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

CASE NO. 25334/JPA/AJP

between

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

Claimants

and

PATEL ENGINEERING LTD. (India)

Respondent

PROCEDURAL ORDER NO. 14

THE ARBITRAL TRIBUNAL

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

ADMINISTRATIVE SECRETARY

Carolina Pitta e Cunha

24 November 2022

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

Table of Contents

Whereas:

A. On 18 May 2022, the Claimants, the Republic of Mozambique and the Ministry of Transport and Communications (respectively referred to as "**Mozambique**" and the "**MTC**" and together referred to as the "**Claimants**") filed an "Application pursuant to Article 28(1) (Renewing) Request to Enjoin Respondent Patel Engineering Ltd." (the "**Claimants' Application**" or the "**Application**"). The Application was accompanied by factual exhibits numbered "CEX-59" to "CEX-63" and legal authorities numbered "CL-139" to "CL-144".

B. By letter of 19 May 2022, the Arbitral Tribunal invited the Respondent, Patel Engineering Ltd. ("**PEL**" or the "**Respondent**"), to submit its response to the Claimants' Application by 15 June 2022.

C. On 20 May 2022, the Claimants informed this Arbitral Tribunal that "*in retribution to Mozambique's submittal of its application to enjoin Patel, Patel has sent an email to the UNCITRAL Tribunal attaching the application and accusing Mozambique of wrongdoing by filing this application*". The Claimants' email was accompanied by *(i)* the email whereby the Respondent informed the UNCITRAL Tribunal of the Claimants' Application (attached as "Exhibit 1") and *(ii)* Mozambique's response to the UNCITRAL Tribunal (attached as "Exhibit 2").

D. On 15 June 2022, the Respondent filed the "Respondent's Response to Claimants' Sixth Application to Enjoin the UNCITRAL Arbitration pusuant to Article 28(1) of the ICC Arbitration Rules" (the "**Respondent's Response**" or the "**Response**"). The Response was accompanied by factual exhibits numbered "REX-128" and "REX-129" and legal authorities numbered "RL-15A" and "RL-153" to "RL-156".

E. On 17 June 2022, the Arbitral Tribunal notified the Parties of Procedural Order No. 10 ("**PO10**"), whereby it provided the Claimants with the opportunity to reply to the Respondent's Response by 30 June 2022 and the Respondent with the opportunity to then file a rejoinder to the Claimants' reply by 14 July 2022, and further proposed to hold a two-hour online hearing on the matter of the Claimants' application for an injunction in one of two suggested days and times.

F. On 22 June 2022, the Respondent sent a letter to the Arbitral Tribunal whereby it requested the Tribunal to reconsider its decision in PO10 or, in the alternative, to order the Claimants to identify what had changed since the Tribunal issued the Partial Award on Jurisdiction of 9 February 2022 (the "**Partial Award on Jurisdiction**" or the "**Partial Award**"), which would warrant the Claimants' application.

G. On the next day, the Claimants confirmed their availability for the online hearing proposed by the Tribunal in its letter of 17 June 2022.

H. By letter of 23 June 2022, the Arbitral Tribunal declined the Respondent's request to reconsider its decision in PO10 but confirmed that it would reconsider the expediency of holding the projected online hearing in the light of the reply and the rejoinder to be filed respectively by the Claimants and the Respondent.

I. On 24 June 2022, the Respondent informed the Arbitral Tribunal of its availability regarding the date of the projected online hearing on the Claimants' application.

J. On 30 June 2022, the Claimants submitted their "Reply to Respondent's Response to Application pursuant to Article 28(1) (Renewing) Request to Enjoin Respondent Patel Engineering Ltd." (the "**Claimants' Reply**" or the "**Reply**"), which was accompanied by a new legal authority (numbered "CL-151") and an expert opinion (numbered "CER-13"). In the Reply, the Claimants requested, *inter alia*, that the Tribunal hold a hearing on the Claimants' application.

K. On 14 July 2022, the Respondent submitted its "Rejoinder to Claimants' Reply in Support of their Sixth Application to Enjoin the UNCITRAL Arbitration pursuant to Article 28(1) of the ICC Arbitration Rules" (the "**Respondent's Rejoinder**" or the "**Rejoinder**"), with a new legal authority (numbered "RL-154"). In its Rejoinder, the Respondent reiterated its request that the Tribunal dispense with the need for an oral hearing on the Claimants' application for an injunction.

