

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

**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.

Claimant

-and

REPUBLIC OF MOZAMBIQUE

Respondent

RESPONDENT'S MOTION FOR BIFURCATION

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I. INTRODUCTION

Respondent Republic of Mozambique (“Mozambique”) requests that the Tribunal bifurcate this UNCITRAL proceeding and adopt “Scenario A – Bifurcated Proceedings” in the Procedural Timetable in Procedural Order No. 1. Bifurcation of the jurisdictional questions from the merits and damages is the efficient, economical and sensible approach to proceed. There are substantial jurisdictional questions to be decided, which can be dispositive of this proceeding.

First, there are substantial jurisdictional questions whether Claimant Patel Engineering Ltd. (“Patel”) has made any investment. Patel asserts that it entered into a 2011 Memorandum of Interest (“MOI”) with Mozambique, whereby Patel was allegedly provided a right of first refusal to negotiate and enter into a concession to build a railroad/port in Mozambique. A dispute arose whether Mozambican law required the public tender of the project. To resolve the matter, Patel organized a consortium and agreed to participate in a 2013 public tender and was provided a point bidding advantage to account for the MOI. After Patel’s consortium did not win, Patel abandoned the consortium and reverted to insisting instead on its alleged right of first refusal.

Applying the *Salini* factors, this is a pre-concession, pre-investment contractual dispute involving the validity of the MOI and Patel’s belated claims (7 years later) over a completed public tender. Because Patel – a disappointed bidder – never entered into a concession agreement with Mozambique and did not make any investment in Mozambique, there is a substantial question whether this Tribunal has jurisdiction. Indeed, a mere contractual right of first refusal, and for that matter an MOI, do not constitute investments under the BIT and international law.

Second, there is a substantial jurisdictional question whether, in the MOI, the parties contractually agreed to arbitration of this dispute under ICC Arbitration Rules in Mozambique. The MOI contains an arbitration agreement that is valid, enforceable and severable. It broadly

requires that “any dispute arising out of this memorandum between the parties shall be referred to arbitration” under ICC Arbitration Rules and the seat of arbitration shall be in Mozambique. This is the parties’ contractual bargain. Patel has violated the arbitration agreement and filed this UNCITRAL arbitration. The arbitration agreement in the MOI is not a “judicial forum selection clause” or a local arbitration clause limited to contractual disputes. As this Tribunal is aware, the ICC Arbitration Rules are broad enough to permit arbitration of investment treaty claims, and investment treaty claims are regularly administered by the ICC. The MOI requires Patel to bring its investment treaty claims in an ICC arbitration in Mozambique. This Tribunal must respect and give effect to the parties’ arbitration agreement and their selection of the Mozambique seat.

Third, there is a substantial jurisdictional question whether, in the MOI, the parties have made a contractual election, in accordance with the India-Mozambique BIT, to proceed pursuant to ICC Arbitration Rules instead. The BIT permits parties to select particular procedures for dispute resolution in lieu of the defaults in the treaty. In the MOI, the parties agreed to dispute resolution by arbitration under the ICC Arbitration Rules, and ICC arbitration is broad enough to include investment treaty claims. The ICC does administer investment treaty arbitrations.

Fourth, there is a substantial jurisdictional question whether this UNCITRAL proceeding should be dismissed or stayed in deference to the pending ICC arbitration among the parties in Mozambique. In accordance with the arbitration agreement in the MOI, Mozambique, as well as the Mozambican Ministry of Transport and Communications (“MTC”) (the entity that allegedly contracted with Patel), initiated an arbitration against Patel pursuant to the ICC Arbitration Rules which the ICC has concluded has its seat in Mozambique. In that ICC arbitration, Mozambique and the MTC have placed at issue both the contractual and the investment treaty disputes. Patel has appeared and is participating in that ICC arbitration, and has requested affirmative relief.

This UNCITRAL proceeding should be dismissed in favor of the ICC arbitration, which can determine all contract and investment treaty disputes among the parties, including the MTC that signed the MOI. At a minimum, this UNCITRAL arbitration should be suspended until after the ICC arbitration determines the underlying contractual rights of Patel, if any, the existence of which are governed by Mozambican law. If Patel has no contractual rights under the MOI, then Patel has no claims under the BIT and its investment treaty claims would be rendered moot.

Fifth, there is a substantial jurisdictional question whether Patel has failed to exhaust its remedies in Mozambique. Mozambique law provides disappointed bidders with certain recourse, and the MOI requires arbitration in Mozambique. Patel failed to exhaust its remedies.

