

R-39(A)

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Via Email

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Re: PCA CASE N° 2020-21 – PATEL ENGINEERING LIMITED (INDIA) V. THE
REPUBLIC OF MOZAMBIQUE.

Dear Members of the Tribunal:

On 9 February 2022, the ICC Tribunal in the ICC arbitration¹ issued a Partial Award on Jurisdiction, holding that the parties selected the ICC to resolve their contractual dispute, but that the ICC lacks jurisdiction over the parties' treaty dispute. It has now been finally adjudicated between the parties that the forum for resolution of the parties' underlying contractual dispute is the ICC. The ICC Partial Award on Jurisdiction is binding on Patel Engineering Ltd. ("Patel") pursuant to the ICC Arbitration Rules and the principle of *res judicata*. Therefore, the parties' underlying contractual dispute must be decided exclusively by the ICC, given that Mozambique has invoked the MOI arbitration clause and initiated the ICC arbitration.

Patel's treaty claims are dependent on the existence of Patel's alleged contractual rights in the MOI, which Mozambique disputes, and that contractual dispute must be adjudicated in the ICC pursuant to the parties' ICC compulsory arbitration agreement. The ICC is respecting this UNCITRAL Tribunal's jurisdiction over Patel's treaty claims, and this UNCITRAL Tribunal similarly should respect the ICC Tribunal's jurisdiction over the underlying contractual dispute.

Accordingly, the Republic of Mozambique ("Mozambique") respectfully requests that, based upon the ICC Partial Award on Jurisdiction, this UNCITRAL Tribunal should reconsider its earlier decision not to suspend this UNCITRAL proceeding, and should now suspend this UNCITRAL proceeding until after the ICC issues a final award on the merits.

¹ *Republic of Mozambique and Mozambique Ministry of Transport and Communications v. Patel Engineering Ltd.*, ICC Case No. 25334/JPA (Jan Kleinheisterkamp, Presiding Arbitrator; Eduardo Silva Romero and Stephen P. Anway, Co-arbitrators). In the ICC, Mozambique and the MTC are Claimants and Patel is Respondent.

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A. The ICC Has Now Issued a Partial Award on Jurisdiction, Adjudicating That the Parties Agreed to Resolve their Contractual Dispute before the ICC.

Mozambique (and the MTC) initiated the ICC Arbitration in Mozambique against Patel, pursuant to the parties' arbitration agreement in Clause 10 of the MOI, which provides:

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.

R-2, MOI, Clause 10.

On 9 February 2022, the ICC Tribunal in the ICC arbitration issued a Partial Award on Jurisdiction. *See* Exhibits **R-92** and **R-93**, submitted herewith.² The ICC Partial Award on Jurisdiction and Arbitrator Anway Separate Opinion were communicated to the parties via a letter from the ICC Secretariat, dated 16 February 2022. *See* Exhibit **R-94**, submitted herewith.

First, the ICC Tribunal has now finally adjudicated that it has jurisdiction over the parties' contractual dispute:

In the present case, the reference to “any dispute arising out of this memorandum” clearly covers all contractual issues that can be – and largely are – disputed between the Parties, notably the existence and validity of the underlying agreement, the scope of the obligations arising from this agreement, their performance or breach and the eventual remedies for any breaches. These issues are to be determined in accordance with the law governing that agreement, i.e., Mozambican contract law, as framed also by Mozambican public law that governs contracts entered into by the State and its entities.

R-92, ICC Partial Award on Jurisdiction, ¶ 138.