L. On 29 July 2022, the Arbitral Tribunal notified the Parties of Procedural Order No. 11 ("**PO11**"), whereby it decided that it would hold an online hearing on the matter of the Claimants' application for an injunction (the "**Injunction Hearing**") on 6 September 2022, 6pm CAT (GMT+2 / Maputo time). PO11 also determined that, unless the Parties agree otherwise, each Party, starting with the Claimants, shall dispose of up to 20 minutes to address their arguments and, particularly, the Parties' understanding of the scope of the "disputes arising from the memorandum" that defines this Tribunal's jurisdiction, referred to in the Partial Award on Jurisdiction, and of the degree to which this may overlap with the matters currently before the PCA Tribunal in the ongoing arbitration between PEL (as claimant) and Mozambique (as respondent) under the UNCITRAL Arbitration Rules (PCA Case No. 2020-21) (the "**UNCITRAL Arbitration**").

M. On 6 September 2022, the Parties exchanged the slides' presentations to be used at the "**Injunction Hearing**". The Respondent further requested to add the following

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

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

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

I. THE PARTIES' POSITIONS

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

1. Claimants' Position

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

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

> *cease and desist from taking any further actions, and participating in a hearing or in any other manner, in the UNCITRAL arbitration during the pendency of said Interim Measures.*
>
> *(b) Grant such further relief to Mozambique as this ICC Tribunal deems to be just and proper.*[2]

3. As regards the nature or shape of the injunction, the Claimants emphasised at the Injunction Hearing that their request is for an injunction enjoining PEL from proceeding *in its entirety* in the PCA, until a decision from this Tribunal relating to the disputes arising out of the MOI. According to the Claimants, an injunction ordering PEL not to go ahead with the disputes arising out of the Memorandum of Interest entered into by the MTC and PEL on 6 May 2011 (the "**MOI**") would not be a workable injunction, as PEL's own pleadings reflect the fact that their claims in the UNCITRAL Arbitration are related to the MOI and dependent on the determination of the contractual claims.

4. The Claimants justify their renewed application for an injunction and the need to revisit this question on several considerations relating to the Tribunal's decision in the Partial Award on Jurisdiction and the subsequent factual background.[3]

5. The Claimants refer to the Tribunal's Partial Award and the reasons provided therein to deny the Claimants' request for an injunction, specifically to the part of that award where the Tribunal indicated *"the clear understanding that the Respondent has accepted – both in the MOI but also in its submissions and statements in these arbitral proceedings – this Tribunal's jurisdiction over 'any dispute arising from the memorandum'"*, and expressed its expectation "*that its jurisdiction on the issues in dispute between the Parties arising from the MOI will be respected by the Parties,* i.e.*, they will respect their own commitment to submit to this jurisdiction for these purposes*".[4] According to the Claimants, the Tribunal placed its trust in PEL to respect the Partial Award's determination on this Tribunal's jurisdiction to decide all disputes arising out of the MOI.[5]

6. The Claimants assert that, following the notification of the Partial Award, Mozambique sent a letter to the UNCITRAL Tribunal (CEX-59) whereby it informed the latter of this ICC Tribunal's Partial Award, and renewed the request that the UNCITRAL Tribunal stay the UNCITRAL Arbitration until the disputes arising out of the MOI are

[2] Reply, ¶ 60.
[3] Application, ¶ 5, and section II (¶¶ 9-54). See also Reply, ¶ 4, and section II (¶¶ 9-21).
[4] Application, section II.A (¶¶ 9 and 10), citing Partial Award, ¶ 49.
[5] Application, section II.A (¶¶ 9 and 10), citing Partial Award, ¶ 49.

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

7. The Claimants submit that PEL has abused the trust this Tribunal placed in it, by obfuscating and ignoring this Tribunal's jurisdiction over the disputes arising out of the MOI, namely in a letter submitted by the Respondent to the UNCITRAL Tribunal on 21 March 2022 (CEX-60).[7] The Claimants highlight several instances of that letter to demonstrate that "*Patel prevailed on the UNCITRAL Tribunal to simply ignore the Partial Award, and move forward in disregard of this ICC Tribunal's jurisdiction over disputes arising out of the MOI*",[8] and refer to ¶ 139 of the Partial Award, which the Respondent cited in its letter, as merely implying that *"while the UNCITRAL Tribunal has jurisdiction over the Treaty Claims, the 'obligations arising out of the MOI' are still 'preliminary questions' in need of* [prior] *resolution in this ICC arbitration*", as also suggested by ¶ 151 of the Partial Award.[9]

