ICC ARBITRATION RULES IN FORCE AS FROM 1 MARCH 2017

REPUBLIC OF MOZAMBIQUE

— and —

MOZAMBIQUE MINISTRY OF TRANSPORT AND COMMUNICATIONS
(TOGETHER, "MOZAMBIQUE")

(Mozambique)

Claimants

— v —

PATEL ENGINEERING LTD.
("PEL")

(India)

Respondent

(ICC Case No. 25334/JPA)

DISSENTING OPINION OF ARBITRATOR STEPHEN ANWAY

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24 November 2022

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I. INTRODUCTION

1. I am deeply troubled by the Majority's order today (the "Order"), which enjoins a party from making certain arguments before a *different* arbitral tribunal whose jurisdiction is based on a *different* instrument of consent than the one that empowers this tribunal. I am aware of no case where an arbitral tribunal has issued such an order—and the Majority cites none.

2. The Majority's Order is concerning for numerous reasons, not least because it decides the jurisdiction not of this tribunal (whose jurisdiction was already decided in our Partial Award on Jurisdiction) but, rather, the jurisdiction of a different, public-international law tribunal, and then functionally *imposes* that decision on the other tribunal through an injunction. By silencing a party before a different tribunal, the Majority effectively strips that other tribunal of its competence-competence—*i.e.*, its jurisdiction to decide its own jurisdiction. It would seem obvious that the other arbitral tribunal should decide what a party can and cannot argue before it—not our tribunal.

3. The Majority's Order is even more troubling because it decides the jurisdiction of the other tribunal *wrongly*. For two decades, a long line of tribunals, starting with the *Vivendi* ad hoc committee in 2002, has concluded that treaty tribunals can base their decisions on a contract insofar as necessary to determine whether there has been a breach of the treaty.[1] The Majority's Order today is, to my knowledge, the first time that a tribunal has taken the opposite view.

4. These two factors, taken together, mean that the Majority is not only issuing an *injunction* that is unprecedented, but it is doing so on a *legal basis* that is equally unprecedented.

5. I further note that our tribunal unanimously rejected Mozambique's previous request for the very same injunction in its Partial Award on Jurisdiction. Mozambique thereafter filed another request for the same injunction, even though nothing relevant had changed. Nevertheless, the Majority today renders a decision that is exactly the opposite of what our tribunal previously decided, when nothing new has occurred in

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

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

6. My dissenting opinion is organized into the following Sections:

(a) Section II provides the relevant background;

(b) Section III explains that the legal basis for the Majority's Order, which rejects *Vivendi* and nearly 20 years of consistent jurisprudence, is incorrect;

(c) Section IV demonstrates that, in any event, the requirements for an anti-arbitration injunction are not satisfied;

(d) Section V notes the tangible and foreseeable enforcement issues that an anti-arbitration injunction creates; and

(e) Section VI is the Conclusion.

II. BACKGROUND

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

8. The second tribunal (ours) was formed when, after PEL filed its treaty claim, Mozambique brought a claim against PEL under the arbitration agreement in the

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

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

9. PEL attempted to consolidate the arbitrations, but Mozambique refused.

10. On 1 October 2021, Mozambique applied to the Treaty Tribunal for a stay of the treaty arbitration because, according to Mozambique, our Contract Tribunal should issue our award before the Treaty Tribunal issues its award. In support of its application, Mozambique argued that the Treaty Tribunal would be bound to follow any findings made by this Contract Tribunal concerning the "*local contractual law dispute*".[3]

11. On 3 November 2021, the Treaty Tribunal rejected Mozambique's stay application, holding:

> [A] stay of these proceedings pending a decision by another tribunal, constituted on the basis of a different agreement, is not justified. *In the Tribunal's view, the respective causes of action appear to be quite different, considering not only that one proceeding is based on the Treaty and the other one on the MOI, but also that, although the same parties are involved in both arbitrations, their corresponding roles as claimant and respondent are reversed*.[4]

12. Mozambique likewise requested this Contract Tribunal to enjoin PEL from proceeding before the Treaty Tribunal. It did so numerous times, including in its submissions on jurisdiction. In those submissions, Mozambique argued that our Contract Tribunal, rather than the Treaty Tribunal, had jurisdiction over PEL's treaty claims and requested that we enjoin PEL from proceeding in the treaty arbitration.