Second, in respect to this proceeding before this UNCITRAL Tribunal, the ICC Tribunal also held that it lacks jurisdiction over the parties' treaty dispute:

In contrast, the dispute about whether the Republic of Mozambique breached the Treaty and whether any damages are owed under the Treaty is of a different nature. Not only

² Arbitrator Anway also issued a Separate Opinion, but it concurs with the relevant holdings in the ICC Partial Award on Jurisdiction. *See* Exhibit **R-93**.

are the claims brought on such basis clearly arising out of the Treaty; but also the dispute over these issues is arising out of that Treaty, and not properly out of the MOI. Any obligations arising out of the MOI – and thus any dispute over such obligations – appear to be, from that perspective, merely accessory and preliminary questions for determining the dispute between the Parties over the alleged violations of the Respondent’s rights under the Treaty and thus the availability of remedies provided by that Treaty under international law. Taking aside umbrella clauses, any findings of violations of such public international law would not, in themselves, have any relevance for the existence, validity and enforceability about any obligations under the MOI. In that sense, the dispute between the Parties over the alleged obligations arising out of the Treaty could possibly be considered as a dispute arising “in connection” or “relating to” the MOI, but not as “arising out of” the MOI.

Id., ¶ 139.

Thus, the ICC Tribunal concluded:

Consequently, the Tribunal believes that it can, and should, interpret the Arbitration Agreement in a manner that harmoniously respects the jurisdictional realms of both international tribunals, the jurisdiction of which is, respectively based on two separate legal instruments (the MOI and the Treaty) to which the Republic of Mozambique has prima facie consented. The Tribunal prefers this approach to one that would expand the jurisdiction of this Tribunal to disputes that are not properly “arising out of” the MOI, potentially at the exclusion of, or in collision with, the jurisdiction of the PCA Tribunal. Accordingly, this Tribunal has unquestioned jurisdiction for deciding on any disputes arising out the MOI but no jurisdiction for deciding any disputes arising out of the Treaty.

Id., ¶ 142.

The ICC Tribunal also indicated that it expects the parties to respect their arbitration agreement to submit to ICC arbitration for resolution of their contractual dispute:

The Tribunal is thus confident that its jurisdiction on the issues in dispute between the Parties arising from the MOI will be respected by the Parties, i.e., they will respect their own commitment to submit to this jurisdiction for these purposes.

Id., ¶ 149.

It is therefore sufficient to note at this stage that the Parties are bound to the specific dispute settlement agreement to have their contractual issues arising out of the MOI to be arbitrated before this Tribunal, which the Tribunal expects them to honour. Whether any

possible contractual breaches of the MOI then further amount to a breach of a more general umbrella clause and may give rise to a claim arising out of the BIT is not for this Tribunal to decide. Considering that the Respondent has by now clearly accepted this Tribunal's jurisdiction over the contract claims, the Tribunal sees no need to entertain the Claimant's request to enjoin the Respondent at this point, whatever the basis for such injunctive power may be. Should it be necessary to revisit this question at a later point, the Parties will be given the possibility to argue their positions in this respect.

Id., ¶ 151.

The Tribunal is, however, confident that, in the light of its decision here, the Parties will be able to coordinate, and use, the available jurisdictions in the reconciling spirit of such mutual respect between international arbitral tribunals for their respective jurisdictional spheres, which this Tribunal also trusts the PCA Tribunal to share.

Id., ¶ 152.

Accordingly, the ICC Tribunal has adjudicated that Patel is bound to arbitrate the parties' contractual dispute before the ICC under the MOI's arbitration clause. The MOI's arbitration agreement is mandatory and exclusive – it dictates that all disputes arising out of the MOI “shall be referred to [ICC] arbitration.” Because Mozambique has invoked the MOI arbitration clause and initiated ICC arbitration, the contractual dispute must be resolved exclusively by the ICC.

B. The ICC Partial Award on Jurisdiction is Final and Binding on Patel Pursuant to the ICC Arbitration Rules.

The ICC Partial Award on Jurisdiction is a final and binding adjudication between the parties that must be respected by Patel, and also by this UNCITRAL Tribunal.

The ICC Secretariat's cover letter transmitting the ICC Partial Award explicitly reminds the parties that the Partial Award on Jurisdiction is “binding on the parties”:

We remind you of your obligations under Article 35(6) of the Rules, which provides: “Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made”.

R-94, ICC cover letter, dated 16 February 2022, page 2.