8. The Claimants argue that "[a]*t the same time Patel was encouraging the UNCITRAL Tribunal to ignore this Tribunal's Partial Award, Patel was – it appears – contriving an excuse to forestall the ICC hearing*".[10] The Claimants submit that PEL could have avoided the need for an injunction by indicating its availability to hold the evidentiary hearing to be held in these proceedings (the "**Hearing**") on 12-16 September 2022 and by agreeing to suspend the UNCITRAL Arbitration until after this ICC Tribunal renders a final award, instead of refusing to do so "*in the hope that it will obtain a favorable determination of the parties' underlying contractual dispute in the UNCITRAL arbitration instead*".[11]

9. The Claimants further submit that PEL's position has prevailed before the UNCITRAL Tribunal, who on 12 April 2022 issued its decision rejecting Mozambique's request to stay the UNCITRAL Arbitration (CEX-61).[12] According to the Claimants, the UNCITRAL Tribunal "*simply recited its prior* procedural *reasons for rejecting the stay*" and "*refused to address that, a stay of the UNCITRAL arbitration is required, because Patel's Treaty Claims are dependent on the prior adjudication of the parties'*

[6] Application, section II.B (¶¶ 11-15). See also Reply, ¶ 18.
[7] Application, section II.C (¶¶ 16-22).
[8] Application, ¶ 22.
[9] Application, ¶¶ 20 and 21.
[10] Application, section II.D (¶¶ 23-29) (quotation from ¶ 23). See also Reply, ¶ 20.
[11] Application, ¶¶ 24-29 (quotation from ¶ 29).
[12] Application, section E (¶¶ 30-32). See also Reply, ¶ 18.

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

10. The Claimants assert that a review of the Statement of Defence filed by PEL in these proceedings (the "**SoD**"), together with PEL's submissions in the UNCITRAL Arbitration, "*reveals an incredible and pervasive number of 'preliminary questions' – disputes Patel iself now concedes indisputably arise out of the MOI – improperly before the PCA*".[14] The Claimants submit that PEL's Treaty Claims before the UNCITRAL Tribunal require a determination of nine disputes arising out of the MOI and within this ICC Tribunal's exclusive jurisdiction, namely:

(i) Whether Mozambique granted PEL the right to a direct award of a concession;[15]

(ii) Whether the MOI was a contingent, non-binding preliminary document;[16]

(iii) Whether PEL's interpretation of the MOI is illegal or otherwise unenforceable under Mozambican law;[17]

(iv) Whether PEL satisfied the conditions precedent under the MOI;[18]

(v) Whether the MOI is unenforceable as having been procured by fraud;[19]

(vi) Whether Mozambique's public tender for awarding the concession violated or breached the MOI;[20]

(vii) Whether Mozambique provided PEL with a 15% scoring advantage in the public tender, consistent with the MOI;[21]

(viii) Whether the MOI is unenforceable as having been waived by PEL's participation in the public tender;[22] and

[13] Application, ¶¶ 31 and 32.
[14] Application, section II.F (¶¶ 33-54) (quotation from ¶ 36). See also Reply, ¶¶ 19 and 31, and Claimants' Hearing Presentation, where the Claimants highlighted the inextricable link between PEL's UNCITRAL claims and "*no less than nine disputes arising out of the MOI*" and within this Tribunal's jurisdiction.
[15] Application, section II.F.1, ¶ 37; Reply, ¶ 31; and Claimants' Injunction Hearing Presentation, p. 3.
[16] Application, section II.F.2, ¶ 39; Reply, ¶ 31; and Claimants' Injunction Hearing Presentation, p. 4.
[17] Application, section II.F.3, ¶ 41; Reply, ¶ 31; and Claimants' Injunction Hearing Presentation, p. 5.
[18] Application, section II.F.4, ¶ 43; Reply, ¶ 31; and Claimants' Injunction Hearing Presentation, p. 6.
[19] Application, section II.F.5, ¶ 45; Reply, ¶ 31; and Claimants' Injunction Hearing Presentation, p. 7.
[20] Application, section II.F.6, ¶¶ 46 and 47; Reply, ¶ 31; and Claimants' Injunction Hearing Presentation, p. 8.
[21] Application, section II.F.7, ¶ 48; Reply, ¶ 31; and Claimants' Injunction Hearing Presentation, p. 9.
[22] Application, section II.F.8, ¶ 49; Reply, ¶ 31; and Claimants' Injunction Hearing Presentation, p. 10.

