

**The Arbitral Tribunal**

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Dear Members of the Tribunal,

**PCA Case No. 2020-21: *Patel Engineering Ltd* (“Claimant” or “PEL”) v. *The Republic of Mozambique* (“Respondent” or “Mozambique”, together the “Parties”), C-47**

1. Claimant submits this letter (the “**Second Stay Response**”) pursuant to the Tribunal’s email of 8 March 2022 (**A 37**), and Respondent’s letter of 7 March 2022 (**R-39**) (the “**Second Stay Application**”).
2. Respondent seeks for the second time in just over five months to stay this Arbitration until the ICC Tribunal issues a final award on the merits in the parallel arbitration instituted by Mozambique. On 3 November 2021, this Tribunal issued Procedural Order No. 4, Decision on Respondent’s Stay Application (the “**First Stay Decision**”), in which it found there was “*no good cause to amend the procedural timetable and to stay the proceedings.*”<sup>1</sup>
3. The **only** purported basis for Respondent’s Second Stay Application is the ICC Partial Award on Jurisdiction dated 9 February 2022 (the “**ICC Partial Award**”).<sup>2</sup> Nothing has changed in the intervening five months and the ICC Partial Award in no way alters the

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<sup>1</sup> First Stay Decision, para. 54.

<sup>2</sup> Second Stay Application, p. 1 (Mozambique “*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.*”) (Emphasis added).

Tribunal's analysis and conclusions in its First Stay Decision. For the reasons stated below, therefore, Mozambique's Second Stay Application should be rejected.

**I. This Tribunal Has Already Held that A Stay Is Not Warranted**

4. The underlying and essential basis of Mozambique's Second Stay Application remains the same as its failed stay application of 1 October 2021 (the "**First Stay Application**") and its reply of 20 October 2021 (the "**First Stay Reply**"). Namely, that the "*UNCITRAL Tribunal Must Suspend or Stay This Proceeding Until After the ICC Issues a Final Award*" because "*the existence of Patel's treaty claims are dependent on the prior resolution of the parties' underlying contractual dispute*", e.g., "*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.'*"<sup>3</sup> In essence, Mozambique claimed both then and now that "*resolution of the local contractual law dispute is ... material, and in fact necessary, to the outcome of this UCNITRAL arbitration*"<sup>4</sup> and that "*the outcome of the ICC Arbitration on the local contractual law dispute is a prerequisite to the outcome of this arbitration*"<sup>5</sup> and that therefore it is first necessary to "*establish the existence of [PEL's] alleged MOI rights*" to determine "*Treaty jurisdiction, liability, or damages.*"<sup>6</sup>
5. This Tribunal summarized the basis of Mozambique's First Stay Application and Reply as follows:

*"Thereafter, on 1 October 2021 Mozambique filed its Application in the present arbitration, requesting a stay of the proceedings until the ICC Tribunal makes its final award on the basis that:*

- *The ICC Tribunal has refused to stay the ICC Arbitration and has held that it has jurisdiction over the Parties' local law contractual dispute under the MOI.*
- *Patel's Treaty claims are dependent on the validity of the MOI and the existence of contractual rights under the MOI – issues that are pending decision in the ICC Arbitration; and*

<sup>3</sup> Second Stay Application, pp. 5-6 (see also First Stay Application, paras. 3 and 7 and First Stay Reply, paras. 1 and 4).

<sup>4</sup> First Stay Application, para. 51 (see also paras. 20-21 and 52-67); Second Stay Application, pp. 5-8; see, e.g., at p. 7 ("*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.*").

<sup>5</sup> First Stay Application, para. 86. See also Second Stay Application, pp. 1 and 5.

<sup>6</sup> First Stay Application, para. 51.