13. On 16 February 2022, this Tribunal issued its Partial Award on Jurisdiction, declining jurisdiction over the treaty claims and rejecting Mozambique's request for an injunction. In so holding, we accepted that PEL could raise contractual arguments before the Treaty Tribunal—so long as it did so in support of its allegations that Mozambique breached the BIT:

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

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

> Not only are the *claims* brought on such basis clearly arising out of the Treaty; but also the *dispute* over these issues is arising out of that Treaty, and not properly out of the MOI. *Any obligations arising out of the MOI – and thus any dispute over such obligations – appear to be, from that perspective, merely accessory and preliminary questions for determining the dispute between the Parties over the alleged violations of the Respondent's rights under the Treaty and thus the availability of remedies provided by that Treaty under international law*.[5]

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

> It is therefore sufficient to note at this stage that the Parties are bound to the specific dispute settlement agreement to have their contractual issues arising out of the MOI to be arbitrated before this Tribunal, which the Tribunal expects them to honour. *Whether any possible contractual breaches of the MOI then further amount to a breach of a more general umbrella clause and may give rise to a claim arising out of the BIT is not for this Tribunal to decide*. Considering that the Respondent has by now clearly accepted this Tribunal's jurisdiction over the contract claims, the Tribunal sees no need to entertain the Claimant's request to enjoin the Respondent at this point, whatever the basis for such injunctive power may be. Should it be necessary to revisit this question at a later point, the Parties will be given the possibility to argue their positions in this respect.[6]

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

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

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

[6] *Id.* at ¶ 151 (emphasis added).

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

16. As discussed below, the events that have unfolded since I wrote the Separate Opinion have confirmed that my concerns were well founded.

17. On 7 March 2022, on the purported basis of this Contract Tribunal's Partial Award on Jurisdiction, Mozambique submitted a second injunction application to the Treaty Tribunal. On 12 April 2022, the Treaty Tribunal rejected that application, stating that both the Contract Tribunal and the Treaty Tribunal concur that the causes of action and instruments of consent are different in each proceeding:

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

18. Given what happened next, it is important to pause here. By this time, the Treaty Tribunal had rejected *two* requests by Mozambique to enjoin PEL in the BIT arbitration, and this Contract Tribunal had likewise rejected such an application. Equally important, as shown above, both this Contract Tribunal and the Treaty Tribunal had accepted that PEL could make contractual arguments to the Treaty Tribunal insofar as necessary to argue that Mozambique breached the BIT.

19. On 18 May 2022, however, Mozambique *again* asked us to enjoin PEL before the Treaty Tribunal. Nothing new had occurred during the intervening three months between the issuance of the Partial Award on 16 February 2022 and Mozambique's second injunction application to us on 18 May 2022 to justify a different decision. Despite the lack of any developments that could justify deciding the second application differently than the first, the Majority today grants Mozambique's request, holding:

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

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

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

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

* * *

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

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

22. At the heart of the Majority's Order is a misunderstanding about which arbitral tribunal has the competence to decide whether PEL's agreement to the contract, which contains an ICC arbitration clause, constitutes a waiver of its right to raise contractual arguments before the Treaty Tribunal established under a different arbitration provision in the BIT. In my opinion, the only arbitral tribunal competent to decide this issue is the Treaty Tribunal.