(ix) Whether Mozambique breached the MOI.[23]

11. In addition to identifying the abovementioned nine disputes, the Claimants have indicated specific instances of the Parties' submissions in each of the relevant proceedings which, in the Claimants' view, highlight the overlap between the contractual claims and/or defences presented in these proceedings and the contractual issues brought by PEL in the UNCITRAL Arbitration.[24]

12. The Claimants' position is that all of the abovementioned disputes, properly before this Tribunal as "disputes arising out of the MOI",[25] must be decided (first) in this ICC arbitration;[26] and that permitting PEL to have them adjudicated in the UNCITRAL Arbitration prior to their determination by this Tribunal "*would potentially create conflicting results, and potentially render the ICC's exclusive jurisdiction at best superfluous, and at worst a nullity*".[27] The Claimants further submit that PEL's Treaty Claims "*as Patel alleges them*" are dependent on the existence of PEL's alleged rights under the MOI, "*the determination of which is within the exclusive jurisdiction of this ICC Tribunal*".[28]

13. In their Reply, the Claimants submitted that PEL failed to respond to the substance of the nine preliminary questions which PEL itself conceded are within the exclusive jurisdiction of this Tribunal, or to deny that it is breaching the ICC arbitration agreement found in the MOI by arbitrating those disputes before the PCA.[29]

14. The Claimants' considerations regarding the procedural history after the Partial Award, which in the Claimants' perspective justify the Claimants' (renewed) application and warrant the requested injunction, were reiterated in the Claimants' Reply, where the Claimants' assert that PEL's complaints of "*abuse of process*", "*guerrilla tactics*", "*duplicative applications*" or "*gamesmanship*" are merely the result of PEL's own intransigence and refusal to respect the exclusive jurisdiction of this Tribunal and the Partial Award.[30]

[23] Application, section II.F.9, ¶ 50, Reply, ¶ 31; and Claimants' Injunction Hearing Presentation, p. 11.
[24] See fn. 15-23. See also CEX-62, PEL's Statement of Claim in the UNCITRAL Arbitration, 30 October 2020, and CEX-63, PEL's Reply on the Merits and Response to Objections to Jurisdiction in the UNCITRAL Arbitration, 9 August 2021.
[25] Application, ¶ 51.
[26] Application, ¶¶ 38, 40, 42, 44 and 45.
[27] Application, ¶ 38. See also ¶¶ 40, 51, 63 and 74.
[28] Application, ¶¶ 52 and 53.
[29] Reply, section III.B.1, ¶¶ 31 and 32.
[30] Reply, section II, ¶¶ 9-21.

15. The Claimants' request for an injunction was submitted pursuant to Article 28(1) of the ICC Rules.[31] The Claimants submit that ICC tribunals have relied on Article 28(1) to enjoin a party from proceeding in another forum contrary to the agreement to the arbitrate the dispute before an ICC tribunal.[32]

16. In the Reply, the Claimants further referred to Article 33 of the Mozambican *Lei de Arbitragem, Conciliação e Mediação* (*Lei n.º 11/99, de 8 de julho*) ("**Mozambican Arbitration Law**"), and argued that "*both ICC Rules and Mozambiquan law support the broad powers available to grant the request to enjoin Patel*".[33] In the Claimants' view, in the absence of limitations regarding the type of measures which may be granted by arbitral tribunals, "*whether under ICC Rules, or Mozambiquan law, or both*", it should be understood that this ICC Tribunal has powers to grant the requested injunction.[34]

17. The Claimants mention several other authorities to support their position that ICC tribunals have used the powers available to them under Article 28 to issue injunctive relief. In addition to case law, like the Final Award in *Cessna Finance Corp. v. Gulf Jet LLC, et al.* (CL-140, ¶¶ 215-223),[35] and a decision by the United States District Court for the Southern District of New York (CL-135, ¶ 9),[36] the Claimants reproduce the following statement by Prof. Emmanuel Gaillard in its article on "Anti-suit Injunctions Issued by Arbitrators":

> *An arbitrators' jurisdiction to decide disputes relating to the arbitration agreement contains, by definition, the jurisdiction to decide breaches of the obligation to arbitrate* [and] *the arbitrators' power to sanction any breaches that are ascertained on that basis.*[37]

