope of "rights" that PEL alleges it gained in the MOI. PEL argued as much in its response to Mozambique's bifurcation motion. *See* PO3. Likewise, PEL's Statement of Claim ("SOC") states that, in PEL's view, "Mozambique made its specific promises to PEL *in the MOI* which formed the basis of its legitimate expectations," SOC ¶ 321 (emphasis added), and that Mozambique thereafter breached the "promises" or "contractual commitments" PEL alleges are embodied in the MOI, SOC ¶¶ 31, 327. In short, PEL fundamentally contends *the MOI* gave PEL "a right to the direct award of the project concession." PEL Reply on the Merits ("Reply") § IV(B).

20. Mozambique disputes that the MOI gave PEL the rights it claims. SOD § V. For example, the six-page MOI, if valid and binding, only offered PEL a "*direito de preferencia*" that gave PEL a contingent option for a 15% scoring preference in the public tender (consistent with industry practices and as defined in generally applicable PPP legislation during the parties' dealings). *Id.* This *direito de preferencia*—properly defined under the MOI and applicable local law—(1) is not an "investment" under Treaty jurisprudence, (2) was not breached and (3) would not, in any event, give rise to the "lost profit" damages PEL seeks on its illusory and unbuilt proposed project. *Id.* In short, Mozambique's position on the MOI dispute is fatal to PEL's Treaty jurisdiction, liability, and damages arguments.

21. The local contractual law issues are, therefore, essential and a priority to the parties' international law dispute. Resolution of the local contractual law issues adverse to PEL may very well preclude PEL's recovery on any Treaty claim. PEL's alleged "right" to a concession is no "investment"—and was not treated unfairly, breached in a matter violative of an umbrella clause, or indirectly expropriated—*if it does not exist*.

B. The ICC Tribunal Has Concluded It Has Jurisdiction Over The Local Law Contractual Dispute Pursuant to the MOI's ICC Arbitration Agreement.

22. This UNCITRAL Tribunal is presented with a scenario where another international arbitral Tribunal (the ICC Tribunal) has, at a minimum, uncontested jurisdiction over the local contractual law dispute—a core predicate and fundamental issue to the international law claims. The ICC Tribunal may also promptly conclude that it has jurisdiction to decide the Treaty disputes PEL brought before this UNCITRAL Tribunal.

23. The ICC's Tribunal's jurisdiction is uncontested as to the local contractual law dispute. The local contractual law dispute includes Mozambique's requests for declaratory relief as to the existence, validity, and scope of PEL's alleged MOI-derived "rights." *See, e.g.*, **R-61**, ICC SOC §§ IV, XII; SOD § V. In the ICC Arbitration, PEL did not object to said jurisdiction and, in fact, has conceded that the ICC Tribunal has jurisdiction over the local contractual law dispute. *See, e.g.*, **R-59**, ICC PO5 ¶¶ 24-27.[5]

24. Separately from the question of the ICC Tribunal's jurisdiction over the local contractual law dispute, Mozambique has contended that the ICC Tribunal has jurisdiction to decide Mozambique's requests for declaratory relief on PEL's Treaty claims. Mozambique's position throughout both proceedings has been that Clause 10 of the MOI grants the ICC Tribunal jurisdiction over "*any dispute[s] arising out of*" the MOI. This agreement to arbitrate includes "any dispute" irrespective of the cause of action: *i.e.*, contract claims and *those based on international law (including the Treaty)*. *See, e.g.*, SOD § IV(B).

25. PEL's own pleadings demonstrate that the Treaty claims are part of a "dispute arising out of" the MOI, and that the Treaty claims are premised and dependent on the outcome of the local contractual law dispute, as Mozambique has detailed in the SOD. PEL's Treaty claims "arise out of" the MOI, since the MOI allegedly provides the underlying substantive rights which PEL seeks to protect under the MZ-India BIT. The "investment" PEL alleges

[5] *See also* **R-58**, ICC PO2 ¶ 3(i) ("As confirmed by the Parties at the CMC, neither Party has presented any objections to the [ICC Tribunal's] jurisdiction."); **R-59**, ICC PO5 ¶ 21 (PEL "accepted this Tribunal's jurisdiction" and "has not shown why this [ICC] Tribunal should await a decision by the UNCITRAL Tribunal to decide the contract claims that fall under its (accepted) jurisdiction.").

was "its rights under the MOI, including its valuable right to be awarded a concession for the USD$3.115 billion Project that PEL had itself conceived of, and its right of first refusal, both of which were abrogated by the MTC." **Exhibit R-46**, Request for Arbitration ¶ 81. In its Statement of Claim, PEL likewise defines its alleged "investment" as its rights conferred in the MOI. *See* SOC ¶ 257(a) (the alleged "direct award of a concession to implement the Project, as well as all of the rights under the MOI associated with the Project."). PEL also alleges that its "know-how was explicitly protected by the MOI," *id.* ¶ 257(b), and contends that it was Mozambique's commitments in the MOI that formed "the fundamental basis upon which PEL invested in Mozambique" and caused PEL to "complete the PFS at its own costs," *id at* ¶ 324). Plainly, this dispute "arises out of" the MOI, which forms the "fundamental basis" of the alleged rights, and whose alleged breach is the *sine qua non* of the subject claims. *See* SOD ¶ 324.

26. In sum, the ICC Tribunal's jurisdiction over the local contractual law dispute is uncontested by PEL and has been acknowledged by the ICC Tribunal. The ICC Tribunal has not yet ruled on its jurisdiction over the international law dispute, although it has bifurcated this question as discussed below. Conversely, at PEL's behest, this UNCITRAL Tribunal declined to bifurcate Mozambique's jurisdictional objections, joined the jurisdictional issues to the merits and quantum, and has not ruled on its jurisdiction over any aspect of the parties' dispute. *See* PO3.

27. Of note, PEL also rejected Mozambique's reasonable consolidation proposals, which respected the ICC arbitration agreement. PEL's proposal sought to renegotiate the ICC arbitration agreement by, among other things, excising the Parties' agreement to a Mozambican seat for the arbitration. *See* **Exhibits C-183 & C-184**.

C. The ICC Tribunal Rejected PEL's Stay Application And Is Deciding The Prerequisite Contract And Property Issues That Form The Underlying Basis Of PEL's Treaty Claims In This Proceeding.