- *The ICC Tribunal may also determine Patel's Treaty claims in the ICC Arbitration and thus, the present arbitration must be stayed until the ICC Tribunal issues a final award.*<sup>7</sup>

6. After due consideration of the Parties' respective arguments, this Tribunal rejected Mozambique's First Stay Application on the following grounds:

*"54. After duly examining the applicable legal standards and the Parties' positions, the **Tribunal considers that there is no good cause to amend the procedural timetable and to stay the proceedings, for several reasons.***

*55. First, the Parties chose to proceed with two parallel arbitrations. Despite being aware of the existence of these two arbitrations, the Parties agreed on a procedural calendar for this arbitration, over a year ago. The Parties have been complying with this calendar so far. **There seems to be no material change of circumstances that warrants a stay of the agreed calendar.** In particular, the fact that the ICC Tribunal rejected Patel's stay application in the ICC Arbitration has no bearing over the procedural calendar in this arbitration.*

*56. Second, the stay suggested by Mozambique is equivalent to a sine die suspension of the proceedings. Although under the ICC Rules the ICC Tribunal should issue a final award by April 2022, there is no guarantee that such award will be issued by said deadline. Even if it were, the proposed suspension would unreasonably delay the proceedings, considering that the hearing in this arbitration is scheduled to take place precisely in April 2022. **Nothing in the applicable legal standards provides for a sine die suspension of an ongoing arbitration, particularly when the procedural timetable has been agreed between the Parties and the Tribunal for over a year.***

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

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<sup>7</sup> First Stay Decision, para. 53 (referencing its previous summary of Mozambique's position at paras. 11-25 of the First Stay Decision). Notably, the only thing that has changed between Mozambique's First and Second Stay Applications is the fact that the ICC Tribunal has now decided that it does **not** have jurisdiction to determine PEL's Treaty Claims.

*58. For the above reasons, the Tribunal decides to dismiss Mozambique's Application. The Tribunal reserves a decision on the costs of this procedural incident to a future award.*"<sup>8</sup>

(Emphasis added).

7. The reasoning and conclusions of the First Stay Decision remain sound. Accordingly, Respondent has the burden to demonstrate that there has been a substantial and material change in circumstances such that this Tribunal should undo its previous holdings.

## **II. Nothing in the ICC Partial Award Changes the Reasoning or Holdings of This Tribunal's First Stay Decision**

8. No material change that could possibly warrant granting Mozambique's Second Stay Application has occurred. Indeed, the **only** purported change is that one of the motivating factors behind Mozambique's First Stay Application (*i.e.*, that the ICC Tribunal might also decided PEL's Treaty claims) has now fallen away, given the ICC Tribunal's holding that it "*lacks jurisdiction to decide on the Treaty Claims...*"<sup>9</sup> Thus, the ICC Tribunal both (1) dismissed Mozambique's so-called Treaty Claims and (2) denied Mozambique's application to enjoin PEL in this UNCITRAL Arbitration,<sup>10</sup> thereby strengthening even further this Tribunal's conclusions in its First Stay Decision. In fact, both Tribunals are in accord with the fundamental point that both the causes of action and instruments of consent are different in each proceeding, and not predicated upon each other.<sup>11</sup> Despite the fact that its application for any stay has been substantially weakened by the ICC Partial Award, Mozambique raises a frivolous Second Stay Application in its relentless pursuit to derail and increase the costs of this proceeding.

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<sup>8</sup> First Stay Decision, paras. 54-58.

<sup>9</sup> ICC Partial Award, para. 154(a).

<sup>10</sup> *Id.* at para. 154; *see also* Separate Opinion, para. 8 ("*I agree with the dispositive of the Partial Award on Jurisdiction to (i) dismiss Claimants' Treaty Claims, and (ii) deny Claimants' application to enjoin Patel in the UNCITRAL Arbitration.*").

<sup>11</sup> *See, e.g.* First Stay Decision, para. 57 (quoted above). *See also* ICC Partial Award, para. 142 "*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.*" *See id.* at para. 139-140 ("*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 . . . we are faced with the situation of two independent international arbitral tribunals having been seized: one whose jurisdiction is based on the contractual obligation to arbitrate entered into by the Parties to the MOI, and one whose jurisdiction is based on the consent to arbitrate given by the State in the Treaty as a procedural guarantee to secure the substantive rights of protection granted in that Treaty and to which the Respondent argues it is entitled.*" *See also id.* at para. 144.