23. The competence of the Treaty Tribunal to decide on its own jurisdiction stems from the principle of competence-competence and the relationship between contract claims and treaty claims as two distinct categories of claims. The seminal case on the relationship between contract claims and treaty claims is the ad hoc committee's annulment decision in *Vivendi v. Argentina*.[10] In *Vivendi*, investors brought a BIT claim against Argentina arising out of a troubled relationship that developed between the

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

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

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

24. In defense, Argentina argued that the claimants' BIT claim involved exclusively contractual matters (*i.e.*, disputes arising under the Concession Contract), over which the arbitral tribunal did not have jurisdiction.[13] The arbitral tribunal determined that it had jurisdiction over the dispute, rejecting Argentina's argument that a forum selection clause in the Concession Contract prevented it from hearing the case.[14] Nevertheless, the arbitral tribunal found that the majority of the claims under the treaty first required interpretation and application of the Concession Contract.[15] Reasoning that the parties to the Concession Contract had assigned the task of interpreting and applying that contract to the administrative courts of Tucumán, the arbitral tribunal dismissed the claims on the ground that the claimants had to pursue their rights in those local courts before seeking relief under the BIT.[16]

25. Claimants thereafter applied for annulment of the award before an ad hoc annulment committee (the "Committee"). The key question before the Committee was whether the investment treaty tribunal had jurisdiction over, and was obliged to decide the merits of, claims of breach of a BIT, even if a forum selection clause in the contract out of which the dispute arose provides for the exclusive jurisdiction of another forum.[17]

26. Analyzing the relationship between a breach of contract and a breach of a treaty, the Committee first observed that the treaty provisions "*do not relate directly to breach of a municipal contract. Rather they set an independent standard*."[18] As the Committee

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

12 *Id.* at ¶ 27.

13 *Id.* at ¶ 41.

14 *Id.* at ¶¶ 53-54.

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

16 *Id.*

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

18 *Id.* at ¶ 95.

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

27. In support of this proposition, the Committee relied upon Article 3 of the International Law Commission Articles on State Responsibility (the "ILC Articles"). Article 3 of the ILC Articles, entitled "*Characterization of an act of a State as internationally wrongful*," provides that "*[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law*." Article 27 of the Vienna Convention on the Law of Treaties similarly provides that "*[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*"

28. Under these provisions, therefore, the questions of whether there has been a breach of a treaty and whether there has been a breach of a contract are different questions. As the Committee recognized, "*[e]ach of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the . . . [c]ontract, by the proper law of the contract, in other words, [domestic law].*"[20]

29. The commentary to Article 3 of the ILC Articles, cited by the Committee, emphasizes the distinction between the role of international and municipal law in matters of international responsibility:

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

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

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[19] *Id.*

[20] *Id.* at ¶ 96.

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

> [T]he fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness… Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.'
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> […]
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> (7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.[22]

31. Based on these principles, the Committee held that where the "*essential basis of a claim*" is a breach of contract, a tribunal will give effect to any valid choice of forum clause in the contract. But where the "*fundamental basis of a claim*" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, a tribunal will give effect to the choice of forum in the treaty (the "*Vivendi* Principle").

32. Based on the *Vivendi* Principle, the Committee concluded that "*it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court.*"[23] Rather, "*[i]n such a case, the inquiry which the ICSID tribunal*

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

[23] *Id.* at ¶ 102.

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

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

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

34. In sum, although the Majority states that its Order is consistent with *Vivendi*,[28] the foregoing shows that the Committee in *Vivendi* expressly rejected the very proposition that the Majority today adopts: that a treaty tribunal cannot base its decision on a contract insofar as necessary to determine whether there has been a breach of the treaty.

35. Although there is no *stare decisis* principle in investment treaty arbitration, the *Vivendi* Principle is now widely understood to reflect settled law in the field. More than 30 arbitral tribunals have followed the *Vivendi* Principle:

- *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 04 May 2021, footnote 609.

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[24] *Id.*

[25] *Id.* at ¶ 105.

[26] *Id.* at ¶ 110.

[27] *Id.* at ¶ 114 (emphasis added).

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

- *Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, ¶ 163.

- *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia,* ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1032.

- *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Dissenting Opinion of Santiago Torres Bernárdez, 20 June 2018, ¶¶ 193, 217.

- *Oztas Construction, Construction Materials Trading Inc. v. Libyan Investment Development Company and State of Libya*, ICC Case No. 21603/ZF/AYZ, Dissenting Opinion of Dr. Tolga Ayoglu, 14 June 2018, ¶ 10.