28. Faced with the ICC Arbitration whose jurisdiction over the MOI dispute PEL could not contest, PEL sought to delay the ICC proceedings into irrelevancy. Claiming that the two arbitration proceedings were "parallel proceedings" that carried risks of inconsistent

decisions, PEL sought to stay the jurisdictionally-unquestioned ICC proceeding pending this UNCITRAL Tribunal's final award on the Treaty issues. PEL's tactics were unsuccessful and backfired. The ICC Tribunal recently confirmed its uncontested jurisdiction over the local contractual law dispute pursuant to the compulsory arbitration agreement in the MOI. The ICC Tribunal will proceed to a decision on the MOI disputes which form the underlying basis of PEL's Treaty claims.

29. On 10 June 2021, after Mozambique submitted its 19 May 2021 Statement of Claim, PEL filed an application to stay the ICC Arbitration until a final award in this arbitration. **R-59**, ICC PO5 ¶¶ B, 3; *see* **R-62**, PEL ICC Stay Application. PEL contended that the arbitrations qualified as "parallel proceedings" and that policy considerations—the "risk of conflicting decisions" and "duplication of costs and efforts"—justified a stay in favor of the first-filed proceeding. **R-59**, ICC PO5 ¶¶ 4-5. PEL argued that the circumstances satisfied the conditions of the ILA's non-binding Recommendation 5 for a stay, and also referenced the interpretation of the ILA Recommendations by the tribunal in *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*. *Id.* ¶¶ 3, 6.

30. Mozambique responded that PEL's requested stay was inconsistent with the MOI's ICC arbitration agreement (as PEL contended this Tribunal's decision would leave "very few (if any) residual issues for the Tribunal to determine"); would require the Tribunal to prematurely decide merits questions including the scope and validity of the MOI's arbitration agreement; necessitated a finding that the UNCITRAL Tribunal had valid jurisdiction over the dispute; and would cause material prejudice on Mozambique, namely, the denial of its right to have the dispute decided in a timely manner in an ICC arbitration seated in Mozambique, pursuant to the MOI's arbitration agreement. *Id.* ¶¶ 9-12; *see* **R-63**, Mozambique Answer to ICC Stay Application. Mozambique observed that PEL's Treaty claims are premised and depended on disputed contract issues—most significantly, on the validity of the MOI and the existence of rights under the MOI—meaning that at a minimum the ICC Tribunal should adjudicate *first* the local contractual law dispute, pursuant to its unquestioned jurisdiction over the local contractual law claims. **R-59**, ICC PO5 ¶¶ 13, 21.

31. *As this UNCITRAL Tribunal also should do while it decides this application, the ICC Tribunal suspended the briefing deadlines during the pendency of PEL's stay motion briefing. Id.* ¶ C. It also granted PEL's requests to Reply to Mozambique's Answer to the Stay Application and for a virtual hearing. *Id.* ¶¶ E-G. To date, the ICC deadlines remain suspended as the ICC is deciding also whether it has jurisdiction over PEL's Treaty claims.

32. In its Procedural Order 5, dated 16 August 2021, the ICC Tribunal denied PEL's Stay Application. **R-59**, ICC PO5 ¶¶ 14-22. The ICC Tribunal refused to stay, holding that it has jurisdiction over the parties' local law contractual dispute pursuant to the parties' compulsory arbitration agreement in the MOI. *Id.* The ICC Tribunal held that:

> "the Arbitral Tribunal is not satisfied that 'arbitral efficiency' warrants a stay in this case and/or of any 'exceptional circumstances' that could effectively outweigh the Claimants' [Mozambique's] prejudice in not having this issue *resolved timely before a tribunal whose jurisdiction to hear the Claimants' contract claims has been accepted by the Respondent [PEL]*."

R-59, ICC PO5 ¶ 17 (emphasis added).

> **"**The Respondent [PEL] claims that granting a stay in this case would leave this Tribunal with "*very few (if any) residual issues for this Tribunal to determine*", but it has not shown the basis for its assumption that this Arbitral Tribunal should be bound by the decision to be rendered in the UNCITRAL Arbitration; why the UNCITRAL Tribunal has "better jurisdiction" to hear *first* those issues for which this Tribunal has jurisdiction (which is an issue yet to be determined, as explained below); and/or why the UNCITRAL Tribunal is the most 'convenient' forum to determine those issues over which it has jurisdiction (again, which is yet to be determined) *first*, other than the fact that it was constituted first, which is not, in itself, determinant."

Id. at ¶ 18 (emphasis in the original).

> **"**A stay would also hardly be reconcilable with the Respondent's [PEL's] own assertion that it is not asking the Claimants [Mozambique] to give up their contractual rights, but merely for a temporary pause. If and to the extent that an earlier decision in the UNCITRAL Tribunal could have an impact on the outcome of this arbitration (including on the enforceability of a future award), a stay could *de facto* amount to a definitive – and not only temporary – denial of the Claimants' [Mozambique's] rights under the arbitration agreement that served as the basis for the institution of this arbitration and the constitution of this Tribunal, if and to the extent that those rights exist (a matter which has not yet been decided by the Tribunal)."

Id. at ¶ 19.

> "Therefore, the Arbitral Tribunal is not satisfied that these circumstances would justify staying this proceeding where there is a *prima facie* valid arbitration agreement invoked by the Claimants [Mozambique] as the basis for this Tribunal's jurisdiction, merely upon the fact that the UNCITRAL Tribunal was constituted first."

Id. at ¶ 20.

> "Moreover, the Respondent [PEL] has accepted this Tribunal's jurisdiction over "*certain contract claims arising out of the MOI*". Again, the Respondent [PEL] has only asserted that this Tribunal should stay the entirety of the claims before it, pending a decision in the UNCITRAL Arbitration, but it has not shown why this Tribunal should await a decision by the UNCITRAL Tribunal to decide the contract claims that fall under its (accepted) jurisdiction."

Id. at ¶ 21 (emphasis in the original).

> "Accordingly, the Arbitral Tribunal does not believe that the requested stay of proceedings satisfies the 'exceptional circumstances' test."

Id. at ¶ 22. Thus, the ICC Tribunal refused to stay the proceedings. It is undisputed that the ICC Tribunal will proceed to adjudicate, at a minimum, the merits of the underlying contractual dispute between the Parties, where PEL had conceded that the ICC Tribunal has jurisdiction to decide pursuant to the arbitration agreement in the MOI.