Therefore, pursuant to Article 35(6) of the ICC Arbitration Rules (*see* <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>), the ICC Partial Award on Jurisdiction is unquestionably “binding” on Patel. Patel also has an affirmative obligation to

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“undertake to carry out any award without delay.” This means that Patel has an obligation to agree to immediately suspend this UNCITRAL proceeding (until after adjudication by the ICC of the parties’ underlying contractual dispute), in order to carry out the ICC Partial Award. Patel’s refusal to do so constitutes a violation of the ICC Partial Award, and this UNCITRAL Tribunal should not aid such violation. Importantly, Patel also “shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.” Therefore, Patel has no “recourse” against the ICC Partial Award, including before this UNCITRAL Tribunal.

As a result, the circumstances have now materially changed since this UNCITRAL Tribunal initially denied Mozambique’s initial request to suspend this UNCITRAL proceeding. There is now a binding ICC Partial Award on Jurisdiction that has adjudicated that Patel is bound to arbitrate the parties’ underlying contractual dispute before the ICC pursuant to the MOI’s arbitration agreement: the “*Parties are bound to the specific dispute settlement agreement to have their contractual issues arising out of the MOI to be arbitrated before this [ICC] Tribunal.*” ICC Partial Award, ¶ 151.

C. In Addition, the ICC Partial Award on Jurisdiction is Also Binding on Patel Based on the Principle of *Res Judicata*.

“There is no doubt that *res judicata* is a principle of international law”. **RLA-160** (submitted herewith), *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 (Mexico’s Preliminary Objection concerning the Previous Proceedings) (26 June 2002), ¶ 39. A decision is *res judicata* “if it is between the same parties and concerns the same question as that previously decided.” *Id.*

Here, the ICC Partial Award on Jurisdiction is between the same parties, Mozambique and Patel. The issue before this UNCITRAL Tribunal presented by this request to suspend also “concerns the same question as that previously decided” – namely, whether Patel is bound to arbitrate the parties’ underlying contractual dispute before the ICC. Further, the Partial Award is final because it is a binding award without recourse per the ICC Arbitration Rules, Article 35(6).

D. This UNCITRAL Tribunal Must Suspend or Stay This Proceeding Until After the ICC Issues a Final Award.

In this UNCITRAL proceeding, there is an underlying contractual dispute between Patel 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 Patel had the right to a direct award of the concession or to negotiate for a direct award under the MOI; whether Patel resolved its claims under the MOI by agreeing to participate in the public tender with a point advantage to account for any MOI rights; whether the public tender was in accordance with Mozambican law; whether Patel lost the contest; whether Patel failed to timely appeal the result; and whether Patel is now barred from asserting contract rights under the MOI.

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For example, in its Request for Arbitration (“RFA”), Patel alleges that its investment 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.” **R-46**, RFA ¶ 81. In its Statement of Claim (“SOC”), Patel defines its investment as 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.” *See* SOC, ¶ 257(a). To the extent Patel contends its “know-how” constitutes an investment, Patel alleges its “know-how was explicitly protected by the MOI,” *see* SOC ¶ 257(b), and that Mozambique’s commitments in the MOI formed “the fundamental basis upon which PEL invested in Mozambique” and caused PEL to “complete the PFS at its own costs,” *id.* ¶ 324. Patel’s thus asserts that “Mozambique made its specific promises to PEL in the MOI which formed the basis of its legitimate expectations,” SOC ¶ 321, and that Mozambique breached the “promises” or “contractual commitments” embodied in the MOI, *id.*, ¶¶ 31, 327. In short, Patel contends that the MOI gave Patel “a right to the direct award of the project concession.” Patel Reply § IV(B). Mozambique disputes that the MOI gave Patel such rights. The disputed “rights” and “contractual commitments” that Patel relies upon for existence of a protected “investment” are its alleged “rights under the MOI.”

