

PCA Case No. 2020-21

In the matter of an arbitration under the Arbitration Rules of the United Nations
Commission on International Trade Law 1976

and

The Agreement between the Government of the Republic of India and the Republic of
Mozambique for the Reciprocal Promotion and Protection of Investment dated
19 February 2009

-between-

PATEL ENGINEERING LIMITED
(INDIA)

Claimant

-and-

THE REPUBLIC OF MOZAMBIQUE

Respondent

PROCEDURAL ORDER NO. 6 *BIS*

**Decision on Respondent's Request for
Suspension**

THE ARBITRAL TRIBUNAL

Guido Santiago Tawil (Arbitrator)
Hugo Perezcano Díaz (Arbitrator)
Juan Fernández-Armesto (Presiding Arbitrator)

REGISTRY

Permanent Court of Arbitration

ADMINISTRATIVE SECRETARY

Sofia de Sampaio Jalles

2 December 2022

WHEREAS

1. This arbitration arises between Patel Engineering Limited [**“PEL”** or **“Claimant”**] and The Republic of Mozambique [**“Mozambique”** or **“Respondent”**] under the Agreement between the Government of the Republic of India and Mozambique for the Reciprocal Promotion and Protection of Investment dated 19 February 2009 [the **“BIT”**]. Hereinafter, Claimant and Respondent shall be jointly referred to as the **“Parties”**.
2. There is a parallel proceeding No. 25334/JPA pending before an arbitral tribunal [the **“ICC Tribunal”**] constituted under the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce [the **“ICC Rules”**], brought by Mozambique and the Ministry of Transport and Communications [**“MTC”**] against PEL [the **“ICC Arbitration”**].
3. On 16 February 2022 the ICC Tribunal issued a partial award on jurisdiction [**“ICC Partial Award”**], deciding, *inter alia*, that¹:

“The Tribunal lacks jurisdiction to decide on the Treaty Claims as circumscribed in Section A.V.”
4. This decision was accompanied by a separate opinion of co-arbitrator Mr. Stephen Anway [**“Anway Separate Opinion”**], as follows²:

“In sum, I agree with the *dispositif* of the Partial Award on Jurisdiction to (i) dismiss Claimants’ Treaty Claims, and (ii) deny Claimants’ application to enjoin Patel in the UNCITRAL Arbitration. I write separately to make clear my view that it should not be presumed that this Tribunal has the power to police a party’s conduct in a different arbitration before a different tribunal or that, if such a power were available to us, it would be appropriate to exercise in this case.”
5. On 24 November 2022 the ICC Tribunal issued a procedural order enjoining PEL [**“ICC Injunction”**]³:

“[...] from pursuing the determination of any matters in dispute between the Parties arising out of the MOI in any other forum, even if only accessorially for the purpose of the adjudication of Treaty Claims, until this Arbitral Tribunal has taken its decision on those matters.”
6. On 24 November 2022 Mozambique transmitted the ICC Injunction to the Tribunal, together with Mozambique’s application for an emergency order [**“Third Stay Application”**]⁴:

¹ ICC Partial Award (Doc. R-92), para. 154(a).

² Anway Separate Opinion (Doc. R-93), para. 8.

³ ICC Tribunal’s Procedural Order No. 14 dated 24 November 2022 [**“PO 14”**], para. 101, as amended by the ICC Tribunal’s *corrigendum* dated 25 November 2022 [**“Corrigendum”**], attached as Annexes I and II.

⁴ Communication R 61.

“[...] confirming these UNCITRAL arbitration proceedings are suspended, in their entirety, until the ICC [Tribunal] issues a final award.”

7. On that same day, PEL sent the dissenting opinion of the ICC Tribunal co-arbitrator Mr. Anway [**“Anway Dissenting Opinion”**], who found that⁵:

“Today the Majority silences a party before a different, public international law tribunal empowered under a different arbitration agreement. In effect, the Majority’s Order deprives that public international tribunal of even hearing that party’s submissions. That is a breathtaking proposition.

The silencing of a party—particularly in a proceeding over which the tribunal issuing the order has no jurisdiction—should concern not only every stakeholder in the ISDS system, but every party concerned with the rule of law. One tribunal’s attempt to silence a party before another tribunal, when the claims are brought under different legal instruments, inexorably leads to due process concerns.

It is not for Mozambique or for the Majority to determine what arguments PEL can and cannot raise before the Treaty Tribunal. For all of the reasons discussed above, I conclude that this Contract Tribunal should simply decide the claims before us, and the Treaty Tribunal should simply decide the claims before it—without interfering with each other’s arbitral proceedings.

I dissent.”

8. On Friday, 25 November 2022, the Tribunal took note of the ICC Injunction, the Third Stay Application and the Anway Dissenting Opinion, and decided that⁶:

“The hearing is scheduled to commence next Monday morning. Participants are travelling. Therefore, the Tribunal confirms that the hearing will take place. This procedural incident shall be discussed preliminarily first thing on Monday morning. The Parties should be prepared for the full hearing to unfold as scheduled.”

9. On the first day of the evidentiary hearing [**“Hearing”**], the Parties presented their comments on the effect of the ICC Injunction and the Third Stay Application. After deliberating, the Tribunal decided to proceed with the Hearing and announced that it would issue a procedural decision with its reasoning.
10. After carefully analyzing the Parties’ respective submissions, the Tribunal issued Procedural Order No. 6 on 30 November 2022. On that same day, Claimant informed the Tribunal that co-arbitrator Mr. Anway had issued on 29 November 2022 an additional dissenting opinion in light of the Corrigendum⁷ [**“Anway Additional Dissenting Opinion”**]. PEL asked the Tribunal to re-issue Procedural Order No. 6 with the Anway Additional Dissenting Opinion included. Therefore, the Tribunal hereby replaces Procedural Order No. 6 on Mozambique’s Third Stay

⁵ Anway Dissenting Opinion, paras. 88-91, attached as Annex III.

⁶ Communication A 55.

⁷ Anway Additional Dissenting Opinion, attached as Annex IV.

Application by the present Procedural Order No. 6 *bis*, to account for the Anway Additional Dissenting Opinion⁸:

PROCEDURAL ORDER NO. 6 BIS

11. The Tribunal will briefly summarize the Parties' positions (1. and 2.) before proceeding to its decision (3.).

1. RESPONDENT'S POSITION

12. Respondent presented three main points regarding the ICC Injunction.

13. First, Respondent considers that the ICC Injunction binds not only PEL, but also the Tribunal. Respondent cites to the ICC Rules reaffirming the binding nature of the ICC Tribunal's decisions on the Parties⁹. Respondent further cites to an ICSID decision concerning the *res judicata* effect of the ICC's decisions "in the international sphere"¹⁰. Respondent notes that the ICC Tribunal's decisions are also binding under Art. 1075 of the Dutch Civil Code, respecting Art. 2 of the New York Convention¹¹.

14. Considering the above, Respondent invites the Tribunal to "immediately suspend this arbitration" considering the ICC Tribunal's Partial Award and Injunction, and to wait for the ICC Tribunal's final award¹². Respondent finds that only by suspending this arbitration would the Tribunal be "providing [the ICC Tribunal] the proper amount of deference"¹³, afford international comity¹⁴, and respect its "sister" ICC Tribunal's lawful decisions¹⁵.

15. Moreover, Respondent warns that proceeding otherwise would "injure Mozambique's rights to have the underlying contractual disputes decided" in the ICC Arbitration, putting Mozambique "in an untenable position"¹⁶. Respondent submits that to further address the merits of the present arbitration at the Hearing would be to disrespect the ICC Injunction.

16. Second, Respondent points to the ICC Partial Award, which found that "the ICC has exclusive jurisdiction to determine any matters in dispute between the parties arising out of the MOI", as confirmed by the connected ICC Injunction and as agreed by PEL in the Memorandum of Interest's ["MOI"] arbitration clause¹⁷.

⁸ No other changes were made to the Procedural Order.

⁹ HT, Day 1, p. 25, l. 24 - p. 26, l. 19, citing to Doc. R-94.

¹⁰ HT, Day 1, p. 26, l. 20 -p. 27, l. 1, citing to Doc. RLA-160, para. 39.

¹¹ HT, Day 1, p. 27, ll. 2-13.

¹² HT, Day 1, p. 9, ll. 5-16.

¹³ HT, Day 1, p. 10, ll. 7-11.

¹⁴ HT, Day 1, p. 27, ll. 21-23.

¹⁵ HT, Day 1, p. 27, ll. 14-20.

¹⁶ HT, Day 1, p. 10, ll. 17-22.

¹⁷ HT, Day 1, p. 11, l. 1 - p. 12, l. 10, citing to ICC Injunction, para. 65.

Respondent emphasizes that the ICC Partial Award is undoubtedly binding pursuant to the ICC Rules¹⁸.

17. Third, Respondent submits that it is validly entitled to have this arbitration suspended. Respondent indicates that PEL itself admitted that this Tribunal will have to decide on numerous contractual matters in assessing the BIT claims, leaving the ICC Tribunal with “nothing”. This *prima facie* breaches PEL’s obligations under the MOI’s arbitration agreement, which confers the ICC Tribunal exclusive jurisdiction over the MOI claims¹⁹.

2. CLAIMANT’S POSITION

18. Claimant’s position with respect to the ICC Injunction is also threefold.
19. First, PEL submits that the ICC Injunction contradicts the ICC Tribunal’s own Partial Award²⁰. Claimant denies that the ICC Partial Award has the effect of preventing PEL from pursuing the BIT claims in the present arbitration²¹. The ICC Tribunal itself found that any MOI contractual obligations are “merely accessory and preliminary questions for determining the [BIT Claims]” and any consequent remedies under international law²².
20. Claimant further submits that the ICC Injunction does not prevent PEL from participating in the Hearing. The ICC Tribunal itself rejected Mozambique’s request to that effect, saying it would go “beyond the bounds of” the ICC Tribunal’s mandate²³. The ICC Injunction is an *in personam* order against PEL which does not specifically affect this arbitration²⁴.
21. Second, Claimant considers that the ICC Tribunal’s final award is not binding on the present Tribunal anyway, so there is no point in waiting for it. PEL further explains that in the ICC Arbitration Mozambique is only seeking declaratory relief, and is not invoking the protection of its legal rights. Mozambique’s remaining claims for putative and nominal damages are tortious, and PEL considers them to be outside the ICC Tribunal’s jurisdiction and in any event time barred²⁵. This is what PEL referred to when it was cited by the ICC Tribunal as saying that allowing for this Tribunal to issue its award before the ICC Tribunal would leave the latter with “nothing” to decide²⁶. Mozambique’s ICC Arbitration case has no substance.
22. Third, PEL submits that the ICC Injunction violates its due process rights in an “incongruous and unprecedented” way, both under the BIT and Article 10.36 of the Dutch Arbitration Act²⁷. The Injunction seeks to silent Claimant, keep PEL from exercising its right to present its case before a different tribunal empowered by a

¹⁸ HT, Day 1, p. 14, ll. 15-22.

¹⁹ HT, Day 1, p. 21, l. 15 - p. 22, l. 3.

²⁰ HT, Day 1, p. 33, ll. 21-22.

²¹ HT, Day 1, p. 33, ll. 6-10, referring to the Anway Dissenting Opinion, paras. 13 *et seq.*

²² HT, Day 1, p. 33, ll. 11-20, referring to ICC Partial Award, para. 139.

²³ HT, Day 1, p. 32, ll. 5-13, referring to ICC Injunction, para. 97.

²⁴ HT, Day 1, p. 32, ll. 21-24.

²⁵ HT, Day 1, p. 35, ll. 1-22.

²⁶ HT, Day 1, p. 34, ll. 21-25, and p. 35, l. 23 - p. 36, l. 4.

²⁷ HT, Day 1, p. 38, ll. 14-23.

different legal instrument, and to strip this Tribunal of its *kompetenz-kompetenz*²⁸. PEL is in full agreement with the Anway Dissenting Opinion, which also confirms that “this type of injunction has never been issued before and directly contravenes 20 years of settled jurisprudence”, exceeding the ICC Tribunal’s mandate²⁹.

23. Therefore, PEL has asked³⁰:

- That the Tribunal confirm its previous orders (Procedural Order No. 3, Procedural Order No. 4 and A 39); and
- To continue the Hearing as scheduled, provided that the Tribunal, when establishing its jurisdiction, does not feel fettered by the ICC Injunction.

2.1 DECISION OF THE ARBITRAL TRIBUNAL

24. The Tribunal is called upon to decide on Mozambique’s Third Stay Application.

25. As the name indicates, this is not the first time that this Tribunal is addressing an application by Mozambique to suspend the present proceedings. As Mozambique itself has recognized, it “[...] has consistently insisted that the ICC maintains exclusive jurisdiction”³¹ – and it has also repeatedly requested that this Tribunal suspend these UNCITRAL proceedings.

26. PEL, in turn, asks the Tribunal to confirm its previous decisions and to clarify its understanding of the effect of the ICC Injunction on the Tribunal’s jurisdiction.

27. Before making its decision (**B.**), the Tribunal will recall some procedural elements relevant to Mozambique’s Third Stay Application (**A.**).

A. Background to the Third Stay Application

28. On 20 March 2020 PEL filed a Notice of Arbitration against Mozambique, under the UNCITRAL Rules and pursuant to the India-Mozambique BIT, asking for³²:

“(a) a declaration that the Respondent has violated its obligations under Article 3 and/or Article 4 and/or Article 5 of the Treaty and/or to its obligations under customary international law;

(b) an order that the Respondent make full reparation to the Claimant for the loss of its investment arising from the Respondent's violations of the Treaty and/or its obligations under customary international law, such reparation being in the form of monetary compensation in an amount to be determined by the Tribunal;

(c) an order that the Respondent pay the costs of this arbitration, including the costs of the Tribunal and the legal costs and expenses of the Claimant

²⁸ HT, Day 1, p. 36, l. 23 - p. 37, l. 10.

²⁹ HT, Day 1, p. 36, l. 23 - p. 37, l. 10.

³⁰ HT, Day 1, p. 39, l. 11 - p. 41, l. 8, 20-24.

³¹ Communication R 61.

³² Notice of Arbitration, para. 110.

including, without limitation, the fees of legal counsel, experts, and fees associated with third party funding;

(d) an order that the Respondent pay interest on any compensation awarded and/or on any legal costs and expenses awarded, in each case at such rate and for such period or periods as the Tribunal shall consider just and appropriate; and

(e) such further or alternative relief as the Tribunal shall consider just and appropriate.”

29. Two months later, on 20 May 2020, Mozambique (and the MTC) filed a Request for Arbitration with the ICC against PEL under the arbitration agreement contained in the MOI³³, a Request which resulted in the ICC Arbitration. Mozambique (and the MTC) sought declaratory relief with regard to the MOI, and also asked for an award³⁴:

“280.7 enjoining PEL from proceeding with any other legal proceeding, court action and/or arbitration against Mozambique and/or the MTC that refers or relates to any dispute arising out of the MOI, including the international arbitration initiated by PEL pursuant to the India-MZ BIT. In the alternative, the request[ed] injunction should be granted and remain in place until after this Tribunal finally adjudicates the issues otherwise within its jurisdiction;”

30. Both the UNCITRAL and the ICC Arbitrations are proceeding in parallel.
31. On 4 August 2020 the Parties and this Tribunal signed the Terms of Appointment, in which Mozambique manifested its understanding that³⁵:

“This dispute must be resolved in the ICC [A]rbitration which can also address any Treaty claims or the ICC [A]rbitration must be concluded first because it pertains to the existence of underlying rights. Notwithstanding the Terms of Appointment, Respondent disputes that the arbitration clause in the Treaty governs this dispute, and by signing these Terms does not waive this contention.”

32. On 14 October 2020, after extensive consultation with the Parties, the Tribunal issued Procedural Order No. 1 and the procedural timetable.
33. On 14 December 2020, the Tribunal issued Procedural Order No. 3, deciding to reject Mozambique’s request for bifurcation. The Tribunal considered Mozambique’s Jurisdictional Objections and concluded that they were best addressed together with the merits. One of these Objections was that PEL had breached the MOI arbitration agreement by instituting the present arbitration.
34. On 10 June 2021, PEL filed an application with the ICC Tribunal to stay the ICC Arbitration until a final award is made in the present arbitration³⁶. The ICC Tribunal

³³ Doc. R-46.

³⁴ Doc. R-46, para. 280.7.

³⁵ Terms of Appointment, para. 58 (Summary of Mozambique’s claims and relief sought).

³⁶ Communication C 17.

scheduled a stay application hearing³⁷. PEL argued that Mozambique requests for relief from the ICC Tribunal would be tantamount to it seizing the jurisdiction of this Tribunal. Mozambique reaffirmed its position that the ICC Tribunal has exclusive jurisdiction to adjudicate all claims, including BIT claims³⁸.

35. On 16 August 2021 the ICC Tribunal issued its Procedural Order no. 5 [**“ICC PO 5”**], deciding, *inter alia*, that:

- It is “not convinced that the cause of action of this [ICC A]rbitration is identical to the cause of action of the UNCITRAL Arbitration”³⁹;
- It is “not satisfied that ‘arbitral efficiency’ warrants a stay in [the ICC Arbitration] and/or of any ‘exceptional circumstances’ that could effectively outweigh [Mozambique’s] prejudice in not having this issue resolved timely before a tribunal whose jurisdiction to hear the [Mozambique’s] contract claims has been accepted by [PEL]”⁴⁰;
- “PEL has not shown the basis for its assumption that [the ICC Tribunal] should be bound by the decision to be rendered in the UNCITRAL Arbitration”⁴¹;
- It was “not satisfied that these circumstances would justify staying this proceeding where there is a *prima facie* valid arbitration agreement invoked by [Mozambique] as the basis for [the ICC] Tribunal’s jurisdiction, merely upon the fact that the UNCITRAL Tribunal was constituted first”⁴².

36. On 1 October 2021 the Tribunal received Mozambique’s “Application for a stay and modification of the procedural timetable (and request for interim suspension of briefing and all deadlines pending the decision on this application)” [**“First Stay Application”**]. Mozambique submitted that⁴³:

- The ICC Tribunal had refused to stay the ICC Arbitration and had held that it had jurisdiction over the Parties’ local law contractual dispute under the MOI;
- PEL’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
- The ICC Tribunal may also determine PEL’s Treaty claims in the ICC Arbitration and, thus, the present arbitration must be stayed until the ICC Tribunal issues a final award.

³⁷ Communication A 25.

³⁸ Communication R 15.

³⁹ Doc. R-59, para. 16.

⁴⁰ Doc. R-59, para. 17.

⁴¹ Doc. R-59, para. 18.

⁴² Doc. R-59, para. 20.

⁴³ See Procedural Order No. 4, Section 1 – Position of Mozambique.

37. The Tribunal granted PEL the opportunity to respond⁴⁴.
38. On 7 October 2021 the Tribunal rejected Mozambique's request for an interim suspension of all proceedings pending the decision on the First Stay Application, finding that there was no⁴⁵:

“[...] good cause to amend the procedural timetable, since the Tribunal is simply expecting Claimant's response to Respondent's Application, which does not impact on Respondent's preparation of its Rejoinder on the Merits and Reply on Jurisdiction.”

39. Thereafter, PEL filed a response to the First Stay Application on 15 October 2021. On 20 October 2021 Respondent submitted a reply in support of its First Stay Application, and on 25 October 2021 Claimant submitted a rejoinder.
40. On 3 November 2021, the Tribunal issued Procedural Order No. 4 with its decision on the First Stay Application, in which it found no good cause to stay the present proceedings. The Tribunal noted that it shared⁴⁶:

“[...] the view of the ICC Tribunal [in ICC PO 5] 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.”

41. On 9 February 2022 the ICC Tribunal issued its Partial Award, finding that its jurisdiction excludes PEL's BIT claims and only includes contractual claims related to the MOI⁴⁷. Particularly, the ICC Tribunal found that⁴⁸:

“[...] 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.” [Emphasis added]

42. On 7 March 2022 Mozambique reiterated its request for the present Tribunal to suspend these proceedings until the ICC Tribunal issues its final award⁴⁹ [**“Second Stay Application”**]. After giving PEL an opportunity to comment and considering both Parties' positions, the Tribunal dismissed Mozambique's Second Stay

⁴⁴ Communication A 29.

⁴⁵ Communication A 30.

⁴⁶ Procedural Order No. 4, para. 57, citing to Doc. R-59.

⁴⁷ ICC Partial Award (Doc. R-92), paras. 138-142.

⁴⁸ ICC Partial Award (Doc. R-92), para. 142.

⁴⁹ Communication R 39

Application. The Tribunal reaffirmed its decision on the First Stay Application, after finding that there had not been a change of circumstances⁵⁰.

43. Meanwhile, on 18 May 2022 Mozambique again turned to the ICC Tribunal filing an “Application pursuant to Article 28(1) (Renewing) Request to Enjoin [PEL]” [“**Request to Enjoin**”]. Following several exchanges between the Parties, on 6 September 2022 the ICC Tribunal held a hearing to address Mozambique’s Request to Enjoin⁵¹.
44. On 24 November 2022 the ICC Tribunal issued the ICC Injunction. Based on this, Mozambique made its Third Stay Application to the Tribunal⁵².

B. A suspension of the proceedings is not warranted

45. The Tribunal recalls the decision it adopted at the Hearing, after hearing the Parties and deliberating⁵³:

“There is a basic distinction in the type of disputes which can be resolved by arbitration. There can be international law disputes which derive from a treaty breach and there can be contractual disputes which derive from breaches of contract, and as you know, and as we have said in our previous decisions, this is an international law tribunal constituted under the BIT between India and Mozambique. We are an international law tribunal, and the scope of our jurisdiction is restricted to international law disputes which imply a breach of the obligations assumed by the Republic of Mozambique under its BIT.

The second point is that we have, as an international law tribunal constituted under the BIT and the UNCITRAL rules, [...] the right and the duty to define our own jurisdiction. This is a basic principle of international arbitration. And to make it very clear, this principle is unaffected, is unfettered by any order issued by any other arbitration tribunal.

The third point is that we reiterate what we said in our PO3 and PO4 in our previous decisions. There is nothing there which we would like to change at this stage.

Fourth, we direct that the hearing should proceed as scheduled if Claimant wishes the hearing to proceed.”

46. The Tribunal remains convinced that the ICC and UNCITRAL Arbitrations are based on different agreements (*i.e.*, the MOI and the BIT, respectively) and concern different causes of action. Moreover, although the same parties are involved, they appear in different roles (*i.e.*, each of them is the claimant in one and the respondent in the other)⁵⁴.
47. The Tribunal has read the ICC Injunction alongside the ICC Tribunal’s previous reasoned decisions, including the ICC Partial Award. The ICC Tribunal has agreed

⁵⁰ Communication A 39, paras. 15-16 *et seq.*

⁵¹ ICC Procedural Order No. 11.

⁵² Communication R 61.

⁵³ HT, Day 1, p. 42, l. 17 – p. 43, l. 23.

⁵⁴ See Procedural Order No. 4, para. 57.

that, despite the overlap which the Parties must manage, the two proceedings remain separate from each other; and, most importantly, that neither Tribunal can interfere with the other's mandate⁵⁵:

“[...] 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 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. [...]