33. Separately from the question of the ICC Tribunal's clear jurisdiction over the local contractual law dispute, the ICC Tribunal decided to receive submissions on its jurisdiction over the "Treaty Claims." **R-59**, ICC PO5 ¶¶ 23-27. PEL had never requested preliminary dismissal of any Treaty issues in the ICC Arbitration, but in the context of its failed Stay Application, PEL had newly objected to the ICC Tribunal's jurisdiction over certain Treaty issues and Mozambique's related requests for declaratory relief, as further discussed below. *See, e.g.*, **R-59**, ICC PO5 ¶¶ 24-27. In light of the ICC Tribunal's unexpected decision to bifurcate the jurisdictional issue, the parties have been briefing the international law

questions before the ICC Tribunal, in advance of a potential hearing scheduled for 7 October 2021. **R-60**, ICC PO6.[6]

III. THIS TRIBUNAL HAS AUTHORITY TO STAY PROCEEDINGS AND AMEND THE PROCEDURAL TIMETABLE.

34. This Tribunal has clear authority and discretion to stay its proceedings and amend the procedural timetable. Mozambique does not understand PEL to contest the Tribunal's authority on either of these points, given PEL's positions before the ICC Arbitration.

A. The Tribunal Can 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.

35. The UNCITRAL Rules provide the Tribunal broad authority to "[s]ubject to these Rules, conduct the arbitration in such matter 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 [its] case." UNCITRAL Rules Art. 15(1).

36. As explained by authorities that PEL endorsed before the ICC Tribunal, "this provision gives arbitral tribunals constituted under the UNCITRAL Rules broad procedural powers, including the power to grant a stay, subject to certain requirements." *Cairn*, **RLA-141**, ¶ 101. "Other UNCITRAL Tribunals have also considered that their broad procedural discretion under Article 15(1) empowers them to grant a stay." *Id.* ¶ 102 & n.199 (collecting orders).

37. Although the Tribunal's power to grant a stay can be limited by the parties' agreement or the mandatory rules of the law applicable to the arbitration, *see id.* ¶ 103, here no such limitations exist. Neither the Treaty (**CLA-1**), Mozambican arbitral law, nor Dutch law preclude a stay.

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[6] The ICC Tribunal granted PEL's request for an extension of the submission time limits in ICC PO5, on the basis of PEL's counsel's representations concerning vacation plans during the month of August. **R-60**, PO6 ¶ A.

38. To the extent relevant, PEL's position is that Mozambican law provides "no rule preventing an arbitral tribunal from staying its own proceedings." **R-62**, PEL ICC Stay Application ¶ 60.

39. PEL's endorsed authority likewise demonstrates that Dutch law allows for stays of arbitration. *Cairn* found that Dutch law and the UNCITRAL Rules, read together, provided UNCITRAL tribunals "the authority to order a stay of the proceedings" provided a stay "was not inconsistent with . . . three core principles." *Cairn*, **RLA-141**, ¶ 109. These were the "principles of equality," "the right to be heard," and the "duty to ensure that there will be no unreasonable delay in the conduct of the proceedings." *Id.* ¶ 107; *see id.* ¶¶ 104-109.

40. Beyond these controlling principles, the *Cairn* Tribunal analyzed the ILA's non-binding recommendations on concurrent proceedings, finding they provided guidance on the issuance of a stay *even in circumstances where the current arbitration was filed first or where the arbitrations do not strictly qualify as parallel proceedings*. *Id.* ¶¶ 110-112.

41. In so doing, the *Cairn* Tribunal found persuasive ILA Recommendation 6, which provides that:

> 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.

Id. ¶ 112, quoting ILA Recommendations on Lis Pendens and Res Judicata and Arbitration, **RLA-143** ¶ 6.

42. Relative to the "core principles" it deduced from the UNCITRAL Rules and Dutch law, the *Cairn* Tribunal concluded this ILA Recommendation would functionally add a single

"element" to the assessment of whether a stay should be granted: "whether the outcome of the other pending proceedings is material to the outcome of the Current Arbitration." *Cairn*, **RLA-141**, ¶ 113.

43. Similarly, in ICC Case 12510, on which PEL also relied in its Stay Application, the arbitral tribunal stayed its own proceeding pending resolution of contract issues in a parallel proceeding, because the tribunal found that the contract in dispute in the parallel proceedings was "the *foundation* of the claims submitted by [Claimants] in these Proceedings." **RLA-140**, Procedural Order in ICC Case 12510 (Extract), dated 12 April 2004, ¶ 9, in Special Supplement 2010: Decisions on ICC Arbitration Procedure (2003-2004) (emphasis in original).

44. In sum, after applying the UNCITRAL Rules and Dutch law, and interpreting the non-binding ILA Recommendations previously endorsed by PEL, the *Cairn* Tribunal concluded it had authority to issue a stay of the subject proceedings. *Id.* ¶ 114. *The tribunal's considerations for exercising this authority did not hinge on the order the proceedings were filed or whether they were parallel proceedings with the same causes of action*:

> 114. The Tribunal concludes that it has the authority to order a stay of the proceedings, provided that a stay is not precluded by the mandatory law applicable to the arbitration (the *lex arbitri*) or by agreement of the parties. In exercising such power, the Tribunal will consider the following factors, 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:
>
> a. 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;
>
> b. Whether the stay amounts to depriving a party from the right to present its case;
>
> c. Whether the stay delays the proceedings unreasonably; and
>
> d. Where (as here) 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.

45. While a stay is an "exceptional remedy," paradigmatic examples of compelling circumstances warranting a stay are where the parties have consensually submitted to arbitration in another forum or when another pending arbitration is resolving material, fundamental, or threshold issues of relevance to the current proceeding. *See generally Cairn*, **RLA-141 ¶¶** 41, 79, 137 (compiling orders) – both situations being presented here. Moreover, stays are a key procedural mechanism available to tribunals to mitigate the significant pitfalls of concurrent proceedings – also as presented here. *See, e.g.*, **RLA-135**, ILA Final Report on Lis Pendens and Arbitration. As discussed below, then, this case is a manifest example of where these sensible, compelling reasons exist.

46. Further bases for the Tribunal's power and authority to stay proceedings can be found in Mozambique's Statement of Defense. *E.g.*, SOD ¶¶ 357-361.

B. The Tribunal Can Amend The Procedural Timetable At Any Time For Good Cause.

47. Additionally, the Tribunal has clear authority to amend the procedural timetable. This authority includes modifying dates for further written submissions and the hearing.

48. PO1 specifies that the Procedural Timetable can be amended for "good cause" at the "reasonable request of any Party" or on its Tribunal's own initiative. PO1 ¶ 8. The Parties' agreed-upon Terms of Appointment likewise give the Tribunal authority over the Procedural Timetable and allow the Tribunal to "modify [the] Procedural Timetable at any time, after consultation with the Parties." TOA ¶¶ 74-75. Relative to the deadlines for written statements, the UNCITRAL Rules further specify "the arbitral Tribunal may extend the time-limits if it concludes that an extension is justified." UNCITRAL Rules Art. 23.

49. Thus, irrespective of its power and discretion to "stay" proceedings, the Tribunal has authority to alter the submittal and hearing deadlines for good cause.