18. With reference to the Partial Award in *Coastal Corp. v. Nicor Int'l Corp. and Consultores De La Cuenca Del Caribe, S.A.*, the Claimants set forth the following circumstances as those typically considered by tribunals when determining whether to issue interim measures:

---

[31] Application, ¶ 5. See also Application, section III (¶ 55 and ff.); Reply, ¶ 1 and section III.A (¶¶ 22 and ff.); and CL-139, ICC Rules.
[32] Application, ¶ 56.
[33] Reply, ¶ 26. See also ¶¶ 23, 25, 29 and 30; CL-151, Mozambizan Arbitration Law; and CER-13, Teresa Muenda's Opinion regarding Mozambican arbitration law.
[34] Reply, ¶¶ 27-29.
[35] Application, ¶¶ 56, 64 and ff.; and Reply, ¶¶ 30 and 51.
[36] See Application, ¶ 79.
[37] CL-141, Emmanuel Gaillard, "Anti-Suit Injunctions Issued by Arbitrators", in Albert Jan van den Berg (ed.), International Arbitration 2006: Back to Basics? (ICCA / Kluwer 2007) 235, 238, as cited in the Application, ¶ 57. See also Application, ¶¶ 56 and 64; and Reply, ¶ 30.

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

19. According to the Claimants, as in *Coastal Corp.*, if PEL is allowed to continue to attempt to adjudicate disputes arising out of the MOI in the UNCITRAL Arbitration, any result, regardless of the outcome, will be contrary to the arbitration agreement to resolve any disputes arising out of the MOI in this ICC arbitration.[39] Moreover, and referring to the last consideration quoted from the *Coastal Corp.*'s decision, the Claimants submit that the "*practical effectiveness*" of this ICC arbitration could be materially affected, if PEL were permitted to continue with the UNCITRAL Arbitration, and the UNCITRAL Tribunal proceeds to holding a hearing in November-December 2022 and adjudicating the Parties' contractual dispute.[40]

20. With reference to the *Cessna Finance* case, the Claimants assert that it is the duty of this Tribunal to enforce PEL's "*negative obligation*" not to litigate disputes arising out of the MOI in another forum, to uphold the arbitration agreement and prevent any breach of it.[41] The Claimants further emphasised at the Injunction Hearing that, pursuant to Article 35(6) of the ICC Rules, at the moment of the Partial Award, there was an obligation of PEL to carry out the Partial Award immediately and that PEL is now in breach of the MOI, which has been determined to be the source of jurisdiction of this Tribunal.[42] Pursuant to the Claimants, this means that it is now the obligation of this Tribunal to enforce the MOI, as we are now at a position where PEL has not gone back to the PCA acknowledging this Tribunal's exclusive jurisdiction to decide the MOI's issues.[43]

21. Quoting from the tribunal's decision in the same case, the Claimants further mention the following two principles on the appropriateness of an injunction against proceeding in another forum: "*the particular injunctive relief must be necessary or appropriate to*

[38] CL-142, *Coastal Corp. v. Nicor Int'l Corp. and Consultores De La Cuenca Del Caribe, S.A.*, ICC Case No. 10681/KGA, Partial Award, 31 May 2001, ¶ 11, cited in the Application, ¶ 58. See also Reply, ¶ 46.
[39] Application, ¶¶ 59 and 60.
[40] Application, ¶¶ 59 and 61-63.
[41] Application, ¶¶ 65 and 66, referring to (CL-140) *Cessna Finance Corpo. V. Gulf Jet LLC, et al.*, ICC Case No. 18769/VRO/AGF, Final Award, 17 January 2014, ¶¶ 215 and 216. The Claimants also emphasised this point at the Injunction Hearing.
[42] Injunction Hearing recording, at 00:19:50.
[43] Injunction Hearing recording, at 00:20:20.

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

22. The Claimants then refer to a number of reasons why "*this ICC Tribunal has exclusive jurisdiction to adjudicate any disputes arising out of the MOI*", including, *inter alia*, the wording of the arbitration agreement set forth in Clause 10 of the MOI (including the use of the word "shall", in "*shall be referred to arbitration*", and the reference to "*any dispute arising out of this memorandum*"), the internationally recognised principle of freedom of contract (CL-128) underlying the MOI and the arbitration agreement, the negative obligation to refrain from going to another forum implied in an arbitration agreement, PEL's own admission that this ICC Tribunal "*has exclusive jurisdiction over the Parties' dispute arising out of the MOI (which was never disputed)…*" (SoD, ¶ 245), the binding nature of the Partial Award and PEL's affirmative obligation to carry it out without delay, under Article 35(6) of the ICC Rules.[46]