Sixth, these jurisdictional questions are not intertwined with the questions related to the merits and damages. The jurisdictional questions relate to whether a right of first refusal and the MOI constitute an investment, and whether this Tribunal should respect and enforce the parties' arbitration agreement. These jurisdictional questions are distinct from the questions related to the merits, such as whether the MOI is valid, what are the substantive rights under the MOI, whether there was a breach of the MOI, whether Patel's participation in the public tender superseded the MOI, whether there are investment treaty substantive claims, and whether there are damages.

Seventh, bifurcation of the jurisdictional questions is the most efficient and economical approach to resolve this dispute. The investigations, research, analysis, drafting of memorials and hearing on the merits and damages will involve substantial work, time and expense, that will be completely unnecessary if this Tribunal determines that it lacks jurisdiction or this UNCITRAL proceeding should be dismissed or suspended and yield to the ICC arbitration. Therefore, the bifurcation of the jurisdictional stage of these proceedings from the merits and damages stages will prevent a potential significant waste of resources and potentially conflicting awards.

II. BACKGROUND

On 6 May 2011, Patel (also referred to as “PEL”) and the MTC purported to enter into a “Memorandum of Interest” (“MOI”). *See* Exhibit R-1 and R-2 (Portuguese and English versions of the MOI). As its name confirms, the MOI is a preliminary document expressing “interest.”

The MOI states that Patel is “interested” in a potential public-private-partnership project in Mozambique: “MTC *is interested* in developing a Port in and around the Zambebian coast line with a corresponding railway line of 500 (five hundred) kilometers from the corridor of Tete to the proposed port through a Public Private Partnership (PPP).” MOI at Recital (a) (emphasis added). “PEL has shown keen interest in the development of said Project by forming a JV with the Gov’t of Mozambique on a Built Operate and Transfer (BOT) basis.” *Id.* at Recital (d).

Patel agreed to undertake a prefeasibility study at its own cost and expense under the MOI: “PEL agrees to undertake *at its own cost and expense* an initial prefeasibility study for the Project to identify a probable area for the port and the railway line with the assistance of MTC.” MOI at Recital (f) (emphasis added). The parties made clear that “[t]he *objective of the present memorandum is to undertake the prefeasibility study the expense of which will be entirely borne by PEL*, for the development of a port infrastructure and a railway line ... defining the basic terms and conditions for the granting of a concession by the Gov’t of Mozambique to PEL for the construction and operation of the project.” MOI at Clause 1 (emphasis added). Later, the MOI reiterates that “[t]he direct costs necessary to conduct the feasibility study *shall be entirely borne by PEL*.” MOI at Clause 4 (emphasis added).

The MOI purports to provide Patel with a “first right of refusal” for implementation of the project: “PEL shall carry out a prefeasibility study (PFS) within 12 months and will submit to the government for the respective approval.” MOI at Clause 2(1). “After the approval of the

prefeasibility study PEL shall have *the first right of refusal* for the implementation of the project on the basis of the concession which will be given by the Government of Mozambique.” *Id.* at Clause 2(2) (emphasis added). Therefore, the MOI does not obligate Patel to enter into any concession agreement with the MTC – it merely and purportedly provides Patel with an option, so long as certain conditions specified in the MOI are satisfied. These conditions never came to fruition and, importantly, Patel lacked clean hands. Indeed, there is much more to this story.

Mozambique contends that, after the MOI was signed by the MTC and Patel, the following events followed, which are summarized herein only to generally inform the Tribunal of Mozambique’s contentions in this dispute – since they relate to the merits.

In response to the MOI, Patel submitted an initial feasibility proposal. However, Patel is not innocent and lacks clean hands. Patel concealed from the MTC that Patel was blacklisted by the Government of India (Patel is incorporated in India) in connection with a similar government infrastructure project for India. While the parties were engaged in discussions related to the MOI, the Supreme Court of India upheld the Indian government’s blacklisting of Patel and specifically held that Patel was “not commercially reliable and trustworthy.” Patel had misrepresented to the Indian Government the price of its bid on a project in order to fraudulently win the bid contest. Based on said concealment, the MTC was fraudulently induced into accepting Patel’s feasibility study, rather than declaring the MOI void as it had the right to do under Mozambican law.