IV. A STAY IS SENSIBLE AND WARRANTED IN THESE CIRCUMSTANCES.

50. The present circumstances satisfy all stay requirements in the UNCITRAL Rules and found in non-binding persuasive authority (like the ILA Recommendations and *Cairn*) previously endorsed by PEL. Because the MOI dispute is material to these proceedings, the ICC

Tribunal has uncontested jurisdiction to resolve that dispute, and the benefit of awaiting the outcome of the MOI dispute exceeds any prejudice, a stay is necessary.

A. PEL's Treaty Claims Are Dependent On The Existence Of Underlying Local Law Contractual "Rights" Under The MOI That Must, And Will, Be Determined First By The ICC Tribunal.

51. As more fully described above, resolution of the local contractual law dispute is plainly material, and in fact necessary, to the outcome of this UCNITRAL arbitration. The MOI—particularly the existence, validity, and scope of disputed rights PEL alleges the MOI provided it—forms the fundamental and underlying basis for PEL's Treaty claims. At a minimum, the existence of these alleged fundamental "rights" must be decided under Mozambican law, as the ICC Tribunal is required to do under the parties' compulsory arbitration agreement in the MOI. Only if PEL can establish the existence of its alleged MOI rights would there be any hope for Treaty jurisdiction, liability, or damages.

52. Arbitral jurisprudence provides ample illustrations of why contract disputes under municipal law are material—if not fundamental—to many Treaty claims. The reason is simple: the existence, validity, and scope of the alleged "right" to be protected by an investment treaty's substantive standards is one to be resolved under local law.

> "In order to determine whether an investor/claimant holds property or assets capable of constituting an investment *it is necessary in the first place to refer to host State law*. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law."

RLA-46, *Emmis*, ICSID Case No. ARB/12/2 at ¶ 162 (emphasis added).

53. Indeed, it is a fundamental principle of international law that "[i]nvestment disputes are about investments, investments are about property, and property is about specific rights over tangibles and intangibles *cognizable by the municipal law of the host state*." **RLA-136**, Zachary Douglas, *The International Law of Investment Claims*, ¶ 101, Cambridge University Press, 2009 (emphasis added). "Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to the municipal law of property." *Id.* ¶ 102. "[T]hat property law is the

municipal law of the state in which the claimant alleges that it as an investment." *Id.* "Investment treaties do not oblige the host state to protect intangible property rights that are not cognizable in the legal order of the host state." *Id.* ¶ 110.

54. Thus, for a Treaty claim to exist, the alleged "rights affected must exist under the law which creates them." *Id.* ¶ 111 (discussing *EnCana Corporation v. Republic of Ecuador*).

55. It follows that, as a prerequisite for its Treaty claims, PEL must have "an actual and demonstrable" right under Mozambican law applicable to the MOI. **RLA-92**, *Merrill v. Canada* at ¶ 142 ("an investor cannot recover damages for the expropriation of a right it never had").

56. In this context, tribunals frequently examine domestic law to determine the existence of the claimant's alleged rights. *See e.g.*, **RLA-137**, *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) at ¶¶ 117-134 (examining domestic law to conclude that claimant never in fact possessed the alleged right that was purportedly breached); **RLA-138**, *Apotex, Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013) at ¶¶ 207-218 (holding that an application process "governed exclusively by U.S. law and regulation" may not be characterized as "property" for purposes of investment claim).

57. Particularly where the alleged right arises out of a purported contract, like the MOI here, the reviewing tribunal must first examine whether the alleged contractual rights were "enforceable in the courts of the State in accordance with the substantive law of that country." **RLA-74**, *F-W Oil v. Trinidad and Tobago* at ¶ 152; *see also* **RLA-56**, *Zhinvali v. Georgia* at ¶¶ 297-304 (considering rules of interpretation under domestic law in determining whether alleged contract establishes a qualifying "investment" under Article 25(1)). When the alleged rights do not exist under local law, the Treaty claim predicated on the existence of those rights fails.

58. Here, the key disputed "rights" and "contractual commitments" PEL relies upon for the existence of a protected "investment" (and the jurisdiction of this Tribunal) are, by PEL's

own admission, PEL's "rights under the MOI." As Mozambique previously explained (SOD ¶ 324):

> "Specifically, PEL's investment treaty arbitration claims 'arise out of' the MOI, because the MOI allegedly provides the underlying substantive rights which PEL seeks to protect pursuant to the MZ-India BIT. This is confirmed by PEL's pleadings. The 'investment' PEL alleged in its Request for Arbitration was '*its rights under the MOI*, including its valuable right to be awarded a concession for the USD$3.115 billion Project that PEL had itself conceived of, and its right of first refusal, both of which were abrogated by the MTC.' **Exhibit R-46**, Request for Arbitration ¶ 81 (emphasis added). In its Statement of Claim, PEL likewise defines its alleged 'investment' through its flawed allegations regarding rights conferred through the MOI. *See* SOC ¶ 257(a) (the alleged '*direct award of a concession to implement the Project, as well as all of the rights under the MOI associated with the Project*') (emphasis added). To the extent PEL now also contends that any alleged 'know-how' constitutes an investment that did not receive appropriate protection, those assertions, too, 'arise out of' the MOI. PEL alleges its 'know-how was explicitly protected by the MOI,' *see* SOC ¶ 257(b), and contends it was Mozambique's alleged commitments in the MOI that formed 'the fundamental basis upon which PEL invested in Mozambique' and caused PEL to 'complete the PFS at its own costs,' *see, e.g.,* SOC ¶ 324). Plainly, this dispute 'arises out of' the MOI, which forms the 'fundamental basis' of the alleged rights, and whose alleged breach is the *sine qua non* of the subject claims."

59. Simply stated, if the MOI did not make the contractual commitments or give PEL the rights that PEL alleges (*e.g.*, the alleged "right to the concession" that formed PEL's "investment"), PEL's arguments for Treaty jurisdiction would fail without question. *See* SOD ¶¶ 362 *et seq*.

60. This case presents circumstances where the precise question fundamental to this Tribunal's jurisdiction over the Treaty claims—that is, whether there was a valid MOI (the alleged investment) in the first place and what rights it provides the Parties—is being resolved by another international tribunal: the ICC Tribunal. Crucially, that ICC Tribunal's jurisdiction over the underlying local contractual law dispute is unchallenged by PEL, precisely, because the parties consented to exclusively arbitrate "any dispute arising out of the MOI" under the ICC Rules in Mozambique, and the ICC Tribunal has already concluded that it has jurisdiction over the local contractual law dispute, pursuant to the compulsory ICC arbitration agreement in the MOI.

