

PCA CASE NO. 2020-21

**IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF
THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW**

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 (India)

Claimant

AND

THE REPUBLIC OF MOZAMBIQUE

Respondent

**CLAIMANT'S REJOINDER TO
RESPONDENT'S REPLY IN SUPPORT OF ITS APPLICATION
FOR A STAY OF THE PROCEEDINGS**

25 October 2021

1. Mozambique’s Stay Reply adds nothing new. It is not responsive to PEL’s Response. It avoids addressing all points unfavourable to its case and seeks to distort PEL’s position. The Stay Reply fails to engage with all four limbs of the *Cairn* standard, which both Parties agree is relevant for assessing the stay. Rather, it focuses entirely on the fourth limb of that test, *i.e.*, where a stay is premised on the finalisation of another pending proceedings, whether the outcome of the other proceedings is material to the outcome of the arbitration. For the reasons set out below, the Stay Reply does not advance Mozambique’s Application, and fails on all limbs of the *Cairn* standard. Accordingly, this Tribunal should reject Respondent’s Application and assess costs against it.
2. **First, the ICC Arbitration is not material to the outcome of this Arbitration.** Mozambique reiterates that “[t]he treaty dispute between the parties is dependent upon the prior resolution of the underlying contractual dispute.”¹ Even assuming, *arguendo*, that this were true, it would not detract from the fact that:
 - a. this Tribunal has jurisdiction to assess any contractual or municipal law issues relevant to its determination of PEL’s international law claims under the Treaty. As explained previously, such claims are only before this Tribunal, and not before the ICC Tribunal;
 - b. this Tribunal is not bound by and need not defer to any findings of the ICC Tribunal on contractual or municipal law issues (or indeed, any other issues).² Instead, it must assess the evidence before it and make its own determinations on the facts and the law; and
 - c. the two tribunals were appointed under different instruments of consent and have jurisdiction over different causes of action. Accordingly, **neither tribunal has any obligation to defer to the other**. Respondent says nothing about this,³ or about the ICC Tribunal’s own conclusion that the “...causes of actions [in the parallel proceedings] do not appear to be entirely the same and do not, therefore, justify a stay of the entirety of these proceedings pending a decision by another tribunal, constituted on the basis of a different agreement.”⁴ Nor does Mozambique cite a single authority displacing *Vivendi*, which establishes the principle that an arbitration clause in a contract does not prevent an investor from commencing a treaty claim, as the causes of action are different.
3. In such circumstances, Respondent has failed to demonstrate that the outcome of the ICC Arbitration is material to the outcome of this Arbitration.
4. **Second, a stay would deprive PEL from advancing its affirmative Treaty claims for an undefined (and potentially significant) amount of time.** Respondent has no answer to this fact. It says that should a stay be granted, “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**”.⁵ This is no equivalent to PEL pursuing its affirmative Treaty claims before this Tribunal. Importantly, PEL has only asserted affirmative claims in this proceeding.

¹ Stay Reply, para. 1.

² Mozambique appears to acknowledge this when it states that “PEL will then be able to debate the effect of an ICC award before this Tribunal.” Stay Reply, para. 6 (emphasis added).

³ See Stay Response, paras. 72 and 75.

⁴ Exhibit R-59, The ICC Tribunal Procedural Order No. 5, para. 16.

⁵ Stay Reply, para. 6 (emphasis added).

Accordingly, staying this Arbitration would deprive PEL of its right to pursue its affirmative claims for an indefinite (and potentially substantial) amount of time.

5. **Third, a stay would unreasonably delay this Arbitration.** Respondent repeats the false statement that “[t]he ICC will expeditiously resolve the material underlying contractual dispute, since it must by the 29 April 2022 final award extended deadline.”⁶ It ignores that the ICC Tribunal suspended its proceedings *sua sponte* pending a decision on its purported jurisdiction over the so-called “Treaty Claims”.⁷ The Parties do not know when the ICC proceedings will resume, or when a final hearing will take place. With no definitive timetable in place, granting a stay until the conclusion of the ICC proceeding would unreasonably delay this Arbitration.⁸
6. **Fourth, a stay would cause PEL material prejudice and/or create an imbalance between the Parties, thereby violating PEL’s right to equal treatment.** Mozambique initiated the parallel proceedings to undermine and/or derail this Arbitration, and to manufacture a basis to subsequently set aside and/or challenge this Tribunal’s award, should Mozambique be displeased with the result.⁹ Its SOC in the ICC Arbitration chiefly seeks declaratory relief, a nominal USD 1 dollar, and punitive damages, which do not even exist under Mozambican law (a point Respondent does not contest).¹⁰ It is not a genuine claim by genuine claimants. Rather, Mozambique’s ICC claims are nearly entirely plagiarised from its SOD,¹¹ with a singular aim of depriving PEL of its right to have its investment dispute resolved by this Tribunal.
7. While the Stay Reply argues that “[t]here is a genuine underlying contractual dispute between PEL and Mozambique” in the ICC Arbitration, this is belied by the fact that Mozambique (1) raises a number of points that have nothing to do with the MOI;¹² and (2) has already submitted all of these issues for resolution before this Tribunal through its SOD.¹³ PEL’s Treaty claims are both distinct from and broader than the purported “*contract dispute*” in the ICC Arbitration.¹⁴

⁶ Stay Reply, para. 6.

⁷ Stay Response, paras. 69-71.

⁸ Stay Response, paras. 27-33 and 69-71.

⁹ PEL’s Reply on the Merits and Response to Objections to Jurisdiction dated 9 August 2021, paras. 27-30; Stay Response, paras. 15-19.

