

PCA CASE NO. 2020-21

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

AND

**PURSUANT TO THE AGREEMENT BETWEEN THE GOVERNMENT OF THE
REPUBLIC OF INDIA AND THE REPUBLIC OF MOZAMBIQUE FOR THE
RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENT**

BETWEEN

PATEL ENGINEERING LTD (India)

Claimant

AND

THE REPUBLIC OF MOZAMBIQUE

Respondent

**CLAIMANT'S RESPONSE TO RESPONDENT'S APPLICATION
FOR A STAY OF THE PROCEEDINGS**

15 October 2021

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I. INTRODUCTION

1. Pursuant to paragraph 4 of Tribunal's correspondence A-30, Patel Engineering Limited ("**PEL**" or "**Claimant**") submits this response (the "**Response**") to the Application for a Stay of the Proceedings of the Republic of Mozambique ("**Mozambique**" or "**Respondent**") dated 1 October 2021 (the "**Application**").
2. Respondent and its instrumentality the Ministry of Transport and Communication (the "**MTC**") commenced the parallel ICC arbitration (the "**ICC Arbitration**") to undermine this arbitration (the "**Arbitration**"). The timing of Respondent's filing of the ICC Arbitration, its refusal to agree to any form of transparency or consistency between the two sets of proceedings, and its refusal to consolidate the parallel proceedings demonstrate that its commencement of the ICC Arbitration was a tactical manoeuvre aimed at undermining this Arbitration, and maximising the prospect of conflicting awards to generate fodder for Mozambique's future challenges to enforcement, most likely in Maputo. If there were any residual doubt as to Respondent's intentions behind the ICC Arbitration, those were lifted with the filing of the Statement of Claim, supporting documents and evidence in the ICC Arbitration (the "**ICC SOC**"). Not only did the ICC SOC read as a *verbatim* copy paste of the Statement of Defense in this Arbitration, but Respondent merely sought declaratory relief in the ICC Arbitration (apart from a hopeless claim for punitive damages arising out of alleged defamation, where punitive damages do not exist under Mozambican law).
3. Respondent's obstructive tactics have partially succeeded. It successfully opposed PEL's request to stay the ICC Arbitration ("**PEL's ICC Stay Application**"), and that tribunal (the "**ICC Tribunal**") is now *sua sponte* deciding whether it has jurisdiction over the "Treaty Claims" Respondent and the MTC submitted to it under the Mozambique-India Bilateral Investment Treaty (the "**BIT**" or the "**Treaty**"). Respondent has considerably slowed this Arbitration down, including by asking for a 42-day extension to file its Statement of Defense, while seeking to have the ICC Arbitration proceed as quickly as possible.
4. The Application is Respondent's latest attempt to delay and derail this Arbitration. Such guerrilla tactics should not be rewarded, particularly in circumstances where there is no justification for a stay of this Arbitration, either as matter of law or fact.

5. Respondent's two core arguments in support of its Application are untenable. Respondent's first core argument is that this Arbitration should be stayed to avoid the risk of inconsistent awards and preserve costs efficiencies. Yet, Respondent alone deliberately created this situation by filing the ICC Arbitration and effectively adducing a *verbatim* copy of its defence before this Tribunal in the ICC Arbitration.
6. Respondent's second core argument is that this Tribunal should wait until the ICC Tribunal has ruled on the "*local contractual law dispute*" on which the jurisdiction of this Tribunal under the Treaty and PEL's claim on the merits are premised. However, Respondent never defines the "*local contractual law dispute*" before the ICC Tribunal because there is no genuine contractual dispute before the ICC Tribunal. Rather, Respondent's "*claim*" before the ICC Tribunal is in fact its defence in this Arbitration.
7. What is more, this Tribunal is not bound by any finding of the ICC Tribunal. The two tribunals have been appointed under different instruments and the causes of action before each tribunal are different. As explained in PEL's Reply on the Merits and Response to Objections to Jurisdiction (the "**Reply**"), the distinction between contract and treaty claims is a well-established principle of investment treaty law and Respondent has not quoted a single authority to the contrary.¹
8. Yet, to give the wrong impression that this Tribunal must wait for the ICC Tribunal to make its decision, Respondent creates confusion between the alleged jurisdiction of the ICC Tribunal over such "*local contractual law dispute*" with the applicable law to be applied by the respective tribunals. While it is true that this Tribunal may be required to explore certain issues of Mozambican law for the purposes of establishing its jurisdiction under the Treaty or of assessing the merits of PEL's case under the BIT, it is not required to defer to the ICC Tribunal to determine such issues. The very authorities quoted by Respondent demonstrate that investment treaty tribunals routinely make findings under relevant domestic law as part of the factual predicate to determining an investor's international law claims. Tribunals frequently do so without deferring to any other adjudicatory body, be it domestic or international. Critically, any findings the ICC Tribunal ultimately might make will not bind this Tribunal and accordingly, this Tribunal should not stay these proceedings pending those

¹ Reply, paras. 630-633.

determinations. Rather, it should proceed with this Arbitration and make its own determinations regarding PEL's claims and Respondent's defences, based on the information before it.

9. Finally, Respondent will not suffer prejudice if this Tribunal rejects the Application. By contrast, should the Application be successful, PEL's affirmative Treaty claims, which are only before this Tribunal, would be stopped in their tracks. As Mozambique itself acknowledged when contesting PEL's ICC Stay Application, "*justice delayed is justice denied.*"²

II. BACKGROUND TO RESPONDENT'S APPLICATION

A. The ICC Arbitration Was Filed to Undermine and Derail this Arbitration, and to Manufacture a Basis for Challenging any Award Issued by this Tribunal

10. PEL explained in its Statement of Claim and Reply that Mozambique commenced the parallel ICC Arbitration as a tactic aimed at undermining this Arbitration and at preparing a potential challenge of this Tribunal's final award, should it not be to Respondent's liking.³
11. Mozambique attempts to re-write history in its Application. It claims PEL acted unreasonably⁴ and "*hurriedly served the UNCITRAL Notice of Arbitration.*"⁵ It says PEL unreasonably rejected Mozambique's standstill proposal and sought to "*take advantage of the start of the coronavirus pandemic.*"⁶ Mozambique purports to have initiated the parallel ICC Arbitration to "*ensure the parties' dispute arising out of the MOI was resolved quickly and efficiently.*"⁷
12. This fiction is contradicted by the factual background to the dispute, as supported by the documentary evidence.
13. On 25 June 2018, PEL notified Mozambique of an investment dispute under the BIT and engaged in the settlement negotiations in good faith. PEL met with Government's

² **Exhibit C-336**, Mozambique's Rebuttal to PEL's ICC Stay Application, dated 23 July 2021, para. 10.