61. Moreover, the outcome of the local contractual law dispute is fundamental and a prerequisite to whether any Treaty standards were violated. There can be no Treaty claims whatsoever without underlying local law contractual rights based on a valid and enforceable MOI.

62. PEL's Treaty claims in this UNCITRAL proceeding are premised on local contractual law allegations that Mozambique made certain "promises" or "contractual commitments" embodied in the MOI (e.g., the alleged "right to the direct award of the project concession"), which then formed the basis of PEL's "legitimate expectations," which Mozambique treated unfairly when it allegedly reneged on those same "contractual commitments." *E.g.* SOC § V. If PEL is incorrect about the existence, validity, and scope of those so-called MOI "rights," "promises," or "commitments," then PEL states no colorable claim for breach of the FET standard in the circumstances of this case. SOD § VI. The same holds true, of course, for PEL's MFN claim—which is premised on PEL's incorporation of an umbrella clause and allegations that Mozambique breached contractual obligations in the MOI. SOD § VII. PEL's indirect expropriation claim likewise rises or falls on the MOI dispute: "an investor cannot recover damages for the expropriation of a right it never had." **RLA-92**, *Merrill* at ¶ 142 ("The right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument."); *see* SOD § VIII. PEL itself confirmed that the MOI dispute is a predicate to Treaty liability in its response to Mozambique's bifurcation application. *See* PO3 ¶ 40.

63. It is for all these reasons that Mozambique's Statement of Defense led its merits discussion with a robust recitation of why the MOI does not (and could not under Mozambican law) give PEL the rights it alleges. SOD § V. The MOI dispute is fundamental to the parties' positions on substantive Treaty liability. SOD §§ V-VIII.

64. PEL's damages theories drive home the materiality of the MOI dispute. In no instance does PEL attempt to articulate a damages theory that is not predicated on its allegation that the MOI gave PEL the "right to the direct award of the project concession." PEL Reply § IV(B). PEL never attempts to articulate the value of its alleged "know-how," such as the

minimal cost of the Pre-Feasibility Study that it contends was a condition precedent to the vesting of the MOI-derived "right" to a concession. Rather, the basis for all three of PEL's latest damages methodologies—ex post, ex ante, and "loss of chance" DCF calculations—is that PEL allegedly lost "the value of its rights under the MOI," which PEL calls "its rights to the concession." *E.g.*, **CER-5**, Second Versant Expert Report, ¶¶ 5-6, 49.

65. The fundamental assumption PEL's counsel instructed its damages experts to make is that "the Concession would have been rightfully awarded to Claimant." *Id.* ¶ 6. PEL's damages experts expressly went about their task on the assumption that "the MOI was legally binding and obligated Respondent to negotiate with PEL for the award of the Concession directly." *Id.* ¶ 51. The accuracy of that assumption is, of course, the MOI dispute. And that MOI dispute is being resolved by the ICC Tribunal.

66. Accordingly, the ICC Tribunal's decision on the local contractual law dispute is material, and a prerequisite, to PEL's fundamental damages assumptions and, by extension, to whether PEL will be able to prove a single dollar of non-speculative lost profits herein.

67. In short, unlike this UNCITRAL Tribunal (where difficult jurisdictional and admissibility questions abound), [7] the ICC Tribunal has uncontested jurisdiction over the parties' local

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[7] Mozambique objects to this Tribunal's jurisdiction on multiple grounds (and to the admissibility of PEL's Treaty claims). The parties' election for ICC arbitration of "*any dispute* arising out of the MOI" includes both contract and Treaty claims. Under the parties' arbitration agreement, the question is whether the "dispute"—and not a cause of action—arises out of the MOI. In any event, there is no "investment," because the MOI did not give PEL the rights it alleges, and because whatever right the MOI might have provided is more akin to an option.

Notably, PEL's lengthy Reply has little substantive response to Mozambique's evidence that the MOI could not, under Mozambican law, actually grant PEL concession rights. So, instead, PEL's Reply offers new legal and damages methodologies alleging that the MOI can be valid because it only gave PEL the "right" to "negotiate" a concession (as opposed to the concession itself). PEL claims it should be awarded 90% of its DCF lost profit damages on a "loss a chance" theory *(i.e.*, on the attorney-provided assumption that PEL would have had a 90% chance of successfully negotiating an actual concession agreement).

This Tribunal would be breaking new ground in finding that an alleged "right to negotiate" a definitive concession agreement, fundamentally derived from a six-page pre-concession "Memorandum of Interest," is itself an "investment" that gives rise to Treaty jurisdiction and provides the disappointed bidder (who was never awarded the concession and did not design, build, finance, operate, or maintain the project) the speculative profits of an unbuilt USD$3 billion, 30-year rail line and coal port concession. Rather than wrestle with these serious jurisdictional (and

contractual law dispute. The MOI dispute properly will be decided with reference to Mozambican law. It is fully appropriate for the local contractual law dispute to be resolved in accordance with the parties' express agreement in the MOI to arbitrate before the ICC. The MOI dispute is indisputably material—indeed, fundamental—to PEL's Treaty case.

B. Sound Case Management And The Parties' Agreements Are Compelling Reasons For A Stay Of This Proceeding Until The ICC Tribunal Decides The Existence, Validity, And Scope Of PEL's Alleged Rights In The MOI.

68. This is a textbook case where sound management compels a stay. The touchpoint of the inquiry is whether a stay is an appropriate procedural mechanism under the broad authority UNCITRAL Rule 15 provides the Tribunal. Under Rule 15(1), the Tribunal must simply ensure that the parties are treated with equality and are given a full opportunity to be heard.

69. Here, in assessing the appropriateness of a stay, the benefits are undeniable and paramount. A stay respects the parties' MOI arbitration agreement and mitigates key acknowledged pitfalls of concurrent proceedings: the risk of conflicting decisions and cost inefficiency.

70. PEL itself vigorously asserted the risks of inconsistent outcomes and inefficient duplicative work before the ICC Tribunal.[8] Mozambique is likewise concerned that, absent a stay, it will be forced to arbitrate the two disputes concurrently, with substantial impacts relative to litigation expense and the risk of inconsistent judgments. The more appropriate procedural path would be to resolve (at a minimum) the fundamental MOI dispute before the agreed-upon, jurisdictionally-unquestioned ICC Tribunal first.

71. Litigating the same local contractual law dispute before two Tribunals concurrently, using substantially the same exhibits, authorities, witnesses, and experts, is not ideal and

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policy) concerns and interpret the MOI in parallel with the ICC Arbitration, the Tribunal should sensibly await the outcome of the ICC Tribunal's proceedings.