In the Tribunal's view, the PCA Tribunal alone can decide on its own jurisdiction. It is equally clear (and undisputed) that the Parties have agreed that they have the right and the obligation to have ‘any dispute arising out of this memorandum’ under Mozambican law resolved in ICC arbitration. Beyond this, 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.”
[Emphasis added]

48. In the ICC Injunction, the ICC Tribunal confirmed this understanding and clarified that it does not intend to stop the present Hearing or proceedings⁵⁶:

“It is clear from the above, and in particular from [PEL]'s own persistent affirmation that determination of its claims by the PCA Tribunal would leave this ICC Tribunal with ‘*really nothing*’ to decide, that a provisional measure is warranted. It is also clear that the measure needs to be limited to matters in dispute arising out of the MOI. [Mozambique]'s request for [PEL] to be ‘*enjoin[ed] ...*’ from proceeding with the subject UNCITRAL arbitration until after a final award is issued by this ICC Tribunal in this ICC arbitration’ and to be ‘*ordered to cease and desist from taking any further actions, and participating in a hearing or in any other manner, in the UNCITRAL arbitration during the pendency of said Interim Measures*’ goes beyond these bounds. [...]

[Mozambique and MTC] have insisted that any order short of enjoining [PEL] entirely from taking any action, including participating in the hearing before the PCA Tribunal would be ineffective. However, the mutual respect between tribunals (as invoked also in the Partial award) and comity requires this

⁵⁵ ICC Partial Award (Doc. R-92), paras. 139 and 141.

⁵⁶ ICC Injunction, paras. 97 and 99.

Tribunal not to interfere unduly with the UNCITRAL Arbitration. It is for [PEL] to do what is necessary to bring itself back in line with its obligations resulting from the Arbitration Agreement in the MOI. **And it is for the PCA Tribunal to decide what the consequences of [PEL]’s choices are for its own proceedings.**” [Emphasis added]

49. Thus, granting Mozambique’s Third Stay Application would not only contradict this Tribunal’s previous decisions on the same issue – which the Tribunal entirely confirms, as there has not been a change in circumstances – but also the ICC Tribunal’s intentions.
50. Conferring the ICC Injunction any other interpretation, including one which would have the effect of challenging the Tribunal’s *kompetenz-kompetenz*, would run contrary to the ICC Tribunal’s *ratio* and to reason.

* * *

51. In view of the above, the Tribunal:

- Rejects Mozambique’s Third Stay Application,
- Declares that its right to establish its own jurisdiction is unfettered by the ICC Injunction, and
- Orders that the Hearing and the arbitration proceed as scheduled.

Place of Arbitration: The Hague, Netherlands

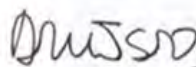
Date: 2 December 2022



Guido Santiago Tawil
Arbitrator



Hugo Perezcano Diaz
Arbitrator



Juan Fernández-Armesto
President of the Arbitral
Tribunal

- Annexes: - ICC Tribunal’s Procedural Order No. 14 dated 24 November 2022 (I);
- ICC Tribunal’s *corrigendum* dated 25 November 2022 (II);
- Dissenting Opinion of Arbitrator Stephen Anway dated 24 November 2022 (III);
- Additional Dissenting Opinion of Arbitrator Stephen Anway dated 29 November 2022 (IV).

Annex I

**ARBITRATION UNDER THE RULES OF ARBITRATION OF THE
INTERNATIONAL CHAMBER OF COMMERCE
IN FORCE AS FROM 1 MARCH 2017
(hereinafter, the “ICC Rules”)**

CASE NO. 25334/JPA/AJP

between

**the REPUBLIC OF MOZAMBIQUE (Mozambique) and the
MOZAMBIQUE MINISTRY OF TRANSPORT AND
COMMUNICATIONS (Mozambique)**

Claimants

and

PATEL ENGINEERING LTD. (India)

Respondent

PROCEDURAL ORDER NO. 14

THE ARBITRAL TRIBUNAL

Eduardo Silva Romero (Co-arbitrator)
Stephen P. Anway (Co-arbitrator)¹
Jan Kleinheisterkamp (President)

ADMINISTRATIVE SECRETARY

Carolina Pitta e Cunha

24 November 2022

¹ In dissent, as per “Dissenting Opinion of Arbitrator Stephen Anway”, dated 24 November 2022 (the “**Dissent**”).

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Whereas:

- A. On 18 May 2022, the Claimants, the Republic of Mozambique and the Ministry of Transport and Communications (respectively referred to as “**Mozambique**” and the “**MTC**” and together referred to as the “**Claimants**”) filed an “Application pursuant to Article 28(1) (Renewing) Request to Enjoin Respondent Patel Engineering Ltd.” (the “**Claimants’ Application**” or the “**Application**”). The Application was accompanied by factual exhibits numbered “CEX-59” to “CEX-63” and legal authorities numbered “CL-139” to “CL-144”.
- B. By letter of 19 May 2022, the Arbitral Tribunal invited the Respondent, Patel Engineering Ltd. (“**PEL**” or the “**Respondent**”), to submit its response to the Claimants’ Application by 15 June 2022.
- C. On 20 May 2022, the Claimants informed this Arbitral Tribunal that “*in retribution to Mozambique’s submittal of its application to enjoin Patel, Patel has sent an email to the UNCITRAL Tribunal attaching the application and accusing Mozambique of wrongdoing by filing this application*”. The Claimants’ email was accompanied by (i) the email whereby the Respondent informed the UNCITRAL Tribunal of the Claimants’ Application (attached as “Exhibit 1”) and (ii) Mozambique’s response to the UNCITRAL Tribunal (attached as “Exhibit 2”).
- D. On 15 June 2022, the Respondent filed the “Respondent’s Response to Claimants’ Sixth Application to Enjoin the UNCITRAL Arbitration pursuant to Article 28(1) of the ICC Arbitration Rules” (the “**Respondent’s Response**” or the “**Response**”). The Response was accompanied by factual exhibits numbered “REX-128” and “REX-129” and legal authorities numbered “RL-15A” and “RL-153” to “RL-156”.
- E. On 17 June 2022, the Arbitral Tribunal notified the Parties of Procedural Order No. 10 (“**PO10**”), whereby it provided the Claimants with the opportunity to reply to the Respondent’s Response by 30 June 2022 and the Respondent with the opportunity to then file a rejoinder to the Claimants’ reply by 14 July 2022, and further proposed to hold a two-hour online hearing on the matter of the Claimants’ application for an injunction in one of two suggested days and times.
- F. On 22 June 2022, the Respondent sent a letter to the Arbitral Tribunal whereby it requested the Tribunal to reconsider its decision in PO10 or, in the alternative, to order the Claimants to identify what had changed since the Tribunal issued the Partial Award on Jurisdiction of 9 February 2022 (the “**Partial Award on Jurisdiction**” or the “**Partial Award**”), which would warrant the Claimants’ application.

- G. On the next day, the Claimants confirmed their availability for the online hearing proposed by the Tribunal in its letter of 17 June 2022.
- H. By letter of 23 June 2022, the Arbitral Tribunal declined the Respondent’s request to reconsider its decision in PO10 but confirmed that it would reconsider the expediency of holding the projected online hearing in the light of the reply and the rejoinder to be filed respectively by the Claimants and the Respondent.
- I. On 24 June 2022, the Respondent informed the Arbitral Tribunal of its availability regarding the date of the projected online hearing on the Claimants’ application.
- J. On 30 June 2022, the Claimants submitted their “Reply to Respondent’s Response to Application pursuant to Article 28(1) (Renewing) Request to Enjoin Respondent Patel Engineering Ltd.” (the “**Claimants’ Reply**” or the “**Reply**”), which was accompanied by a new legal authority (numbered “CL-151”) and an expert opinion (numbered “CER-13”). In the Reply, the Claimants requested, *inter alia*, that the Tribunal hold a hearing on the Claimants’ application.
- K. On 14 July 2022, the Respondent submitted its “Rejoinder to Claimants’ Reply in Support of their Sixth Application to Enjoin the UNCITRAL Arbitration pursuant to Article 28(1) of the ICC Arbitration Rules” (the “**Respondent’s Rejoinder**” or the “**Rejoinder**”), with a new legal authority (numbered “RL-154”). In its Rejoinder, the Respondent reiterated its request that the Tribunal dispense with the need for an oral hearing on the Claimants’ application for an injunction.
- L. On 29 July 2022, the Arbitral Tribunal notified the Parties of Procedural Order No. 11 (“**PO11**”), whereby it decided that it would hold an online hearing on the matter of the Claimants’ application for an injunction (the “**Injunction Hearing**”) on 6 September 2022, 6pm CAT (GMT+2 / Maputo time). PO11 also determined that, unless the Parties agree otherwise, each Party, starting with the Claimants, shall dispose of up to 20 minutes to address their arguments and, particularly, the Parties’ understanding of the scope of the “disputes arising from the memorandum” that defines this Tribunal’s jurisdiction, referred to in the Partial Award on Jurisdiction, and of the degree to which this may overlap with the matters currently before the PCA Tribunal in the ongoing arbitration between PEL (as claimant) and Mozambique (as respondent) under the UNCITRAL Arbitration Rules (PCA Case No. 2020-21) (the “**UNCITRAL Arbitration**”).
- M. On 6 September 2022, the Parties exchanged the slides’ presentations to be used at the “**Injunction Hearing**”. The Respondent further requested to add the following

documents to the record: (i) Mozambique’s second injunction application in the UNCITRAL Arbitration (submitted as “REX-147” and “REX-148”); and (ii) an excerpt of *The Secretariat’s Guide to ICC Arbitration* (submitted as “RL-163”).

- N. Later on the same day, the Arbitral Tribunal and the Parties held the Injunction Hearing, which started at 6.15 pm CAT (GMT+2 / Maputo time). This hearing was held by videoconference and recorded, as previously agreed to by both Parties. Each Party, starting with the Claimants, disposed of about 25 minutes to address their arguments and the matters referred to in PO11, followed by a rebuttal for each Party and the Tribunal’s questions.

THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS WITH RESPECT TO THE CLAIMANTS’ APPLICATION TO ENJOIN THE RESPONDENT:

I. THE PARTIES’ POSITIONS

1. Before addressing the Claimants’ application to enjoin the Respondent and explaining the decision set forth in section III below, the Arbitral Tribunal will briefly outline the arguments respectively submitted by the (1.) Claimants and the (2.) Respondent that were most relevant for its decision. That said, all arguments and evidence submitted by the Parties with respect to the Claimants’ request for an injunction were carefully considered, irrespective of whether those arguments and evidence are expressly referred to in the following sections.

1. Claimants’ Position

2. In their Reply, the Claimants requested this Tribunal to:

(a) Grant Interim Measures (in the form of an injunction) enjoining Patel itself from proceeding with the subject UNCITRAL arbitration until after a final award is issued by this ICC Tribunal in this ICC arbitration. Hold and specifically declare that, pursuant to Clause 10 of the MOI, this Tribunal’s jurisdiction to adjudicate any dispute arising out of MOI is exclusive, and Patel cannot proceed to seek to have the UNCITRAL Tribunal adjudicate such disputes as part of the adjudication of Treaty Claims in the UNCITRAL arbitration. Here, the parties agreed that such underlying disputes shall be adjudicated exclusively in ICC arbitration, and Clause 10 of the MOI is compulsory. Patel must therefore be enjoined immediately, and ordered to

cease and desist from taking any further actions, and participating in a hearing or in any other manner, in the UNCITRAL arbitration during the pendency of said Interim Measures.

(b) Grant such further relief to Mozambique as this ICC Tribunal deems to be just and proper.²

3. As regards the nature or shape of the injunction, the Claimants emphasised at the Injunction Hearing that their request is for an injunction enjoining PEL from proceeding *in its entirety* in the PCA, until a decision from this Tribunal relating to the disputes arising out of the MOI. According to the Claimants, an injunction ordering PEL not to go ahead with the disputes arising out of the Memorandum of Interest entered into by the MTC and PEL on 6 May 2011 (the “**MOI**”) would not be a workable injunction, as PEL’s own pleadings reflect the fact that their claims in the UNCITRAL Arbitration are related to the MOI and dependent on the determination of the contractual claims.
4. The Claimants justify their renewed application for an injunction and the need to revisit this question on several considerations relating to the Tribunal’s decision in the Partial Award on Jurisdiction and the subsequent factual background.³
5. The Claimants refer to the Tribunal’s Partial Award and the reasons provided therein to deny the Claimants’ request for an injunction, specifically to the part of that award where the Tribunal indicated “*the clear understanding that the Respondent has accepted – both in the MOI but also in its submissions and statements in these arbitral proceedings – this Tribunal’s jurisdiction over ‘any dispute arising from the memorandum’*”, and expressed its expectation “*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*”.⁴ According to the Claimants, the Tribunal placed its trust in PEL to respect the Partial Award’s determination on this Tribunal’s jurisdiction to decide all disputes arising out of the MOI.⁵
6. The Claimants assert that, following the notification of the Partial Award, Mozambique sent a letter to the UNCITRAL Tribunal (CEX-59) whereby it informed the latter of this ICC Tribunal’s Partial Award, and renewed the request that the UNCITRAL Tribunal stay the UNCITRAL Arbitration until the disputes arising out of the MOI are

² Reply, ¶ 60.

³ Application, ¶ 5, and section II (¶¶ 9-54). See also Reply, ¶ 4, and section II (¶¶ 9-21).

⁴ Application, section II.A (¶¶ 9 and 10), citing Partial Award, ¶ 49.

⁵ Application, section II.A (¶¶ 9 and 10), citing Partial Award, ¶ 49.

adjudicated by this ICC Tribunal.⁶ As addressed in the Claimants’ Application, in said letter, Mozambique held that PEL itself admitted to have based its Treaty claims on predicate alleged contractual rights under the MOI, which Mozambique disputes, and the Parties’ contractual dispute must be resolved exclusively by the ICC Tribunal having jurisdiction over the underlying contractual dispute.

7. The Claimants submit that PEL has abused the trust this Tribunal placed in it, by obfuscating and ignoring this Tribunal’s jurisdiction over the disputes arising out of the MOI, namely in a letter submitted by the Respondent to the UNCITRAL Tribunal on 21 March 2022 (CEX-60).⁷ The Claimants highlight several instances of that letter to demonstrate that “*Patel prevailed on the UNCITRAL Tribunal to simply ignore the Partial Award, and move forward in disregard of this ICC Tribunal’s jurisdiction over disputes arising out of the MOI*”,⁸ and refer to ¶ 139 of the Partial Award, which the Respondent cited in its letter, as merely implying that “*while the UNCITRAL Tribunal has jurisdiction over the Treaty Claims, the ‘obligations arising out of the MOI’ are still ‘preliminary questions’ in need of [prior] resolution in this ICC arbitration*”, as also suggested by ¶ 151 of the Partial Award.⁹
8. The Claimants argue that “[a]t the same time Patel was encouraging the UNCITRAL Tribunal to ignore this Tribunal’s Partial Award, Patel was – it appears – contriving an excuse to forestall the ICC hearing”.¹⁰ The Claimants submit that PEL could have avoided the need for an injunction by indicating its availability to hold the evidentiary hearing to be held in these proceedings (the “**Hearing**”) on 12-16 September 2022 and by agreeing to suspend the UNCITRAL Arbitration until after this ICC Tribunal renders a final award, instead of refusing to do so “*in the hope that it will obtain a favorable determination of the parties’ underlying contractual dispute in the UNCITRAL arbitration instead*”.¹¹
9. The Claimants further submit that PEL’s position has prevailed before the UNCITRAL Tribunal, who on 12 April 2022 issued its decision rejecting Mozambique’s request to stay the UNCITRAL Arbitration (CEX-61).¹² According to the Claimants, the UNCITRAL Tribunal “*simply recited its prior procedural reasons for rejecting the stay*” and “*refused to address that, a stay of the UNCITRAL arbitration is required, because Patel’s Treaty Claims are dependent on the prior adjudication of the parties’*

⁶ Application, section II.B (¶¶ 11-15). See also Reply, ¶ 18.

⁷ Application, section II.C (¶¶ 16-22).

⁸ Application, ¶ 22.

⁹ Application, ¶¶ 20 and 21.

¹⁰ Application, section II.D (¶¶ 23-29) (quotation from ¶ 23). See also Reply, ¶ 20.

¹¹ Application, ¶¶ 24-29 (quotation from ¶ 29).

¹² Application, section E (¶¶ 30-32). See also Reply, ¶ 18.

underlying contractual dispute, which must be adjudicated instead by this ICC Tribunal".¹³

10. The Claimants assert that a review of the Statement of Defence filed by PEL in these proceedings (the “SoD”), together with PEL’s submissions in the UNCITRAL Arbitration, “*reveals an incredible and pervasive number of ‘preliminary questions’ – disputes Patel itself now concedes indisputably arise out of the MOI – improperly before the PCA*”.¹⁴ The Claimants submit that PEL’s Treaty Claims before the UNCITRAL Tribunal require a determination of nine disputes arising out of the MOI and within this ICC Tribunal’s exclusive jurisdiction, namely:
- (i) Whether Mozambique granted PEL the right to a direct award of a concession;¹⁵
 - (ii) Whether the MOI was a contingent, non-binding preliminary document;¹⁶
 - (iii) Whether PEL’s interpretation of the MOI is illegal or otherwise unenforceable under Mozambican law;¹⁷
 - (iv) Whether PEL satisfied the conditions precedent under the MOI;¹⁸
 - (v) Whether the MOI is unenforceable as having been procured by fraud;¹⁹
 - (vi) Whether Mozambique’s public tender for awarding the concession violated or breached the MOI;²⁰
 - (vii) Whether Mozambique provided PEL with a 15% scoring advantage in the public tender, consistent with the MOI;²¹
 - (viii) Whether the MOI is unenforceable as having been waived by PEL’s participation in the public tender;²² and

¹³ Application, ¶¶ 31 and 32.

¹⁴ Application, section II.F (¶¶ 33-54) (quotation from ¶ 36). See also Reply, ¶¶ 19 and 31, and Claimants’ Hearing Presentation, where the Claimants highlighted the inextricable link between PEL’s UNCITRAL claims and “*no less than nine disputes arising out of the MOI*” and within this Tribunal’s jurisdiction.

¹⁵ Application, section II.F.1, ¶ 37; Reply, ¶ 31; and Claimants’ Injunction Hearing Presentation, p. 3.

¹⁶ Application, section II.F.2, ¶ 39; Reply, ¶ 31; and Claimants’ Injunction Hearing Presentation, p. 4.

¹⁷ Application, section II.F.3, ¶ 41; Reply, ¶ 31; and Claimants’ Injunction Hearing Presentation, p. 5.

¹⁸ Application, section II.F.4, ¶ 43; Reply, ¶ 31; and Claimants’ Injunction Hearing Presentation, p. 6.

¹⁹ Application, section II.F.5, ¶ 45; Reply, ¶ 31; and Claimants’ Injunction Hearing Presentation, p. 7.

²⁰ Application, section II.F.6, ¶¶ 46 and 47; Reply, ¶ 31; and Claimants’ Injunction Hearing Presentation, p. 8.

²¹ Application, section II.F.7, ¶ 48; Reply, ¶ 31; and Claimants’ Injunction Hearing Presentation, p. 9.

²² Application, section II.F.8, ¶ 49; Reply, ¶ 31; and Claimants’ Injunction Hearing Presentation, p. 10.

(ix) Whether Mozambique breached the MOI.²³

11. In addition to identifying the abovementioned nine disputes, the Claimants have indicated specific instances of the Parties’ submissions in each of the relevant proceedings which, in the Claimants’ view, highlight the overlap between the contractual claims and/or defences presented in these proceedings and the contractual issues brought by PEL in the UNCITRAL Arbitration.²⁴
12. The Claimants’ position is that all of the abovementioned disputes, properly before this Tribunal as “disputes arising out of the MOI”,²⁵ must be decided (first) in this ICC arbitration,²⁶ and that permitting PEL to have them adjudicated in the UNCITRAL Arbitration prior to their determination by this Tribunal “*would potentially create conflicting results, and potentially render the ICC’s exclusive jurisdiction at best superfluous, and at worst a nullity*”.²⁷ The Claimants further submit that PEL’s Treaty Claims “*as Patel alleges them*” are dependent on the existence of PEL’s alleged rights under the MOI, “*the determination of which is within the exclusive jurisdiction of this ICC Tribunal*”.²⁸
13. In their Reply, the Claimants submitted that PEL failed to respond to the substance of the nine preliminary questions which PEL itself conceded are within the exclusive jurisdiction of this Tribunal, or to deny that it is breaching the ICC arbitration agreement found in the MOI by arbitrating those disputes before the PCA.²⁹
14. The Claimants’ considerations regarding the procedural history after the Partial Award, which in the Claimants’ perspective justify the Claimants’ (renewed) application and warrant the requested injunction, were reiterated in the Claimants’ Reply, where the Claimants’ assert that PEL’s complaints of “*abuse of process*”, “*guerrilla tactics*”, “*duplicative applications*” or “*gamesmanship*” are merely the result of PEL’s own intransigence and refusal to respect the exclusive jurisdiction of this Tribunal and the Partial Award.³⁰

²³ Application, section II.F.9, ¶ 50, Reply, ¶ 31; and Claimants’ Injunction Hearing Presentation, p. 11.

²⁴ See fn. 15-23. See also CEX-62, PEL’s Statement of Claim in the UNCITRAL Arbitration, 30 October 2020, and CEX-63, PEL’s Reply on the Merits and Response to Objections to Jurisdiction in the UNCITRAL Arbitration, 9 August 2021.

²⁵ Application, ¶ 51.

²⁶ Application, ¶¶ 38, 40, 42, 44 and 45.

²⁷ Application, ¶ 38. See also ¶¶ 40, 51, 63 and 74.

²⁸ Application, ¶¶ 52 and 53.

²⁹ Reply, section III.B.1, ¶¶ 31 and 32.

³⁰ Reply, section II, ¶¶ 9-21.

15. The Claimants’ request for an injunction was submitted pursuant to Article 28(1) of the ICC Rules.³¹ The Claimants submit that ICC tribunals have relied on Article 28(1) to enjoin a party from proceeding in another forum contrary to the agreement to arbitrate the dispute before an ICC tribunal.³²
16. In the Reply, the Claimants further referred to Article 33 of the Mozambican *Lei de Arbitragem, Conciliação e Mediação (Lei n.º 11/99, de 8 de julho)* (“**Mozambican Arbitration Law**”), and argued that “both ICC Rules and Mozambiquan law support the broad powers available to grant the request to enjoin Patel”.³³ In the Claimants’ view, in the absence of limitations regarding the type of measures which may be granted by arbitral tribunals, “whether under ICC Rules, or Mozambiquan law, or both”, it should be understood that this ICC Tribunal has powers to grant the requested injunction.³⁴
17. The Claimants mention several other authorities to support their position that ICC tribunals have used the powers available to them under Article 28 to issue injunctive relief. In addition to case law, like the Final Award in *Cessna Finance Corp. v. Gulf Jet LLC, et al.* (CL-140, ¶¶ 215-223),³⁵ and a decision by the United States District Court for the Southern District of New York (CL-135, ¶ 9),³⁶ the Claimants reproduce the following statement by Prof. Emmanuel Gaillard in its article on “Anti-suit Injunctions Issued by Arbitrators”:

*An arbitrators’ jurisdiction to decide disputes relating to the arbitration agreement contains, by definition, the jurisdiction to decide breaches of the obligation to arbitrate [and] the arbitrators’ power to sanction any breaches that are ascertained on that basis.*³⁷
18. With reference to the Partial Award in *Coastal Corp. v. Nicor Int’l Corp. and Consultores De La Cuenca Del Caribe, S.A.*, the Claimants set forth the following circumstances as those typically considered by tribunals when determining whether to issue interim measures:

³¹ Application, ¶ 5. See also Application, section III (¶ 55 and ff.); Reply, ¶ 1 and section III.A (¶¶ 22 and ff.); and CL-139, ICC Rules.