³ Reply, paras. 27-30; PEL's Statement of Claim, paras. 34-49.

⁴ Application, paras. 14 and 15.

⁵ *Id.* at para. 16.

⁶ *Id.*

⁷ *Id.* at para. 11.

delegation in Maputo and provided the Government with all documents and information it requested, while Mozambique drew out the negotiations at every turn. Having made little progress with the Government over the course of nearly two years, on 20 March 2020, PEL commenced this Arbitration. This was not a sinister tactic as suggested by Respondent. PEL's filing was made a day before the Treaty was set to expire, and PEL wished to avoid any jurisdictional objections (and associated costs) that could coincide with filing after that date.

14. By contrast, Respondent's timing in commencing the ICC Arbitration, on the day Respondent was due to file its response to PEL's Notice of Arbitration in this Arbitration, was no coincidence. Importantly, not once in nearly two years of negotiations pursuant to Article 9(1) of the Treaty, had Mozambique mentioned that the parties' dispute should be resolved by ICC Arbitration.
15. Mozambique's commencement of parallel proceedings was the first step in a deliberate and relentless strategy to undermine the UNCITRAL Arbitration, and to manufacture a means to set aside or challenge this Tribunal's ultimate award. Mozambique's strategy has included its refusal of all reasonable consolidation proposals, including that the two arbitrations be consolidated under either set of arbitration rules and that the consolidated arbitration be seated in virtually any suitable jurisdiction outside of Mozambique.⁸
16. Mozambique's strategy continued with its active refusal of full transparency between the two arbitrations, thereby ensuring that its parallel arbitration could create maximum potential disruption of this Arbitration. It refused to agree to the application of any transparency rules between the two arbitrations, while never explaining which confidence it was seeking to protect or for what purpose.⁹
17. Respondent further objected to the confirmation of Professor Tawil as PEL's arbitrator in the ICC Arbitration, on the very basis that he was PEL's appointee in this Arbitration,

⁸ PEL's Statement of Claim, paras. 42-45; **Exhibit C-182**, Email from Addleshaw Goddard to Dorsey & Whitney, dated 27 July 2020.

⁹ PEL's Statement of Claim, paras. 46-49.

thereby depriving PEL of a key means of ensuring consistency between the parallel proceedings.¹⁰

18. Mozambique’s strategy has likewise included inaccurately presenting facts before both tribunals to accommodate its own narrative of the dispute. For example, during the recent hearing on the ICC Tribunal’s jurisdiction over the “Treaty Claims”, Counsel for Mozambique stated that Mozambique commenced the ICC Arbitration because this Tribunal rejected its motion to bifurcate the proceedings:

“We made a motion to bifurcate jurisdiction in front of the PCA tribunal and said you need to decide this now because, because we have two different arbitrations going on and a dispute. So I went first in deference to the PCA tribunal, to that PCA Tribunal, and said you tell me whether you think you have jurisdiction. Patel said ‘no’, you cannot answer that question right now, you have to answer it with the merits, sometime in April 2022. Because they refused then I came to you.”¹¹

19. Mozambique’s statement that it filed the ICC Arbitration based on this Tribunal’s refusal to bifurcate is incorrect and misleading. The Tribunal issued its bifurcation decision on 14 December 2020, almost seven months *after* Mozambique commenced the ICC Arbitration on 20 May 2020, in direct response to PEL’s filing of this Arbitration.

B. Mozambique’s Alleged “local law contractual claim” Before the ICC Tribunal Is Not Genuine

20. Mozambique repeats time and again in the Application that the ICC Tribunal must determine the “local law contractual claim”, “local contractual law dispute”, “local law contractual dispute”. It uses these expressions 42 times in the Application, and its insistence that such amorphous “claims” be resolved as a matter of priority forms the core justification for its Application.
21. Yet, Respondent never defines the domestic contractual dispute before the ICC Tribunal because there is no *genuine* contractual dispute before it. Rather, Respondent has merely brought its defence in this Arbitration before the ICC Tribunal.

¹⁰ **Exhibit C-337**, Letter from Juan Basombrio of Dorsey & Whitney LLP to the ICC Secretariat regarding the objections to appointment of Professor Tawil to the ICC Tribunal, dated 7 August 2020.

¹¹ Juan Basombrio, Virtual Hearing on the ICC Tribunal’s Jurisdiction over “Treaty Claims”, 7 October 2021, at minute 01:21:38.