[8] PEL represented to ICC Tribunal that the concurrent proceedings caused it material prejudice, citing, *inter alia*, "cost inefficiencies, delay and cost of post-award proceedings, the risk of conflicting decisions" and threats to the "enforceability of an award." *See, e.g.*, **R-59**, ICC PO5 ¶ 6. Further discussion of risks posed by concurrent proceedings can be found in the ILA Final Report on Lis Pendens and Arbitration (**RLA-135**); the UNCITRAL Secretariat Note on Concurrent Proceedings in Investment Arbitration, UN Doc. A/CN.9/881 (8 April 2016) ¶¶ 21-22 (**RLA-142**); and in PEL's other previously endorsed authorities, such as *Cairn* ¶ 42 (**RLA-141**).

prejudices both parties. This concern exists here because, at a minimum, the parties have pleaded the MOI dispute before both Tribunals.[9]

72. Conversely, it is difficult to ascertain *any* material prejudice PEL would sustain from a temporary stay of these proceedings. As noted, the main prejudice PEL of which PEL has complained—inconsistent judgments and extra costs—is mitigated by a stay. There is little risk of "inconsistent awards" or "cost inefficiency" if the parties proceed sequentially, with the ICC Tribunal issuing an award addressing the fundamental local contractual law dispute, and this Tribunal proceeding as appropriate thereafter. If PEL suffers any prejudice at all, it certainly does not outweigh the benefits of a stay.

73. With a stay, PEL will still have the opportunity to present its case—both before the prompt ICC Tribunal and, where appropriate, this Tribunal thereafter. PEL has no right to exclusively litigate the local contractual law dispute before this jurisdictionally-challenged Tribunal, and since the existence of MOI "rights" is governed by domestic law even in Treaty litigation, it is appropriate to have that issue decided by the ICC Tribunal applying Mozambican law—as the parties agreed to do in the MOI itself. *Supra* § IV(A). A stay has the same impact on both parties and does not treat PEL unequally in any fashion.

74. Cases granting stays often share a common characteristic with the present circumstances: a separate tribunal with jurisdiction is resolving a material or fundamental issue. *E.g.*,

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[9] PEL's Statement of Claim was premised on its MOI arguments that "the Government and PEL formalized their relationship and respective commitments by entering into the MOI" (SOC §III(B)) and that "Mozambique reneged on its promise to award the concession to PEL and proceeded with a public tender in violation of its commitment in the MOI (SOC §III(G)). PEL fundamentally relies on its interpretation of the MOI for Treaty jurisdiction, liability and damages. *E.g.*, SOC §V(A)(2) ("Mozambique's conduct frustrated Claimant's legitimate expectations by reneging on the specific assurances contained in the MOI and Mozambican Law); *id.* §V(B)(2)(c) ("Mozambique breached its umbrella clause obligations to PEL" by breaching allegedly "core obligation(s)" in the MOI); *id.* ¶ 419 ("Mozambique indirectly expropriated PEL's contractual rights to a concession and to exclusivity in respect of the Project."). Mozambique contested PEL's assertions regarding the existence, validity, enforceability, and scope of MOI "rights" or "contractual commitments" throughout the Statement of Defense, including in the fact and jurisdictional sections and all of Section V. Mozambique's Statement of Claim in the ICC Arbitration, seeking declaratory and other relief, asserted similar MOI arguments as what Mozambique raised in its Statement of Defense in this proceeding. *Compare* **R-61** (Mozambique's ICC SOC).

Southern Pacific v. Egypt, **RLA-48**, ¶¶ 79-88 (ICSID tribunal stayed its own proceedings where an ICC arbitration had been commenced pursuant to the arbitration clause in parties' agreement, and *questions prealable* to the ICSID Tribunal's jurisdiction were *sub judice* before the ICC tribunal and French courts); *The MOX Plant Case (Ireland v. United Kingdom)*, **RLA-139**, Order No. 3 (24 June 2003) 42 ILM 1187, 1199 (PCA tribunal stayed its own proceedings pending resolution by the European Court of Justice of issues material to the tribunal's jurisdiction); *SGS v. Philippines*, **RLA-116**, ¶¶ 173-176 (ICSID tribunal stayed pending adjudication of the parties' contractual obligations in another proceeding).

75. As *Cairn* noted, stays are granted "pending the resolution of other proceedings which could define the Tribunal's jurisdiction . . . or resolve the content or quantum of an underlying obligation in accordance with its proper law and forum." **RLA-141**, *Cairn* ¶ 137. PEL's ICC authorities likewise reflect that stays are warranted when another tribunal is resolving a fundamental issue. *See, e.g.*, **RLA-140**, ICC Case 12510 (tribunal issuing a stay to resolve a foundational contract issue to be decided by another tribunal with jurisdiction).

76. The ICC Arbitration is the appropriate proceeding to promptly resolve the local contractual law dispute. The ICC Tribunal has uncontested jurisdiction over the local contractual law dispute under the MOI's arbitration agreement, and recognizes its mandate to reach an award as close as possible to the six-month time period in the ICC Rules. In contrast, this Tribunal's jurisdiction would arise only under the Treaty and if other admissibility or jurisdictional hurdles were overcome.[10] If there is no Treaty jurisdiction—for any reason—or if the claims are otherwise inadmissible, the Tribunal has no basis to resolve the MOI dispute. If Mozambique prevails on the local contractual law dispute, PEL has not Treaty claims left. It prejudices all parties, and would constitute an enormous waste of resources, to continue this UNCITRAL proceeding concurrently with the ICC proceeding:

[10] Mozambique respectfully disputes the existence of this Tribunal's jurisdiction, and the admissibility of PEL's claims, on several grounds. SOD §§ III, IV. The Tribunal will recall that PEL contested bifurcation of the jurisdictional questions and sought to have all jurisdictional objections resolved with the merits. PO3. Based on PEL's assertions regarding intertwined merits determinations, the Tribunal agreed to defer its resolution of the jurisdictional objections until the hearing on the merits. *Id.* Thus, this Tribunal's jurisdiction over any and all aspects of the dispute remains an open question as a result of PEL's own strategy to oppose Mozambique's motion to bifurcate the jurisdictional issues for an early decision by this Tribunal.

the parties may well incur extensive unnecessary costs to reach a decision that this Tribunal cannot rule on any aspect of the merits. That outcome will not exist in the ICC Arbitration which has unquestioned jurisdiction over the local contractual law dispute. Or, this UNCITRAL Tribunal and the ICC Tribunal, if proceeding concurrently, may reach inconsistent outcomes on the dispute, thereby imposing uncertainty and extra costs on the parties in post-award proceedings. Temporarily staying this UNCITRAL proceeding to await the material outcome of the jurisdictionally-unquestioned ICC Tribunal is sound case management, and entirely "appropriate" and required under UNCITRAL Rule 15(1).