- *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 336.

- *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 332.

- *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 474.

- *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability, 21 April 2015, ¶ 172.

- *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, footnote 1744.

- *Getma International and others v. Republic of Guinea*, ICSID Case No. ARB/11/29, Decision on Jurisdiction, 29 December 2012 [Unofficial English], footnote 5.

- *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 131.

- *Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, ¶ 143.

- *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 137 and footnote 18.

- *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction, 29 May 2009, ¶¶ 127, 149.

- *Cargill, Incorporated v. Republic of Poland II*, UNCITRAL, Award, 5 March 2008, ¶ 228.

- *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 258.

- *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006, ¶ 43.

- *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, ¶ 43.

- *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. Argentine Republic*, ICSID Case No. ARB/03/13 & ARB/04/8, Decision on Preliminary Objections, 27 July 2006, ¶ 108.

- *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶ 79.

- *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, ¶ 43.

- *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, ¶ 79.

- *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 148.

- *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 114.

- *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award and Dissenting Opinion, 19 August 2005, ¶ 102.

- *Impregilo S.p.A. v. Islamic Republic of Pakistan II*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶¶ 210, 256.

- *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, ¶¶ 152, 157.

- *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 73 and footnote 20.

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

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

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

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

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

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

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

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

[. . .]

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

39. In the present case, the *lex arbitri* is Mozambican law. The question that arises, then, is whether Mozambican law permits anti-arbitration orders—or even anti-suit orders. Many national legal systems do not permit such orders.

40. In this case, neither Mozambique nor its legal expert, Ms. Muenda, cite a single authority supporting their argument that this Contract Tribunal has the power to grant an anti-arbitration injunction (or even an anti-suit injunction) under Mozambican law [31] —much less to functionally impose such an injunction against a public international law tribunal. While framed as an injunction against only PEL, the Majority's Order also applies to the Treaty Tribunal, because it restrains what that Tribunal can *hear*—and thus what it can *adjudicate*. That being the case, Mozambique bore the burden to establish that a domestic law arbitral tribunal has the authority to functionally enjoin a public international law tribunal. Mozambique did not even attempt to do so.

41. To my mind, this issue is of greater relevance than Mozambique or the Majority accord it. The authority of our Contract Tribunal stems from the Parties' agreement governed by Mozambican law. By contrast, the authority of the Treaty Tribunal stems from the Parties' agreement governed under public international law. Public international law prevails over Mozambican law, because it is higher in the hierarchy of legal norms.[32]

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

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

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

42. In this regard, I note that there is no material difference between a contractual provision stating that disputes are to be resolved by ICC arbitration applying Mozambican law, on the one hand, and one stating that disputes are to be resolved by the Mozambique courts applying Mozambican law, on the other hand. Would Mozambican courts have the authority to enjoin a public international law tribunal? I do not believe so.

43. For that reason alone, I believe that Mozambique failed to carry its burden of proof on this issue, and its application therefore should be denied.

B. Anti-arbitration injunctions are widely condemned

44. But even if, *arguendo*, Mozambique had established that its municipal law empowered us to issue an anti-arbitration injunction, I believe that it would be inappropriate to exercise that power here.

45. Professor George Bermann has defined anti-arbitrations injunctions as "*injunctions enjoin[ing] parties from initiating or maintaining proceedings before an arbitral tribunal*

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

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

(a) deprive the tribunal of its prerogative under the doctrine of competence-competence;

(b) constitute an aggressive remedy; and

(c) deprive competent domestic courts of their opportunity to review the jurisdiction of the tribunal.[34]

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

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

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

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

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

[34] *Id.* at ¶ 42.

[35] *Id.* at ¶ 40.

[36] *Id.* at ¶ 41.