22. The ICC SOC is nearly entirely plagiarised from its Statement of Defense in this Arbitration.¹² Exhibits, legal authorities, expert reports, and witness statements submitted by Mozambique in the ICC Arbitration are nearly identical in the two arbitrations. Mozambique’s ICC SOC reads as a response to PEL’s entire case in this Arbitration to such extent that Claimants even respond to PEL’s case and expert report on damages, although PEL does not claim any damages in the ICC Arbitration, and indeed, raises no affirmative Treaty claims in those proceedings.
23. While Mozambique and the MTC attempted to formulate their request for relief in the ICC SOC slightly differently from that in this Arbitration, the body of their ICC SOC lays bare the fact that the relief requested is essentially identical. By way of example, Mozambique asks the ICC Tribunal to find that this Tribunal lacks jurisdiction,¹³ that the MOI is not an “*investment*”,¹⁴ and that PEL is not an “*investor*”.¹⁵ Mozambique also requests the ICC Tribunal to decide PEL’s BIT claims for breach of the Fair and Equitable Standard,¹⁶ breach of the Most-Favoured Nation Clause,¹⁷ and expropriation on the merits¹⁸ — notwithstanding the fact that PEL never raised its affirmative Treaty claims in the ICC proceedings.
24. What is more, the ICC SOC merely seeks declaratory relief,¹⁹ a nominal USD 1 dollar, and punitive damages for defamation,²⁰ when punitive damages do not even exist under Mozambican law.
25. Respondent also repeats in the Application that the ICC Tribunal held that it has jurisdiction “*over the parties’ local law contractual dispute*”.²¹ However, it does not provide any reference to a decision of the ICC Tribunal. This is because the *ICC*

¹² Reply, para. 28; **Exhibit C-334**, Comparison of the UNCITRAL Jurisdictional Objections & Statement of Defense and the ICC Statement of Claim.

¹³ **Exhibit C-335**, Mozambique’s ICC Statement of Claim, dated 19 May 2021, paras. 179-232.

¹⁴ *Id.* at paras. 233-286.

¹⁵ *Id.* at paras. 293-307.

¹⁶ *Id.* at paras. 613-700.

¹⁷ *Id.* at paras. 701-740.

¹⁸ *Id.* at paras. 741-791.

¹⁹ **Exhibit C-335**, Mozambique’s ICC Statement of Claim, dated 19 May 2021, paras. 939.1-939.6, 939.8-939.11.

²⁰ *Id.* at para. 939.12.

²¹ Application, paras. 2, 5, 28, and 32.

Tribunal has never decided that it has jurisdiction over any part of the Parties' dispute, nor has it issued any decision on its jurisdiction.

26. Rather, the ICC Tribunal cited PEL's position that it does not dispute the ICC Tribunal's jurisdiction over Mozambique's contractual claims based on the *prima facie* valid arbitration clause in the MOI.²² The fact that PEL does not contest that the MOI contains a valid arbitration agreement, says nothing about PEL's views on the merits of the purported contractual claims arising out of the MOI. As noted, those claims are not genuine and, for a number of reasons, are destined to fail.

C. The Timetable in the ICC Arbitration Is Currently Suspended Pending a Decision by that Tribunal on Its Jurisdiction Over So-Called "Treaty-Claims"

27. On 10 June 2021, after Mozambique and the MTC filed their ICC SOC, PEL applied to stay the ICC Arbitration proceedings until a final award is made in this Arbitration.²³
28. PEL highlighted that its core concerns were (i) the considerable risk created by Mozambique that any decision made by this Tribunal would be contradicted by the ICC Tribunal, given the overlap of pleadings, evidence, witnesses, experts, and even legal authorities between the two tribunals; (ii) the duplication of costs and work epitomised by Mozambique's plagiarised ICC SOC and supporting materials; and (iii) the fact that PEL ought not to be left at the mercy of Mozambique's oppressive tactics.
29. On 16 August 2021, the ICC Tribunal handed down its decision on PEL's ICC Stay Application, refusing to stay its own proceedings on the basis that:

*"...despite the overlap between the two proceedings, their causes of actions do not appear to be entirely the same and do not, therefore, justify a stay of the entirety of these proceedings pending a decision by another tribunal, constituted on the basis of a different agreement."*²⁴

*"...the Arbitral Tribunal is not satisfied that "arbitral efficiency" warrants a stay in this case and/or of any "exceptional circumstances" that could effectively outweigh the Claimants' prejudice in not having this issue resolved timely before a tribunal whose jurisdiction to hear the Claimants' contract claims has been accepted by the Respondent."*²⁵

²² **Exhibit R-59**, The ICC Tribunal Procedural Order No. 5, dated 16 August 2021, para. 25.

²³ **Exhibit R-62**, PEL's ICC Stay Application, dated 10 June 2021.

²⁴ **Exhibit R-59**, The ICC Tribunal Procedural Order No. 5, dated 16 August 2021, para. 16.

²⁵ *Id.* at para. 17.

30. The ICC tribunal then raised, *sua sponte*, the question of its own jurisdiction over the “Treaty Claims”, which it defined as “*the Claimants’ [Mozambique’s and the MTC’s] claims under the India-Mozambique Bilateral Investment Treaty (the “BIT” or the “Treaty”), which are also being litigated in the UNCITRAL Arbitration, including Claimants’ request for a declaration in this arbitration on whether the UNCITRAL Tribunal has jurisdiction to adjudicate claims under the BIT, whether the BIT has been breached, and the damages claimed by Respondent under the BIT (the ‘Treaty Claims’)*”.²⁶
31. Contrary to Respondent’s allegation,²⁷ this was not prompted by any jurisdictional objection by PEL in the ICC Arbitration, as it is yet to file its statement of defence. In the context of its ICC Stay Application, PEL simply argued that the UNCITRAL Tribunal has *prima facie* jurisdiction to resolve the issues of its own jurisdiction under the Treaty, of the breaches of the Treaty, and of the damages associated with such breaches.²⁸
32. Pending the determination of its own jurisdiction over the so-called “Treaty Claims”, the ICC Tribunal suspended the entire timetable in the ICC Arbitration:
- “The running of the time limits for the next procedural steps as defined by the Procedural Timetable are suspended until the decision of the Arbitral Tribunal on the jurisdictional questions; the dates of the Procedural Timetable will be adapted accordingly.”*²⁹
33. On 7 October 2021, the ICC Tribunal held a virtual hearing on the matter of its jurisdiction over the “Treaty Claims”. The timetable remains suspended until a decision is issued in this respect.

D. This Application Is a Continuation of Respondent’s Obstructive Tactics

34. Respondent has consistently attempted to accelerate the ICC Arbitration while slowing down this Arbitration, with an aim to ensure that the former overtakes and ultimately

²⁶ **Exhibit R-59**, The ICC Tribunal Procedural Order No. 5, dated 16 August 2021, para. 23.

