

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

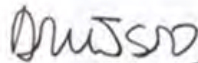
Date: 2 December 2022



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).