Further, the MOI imposed conditions precedent on granting a concession, including forming a joint venture. Patel was unable to satisfy the conditions. A dispute also arose regarding whether the project was subject to public tender under Mozambican law. Because Mozambican law required that the project be submitted to open and transparent public bidding, the MOI was unauthorized, illegal and could not bind the government. To resolve that dispute, Patel agreed to

participate in a 2013 public tender as part of a consortium and was provided a point bidding advantage to account for the MOI. That was a settlement and satisfaction extinguishing Patel's rights under the MOI. After the Patel consortium was not the winning bidder, Patel abandoned its consortium partners and reverted to insisting on a right of first refusal. Years later, after finding a third-party financier, Patel raced to file this UNCITRAL arbitration seeking a windfall.

The foregoing contentions are set forth in Mozambique's and the MTC's Request for Arbitration, dated 20 May 2020 (R-3), ICC Case No. 25344/JPA, against Patel, pursuant to the MOI's arbitration agreement and Arbitration Rules of the International Chamber of Commerce ("ICC Rules"). The ICC arbitration is now pending in Mozambique. A copy of the Request for Arbitration is attached so this Tribunal may compare it with Patel's Statement of Claim here, and appreciate that this UNCITRAL arbitration is subsumed within the scope of the ICC arbitration.

The ICC arbitration was duly filed pursuant to the arbitration agreement in the MOI, which is severable from the MOI and requires arbitration under ICC Rules in Mozambique:

"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.

MOI at Clause 10 (emphasis added). In the ICC arbitration, both the contractual and investment treaty disputes are at issue, and the parties also have nominated international arbitrators with substantial investment treaty arbitration experience, Eduardo Silva Romero and Stephen Anway.¹

¹ Finally, the arbitration agreement and MOI are expressly governed by Mozambican law. See MOI at Clause 8 ("The implementation of a project shall be done within the laws approved by the Gov't of Mozambique"), Clause 9 (applying the Mozambican procurement law, No. 6/2004) and Clause 10 ("The arbitration will be governed by Mozambique law ...").

III. DISCUSSION

A. The Standard for Analysis on a Motion for Bifurcation.

On a motion for bifurcation, the Tribunal need not decide the jurisdictional questions. It determines whether there are substantial jurisdictional questions, and whether bifurcation of the jurisdictional questions is the efficient, economical and sensible manner in which to proceed.

The 1976 UNCITRAL Arbitration Rules (RL-1) empower the Tribunal to bifurcate jurisdictional questions. Article 15(1) states that “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.”

In connection with a request for bifurcation of jurisdiction objections, tribunals inquire whether the jurisdictional objections are “*prima facie* serious and substantial,” can “be examined without prejudging or entering the merits,” and, “if successful, [would] dispose of all or an essential part of the claims made.” *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12 (Procedural Order No 8 on Bifurcation, 14 April 2014) at ¶ 109 (RL-2).

Under the first factor, a liberal standard is applied in favor of finding that a jurisdictional objection is *prima facie* serious and substantial. “The determination of ... whether an objection is ‘*prima facie* serious and substantial’ should not, in the Tribunal’s view, entail a preview of the jurisdictional arguments themselves. Rather, at this stage the Tribunal is only required to be satisfied that the objections are not frivolous or vexatious.” *Resolute Forest Products, Inc. v. Government of Canada*, PCA Case No. 2016-13 (Procedural Order No. 4 on Bifurcation, 18 November 2016) at ¶ 4.4 (RL-3). An objection is not frivolous if it is “credible and brought in good faith and cannot be excluded on a *prima facie* basis. The Tribunal emphasizes however that such an assessment should in no way be understood to prejudice how the Tribunal will resolve

the substance of the preliminary objections themselves” *Id.* Even if the claimant puts forward “serious reasons” why the “objection is not justified,” that would be insufficient to “*prima facie* exclude” that the objection “may be successful.” *Philip Morris, id.* at ¶ 111.

Under the second factor, the issue is whether “the facts involved in determining the objection in issue are distinct from those likely to be involved in determining the merits of the claims.” *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17 (Procedural Order No. 2 on Bifurcation, 18 January 2013) at ¶ 20 (RL-4).

Under the third factor, where an objection, “if it were to succeed, ... is likely to at least narrow the scope of issues to be briefed at the merits stage,” and “[b]ifurcating the proceedings may thus result in a reduction in the time and costs of any future phase of the proceedings,” the “Respondent would not be put to the burden of defending the entire case on the merits.” *Mesa Power, id.* at ¶ 19. These factors favor bifurcation of jurisdiction in these proceedings.