²⁷ Application, para. 33.

²⁸ **Exhibit R-62**, PEL’s ICC Stay Application, dated 10 June 2021, para. 102.

²⁹ **Exhibit R-59**, The ICC Tribunal Procedural Order No. 5, dated 16 August 2021, para. 33 (iv).

jeopardises the final decision in the latter. The Application is a doubling-down of such guerrilla tactics.

35. In the ICC Arbitration, Mozambique has consistently sought to expediate the proceedings. It has objected to even the slightest extension of the deadlines in the ICC Arbitration, notwithstanding their justification.
36. Mozambique's double standards are illustrated by the fact that while it requested the ICC Tribunal to "*deny PEL's Stay Application promptly, without reply, hearing, or further delay; reinstate the procedural timetable*",³⁰ it asks this Tribunal to suspend all the deadlines pending the resolution of its Application.³¹
37. Indeed, in this Arbitration, Respondent has made every effort to delay the proceedings. It initially sought to hold back the proceeding by filing a weak motion to bifurcate, which was dismissed by the Tribunal.³²
38. Later, in January 2021, it requested a 42-day extension to file its Statement of Defense.³³ Most recently, Respondent requested this Tribunal to "*immediately suspend the deadlines (including all briefing deadlines) in the UNCITRAL proceeding*"³⁴ pending the Tribunal's decision on the Application.
39. Mozambique's Application should be seen for what it is — just its latest attempt to delay and derail these proceedings.

III. APPLICABLE LEGAL PRINCIPLES

40. It is common ground³⁵ that Article 15(1) of the UNCITRAL Rules grants UNCITRAL tribunals broad discretion to conduct arbitral proceedings, including the power to stay their own proceedings, subject to certain requirements. Article 15(1) of the UNCITRAL Rules provides:

³⁰ **Exhibit R-63**, Mozambique's Answer to PEL's ICC Stay Application, dated 2 July 2021, para. 119.

³¹ Application, para. 97.

³² Procedural Order No, 3, dated 14 December 2020.

³³ **Exhibit C-338**, Email chain between Juan Basombrio of Dorsey & Whitney LLP and Sarah Vasani of Addleshaw Goddard LLP regarding extension to the Statement of Defence deadline and attaching revised procedural schedule, dated 6-8 January 2021.

³⁴ Application, para. 9.

³⁵ *Id.* at paras. 35-36.

“1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

41. It is also common ground that neither the Treaty, nor Dutch law limit this Tribunal’s discretion to stay its own proceedings.³⁶
42. Few authorities exist expounding on the factors that tribunals must consider when deciding whether to order a stay in case of parallel arbitration proceedings.
43. However, PEL agrees with Respondent³⁷ that the International Law Association Report on Lis Pendens and Arbitration (the “**ILA Report**”) and the associated International Law Association Recommendations on Lis Pendens and Arbitration (the “**ILA Recommendations**”) constitute useful guidance as to when parallel proceedings may warrant a stay decision.
44. ILA Recommendation 1 defines “Parallel Proceedings” as:

*“...any other proceedings pending before a national court or another arbitral tribunal in which the parties and one or more of the issues are the same or substantially the same as the ones before the arbitral tribunal in the Current Arbitration...”*³⁸

45. Recommendation 5 applies specifically to the case of parallel proceedings before two arbitral tribunals (Recommendation 3 and 4 deal with parallel court proceedings). Recommendation 5 essentially provides that in such cases, the *second* tribunal to be seized should decline jurisdiction or stay proceedings as it deems appropriate, subject to the following proviso:

“5. Where the Parallel Proceedings have been commenced before the Current Arbitration and are pending before another arbitral tribunal, the arbitral tribunal should decline jurisdiction or stay the Current Arbitration, in whole or in part, and on such conditions as it sees fit, for such duration as it sees fit (such as until a relevant determination in the Parallel Proceedings), provided

³⁶ Application, paras. 37, 39. Without explaining the relevance or applicability of “*Mozambican arbitral law*”, Respondent asserts that “[n]either the Treaty (**CLA-I**), Mozambican arbitral law, nor Dutch law preclude a stay.”). *Id.* at para. 37. Mozambican law is not relevant to this question. It is neither the applicable law, which is the Treaty, nor the *lex arbitri*, which is Dutch law.

³⁷ Application, para. 40.

³⁸ **RLA-143**, F. De Ly and A. Sheppard, *ILA Recommendations on Lis Pendens and Arbitration*, in *Arbitration International*, 2009, Issue 1, p. 83.

that it is not precluded from doing so under the applicable law and provided that it appears that:

- *the arbitral tribunal in the Parallel Proceedings has jurisdiction to resolve the issues in the Current Arbitration; and*
- *there will be no material prejudice to the party opposing the request because of (i) an inadequacy of relief available in the Parallel Proceedings; (ii) a lack of due process in the Parallel Proceedings; (iii) a risk of annulment or non-recognition or non-enforcement of an award that has been or may be rendered in the Parallel Proceedings; or (iv) some other compelling reason.”³⁹ (Emphasis added).*

46. Respondent cannot rely upon Recommendation 5 because (1) this Tribunal was seized *before* the ICC Tribunal; and (2) Respondent argued in the ICC Arbitration that the two arbitrations are not parallel proceedings for the purposes of the ILA Recommendations.⁴⁰

47. Respondent thus relies on Recommendation 6,⁴¹ which deals with arbitral tribunals’ residual discretion to stay their proceedings where the circumstances of the case do not fall within the other specific recommendations. Recommendation 6 provides:

“6. Also, as a matter of sound case management, or to avoid conflicting decisions, to prevent costly duplication of proceedings or to protect a party from oppressive tactics, an arbitral tribunal requested by a party to stay temporarily the Current Arbitration, on such conditions as it sees fit, until the outcome, or partial or interim outcome, of any other pending proceedings (whether court, arbitration or supra-national proceedings), or any active dispute settlement process, may grant the request, whether or not the other proceedings or settlement process are between the same parties, relate to the same subject matter, or raise one or more of the same issues as the Current Arbitration, provided that the arbitral tribunal in the Current Arbitration is:

- *not precluded from doing so under the applicable law;*
- *satisfied that the outcome of the other pending proceedings or settlement process is material to the outcome of the Current Arbitration; and*
- *satisfied that there will be no material prejudice to the party opposing the stay.”⁴²*

³⁹ **RLA-143**, F. De Ly and A. Sheppard, *ILA Recommendations on Lis Pendens and Arbitration*, in *Arbitration International*, 2009, Issue 1, p. 84.