This is also confirmed in Patel’s recent Reply on the Merits. Patel asserts repeatedly that its investment is its alleged right to a direct concession award under the MOI: “the Parties entered into the MOI, whereby PEL agreed to carry out the PFS at its sole expense in consideration of which Mozambique promised that if it approved the PFS and PEL decided to implement the Project through the exercise of its right of first refusal, Mozambique would grant PEL a concession to implement the Project.” *Id.*, ¶ 164. “Mr Baxter, PEL’s PPP procurement expert, explains that: ‘in my opinion, based on the terms of the MOI and conduct of Mozambique, PEL could have expected a direct award of the concession agreement.’” *Id.*, ¶ 177. “Moreover, according to the principles of contract interpretation set forth in Mozambican law, the behaviour of the Parties – which is key to the interpretation of a contract, ‘confirms that immediately after the approval of the pre-feasibility study, the MTC and PEL assumed that the contract granted PEL the right to a direct award of the concession contract.’” *Id.*, ¶ 197. “[I]t is manifest that the MOI and PEL’s rights under the MOI are assets that were acquired or established by PEL, including its right to the direct award of the Project concession.” *Id.*, ¶ 517. “While PEL may not have physically signed a concession agreement (that failing being part and parcel of Respondent’s breach of the Treaty), it acquired an immediate and direct right to a concession that became vested in PEL once Respondent approved the PFS and PEL exercised its right of first refusal by agreeing to proceed with the Project.” *Id.*, ¶¶ 518-519.

Without a doubt, the existence of Patel’s treaty claims is therefore dependent on the prior resolution of the parties’ underlying contractual dispute. Patel’s claim for breach of the FET standard is entirely dependent upon the existence, validity, and scope of alleged MOI “rights,” “promises” and “commitments.” The same holds true for Patel’s MFN claim, which is premised on Patel’s incorporation of an umbrella clause and allegations that Mozambique breached

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contractual obligations in the MOI. Patel's expropriation claim likewise rises or falls on the resolution of the contractual dispute over the MOI: "an investor cannot recover damages for the expropriation of a right it never had." **RLA-92**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID), Award (31 March 2010), 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.").³ Therefore, the resolution of the treaty dispute between the parties is dependent upon the prior resolution of the parties' underlying contractual dispute. Without the contractual rights that Patel asserts, and that Mozambique disputes, there are no local rights to protect under the BIT and Patel can have no treaty claims.

In international decisions, it is settled that the existence, validity, and scope of the alleged "right" to be protected by BIT standards is resolved by 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 Int'l Holding, B.V., Emmis Radio Operating, B.C., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014), ¶ 162 (emphasis added). 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). "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. For a treaty claim to exist, the "rights affected must exist under the law which creates them." *Id.* ¶ 111 (discussing **RLA-121**, *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN 3481, Award (3 February 2006)). As a prerequisite for its treaty claims, Patel must have "an actual and demonstrable" right under the MOI. **RLA-92**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID), Award (31 March 2010), ¶ 142 ("an investor cannot recover damages for the expropriation of a right it never had").

Where the alleged right arises out of a purported contract, like the MOI, the tribunal must first examine whether the contractual rights were "enforceable in the courts of the State in accordance with the substantive law of that country." **RLA-74**, *F-W Oil Interests Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 March 2006), ¶ 152;

³ Similarly, Patel's damages theories are predicated on its allegation that the MOI gave Patel the "right to the direct award of the project concession." Reply § IV(B). The basis for Patel's damages methodologies (ex post, ex ante, and "loss of chance" DCF calculations) is that Patel lost "the value of its rights under the MOI," which Patel identifies as "its rights to the concession." See **CER-5**, Second Versant Expert Report, ¶¶ 5-6, 49. Patel's counsel instructed its damages experts to assume that "the Concession would have been rightfully awarded to Claimant." *Id.* ¶ 6. Patel's damages experts also 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.

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RLA-56, *Zhinvali*, ¶¶ 297-304 (considering rules of interpretation under domestic law in determining whether alleged contract establishes a qualifying “investment” under Article 25(1)); **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). When the alleged rights do not exist under local law, the treaty claim predicated on the existence of those rights necessarily also fails.