B. There are Substantial Jurisdictional Questions Whether Patel Made an Investment.

There are substantial jurisdictional questions regarding whether Patel has made an investment in Mozambique. Patel asserts that it “invested” in the MOI and its purported “right of first refusal,” which Patel basically treats as an option to receive a no-bid direct award of a long-term concession to design, build and operate a railway and port valued at USD \$3 billion. Patel asserts that it prepared an initial feasibility study and thus had the right to receive the concession. Patel claims it made expenditures in connection with the preparation of the feasibility study. Patel seeks speculative profits on this unrealized concession, claiming Mozambique breached its treaty obligations by not awarding it the concession, and conducting a public tender, in which Patel participated through a consortium that was not the winning bidder, despite a point bidding advantage provided to Patel to account for the MOI. Before reaching the merits of Patel’s claims,

this Tribunal must determine whether the purported right of first refusal or option, MOI and expenditures constitute an “investment” sufficient for *ratione materiae*. They do not.

First, there is a substantial jurisdictional question whether the MOI and its right of first refusal are an investment. According to various tribunals, an MOI which is merely an expression of interest, and a mere right of first refusal or option, are not investments under international law.

For example, in *PSEG Global*, the dispute involved a memorandum of understanding that provided an option to invest in a project company involved in a mining project in Turkey. See *PSEG Global Inc., The North American Coal Corp., and Konya Ilgin Elektrik Üretim ve Ticaret Ltd. Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5 (Decision on Jurisdiction, 4 June 2004) at ¶ 176 (RL-5). Respondent Turkey argued that the memorandum of understanding was not an investment, even if the claimants had incurred expenses in connection therewith:

“In Respondent’s view, the Memorandum in question is not valid because it is a *preliminary agreement* which is not binding until the parties’ intention to be bound materializes, a *situation that never happened*. *The instrument was conceived as the expression of a desire to ‘explore an arrangement’, the terms of which were never formalized or even agreed to*. However broad the definition of ‘investment’ might be, it *does not include mere options and, therefore, this Memorandum does not qualify either as an investment under the Treaty or in any other way*. Even if some expenses were made by NACC in connection with the Revised Mine Plan, *these are not an investment subject to recovery.*”

Id. at ¶ 176 (emphasis added).

The *PSEG Global* Tribunal agreed with the Republic of Turkey, and concluded that the memorandum of understanding was not an investment:

“Whether the Memorandum *is valid and in force is immaterial* for the purpose of the Tribunal’s decision. *The Tribunal considers that the Respondent’s argument that the definition of investment does not include an option is persuasive as a general approach*. *Broad as many definitions of investment are in treaties of this kind, there is a limit to what they can reasonably encompass as an investment*. *Options such as this particular*

one cannot, in the view of the Tribunal, be interpreted as an ‘investment’. The Tribunal acknowledges that different circumstances from those which obtain in the present case may lead to a different conclusion.”

Id. at ¶ 189 (emphasis added).

Here too, the MOI on its face does not obligate Patel, or for that matter the MTC, to enter into a concession. The MOI contains various conditions precedent that must be satisfied and also required that the parties reach agreement on the specific terms of a concession, before there was any binding commitment to any concession. The MOI is like the memorandum of understanding in *PSEG Global*, which was an “expression of a desire to ‘explore an arrangement.’” Patel undertook to explore by preparing an initial feasibility study expressly at its own cost and expense. Undoubtedly, Patel was free to walk away, not enter into a concession and not exercise the right of first refusal. The MOI is thus completely uncharacteristic of an “investment.”

Second, there is also a substantial jurisdictional question whether expenditures made by Patel in connection with the MOI, including those incurred in preparation of the feasibility study, constitute an investment. For example, in *Mihaly Int’l*, the Tribunal explained that it “has been asked to consider whether or not, *the undoubted expenditure of money, following upon the execution of the Letter of Intent, in pursuit of the ultimately failed enterprise to obtain a contract, constituted ‘investment’ for the purpose of the Convention.*” *Mihaly Int’l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2 (Award, 15 March 2002) at ¶ 48 (RL-6) (emphasis added). The Tribunal explained that:

“if the negotiations during the period of exclusivity, or for that matter, without exclusivity, had come to fruition, it may well have been the case that the moneys expended during the period of negotiations might have been capitalised as part of the cost of the project and thereby become part of the investment. By capitalising expenses incurred during the negotiation phase, the parties in a sense may retrospectively sweep

those costs within the umbrella of an investment.”