³² Application, ¶ 56.

³³ Reply, ¶ 26. See also ¶¶ 23, 25, 29 and 30; CL-151, Mozambican Arbitration Law; and CER-13, Teresa Muenda’s Opinion regarding Mozambican arbitration law.

³⁴ Reply, ¶¶ 27-29.

³⁵ Application, ¶¶ 56, 64 and ff.; and Reply, ¶¶ 30 and 51.

³⁶ See Application, ¶ 79.

³⁷ CL-141, Emmanuel Gaillard, “Anti-Suit Injunctions Issued by Arbitrators”, in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (ICCA / Kluwer 2007) 235, 238, as cited in the Application, ¶ 57. See also Application, ¶¶ 56 and 64; and Reply, ¶ 30.

- a. Threat of grave or irreparable damage to the counter-party in the arbitration proceedings;
- b. Threat of grave or irreparable damage to the tribunal’s jurisdiction; and/or
- c. The preservation of the status quo of the arbitration so as to protect the subject-matter from conduct which might render the outcome of the arbitration proceedings useless.³⁸

19. According to the Claimants, as in *Coastal Corp.*, if PEL is allowed to continue to attempt to adjudicate disputes arising out of the MOI in the UNCITRAL Arbitration, any result, regardless of the outcome, will be contrary to the arbitration agreement to resolve any disputes arising out of the MOI in this ICC arbitration.³⁹ Moreover, and referring to the last consideration quoted from the *Coastal Corp.*’s decision, the Claimants submit that the “*practical effectiveness*” of this ICC arbitration could be materially affected, if PEL were permitted to continue with the UNCITRAL Arbitration, and the UNCITRAL Tribunal proceeds to holding a hearing in November-December 2022 and adjudicating the Parties’ contractual dispute.⁴⁰
20. With reference to the *Cessna Finance* case, the Claimants assert that it is the duty of this Tribunal to enforce PEL’s “*negative obligation*” not to litigate disputes arising out of the MOI in another forum, to uphold the arbitration agreement and prevent any breach of it.⁴¹ The Claimants further emphasised at the Injunction Hearing that, pursuant to Article 35(6) of the ICC Rules, at the moment of the Partial Award, there was an obligation of PEL to carry out the Partial Award immediately and that PEL is now in breach of the MOI, which has been determined to be the source of jurisdiction of this Tribunal.⁴² Pursuant to the Claimants, this means that it is now the obligation of this Tribunal to enforce the MOI, as we are now at a position where PEL has not gone back to the PCA acknowledging this Tribunal’s exclusive jurisdiction to decide the MOI’s issues.⁴³
21. Quoting from the tribunal’s decision in the same case, the Claimants further mention the following two principles on the appropriateness of an injunction against proceeding in another forum: “*the particular injunctive relief must be necessary or appropriate to*

³⁸ CL-142, *Coastal Corp. v. Nicor Int’l Corp. and Consultores De La Cuenca Del Caribe, S.A.*, ICC Case No. 10681/KGA, Partial Award, 31 May 2001, ¶ 11, cited in the Application, ¶ 58. See also Reply, ¶ 46.

³⁹ Application, ¶¶ 59 and 60.

⁴⁰ Application, ¶¶ 59 and 61-63.

⁴¹ Application, ¶¶ 65 and 66, referring to (CL-140) *Cessna Finance Corpo. V. Gulf Jet LLC, et al.*, ICC Case No. 18769/VRO/AGF, Final Award, 17 January 2014, ¶¶ 215 and 216. The Claimants also emphasised this point at the Injunction Hearing.

⁴² Injunction Hearing recording, at 00:19:50.

⁴³ Injunction Hearing recording, at 00:20:20.

protect the integrity of the arbitral process” and “the relief may be necessary or appropriate to ensure that the arbitrators may be able to render an award capable of being recognized and enforced”.⁴⁴ The Claimants then differentiate the two cases on the ground that the integrity of the arbitral process was not at stake in the *Cessna* case, as the principal claims before the arbitral tribunal and – also – before the court in Dubai had been finally determined by the arbitral tribunal in a final award “without any significant or substantial interference from the Dubai Court Proceeding”.⁴⁵

22. The Claimants then refer to a number of reasons why “this ICC Tribunal has exclusive jurisdiction to adjudicate any disputes arising out of the MOI”, including, *inter alia*, the wording of the arbitration agreement set forth in Clause 10 of the MOI (including the use of the word “shall”, in “shall be referred to arbitration”, and the reference to “any dispute arising out of this memorandum”), the internationally recognised principle of freedom of contract (CL-128) underlying the MOI and the arbitration agreement, the negative obligation to refrain from going to another forum implied in an arbitration agreement, PEL’s own admission that this ICC Tribunal “has exclusive jurisdiction over the Parties’ dispute arising out of the MOI (which was never disputed)...” (SoD, ¶ 245), the binding nature of the Partial Award and PEL’s affirmative obligation to carry it out without delay, under Article 35(6) of the ICC Rules.⁴⁶
23. Pursuant to the Claimants, the Respondent’s refusal to suspend the UNCITRAL Arbitration amounts to a violation of the Partial Award, and an injunction against PEL is “necessary to ensure that this ICC Tribunal will be able to render an award capable of being recognized and enforced readily, promptly and without further arguments about jurisdiction”.⁴⁷
24. The Claimants further rely on *Ridge C.C. At Reynosa Beneficiary LLC v. Banco J.P. Morgan, S.A., et al.* (CL-144) to sustain that “Article 28(1) interim measures can be appropriately used to undo relief wrongfully”, considering that in that case “[n]ot only did the (...) tribunal order the respondent to move to stay the Mexican Court action (...), but the tribunal ordered the respondent to request that the Mexican Court withdraw its *ex parte* orders”.⁴⁸ According to the Claimants, “[l]ike the ICC tribunal in

⁴⁴ Application, ¶ 68, citing CL-140 (above n. 41) ¶ 217.

⁴⁵ Application, ¶¶ 69-71.

⁴⁶ Application, ¶ 72.

⁴⁷ Application, ¶¶ 73-75 (quotation from ¶ 75).

⁴⁸ Application, ¶¶ 76 and 77, referring to (CL-144) *Ridge C.C. At Reynosa Beneficiary LLC v. Banco J.P. Morgan, S.A., et al.*, ICC Case No. 19134/CA/ASM, Procedural Order Relating To Interim Measures, 10 April 2013, ¶ 24.

Ridge C.C., this ICC Tribunal also has the power to enjoin Patel from proceeding with the UNCITRAL arbitration".⁴⁹

25. The Claimants submit that the scope of the requested injunction “*is limited to what is necessary and proper*”, in that Mozambique is merely asking that PEL, not the PCA or the UNCITRAL Tribunal, be enjoined from proceeding with the UNCITRAL Arbitration until after this ICC Tribunal renders its final award, and not in a permanent way.⁵⁰ The Claimants further clarify that Mozambique is not asking the ICC Tribunal to decide on the UNCITRAL Tribunal’s jurisdiction, but rather “*to give effect to the MOI’s arbitration agreement’s mandate requiring arbitration pursuant to the ICC Arbitration Rules (...)*”.⁵¹
26. The Claimants refer to the ICSID case *Emmis Int’l Holding, B.V., Emmis Radio Operating, B.C., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary* in favour of the proposition that “[i]f this Tribunal rules in favor of Mozambique, Patel will have no rights to enforce under internationally treaty law”, as well as to the case law originating in the Vivendi decision, referred to in the Partial Award.⁵² According to the Claimants, whilst this Tribunal’s jurisdiction is derived exclusively from the MOI’s arbitration agreement and is, as such, “*merely a matter of contract*”,⁵³ investment treaty law supports the conclusion that “*where, as here, the parties have elected to adjudicate contractual disputes in a specific forum (here, ICC arbitration), the assertion of Treaty Claims does not defeat the compulsory and exclusive nature of the parties’ election of ICC arbitration to adjudicate the underlying contractual dispute*”.⁵⁴ In this respect, the Claimants also state that:

If there had been no ICC arbitration clause in the MOI, the UNCITRAL Tribunal could have adjudicated the parties’ contractual disputes as “accessory or preliminary” issues. But that is not the case here – where the parties have instead specifically agreed that the underlying contractual dispute “shall” be submitted to ICC arbitration for adjudication, that agreement deprives the UNCITRAL Tribunal of jurisdiction to adjudicate the parties’

⁴⁹ Application, ¶ 78.

⁵⁰ Application, ¶ 80.

⁵¹ Application, ¶ 83.

⁵² Application, ¶¶ 81-86, referring to (CL-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, and the Partial Award, ¶ 144 (fn. 27).

⁵³ Application, ¶ 86, citing Partial Award, ¶ 144.

⁵⁴ Application, ¶ 81-86, particularly, ¶ 86.

*underlying contractual dispute, and grants that jurisdiction exclusively to this ICC Tribunal.*⁵⁵

27. Further to the above, in their Reply, the Claimants sought to clarify the following points, in response to the Respondent's Response.
28. The Claimants assert that referring to the requested relief as an “anti-arbitration injunction”, as PEL did in its Response, does not support PEL or defeat this Tribunal's power.⁵⁶ According to the Claimants, the Respondent's argument that “*courts*” issue anti-arbitration injunctions only “*in truly exceptional circumstances*”, such as where they find that “*(...) the arbitration agreement relied upon is non-existent, invalid, and inapplicable [to] the underlying dispute, or otherwise not enforceable*” has nothing to do with the present case,⁵⁷ in which the Claimants are not asking the Tribunal to determine that PEL may not proceed “*at all*” in the UNCITRAL Arbitration:

*The question (...) is not whether the Treaty Claims are non-existent, or event whether Patel may or may not try some claims to the PCA. The only question is what relief is appropriate given that Patel insists on breaching its agreement to resolve MOI disputes before this Tribunal, by attempting to raise those exact same disputes before the PCA for resolution.*⁵⁸

29. With reference to the factors mentioned by PEL, in ¶ 44 of its Response, as relevant factors tribunals consider when determining whether to issue an injunction,⁵⁹ the Claimants assert that:
- (i) This Tribunal already found that it has exclusive jurisdiction to determine disputes arising out of the MOI;⁶⁰
 - (ii) Mozambique has the right to have this ICC Tribunal determine disputes arising out of the MOI;⁶¹

⁵⁵ Application, ¶ 83. This point was also addressed by the Claimants at the Injunction Hearing, where the Claimants reiterated that, whilst in an ordinary case a BIT arbitration tribunal would have jurisdiction to determine the rights of the parties as part of the claims of the BIT, this is not an ordinary case because, here, there is in fact a separate MOI dispute resolution provision, whereby the Parties took away from the PCA the right to decide the disputes arising out of the MOI.

⁵⁶ Reply, section III.B.2 (¶¶ 33-38).

⁵⁷ Reply, ¶¶ 37 and 38, citing Response, ¶ 34 (in turn, citing RL-153, ¶ 40) (emphasis from the Reply).

⁵⁸ Reply, ¶ 38.

⁵⁹ See Reply, section III.B.2, ¶ 39. See also ¶ 48 below, citing Response, ¶ 44.

⁶⁰ Reply, section III.B.3.a, ¶ 40.

⁶¹ Reply, section III.B.3.b, ¶ 41.

(iii) Enjoining PEL would support the non-aggravation of the dispute between the Parties, by avoiding “*the potential for inconsistent results*” and a “*further dispute regarding the effect of such inconsistent results*”;⁶²

(iv) The integrity of this ICC proceeding demands PEL to be enjoined, as

*there can be no doubt that left to its own devices, Patel clearly hopes and plans to have the PCA determine disputes arising out of the MOI, seek monetary award on the basis of those disputes – transformed into Treaty Claims – and thereafter expected to treat as irrelevant any findings or conclusions of this ICC Tribunal;*⁶³

(v) Urgency requires that PEL be enjoined now, considering that

*[t]he passage of time has only made it all the more difficult to place the ICC hearing ahead of the PCA hearing, but without relief, Mozambique will be deprived of Patel’s agreement to arbitrate the MOI disputes before this ICC forum, (...);*⁶⁴

(vi) Proportionality favours Mozambique, in so far as Mozambique is only asking that PEL be enjoined from proceeding in the UNCITRAL Arbitration until the disputes arising out of the MOI are fully and finally decided by this Tribunal.⁶⁵

30. The Claimants further argue that PEL’s efforts to distinguish this case from *Cessna Finance, Coastal Corp.* and *Ridge C.C.* are unavailing.⁶⁶ Specifically with respect to the Respondent’s allegation that, unlike the *Cessna Finance* and *Coastal Corp.* cases, this case and the UNCITRAL Arbitration involve different claims, the Claimants expressed the following position:

*(...) while the PCA has jurisdiction over Patel’s Treaty Claims, Patel’s own pleadings of its Treaty Claims make those Treaty Claims expressly dependent upon, and subject to, predicate allegations regarding the scope, meaning and enforceability of the MOI that are properly before this Tribunal (...). Whether Patel could have, or might have, raised a Treaty Claim without relying on the alleged rights it claims under the MOI – it did not do so.*⁶⁷

⁶² Reply, section III.B.3.c, ¶¶ 42 and 43 (quotations from ¶ 43).

⁶³ Reply, section III.B.3.d, ¶¶ 44-46 (quotation from ¶ 46).

⁶⁴ Reply, section III.B.3.e, ¶ 47.

⁶⁵ Reply, section III.b.f, ¶ 48 and 49.

⁶⁶ Reply, section III.4 (¶¶ 50-54).

⁶⁷ Reply, ¶ 52 (emphasis from the original).

31. Also with regard to the requirements for granting interim measures, as set out in *The Secretariat’s Guide to ICC Arbitration*,⁶⁸ the Claimants argued at the Injunction Hearing that there is irreparable harm here because “*once the PCA, instead of the ICC, determines disputes arising out of the MOI, that’s it, that’s the harm, that’s what was not agreed to and that would be what would happen*”. The Claimants further stated that the *Secretariat’s Guide* itself mentions that the threat of irreparable harm may not be the only relevant requirement under Article 28(1); “[i]t is rather for the arbitral tribunal to determine the test it deems appropriate in the circumstances”.⁶⁹ The Claimants recalled in this respect that they referred to a number of cases and, in particular, the *Coastal Corp.* case, on what the Tribunal can consider when deciding whether or not to grant the requested injunction, particularly, the need to make sure that the *status quo* is respected so that the outcome is not useless.

2. Respondent’s Position

32. The Respondent requests the Tribunal:

(a) **TO DISMISS** Claimants’ Sixth Injunction Application to enjoin PEL from proceeding with the UNCITRAL Arbitration;

(...)

(c) **TO ORDER** any further and/or additional relief as the Tribunal may deem appropriate.⁷⁰

33. In addition, in its Rejoinder, the Respondent “*reserv[ed] its right to seek cost orders from this Tribunal for all unmeritorious applications made by Claimants which have served only to further increase the costs of these proceedings*”.⁷¹

34. Firstly, the Respondent argues that there has been no material change in circumstances since the Tribunal considered and (rightly) rejected the Claimants’ arguments and request to enjoin PEL from pursuing the UNCITRAL Arbitration, in its Partial Award.⁷² It asserts that the only purported changes the Claimants allege are PEL’s refusal to voluntarily suspend the UNCITRAL Arbitration and/or to move the UNCITRAL Arbitration’s hearing dates.⁷³

⁶⁸ RL-163.

⁶⁹ As mentioned by the Claimants’, citing RL-163, p. 290.

⁷⁰ Rejoinder, ¶ 22. See also Response, ¶ 75.

⁷¹ Rejoinder, ¶ 23.

⁷² Response, section III.A. (¶¶ 15-22) and section IV.B, ¶¶ 55-57; and Rejoinder, section II (¶¶ 6-11).

⁷³ Rejoinder, ¶¶ 3(1) and 6. See also Response, ¶ 21.

35. The Respondent further submits that Mozambique misconstrues this Tribunal’s findings in the Partial Award by relying on the Tribunal’s statement that the “obligations arising out of the MOI” are “preliminary questions for determining the dispute between the Parties over the alleged violations of the Respondent’s rights under the Treaty” (Partial Award, ¶ 139), to assert that PEL’s claims in the UNCITRAL Arbitration are dependent upon this ICC Tribunal’s determination of the underlying contractual disputes.⁷⁴ According to the Respondent, contrary to what the Claimants argue, this Tribunal “expressly acknowledged the different nature of the causes of action underlying the parallel proceedings and highlighted the differences between the purported contract claims and treaty claims”,⁷⁵ and, like the UNCITRAL Tribunal, “unequivocally recognised that nothing in the MOI prevents PEL from pursuing its claims in the UNCITRAL Arbitration and both arbitrations can proceed in tandem harmoniously”.⁷⁶ The Respondent further asserted in its Rejoinder that this Tribunal “explicitly recognised that both tribunals have concurrent jurisdiction”.⁷⁷ The Respondent refers, in this respect, to different passages of this Tribunal’s Partial Award (namely at ¶¶ 134, 136, 139, 140, 141 and 142), to the Separate Opinion issued by Co-Arbitrator Stephen Anway on the same occasion (¶¶ 7 and 8) and to the UNCITRAL Tribunal’s letter of 12 April 2022, on the (dismissal of the) Claimants’ second stay application (REX-65).⁷⁸
36. With reference to the Claimants’ concerns regarding the dates of the ICC Hearing and the UNCITRAL evidentiary hearing, the Respondent notes, in particular, that “the UNCITRAL hearing was always scheduled to take place prior to the ICC hearing (i.e., the UNCITRAL hearing was initially scheduled for 4-8 April 2022 and was subsequently delayed at Claimants’ request due to health considerations of its counsel)”.⁷⁹ The Respondent further mentions that the Claimants’ arguments in this respect also demonstrate that “the genuine purpose of this arbitration is to thwart the UNCITRAL proceedings”.⁸⁰
37. Furthermore, the Respondent argues that the Claimants have failed to establish that this Tribunal has powers to grant an anti-arbitration injunction in relation to the UNCITRAL Arbitration.⁸¹ The Respondent asserts that, whilst ICC tribunals have the

⁷⁴ Response, ¶ 23.

⁷⁵ Response, ¶ 23.

⁷⁶ Response, ¶ 24. See also Rejoinder, ¶ 7.

⁷⁷ Rejoinder, ¶ 7.

⁷⁸ Response, ¶¶ 16, 17, 23, 24 (fn. 37) and 56; and Rejoinder, ¶¶ 7-10. See also Respondent’s Injunction Hearing Presentation, pp. 2, 3, 5 and 8-11.

⁷⁹ Response, ¶ 21.

⁸⁰ Rejoinder, ¶ 11.

⁸¹ Response, section IV.A, ¶¶ 31-40, and section IV.B, ¶¶ 58-61.

power to grant interim measures, and the “*Claimants are correct that tribunals have issued anti-suit injunctions based on article 28(1) of the ICC Rules, what they are effectively seeking in their Renewed Application is an anti-arbitration injunction*”.⁸² According to the Respondent, the Claimants only adduced legal authorities relating to anti-suit injunctions and failed to address the different paradigm of anti-arbitration injunctions, which would be “*(...) widely condemned throughout the international arbitration community*” and only issued by courts ‘in truly exceptional circumstances’, namely, where they find “*(...) that the arbitration agreement relied upon is non-existent, invalid, and inapplicable to the underlying dispute, or otherwise not enforceable*”.⁸³ The Respondent submits that this is not the case here and, in any event, the Claimants have not established that an anti-arbitration injunction would be appropriate here, where this Tribunal has acknowledged that the UNCITRAL Tribunal has *prima facie* jurisdiction under Treaty.⁸⁴

38. The Respondent contends that the Claimants would not have met their burden of proof with respect to Mozambican law.⁸⁵ The Respondent submits that a tribunal may only grant the interim relief it is entitled to under the law of the place of arbitration – in this case, Mozambican law –, and “*neither the Claimants nor their legal expert, Ms Muenda, cite a single authority supporting their argument that this Tribunal has the power to grant an anti-arbitration injunction (or even an anti-suit injunction) under Mozambican law*”.⁸⁶
39. Moreover, the Respondent submits that, even assuming *arguendo* that, (i) the Claimants had satisfied their burden to show that the legal principles applicable to anti-suit injunctions are relevant to the determination of the Claimants’ application and that (ii) the Tribunal has authority or discretion to issue such an extraordinary remedy, *quod non*, the Claimants would not have established the threshold requirement for granting the injunction they seek, namely, that PEL breached the MOI’s arbitration agreement by starting the UNCITRAL Arbitration, which was brought under a different instrument of consent and involves different causes of action, as already recognised by both this

⁸² Response, ¶¶ 31 and 32 (emphasis from the original).

⁸³ Response, ¶¶ 33-35, citing RL-153, George A. Bermann, “Anti-Suit Injunctions: International Adjudication”, in H. Ruiz Fabri (eds.), *Max Planck Encyclopaedia of International Law* (OUP, 2015) ¶¶ 40-42. See also Response, ¶¶ 39-40 and 58-59, and Rejoinder, section III (¶¶ 12-14).

⁸⁴ Response, ¶¶ 60-62, citing Partial Award, ¶ 142.

⁸⁵ Response, ¶ 37-40 and ¶ 58; and Rejoinder, ¶ 12-14.

⁸⁶ Response, ¶¶ 37-40; and Rejoinder, ¶¶ 12-14, referring to CER-13. See also Response, ¶ 58.

Tribunal (namely, in its Partial Award and in Procedural Order No. 5, ¶ 16) and the UNCITRAL Tribunal (REX-64, ¶ 16).⁸⁷

40. The Respondent objects to the Claimants’ argument that PEL submitted the “disputes arising out of the MOI” in the UNCITRAL Arbitration and therefore allegedly breached the MOI’s arbitration agreement.⁸⁸
41. It reiterates “the well-established principle of investment treaty law that an arbitration clause in a contract does not prevent an investor from commencing a treaty claim because the causes of action are different”, which it argues was expressly endorsed in the Partial Award (namely, in its ¶¶ 136, 139 and 141).⁸⁹ It insists it has not asked the UNCITRAL Tribunal (or this Tribunal) to adjudicate claims “arising out of the MOI”, but rather to adjudicate breaches of the Treaty, that is, whether Mozambique breached the Treaty and to order compensation for Mozambique’s breaches.⁹⁰
42. Objecting against the Claimants suggestions in this respect, the Respondent argues that none of the decisions originating from the *Vivendi* decision mentioned in the Partial Award (fn. 27, at ¶ 144) “*has the effect that commencing an investment treaty claim is per se a breach of the relevant dispute resolution clause in an underlying contract.*”⁹¹ Accordingly, it holds that

*[w]hile the UNCITRAL tribunal may be called upon to explore certain issues related to the MOI for the purposes of establishing its jurisdiction under the Treaty or deciding the merits of PEL’s case under the Treaty, that does not mean that PEL must litigate these issues first before this Tribunal.*⁹²

43. The Respondent also refers to the consideration that the treaty was in force when the Parties entered the MOI but was not mentioned in the MOI, as well as to the wording of the MOI’s arbitration agreement, which, according to the Respondent, was narrowly tailored to contractual disputes, and therefore also demonstrates that the jurisdiction of this Tribunal is separate from that of the UNCITRAL Tribunal.⁹³

⁸⁷ Response, section IV.A, ¶¶ 41-53 and 63-67; and Rejoinder, ¶ 3(3) and (4), and section IV, particularly, ¶ 18. See also RL-154, ¶ 28-61 and 28-64, RL-155, p. 184, and CL-140 (above n. 41) ¶ 213, on the relevant threshold requirement (Response, fn. 56 and 57).