23. Pursuant to the Claimants, the Respondent's refusal to suspend the UNCITRAL Arbitration amounts to a violation of the Partial Award, and an injunction against PEL is "*necessary to ensure that this ICC Tribunal will be able to render an award capable of being recognized and enforced readily, promptly and without further arguments about jurisdiction*".[47]

24. The Claimants further rely on *Ridge C.C. At Reynosa Beneficiary LLC v. Banco J.P. Morgan, S.A., et al.* (CL-144) to sustain that "*Article 28(1) interim measures can be appropriately used to undo relief wrongfully*", considering that in that case "[n]*ot only did the* (…) *tribunal order the respondent to move to stay the Mexican Court action* (…)*, but the tribunal ordered the respondent to request that the Mexican Court withdraw its ex parte orders*".[48] According to the Claimants, "[l]*ike the ICC tribunal in*

[44] Application, ¶ 68, citing CL-140 (above n. 41) ¶ 217.
[45] Application, ¶¶ 69-71.
[46] Application, ¶ 72.
[47] Application, ¶¶ 73-75 (quotation from ¶ 75).
[48] Application, ¶¶ 76 and 77, referring to (CL-144) R*idge C.C. At Reynosa Beneficiary LLC v. Banco J.P. Morgan, S.A., et al.*, ICC Case No. 19134/CA/ASM, Procedural Order Relating To Interim Measures, 10 April 2013, ¶ 24.

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

25. The Claimants submit that the scope of the requested injunction "*is limited to what is necessary and proper*", in that Mozambique is merely asking that PEL, not the PCA or the UNCITRAL Tribunal, be enjoined from proceeding with the UNCITRAL Arbitration until after this ICC Tribunal renders its final award, and not in a permanent way.[50] The Claimants further clarify that Mozambique is not asking the ICC Tribunal to decide on the UNCITRAL Tribunal's jurisdiction, but rather "*to give effect to the MOI's arbitration agreement's mandate requiring arbitration pursuant to the ICC Arbitration Rules* (…)".[51]

26. The Claimants refer to the ICSID case *Emmis Int'l Holding, B.V., Emmis Radio Operating, B.C., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary* in favour of the proposition that "[i]*f this Tribunal rules in favor of Mozambique, Patel will have no rights to enforce under internationally treaty law*", as well as to the case law originating in the Vivendi decision, referred to in the Partial Award.[52] According to the Claimants, whilst this Tribunal's jurisdiction is derived exclusively from the MOI's arbitration agreement and is, as such, "*merely a matter of contract*",[53] investment treaty law supports the conclusion that "*where, as here, the parties have elected to adjudicate contractual disputes in a specific forum (here, ICC arbitration), the assertion of Treaty Claims does not defeat the compulsory and exclusive nature of the parties' election of ICC arbitration to adjudicate the underlying contractual dispute*".[54] In this respect, the Claimants also state that:

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

[49] Application, ¶ 78.
[50] Application, ¶ 80.
[51] Application, ¶ 83.
[52] Application, ¶¶ 81-86, referring to (CL-46) *Emmis Int'l Holding, B.V., Emmis Radio Operating, B.C., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 162, and the Partial Award, ¶ 144 (fn. 27).
[53] Application, ¶ 86, citing Partial Award, ¶ 144.
[54] Application, ¶ 81-86, particularly, ¶ 86.

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

27. Further to the above, in their Reply, the Claimants sought to clarify the following points, in response to the Respondent's Response.

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

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

29. With reference to the factors mentioned by PEL, in ¶ 44 of its Response, as relevant factors tribunals consider when determining whether to issue an injunction,[59] the Claimants assert that:

(i) This Tribunal already found that it has exclusive jurisdiction to determine disputes arising out of the MOI;[60]

(ii) Mozambique has the right to have this ICC Tribunal determine disputes arising out of the MOI;[61]

---

[55] Application, ¶ 83. This point was also addressed by the Claimants at the Injunction Hearing, where the Claimants reiterated that, whilst in an ordinary case a BIT arbitration tribunal would have jurisdiction to determine the rights of the parties as part of the claims of the BIT, this is not an ordinary case because, here, there is in fact a separate MOI dispute resolution provision, whereby the Parties took away from the PCA the right to decide the disputes arising out of the MOI.
[56] Reply, section III.B.2 (¶¶ 33-38).
[57] Reply, ¶¶ 37 and 38, citing Response, ¶ 34 (in turn, citing RL-153, ¶ 40) (emphasis from the Reply).
[58] Reply, ¶ 38.
[59] See Reply, section III.B.2, ¶ 39. See also ¶ 48 below, citing Response, ¶ 44.
[60] Reply, section III.B.3.a, ¶ 40.
[61] Reply, section III.B.3.b, ¶ 41.