Id. at ¶ 50. However, the Tribunal concluded that the expenditures were not an investment:

“The facts of the case point to the opposite conclusion. The Respondent clearly signaled, in the various documents which are relied upon by the Claimant, that *it was not until the execution of a contract that it was willing to accept that contractual relations had been entered into and that an investment had been made.* It may be and the Tribunal does not have to express an opinion on this, that during periods of lengthy negotiations even absent any contractual relationships obligations may arise such as the obligation to conduct the negotiations in good faith. These obligations if breached may entitle the innocent party to damages, or some other remedy. *However, these remedies do not arise because an investment had been made, but rather because the requirements of proper conduct in relation to negotiation for an investment may have been breached. That type of claim is not one to which the Convention has anything to say. They are not arbitrable as a consequence of the Convention.*”

Id. at ¶ 51 (emphasis added). Similarly, whatever expenses Patel incurred in connection with the feasibility study under the MOI are not an investment, because the concession never came to fruition. Patel may have a contract claim under local law that Mozambique and the MTC would oppose, but “[t]hat type of claim is not one to which the Convention has anything to say.” *Id.*

Third, considering the typical *Salini* factors, there is a substantial jurisdictional question whether there was any investment by Patel in Mozambique. An investment requires a substantial contribution by the investor, of a certain duration in time, the existence of an operational risk to the investor, a certain regularity of profit to the investor, and a contribution to the economic development of the host State. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 (Decision on Jurisdiction, 23 July 2001) at ¶ 52 (RL-7).

The MOI and expenditures incurred by Patel in connection therewith do not satisfy the *Salini* factors. The preparation of an initial feasibility study is not a substantial contribution by Patel to Mozambique, lacks sufficient duration, contains no operational risk (even if the MOI

gave Patel an option on the concession, by its very nature an option did not obligate Patel to accept it – again, Patel could walk away), there is no profit arising from the MOI itself since no concession had been negotiated, and the MOI did not provide a contribution to Mozambique’s economic development. This substantial jurisdictional question, whether the MOI – a mere six-page, negotiation-phase, pre-concession expression of “interest” – can be deemed an investment, must be resolved prior to expensive, time-consuming consideration of the merits or quantum.

Fourth, there is a substantial jurisdictional question whether the MOI is an investment as defined by the subject bilateral investment treaty between India and Mozambique (“India-MZ BIT”) (RL-8). Article 1(b)(iii) defines an investment as “rights to money or to any performance under contract having a financial value,” but the MOI is exploratory and conditional, and not a “right” to money nor has a financial value. Further, Article 1(b)(v) specifies when a concession constitutes an investment. Investments include “business concessions conferred by law or under contract,” but no concession was conferred by Mozambique to Patel by law or under contract.

Fifth, as noted, the MOI is governed by Mozambican law. Article 22 (“Registration of Direct Foreign Investment”), Section 1, of the Mozambique Investment Law expressly requires that a “foreign investor, within one hundred and twenty (120) days counted from the date of notification of the decision authorizing the investment project, shall register the undertaking involving direct foreign investment with the authority responsible for monitoring the inflow of capital, and register subsequently each actual capital import operation that takes place.” Patel never registered as a foreign investor, and cannot be considered to be an investor under the India-MZ BIT, because the treaty at Article 1(d) defines investments as those made “in accordance with the national laws of the Contracting Party in whose territory the investment is made.”

C. There is a Substantial Jurisdictional Question Whether the Parties Contractually Agreed to ICC Arbitration.

There is a substantial jurisdictional question whether, in the MOI, the parties contractually agreed to arbitration of this dispute under the ICC Rules in Mozambique.

Although Patel “fired first” and filed this UNCITRAL arbitration, that cannot avoid that the MOI contains an express arbitration agreement that is valid, enforceable and severable from the question of the MOI’s validity. The MOI’s arbitration agreement broadly states that “[a]ny 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.” R-1 at Clause 10 (emphasis added). “The venue of the arbitration shall be at the Republic of Mozambique.” *Id.* This is the parties’ binding, contractual bargain.

Patel has intentionally violated the MOI’s arbitration agreement and instead filed this UNCITRAL arbitration. The MOI’s arbitration agreement is not a “judicial forum selection clause” or local arbitration clause limited to contractual disputes. As this learned Tribunal is aware, *the ICC Arbitration Rules are broad enough to permit arbitration of investment treaty claims and investment treaty claims are regularly brought before the ICC.*² The MOI requires Patel to bring its BIT claims in an ICC arbitration in Mozambique. This Tribunal must respect and give effect to the parties’ arbitration agreement and their selection of the Mozambique seat, without second-guessing the parties’ selection of Mozambique as the place of arbitration.