⁸⁸ Rejoinder, ¶ 19.

⁸⁹ Rejoinder, ¶ 19(1); and Response, ¶ 48.

⁹⁰ Rejoinder, ¶ 19(2); and Response, ¶¶ 25, 26 and 65(a). See also CEX-63 (above n. 24) ¶ 1152, cited in the Rejoinder, ¶ 19(2) (fn. 32), and also referred to at the Injunction Hearing – see Respondent’s Injunction Hearing Presentation, p. 13.

⁹¹ Response, ¶¶ 48-50.

⁹² Response, ¶ 26.

⁹³ Response, ¶ 65(b).

44. Further, at the Injunction Hearing, the Respondent submitted the following:
- (i) The overlap between the two proceedings is the result of the way in which PEL chose to formulate its Treaty claims;
 - (ii) The jurisdiction of the two tribunals does not, however, overlap: the UNCITRAL Tribunal has jurisdiction over PEL’s Treaty claims; this Tribunal has jurisdiction over the Claimants’ claims arising out of the MOI;
 - (iii) The causes of action between the two proceedings are also distinct: PEL has not asserted any contractual claims before the PCA Tribunal, and has only raised defences in these proceedings; the jurisdiction of this Tribunal is very narrow, and narrower than would be provided under the standard ICC arbitration clause, which refers to “*disputes arising out of or in connection with*” the contract;
 - (iv) PEL’s Treaty claims could be considered as “connected with” the contract, but they are not claims “arising out of” the MOI;
 - (v) This Tribunal’s jurisdiction over any disputes arising out of the MOI does not mean that the UNCITRAL Tribunal cannot analyse the same contractual issues as preliminary issues;
 - (vi) In the UNCITRAL case, anything to do with the MOI will be dealt with as an evidentiary question to determine PEL’s treaty claims, or – as also put by the Respondent – as a “simple factual building block” of PEL’s treaty claims, and not as a legal holding;
 - (vii) While some of the issues will be considered by both Tribunals, they will be considered to different ends: in this case, they will be considered to determine the Claimants’ contractual claims under Mozambican law; in the UNCITRAL case they will be considered as an evidentiary matter that fits into that Tribunal’s ultimate determination of PEL’s claims under the Treaty;
 - (viii) In deciding the Treaty claims, the UNCITRAL Tribunal will look at the contractual issues not to decide whether there was a breach of Mozambican law, but rather to decide whether there was a breach of international law.
45. Also with respect to the threshold determination, the Respondent further sought to distinguish the present case from the three ICC cases relied upon by the Claimants, namely, *Cessna Finance*, *Coastal Corp.* and *Ridge C.C.*, in so far as those cases concern

“anti-suit injunctions granted in the context of parallel court proceedings”⁹⁴ and, in any event, in this case, “both the ICC Tribunal and [the UNCITRAL] Tribunal concur that the causes of action and instruments of consent are different in each of the proceedings”⁹⁵.

46. The Respondent submits that the Claimants have not established that the decision in *Emmis v. Hungary* has any relevance to the threshold determination for granting an injunction, that the Bilateral Investment Treaty entered into between India and Mozambique (the “**India-Mozambique BIT**”, the “**BIT**” or the “**Treaty**”) contains its own definition of investment, and that “*treaty tribunals routinely interpret and apply domestic law*”.⁹⁶
47. Moreover, the Respondent submits that, even if this Tribunal were to find that the UNCITRAL Arbitration was commenced in breach of the MOI’s arbitration agreement, “*the Claimants have failed to satisfy any other relevant factors (other than the fact that this Tribunal has prima facie jurisdiction to grant the interim measures they seek)*”.⁹⁷
48. The Respondent mentions the following “*other relevant factors*” that tribunals consider when deciding whether to issue an injunction:

*whether the tribunal has prima facie jurisdiction, whether there is a right to be protected (i.e., non-aggravation of the dispute between the parties, integrity of the arbitration, including ensuring the ultimate enforceability of any final award), urgency, and proportionality / necessity to prevent harm.*⁹⁸

49. According to the Respondent:

- (i) As to the right to be protected, the Claimants’ concerns regarding the integrity of this ICC arbitration and, particularly, the risk of conflicting decisions do not hold, considering that the Claimants themselves created this situation, namely by initiating these proceedings in which they essentially seek only declaratory relief,

⁹⁴ Response, ¶ 45 (emphasis from the original); and Rejoinder, ¶ 16(2).

⁹⁵ Response, ¶¶ 46 and 47 (quotation from ¶ 47, citing REX-65, Letter from UNCITRAL Tribunal dismissing Mozambique’s Application to Stay Proceedings, 12 April 2022, ¶ 17; and Rejoinder, 16(3)).

⁹⁶ Response, ¶¶ 51-53. See also Response, ¶ 66.

⁹⁷ Response, ¶¶ 68. See also Response, ¶¶ 44 and ff.; and Rejoinder, ¶ 20.

⁹⁸ Response, ¶ 44. See also Rejoinder, ¶ 20, and RL-155, pp. 189, CL-141, Gaillard (above n. 37) 239, and RL-156, p. 125, with respect to each of the relevant factors (Response, fn. 58-63).

refusing to consolidate the two arbitrations, and bringing its defences against PEL's claims in the UNCITRAL Arbitration before this Tribunal;⁹⁹

- (ii) As to urgency, the Claimants have demonstrated none, as results from the fact that there has been no material change of circumstances since the Claimants' last application for an injunction;¹⁰⁰
- (iii) As to proportionality, the harm the Respondent would suffer if the injunction were to be granted, namely, the significant delay and costs associated with any adjournment of the UNCITRAL Arbitration, and denial of its access to justice, far outweighs the harm that the Claimants would suffer should the injunction be refused.¹⁰¹

50. Finally, with respect to the "threat of irreparable harm" required to issue an injunction under *The Secretariat's Guide to ICC Arbitration*,¹⁰² the Respondent contends that the requested relief cannot alleviate Mozambique's alleged harm, considering that (i) both Tribunals hold concurrent jurisdiction to address the contractual issues and that (ii) this Tribunal's decisions have no *res judicata* effect on the UNCITRAL Tribunal's findings under either Mozambican or international law.

II. THE TRIBUNAL'S ANALYSIS

51. The decision on whether to enjoin the Respondent depends on (1.) there being a legal basis for the Tribunal's powers to grant such interim relief; and (2.) the conditions for the requested measures as required under the applicable standard being fulfilled.

1. Legal Basis

52. The Arbitral Tribunal considers that it has jurisdiction to enjoin a party from pursuing in another forum the resolution of disputes that are covered by the arbitration agreement that confers exclusive jurisdiction on this Tribunal for resolving those disputes, that is,

⁹⁹ Response, ¶¶ 27 and 70. This point was also mentioned at the Injunction Hearing, where the Respondent further emphasised that there is no binding precedent in international arbitration or Mozambican law and, as a result, each tribunal will conduct a *de novo* review of the issues before it, without being bound by the other tribunal's decision.

¹⁰⁰ Response, ¶ 71.

¹⁰¹ Response, ¶ 72.

¹⁰² RL-163, ¶ 3-1037. See also Respondent's Injunction Hearing Presentation, p. 4.

the arbitration agreement contained in Clause 10 of the MOI (the “**Arbitration Agreement**”), which in its English version provides as follows:

CLAUSE 10

(Resolution of Disputes)

*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.*¹⁰³

53. This derives from the Arbitral Tribunal’s power to order provisional measures under Article 28(1) of the ICC Rules as embedded in, and enabled by, the *lex arbitri*, i.e., Mozambican law.

a. The Powers under Mozambican Law

54. Mozambican arbitration law governs this arbitration as the *lex arbitri*, the procedural law of the arbitration that provides the legal basis for the powers of this Arbitral Tribunal. Its Article 33(1), which is literally based on Article 17, first sentence, of the Model Law as adopted by the UNCITRAL on 21 June 1985,¹⁰⁴ provides as follows:

Salvo convenção em contrário das partes, o tribunal pode, a pedido de uma das partes, ordenar a qualquer delas que tome as medidas provisórias que o tribunal arbitral considere necessárias em relação ao objecto do litígio.

In English:

Unless otherwise agreed by the parties, the tribunal may, at the request of one of the parties, order any of them to take the provisional measures that the

¹⁰³ The Parties have submitted different versions of the MOI – see CEX-1 and CEX-2 (respectively, the Portuguese and the English versions of the MOI submitted by the Claimants), and REX-39 and REX-39A (respectively, the Portuguese and the English versions of the MOI submitted by the Respondent; also previously submitted by the Claimants as CEX-6A and CEX-6B). In any case, the different versions of the MOI provide uniformly for the same text in their respective Clause 10.

¹⁰⁴ UN Doc. A/40/17 Annex I, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf. Article 17 (in the version of 1985) provides: “*Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute...*”

arbitral tribunal considers necessary in respect of the subject-matter of the dispute.

55. By agreeing to the ICC Rules to govern this dispute, the Parties have agreed also to their Article 28(1), which provides:

Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

56. It is broadly accepted, and not contested by the Respondent,¹⁰⁵ that “anti-suit injunctions” are among the interim or provisional measures that arbitral tribunals have the power to issue if they so deem appropriate.¹⁰⁶

57. The Respondent’s objection that Mozambican law as the *lex arbitri* would not provide for the possibility of issuing anti-suit or other related injunctions is misplaced. The Mozambican provision itself expressly allows the Parties to agree on what powers they wish to confer on the Arbitral Tribunal with respect to provisional measures. Accordingly, Article 28(1) of the ICC Rules is ultimately controlling in this respect.¹⁰⁷ And there is no question about this provision allowing arbitrators to issue those measures it deems necessary for provisionally preserving contractual rights as well as protecting the integrity of their arbitral process. There is therefore no need to decide on whether Article 33 of the Mozambican Arbitration Law itself already allows for such measures.¹⁰⁸ It is sufficient to note that there is nothing to suggest that the Parties would

¹⁰⁵ Response, ¶ 32.

¹⁰⁶ See, for example, for a detailed and critical discussion (RL-155) Olga Vishnevskaya, “Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?”, (2015) 32(2) Journal of International Arbitration 174, 180-184; more generically (CL-141) Emmanuel Gaillard, “Anti-Suit Injunctions Issued by Arbitrators”, in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (ICCA / Kluwer 2007) 235, 237-238 (“*the arbitrators’ jurisdiction to decide disputes relating to the arbitration agreement contains, by definition, the jurisdiction to decide breaches of the obligation to arbitrate. It also contains the arbitrators’ power to sanction any breaches that are ascertained on that basis. Arbitral jurisdiction would, otherwise, simply be negated*”) and on ICC arbitration at 251-259.

¹⁰⁷ The Dissent is puzzling when it affirms at ¶ 42: “*Would Mozambican courts have the authority to enjoin a public international law tribunal? I do not think so.*” On the one hand, Mozambican courts can, of course, not invoke Article 28(1) of the ICC Rules, which empowers this Tribunal to enjoin the Respondent; on the other hand, this Tribunal is not enjoining a public international tribunal but the Respondent *in personam*, who agreed to the exclusive jurisdiction of this Tribunal for the matters concerned, as discussed below.

¹⁰⁸ In the light of by now more general agreement that Article 17 the UNCITRAL Model Law, upon which the Mozambican provision is based, does allow such measures, it seems likely that – even beyond a separate party agreement – also Article 33 of the Mozambican Arbitration Law should be interpreted in this way; see the Report

be prohibited to confer the powers to make such a provisional order to the Arbitral Tribunal by reference to the ICC Rules.¹⁰⁹

b. The Labelling of the Requested Measure

58. Insofar as the Respondent argues that the measure requested in the present case would actually not be an “anti-suit” but an “anti-arbitration” injunction and would therefore fall under “*a different paradigm*”,¹¹⁰ it misses that that voices cautioning against such anti-arbitration injunctions refer exclusively to state courts “*enjoin[ing] parties from initiating or maintaining proceedings before an arbitral tribunal sitting overseas*”.¹¹¹ This is not the case here. The question here is – like that of “anti-suit” injunctions – whether the Arbitral Tribunal has the power to order an interim measure of protection to address a purported breach of the arbitration agreement caused by one party by bringing and maintaining proceedings in another forum pertaining to matters covered by the arbitration agreement. It is insofar irrelevant that this other forum is also arbitral, since it still is a more general forum whose jurisdiction is being invoked potentially at the detriment of the jurisdiction of the specifically agreed forum.
59. In this respect, the Arbitral Tribunal notes that the contractual agreement to resolve “*any dispute arising out of this memorandum between the parties (...) [in ICC] arbitration*” has been concluded in May 2011, that is, almost two years after the India-Mozambique BIT entered into force in September 2009. By this Treaty under public international law, the two countries generally accorded investors from the respective other country the right to have disputes relating to the exercise of the host state’s sovereign powers, insofar as regulated in the Treaty, resolved before an international tribunal instead of its domestic public courts. The Parties have, however, subsequently specifically agreed by contract to have “*any disputes arising out of this memorandum (...) referred to arbitration*” under the ICC Rules.¹¹² Therefore, the concerns voiced

of UNCITRAL Working Group on Arbitration on the Work of its 39th Session, 2006, U.N. Doc. A/61/17, ¶¶ 92-95, available at https://unctad.org/system/files/official-document/a61d17_en.pdf, showing that the 2006 revised version of Article 17 merely clarifies this understanding by expressly referring to the tribunal’s power to order a party to “*take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself*.”

¹⁰⁹ The Dissent argues at ¶¶ 38 *et seq.* that even if Article 28 of the ICC Rules applies, it would still depend on the *lex arbitri* to provide an express legal basis for a tribunal to issue an anti-suit injunction, then concluding that it has not been shown that Mozambican law would provide for such powers expressly. This ignores the just explained reverse logic of the Mozambican provision, which is based on the UNCITRAL Model Law: the Claimants have shown that the *lex arbitri* accepts the Parties’ contractual choice, which the Parties have exercised by choosing the ICC Rules; these Rules have in turn been clearly accepted to constitute sufficient basis for enjoining a party in breach of an arbitration agreement. No more is needed under the applicable provisions.

¹¹⁰ Response, ¶¶ 33-35.

¹¹¹ Response, ¶ 33, referring to Bermann (above n. 83) ¶ 40 (who only refers to “anti-arbitration injunctions” issued by state courts).

¹¹² *Ibid.*

against “anti-arbitration injunctions”, notably parochial attempts of public courts to impose the primacy their general jurisdiction over a specifically agreed contractual arbitral jurisdiction,¹¹³ do not apply here.¹¹⁴

60. On the contrary, what is applicable are the concerns that underly the need for “anti-suit injunctions” – even if that label also does not entirely fit here: the Claimants request provisional measures against the Respondent for having invoked a more general jurisdiction to the detriment of a specifically agreed jurisdiction in breach of a contractual obligation.¹¹⁵ Had the Respondent chosen not to pursue its claims under the BIT but under Mozambican law before Mozambican courts, there would certainly be no doubt as to the possibility of this Arbitral Tribunal to enjoin the Respondent for having those state courts decide “*any dispute arising out of this memorandum*”. Had the Claimants brought court proceedings on these matters before a Mozambican court, it would not have been surprising to see the Respondents themselves invoke the Arbitration Agreement in the MOI and requesting an injunction. The fact that the Respondent has chosen to pursue the disputed rights before the PCA Tribunal does not change the powers of this Arbitral Tribunal relating to interim measures of protection. The decisive question is whether that pursuance of rights before the other tribunal is in breach of the MOI’s Arbitration Agreement and warrants the ordering of a provisional measure.
61. In consequence, it is irrelevant how the requested measure is labelled by the Parties beyond the language of the applicable provisions. What does matter is that the requested measure is about the respect for the contracted jurisdiction and the protection of its integrity, which is, indeed, at stake here. The Arbitral Tribunal is requested to address this by the means of a provisional measure, and the Arbitral Tribunal has that power under Article 28(1) of the ICC Rules, as embedded in the *lex arbitri*, Article 33 of the Mozambican Arbitration Law.

2. The Conditions for Provisional Measures

62. Article 28(1) of the ICC Rules does not spell out the conditions that need to be met for an arbitral tribunal to order “*any interim or conservatory measure it deems*

¹¹³ Cf. Bermann (above n. 83) ¶ 42.

¹¹⁴ This Tribunal is not a Mozambican court but an arbitral tribunal whose jurisdiction was created by the Parties’ agreement and which is uncontested for the question at stake; see also above n. 107.

¹¹⁵ See in this sense also (CL-141) Gaillard (above n. 37 and 106) 241, when addressing the criticism that it would be “*somehow improper for an arbitral tribunal to address injunctions to State courts*”: “*The relevant question, therefore, is not a party’s fundamental right to seek relief before national courts, but whether the arbitration agreement exists and whether the dispute is covered by such agreement, and who has jurisdiction to decide these questions.*”

appropriate”. Yet the Parties largely agree on the standards to be met for this purpose,¹¹⁶ basically along the lines of those listed by Article 17A of the revised UNCITRAL Model Law, which – rather than innovating – can be taken to merely explicit the details already required under its previous edition, which in turn was the model for the Mozambican provision applicable here. Accordingly, what is needed here is, in general terms, (a.) that the Arbitral Tribunal has jurisdiction to decide on the merits of the dispute; (b.) that the applicant, *i.e.*, the Claimants, have a *prima facie* case on the merits regarding the right for which they seek protection (*fumus boni iuris*); (c.) that there is urgency in protecting that right and that otherwise the Claimants would suffered irreparable harm or at least substantive prejudice (*periculum in mora*); and (d.) that on the balance of equities it is necessary to take the requested measure.

a. Jurisdiction to Decide on the Merits

63. There is no dispute about this Arbitral Tribunal having jurisdiction to decide on the merits of the claim before it insofar as they relate to a “*dispute arising out to this memorandum*”. As stated in the Partial Award on Jurisdiction:

149. When finding that it does not have jurisdiction over the Treaty Claims, this Tribunal does so in the clear understanding that the Respondent has accepted – both in the MOI but also in its submissions and statements in these arbitral proceedings – this Tribunal’s jurisdiction over “any dispute arising from the memorandum”. 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.

b. *Fumus boni iuris*: a *prima facie* Case on the Merits

64. An essential condition is that the applicant shows that there it has a reasonable possibility of succeeding on the merits of what it claims. In the context of an injunction as requested in the present case, the merits are those of the claim to the right whose protection is being sought, notably the alleged breach of the rights resulting from the arbitration agreement. The applicant must show that it has the *prima facie* right to obtain remedies from a breach of the arbitration agreement by the other party; this, in turn, requires that the parties intended to submit their dispute to the arbitration at the exclusion of any other jurisdictions.¹¹⁷

¹¹⁶ See Application, ¶¶ 58 and 68; Response, ¶¶ 43-44; and Reply, ¶ 39.

¹¹⁷ RL-155, Vishnevskaya (above n. 106) 183.

i. Exclusive or Concurrent Jurisdiction

65. As already stated in the Partial Award on Jurisdiction, the Respondent never contested that it has the obligation to submit “[a]ny dispute arising out of this memorandum between the parties (...) referred to arbitration” under ICC Rules. Confronted with the Claimants’ arguments that the Arbitral Tribunal’s jurisdiction would be an exclusive one, the Respondent has, however, argued that this jurisdiction would not be exclusive. It invokes that this Tribunal did not expressly find an obligation of the Respondent to suspend the UNCITRAL Arbitration proceedings pending a final award in this arbitration but that it would have recognised that it lacks jurisdiction to decide questions concerning the other Tribunal’s jurisdiction; that nothing in the MOI would prevent the Respondent from pursuing its claims in the UNCITRAL Arbitration proceedings; and that both proceedings could proceed in tandem.¹¹⁸ It concludes in its Rejoinder – and reiterated this understanding at the Hearing – that this Tribunal would have explicitly recognised that its jurisdiction resulting from the MOI would be “concurrent” to that of the PCA Tribunal.¹¹⁹
66. The Partial Award, however, does not allow such a conclusion. On the contrary, this Tribunal stated there that “it is (...) clear and undisputed that the Parties have agreed that they have the right and the obligation to have ‘any dispute arising out of this memorandum’ under Mozambican law resolved in ICC arbitration”.¹²⁰ It is only “[b]eyond this” obligation that “there is not clear language (...) in the Arbitration Agreement in the MOI that suggests that the Respondent has also agreed to refrain from proceedings before the PCA Tribunal”.¹²¹ The Tribunal insisted accordingly “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.”¹²² Moreover, it stated expressly:

When finding that it does not have jurisdiction over the Treaty Claims, this Tribunal does so in the clear understanding that the Respondent has accepted – both in the MOI but also in its submissions and statements in these arbitral proceedings – this Tribunal’s jurisdiction over “any dispute arising from the memorandum”. 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

¹¹⁸ See above para. 35; Response, ¶ 24; and Rejoinder, ¶ 7. See also SoD, ¶¶ 245-249.

¹¹⁹ Rejoinder, ¶ 7.

¹²⁰ Partial Award, ¶ 141 (emphasis added).

¹²¹ Ibid. (emphasis added).

¹²² Ibid, ¶ 151 (emphasis added).

*Parties, i.e., they will respect their own commitment to submit to this jurisdiction for these purposes.*¹²³

67. There is therefore no place to doubt that it was, and still is, the understanding of the Tribunal that the Respondent did, and still does, have the obligation to refrain from proceedings before the PCA Tribunal, and/or any other court or tribunal, insofar as they concern “*any dispute arising out of this memorandum*”.¹²⁴
68. The Respondent’s attempt to re-qualify the jurisdiction resulting from the MOI as “concurrent” rather than exclusive is therefore misconceived. Not only is there nothing in the unequivocal language used in the MOI to suggest that the jurisdiction conferred by the Parties to this Tribunal would in any way be concurrent with that of any other court or tribunal, but this Tribunal has clarified in its Partial Award on Jurisdiction that it understands its jurisdiction to be exclusive.

ii. The relevance of *Vivendi*

69. The understanding that this Tribunal’s jurisdiction is exclusive appears also to accord with the line of cases originating from *Vivendi*,¹²⁵ as cited in the Partial Award and also invoked again by both Parties.¹²⁶ Contrary to the Respondent’s assertions,¹²⁷ the Partial Award referred to the logic developed by treaty-based tribunals on the basis of *Vivendi* as a single line of cases, without any opposition, even highlighting its necessary consistency:

The focus on the different causes of action has led those tribunals [i.e., Vivendi and its progeny] 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 and, conversely in

¹²³ Ibid, ¶ 149 (emphasis added).

¹²⁴ Insofar as the Dissent, at ¶ 19, considers that the Majority would ignore that “*nothing new had occurred during the intervening three months between the issuance of the Partial Award on 16 February 2022 and Claimants’ second injunction application to us on 18 May 2022 to justify a different decision*” it misses an essential point: the Tribunal expressly invited the Parties in ¶ 152 of the Partial Award to “*to coordinate, and use, the available jurisdictions in the reconciling spirit of such mutual respect between international arbitral tribunals for their respective jurisdictional spheres*” in the light of the decided allocation of jurisdiction. The fact that after the Partial Award “*nothing new had occurred*” is precisely the problem.