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

49. In other words, the situation where an anti-arbitration injunction may be potentially appropriate is where the dispute in the second proceeding is covered by the same arbitration agreement as the dispute in the first proceeding.[38]

50. This principle is also reflected in arbitral decisions, where tribunals have considered anti-arbitration injunctions.[39] In an unreported ICC case cited by Laurent Levy, the sole arbitrator "*refused to enjoin the contractor from pursuing the second arbitration on the grounds that it did not have the power to interfere with another arbitration, in particular because the latter had arisen out of a separate arbitration clause.*"[40]

51. So, too, here. This Contract Tribunal and the Treaty Tribunal base their jurisdiction on different arbitration agreements.

52. Further, even where tribunals consider that they have discretion to issue anti-suit injunctions, they have exercised that discretion with considerable caution. In the words of the ICC tribunal in Case No. 10681/KGA, an authority quoted by Mozambique, "*[t]he issuance of an injunction is a delicate measure which tribunals, including arbitral tribunals, must take seriously and approach with utmost caution*."[41]

53. In sum, anti-arbitration injunctions are:

- "*widely condemned in the international arbitration community*";
- should only be ordered in "*truly extraordinary circumstances*"; and

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

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

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

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

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

- must be applied with the "*utmost caution*".

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

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

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

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

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

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

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

43 *Id.* at ¶ 85.

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

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

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

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

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

62. Other tribunals had the same opportunity:

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

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44 *Id.*

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

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

- The tribunal in *Joy Mining v. Egypt* concluded that "*even if for the sake of argument there was an investment in this case, the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction.*"[47]

- In *Salini v. Jordan*, the tribunal found that it "*[did] not have jurisdiction in respect of the contractual breaches and could entertain them only if the alleged breaches were simultaneously to constitute breaches of the treaty.*"[48]

- In *Impregilo v. Pakistan (II)*, the tribunal declined jurisdiction over the contractual claims, finding:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

64. The Majority's Order, however, does the opposite. It removes from the Treaty Tribunal its autonomy to make an "*objective determination*" and decide for itself whether PEL's claims are contract breaches simply labeled as treaty breaches.

65. In short, it is not for this Contract Tribunal to issue an order on what PEL can and cannot put before the Treaty Tribunal and, in so doing, narrow the scope of the Treaty Tribunal's authority. As held by the tribunal in *BIVAC v. Paraguay*:

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

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

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

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

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

[55] *Id.*

68. In fact, investment treaty jurisprudence has widely rejected the idea underlying the Majority's Order—that a contract needs to be first interpreted by the contractual forum—*even when that approach was taken by a treaty tribunal deciding on its own competence.* In *SGS v. Philippines*, the tribunal established under the Switzerland-Philippines BIT stayed *its own action* (which, unlike the Majority here, the tribunal clearly had the power to do) so that the judicial forum in the parties' contract[56] could interpret the contract first, while still allowing itself the ability to consider the contractual arguments afterward (which, too, is different than the Majority's Order today).

69. In response to that far less aggressive approach, the international arbitration community largely renounced *SGS v. Philippines.* In *Nissan Motor v. India*, the tribunal stated:

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

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

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[56] The Regional Trial Courts of Makati or Manila.

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

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

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

> The [*SGS v. Philippines*] tribunal did not, however, dismiss the claim. Instead, it decided to stay the proceedings "pending determination of the amount payable, either by agreement between the parties or by the Philippine courts in accordance with [the contract]". The tribunal's true rationale for that decision is not entirely clear from the text.
>
> [. . .]
>
> *The logic of this approach is not immediately apparent to us*: if the parties to the contract have agreed on an exclusive jurisdiction to resolve a dispute under the contract, whether it relates to the amount that is to be paid or the justifications raised by one party for non payment, then it is exclusively for that forum to resolve all aspects of the dispute under the exclusive jurisdiction clause. If any agreement between the parties on the amounts outstanding under the contract does not resolve the contractual dispute, then exclusive jurisdiction continues to vest in the agreed forum and the ICSID tribunal is