⁴⁰ **Exhibit R-63**, Mozambique’s Answer to PEL’s ICC Stay Application, 2 July 2021, paras. 80-83.

⁴¹ Application, para. 41.

⁴² **RLA-143**, F. De Ly and A. Sheppard, *ILA Recommendations on Lis Pendens and Arbitration*, in *Arbitration International*, 2009, Issue 1, p. 84.

48. The commentary to Recommendation 6 makes clear that the ILA envisaged that such discretion would only be exercised very sparingly in exceptional circumstances:

*“The Committee concluded that arbitral tribunals should have confidence to exercise case management powers and be empowered to stay their own proceedings, even when the situation did not fulfil the traditional criteria of lis pendens. The ultimate objective should be to achieve a fair result as between the parties, and in some circumstances this may mean waiting for the outcome of other proceedings. A possible situation where this might be appropriate includes one where a tribunal hearing a dispute between an owner and contractor might decide to suspend that arbitration until legal proceedings between the contractor and its relevant sub-contractor have been determined. Or a tribunal hearing a dispute between two parties in a string contract or long supply chain might decide that it would be right to await the outcome of legal proceedings between the original seller or manufacturer and the original buyer. Nevertheless, the Committee envisages such power being exercised very sparingly.”*⁴³ (Emphasis added).

49. The *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India* tribunal considered Recommendation 6 when it decided not to stay its proceedings.⁴⁴
50. The parties agree⁴⁵ that the *Cairn* tribunal, after it recalled that “a stay is an exceptional remedy and that for it to be granted the applicant must provide compelling reasons”, specifically considered the following factors: (i) whether the stay creates an imbalance between the parties, or causes material prejudice to one of the parties, thus violating their right to equal treatment; (ii) whether the stay amounts to depriving a party from the right to present its case; (iii) whether the stay would unreasonably delay the proceedings; and (iv) where the stay is premised on the finalisation of other pending proceedings, whether the outcome of the other pending proceedings is material to the outcome of the arbitration.⁴⁶

⁴³ **RLA-135**, F. De Ly and A. Sheppard, *ILA Final Report on Lis Pendens and Arbitration*, 2009, in *Arbitration International*, 2009, Issue 1, p. 33.

⁴⁴ See e.g. **RLA-141**, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7, Procedural Order No. 3 – Decision on the Respondent’s Application for a Stay of the Proceedings, 31 March 2017, paras. 110-112.

⁴⁵ Application, para. 44.

⁴⁶ See e.g. **RLA-141**, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7, Procedural Order No. 3 – Decision on the Respondent’s Application for a Stay of the Proceedings, 31 March 2017, para. 114.

51. Respondent further relies upon three authorities in support of a general proposition that “[c]ases granting stays often share a common characteristic with the present circumstances: a separate tribunal with jurisdiction is resolving a material or fundamental issue.”⁴⁷ PEL disputes that any of the cases relied upon by Respondent bear any resemblance to the case at hand:
- a. In *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, the claimants commenced ICSID proceedings under Egyptian Law No. 43. They conceded that a prerequisite to the submissions of an investment dispute to ICSID arbitration under such law was that the parties failed to agree upon another means of dispute resolution.⁴⁸ It is in the specific context of Law No. 43 that the tribunal found that the question of whether the parties had agreed on another method of dispute resolution was a *question préalable*.⁴⁹ The tribunal went on to stay its own proceedings because the question of whether the parties had reached such agreement was already pending before the French Court of Cassation, which was due to determine whether an ICC tribunal had correctly found that it had jurisdiction.⁵⁰
 - b. In the *MOX Plant* case, Ireland commenced arbitration proceedings against the United Kingdom under Article 287 and Article 1 of Annex VII of the United Nations Convention on the Law of the Sea (the “UNCLOS”). The tribunal suspended its proceedings because there was a question as to whether the provisions of the UNCLOS upon which Ireland relied were matters in relation to which competence had been transferred to the European Community, and whether exclusive jurisdiction of the European Court of Justice extended to the interpretation and application of the UNCLOS as such and in its entirety.⁵¹
 - c. In *SGS v. Philippines*, the tribunal was not dealing with a request for stay of its proceedings but with a jurisdictional objection based on an exclusive

⁴⁷ Application, para. 74.

⁴⁸ **RLA-48**, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (27 November 1985), para. 78.

⁴⁹ *Id.* at para. 79.

⁵⁰ *Id.* at paras. 80-87.

⁵¹ **RLA-139**, *The MOX Plant Case (Ireland v. United Kingdom)*, Order No. 3 (24 June 2003) 42 ILM 1187, 1199, para. 21.

jurisdiction clause in a contract – the decision adduced by Respondent is the tribunal’s decision on objections to jurisdiction.⁵² The *SGS v. Philippines* tribunal found that it had jurisdiction but that SGS’ claims were not admissible and consequently, stayed its own proceedings.⁵³

52. Similarly, Respondent relies upon ICC Case 12510 to argue that the rationale for the stay in that case was that “*the contract in dispute in the parallel proceedings was ‘the foundation of the claims submitted by [Claimants] in these Proceedings’*”.⁵⁴ In reality, the rationale for the stay was the need to avoid possible inconsistencies.⁵⁵ The fact that a shareholders agreement, which was the foundation of the claims in ICC Case 12510, was under attack in the parallel arbitration was seen as a potential source of inconsistency.