¹²⁵ As already stated in the Partial Award, ¶ 144: “*this Tribunal needs not to rely on that case law either, as our jurisdiction derives from the contractual agreement between the Parties and its scope is merely a matter of contract, not a matter of treaty law that has motivated Vivendi and its progeny.*” This includes *SGS v. Philippines*, to which the Dissent dedicates considerable attention.

¹²⁶ See above paras. 26 and 42; Application, ¶ 84, and Response, ¶ 48. See also Rejoinder, ¶ 3(2).

¹²⁷ Response, ¶¶ 49-50.

*other cases, to decline their jurisdiction over claims arising out of a contract under domestic law.*¹²⁸

70. What this line of cases shows is that the dichotomy created by treaty-based tribunals of looking at the cause of action for affirming their jurisdiction for treaty-based disputes (for the purpose of shielding it against other jurisdictions), makes sense – and may claim legitimacy – only to the degree that the other side of the same coin is also true: that the jurisdiction that has been contractually created by the parties for contract-based disputes is equally respected.¹²⁹ Or, put in other terms, the *Vivendi* logic is premised on the corollary of respect for contract-based jurisdiction as equally exclusive. Without purporting to preclude any of the jurisdictional issues before the PCA Tribunal, this corollary logic of respect for the jurisdiction contractually agreed by the parties¹³⁰ had comforted this Arbitral Tribunal to be

*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.*¹³¹

71. This confidence appears to have been misplaced.¹³² Despite the clear invitation “to coordinate, and use, the available jurisdictions” in the light of the allocation of jurisdiction decided in the Partial Award, the Respondent has done nothing of that sort to respect its obligation under the MOI. The above passage was not, as purported by the Respondent, a form of endorsement of some concurrent jurisdiction of the two tribunals in tandem for “any dispute arising out of this memorandum”. Any such dispute “shall be referred to arbitration” under the ICC Rules and is within the exclusive jurisdiction of this Arbitral Tribunal.

iii. Contract or Treaty

72. The Respondent has tried to evade this understanding of a clear allocation of jurisdiction by insisting that it does not pursue any contract claims before the PCA Tribunal. In line with its interpretation of *Vivendi*, it argues that the claims it pursues before the PCA Tribunal only have their causes of action rooted in the India-

¹²⁸ Partial Award, ¶ 144 (footnotes omitted).

¹²⁹ See the cases referred the Partial Award fn. 27, which are highlighted in the Dissent, ¶ 62.

¹³⁰ See *ibid*, ¶ 150: “This comfort is justified to the degree that *Vivendi* has also been accepted by treaty-based tribunals to decline their jurisdiction over contract-based disputes”.

¹³¹ Partial Award, ¶ 152.

¹³² See also above fn. 124

Mozambique BIT, the Treaty. It therefore affirms to have “*respected (rather than breached) the arbitration agreement by submitting to this Tribunal’s jurisdiction with respect to the Claimants’ contractual claims.*”¹³³

73. The Respondent does not deny that the underlying contractual matters, as listed by the Claimants,¹³⁴ are also pending before the PCA Tribunal. However, at least at the Injunction Hearing, it has attempted to justify this pendency in a different forum with two arguments. Firstly, these matters would only be taken into consideration by the PCA Tribunal as a matter of fact for the purpose of determining whether Mozambique’s behaviour towards the Respondent amounts to breaches of the BIT under international law; owing to the different causes of actions for determining liability, these matters would thus not constitute contract claims before the PCA Tribunal.¹³⁵ Secondly, if these matters are now pending for consideration before two tribunals, that is merely because the Claimants commenced these ICC proceedings in which they would essentially seek only declaratory relief, which would be both illegitimate and an abusive duplication of proceedings.¹³⁶ The two strands of argumentation deserve to be addressed separately.

Matters arising out of the MOI as mere fact before the PCA Tribunal

74. The Respondent has insisted at the Injunction Hearing that none of its claims before the PCA Tribunal are claims arising out of the MOI since the causes of action of its claims are exclusively rooted in the Treaty and none are rooted in Mozambican law, which frames the contractual claims.¹³⁷ It argued that the PCA Tribunal would not make any determinations on the Claimants’ contractual rights under Mozambican law but would treat any questions of contract relevant for determining breaches of the Treaty provisions as a matter of fact.¹³⁸ That position is, however, flawed.
75. One may already have doubts in view of Article 12(1) of the Treaty, which provides that “*all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made*”. This suggests that it would be difficult for the PCA Tribunal to avoid the application of Mozambican law in its determination of the basis for claims brought under the Treaty, notably those relating to rights arising out of the MOI. The Respondent itself has affirmed that “*a week before the hearing in this [ICC] case, [before the PCA Tribunal] each of these witnesses will*

¹³³ Rejoinder, ¶ 16(2).

¹³⁴ See above para. 10.

¹³⁵ See above para. 44.

¹³⁶ See above para. 49(i).

¹³⁷ See above para. 44.

¹³⁸ Ibid.

*be questioned on the same facts, expert opinions, and Mozambican law issues that are relevant to this Arbitration.*¹³⁹

76. Be it as it may, the Respondent’s reliance on different causes of actions of the relevant claims does not square with the wording of the Arbitration Agreement, by which the Respondent accepted to submit “[a]ny dispute arising out of this memorandum” to the exclusive jurisdiction of this ICC Tribunal. At least *prima facie*, the claims before the PCA Tribunal seem to be in part based on, or at least concern, the Parties’ dispute arising out of the MOI.
77. The Respondent itself very clearly stated that it has considered that the dispute between the Parties arising out of the MOI should be decided by the PCA Tribunal. Already the PCA Tribunal has understood the position of the Respondent to be that “*the only tribunal that has jurisdiction to hear both arguments under the MOI and under the BIT is this [PCA] Tribunal.*”¹⁴⁰ In line with such a position, the Respondent invoked the doctrine of *lis pendens* to justify the Stay Application submitted on 10 June 2021 before this (ICC) Tribunal (the “**Stay Application**”), affirming that “*the parties and the issues are essentially identical*” and that consequently “*there is a considerable risk that any decision made by this [ICC] Tribunal would be conflicting with those made by the UNCITRAL Tribunal.*”¹⁴¹ The Respondent went on to affirm:

That this Arbitration and the UNCITRAL Arbitration cover identical issues is not in dispute between the Parties. (...)

While the UNCITRAL Arbitration is brought under the Treaty and this claim is brought pursuant to the MOI, identical causes of action are not a requirement under the ILA Recommendations for the two arbitrations to be considered as parallel proceedings. (...)

It follows that the two arbitrations are parallel proceedings [and thus warrant a stay of the ICC proceedings]. The overlap between the two arbitrations in the present case even goes beyond the requirement of the ILA Recommendations for a proceeding to be considered a parallel proceeding, which only provides

¹³⁹ Respondent’s letter of 3 August 2022, ¶ 5; see also Response, ¶ 53 (cited above, at para. 46): “*As for the fact that the UNICTRAL tribunal may be called upon to interpret and/or apply domestic law to this question, it is neither here nor there. Investment treaty tribunals routinely interpret and apply domestic law.*” See also its Stay Application as cited below para. 78.

¹⁴⁰ CEX-60, PCA Case No. 2020-21, Procedural Order No. 3 of 14 December 2020, ¶ 47.

¹⁴¹ Stay Application, ¶ 7.

*that one or more of the issues are the same or substantially the same. In this case, the overlap is so pervasive that it is not even denied by Claimants.*¹⁴²

78. And the Respondent was also clear in stating that this pervasive overlap was not limited to the Treaty Claims originally brought by the Claimants in these ICC Proceedings:

*The danger of conflicting decisions is equally present in respect of issues of Mozambican law, including the validity of the MOI, which Mozambique has pleaded before both tribunals including citing identical expert evidence in support of its claims.*¹⁴³

79. After this Tribunal declined its jurisdiction over the Treaty Claims, the Respondent continued with the same understanding of pervasive overlap, thus asking this Tribunal “to accept into evidence the transcripts and recordings of the relevant cross-examination of the same witnesses in the UNCITRAL proceedings” because “many of Claimant’s witnesses in this Arbitration will be cross-examined on virtually the same topics only a few days before the hearing.”¹⁴⁴ With express reference to its Stay Application, the Respondent affirmed that “the evidence provided by these witnesses in conjunction with Mozambique’s Statement of Claim was nearly identical to that provided in the UNCITRAL proceeding”.¹⁴⁵

80. The consequences of this pervasive overlap have been clearly stated by the Respondent in its Stay Application:

*[T]he outcome of the UNCITRAL Arbitration is material to the outcome of this [ICC] Arbitration. Once the UNCITRAL tribunal has decided PEL’s Treaty claims, there will be very few (if any) residual issues for this Tribunal to determine.*¹⁴⁶

And moreover:

*Any determination [this Tribunal] makes before the UNCITRAL tribunal’s award would run the risk of being contradicted, such that the finality of such determinations would be put into question.*¹⁴⁷

¹⁴² Ibid., ¶¶ 85-87 (emphasis added); see also the quotation above para. 75.

¹⁴³ Ibid., ¶ 89.

¹⁴⁴ Respondent’s letter of 3 August 2022, ¶ 1 (emphasis added).

¹⁴⁵ Ibid., ¶ 5 (emphasis added).

¹⁴⁶ Stay Application, ¶ 119 as already stated in ¶ 8.

¹⁴⁷ Ibid., ¶ 118.

81. The problem is, however, that this Tribunal cannot carry out its jurisdictional mandate in full if its exclusive jurisdiction to decide any dispute arising out of MOI with binding effect between the Parties is avoided and reduced to virtually zero by the Respondent bringing the same matters in other proceedings.

Overlap caused by the Claimants

82. The Respondent reaffirmed its conclusion that there would basically be nothing left to be decided by this Tribunal once the PCA Tribunal has decided on the claims during the Injunction Hearing. And the Respondent explained that this would be “*by design*”.¹⁴⁸ The key to this argument of the Respondent is, as it stated during the Injunction Hearing, that it

*believe[s] that Patel was not required to bring its contract claims before you. It has a right to formulate its own claims in the way it sought fit. What it decided to raise is international law claims under the treaty. It has not raised claims before this tribunal; it was its right not to bring claims before this tribunal. It is not obliged to bring claims before this tribunal. We really say the claims here are really nothing; that is why you are left with nothing, because everything was just a response to the UNCITRAL arbitration.*¹⁴⁹

83. The Respondent’s crucial argument seems to be that “*it was not required to bring its claims before this tribunal*” and that “*it is entitled to formulate the claims in the form that it wishes and thus to bring the international law claims before the PCA tribunal*”.¹⁵⁰ Indeed, the Claimants were not required to bring any claims based on “*any dispute arising out of this memorandum*”. But to the degree that they chose – as they have – to request the determination of matters in dispute arising out of the MOI, they had and have the contractual obligation to do so in the arbitration stipulated for in the MOI, *i.e.*, in ICC proceedings. At least from the contractual perspective, but probably also from a treaty-based perspective (see below), the Respondent does not have “*a right to formulate its own claims in the way it sought fit*”. It waived that right by accepting the Arbitration Agreement and, with it, the obligation not to submit any dispute arising out of the MOI to any other forum than ICC arbitration. The Respondent cannot unilaterally change its contractual obligations contracted under Mozambican law by “*reformulating*” the same issues as claims under the Treaty.

¹⁴⁸ Injunction Hearing recording, at 1:45:06.

¹⁴⁹ Injunction Hearing recording, at 1:43:40; see also its Rejoinder, ¶ 21: “*It is not for Claimants or this Tribunal to determine what claims or defences PEL should argue either in this or in the UNCITRAL Arbitration.*”

¹⁵⁰ *Ibid.*, at 1:44:45-57.

84. That does not mean, of course, that the Respondent would be deprived from bringing any of its Treaty claims in the UNCITRAL Arbitration proceedings, as this Tribunal recognised in its Partial Award on Jurisdiction. The Respondent is free to do so, but – at least from this Tribunal’s contractual perspective – only to the degree that the bringing of such claims does not avoid and undermine the jurisdiction that the Parties chose in their Arbitration Agreement in the MOI. To the degree that the resolution of the Treaty claims depends on the adjudication of a dispute arising out of the MOI and properly before an ICC Tribunal with (exclusive) jurisdiction over “[a]ny dispute arising out of this memorandum”, this Tribunal needs to insist on deciding these issues exclusively.
85. The Respondent’s position at the Injunction Hearing that Mozambique agreed to the Most-Favoured Nation (“MFN”) clause when it signed the Treaty does not change the analysis. If one accepts that an umbrella clause can be imported on such basis, one may understand the MFN clause to constitute Mozambique’s acceptance of an investor bringing claims for breaches of contractual obligations before an investment tribunal. This does not, however, mean that the Respondent is free to ignore its own more specific and posterior jurisdictional agreement for the contractual claim in question.¹⁵¹ As stated in the Partial Award, this Tribunal has nothing to say about the PCA Tribunal’s jurisdiction under the Treaty. This Tribunal does, however, everything to say about the Respondent’s obligation arising out of the MOI. And in this respect, it is sufficiently clear that the dispute arising out of the MOI, even if one were to accept that that is a mere question of fact for the Respondent’s claims under the Treaty, needs to be resolved exclusively in accordance with the terms of the MOI. This means that nothing prevents the Respondent from bringing its umbrella clause claim under the Treaty before the PCA Tribunal – so long as the Respondent accepts (as it has) that the underlying contractual questions are resolved exclusively and thus preliminarily in the agreed ICC arbitration. But requesting the very same issues to be decided by a different tribunal in parallel constitutes *prima facie* a violation of the Arbitration Agreement. Indeed, the respect for party autonomy under the case law deriving from *Vivendi* suggests that the appreciation would probably not be different from a treaty-based perspective.¹⁵²
86. The Respondent’s affirmation that this Tribunal’s determination of the matters in dispute arising out of the MOI would not bind the PCA Tribunal and thus make any kind of sequencing of decisions pointless¹⁵³ is again beside the point. The crucial point

¹⁵¹ See also above para. 59.

¹⁵² See above paras. 69-70.

¹⁵³ Injunction Hearing recording at 00:58:00 *et seq.*

is not whether the PCA Tribunal would be bound by the determinations of this ICC Tribunal – but whether the Respondent is bound.¹⁵⁴ It is not for this Tribunal to speculate whether the PCA Tribunal would be technically bound by the determinations of this ICC Tribunal by virtue of doctrines such as *res iudicata* or issue estoppel under international law or (*exceção* or *autoridade de*) *caso julgado* under Mozambican law. That is for the PCA Tribunal to decide. The one legally bound by the determinations of this Tribunal is the Respondent. As also shown by Article 35(6) of the ICC Rules (incorporated into an arbitration agreement by reference), the essence of an arbitration agreement is that the Parties submit to the determinations made by the arbitrators for the matters within their jurisdiction. Should the Respondent ignore this Tribunal's eventual determinations and pursue a contrary determination of the matters arising out of the MOI before another tribunal, that would constitute a breach of the Arbitration Agreement and may trigger remedies for breach under the Mozambican law of obligations.

87. One may add that there are no reasons to believe that the PCA Tribunal, should it decide after this Tribunal has decided, would be indifferent to the determinations made by this ICC Tribunal on matters in dispute arising out of the MOI. After all, it is possible that the PCA Tribunal accepts – as the Respondent has – that this ICC Tribunal is the one that the Parties have expressly and exclusively chosen to make these determinations. Even if the PCA Tribunal were to consider the matters in dispute arising out of the MOI to be mere matters of fact, the disputed question is of what these disputed facts are. And that is precisely – according to the Parties' own express will – what this ICC Tribunal is tasked to decide. There is no reason to assume that the PCA Tribunal would ignore this expression of freedom of contract and (procedural) party autonomy.¹⁵⁵
88. Against this background, the claims before this Tribunal – and thus its jurisdiction – cannot really be seen as a mere attempt to derail the UNCITRAL Arbitration. The Respondent has unequivocally accepted that “[a]ny dispute arising out of this memorandum between the parties shall be referred to arbitration” under the ICC Rules.

¹⁵⁴ The Dissent also ignores this when insisting at ¶ 86: “[W]hat happens if the Treaty Tribunal does not accept the Majority’s Order? If the Treaty Tribunal directs the Parties to engage on the very issues the Majority now seeks to enjoin, what are the Parties to do? If the Parties do engage on the issues at the Treaty Tribunal’s direction, what is our Contract Tribunal to do?” It is not about the Treaty Tribunal accepting an *in personam* injunction addressed at the Respondent but about the Respondent respecting its contractual obligation and formulating its procedural requests in accordance with its contractual obligations.

¹⁵⁵ See also RL-18, Emmanuel Gaillard, “Coordination or Chaos: Do the Principles of Comity, Lis Pendens and Res Judicata Apply to International Arbitration?”, (2018) 29(3) *The American Review of International Arbitration* 205, 225: “As a matter of principle, nothing prevents arbitrators from assessing the impact of previously adjudicated matters on the dispute before them in the same manner as national courts. The principle is uncontroversial and a general principle of international law. As noted in an early award, it would be paradoxical for an arbitral tribunal not to recognize the binding effect of a prior arbitral award.”

Accordingly, the Claimants have a right to seek, primarily, a declaration of those issues relating to the Parties' dispute arising out of the MOI before this ICC Tribunal. The Claimants' request for declaratory relief is *prima facie* not only not abusive, as claimed by the Respondent; it is essentially the Claimants' effort to enforce the Respondent's obligation to arbitrate the dispute arising out of the MOI in ICC proceedings. The Claimants' request of declaratory relief is thus *prima facie* legitimate: had the Respondent brought the contractual issues arising from the MOI before an ICC tribunal, as it had obliged itself to do, the Claimants would not have had to seek a determination of the same questions as declaratory relief in these parallel proceedings. It is understandable that the Respondent was reluctant to do so in view of the seat of the arbitration being in Mozambique; yet that is what it bound itself to do by contract, and that is what it must keep to.

iv. Conclusion on *prima facie* Claim on the Merits

89. It is clear from the above that the Respondent under the Arbitration Agreement in the MOI had a contractual obligation not to submit any dispute arising out of the MOI to any another jurisdiction. According to the Respondent's own admission, it has requested the PCA Tribunal to adjudicate claims that, despite their non-contractual causes of actions, will require other tribunal to determine numerous contractual matters in dispute arising out of the MOI. This is *prima facie* a violation of the Arbitration Agreement in the MOI and risks rendering virtually moot the mission of this ICC Tribunal, which has exclusive jurisdiction over these matters. It follows that the Claimants have a *prima facie* claim that they are entitled to seek relief as a result of the breach of the Arbitration Agreement.

c. *Periculum in mora*: Urgency and Substantial Prejudice

90. Once it is *prima facie* clear that the applicant has a right that warrants protection, it is also necessary that there be urgency in ordering the measures required to protect the right at stake and that, without the measure being ordered, the applicant would risk suffering irreparable harm or, at least, a substantial prejudice, *i.e.*, harm not adequately reparable by an award on damages in a future award on the merits.¹⁵⁶
91. The Respondent's own insistence that "*once the UNCITRAL tribunal has decided PEL's Treaty claims, there will be very few (if any) residual issues for this Tribunal to determine*"¹⁵⁷ makes it sufficiently clear that if the Respondent continues to pursue the adjudication of the contract law issues before the PCA Tribunal, the Claimants' right

¹⁵⁶ In this sense also ¶ 3-1037 of the Secretariat's Guide to ICC Arbitration (RL-163).

¹⁵⁷ Above para. 80.

to have “*any dispute arising out of this memorandum*” decided in ICC arbitration will essentially be voided of sense and value. And this, according to the Respondent’s own arguments, is the case irrespective of whether the PCA Tribunal decides prior to this Tribunal: even if this Tribunal were to decide first, the Respondent has considered that “[a]ny determination [this Tribunal] makes before the UNCITRAL tribunal’s award would run the risk of being contradicted, such that the finality of such determinations would be put into question.”¹⁵⁸

92. It is therefore clear that, if the Respondent were to be allowed to continue to press forward with the determination of the contractual issues between the Parties by the PCA Tribunal, even if only as preliminary, factual or evidential questions, this Tribunal’s jurisdiction, *i.e.*, its mandate to *ius dicere*: to make the exclusive legal determination of matters in dispute arising out of the MOI, would be largely reduced – in the Respondent’s own words – to “*really nothing*”. As the PCA Tribunal’s hearing on also these matters is scheduled to take place in the week before this Tribunal’s Hearing, there is, indeed, also urgency in protecting the Claimants’ *prima facie* right to have the matters arising out of the MOI decided by the chosen jurisdiction.
93. Conversely, without an injunction, the Claimants would incur further substantial costs in parallel proceedings to defend their position regarding matters, the determination of which they are entitled to have in the agreed forum and in no other forum. Moreover, contrary to the exclusivity of their Arbitration Agreement with the Respondent in the MOI, the Claimants also face the risk of contradicting determinations of these contractual matters in dispute arising out of the MOI. This, in turn, may give rise to a liability under the Treaty that could be different had the Respondent respected the exclusive jurisdiction of this Tribunal and thus the sequencing of the proceedings. There is therefore also evidence of imminent substantial prejudice. This means that the Claimants’ right resulting from the Arbitration Agreement in the MOI, as well as this Tribunal’s jurisdiction and the integrity of these ICC proceedings, warrant ordering the Respondent to take measures to prevent this prejudice from materialising.

d. The Balance of Equities

94. The Respondent has essentially forwarded two arguments against granting the injunction even if the preceding conditions are fulfilled (as they are). Firstly, the harm that the Respondent were to suffer from being enjoined would significantly outweigh the Claimants’ harm if the application was rejected because of the delay of the UNCITRAL Arbitration “*with deleterious effects on PEL in terms of the wasted costs*

¹⁵⁸ Ibid.

and time associated with any adjournment, and denial of its access to justice.”¹⁵⁹ This argument, however, could only succeed if one were to accept that this Tribunal’s jurisdiction is merely concurrent with that of the PCA Tribunal and that the Respondent had the right to formulate its claims, even if involving matters in dispute arising out of the MOI, as and when it deemed fit. As already discussed above, neither is the case. This Tribunal’s jurisdiction is exclusive with respect to all matters in dispute arising out of the MOI; and by agreeing to the Arbitration Agreement, the Respondent has accepted the negative obligation not to seek adjudication of “*any dispute arising out of this memorandum*” anywhere else but in ICC arbitration. Accordingly, whatever deleterious effects an injunction may have on the Respondent, those are the consequences of its choice made at the time of entering the arbitration obligation under the MOI and the commitment assumed therein.

95. Secondly, during the Injunction Hearing, the Respondent argued that granting the relief requested by the Claimants “*ultimately would not prevent the UNCITRAL arbitration from proceeding in any event*”, since, as publicly traded company, the Respondent owed a duty under Indian law to its shareholders to “*pursue the UNCITRAL arbitration as it is entitled to*”.¹⁶⁰ It is remarkable that the Respondent puts forward an anticipated lack of respect for this Tribunal’s order as a ground for not granting the order in the first place. Surely, as a matter of principle, *nemo auditur propriam turpitudinem (futuram) allegans*. As explained before, the Respondent is not “*entitled to*” seek determination of matters in disputes arising out of the MOI in another forum than the one it has itself accepted as exclusive. It is difficult to imagine that the Respondent under Indian law could have an obligation to its shareholders to breach its freely assumed contractual obligations to which it is, by its own admission, bound.
96. Accordingly, on the balance of equities, it does not appear that any particular circumstances militate against ordering a provisional measure to address the *prima facie* current breach of the Arbitration Agreement by the Respondent.