9. Failing to respect the meaning and impact of the ICC Partial Award, Mozambique misconstrues both its content and import. It alleges that because the ICC Tribunal “*adjudicated between the parties that the forum for resolution of the parties’ underlying contractual dispute is the ICC*” (which was never disputed), and because the ICC Partial Award is binding (an obvious but irrelevant point for present purposes),<sup>12</sup> this somehow translates to the fact that PEL and/or this Tribunal must suspend this proceeding until a final award is rendered by the ICC Tribunal (a conclusion that is never reached by the ICC Tribunal itself).<sup>13</sup> Respondent’s conclusions as to the import of the ICC Partial Award (*i.e.*, that this Tribunal must stay its proceedings or that PEL must agree to such a suspension to carry out the ICC Partial Award) are illogical and unprecedented:

**“Patel also has an affirmative obligation to ‘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 . . .**

*As a result, the circumstances have now materially changed since this UNCITRAL Tribunal initially denied Mozambique’s initial request to suspend this UNCITRAL proceeding.*<sup>14</sup>

. . . .

***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***

<sup>12</sup> Second Stay Application, p. 1.

<sup>13</sup> ICC Partial Award, para. 122. The ICC Tribunal, in setting out PEL’s position, acknowledged that PEL “*recognizes the Arbitral Tribunal’s jurisdiction over ‘certain contract law claims arising out of the MoI’ but rejects that the arbitration agreement in the MOI could confer jurisdiction to the Arbitral Tribunal over questions of breaches of the Treaty and of damages associated with such breaches, i.e., the Treaty Claims.*” In other words, PEL never contested the fact that the ICC Tribunal has jurisdiction over Mozambique’s (unmeritorious) contract claims under the MOI. Indeed, Section II.B of Mozambique’s First Stay Application, entitled “*The ICC Tribunal Has Concluded It Has Jurisdiction Over the Local Law Contractual Dispute Pursuant to the MOI’s ICC Arbitration Agreement*”, is dedicated to underscoring that “*the ICC Tribunal’s jurisdiction over the local contractual law dispute is uncontested by PEL and has been acknowledged by the ICC Tribunal.*” Accordingly, Mozambique’s attempt to “*refresh*” its Second Stay Application on the basis that the ICC Tribunal has jurisdiction over contract claims — a contested fact which was previously established — is both frivolous and unsustainable.

<sup>14</sup> Second Stay Application, pp. 4-5.

***contractual dispute, and must instead wait for the ICC Tribunal to make that adjudication.***<sup>15</sup> (Emphasis added).

10. Mozambique's arguments do not withstand scrutiny.
11. First, the ICC Tribunal never concluded, as Mozambique suggests, that either PEL or this Tribunal have any obligation whatsoever to suspend the UNCITRAL proceedings pending a final award in the ICC case. In this respect, Mozambique's allegations are demonstrably untrue.
12. Second, the ICC Tribunal expressly recognised that (1) it lacks jurisdiction to decide questions concerning the UNCITRAL Tribunal's jurisdiction, (2) nothing in the MOI prevents PEL from pursuing its claims in this UNCITRAL proceeding; and (3) both proceedings can proceed in tandem harmoniously:

*"This Tribunal has no supervisory or equivalent powers over the PCA Tribunal and its jurisdiction, which are reserved to the courts at its seat in The Hague in the Netherlands or to the courts of a future place of enforcement of such award. It is therefore clear that, irrespective of the formulation of the Arbitration Agreement, this Tribunal does not have jurisdiction to decide on whether the PCA Tribunal lacks jurisdiction over the dispute before it or whether PEL's treaty claims fail for want of treaty jurisdiction.*"<sup>16</sup>

.....

*there is no clear language in the Arbitration Agreement in the MOI that suggests that [PEL] has also agreed to refrain from proceeding before the PCA Tribunal in favour of this Tribunal for any dispute arising out of the Treaty, when that Treaty provides for its own dispute settlement mechanism, the scope of which is not for this Tribunal to decide upon.*"<sup>17</sup>

***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***

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<sup>15</sup> Second Stay Application, p. 8.

<sup>16</sup> ICC Partial Award, at para. 134.

<sup>17</sup> *Id.* at para. 141. This portion of the ICC Partial Award, along with the ICC Tribunal's dismissal of Mozambique's request enjoin PEL from proceeding with UNCITRAL Arbitration, directly contradicts Mozambique's assertion that PEL must agree to suspend the UNCITRAL arbitration, or risk being in violation of the Partial Award on Jurisdiction.

*any disputes arising out the MOI but no jurisdiction for deciding any disputes arising out of the Treaty.*<sup>18</sup> (Emphasis added).