² Because bringing investment treaty claims in the ICC has been a reality for years, the 2021 ICC Rules have added two provisions that expressly related to investment treaty arbitration. “The 2021 ICC Rules ... include two new provisions *applying specifically to investment treaty arbitrations. This reflects the growing number of such cases involving States and State-owned parties administered by the ICC in recent years.*” Shearman & Sterling, Newly Revised ICC Arbitration Rules, 13 November 2020, <https://www.jdsupra.com/legalnews/newly-revised-icc-arbitration-rules-68080/> (emphasis added). There is no doubt that investment treaty arbitration claims can be brought, and have been brought for years, before the ICC. The ICC is fully capable of administering investment treaty arbitration claims.

D. There is a Substantial Jurisdictional Question Whether, in the MOI, the Parties Made an Election Under the BIT to Proceed before the ICC.

There is a substantial jurisdictional question whether, in the MOI, the parties made a contractual election under the India-MZ BIT to proceed under the ICC Arbitration Rules in Mozambique, given that BIT claims are administered by the ICC. In this regard, Article 9(2)(a) of the India-MZ BIT states that the parties may agree to a particular mode of dispute resolution:

“Any such dispute which has not been amicably settled within a period of six months may, if both Parties agree, be submitted: (a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party’s competent judicial, arbitral or administrative bodies.”

India-MZ BIT at Article 9(2)(a) (RL-8) (emphasis added). The ICC is a recognized arbitration body in Mozambique. The MOI provides that “[t]he arbitration will be governed by Mozambique law and the rules of the International Chamber of Commerce shall be followed.” R-1 at Clause 10. Therefore, as permitted by the India-MZ BIT, a contractual election was made by the parties to submit their disputes to arbitration pursuant to ICC Rules in Mozambique. Patel is bound by its contractual election in the MOI, and violated it by filing this UNCITRAL proceeding.

E. There is a Substantial Jurisdictional Question Whether this UNCITRAL Proceeding Should Yield to the ICC Arbitration.

There is a substantial jurisdictional question whether this UNCITRAL proceeding should be dismissed or stayed in deference to the pending ICC arbitration in Mozambique.

For example, in *Fraport AG*, the Tribunal was faced with somewhat overlapping ICSID and ICC arbitrations. The Tribunal noted the dangers of proceeding with two arbitrations:

“[w]hile the present ICSID arbitration and the ICC arbitration are not strictly speaking, parallel arbitrations, the Tribunal accepts Claimant’s representations that the underlying issues in both arbitrations are, in substantial part, overlapping. In the circumstances, there exists a real possibility that the two arbitral tribunals, presented with and asked to consider similar facts, could render conflicting or inconsistent decisions regarding those

facts. *This is not a desirable outcome.*”

Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25 (Award, 23 July 2007) at ¶ 19 (RL-9) (emphasis added). The Tribunal accepted the objection to ICSID jurisdiction, holding that since the investment was contrary to local law, there was no investment under the subject bilateral investment treaty. *Id.* at ¶¶ 404 and 46.

Mozambique and the MTC have initiated an arbitration against Patel under the ICC Rules in Mozambique, Request for Arbitration (R-3), in which international arbitrators with substantial investment treaty experience have been designated. This UNCITRAL proceeding is subsumed within the ICC arbitration. In the ICC arbitration, Mozambique and the MTC have placed at issue both the contractual and investment treaty disputes, and seek the following relief, which is substantially broader and more detailed than the issues raised in this UNCITRAL proceeding:

“Based on the foregoing, Mozambique and the MTC are entitled to and seek an Award:

5.1. declaring that:

- a. the correct Portuguese and English versions of the MOI are those submitted herein by the MTC and Mozambique, and the governing version is the one in Portuguese;
- b. the MOI is governed by the laws of the Republic of Mozambique;
- c. the MOI is void, voidable and voided, invalid, not legally binding and/or legally unenforceable, for the various reasons discussed herein;
- d. the purported first right of refusal provisions in Clause 2(2) of the MOI are void, voidable and voided, invalid, not binding and/or unenforceable, for the various reasons discussed herein;
- e. the purported exclusivity provisions in Clause 6 of the MOI are void, voidable and voided, invalid, not binding and/or unenforceable, for the various reasons discussed herein;
- f. the MOI was induced by PEL’s fraudulent concealment; and