IV. THE CIRCUMSTANCES OF THIS CASE MILITATE AGAINST A STAY OF THIS ARBITRATION

53. Respondent fails to meet the test proposed by the *Cairn* tribunal, which both Parties agree is relevant.

⁵² **RLA-116**, *SGS Société General de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004).

⁵³ *Id.* at paras. 169-170.

⁵⁴ Application, para. 43.

⁵⁵ **RLA-140**, Procedural Order of 12 April 2004 in ICC Case 12510 (Extract), para. 6: “*Respondent's Motion, of course does not involve a jurisdictional issue. However, it relates to one of the core purposes of the lis pendens, which is to preserve consistency and to avoid conflicting decisions. As pointed out by Elliot Geisinger and Laurent Lévy, and applicable, mutatis mutandis, to this Arbitration: [I]t is preferable to deal with the issue of parallel and conflicting proceedings at an early stage, rather than running the risk of being faced later with conflicting decisions. If arbitrators ignore competing court proceedings, they may be doing a disservice to the parties, for any time gained by disregarding parallel proceedings will be outweighed by the real-and potentially unsolvable-problems that will arise if the national court subsequently renders a conflicting judgment. (Emphasis added) 7. This need to avoid possible inconsistencies and to try to prevent future problems is **paramount to this Tribunal**, which distinctly understands that its mission is, to the fullest extent possible, to render rulings that decide the disputes submitted by the Parties, without giving room for further litigation thereof. 8. Article 35 of the ICC Rules, understood in the context of the actual reliability expected from international arbitration, provides support to the Tribunal's position, and even Article 20,1 *ibidem* -cited in Claimants' Opposition may supply further support because, in the same context, the speed called for in such provision shall not be served if under the guise of rushing an arbitral tribunal does not consider and sets aside factors that may delay or complicate the effectiveness of a given decision. 9. Thus, having found support to the possibility to stay arbitral proceedings, the Tribunal moves to compare the issues submitted in this Arbitration with those submitted in Case 12125/JNK and finds a large degree of connection among some of them. In particular, the Tribunal notes the attack mounted in Case 12125/JNK against the Shareholders Agreement, under the allegation of being part of the Stock Purchase Agreement, and the circumstance that the Shareholders Agreement is the foundation of the claims submitted by [Claimants] in these Proceedings.” (Emphasis in the original).*

A. A Stay Would Create an Imbalance Between the Parties, and/or Cause Material Prejudice to PEL, Thereby Violating the Parties' Right to Equal Treatment

54. A stay of this Arbitration would create an imbalance between the Parties and/or cause material prejudice to PEL, thus violating its right to equal treatment.
55. Should this Tribunal decide to stay its proceedings, a considerable imbalance would be created between the Parties. It would reward Respondent's guerrilla tactics thereby favouring Respondent at the expense of PEL.
56. As explained above, Respondent is not a good faith litigant. It is merely a party which has commenced parallel proceedings, to obtain an unfair advantage over PEL. Its intention is to stall PEL's claim and/or ensure that it does not obtain an enforceable award from this Tribunal.
57. That Respondent is not a good faith litigant is clear from the fact that it commenced the ICC Arbitration in direct retaliation against these proceedings, it refused all reasonable consolidation proposals (including when it was prompted to do so by this Tribunal), and it resisted PEL's attempt to ensure consistency and transparency between the two sets of proceedings. It is also manifest from the fact that Respondent insisted that the matter be resolved as promptly as possible before the ICC Tribunal but sought to delay matters before this Tribunal.
58. In the same vein, Respondent has made self-serving and contradictory arguments on identical issues in both arbitrations. For instance, Respondent argued in the ICC Arbitration that a legal principle exists which makes stays improper when two arbitrations are commenced under different arbitral rules.⁵⁶ Similarly, it sought to distinguish ICC Case 12510, which it now relies upon,⁵⁷ on the basis that the stay concerned "*a foundational issue decided by another ICC tribunal*" (emphasis in the original).⁵⁸ If this were correct, it would be dispositive of this Application, in that a stay would only be possible if the two arbitrations were commenced under the same procedural rules.

⁵⁶ **Exhibit R-63**, Mozambique's Answer to PEL's ICC Stay Application, dated 2 July 2021, para. 84.

⁵⁷ *Id.* at paras. 43, 75.

⁵⁸ *Id.* at para. 66.

59. If its Application were successful, Respondent's obstructionist tactics would therefore be rewarded.
60. This, in turn, would give an unfair advantage to Respondent over PEL and cause considerable material prejudice to PEL. It would prevent PEL from advancing its affirmative Treaty claims, which are only before this Tribunal. Furthermore, if and to the extent that an earlier decision in the ICC Arbitration could have an impact on the outcome of this Arbitration (including on the enforceability of a future award rendered by this Tribunal), a stay could *de facto* amount to a definitive – and not only temporary – denial of the PEL's rights under the Treaty, that served as the basis for the institution of this arbitration and the constitution of this Tribunal.
61. In light of the above, Respondent's aim of achieving an award from the ICC Tribunal in the first instance, which it could then use to scupper the enforcement of any award rendered by this Tribunal, would be advanced.
62. By contrast, there is no prejudice to Respondent in refusing the stay, save for the risk of contradictory awards and the costs associated with parallel proceedings, which Respondent itself has created.
63. It follows that a stay of this Arbitration would create an imbalance between the Parties and would cause material prejudice to PEL, thus violating its right to equal treatment.