C. The ILA Recommendations And Authorities Endorsed By PEL Favor A Stay.

77. Persuasive authority—including, most significantly, authority endorsed by PEL—likewise favors a stay of these UNCITRAL proceedings.

78. As noted, PEL referenced *Cairn* and the ILA Recommendations in its attempt to stay the ICC proceedings. Those authorities did not support a stay of the ICC arbitration for the reasons described above and by the ICC Tribunal in its PO5. In short, it was not sound case management to stay a jurisdictionally unquestioned ICC arbitration in favor of a jurisdictionally challenged UNCITRAL arbitration. Further, PEL improperly flipped the order of which proceeding was material to the other: the local contractual law dispute is material to the Treaty issues, but the converse is not necessarily true. As the ICC Tribunal acknowledged, PEL's Stay Application risked depriving Mozambique of its right to seek justice and proceed at least as to the local contractual law dispute. **R-59**, ICC PO5.

79. In contrast, PEL's authorities confirm the appropriateness of a stay of this UNCITRAL proceeding. The *Cairn* tribunal developed the four factors to guide tribunals in exercising their power to stay. These factors were derived from the UNCITRAL Rules, Dutch law (which is relevant to this Tribunal because this arbitration is seated in The Netherlands, and a Dutch court reviewing the decision of this Tribunal would consider Dutch law), and the ILA Recommendations. Each of the factors are satisfied in the present circumstances.

80. First, a stay would not create an imbalance between the parties or violate PEL's right to equal treatment. Rather, the balance of convenience between the parties favors a stay. The material prejudice caused to Mozambique—and, in fact, also to PEL—in continuing this

UNCITRAL proceeding (given that the ICC Arbitration will decide the local law contractual dispute which is a prerequisite and material to resolution of the Treaty claims) far outweighs whatever prejudice PEL may claim in staying this UNCITRAL arbitration.

81. The impact to PEL is simply that this proceeding is temporarily stayed—likely for only a few months—as the ICC Tribunal rules on the issues that PEL concedes are within its jurisdiction. Thus, that cannot constitute material prejudice. Rather, it is a benefit to PEL, as it mitigates the prejudice PEL has complained of elsewhere: inconsistent judgments, risk to enforceability of awards, and excessive costs.

82. Notably, because PEL waited for years to commence this arbitration, a brief stay of the type contemplated here is insignificant, and to the extent PEL's damages methodologies account for the time value of money, would be reparable in the event PEL proves it case.

83. In contrast, both parties suffer considerable and irreparable harm should this arbitration not be stayed. PEL complained in the ICC proceeding that it would be harmed by incurring considerable costs fighting the same case in two *fora* with associated duplication of cost. **R-62**, PEL ICC Stay Application ¶ 115. PEL also complained that the existence of concurrent proceedings threatens the enforceability of any award ("a harm which is by definition irreparable") and, also, that any contradiction between the two tribunals could be used to render an award unenforceable. *Id.* ¶ 116. PEL's stated concerns must still exist (as the ICC Tribunal appropriately denied PEL's efforts to stay the wrong proceeding) but logically would be mitigated by a stay of this UNCITRAL proceeding. Mozambique is similarly prejudiced by proceeding concurrently with the ICC and UNCITRAL proceedings. The prejudice both parties incur absent a stay is paramount.

84. Second, a stay would not deprive PEL the right to present its case. PEL may make its arguments to the ICC Tribunal on the local law contractual dispute and then present its case, as appropriate, later in this UNCITRAL proceeding. PEL cannot be said to be "harmed" by arbitrating before the ICC Tribunal in which it expressly and exclusively agreed to arbitrate "any dispute arising out of the MOI." PEL has never disputed the validity of the arbitration agreement in the MOI and, regardless of whether the MOI itself is valid, the parties' arbitration agreement is severable and enforceable.

85. Third, a stay would not delay these proceedings unreasonably. The stay contemplated here would be of a shorter duration than those found reasonable in other decisions. For example, the *Cairn* procedural order noted that relevant arbitral jurisprudence found stays of six months, 1.5 years, and three years to be a reasonable, limited durations. *See* **RLA-141**, *Cairn* ¶ 79. Here, the ICC Tribunal has recognized that "Article 31(1) of the ICC Rules exhorts the Arbitral Tribunal to render the Award within six months of the date of the last signature of the Terms of Reference" and that "the Arbitral Tribunal has the obligation to respect the six-month time limit to the best of its efforts." **R-58**, ICC PO2 ¶ 3(vi). The Secretariat's deadline for a final award in the ICC Arbitration is 29 April 2022. This requested stay is thus objectively reasonable. It is *de minimis* compared to the many years (2013-2020) PEL waited before filing for arbitration.

86. Fourth, the outcome of the ICC Arbitration on the local contractual law dispute is a prerequisite to the outcome of this arbitration. As discussed above, without the local contractual law rights that PEL claims based on the MOI, PEL has no Treaty claims to assert. At a minimum, the local contractual law dispute is indisputably material to PEL's Treaty claims in this proceeding, including Treaty jurisdiction, liability, and damages.

87. It follows that the present case meets all the factors considered material by the *Cairn* tribunal to grant the "exceptional" remedy of a stay.

88. PEL may observe that the *Cairn* Tribunal rejected the requested stay. However, its rationale for doing so underscores why compelling reasons for a stay exists here instead.

89. In *Cairn*, the underlying dispute involved two tax demands that India issued to separate parties related to the same economic transaction. *See* **RLA-141**, *Cairn* ¶ 17. India sought to stay *Cairn* to await the outcome of (1) another arbitration (the *Vedanta* arbitration) initiated *by a separate claimant* and (2) *cross-litigation* between the two claimants. *Id.* ¶¶ 15-17. In denying to exercise its power to stay, the *Cairn* tribunal expressed concern about prejudice to the non-movant *in the circumstances of that case*, because, among other things:

- The requested stay was *several years* in duration. *Id.* ¶ 117.

- Pending resolution of the Treaty dispute, *India had seized shares valued at approximately USD$1 billion*, against a company whose market valuation was merely USD $1.5 billion. The Tribunal found material prejudice because the seizure created a substantial impairment in Cairn's ability to manage its business. *Id.*

- India imposed *a USD$4.4 billion tax assessment* that would remain outstanding during the stay. The Tribunal found material prejudice in granting a stay, given that interest was potentially *accumulating at $44 million per month*, plus penalties. *Id.* ¶ 119.