- g. notwithstanding the foregoing, the Arbitration Agreement contained in Clause 10 of the MOI is severable and enforceable, and is governed by the laws of the Republic of Mozambique;
- 5.2. in the alternative, declaring that:
- a. the MOI is a preliminary, vague and nonbinding document, and, in the alternative, any purported right of first refusal, exclusivity, or direct award thereunder were preliminary, vague and nonbinding;
 - b. PEL did not comply with the conditions precedent and/or requirements of, and/or has breached, the MOI, and/or has waived its rights under the MOI, is estopped from asserting rights under the MOI and/or entered into an accord and satisfaction superseding and voiding any prior rights under the MOI;
 - c. a right of first refusal never arose under the MOI, and/or any purported right of first refusal, exclusivity, or a direct award were superseded by the PPP Law and PPP Regulations applicable to the Project, concession, and procurement process;
 - d. the subject project as proposed by PEL was not viable and/or feasible, which renders futile and moot any claim by PEL pursuant to the MOI, and makes PEL's alleged damages speculative and illusory;
 - e. Mozambique and the MTC have not breached the MOI;
 - f. PEL breached the MOI and/or anticipatorily repudiated the MOI release Mozambique and the MTC of any obligations thereunder and causing damages to Mozambique and the MTC, by concealing its blacklisting and/or other material facts; by failing to disclose the impediments to its participation in the project and fraudulently concealing the same; by violating Mozambican law; by violating the confidentiality clause; and by violating the arbitration clause;
 - g. PEL is obligated under the MOI to bear the costs incurred in connection with its feasibility study;
 - h. the MOI does not provide for the recovery of any lost profits, consequential and/or incidental damages by PEL;
 - i. any and all obligations of Mozambique and the MTC under the MOI have been satisfied, released and/or excused; and
 - j. any claims by PEL under the MOI are barred by the applicable statutes of limitation (prescription periods) under Mozambican law.
- 5.3. declaring that PEL lacks standing to bring any claims under or related to the public tender because the consortium of PEL, Grindrod and SPI is not asserting claims against the MTC or Mozambique and/or is not participating jointly with PEL in the international arbitration PEL has commenced;

- 5.4. declaring that PEL is not entitled to any rights, relief or any damages whatsoever, including but not limited to lost profits, consequential and/or incidental damages, under the MOI against Mozambique and the MTC;
- 5.5. declaring that PEL is not entitled to any rights, relief or any damages whatsoever, including but not limited to lost profits, consequential and/or incidental damages, under the public tender process, or under any other dealings or transactions that PEL had or was supposed to have with the MTC or Mozambique, against Mozambique and the MTC, because PEL's participation and said dealings and transactions was induced by PEL's fraudulent concealments, and PEL's acts and omissions violated Mozambican law and regulations, for the various reasons discussed herein;
- 5.6. declaring that even if PEL is entitled to damages, it is limited to the reasonable cost of preparing the prefeasibility study, in an amount to be submitted by Mozambique and the MTC in this arbitration;
- 5.7. enjoining PEL from proceeding with any other legal proceeding, court action and/or arbitration against Mozambique and 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 injunction should be granted and remain in place until after this Tribunal finally adjudicates the issues within its jurisdiction;
- 5.8. declaring that PEL lacks standing and cannot assert any claims under the India-MZ BIT, Mozambique and the MTC did not violate the India-MZ BIT, and that PEL is not entitled to any rights, relief or any damages whatsoever, including but not limited to lost profits, consequential and/or incidental damages, under the India-MZ BIT against Mozambique and the MTC;
- 5.9. declaring that PEL has engaged in defamation of Mozambique and the MTC;
- 5.10. declaring that PEL engaged in fraudulent concealment of, and indeed defrauded Mozambique and the MTC, for the reasons discussed herein;
- 5.11. declaring that PEL engaged in ethics and professional violations under Mozambican law, including procurement and PPP law, for the reasons discussed herein;
- 5.12. awarding compensatory, actual, *per se* and/or punitive damages to Mozambique and the MTC to be paid by PEL for its fraud and defamation of Mozambique and the MTC, breach of the MOI if it is valid, ethics and professional violations, and other wrongful conduct described herein, in an amount according to proof to be presented by Mozambique and the MTC in this arbitration;
- 5.13. ordering PEL to pay Mozambique's and the MTC's attorneys' fees and costs incurred in connection with this arbitration; and
- 5.14. granting Mozambique and the MTC such further or other relief as the Tribunal shall deem to be just and appropriate."

See Request for Arbitration (R-3) at ¶ 280.

