

**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'S REPLY IN SUPPORT OF ITS
APPLICATION FOR A TEMPORARY STAY
UNTIL THE ICC ISSUES A FINAL AWARD**

20 October 2021

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1. There clearly is an underlying contractual dispute between the parties. The ICC Tribunal has decided that it has jurisdiction to adjudicate that contractual dispute pursuant to the ICC arbitration agreement in the MOI. PEL has conceded that the ICC has jurisdiction to decide the underlying contractual dispute. The resolution of the treaty dispute between the parties is dependent upon the prior resolution of the underlying contractual dispute. Without the underlying contractual rights that PEL asserts, and that Mozambique disputes, there are no local contractual rights to protect under the BIT or, at a minimum, PEL's treaty claims are largely diminished. Mozambique's stay application thus seeks a commonsense and necessary stay premised on sound case management and respect for both Tribunals.¹
2. PEL's argument that "there is no genuine contractual dispute" is plain wrong. There is a genuine underlying contractual dispute between PEL and Mozambique: The parties dispute which is the correct version of the MOI; whether the MOI is valid and enforceable; what are the parties' rights and obligations under the MOI; whether PEL had the right to a direct award of the concession or to negotiate for a direct award under the MOI; whether PEL resolved its claims under the MOI by agreeing to participate in the public bidding contest with a bidding point advantage to account for any MOI rights; whether the public bidding contest was in accordance with Mozambican law; whether PEL lost the bidding contest; whether PEL failed to timely appeal the contest result; and whether PEL is thus now barred from reverting to asserting contract rights under the MOI. As the ICC Tribunal has now acknowledged, it has jurisdiction to resolve the underlying contractual dispute, which has been presented on a declaratory judgment basis to the ICC, because the MOI's arbitration clause states that "*Any dispute* arising out of this memorandum between the parties shall be referred to arbitration" under the ICC arbitration rules. **Exhibit R-2**, MOI, Clause 10.
3. The ICC Tribunal's jurisdiction over the parties' underlying contractual dispute is therefore proper and uncontested. PEL has confirmed to the ICC Tribunal that it had no objections to its jurisdiction. **R-58**, ICC Proc. Order No. 2 ¶ 3(i) ("As confirmed by the Parties at the

¹ PEL's Response begins with the same old inflammatory attacks ("Respondent is not a good faith litigant" and is "obstructionist") intended to bias this Tribunal against Mozambique. However, as the ICC has now concluded, Mozambique was within its rights to seek ICC arbitration to resolve the parties' underlying contractual dispute. That PEL filed the UNCITRAL arbitration first "is not, in itself, determinant." **R-59**, ICC Proc. Order No. 5 ¶ 18.

CMC, neither Party has presented *any objections to the Arbitral Tribunal's jurisdiction.*”). The ICC Tribunal also has indicated that its “*jurisdiction to hear the Claimants’ contract claims has been accepted by the Respondent [which, in the ICC, is PEL].*” **R-59**, ICC Proc. Order No. 5 ¶ 17. Denying PEL’s recent application to stay the ICC proceeding, the ICC Tribunal also has – indeed – concluded that it has jurisdiction over the contractual dispute: PEL “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.*” *Id.* ¶ 21. At a recent hearing, PEL again told the ICC Tribunal that “*we do not contest that yes, there is a valid arbitration clause in clause 10, and for that reason we did not contest this tribunal’s jurisdiction over contractual claims.*” **R-64**, 7 October 2021 ICC Hearing, 1:34–35. The ICC Tribunal’s uncontested jurisdiction over the underlying contractual dispute is proper and sufficient grounds to stay this proceeding until the ICC resolves the contractual dispute, regardless of whether the ICC also has jurisdiction over the treaty dispute.

4. There is, obviously, also a treaty dispute between the parties, but its resolution is dependent on the prior resolution of the underlying contract dispute, because the existence of PEL’s MOI-derived contract “rights” is fundamental to treaty jurisdiction, liability and damages. Likewise, absent an MOI breach, PEL has no umbrella claim. For example, PEL claims that its “investment” includes its rights in the MOI. In its Reply on the Merits, PEL argues that “PEL’s investment in the Project includes ... the right to a direct award of a concession and the rights under the MOI associated with the Project” (¶ 510), and that “PEL’s rights under the MOI ... meet the criteria of investments under the Treaty” (¶ 531). If the MOI is invalid, PEL has no MOI contractual rights to protect under the treaty. The existence of PEL’s treaty claims is dependent (in whole or to a large extent) on the prior resolution of the underlying contractual dispute favorably to PEL: “In order to determine whether an investor/claimant [made] ... 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*, ¶ 162. These local law contractual issues, also essential to this Tribunal’s jurisdiction (for example, whether there is a valid MOI – an alleged “investment”) are being resolved by another international tribunal (the ICC Tribunal) pursuant the MOI’s compulsory ICC arbitration clause.

5. PEL's response, that the ICC Arbitration "will not bind this Tribunal," contradicts what PEL told the ICC Tribunal (where it sought a stay arguing that this UNCITRAL proceeding would have a preclusive/binding effect on the ICC proceeding, leaving "very few (if any) residual issues for [the ICC] Tribunal to determine," **R-59**, ICC Proc. Order No. 5 ¶ 18). Although the ICC arbitration clause is compulsory, and thus could have a preclusive effect on PEL, at this stage that need not be decided because *Cairn* simply requires "materiality."
6. Even if, normally, a treaty tribunal may address contract issues, this situation is different because jurisdiction over the contractual dispute is disputed in this UNCITRAL arbitration, but is uncontested and conceded by PEL in the ICC arbitration.² The ICC and UNCITRAL arbitration rules are similar, and both tribunals are composed entirely of international arbitrators, so there is no fear of local bias. The ICC will expeditiously resolve the material underlying contractual dispute, since it must by the 29 April 2022 final award extended deadline. By filing a motion to stay in the ICC, PEL itself recognized that one of these proceedings should be stayed, and argued no prejudice would result from a stay. PEL will be able to present its case on the contract issues to the ICC Tribunal, and PEL will then be able to debate the effect of an ICC award before this Tribunal. The ILA and *Cairn* factors are therefore satisfied, and this Tribunal obviously has the power to stay this proceeding.
7. In sum, PEL objected to this Tribunal deciding the jurisdictional issues first on a bifurcated basis, and instead placed them in front of the ICC Tribunal via its motion to stay the ICC proceeding. But PEL then got caught in its own fishing net, and had to admit that the ICC has jurisdiction over the underlying contractual dispute. This was not simply a strategic blunder by PEL, but is the correct result mandated by the parties' ICC arbitration clause. Considering the ICC Tribunal's confirmation that it will resolve the contractual dispute expeditiously, which is a precursor to addressing the treaty dispute, this Tribunal should respect the parties' agreement to arbitrate the contractual dispute before the ICC Tribunal, avoid the waste and prejudice of concurrently deciding the same contractual dispute, and temporarily stay these UNCITRAL proceedings until after the ICC issues its final award.

² Further, this Tribunal cannot now rule (in response to this stay application) that it has concurrent jurisdiction to decide the contractual dispute, because it has ruled, adopting PEL's opposition to Mozambique's prior motion to bifurcate, that it cannot make jurisdictional determinations before reaching the merits. *See* Stay Application, note 10.

Dated: 20 October 2021.

Respectfully submitted,



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