3. The Adequate Measure to Order

97. It is clear from the above, and in particular from the Respondent’s own persistent affirmation that determination of its claims by the PCA Tribunal would leave this ICC Tribunal with “*really nothing*” to decide, that a provisional measure is warranted. It is

¹⁵⁹ Response, ¶ 72. See also above para. 49(iii).

¹⁶⁰ Injunction Hearing recording at 00:42:13 *et seq.* and 01:01:55; already at 00:30:20: “*No injunction from this tribunal has the power to stop the UNCITRAL Tribunal from conducting its scheduled hearing and issuing its decision, adjudicating PEL’s treaty claims.*”

also clear that the measure needs to be limited to matters in dispute arising out of the MOI. The Claimants' request for the Respondent to be "*enjoin[ed ...] from proceeding with the subject UNCITRAL arbitration until after a final award is issued by this ICC Tribunal in this ICC arbitration*" and to be "*ordered to cease and desist from taking any further actions, and participating in a hearing or in any other manner, in the UNCITRAL arbitration during the pendency of said Interim Measures*" goes beyond these bounds.

98. As stated before, the Respondent's pursuance of claims arising out of the Treaty does not in itself violate the Arbitration Agreement. It is the Respondent's attempts to have matters in dispute arising out of the MOI determined in parallel proceedings before by the PCA Tribunal that, at least *prima facie*, violate the Arbitration Agreement and thus this Tribunal's jurisdiction. This Tribunal's mandate is to exercise its jurisdiction, to protect the integrity of these proceedings and thus to ensure that it gets effectively to decide "*any matter arising out of this memorandum*" with a real and binding effect between the Parties. That defines the scope of the required measure.
99. The Claimants have insisted that any order short of enjoining the Respondent entirely from taking any action, including participating in the hearing before the PCA Tribunal would be ineffective. However, the mutual respect between tribunals (as invoked also in the Partial award) and comity requires this Tribunal not to interfere unduly with the UNCITRAL Arbitration. It is for the Respondent to do what is necessary to bring itself back in line with its obligations resulting from the Arbitration Agreement in the MOI. And it is for the PCA Tribunal to decide what the consequences of the Respondent's choices are for its own proceedings.¹⁶¹
100. Accordingly, what this Tribunal can and must do is to enjoin the Respondent from pursuing the determination of matters in dispute arising out of the MOI in any other forum, even if only accessorially for the purpose of the adjudication of its Treaty Claims.

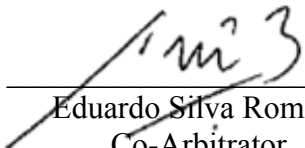
¹⁶¹ The Dissent at ¶ 59, however, believes that "*the Majority is stating that the Treaty Tribunal does not have jurisdiction to resolve these issues. Such a holding violates the most elementary principles of the doctrine of competence-competence. It is for the Treaty Tribunal, not this Contract Tribunal, to decide the scope of issues that it can decide.*"

III. DECISION

101. Based on the foregoing, the Tribunal decides:


- a) The Respondent is enjoined from pursuing the determination of any matters in dispute between the Parties arising out of the MOI in any other forum, even if only accessorially for the purpose of the adjudication of Treaty Claims.
- b) All other requests are rejected.
- c) The costs relating to this decision will be decided in a future award.

Place of Arbitration: Maputo, Mozambique
Date: 24 November 2022



Eduardo Silva Romero
Co-Arbitrator

Stephen P. Anway
Co-Arbitrator
(dissenting)



Jan Kleinheisterkamp
Presiding Arbitrator

Annex II

**ARBITRATION UNDER THE RULES OF ARBITRATION OF THE
INTERNATIONAL CHAMBER OF COMMERCE
IN FORCE AS FROM 1 MARCH 2017**

CASE NO. 25334/JPA/AJP

between

**the REPUBLIC OF MOZAMBIQUE (Mozambique) and the
MOZAMBIQUE MINISTRY OF TRANSPORT AND
COMMUNICATIONS (Mozambique)**

Claimants

and

PATEL ENGINEERING LTD. (India)

Respondent

**PROCEDURAL ORDER NO. 14
CORRIGENDUM**

THE ARBITRAL TRIBUNAL

Eduardo Silva Romero (Co-arbitrator)
Stephen P. Anway (Co-arbitrator)*
Jan Kleinheisterkamp (President)

ADMINISTRATIVE SECRETARY

Carolina Pitta e Cunha

25 November 2022

* Not concerned by this Corrigendum as he did not sign the Procedural Order No. 14.

WHEREAS

- A. On 24 November 2022, the Arbitral Tribunal issued its Procedural Order No. 14 on the Claimants' application for an injunction, accompanied by the Dissent by Co-Arbitrator Stephen P. Anway, based on Article 33(1) of the Mozambican Arbitration Law in conjunction with Article 28(1) of the ICC Rules applicable in these proceedings.
- B. In the dispositive part (under Section III), the order to enjoin the Respondent omitted a clear formulation to clarify the provisional nature of the order so as to reflect the nature of its legal basis. The Arbitral Tribunal's intention was to enjoin the Respondent from pursuing the determination of any matters in dispute between the Parties arising out of the MOI in any other forum, even if only accessorially for the purpose of the adjudication of Treaty Claims until this Arbitral Tribunal has taken its decision on those matters.
- C. The dispositive part therefore needs to be corrected accordingly to reflect the temporary nature of the order.

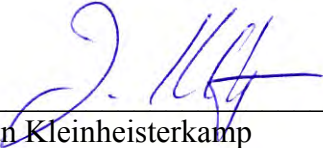
CORRIGENDUM

Based on the foregoing, the Arbitral Tribunal corrects paragraph 101(a) of Procedural Order No. 14 to read as follows:

- a) The Respondent is enjoined from pursuing the determination of any matters in dispute between the Parties arising out of the MOI in any other forum, even if only accessorially for the purpose of the adjudication of Treaty Claims, until this Arbitral Tribunal has taken its decision on those matters.

Place of Arbitration: Maputo, Mozambique

Date: 25 November 2022



Jan Kleinheisterkamp
Presiding Arbitrator

On behalf of the Arbitral Tribunal
(without prejudice to the Dissent of Co-Arbitrator Stephen P. Anway)

Annex III

ICC ARBITRATION RULES IN FORCE AS FROM 1 MARCH 2017

REPUBLIC OF MOZAMBIQUE

— and —

**MOZAMBIQUE MINISTRY OF TRANSPORT AND COMMUNICATIONS
(TOGETHER, “MOZAMBIQUE”)**

(Mozambique)

Claimants

— v —

PATEL ENGINEERING LTD.

(“PEL”)

(India)

Respondent

(ICC Case No. 25334/JPA)

DISSENTING OPINION OF ARBITRATOR STEPHEN ANWAY

24 November 2022

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I. INTRODUCTION

1. I am deeply troubled by the Majority's order today (the "Order"), which enjoins a party from making certain arguments before a *different* arbitral tribunal whose jurisdiction is based on a *different* instrument of consent than the one that empowers this tribunal. I am aware of no case where an arbitral tribunal has issued such an order—and the Majority cites none.
2. The Majority's Order is concerning for numerous reasons, not least because it decides the jurisdiction not of this tribunal (whose jurisdiction was already decided in our Partial Award on Jurisdiction) but, rather, the jurisdiction of a different, public-international law tribunal, and then functionally *imposes* that decision on the other tribunal through an injunction. By silencing a party before a different tribunal, the Majority effectively strips that other tribunal of its competence-competence—*i.e.*, its jurisdiction to decide its own jurisdiction. It would seem obvious that the other arbitral tribunal should decide what a party can and cannot argue before it—not our tribunal.
3. The Majority's Order is even more troubling because it decides the jurisdiction of the other tribunal *wrongly*. For two decades, a long line of tribunals, starting with the *Vivendi* ad hoc committee in 2002, has concluded that treaty tribunals can base their decisions on a contract insofar as necessary to determine whether there has been a breach of the treaty.¹ The Majority's Order today is, to my knowledge, the first time that a tribunal has taken the opposite view.
4. These two factors, taken together, mean that the Majority is not only issuing an *injunction* that is unprecedented, but it is doing so on a *legal basis* that is equally unprecedented.
5. I further note that our tribunal unanimously rejected Mozambique's previous request for the very same injunction in its Partial Award on Jurisdiction. Mozambique thereafter filed another request for the same injunction, even though nothing relevant had changed. Nevertheless, the Majority today renders a decision that is exactly the opposite of what our tribunal previously decided, when nothing new has occurred in

¹ The case law is divided in this regard concerning umbrella clause claims, but the same case law is unanimous with respect to non-umbrella clause claims. The Majority's Order, however, applies to *both* umbrella and non-umbrella clause claims.

between those decisions. The Majority provides no credible explanation for why it grants today the same injunction that it previously denied.

6. My dissenting opinion is organized into the following Sections:
 - (a) Section II provides the relevant background;
 - (b) Section III explains that the legal basis for the Majority’s Order, which rejects *Vivendi* and nearly 20 years of consistent jurisprudence, is incorrect;
 - (c) Section IV demonstrates that, in any event, the requirements for an anti-arbitration injunction are not satisfied;
 - (d) Section V notes the tangible and foreseeable enforcement issues that an anti-arbitration injunction creates; and
 - (e) Section VI is the Conclusion.

II. BACKGROUND

7. Before explaining in detail the reasons for my dissent, it is necessary to lay some groundwork. The dispute between PEL and Mozambique is now pending before two arbitral tribunals. The first tribunal was formed when PEL brought a claim against Mozambique under the arbitration clause in the India–Mozambique Bilateral Investment Treaty (“BIT”), which is governed by public international law (the “Treaty Tribunal”). Before the Treaty Tribunal, PEL’s Request for Relief seeks adjudication of only whether Mozambique violated the BIT. Nothing in the Request for Relief before the Treaty Tribunal seeks adjudication of whether the contract between the parties has been breached. Nevertheless, PEL argues before the Treaty Tribunal that the State’s alleged breach of the contract is a relevant factor in determining whether Mozambique violated the BIT.²
8. The second tribunal (ours) was formed when, after PEL filed its treaty claim, Mozambique brought a claim against PEL under the arbitration agreement in the

² See, e.g., *Patel Engineering Limited v. Republic of Mozambique*, PCA Case No. 2021-21, Claimant Rejoinder to Respondent Reply in support of its Application for a Stay of the Proceedings, 25 October 2021, ¶ 2; *Id.*, Claimant Response to Respondent Application for a Stay of the Proceedings, 15 October 2021, ¶¶ 8, 79.

contract between the parties, which is governed by Mozambican law (the “Contract Tribunal”). In Mozambique’s Request for Arbitration, it requests that we declare, among other things, that the contract is void and invalid, that PEL has no standing to bring treaty claims before the Treaty Tribunal, that Mozambique did not breach the BIT, and that Mozambique did not cause any damage to PEL.

9. PEL attempted to consolidate the arbitrations, but Mozambique refused.
10. On 1 October 2021, Mozambique applied to the Treaty Tribunal for a stay of the treaty arbitration because, according to Mozambique, our Contract Tribunal should issue our award before the Treaty Tribunal issues its award. In support of its application, Mozambique argued that the Treaty Tribunal would be bound to follow any findings made by this Contract Tribunal concerning the “*local contractual law dispute*”.³
11. On 3 November 2021, the Treaty Tribunal rejected Mozambique’s stay application, holding:

[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.*⁴

12. Mozambique likewise requested this Contract Tribunal to enjoin PEL from proceeding before the Treaty Tribunal. It did so numerous times, including in its submissions on jurisdiction. In those submissions, Mozambique argued that our Contract Tribunal, rather than the Treaty Tribunal, had jurisdiction over PEL’s treaty claims and requested that we enjoin PEL from proceeding in the treaty arbitration.
13. On 16 February 2022, this Tribunal issued its Partial Award on Jurisdiction, declining jurisdiction over the treaty claims and rejecting Mozambique’s request for an injunction. In so holding, we accepted that PEL could raise contractual arguments before the Treaty Tribunal—so long as it did so in support of its allegations that Mozambique breached the BIT:

³ Respondent’s Response to Claimant’s Sixth Injunction Application, 15 June 2022, ¶ 10.

⁴ Treaty Tribunal’s Procedural Order No. 4, 3 November 2022, ¶ 57 (emphasis added), **REX-64**.

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.*⁵

14. Also in the Partial Award on Jurisdiction, this tribunal denied Mozambique’s request to enjoin PEL before the Treaty Tribunal. The same Majority that issues its Order today noted that an important part of its decision was based on PEL’s acceptance of this tribunal’s jurisdiction over the so-called “contract claims”. In particular, the Majority concluded that such an injunction was unnecessary “*at this point*” because “[PEL] has by now clearly accepted this Tribunal’s jurisdiction over the contract claims”—but nonetheless again accepted that PEL could raise contractual arguments before the Treaty Tribunal insofar as it did so in support of its allegations that Mozambique breached the BIT:

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.⁶

15. In my Separate Opinion, I agreed with this result but disagreed with its reasoning, noting that our legal decisions should be based on the language of the relevant legal instruments before this tribunal, not on whether a party before it accepts a particular position or not. I further explained:

I have reservations with this language to the extent that it presumes (i) that this Tribunal has the power to control what a party can argue

⁵ Partial Award on Jurisdiction, 16 February 2022, ¶ 139 (emphasis added).

⁶ *Id.* at ¶ 151 (emphasis added).

in a different arbitration, which was brought under a different instrument of consent, and which is pending before a different tribunal, and *(ii)* that, if such a power were available to us, it would be appropriate to exercise that power here.⁷

16. As discussed below, the events that have unfolded since I wrote the Separate Opinion have confirmed that my concerns were well founded.
17. On 7 March 2022, on the purported basis of this Contract Tribunal's Partial Award on Jurisdiction, Mozambique submitted a second injunction application to the Treaty Tribunal. On 12 April 2022, the Treaty Tribunal rejected that application, stating that both the Contract Tribunal and the Treaty Tribunal concur that the causes of action and instruments of consent are different in each proceeding:

As expected, the ICC Tribunal upheld jurisdiction over the Parties' contractual claims and declined to exercise jurisdiction over the Treaty claims. *This is because both the ICC Tribunal and this Tribunal concur that the causes of action and instruments of consent are different in each of the proceedings.* Considering that there has not been a change of circumstances, the Tribunal sees no good cause to revisit its First Stay Decision and stay these proceedings, particularly before the hearing on jurisdiction and merits has been held.⁸

18. Given what happened next, it is important to pause here. By this time, the Treaty Tribunal had rejected *two* requests by Mozambique to enjoin PEL in the BIT arbitration, and this Contract Tribunal had likewise rejected such an application. Equally important, as shown above, both this Contract Tribunal and the Treaty Tribunal had accepted that PEL could make contractual arguments to the Treaty Tribunal insofar as necessary to argue that Mozambique breached the BIT.
19. On 18 May 2022, however, Mozambique *again* asked us to enjoin PEL before the Treaty Tribunal. Nothing new had occurred during the intervening three months between the issuance of the Partial Award on 16 February 2022 and Mozambique's second injunction application to us on 18 May 2022 to justify a different decision. Despite the lack of any developments that could justify deciding the second application differently than the first, the Majority today grants Mozambique's request, holding:

⁷ Separate Opinion of Arbitrator Stephen Anway, 16 February 2022, ¶ 7.

⁸ Treaty Tribunal's correspondence dismissing Mozambique's Application to Stay, 12 April 2022, ¶¶ 17-18 (emphasis added), **REX-65**.

The Respondent is enjoined from pursuing the determination of any matters in dispute between the Parties arising out of the MOI in any other forum, even if only accessorially for the purpose of the adjudication of Treaty Claims.⁹

20. The Majority offers no credible explanation for why it grants today the very same request that it denied three months earlier.

* * *

21. In view of the foregoing, the Majority's Order rests on two pillars: (i) that it is for our Contract Tribunal, rather than the Treaty Tribunal, to decide whether, by signing the contract with an ICC arbitration provision, PEL waived its right to raise contractual arguments before the Treaty Tribunal under the BIT, and (ii) that it is appropriate for our Contract Tribunal to functionally impose that conclusion on the Treaty Tribunal through an anti-arbitration injunction. For the reasons explained below, I believe both pillars—each of which are necessary for the Order to stand—are incorrect.

III. THE LEGAL BASIS OF THE MAJORITY'S ORDER, WHICH REJECTS *VIVENDI* AND NEARLY 20 YEARS OF CONSISTENT JURISPRUDENCE, IS INCORRECT

22. At the heart of the Majority's Order is a misunderstanding about which arbitral tribunal has the competence to decide whether PEL's agreement to the contract, which contains an ICC arbitration clause, constitutes a waiver of its right to raise contractual arguments before the Treaty Tribunal established under a different arbitration provision in the BIT. In my opinion, the only arbitral tribunal competent to decide this issue is the Treaty Tribunal.
23. The competence of the Treaty Tribunal to decide on its own jurisdiction stems from the principle of competence-competence and the relationship between contract claims and treaty claims as two distinct categories of claims. The seminal case on the relationship between contract claims and treaty claims is the ad hoc committee's annulment decision in *Vivendi v. Argentina*.¹⁰ In *Vivendi*, investors brought a BIT claim against Argentina arising out of a troubled relationship that developed between the

⁹ Procedural Order No. 14, 23 November 2022, ¶ 101(a).

¹⁰ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002.

parties to a 1995 concession agreement (the “Concession Contract”) to privatize the water and sewage services of the Province of Tucumán in Argentina.¹¹ Article 16.4 of the Concession Contract provided that contract disputes must be submitted to the exclusive jurisdiction of the administrative courts of Tucumán.¹²

24. In defense, Argentina argued that the claimants’ BIT claim involved exclusively contractual matters (*i.e.*, disputes arising under the Concession Contract), over which the arbitral tribunal did not have jurisdiction.¹³ The arbitral tribunal determined that it had jurisdiction over the dispute, rejecting Argentina’s argument that a forum selection clause in the Concession Contract prevented it from hearing the case.¹⁴ Nevertheless, the arbitral tribunal found that the majority of the claims under the treaty first required interpretation and application of the Concession Contract.¹⁵ Reasoning that the parties to the Concession Contract had assigned the task of interpreting and applying that contract to the administrative courts of Tucumán, the arbitral tribunal dismissed the claims on the ground that the claimants had to pursue their rights in those local courts before seeking relief under the BIT.¹⁶
25. Claimants thereafter applied for annulment of the award before an ad hoc annulment committee (the “Committee”). The key question before the Committee was whether the investment treaty tribunal had jurisdiction over, and was obliged to decide the merits of, claims of breach of a BIT, even if a forum selection clause in the contract out of which the dispute arose provides for the exclusive jurisdiction of another forum.¹⁷
26. Analyzing the relationship between a breach of contract and a breach of a treaty, the Committee first observed that the treaty provisions “*do not relate directly to breach of a municipal contract. Rather they set an independent standard.*”¹⁸ As the Committee

¹¹ *Vivendi*, Award, 21 November 2000, ¶ 25, *partly annulled*, Decision on Annulment, 3 July 2002.

¹² *Id.* at ¶ 27.

¹³ *Id.* at ¶ 41.

¹⁴ *Id.* at ¶¶ 53-54.

¹⁵ *Id.* at § A (Introduction and Summary).

¹⁶ *Id.*

¹⁷ *Vivendi*, Decision on Annulment, ¶¶ 86-88.

¹⁸ *Id.* at ¶ 95.

explained, “[a] state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT.”¹⁹

27. In support of this proposition, the Committee relied upon Article 3 of the International Law Commission Articles on State Responsibility (the “ILC Articles”). Article 3 of the ILC Articles, entitled “*Characterization of an act of a State as internationally wrongful*,” provides that “[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.” Article 27 of the Vienna Convention on the Law of Treaties similarly provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”
28. Under these provisions, therefore, the questions of whether there has been a breach of a treaty and whether there has been a breach of a contract are different questions. As the Committee recognized, “[e]ach of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the . . . [c]ontract, by the proper law of the contract, in other words, [domestic law].”²⁰
29. The commentary to Article 3 of the ILC Articles, cited by the Committee, emphasizes the distinction between the role of international and municipal law in matters of international responsibility:

(4) The International Court has often referred to and applied the principle. For example in the *Reparation for Injuries* case, it noted that “[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible . . . the Member cannot contend that this obligation is governed by municipal law.” In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that: ‘Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.’²¹

30. Conversely, the Committee cited the Chamber as follows:

¹⁹ *Id.*

²⁰ *Id.* at ¶ 96.

²¹ *Id.* at ¶ 97 (citing Commentary ¶ 4 to Article 3 of the ILC Articles).

[T]he fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness... Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.’

[...]

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.²²

31. Based on these principles, the Committee held that where the “*essential basis of a claim*” is a breach of contract, a tribunal will give effect to any valid choice of forum clause in the contract. But where the “*fundamental basis of a claim*” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, a tribunal will give effect to the choice of forum in the treaty (the “*Vivendi Principle*”).
32. Based on the *Vivendi Principle*, the Committee concluded that “*it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court.*”²³ Rather, “[i]n such a case, the inquiry which the ICSID tribunal

²² *Id.* (citing Commentary ¶ 7 to Article 3 of the ILC Articles).

²³ *Id.* at ¶ 102.

*is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties.”*²⁴

33. On the key issue of whether a treaty tribunal can take into account contractual terms, the Committee explicitly held that “*it is one thing to exercise contractual jurisdiction . . . and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in Article 3 of the BIT.*”²⁵ The Committee concluded that “*under Article 8(4) of the BIT the Tribunal had jurisdiction to base its decision upon the Concession Contract, at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT.*”²⁶ The Committee therefore annulled that portion of the award, holding:

In the Committee’s view, the BIT gave Claimants the right to assert that the Tucumán conduct failed to comply with the treaty standard for the protection of investments. *Having availed itself of that option, Claimants should not have been deprived of a decision, one way or the other, merely on the strength of the observation that the local courts could conceivably have provided them with a remedy, in whole or in part. Under the BIT they had a choice of remedies.*²⁷

34. In sum, although the Majority states that its Order is consistent with *Vivendi*,²⁸ the foregoing shows that the Committee in *Vivendi* expressly rejected the very proposition that the Majority today adopts: that a treaty tribunal cannot base its decision on a contract insofar as necessary to determine whether there has been a breach of the treaty.
35. Although there is no *stare decisis* principle in investment treaty arbitration, the *Vivendi* Principle is now widely understood to reflect settled law in the field. More than 30 arbitral tribunals have followed the *Vivendi* Principle:
- *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 04 May 2021, footnote 609.

²⁴ *Id.*

²⁵ *Id.* at ¶ 105.

²⁶ *Id.* at ¶ 110.

²⁷ *Id.* at ¶ 114 (emphasis added).

²⁸ Procedural Order No. 14, 23 November 2022, ¶ 69.

- *Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, ¶ 163.
- *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1032.
- *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Dissenting Opinion of Santiago Torres Bernárdez, 20 June 2018, ¶¶ 193, 217.
- *Oztas Construction, Construction Materials Trading Inc. v. Libyan Investment Development Company and State of Libya*, ICC Case No. 21603/ZF/AYZ, Dissenting Opinion of Dr. Tolga Ayoglu, 14 June 2018, ¶ 10.
- *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 336.
- *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 332.
- *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 474.
- *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability, 21 April 2015, ¶ 172.
- *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, footnote 1744.
- *Getma International and others v. Republic of Guinea*, ICSID Case No. ARB/11/29, Decision on Jurisdiction, 29 December 2012 [Unofficial English], footnote 5.
- *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 131.
- *Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, ¶ 143.
- *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 137 and footnote 18.
- *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction, 29 May 2009, ¶¶ 127, 149.