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

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

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

> Italy relies on the approach taken in *SGS v. Philippines* and *BIVAC v. Paraguay* in support of its position that Belenergia's umbrella clause claims are contract claims subject to the jurisdiction of Rome courts.
>
> [. . .]
>
> Second, even if the Tribunal were to consider these case decisions relevant (*quod non*), it cannot agree with the approach taken in *SGS v. Philippines*. According to the *SGS v. Philippines* tribunal, the claims for money founded on the contract between SGS and the Philippines were inadmissible because they were contract claims subject to the choice of forum clause under the relevant contract. *This approach would automatically deprive the umbrella clause under Article 10(1) ECT of its meaning because each and every contract, even one without a choice of forum clause, would inherently be subject to a State court based on default rules on conflicts of jurisdiction.*
>
> Rather, the Tribunal considers the *SGS v. Paraguay* approach on the source of the umbrella claim being the treaty even if it requires a showing of contractual breach. According to the *SGS v. Paraguay* tribunal, declining to hear the umbrella claim by virtue of a contractual forum selection clause "*would place the Tribunal at risk of failing to carry out its mandate under the Treaty and the ICSID Convention*."

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

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

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

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

> that this system implies an intrinsic risk of contradictory decisions or double recovery.
>
> [. . .]
>
> The Tribunal is sympathetic towards the efforts of the tribunal in *SGS v. Philippines* "to give effect to the parties' contracts while respecting the general language of BIT dispute settlement provisions". However, to do so raises several practical difficulties. In particular, it may be very difficult to decide, at this preliminary stage, which contractual issues (if any) will have to be addressed by the Tribunal on the merits.[61]

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

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

75. Jarrod Wong likewise agrees:

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

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

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

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

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

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

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

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

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

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

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

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

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

80. First, I fail to see how Mozambique's request is "urgent". As shown above, Mozambique has repeatedly filed the same application with both tribunals to enjoin PEL. Mozambique made this request in its very first pleading in this proceeding on 5 May 2020—two-and-a-half years ago—and continued making it both before the Treaty Tribunal and to this Contract Tribunal thereafter. In all of these prior attempts, both tribunals either rejected the application or ignored it. Why is it now suddenly "urgent"? The Majority offers no explanation. That no material change in circumstances has occurred since Mozambique's last application for an injunction proves that no urgency exists.

81. Second, why is the Majority's order "necessary"? Why not let the Treaty Tribunal decide the scope of its own jurisdiction, without another tribunal interfering with it? The answer appears to be that the Majority is concerned that the Treaty Tribunal may interpret certain contract-related issues differently than we do. But that is not a reason to exercise the extraordinary power of enjoining another tribunal constituted under a different arbitration agreement.

82. Nor has Mozambique ever argued in its pleadings that the Treaty Tribunal's interpretation of the contract would be binding on this Tribunal. Res judicata—*i.e.*, claim preclusion—would not apply, as the claim before the Treaty Tribunal (a breach of the treaty) is a different claim than the one before us (a breach of the contract). The only related doctrine that could apply is issue estoppel (under the English legal system) or collateral estoppel (under the U.S. legal system). But it is not at all clear that notions of issue/collateral estoppel would apply between different legal systems—public international law, on the one hand, and commercial domestic arbitration governed by Mozambican law, on the other hand.

83. Third, where is the irreparable harm? For nearly two decades, tribunals have routinely held that a treaty tribunal can base its decision on a contract insofar as necessary to determine whether there has been a breach of the treaty. Given that, it hardly seems that "irreparable harm" will occur if we simply let the Treaty Tribunal decide its own jurisdiction.

84. Finally, the Majority's Order today is entirely disproportionate to the perceived "harm" that it purports to prevent. On one side of the scale, the Majority's Order deprives PEL from its access to justice under public international law and the BIT, and it deprives the

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

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

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

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

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

VI. CONCLUSION

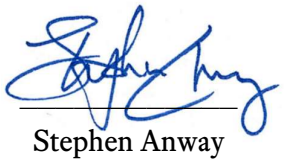
88. Today the Majority silences a party before a different, public international law tribunal empowered under a different arbitration agreement. In effect, the Majority's Order deprives that public international tribunal of even hearing that party's submissions. That is a breathtaking proposition.

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

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

91. I dissent.

Dated this 24th day of November 2022.



Stephen Anway

Arbitrator