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

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

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

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

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

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

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

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

[62] Reply, section III.B.3.c, ¶¶ 42 and 43 (quotations from ¶ 43).
[63] Reply, section III.B.3.d, ¶¶ 44-46 (quotation from ¶ 46).
[64] Reply, section III.B.3.e, ¶ 47.
[65] Reply, section III.b.f, ¶ 48 and 49.
[66] Reply, section III.4 (¶¶ 50-54).
[67] Reply, ¶ 52 (emphasis from the original).

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

2. Respondent's Position

32. The Respondent requests the Tribunal:

> *(a)* ***TO DISMISS*** *Claimants' Sixth Injunction Application to enjoin PEL from proceeding with the UNCITRAL Arbitration;*
>
> (…)
>
> *(c)* ***TO ORDER*** *any further and/or additional relief as the Tribunal may deem appropriate.*[70]

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

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

---

[68] RL-163.
[69] As mentioned by the Claimants', citing RL-163, p. 290.
[70] Rejoinder, ¶ 22. See also Response, ¶ 75.
[71] Rejoinder, ¶ 23.
[72] Response, section III.A. (¶¶ 15-22) and section IV.B, ¶¶ 55-57; and Rejoinder, section II (¶¶ 6-11).
[73] Rejoinder, ¶¶ 3(1) and 6. See also Response, ¶ 21.

35. The Respondent further submits that Mozambique misconstrues this Tribunal's findings in the Partial Award by relying on the Tribunal's statement that the "*obligations arising out of the MOI*" are "*preliminary questions for determining the dispute between the Parties over the alleged violations of the Respondent's rights under the Treaty*" (Partial Award, ¶ 139), to assert that PEL's claims in the UNCITRAL Arbitration are dependent upon this ICC Tribunal's determination of the underlying contractual disputes.[74] According to the Respondent, contrary to what the Claimants argue, this Tribunal "*expressly acknowledged the different nature of the causes of action underlying the parallel proceedings and highlighted the differences between the purported contract claims and treaty claims*",[75] and, like the UNCITRAL Tribunal, "*unequivocally recognised that nothing in the MOI prevents PEL from pursuing its claims in the UNCITRAL Arbitration and both arbitrations can proceed in tandem harmoniously*".[76] The Respondent further asserted in its Rejoinder that this Tribunal "*explicitly recognised that both tribunals have concurrent jurisdiction*".[77] The Respondent refers, in this respect, to different passages of this Tribunal's Partial Award (namely at ¶¶ 134, 136, 139, 140, 141 and 142), to the Separate Opinion issued by Co-Arbitrator Stephen Anway on the same occasion (¶¶ 7 and 8) and to the UNCITRAL Tribunal's letter of 12 April 2022, on the (dismissal of the) Claimants' second stay application (REX-65).[78]

36. With reference to the Claimants' concerns regarding the dates of the ICC Hearing and the UNCITRAL evidentiary hearing, the Respondent notes, in particular, that "*the UNCITRAL hearing was always scheduled to take place prior to the ICC hearing (*i.e.*, the UNCITRAL hearing was initially scheduled for 4-8 April 2022 and was subsequently delayed at Claimants' request due to health considerations of its counsel)*".[79] The Respondent further mentions that the Claimants' arguments in this respect also demonstrate that "*the genuine purpose of this arbitration is to thwart the UNCITRAL proceedings*".[80]

37. Furthermore, the Respondent argues that the Claimants have failed to establish that this Tribunal has powers to grant an anti-*arbitration* injunction in relation to the UNCITRAL Arbitration.[81] The Respondent asserts that, whilst ICC tribunals have the

[74] Response, ¶ 23.
[75] Response, ¶ 23.
[76] Response, ¶ 24. See also Rejoinder, ¶ 7.
[77] Rejoinder, ¶ 7.
[78] Response, ¶¶ 16, 17, 23, 24 (fn. 37) and 56; and Rejoinder, ¶¶ 7-10. See also Respondent's Injunction Hearing Presentation, pp. 2, 3, 5 and 8-11.
[79] Response, ¶ 21.
[80] Rejoinder, ¶ 11.
[81] Response, section IV.A, ¶¶ 31-40, and section IV.B, ¶¶ 58-61.