- *Cargill, Incorporated v. Republic of Poland II*, UNCITRAL, Award, 5 March 2008, ¶ 228.
- *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 258.
- *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006, ¶ 43.
- *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, ¶ 43.
- *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. Argentine Republic*, ICSID Case No. ARB/03/13 & ARB/04/8, Decision on Preliminary Objections, 27 July 2006, ¶ 108.
- *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶ 79.
- *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, ¶ 43.
- *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, ¶ 79.
- *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 148.
- *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 114.
- *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award and Dissenting Opinion, 19 August 2005, ¶ 102.
- *Impregilo S.p.A. v. Islamic Republic of Pakistan II*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶¶ 210, 256.
- *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, ¶¶ 152, 157.
- *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 73 and footnote 20.

- *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, ¶ 122.
- *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, 16 September 2003, ¶ 10.6.
- *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Award on Jurisdiction, 6 August 2003, ¶ 147.

36. I am aware of no tribunal that has disagreed with the *Vivendi* Principle. That fact is crucially important, as the proper application of the *Vivendi* Principle alone requires that we deny Mozambique’s application.

IV. THE REQUIREMENTS FOR AN ANTI-ARBITRATION INJUNCTION ARE, IN ANY EVENT, NOT SATISFIED

37. Having determined that the Majority is incorrect and unprecedented in its departure from the *Vivendi* Principle, I could dissent on that basis alone. However, the Majority’s decision to impose an anti-arbitration injunction is, in itself, also without precedent. As explained below, I believe this second pillar of the Majority’s analysis is just as flawed as the first.

A. Mozambique has failed to establish that the *lex arbitri* empowers this tribunal to issue an anti-arbitration injunction

38. Mozambique makes its request for an anti-arbitration injunction under Rule 28(1) of the 2021 ICC Arbitration Rules, which allows a tribunal to grant interim measures that “*it deems appropriate.*” An arbitral tribunal may only grant an interim measure, however, that is permitted under the law of the place of arbitration. Bühler and Webster note that any procedural order or award with respect to such measures will include an analysis of the *lex arbitri*.²⁹ Gary Born agrees, explaining that, as a general matter, the *lex arbitri* governs the power of an arbitral tribunal to issue interim relief:

In many cases, the law applicable to the arbitral tribunal’s power to grant provisional measures will be the procedural law of the arbitration, typically the arbitration legislation of the arbitral seat. Most awards look to the law of the arbitral seat as defining the arbitrators’ power to grant provisional relief, as does most national court authority and commentary.

²⁹ M. W. Bühler and T. H. Webster, *Handbook of ICC Arbitration* (5th ed.), ¶ 28-25, **RL-154**.

[. . .]

Absent express contrary statements, it is the law of the arbitral seat that was most likely intended by the parties to define the powers of the tribunal. In principle, therefore, the law governing the tribunal's power to grant interim relief is that of the arbitral seat.³⁰

39. In the present case, the *lex arbitri* is Mozambican law. The question that arises, then, is whether Mozambican law permits anti-arbitration orders—or even anti-suit orders. Many national legal systems do not permit such orders.
40. In this case, neither Mozambique nor its legal expert, Ms. Muenda, cite a single authority supporting their argument that this Contract Tribunal has the power to grant an anti-arbitration injunction (or even an anti-suit injunction) under Mozambican law³¹—much less to functionally impose such an injunction against a public international law tribunal. While framed as an injunction against only PEL, the Majority's Order also applies to the Treaty Tribunal, because it restrains what that Tribunal can *hear*—and thus what it can *adjudicate*. That being the case, Mozambique bore the burden to establish that a domestic law arbitral tribunal has the authority to functionally enjoin a public international law tribunal. Mozambique did not even attempt to do so.
41. To my mind, this issue is of greater relevance than Mozambique or the Majority accord it. The authority of our Contract Tribunal stems from the Parties' agreement governed by Mozambican law. By contrast, the authority of the Treaty Tribunal stems from the Parties' agreement governed under public international law. Public international law prevails over Mozambican law, because it is higher in the hierarchy of legal norms.³²

³⁰ G. Born, *International Commercial Arbitration*, Kluwer International, 2021, pp. 2639, 2641, **RL-15A**.

³¹ Mozambique instead refers to a judgment of the US District Court for the Southern District of New York recognizing the availability of injunctive relief in an ICC arbitration. Mozambique's Application to Enjoin, 18 May 2022, ¶ 79. That authority is obviously irrelevant to this dispute.

³² See, e.g., *The Greco-Bulgarian "Communities"*, Advisory Opinion, 31 July 1930, PCIJ Series B, No. 17, p. 32 ("[I]t is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."); *Exchange of Greek and Turkish Populations*, Advisory Opinion, 21 February 1925, PCIJ Series B, No. 10, p. 20 ("[A] principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."); *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, ¶ 64 ("To the extent that there may be any inconsistency between the two bodies of law [Costa Rican law and public international law], the rules of public international law must prevail."); *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006, ¶ 162

42. In this regard, I note that there is no material difference between a contractual provision stating that disputes are to be resolved by ICC arbitration applying Mozambican law, on the one hand, and one stating that disputes are to be resolved by the Mozambique courts applying Mozambican law, on the other hand. Would Mozambican courts have the authority to enjoin a public international law tribunal? I do not believe so.
43. For that reason alone, I believe that Mozambique failed to carry its burden of proof on this issue, and its application therefore should be denied.

B. Anti-arbitration injunctions are widely condemned

44. But even if, *arguendo*, Mozambique had established that its municipal law empowered us to issue an anti-arbitration injunction, I believe that it would be inappropriate to exercise that power here.
45. Professor George Bermann has defined anti-arbitration injunctions as “*injunctions enjoin[ing] parties from initiating or maintaining proceedings before an arbitral tribunal*

(“[E]ven if the law of Peru were held to apply to the interpretation of the DEI Bermuda LSA, this Tribunal has the authority and duty to subject Peruvian law to the supervening control of international law.”) (citing C. Schreuer, *The ICSID Convention: A Commentary* (2nd ed., 2009), pp. 585-590 (2001)); Y. Negishi, *The Pro Homine Principle’s Role in Regulating the Relationship Between Conventionality Control and Constitutionality Control*, 28 Eur. J. Int’l L. 457, 459 (2017) (“[T]he supremacy of international law over domestic law which has been recognized as one of the fundamental principles at the international sphere[.]”) (citing G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 (II) *Recueil des Cours* (1957) 85); C. Baltag, *Chapter 2: Investor and Contracting Parties to the Energy Charter Treaty* in C. Baltag (ed.), *The Energy Charter Treaty: The Notion of Investor*, (Jan 2012), pp. 43-44 (“Article 27 of the Vienna Convention codifies the principle of supremacy of international law over internal law . . . the principle of supremacy of international law over internal law provides that a state may not rely on the provisions or deficiencies of its own law to justify a breach or a failure to perform its duties under international law.”); M. Sasson, *Conclusion: The Unsettled Relationship Between International and Municipal Law* in M. Sasson (ed.), *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (2nd ed., 2017), p. 244 (“In the investment treaty context, the same approach applies: international law regulates the standard of protection granted by a treaty, and the application of municipal law to govern the treaty’s subject matter cannot affect this standard of protection.”); D. M. C. Barbosa and P. Martini, *Chapter 3: Two Sides of the Same Coin: To What Extent Is Arbitration with the Brazilian Administration Similar to Investment-Treaty Arbitration?* in D. de Andrade Levy, et al. (eds), *Investment Protection in Brazil* (2013), pp. 50-51 (“[W]here a Tribunal finds that provisions of a national law . . . conflict with the state’s obligations under an international treaty, the international obligation shall prevail.”); *Id.* (“At this point, it is important to stress that such supremacy of international law over municipal law as provided by the Vienna Convention applies even to municipal norms of constitutional status.”); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Jurisdiction, 30 April 2004, ¶ 94 (“International law overrides domestic law when there is a contradiction since a State cannot justify non-compliance of international obligations by asserting the provisions of its domestic law”.); R. Ludwikowski, *Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy*, 9 *Cardozo J. Int’l & Comp. L.* 253, 266-267 (2001) (“From the international community’s perspective, the superiority of international legal order over domestic law seemed to be less questionable than ever.”).

sitting overseas.³³ He explains that “[s]uch injunctions are widely condemned throughout the international arbitration community” for numerous reasons, including the fact that anti-arbitration injunctions:

- (a) deprive the tribunal of its prerogative under the doctrine of competence-competence;
- (b) constitute an aggressive remedy; and
- (c) deprive competent domestic courts of their opportunity to review the jurisdiction of the tribunal.³⁴

46. Professor Bermann further explains that, of the jurisdictions that allow anti-suit injunctions, even courts only issue anti-arbitration injunctions “*in truly exceptional circumstances*.”³⁵ To do so, the courts must “*find that the arbitration agreement relied upon is non-existent, invalid, inapplicable to the underlying dispute, or otherwise not enforceable*.”³⁶

47. Here, by contrast, no one disputes that the arbitration agreement in the BIT is a valid, existent, applicable, and enforceable clause.

48. Moreover, in the context of parallel arbitration proceedings, an injunction is generally only appropriate where both proceedings are covered by the same arbitration agreement. Olga Vishnevskaya states:

The rationale of anti-suit injunctions in support of arbitration is to prevent parallel proceedings over the same dispute in breach of the arbitration agreement. Therefore, in order to be able to grant this relief, the arbitral tribunal should establish that the court proceedings are initiated in violation of *such* agreement. *The commencement of parallel*

³³ G. Bermann, *Anti-Suit Injunctions: International Adjudication*, in H. Ruiz Fabri and A. Peters (eds), *Max Planck Encyclopaedias of International Law*, OUP (2015), ¶ 40, **RL-153**.

³⁴ *Id.* at ¶ 42.

³⁵ *Id.* at ¶ 40.

³⁶ *Id.* at ¶ 41.

*proceedings can constitute breach of the arbitration agreement if the disputes therein are covered by the arbitration agreement.*³⁷

49. In other words, the situation where an anti-arbitration injunction may be potentially appropriate is where the dispute in the second proceeding is covered by the same arbitration agreement as the dispute in the first proceeding.³⁸
50. This principle is also reflected in arbitral decisions, where tribunals have considered anti-arbitration injunctions.³⁹ In an unreported ICC case cited by Laurent Levy, the sole arbitrator “*refused to enjoin the contractor from pursuing the second arbitration on the grounds that it did not have the power to interfere with another arbitration, in particular because the latter had arisen out of a separate arbitration clause.*”⁴⁰
51. So, too, here. This Contract Tribunal and the Treaty Tribunal base their jurisdiction on different arbitration agreements.
52. Further, even where tribunals consider that they have discretion to issue anti-suit injunctions, they have exercised that discretion with considerable caution. In the words of the ICC tribunal in Case No. 10681/KGA, an authority quoted by Mozambique, “[t]he issuance of an injunction is a delicate measure which tribunals, including arbitral tribunals, must take seriously and approach with utmost caution.”⁴¹
53. In sum, anti-arbitration injunctions are:
- “*widely condemned in the international arbitration community*”;
 - should only be ordered in “*truly extraordinary circumstances*”; and

³⁷ O. Vishnevskaya, *Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?*, Journal of International Arbitration, Kluwer Law International (2015), Volume 32, Issue 2, p. 173, § 2.3[b] (emphasis added), **RL-155**.

³⁸ S. Besson, *Anti-Suit Injunctions by ICC Emergency Arbitrators*, in *International Arbitration Under Review: Essays in Honour of John Beechey*, ¶ 37; M. Scherer & W. Jahnel, *Anti-Suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective*, (2009) 4 Int A.L.R. 66, 73.

³⁹ ICC Interim Order on the application for an anti-arbitration injunction (2005) cited in M. Scherer & W. Jahnel, *Anti-Suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective*, (2009) 4 Int A.L.R. 66, 71-72.

⁴⁰ Unreported ICC Case cited in L. Levy, *Anti-Suit Injunctions Issued by Arbitrators*, IAI International Arbitration Series No. 2, Anti-Suit Injunctions in International Arbitration, 115, 123 (emphasis added).

⁴¹ *The Coastal Corporation v. Nicor International Corporation and Consultores de la Cuenca del Caribe, S.A.*, ICC Case No. 10681/KGA, Partial Award, 31 May 2001, ¶ 11, **CL-142**.

- must be applied with the “*utmost caution*”.

54. These concerns are born of good reason. The typical concerns voiced against anti-arbitration injunctions apply with equal force here. The Majority suggests otherwise, stating that, because the arbitration agreement was concluded after the entry into force of the BIT, “*the concerns voiced against ‘anti-arbitration injunctions’, notably parochial attempts of public courts to impose the primacy [sic] their general jurisdiction over a specifically agreed contractual arbitral jurisdiction, do not apply here.*”⁴² I do not agree.

55. Most significantly, anti-arbitration injunctions can be problematic when they violate the principle of competence-competence. That principle applies not only against a court that attempts to deprive an arbitral tribunal of its jurisdiction, but equally against an arbitral tribunal that does the same to another arbitral tribunal, which is exactly what has happened here. And it is that topic, therefore, to which I turn next.

C. The Majority improperly decides on the Treaty Tribunal’s own competence-competence

56. The Majority’s Order today decides the scope of the Treaty Tribunal’s jurisdiction. It would be troubling in any scenario for one tribunal to decide another tribunal’s jurisdiction, but it is particularly concerning here because the Treaty Tribunal has twice denied the very same injunction request that the Majority today grants. In other words, the Majority’s Order can be viewed as *overruling* the Treaty Tribunal’s prior decisions on how the parties before it should or should not proceed.

57. Recognizing this concern, the Majority is quick to distance itself from it by asserting that “*this Tribunal has nothing to say about the PCA Tribunal’s jurisdiction under the Treaty.*”⁴³ However, the substance of what it does today is *precisely* that: to decide the jurisdiction of the Treaty Tribunal.

58. A simple example illustrates the point. If the Majority were only concerned with its own jurisdiction and not that of the Treaty Tribunal, then it would merely define the contours of its own jurisdiction (which is what we did in our Partial Award on Jurisdiction)—*without interfering with what PEL can argue before the Treaty Tribunal*. By

⁴² Procedural Order No. 14, 23 November 2022, ¶ 59.

⁴³ *Id.* at ¶ 85.

enjoining PEL from making certain arguments before the Treaty Tribunal, however, the Majority most certainly decides the scope of the Treaty Tribunal's jurisdiction.

59. See, by way of example, paragraph 85 of the Majority's Order. There, the Majority states that PEL's obligations under the arbitration agreement render this Contract Tribunal's jurisdiction exclusive and that, consequently, "*the dispute arising out of the MOI, even if one were to accept that that is a mere question of fact for the Respondent's claims under the Treaty, needs to be resolved exclusively in accordance with the terms of the MOI.*"⁴⁴ In other words, the Majority is stating that the Treaty Tribunal does not have jurisdiction to resolve these issues. Such a holding violates the most elementary principles of the doctrine of competence-competence. It is for the Treaty Tribunal, not this Contract Tribunal, to decide the scope of issues that it can decide.

60. To understand the range of jurisdictional findings the Majority has now prevented the Treaty Tribunal from making, one need only review the robust case law on this issue. The tribunal in *Crystallex v. Venezuela*, for example, concluded:

The fact that a contract may exist between the Parties and that issues relating to its performance or termination may play a role in the Parties' pleadings, does not per se entail that the Tribunal is faced with contract claims rather than treaty claims. *As is well-established in investment treaty jurisprudence, treaty and contract claims are distinct issues.*⁴⁵

61. Under the Majority's Order today, by contrast, the Treaty Tribunal will be deprived of what the *Crystallex* tribunal had the opportunity to do: to decide its own jurisdiction over contract-related arguments.

62. Other tribunals had the same opportunity:

- In *SGS v. Pakistan*, the tribunal found that it "*has no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT.*"⁴⁶

⁴⁴ *Id.*

⁴⁵ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 474 (citing *Vivendi*, Decision on Annulment, ¶¶ 95-96) (emphasis added).

⁴⁶ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Award on Jurisdiction, 6 August 2003, ¶ 162.

- The tribunal in *Joy Mining v. Egypt* concluded that “*even if for the sake of argument there was an investment in this case, the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction.*”⁴⁷
- In *Salini v. Jordan*, the tribunal found that it “[*did*] not have jurisdiction in respect of the contractual breaches and could entertain them only if the alleged breaches were simultaneously to constitute breaches of the treaty.”⁴⁸
- In *Impregilo v. Pakistan (II)*, the tribunal declined jurisdiction over the contractual claims, finding:

As a consequence, the Tribunal has declined to exercise jurisdiction over the Contract Claims presented by Impregilo. In contrast, under public international law (*i.e.* as will apply to an alleged breach of treaty), a State may be held responsible for the acts of local public authorities or public institutions under its authority. The different rules evidence the fact that the overlap or coincidence of treaty and contract claims does not mean that the exercise of determining each will also be the same.⁴⁹

- The tribunal in *Gemplus v. Mexico* recognized the limitations of its jurisdiction, holding that:

[D]isputes under the Concession Agreement are expressly submitted to the jurisdiction of another consensual forum and not this Tribunal; and this Tribunal’s jurisdiction in addressing the breaches of the two BITs alleged by the Claimants is limited to the terms of those BITs and international law, excluding Mexican law.⁵⁰

⁴⁷ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶ 82.

⁴⁸ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, ¶ 160.

⁴⁹ *Impregilo S.p.A. v. Islamic Republic of Pakistan (II)*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 262.

⁵⁰ *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, ¶ 6-22.

- In *Abaclat v. Argentina*, the tribunal clarified that it would have jurisdiction over treaty claims based on an alleged breach of contract if the State further breached its obligations under the treaty, observing:

It is in principle admitted that with respect to a BIT claim an arbitral tribunal has no jurisdiction where the claim at stake is a pure contract claim. *This is because a BIT is not meant to correct or replace contractual remedies, and in particular it is not meant to serve as a substitute to judicial or arbitral proceedings arising from contract claims.* Within the context of claims arising from a contractual relationship, the tribunal's jurisdiction in relation to BIT claims is in principle only given where, in addition to the alleged breach of contract, the Host State further breaches obligations it undertook under a relevant treaty. *Pure contract claims must be brought before the competent organ, which derives its jurisdiction from the contract, and such organ - be it a court or an arbitral tribunal - can and must hear the claim in its entirety and decide thereon based on the contract only.*⁵¹

- The tribunal in *Garanti Koza v. Turkmenistan* clearly set forth the inquiry as follows:

If, indeed, the Claimant's claims amounted merely to claims for breach of contract, the Tribunal would agree with the Respondent that such claims would *be beyond the jurisdiction of an ICSID tribunal and also that they would be subject to the forum-selection clause in the Contract.* If, on the other hand, as the Claimant argues, the Claimant's claims are for breaches of the BIT arising out of the Claimant's investment in Turkmenistan, this Tribunal has jurisdiction to hear them.⁵²

63. All of these tribunals were given the opportunity to decide their own jurisdiction over contract-related arguments. As the *Crystallex v. Venezuela* tribunal noted:

[I]t would of course not be sufficient for a claimant to simply label contract breaches as treaty breaches to avoid the jurisdictional hurdles present in a BIT. *The Tribunal's jurisdictional inquiry is a matter of objective determination, and the Tribunal would in case of pure "labeling" be at liberty and have the duty to re-characterize the alleged breaches.*⁵³

⁵¹ *Abaclat and others (formerly known as Giovanna a Becara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 316 (emphasis added).

⁵² *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 244 (emphasis added).

⁵³ *Crystallex*, ¶ 475 (emphasis added).

64. The Majority's Order, however, does the opposite. It removes from the Treaty Tribunal its autonomy to make an "*objective determination*" and decide for itself whether PEL's claims are contract breaches simply labeled as treaty breaches.
65. In short, it is not for this Contract Tribunal to issue an order on what PEL can and cannot put before the Treaty Tribunal and, in so doing, narrow the scope of the Treaty Tribunal's authority. As held by the tribunal in *BIVAC v. Paraguay*:

The fundamental basis of the treaty claim under Article 3(1), over which this Tribunal has jurisdiction, turns on the interpretation and application of that treaty provision and the alleged conduct of Paraguay (as '*puissance publique*'), and not on the interpretation and application of the Contract as such (*although the Contract will necessarily be part of the overall factual and legal matrix which must be considered*). In this regard, the Tribunal notes that the interpretation of Article 3(1) of the BIT is not a matter over which the tribunals of the City of Asunción would be able to exercise jurisdiction under Article 9 of the Contract. The issue of fair and equitable treatment was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the courts of Asunción. The treaty issue is therefore not one for that forum, and there can be no question of an independent or self-standing treaty claim over which the Tribunal has jurisdiction being inadmissible by reason of the choice of forum for the resolution of a dispute under the Contract.⁵⁴

66. The *BIVAC* tribunal held that whether a claim based on a contract may touch upon a treaty claim is "*not a matter over which the [contract tribunal] would be able to exercise jurisdiction under [the contract]*."⁵⁵ In essence, the Majority has issued an Order that is "*not one for that forum*".

D. Investment treaty jurisprudence has widely rejected the idea that a contract needs to be first interpreted by the contractual forum

67. The Majority's Order today prevents the Treaty Tribunal from hearing PEL's contractual arguments before we issue our final award. As noted above, this decision deprives the Treaty Tribunal of its competence-competence. No contract-based tribunal has ever issued such an order.

⁵⁴ *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012, ¶ 212 (emphasis added).

⁵⁵ *Id.*

68. In fact, investment treaty jurisprudence has widely rejected the idea underlying the Majority's Order—that a contract needs to be first interpreted by the contractual forum—even *when that approach was taken by a treaty tribunal deciding on its own competence*. In *SGS v. Philippines*, the tribunal established under the Switzerland-Philippines BIT stayed *its own action* (which, unlike the Majority here, the tribunal clearly had the power to do) so that the judicial forum in the parties' contract⁵⁶ could interpret the contract first, while still allowing itself the ability to consider the contractual arguments afterward (which, too, is different than the Majority's Order today).
69. In response to that far less aggressive approach, the international arbitration community largely renounced *SGS v. Philippines*. In *Nissan Motor v. India*, the tribunal stated:

The Tribunal accepts that some tribunals have been uncomfortable with the potential consequences of permitting investors to prosecute umbrella clause claims without first pursuing resolution of complaints through domestic law remedies provided in the underlying contract. Postulating that the Contracting States could not have intended such a result, some tribunals have tried to limit the consequences through application of the doctrine of admissibility. This has led some tribunals to stay international proceedings to allow local remedies to be pursued first, while others have dismissed treaty claims outright as prematurely filed, while leaving open the possibility of an investor reverting to international arbitration following domestic proceedings. *However, this Tribunal does not see it as its role as delineating a proper sequence for proceedings in two potential venues, each of which has a legitimately designated basis of jurisdiction over a type of dispute (i.e., local arbitration of contract claims under the 2008 MoU, international arbitration of umbrella clause claims under the CEPA). While it is possible that these two overlapping sources of jurisdiction could result in parallel proceedings interpreting contractual obligations, nothing in the CEPA forbids this possibility. It certainly does not require arbitral tribunals with jurisdiction over treaty claims to stay their hand in circumstances where there is no parallel proceeding on the horizon, in order to force an investor to pursue potential contract remedies rather than treaty ones.*⁵⁷

70. Similarly, the tribunal in *El Paso Energy v. Argentina* observed:

⁵⁶ The Regional Trial Courts of Makati or Manila.