B. A Stay Would Deprive PEL of the Right to Present Its Case

64. Granting the stay would be tantamount to depriving PEL of the right to present its case.
65. PEL argues before this Tribunal that Respondent breached Article 3(2) and/or Article 5 of the Treaty and/or Article 3(4) of the Mozambique-Netherlands BIT and seeks compensation in the sum of USD 156 million, or such other amount that is just.
66. By contrast, PEL has not put forward any positive case before the ICC Tribunal, and contests the ICC Tribunal's jurisdiction over its affirmative Treaty claims, as well as Mozambique's defences to those Treaty claims. It is therefore no consolation prize, as Respondent suggests, that "*PEL may make its arguments to the ICC Tribunal on the local law contractual dispute.*"⁵⁹

⁵⁹ Application, para. 84.

67. PEL's case before this Tribunal is not that Mozambique breached the MOI under Mozambican law but that it breached its international law obligations under the Treaty. As explained in the Reply and further below, and as apparently acknowledged by Mozambique in the ICC Arbitration,⁶⁰ the causes of action before the two tribunals are distinct.⁶¹ Mozambique's attempt, elsewhere in its submissions, to circumvent the well-established case law in this respect by arguing that “*this dispute arises out of the MOI, which forms the 'fundamental basis' of the alleged rights, and whose alleged breach is the sine qua non of the subject claims*”⁶² is not supported by any authority. Any decision by this Tribunal to stay these proceedings would inevitably deprive PEL of its right to present its case because (1) PEL's affirmative Treaty claims are only before this Tribunal and not before the ICC Tribunal; and (2) it is unclear how long the stay requested by Respondent would remain in effect, given that the procedural timetable in the ICC Arbitration is currently suspended.
68. In sum, therefore, if this Tribunal were to grant Respondent's Application, PEL would be deprived of its right to advance its Treaty claims for an indefinite period.

C. A Stay Would Unreasonably Delay the UNCITRAL Arbitration

69. Respondent incorrectly argues that the stay it requests would not delay these proceedings unreasonably “*likely for only a few months*”.⁶³ Respondent cites no authority for this hypothesis. Rather, it appears to be based on the fact that the ICC Arbitration Rules exhort tribunals to respect the six-month time limit to render their award, and the Secretariat set an initial deadline for issuing a final award by 29 April 2022.⁶⁴
70. Yet, Respondent omits that tribunals routinely take longer than six months to issue their final awards, and for good reasons. For example, the average duration of non-Expedited Procedure Provisions is 26 months.⁶⁵

⁶⁰ **Exhibit R-63**, Mozambique's Answer to PEL's ICC Stay Application, para. 101.

⁶¹ Reply, paras. 938-1030.

⁶² Application, paras. 25. *See also* Application, para. 51.

⁶³ *Id.* at para. 81.

⁶⁴ *Id.* at para. 85.

⁶⁵ **Exhibit R-56**, ICC Releases 2019 Dispute Resolution Statistics, available at <https://iccwbo.org/mediawall/news-speeches/icc-releases-2019-dispute-resolution-statistics/> last viewed 14 July 2021.

71. More importantly, Respondent does not mention that the entire timetable in the ICC Arbitration is now suspended at the direction of the ICC Tribunal, pending a decision on its purported jurisdiction over the so-called Treaty Claims. Accordingly, the initial six-month time limit of 29 April 2022 has been overtaken by the circumstances of the case. Accordingly, the Respondent cannot assert with any certainty that if the Application were granted, it would not unreasonably delay this Arbitration because the Parties do not know when the ICC proceedings will resume, or when a final hearing will take place in that proceeding.

D. The Outcome of the ICC Arbitration Is Not Material to the Outcome of This Arbitration

72. This Tribunal is not bound by and need not defer to any findings by the ICC Tribunal. The two tribunals were appointed under different instruments of consent and have jurisdiction over different causes of action. Neither tribunal has any obligation to defer to the other. In such circumstances, Respondent has failed to demonstrate that the outcome of the ICC Arbitration is material to the outcome of this Arbitration.

73. Respondent's core submission is that resolution of the "*local contractual law dispute is plainly material and in fact necessary to the outcome of this UNCITRAL Arbitration,*" and therefore must be decided by the ICC Tribunal first.⁶⁶ Specifically, Respondent contends that the determination of whether PEL has any rights under the MOI and accordingly under the Treaty is part of the contractual dispute before the ICC tribunal, such that this Tribunal's jurisdiction is premised upon the findings of the ICC Tribunal.⁶⁷ It further submits that the outcome of the "*contractual law dispute*" is fundamental and a pre-requisite to whether any Treaty standards were violated because PEL's claim for breach of the FET and the MFN standards are premised upon "*local contractual law allegations*" that Mozambique made promises to PEL; and PEL's indirect expropriation claim is premised upon the existence of the MOI.⁶⁸

74. At the outset, it is telling that Respondent fails to define "*local contractual law dispute*". This is because any attempt at doing so would make it manifest that there is no genuine "*local contractual law dispute*" before the ICC Tribunal. Respondent has merely put

⁶⁶ Application, Section IV(A).

⁶⁷ *Id.* at paras. 59-60.

⁶⁸ *Id.* at para. 62.

its defence in this Arbitration before the ICC Tribunal to create as many potential contradictions and inconsistencies as possible, thereby paving the way for a potential challenge.

75. Regardless of how Mozambique (mis)characterizes its claims, the conclusion that the ICC Tribunal's decision is not material to the outcome of this Arbitration is inescapable given that this Tribunal is not bound by the findings of the ICC Tribunal, and both the instruments of consent and the causes of action in the two parallel proceedings are distinct, such that the arbitration clause in the MOI does not affect the jurisdiction of this Tribunal under Article 9 of the Treaty. As explained in the Reply,⁶⁹ this is owing to 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, as the causes of action are different. This principle first set out by the *Ad Hoc* Committee in the seminal *Vivendi* decision has since been widely adopted, including in very recent awards.
76. Respondent has not adduced a single authority to the contrary in the entirety of its submissions in this Arbitration. Rather, it mischaracterises the case at hand erroneously as “*arising out of the MOP*”⁷⁰ (rather than the Treaty) to circumvent the fact that the causes of action before the two Tribunals are distinct.
77. Respondent's play on words does not displace the fact that the causes of action before the two tribunals, as well as their jurisdictional foundations, are distinct. Accordingly, there is no order of priority between them. Indeed, this fundamental distinction was the ICC Tribunal's primary reason for its decision not to stay the ICC Arbitration:

“First, the Arbitral Tribunal is not convinced that the cause of action of this arbitration is identical to the cause of action of the UNCITRAL Arbitration. While the UNCITRAL Arbitration was initiated by the Respondent on the basis of the arbitration agreement found in the India-Mozambique BIT, as an “[investment] dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement”, the dispute before this Tribunal has been referred to arbitration based on the arbitration agreement contained in Clause 10 of the MOI, as a “dispute arising out of this memorandum”. Thus, despite the overlap between the two proceedings, their causes of actions do not appear to be entirely the same and do not, therefore, justify a stay of the entirety of these proceedings

⁶⁹ Reply, paras. 630-633.

⁷⁰ Application, paras. 58-60.

*pending a decision by another tribunal, constituted on the basis of a different agreement.*⁷¹ (Emphasis added).

78. Perhaps to detract from these inescapable facts, Respondent creates confusion between the undefined contractual dispute on which it contends that the ICC Tribunal has jurisdiction, and the law applicable to such dispute and to this Arbitration.⁷² However, the fact that there may be some issues of municipal law, which are relevant to determining PEL's claims under the Treaty, does not mean that these issues can or must be determined by the ICC Tribunal as opposed to this Tribunal.
79. The very authorities quoted by Respondent demonstrate that investment treaty tribunals routinely make findings under relevant domestic law as part of the factual predicate to determining an investor's international law claims. They routinely do so without deferring to any other adjudicatory body, be it domestic or international. Critically, any findings the ICC Tribunal may ultimately make in relation to the MOI or Mozambican law will not bind this Tribunal. Rather, this Tribunal will need to determine such matters for itself, based on the evidence before it.
80. The authorities Respondent cites to the contrary are simply not on point. The passage of *Emmis v. Hungary* quoted by Respondent⁷³ related to the existence of rights under domestic law for the purposes of assessing whether there was a protected right capable of expropriation under the relevant bilateral investment treaties.⁷⁴ The passages of the Zachary Douglas treatise,⁷⁵ and *F W Oil v. Trinidad and Tobago*⁷⁶ are essentially to the same effect.
81. The remainder of the authorities quoted by Respondent are plainly irrelevant.⁷⁷

⁷¹ **Exhibit R-59**, The ICC Tribunal Procedural Order No. 5, para. 16.

⁷² Application, para. 52.

⁷³ *Id.*

⁷⁴ **RLA-46**, *Emmis Int'l Holding, B.V., Emmis Radio Operating, B.C., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014), para. 162.

⁷⁵ Application, para. 53.

⁷⁶ Application, para. 57; **RLA-74**, *F-W Oil Interests Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 March 2006), para. 152.

⁷⁷ The passage of *Merill v. Canada* quoted by Respondent does not even refer to domestic law to determine whether Merill's investment is an investment as defined under the NAFTA treaty (Application, para. 55. **RLA-92**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL (ICSID), Award (31 March 2010), para. 142). The tribunal's comment about an investor not being able to recover damages

82. Accordingly, Respondent failed to demonstrate that the outcome of the ICC Arbitration is material to the outcome of this Arbitration.
83. It follows that the circumstances of this case do not meet any of the limbs of the relevant test for a stay to be granted and accordingly, the Tribunal should reject Respondent's Application.

V. PRAYER FOR RELIEF

84. For the reasons set out above, Claimant invites the Tribunal:
- a. TO DENY Respondent's Application to Stay these Proceedings;
 - b. TO DENY Respondent's request to suspend and/or extend the deadlines pending the Tribunal's resolution of this Application;
 - c. TO ORDER Respondent to pay all the costs incurred by Claimant in connection with the Application, including the costs of the arbitrators and of the Permanent Court of Arbitration, legal costs and other expenses; and
 - d. TO ORDER such further relief as the Tribunal considers appropriate.

for the expropriation of a right it never had, which Respondent quotes, is merely a reference to the fact that an investment must exist under NAFTA (**RLA-92**, *Merrill v. Canada*, paras. 139-142). The first passage of *Feldman v. Mexico* referred to by Respondent is the analysis of whether Mexico's refusal of giving a tax rebate to Feldman constituted an expropriation of his right to export cigarettes. (Application, para. 56; **RLA-137**, *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), paras. 117-134). It does not even deal with the respective role of domestic and international law in this respect. The second passage relied upon by Respondent relates to whether the alleged expropriation was for a public purpose. (Application, para. 56; **RLA-137**, *Feldman v. Mexico*, paras. 135-137). Likewise, it is difficult to see any relevance in the passage of *Apotex* referred to by Respondent (Application, para. 56; **RLA-138**, *Apotex, Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013) paras. 207-218). It sets out the findings of the tribunal regarding whether an Abbreviated New Drug Application ("ANDA") was "property" for the purposes of Article 1139(g) of NAFTA (**RLA-138**, *Apotex v. USA*, para. 206-218). As for the passage of *Zhinvali v. Georgia* quoted by Respondent, it does not "consider... rules of interpretation under domestic law in determining whether alleged contract establishes a qualifying "investment" under Article 25(1)", as Respondent contends (Application, para. 57; **RLA-56**, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003), paras. 297-304). The tribunal in *Zhinvali* noted that (i) the questions of whether the necessary "consent" or the requisite qualifying investment under Article 25(1) were met in the case were a mixed question of Georgian national law and international law (**RLA-56**, *Zhinvali v. Georgia*, paras. 296-301) and (ii) it would apply the VCLT, which the tribunal had no reason to suspect was inconsistent Georgia's rules of interpretation for its own domestic law, as the rule of interpretation (**RLA-56**, *Zhinvali v. Georgia*, paras. 302-308).

Respectfully submitted on 15 October 2021 by

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