Patel is participating in the ICC arbitration and requesting relief on the merits, including an award that Mozambique and the MTC “have violated their obligations under the MOI.”

This UNCITRAL proceeding should be dismissed in favor of the ICC arbitration, which can determine all contract and BIT disputes among all parties, including the MTC that signed the MOI. At a minimum, this UNCITRAL arbitration should be suspended until after the ICC arbitration determines the validity of the MOI and contractual rights thereunder, the existence of which are governed by Mozambican law. In addition, as in *Fraport AG*, if the MOI violated Mozambican procurement law, there was no investment to protect under the India-MZ BIT, and this Tribunal would lack jurisdiction. Patel’s Statement of Claim, at ¶ 16, asserts that “PEL expressly exercised its right of first refusal under the MOI.” Similarly, at ¶¶ 30 and 40 of its Notice for Arbitration, Patel asserted that it “expressly exercised its right of first refusal” and was granted “in the MOI” a “right of first refusal and its right to a direct award of a concession.” Patel’s asserted treaty rights, if any, are dependent on a valid MOI and right of first refusal.

Bifurcation allows this Tribunal to timely assess whether or how this proceeding should proceed relative to the ICC arbitration, which may be dispositive to Patel’s international claims herein that rely on the MOI’s purported “rights” for jurisdiction, entitlement, and quantum.

F. There is a Substantial Jurisdictional Question Whether Patel Exhausted its Remedies in Mozambique.

The MOI requires compliance with Mozambican law. Clause 8 (project implementation). PPPs are governed by Law No. 15/2011, which at Article 39 states that disputes must be resolved pursuant to the terms of the parties’ contract. In the alternative, even if the Tribunal concluded the ICC arbitration did not encompass BIT claims, the UNCITRAL arbitration must be dismissed or suspended because the contract dispute has not yet been resolved in the ICC arbitration.

In addition, Patel’s bid dispute should have been timely resolved utilizing the bid protest procedures in Mozambican procurement law. By seeking to belatedly turn a procurement dispute into an investment treaty case, Patel seeks to impermissibly expand the scope of investor-state arbitration and raises substantial jurisdictional questions in the process. There would be a chilling effect on State receptiveness to investment and investment treaty arbitration if a contractor could lie in wait for years after a public tender, and bring a BIT claim bypassing local law, project-specific dispute resolution clauses, and public bid protest mechanisms, and seek millions in illusory lost profits – on a “speculative history” of what may have happened if its losing bid had won. Lax policing of jurisdictional limits risks a decision that opens the way to any disappointed bidder for a PPP concession forgoing dedicated, efficient, established bid protest procedures and procurement law (that exist in all States to balance the interests of taxpayers and state entities), in favor of amorphous, *ad hoc* and expensive resolution through generalist, less-developed “fair and equitable” BIT standards. This would be “open hunting season” on public financing. What would stop five disappointed bidders in a PPP megaproject from each separately claiming millions in 30-year lost profits if a State allegedly failed to “fairly” evaluate their bid and feasibility studies? These jurisdictional questions, and related policies, are serious and warrant bifurcated attention.

G. The Jurisdictional Questions Are Not Intertwined with the Merits or Damages.

As held in *PSEG Global* at ¶ 189, contractual issues such as “[w]hether the Memorandum is valid and in force [are] immaterial for the purpose of the Tribunal’s [jurisdictional] decision.”

Indeed, the aforementioned jurisdictional questions are not inextricably intertwined with the merits or damages. The jurisdictional questions here relate to whether the MOI and related expenditures constitute an investment, and whether this Tribunal should respect and enforce the parties’ arbitration agreement. These jurisdictional questions are distinct from the merits (such as

whether the MOI is valid, what are the substantive rights under the MOI, whether there was a breach of the MOI, whether there are investment treaty claims, and whether there are damages).

H. Bifurcation of the Jurisdictional Questions is Most Efficient and Economical.

Bifurcation is the appropriate procedural means to resolve these important, threshold jurisdictional matters efficiently, before Mozambique is forced to expend considerable resources engaging in merits discovery, hiring experts and briefing a dispute in which the Tribunal lacks jurisdiction. Similarly, it would be a waste of resources for the Tribunal to analyze the complex and various merits and damages issues without determining first whether there is jurisdiction.

IV. CONCLUSION

Thus, Mozambique requests that the Tribunal bifurcate the jurisdictional issues and adopt “Scenario A – Bifurcated Proceedings” in the Procedural Timetable in Procedural Order No. 1.

Dated: 20 November 2020.

Respectfully submitted,



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