⁵⁷ *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No 2017-37, Decision on Jurisdiction, 29 April 2019, ¶ 280 (emphasis added).

[T]he Tribunal also wishes to point to the fact that quite contradictory conclusions have been drawn by the Tribunal in *SGS v. Philippines*: among other things, the Tribunal stated that, although the umbrella clause transforms the contract claims into treaty claims, first “it does not convert the issue of the extent or content of such obligations into an issue of international law” (Decision, § 128, original emphasis), which means that the “contract claims/treaty claims” should be assessed according to the national law of the contract and not the treaty standards, and, second, that the umbrella clause does not “override specific and exclusive dispute settlement arrangements made in the investment contract itself” (Decision, § 134), which explains that the Tribunal has suspended its proceedings until the “contract claims/treaty claims would be decided by the national courts in accordance with the dispute settlement provisions of the contract”, stating that “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” (Decision, § 155). *In other words, the Tribunal asserts that a treaty claim should not be analysed according to treaty standards, which seems quite strange, and that it has jurisdiction over the contract claims/treaty claims, but at the same time that it does not really have such jurisdiction – until the contract claims are decided.* This controversy has been going on ever since these two contradictory decisions [*SGS v. Pakistan* and *SGS v. Philippines*].⁵⁸

71. Likewise, the tribunal in *Bureau Veritas v. Paraguay* concluded:

The [*SGS v. Philippines*] tribunal did not, however, dismiss the claim. Instead, it decided to stay the proceedings “pending determination of the amount payable, either by agreement between the parties or by the Philippine courts in accordance with [the contract]”. The tribunal’s true rationale for that decision is not entirely clear from the text.

[. . .]

The logic of this approach is not immediately apparent to us: if the parties to the contract have agreed on an exclusive jurisdiction to resolve a dispute under the contract, whether it relates to the amount that is to be paid or the justifications raised by one party for non payment, then it is exclusively for that forum to resolve all aspects of the dispute under the exclusive jurisdiction clause. If any agreement between the parties on the amounts outstanding under the contract does not resolve the contractual dispute, then exclusive jurisdiction continues to vest in the agreed forum and the ICSID tribunal is

⁵⁸ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, ¶ 76 (emphasis added).

barred from exercising jurisdiction. *Whatever facts may have pertained in the case of SGS v Philippines, or whatever other considerations may have given rise to the Tribunal's decision to stay the proceedings rather than dismiss the claim, it is not immediately apparent to us the nature or extent of argument that was addressed to this point by the parties, or what truly motivated the decision.*⁵⁹

72. With equal force, the tribunal in *Belenergia v. Italy* determined:⁶⁰

Italy relies on the approach taken in *SGS v. Philippines* and *BIVAC v. Paraguay* in support of its position that Belenergia's umbrella clause claims are contract claims subject to the jurisdiction of Rome courts.

[. . .]

Second, even if the Tribunal were to consider these case decisions relevant (*quod non*), it cannot agree with the approach taken in *SGS v. Philippines*. According to the *SGS v. Philippines* tribunal, the claims for money founded on the contract between SGS and the Philippines were inadmissible because they were contract claims subject to the choice of forum clause under the relevant contract. *This approach would automatically deprive the umbrella clause under Article 10(1) ECT of its meaning because each and every contract, even one without a choice of forum clause, would inherently be subject to a State court based on default rules on conflicts of jurisdiction.*

Rather, the Tribunal considers the *SGS v. Paraguay* approach on the source of the umbrella claim being the treaty even if it requires a showing of contractual breach. According to the *SGS v. Paraguay* tribunal, declining to hear the umbrella claim by virtue of a contractual forum selection clause “*would place the Tribunal at risk of failing to carry out its mandate under the Treaty and the ICSID Convention.*”

73. Other tribunals are in accord. In *Bayindir v. Pakistan*, the tribunal held:

In the Tribunal's view its jurisdiction under the BIT allows it – if this should prove necessary – to resolve any underlying contract issue as a preliminary question. Exactly like the arbitral tribunal sitting in Pakistan, this Tribunal should proceed with the merits of the case. This is an inevitable consequence of the principle of the distinct nature of treaty and contract claims. The Tribunal is aware

⁵⁹ *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. AR/07/9, Decision on Jurisdiction, 29 May 2009, ¶ 154 (emphasis added).

⁶⁰ *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, ¶¶ 353-356 (emphasis added).

that this system implies an intrinsic risk of contradictory decisions or double recovery.

[. . .]

The Tribunal is sympathetic towards the efforts of the tribunal in *SGS v. Philippines* “to give effect to the parties’ contracts while respecting the general language of BIT dispute settlement provisions”. However, to do so raises several practical difficulties. In particular, it may be very difficult to decide, at this preliminary stage, which contractual issues (if any) will have to be addressed by the Tribunal on the merits.⁶¹

74. Other leaders in the field are similarly critical of *SGS v. Philippines*. The late Emmanuel Gaillard, a titan in the field of international arbitration, stated:

[T]o the extent this solution recognizes, “in principle,” an investor’s right to choose an international arbitral tribunal for the settlement of its investment disputes and, in the same breath, requires that the selected tribunal stay the proceedings on the basis of an exclusive forum selection clause contained in the investment contract, *it results in the BIT tribunal having jurisdiction over an empty shell and depriving the BIT dispute resolution of any meaning. As such, the SGS v. Philippines decision is hardly satisfactory.*⁶²

75. Jarrod Wong likewise agrees:

While the Tribunal in *SGS v. Philippines* determined that it had jurisdiction over SGS’s contractual dispute by virtue of the umbrella clause, it nevertheless found it inappropriate to exercise such jurisdiction in view of the exclusive forum selection clause in the contract. *But this is to take away with one hand what was given with the other, leaving investors no less empty-handed than they were under SGS v. Pakistan. Indeed, as discussed below, the Tribunal’s approach in SGS v. Philippines is not only untenable in practice for effectively rendering the umbrella clause a nullity and creating other practical difficulties, it is also misguided in theory for failing to comprehend the relationship between breaches of contract and treaty violations under an umbrella clause.* The Tribunal also failed to apply the correct principles of contractual interpretation in resolving the conflict between umbrella clauses and forum selection clauses in contracts. The better interpretation of the

⁶¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 270-272.

⁶² E. Gaillard, *Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered*, in T. Weiler (ed.), *International investment law and arbitration: leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, London (2005), p. 334 (emphasis added).

umbrella clause allows for its application notwithstanding contractual forum selection clauses.⁶³

76. The leading author of the ICSID Convention commentary, Christoph Schreuer, together with Professor Rudolf Dolzer, share the same view:

In *SGS v Philippines*, the Tribunal, in its Decision on Jurisdiction, also ruled that in the presence of an umbrella clause in the Philippines-Swiss BIT, a violation of an investment agreement will lead to a violation of the investment treaty . . . *However, SGS v Philippines did not carry this approach to its logical conclusion.* Instead the Tribunal assumed that, due to the existence of a forum selection clause in favour of the courts of the host state, the Philippine courts were to rule on the obligations contained in the investment contract.⁶⁴

77. As these quotes demonstrate, the international arbitration community—tribunals, commentators, and academics alike—has rejected a far less aggressive approach than the one adopted by the Majority today.

E. Mozambique also fails under the general requirements for interim measures

78. Finally, even putting aside the problems with the Majority’s analysis of *Vivendi* and anti-arbitration injunctions, Mozambique’s injunction application still should fail under the standard requirements for interim measures.

79. It is well settled that interim measures are extraordinary measures not to be granted lightly, as stated in a number of arbitral awards rendered under various arbitration rules.⁶⁵ Even under the discretion granted to the tribunal under the ICC Arbitration Rules for general interim measures, the tribunal has to deem those measures (i) urgent and (ii) necessary (iii) to avoid “irreparable” harm—and not only convenient or appropriate.

⁶³ J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes* (2006), 14 Geo. Mason L. Rev. 137, 167 (emphasis added).

⁶⁴ R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd ed., Oxford University Press (2012), p. 170 (emphasis added).

⁶⁵ See, e.g., *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No ARB/97/7, Procedural Order No. 2, 28 October 1999.

80. First, I fail to see how Mozambique’s request is “urgent”. As shown above, Mozambique has repeatedly filed the same application with both tribunals to enjoin PEL. Mozambique made this request in its very first pleading in this proceeding on 5 May 2020—two-and-a-half years ago—and continued making it both before the Treaty Tribunal and to this Contract Tribunal thereafter. In all of these prior attempts, both tribunals either rejected the application or ignored it. Why is it now suddenly “urgent”? The Majority offers no explanation. That no material change in circumstances has occurred since Mozambique’s last application for an injunction proves that no urgency exists.
81. Second, why is the Majority’s order “necessary”? Why not let the Treaty Tribunal decide the scope of its own jurisdiction, without another tribunal interfering with it? The answer appears to be that the Majority is concerned that the Treaty Tribunal may interpret certain contract-related issues differently than we do. But that is not a reason to exercise the extraordinary power of enjoining another tribunal constituted under a different arbitration agreement.
82. Nor has Mozambique ever argued in its pleadings that the Treaty Tribunal’s interpretation of the contract would be binding on this Tribunal. *Res judicata*—*i.e.*, claim preclusion—would not apply, as the claim before the Treaty Tribunal (a breach of the treaty) is a different claim than the one before us (a breach of the contract). The only related doctrine that could apply is issue estoppel (under the English legal system) or collateral estoppel (under the U.S. legal system). But it is not at all clear that notions of issue/collateral estoppel would apply between different legal systems—public international law, on the one hand, and commercial domestic arbitration governed by Mozambican law, on the other hand.
83. Third, where is the irreparable harm? For nearly two decades, tribunals have routinely held that a treaty tribunal can base its decision on a contract insofar as necessary to determine whether there has been a breach of the treaty. Given that, it hardly seems that “irreparable harm” will occur if we simply let the Treaty Tribunal decide its own jurisdiction.
84. Finally, the Majority’s Order today is entirely disproportionate to the perceived “harm” that it purports to prevent. On one side of the scale, the Majority’s Order deprives PEL from its access to justice under public international law and the BIT, and it deprives the

Treaty Tribunal of its competence-competence. On the other side of the scale, the Majority issues its Order—one that, to the best of my knowledge, is unprecedented—to ensure that a party only makes contractual arguments before it and not another tribunal, which the other tribunal is perfectly qualified to decide. To my mind, the conclusion is obvious: the harm caused by the Majority’s Order is entirely disproportionate to what it seeks to prevent.

V. AN ANTI-ARBITRATION INJUNCTION CREATES TANGIBLE AND FORESEEABLE ENFORCEMENT ISSUES

85. I make one final, practical point: enforcement. As I have already noted, the Treaty Tribunal has already denied—twice—the very application the Majority now grants. And it has done so in words echoing *Vivendi*: “[t]his is because both the ICC Tribunal and this Tribunal concur that the causes of action and instruments of consent are different in each of the proceedings.” In other words, the Treaty Tribunal recognizes the fundamental distinction that *Vivendi* and its progeny have made between contract claims and treaty claims over the past two decades.

86. That being the case, what happens if the Treaty Tribunal does not accept the Majority’s Order and allows PEL to present its contractual arguments? If the Treaty Tribunal directs the Parties to engage on the very issues the Majority now seeks to enjoin, what are the Parties to do? If the Parties do engage on the issues at the Treaty Tribunal’s direction, what is our Contract Tribunal to do? And if PEL wants to challenge this Contract Tribunal’s decision on the scope of the Treaty Tribunal’s jurisdiction, how can it do so before a competent court in a setting-aside action or in defense of an enforcement action?

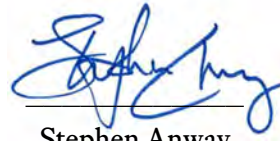
87. It seems to me that the Majority has created a whole host of problems where there should have been none in the first place.

VI. CONCLUSION

88. Today the Majority silences a party before a different, public international law tribunal empowered under a different arbitration agreement. In effect, the Majority’s Order deprives that public international tribunal of even hearing that party’s submissions. That is a breathtaking proposition.

89. The silencing of a party—particularly in a proceeding over which the tribunal issuing the order has no jurisdiction—should concern not only every stakeholder in the ISDS system, but every party concerned with the rule of law. One tribunal’s attempt to silence a party before another tribunal, when the claims are brought under different legal instruments, inexorably leads to due process concerns.
90. It is not for Mozambique or for the Majority to determine what arguments PEL can and cannot raise before the Treaty Tribunal. For all of the reasons discussed above, I conclude that this Contract Tribunal should simply decide the claims before us, and the Treaty Tribunal should simply decide the claims before it—without interfering with each other’s arbitral proceedings.
91. I dissent.

Dated this 24th day of November 2022.



Stephen Anway

Arbitrator

Annex IV

ICC ARBITRATION RULES IN FORCE AS FROM 1 MARCH 2017

REPUBLIC OF MOZAMBIQUE

— and —

**MOZAMBIQUE MINISTRY OF TRANSPORT AND COMMUNICATIONS
(TOGETHER, “MOZAMBIQUE”)**

(Mozambique)

Claimants

— v —

PATEL ENGINEERING LTD.

(“PEL”)

(India)

Respondent

(ICC Case No. 25334/JPA)

**ADDITIONAL DISSENTING OPINION OF
ARBITRATOR STEPHEN ANWAY**

29 November 2022

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I. INTRODUCTION

1. On 24 November 2022, this Contract Tribunal¹ issued Procedural Order No. 14 (the “Order”) and my Dissenting Opinion. The *dispositif* of the Order stated:

The Respondent is enjoined from pursuing the determination of any matters in dispute between the Parties arising out of the MOI in any other forum, even if only accessorially for the purpose of the adjudication of Treaty Claims.

2. As the Majority explained, its Order was based on the proposition that, by signing a contract with Mozambique containing an ICC arbitration clause, PEL waived its right to raise any contractual arguments before the Treaty Tribunal under the arbitration provision in the BIT, even insofar as relevant to establishing a breach of the BIT.² Nothing in the Majority’s Order stated that its injunction had a temporal limitation on it and would apply only until this Contract Tribunal decides the contract-related issues (all emphasis added):

- ¶ 67: “*There is therefore no place to doubt that it was, and still is, the understanding of the Tribunal that the **Respondent did, and still does, have the obligation to refrain from proceedings before the PCA Tribunal, and/or any other court or tribunal, insofar as they concern ‘any dispute arising out of this memorandum’.***”
- ¶ 83: “*At least from the contractual perspective, but probably also from a treaty-based perspective (see below), the Respondent does not have ‘a right to formulate its own claims in the way it sought fit’. **It waived that right by accepting the Arbitration Agreement, and with it, the obligation not to submit any dispute arising out of the MOI to any other forum than ICC arbitration.***”
- ¶ 84: “*That does not mean, of course, that the Respondent would be deprived from bringing any of its Treaty claims in the UNCITRAL Arbitration proceedings, as this Tribunal recognised in its Partial Award on Jurisdiction. The Respondent is free to do so, but – at least from this Tribunal’s contractual perspective – **only to the degree that the bringing of such claims does not avoid and undermine the jurisdiction that the Parties chose in their Arbitration Agreement in the MOI.***”

¹ Capitalized terms used in this Additional Dissenting Opinion have the meaning ascribed to them in my Dissenting Opinion of 24 November 2022 (the “Dissenting Opinion”).

² Majority’s Order, ¶ 66.

- ¶ 84: “*To the degree that the resolution of the Treaty claims depends on the adjudication of a dispute arising out of the MOI and properly before an ICC Tribunal with (exclusive) jurisdiction over ‘[a]ny dispute arising out of this memorandum’, this Tribunal needs to insist on deciding these issues exclusively.*”
- ¶ 94: “*This Tribunal’s jurisdiction is exclusive with respect to all matters in dispute arising out of the MOI; and by agreeing to the Arbitration Agreement, the Respondent has accepted the negative obligation not to seek adjudication of ‘any dispute arising out of this memorandum’ anywhere else but in ICC arbitration.*”
- ¶ 95: “*As explained before, the Respondent is not ‘entitled to’ seek determination of matters in disputes arising out of the MOI in another forum than the one it has itself accepted as exclusive.*”

3. I wrote my Dissenting Opinion accordingly.

II. THE MAJORITY’S NEW *DISPOSITIF* IS A MATERIAL CHANGE TO ITS ORDER

4. One day after issuing its Order, the Majority sent to the Parties a document entitled “Corrigendum”, in which the Majority stated that it needed to “correct[]”³ the *dispositif* in its Order (the “New *Dispositif*”). The New *Dispositif* states (new language in italics):

The Respondent is enjoined from pursuing the determination of any matters in dispute between the Parties arising out of the MOI in any other forum, even if only accessorially for the purpose of the adjudication of Treaty Claims, *until this Arbitral Tribunal has taken its decision on those matters.*

5. Although I am unaware of the reasons that led to this change, I do not consider this to be a mere correction. Unlike the Majority’s Order and original *dispositif*, the New *Dispositif* imposes a time limitation on the Majority’s injunction.

III. THE NEW *DISPOSITIF* IS DIFFICULT TO RECONCILE WITH THE LANGUAGE OF THE ORDER

6. I find the Majority’s New *Dispositif* difficult to reconcile with the reasoning in the Order. In the body of the Order, the Majority categorically determined that PEL should be enjoined from making contractual arguments before the Treaty Tribunal because it

³ Corrigendum, 25 November 2022, p. 2.

waived its right to do so by signing a contract including an ICC provision.⁴ The Majority never qualified that determination by stating that PEL’s alleged waiver was somehow partial—*i.e.*, that PEL only waived the right to raise contractual arguments before the Treaty Tribunal *unless and until* an ICC tribunal first decides those issues.

7. For example, the body of the Majority’s Order repeatedly states that the present Contract Tribunal has the “*exclusive*” jurisdiction to resolve contract-related matters. That conclusion seems incompatible with the notion that the Treaty Tribunal can decide contract-related issues, so long as it is *after* we do so (emphasis in all added):

- ¶ 68: “*Not only is there nothing in the unequivocal language used in the MOI to suggest that the jurisdiction conferred by the Parties to this Tribunal would in any way be concurrent with that of any other court or tribunal, but this Tribunal has clarified in its Partial Award on Jurisdiction that it understands its jurisdiction to be exclusive.*”
- ¶ 71: “*Despite the clear invitation ‘to coordinate, and use, the available jurisdictions’ in the light of the allocation of jurisdiction decided in the Partial Award, the Respondent has done nothing of that sort to respect its obligation under the MOI. The above passage was not, as purported by the Respondent, a form of endorsement of some concurrent jurisdiction of the two tribunals in tandem for ‘any dispute arising out of this memorandum’. Any such dispute ‘shall be referred to arbitration’ under the ICC Rules and is within the exclusive jurisdiction of this Arbitral Tribunal.*”
- ¶ 81: “*The problem is, however, that this Tribunal cannot carry out its jurisdictional mandate in full if its exclusive jurisdiction to decide any dispute arising out of MOI with binding effect between the Parties is avoided and reduced to virtually zero by the Respondent bringing the same matters in other proceedings.*”
- ¶ 84: “*To the degree that the resolution of the Treaty claims depends on the adjudication of a dispute arising out of the MOI and properly before an ICC Tribunal with (exclusive) jurisdiction over [a]ny dispute arising out of this memorandum’, this Tribunal needs to insist on deciding these issues exclusively.*”
- ¶ 94: “*This Tribunal’s jurisdiction is exclusive with respect to all matters in dispute arising out of the MOI; and by agreeing to the Arbitration Agreement, the Respondent has accepted the negative obligation not to seek adjudication of ‘any dispute arising out of this memorandum’ anywhere else but in ICC arbitration.*”

⁴ Order, ¶¶ 83-86, 89, 94, 100.

- ¶ 95: “*As explained before, the Respondent is not ‘entitled to’ seek determination of matters in disputes arising out of the MOI in another forum than the one that it has itself accepted as exclusive.*”

8. The only way to reconcile the Majority’s quotations above with its New *Dispositif* is if the Majority’s decisions on the contract-related issues are *binding* on the Treaty Tribunal. As explained in my Dissenting Opinion, however, Mozambique did not even attempt to argue in its pleadings—much less establish—that the Majority’s findings on the contract-related issues would be binding on the Treaty Tribunal.⁵ And, indeed, the Majority’s Order draws no such conclusion.

IV. THE OBJECTIONS IN MY DISSENTING OPINION STILL STAND

9. Notwithstanding the disconnect between the Majority’s Order and its New *Dispositif*, the New *Dispositif* does not remedy any of the concerns that I expressed in my Dissenting Opinion. As I explained therein, the Majority’s Order is unprecedented in two respects: (i) it rejects 20 years of consistent jurisprudence established by *Vivendi*⁶ and its progeny,⁷ whereby investors are entitled to allege a violation of contract before a treaty tribunal insofar as relevant to establishing a breach of the BIT;⁸ and (ii) it functionally imposes that unprecedented conclusion on a public international law tribunal, seized under a different arbitration agreement, through an unprecedented anti-arbitration injunction. These concerns, as well as the others expressed in my Dissenting Opinion, apply with equal force to the New *Dispositif*. Whether or not the Majority imposes a time limitation on its injunction, the Majority’s Order still rests on the two foregoing incorrect and unprecedented propositions.

10. One final point bears mention. I devoted an entire section in my Dissenting Opinion to show that investment treaty jurisprudence has widely rejected the idea that a contractual forum must first resolve contract-related issues before an investment treaty tribunal does. In that regard, I noted that the tribunal in *SGS v. Philippines*, which adopted this proposition in principle,⁹ is one of the most heavily-criticized decisions in

⁵ Dissenting Opinion, ¶¶ 38-43.

⁶ *Id.* at ¶¶ 3, 22-34.

⁷ *Id.* at ¶¶ 35-36.

⁸ *Id.* at ¶¶ 33, 83.

⁹ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, ¶ 175.

investment treaty jurisprudence.¹⁰ I did so not because I understood the Majority’s Order to have imposed an injunction only until our Contract Tribunal decides the contract-related issues (in fact, I did *not* have that understanding, because nothing in the Majority’s Order stated so). Instead, I devoted an entire section in my Dissenting Opinion to *SGS v. Philippines* to show that “*the international arbitration community—tribunals, commentators, and academics alike—has rejected a far less aggressive approach than the one adopted by the Majority today.*”¹¹

11. Accordingly, I wish to emphasize that what the Majority does in its New *Dispositif* still is markedly different from what the tribunal did in *SGS v. Philippines*. The tribunal in *SGS v. Philippines* was a public international law tribunal, and it stayed *its own action* to allow the contract forum to decide the contract-related issues first. Although that decision remains one of the most criticized awards in investment treaty jurisprudence, the tribunal in *SGS v. Philippines* still did not come close to doing what the Majority did in its Order and does in its New *Dispositif*: to enjoin a different, public international law tribunal whose jurisdiction is based on a different instrument of consent.

V. CONCLUSION

12. My Dissenting Opinion stands.

Dated this 29th day of November 2022.



Stephen Anway

Arbitrator

¹⁰ Dissenting Opinion, Section IV.D.

¹¹ *Id.* at ¶ 77.