Although treaty tribunals normally have jurisdiction to review underlying contractual issues, the situation presented here is different, because here the parties entered into an ICC arbitration agreement that mandates resolution of the underlying contractual law dispute by ICC arbitration, as has been now adjudicated in the ICC Partial Award on Jurisdiction. It would thus be premature for this UNCITRAL Tribunal to proceed further before the ICC adjudicates the parties’ underlying contractual dispute. Therefore, respectfully, this UNCITRAL Tribunal cannot and must not adjudicate the parties’ underlying contractual dispute, and must instead wait for the ICC Tribunal to make that adjudication.⁴

As the *SGS* tribunal observed: “in the Tribunal’s view its jurisdiction is defined by reference to the BIT and the ICSID Convention. But the Tribunal *should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively*. *SGS* should not be able to *approve and reprobate* in respect of the same contract: *if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim*. The Philippine courts are available to hear *SGS*’s contract claim. Until the question of the scope or extent of the

⁴ Because the ICC Partial Award on Jurisdiction has adjudicated the issue of jurisdiction over the contract dispute, that issue cannot be revisited by this Tribunal. In any event, and as explained in the Partial Award at ¶ 144, note 27, the Partial Award is consistent with investment treaty decisions. For example, in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (Decision on Jurisdiction), 29 January 2004, **R-116**, “*SGS* concluded an agreement with the Philippines regarding the provision of comprehensive import supervision services (the CISS Agreement) A dispute having arisen between the parties concerning alleged breaches of the CISS Agreement, *SGS* invoked in the request for arbitration the provisions of a [BIT]” *Id.*, ¶ 1. However, a “dispute resolution agreement [was] included in the CISS Agreement, according to which ‘all disputes’ have to be submitted to the Regional Trial Courts of Makati or Manila.” *Id.*, ¶ 51. The question was “whether the BIT or the ICSID Convention purport to confer upon investors the right to pursue contractual claims under the BIT disregarding the contractually chosen forum.” *Id.*, ¶ 139. The tribunal held: “The BIT itself was not concluded with any specific investment or contract in view. It is not to be presumed that such a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties.” *Id.*, ¶ 141. Further, “the character of an investment protection agreement as a framework treaty, intended by the States Parties to support and supplement, [does] not ... override or replace, the actually negotiated investment arrangements made between the investor and the host State.” *Id.* Thus, “the BIT did not purport to override the exclusive jurisdiction clause in the CISS Agreement, or to give *SGS* an alternative route for the resolution of contractual claims which it was bound to submit to the Philippine courts under that Agreement.” *Id.*, ¶ 143. “The Tribunal cannot accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims.” *Id.*, ¶ 153. Similarly, here, the parties’ contract dispute must be resolved by the ICC Tribunal.

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Respondent's obligation to pay is clarified-whether by agreement between the parties or by proceedings in the Philippine courts as provided for in Article 12 of the CISS Agreement - a decision by this Tribunal on SGS's claim to payment would be *premature*." **R-116**, ¶ 155 (emphasis added). "The Tribunal holds that it has jurisdiction over SGS's claim under Articles X(2) and IV of the BIT, but that in respect of both provisions, *SGS's claim is premature and must await* the determination of the amount payable *in accordance with the contractually-agreed process*." *Id.*, ¶ 163 (emphasis added).

For the foregoing reasons, and taking into consideration the recent ICC Partial Award on Jurisdiction which is binding on Patel, Mozambique respectfully requests that this UNCITRAL Tribunal reconsider its earlier decision not to suspend this UNCITRAL proceeding, and that this UNCITRAL Tribunal immediately suspend this UNCITRAL proceeding until after the ICC issues a final award on the merits. The ICC Tribunal has respected this UNCITRAL Tribunal's jurisdiction over the treaty claims, and this UNCITRAL Tribunal should extend the same respect and comity to the ICC Tribunal which must adjudicate the parties' underlying contractual dispute pursuant to the MOI's ICC arbitration agreement.

Very truly yours,



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