¹⁰ **Exhibit C-335**, Mozambique’s ICC Statement of Claim, dated 19 May 2021, paras. 939.1-939.6, 939.8-939.12.

¹¹ **Exhibit C-334**, Comparison of the UNCITRAL Jurisdictional Objections & Statement of Defense and the ICC Statement of Claim.

¹² Stay Reply, para. 2. For example, Mozambique lists the following matters as genuine contractual dispute when in fact, none of them have anything to do with the MOI: “*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.*”

¹³ **Every single point** Respondent makes in Stay Reply, para. 2 is addressed in Respondent’s SOD: “*The parties dispute which is the correct version of the MOP*” which Respondent addresses *inter alia* at SOD, paras. 77-84 in a section entitled “*PEL’s English Version of the MOI is incorrect*” and SOD, paras. 461-472.7; “*whether the MOI is valid and enforceable*” which Respondent addresses *inter alia* at SOD, paras. 477-563 in a section entitled “*The MOI is Void, not Legally Binding and Unenforceable*”; “*what are the parties’ rights and obligations under the MOP*” and “*whether PEL had the right to a direct award of the concession or to negotiate for a direct award under the MOP*” which Respondent addresses *inter alia* at SOD, paras. 42-67 in a section entitled “*The MOI does not Provide PEL An Enforceable Right to a Concession*”; “*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*” which Respondent addresses *inter alia* at SOD, paras. 116-131 in a section entitled “*The MTC Conducted a Tender Process, and PEL Participated Through a Consortium, Waiving any Rights under the MOP*”; and “*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 MOP*” which Respondent addresses *inter alia* at SOD, paras. 135-141, 155-160, 677-678, 716.

¹⁴ For example, in this Arbitration alone, PEL alleges that Respondent breached the FET standard by the conduct of the MTC, the CFM and the Council of Ministers, which reneged on the commitments made to PEL to directly award it the Project concession, made inconsistent

Granting Respondent's Application would therefore deprive PEL of its right to have its Treaty claims heard by the only Tribunal with jurisdiction to decide them, causing material prejudice to PEL and/or creating an imbalance between the Parties.¹⁵

8. **Finally, PEL addresses some of Mozambique's main mischaracterisations in the Stay Reply:**

- a. Mozambique repeats its incorrect allegation, without further substantiation, that the "ICC Tribunal has now acknowledged, it has jurisdiction."¹⁶ This is not true.¹⁷
- b. It says PEL argued before the ICC Tribunal 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'*".¹⁸ This is not true. PEL argued that because Mozambique's "claim" in the ICC Arbitration was essentially aimed at thwarting PEL's Treaty claim in this Arbitration, very few (if any) issues would be left to be determined by the ICC Tribunal once this Tribunal issued its final award.¹⁹
- c. PEL acknowledging that MOI clause 10 is a valid arbitration clause and that the ICC Tribunal has jurisdiction over contractual claims²⁰ does not override the fact that both tribunals have jurisdiction over the respective disputes before them and need not defer to each other.
- d. While Mozambique appears to concede that this Tribunal has jurisdiction to consider municipal law,²¹ it does not explain its confusion of an undefined contract dispute with municipal law in general.²² Instead, it erroneously presents issues that this Tribunal must decide under the Treaty as "*an underlying contract dispute*" and states they must be determined by the ICC Tribunal because this Tribunal's jurisdiction over such issues is disputed.²³ This argument is self-serving and wrong. Respondent alone presented its defence to PEL's Treaty claims as an alleged contractual dispute and commenced the ICC Arbitration. Serious policy concerns would arise if all respondent States needed to obtain a stay of a treaty arbitration in case of parallel proceedings under a contract were to frame their defence and objections as a contractual dispute.
- e. Finally, Respondent's complaint that "*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*" is not understood.²⁴ **PEL has not placed any jurisdictional issue before the ICC Tribunal.** Rather, it is Respondent, through its Stay Application, which seeks to obtain through the backdoor the very bifurcation of this proceeding that this Tribunal refused.

9. Considering the above, PEL reiterates its prayer for relief set out in its Stay Response.

and non-transparent decisions, conducted themselves arbitrarily, and failed to act in good faith. It involves not only claims relating to the promises made in the MOI, but also claims relating to the conduct of the public tender process, which was riddled with irregularities, lacked transparency, and destined for a pre-determined outcome. The tender process is not even mentioned in the MOI (and hence, axiomatically, cannot be part of a purely contractual dispute). Likewise, the protagonists are broader than the contractual counterparties to the MOI. PEL claims that Mozambique, through several of its organs and state-owned entities, including the CFM and the Council of Ministers, breached PEL's *treaty* rights.

¹⁵ Respondent also has no response to the fact that a stay would cause PEL material prejudice and none to Mozambique. It merely states that PEL argued that no prejudice would result from a stay of the *ICC Arbitration*. This is beside the point: in the ICC Arbitration, PEL submitted that **Mozambique** would not be prejudiced by a **stay of the ICC Arbitration**.

¹⁶ Stay Reply, para. 2.

¹⁷ See Stay Response, paras. 25-26.

¹⁸ Stay Reply, para. 5.

¹⁹ **Exhibit R-62**, PEL's ICC Stay Application, paras. 119 and 32-53.

²⁰ Stay Reply, para. 3.

²¹ Stay Reply, para. 6: "*Even if, normally, a treaty tribunal may address contract issues...*"

²² Stay Response, paras. 72-83.

²³ Stay Reply, paras. 4 and 6.

²⁴ Stay Reply, para. 7.

Respectfully submitted on 25 October 2021 by

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