- And, importantly, the Tribunal was not persuaded a stay, in that case, would eliminate potential inconsistent outcomes: "In the case of the *Cairn* and *Vedanta* arbitrations, two unaffiliated parties are bringing two separate claims against India under the same treaty, but they both allege different breaches of the treaty and request their own relief." ¶125. Thus, the risk of different outcomes was "virtually unavoidable" because even with a stay, "each claimant has a right to a resolution of its own dispute." *Id.* Arbitration by one unaffiliated claimant also was not necessarily material to the outcome of the other, *id.* ¶ 137, and the delay of several years not was reasonable, *id.* ¶ 138.

90. The difference between *Cairn* and the present circumstances is striking and underscores the appropriateness of a stay here. Here, the stay will last months, not "several years." There is no crushing multi-billion-dollar seizure or rapidly-accumulating assessments. There is no material prejudice to PEL (PEL previously claimed prejudice in the *absence* of a stay). A stay to allow the ICC Tribunal to resolve material issues within its jurisdiction reduces, if not eliminates, the risk of inconsistent outcomes. And, resolution of the local law contractual dispute is a prerequisite and patently material to the resolution of the Treaty claims in this proceeding. Accordingly, *Cairn* and the other authority endorsed by PEL evinces why a stay of this UNCITRAL proceeding is wholly appropriate and necessary.

V. AN INTERIM SUSPENSION OF ALL DEADLINES IS APPROPRIATE WHILE THE TRIBUNAL DECIDES THIS APPLICATION FOR A STAY.

91. Mozambique has a **November 8** deadline to submit its Rejoinder on the Merits and Reply to Objections to Jurisdiction. Good cause exists for this Tribunal to immediately issue **an interim suspension** of all deadlines (including all briefing deadlines) in this UNCITRAL proceeding until after it decides Mozambique's instant application to stay this proceeding. There are various reasons why an interim suspension is necessary:

92. Depending on how the ICC Tribunal rules on the local contractual law dispute, the ICC award may eliminate the need for all, if not much, of Mozambique's work on its Rejoinder

on the Merits and Reply to Objections to Jurisdiction or affect such briefing substantially. Thus, considerations of economy and efficiency strongly support an interim suspension of all deadlines (including all briefing deadlines) in this proceeding until after this Tribunal decides Mozambique's instant application to stay this proceeding.

93. In this regard, with its Reply on the Merits, PEL has improperly submitted substantial new evidence and raised multiple new arguments, as well as introduced statements from new factual and expert witnesses and increased its damages claims by $40 million, which will require substantial additional work – not only by Mozambique's counsel, but by its expert witnesses – which may result in a waste of resources depending on how the ICC Tribunal rules on the local contractual law dispute. Indeed, PEL's 332-page Reply on the Merits includes extensive new arguments and new evidence, including a new expert on PPP procurement (CER-7); a new fact witness (CWS-5); two new damages methodologies (CER-5, "ex ante" and "loss of chance" calculations); and about 250 new exhibits. In its Reply, PEL has *increased* its claimed *ex post* damages by more than 35% (from $115.3 million (SOC ¶ 475) to $156 million (Reply ¶ 1033)); added a new *ex ante* methodology of $49.3 million (*sans* interest) (Reply ¶ 1034); and added a third, loss-of-chance methodology yielding 90% of the values above (Reply ¶ 1036). PEL's Reply on the Merits now offers a smorgasbord of damages methodologies claiming anywhere from $44 million to $156 million in damages – hoping that something "sticks" – but basically showing the weakness of its claims and speculative nature of the purported damages. In this regard, Mozambique also reserves its rights to contend, at the appropriate time, that PEL's new arguments and new evidence must be stricken from the record. *See* PO1 ¶ 83 (precluding "new evidence" and "new argument" in Reply on the Merits "except if required to rebut arguments and evidence submitted with the Statement of Defense[] and/or if evidence has arisen from the document production").

94. As this Tribunal is aware, PEL also has failed to produce to Mozambique herein important blacklisting documentation. PEL has admitted that it *did not even request the blacklisting documents from the Indian courts until 28 September 2021* (C-21), although it was required—by order of this Tribunal—to produce said documentation to Mozambique back in June, 2021. There is no current deadline set for this belated production.

95. Further, Mozambique has incurred significant time and effort to defeat PEL's stay application in the ICC arbitration—all of which has substantially impacted Mozambique's time for preparation of its submissions in this UNCITRAL proceeding. As PEL stated in seeking to excuse its nonproduction of the blacklisting documents, *see* C-20 ¶ 4, the ICC jurisdictional briefing has been a significant effort that has distracted the parties' focus from planned efforts in this UNCITRAL proceeding. The ICC Tribunal also requested bifurcated submissions on its jurisdiction over the international law and "Treaty claims," in advance of a hearing potentially scheduled for 7 October 2021. This Tribunal will recall that PEL requested—and received—an extension of time herein because of the two-hour hearing that the ICC Tribunal scheduled on PEL's stay application (at PEL's request). *See* A-25. The upcoming ICC October 7 hearing on Treaty jurisdictional issues is far more significant and evinces much better cause for an extension of Mozambique's November 8 deadline.

96. Accordingly, because the ICC Tribunal will decide the local contractual law dispute, and in order to prevent a potential significant waste of resources (Mozambique is a sovereign state and the resources of the people of Mozambique are being spent in this proceeding), Mozambique requests that this Tribunal immediately issue **an interim suspension** of all deadlines (including all briefing deadlines) in this UNCITRAL proceeding until after this Tribunal decides Mozambique's instant application to stay this proceeding.[11]

VI. PRAYER FOR RELIEF

97. Mozambique thereby requests the Tribunal:

a) Immediately suspend all deadlines (including briefing deadlines) pending the Tribunal's resolution of this application and then modify the procedural timetable accordingly; [12]

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[11] Similarly, to avoid waste, the ICC Tribunal also issued an interim suspension of all deadlines in that case while it decided PEL's motion to stay.

[12] At the very least, based on the magnitude of PEL's new Reply material that Mozambique must analyze and respond to in its upcoming Rejoinder, based on the significant time and effort that Mozambique has had to spent to defeat PEL's stay application in the ICC arbitration which deprived it of time to focus on this proceeding, and based on Patel's failure to yet produce the blacklisting documentation and there being no present deadline for the same, and to ensure equality

b) Stay this arbitration proceeding until a final award is made in the ICC Arbitration; and

c) Provide such further relief as the Tribunal deems appropriate.

Dated: 1 October 2021.

Respectfully submitted,

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and provide both parties a full and fair opportunity to be heard, Mozambique's November 8 briefing deadline should be extended for two months (which will not affect the hearing date herein), **even if** this Tribunal does not issue an **interim suspension** of all deadlines pending its decision on this application.