13. Third, the ICC Tribunal (like this Tribunal in its First Stay Decision)<sup>19</sup> acknowledged the different nature of the causes of action underlying the parallel proceedings. Given this distinction, there is of course no requirement for this Tribunal to suspend these proceedings to enable the ICC Tribunal to decide Mozambique’s contract claims as a “prerequisite” to this Tribunal deciding PEL’s Treaty Claims. The ICC Tribunal highlighted the differences between the Mozambique’s purported contract claims, and PEL’s treaty claims, as follows:

*“while the MOI is condition sine qua non for the current dispute between the Parties, **it appears strenuous to stretch this causal link as far as suggesting that questions relating to the breaches of different standards of the Treaty and resulting damages under that Treaty would be part of a ‘dispute arising out of this memorandum’**”.*<sup>20</sup>

.....

***Not only 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.***<sup>21</sup>

.....

*we are faced with the situation of two independent international arbitral tribunals having been seized: one whose jurisdiction is based on the contractual obligation to arbitrate entered into by the Parties to the MOI, and one whose jurisdiction is based on the consent to arbitrate given by the State in the Treaty as a procedural guarantee to secure the substantive rights of protection granted in that Treaty and to which the Respondent argues it is entitled.*<sup>22</sup>

*In reaching this conclusion on the basis of contractual interpretation, **we take note of, and – considering the outcome – draw some comfort from, the case law originating in the Vivendi decision and embraced by other international tribunals since. The focus on the different***

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<sup>18</sup> ICC Partial Award, para. 142.

<sup>19</sup> First Stay Decision, para. 57.

<sup>20</sup> ICC Partial Award, para. 136.

<sup>21</sup> *Id.* at para. 139.

<sup>22</sup> *Id.* at para. 140.

***causes of action has led those tribunals to affirm their jurisdiction over claims arising out of investment treaties, despite the presence of jurisdictional agreements between the Parties in favour of other courts or arbitral institution[s]***".<sup>23</sup>

(Emphasis added) (Underlining is original emphasis).

14. In light of the foregoing, the ICC Partial Award accords with and strengthens even further this Tribunal's conclusions in its First Stay Decision.

### **III. Mozambique's Second Stay Application Should Be Rejected**

15. In summary, Mozambique's Second Stay Application should be rejected because:
- a. This Tribunal has already considered and rejected Mozambique's request to stay the UNCITRAL Proceedings.<sup>24</sup>
  - b. No material change has occurred since this Tribunal issued its First Stay Decision which would warrant a reversal of that decision.
  - c. Mozambique's reliance on the ICC Partial Award to manufacture a material change in circumstances should be rejected because:
    - i. The only development since the First Stay Application is the ICC Tribunal's confirmation that it lacks jurisdiction over PEL's Treaty claims and its dismissal of Mozambique's request to enjoin PEL from pursuing the UNCITRAL Arbitration – neither of which could possibly support a suspension of the UNCITRAL Arbitration.
    - ii. The fact that the ICC Tribunal has confirmed it has jurisdiction over Mozambique's (unmeritorious) contract claims is of no consequence and cannot represent a material change in circumstances because PEL never contested the ICC Tribunal's jurisdiction over Mozambique's purported contract claims, and Mozambique previously argued before this Tribunal that the ICC Tribunal's jurisdiction was "*uncontested*" in any event. Accordingly, the fact that the ICC confirmed that which was never disputed

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<sup>23</sup> ICC Partial Award, para. 144.

<sup>24</sup> First Stay Decision, para. 58.



and already agreed, cannot constitute a material change in circumstances which would warrant a suspension of these proceedings.

- iii. PEL's Treaty Claims are only before this Tribunal, while Mozambique's purported contract claims are only before the ICC Tribunal. The Parties' respective claims are based on different causes of action, entail different instruments of consent, and concern different applicable laws. Accordingly, Mozambique's claim that its underlying contractual claims must be decided as a prerequisite to this Tribunal's adjudication of PEL's Treaty claims is wrong. This Tribunal is empowered to make its own determinations concerning the fact and the law before it, and is not bound by any findings that the ICC Tribunal ultimately may arrive at.

**IV. Relief Sought**

- 16. In light of the foregoing, Claimant respectfully requests this Tribunal:
  - a. **TO DISMISS** Respondent's Second Stay Application in its entirety; and
  - b. **TO ASSESS** an interim cost award against Mozambique, for all of Claimants' costs associated with this frivolous application.

Yours faithfully,



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