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

38. The Respondent contends that the Claimants would not have met their burden of proof with respect to Mozambican law.[85] The Respondent submits that a tribunal may only grant the interim relief it is entitled to under the law of the place of arbitration – in this case, Mozambican law –, and "*neither the Claimants nor their legal expert, Ms Muenda, cite a single authority supporting their argument that this Tribunal has the power to grant an anti-arbitration injunction (or even an anti-suit injunction) under Mozambican law*".[86]

39. Moreover, the Respondent submits that, even assuming *arguendo* that, *(i)* the Claimants had satisfied their burden to show that the legal principles applicable to anti-suit injunctions are relevant to the determination of the Claimants' application and that *(ii)* the Tribunal has authority or discretion to issue such an extraordinary remedy, *quod non*, the Claimants would not have established the threshold requirement for granting the injunction they seek, namely, that PEL breached the MOI's arbitration agreement by starting the UNCITRAL Arbitration, which was brought under a different instrument of consent and involves different causes of action, as already recognised by both this

[82] Response, ¶¶ 31 and 32 (emphasis from the original).
[83] Response, ¶¶ 33-35, citing RL-153, George A. Bermann, "Anti-Suit Injunctions: International Adjudication", in H. Ruiz Fabri (eds.), *Max Planck Encyclopaedia of International Law* (OUP, 2015) ¶¶ 40-42. See also Response, ¶¶ 39-40 and 58-59, and Rejoinder, section III (¶¶ 12-14).
[84] Response, ¶¶ 60-62, citing Partial Award, ¶ 142.
[85] Response, ¶ 37-40 and ¶ 58; and Rejoinder, ¶ 12-14.
[86] Response, ¶¶ 37-40; and Rejoinder, ¶¶ 12-14, referring to CER-13. See also Response, ¶ 58.

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

40. The Respondent objects to the Claimants' argument that PEL submitted the "disputes arising out of the MOI" in the UNCITRAL Arbitration and therefore allegedly breached the MOI's arbitration agreement.[88]

41. It reiterates "the well-established principle of investment treaty law that an arbitration clause in a contract does not prevent an investor from commencing a treaty claim because the causes of action are different", which it argues was expressly endorsed in the Partial Award (namely, in its ¶¶ 136, 139 and 141).[89] It insists it has not asked the UNCITRAL Tribunal (or this Tribunal) to adjudicate claims "arising out of the MOI", but rather to adjudicate breaches of the Treaty, that is, whether Mozambique breached the Treaty and to order compensation for Mozambique's breaches.[90]

42. Objecting against the Claimants suggestions in this respect, the Respondent argues that none of the decisions originating from the *Vivendi* decision mentioned in the Partial Award (fn. 27, at ¶ 144) "*has the effect that commencing an investment treaty claim is* per se *a breach of the relevant dispute resolution clause in an underlying contract*.[91] Accordingly, it holds that

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

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

---

[87] Response, section IV.A, ¶¶ 41-53 and 63-67; and Rejoinder, ¶ 3(3) and (4), and section IV, particularly, ¶ 18. See also RL-154, ¶ 28-61 and 28-64, RL-155, p. 184, and CL-140 (above n. 41) ¶ 213, on the relevant threshold requirement (Response, fn. 56 and 57).
[88] Rejoinder, ¶ 19.
[89] Rejoinder, ¶ 19(1); and Response, ¶ 48.
[90] Rejoinder, ¶ 19(2); and Response, ¶¶ 25, 26 and 65(a). See also CEX-63 (above n. 24) ¶ 1152, cited in the Rejoinder, ¶ 19(2) (fn. 32), and also referred to at the Injunction Hearing – see Respondent's Injunction Hearing Presentation, p. 13.
[91] Response, ¶¶ 48-50.
[92] Response, ¶ 26.
[93] Response, ¶ 65(b).

44. Further, at the Injunction Hearing, the Respondent submitted the following:

(i) The overlap between the two proceedings is the result of the way in which PEL chose to formulate its Treaty claims;

(ii) The jurisdiction of the two tribunals does not, however, overlap: the UNCITRAL Tribunal has jurisdiction over PEL's Treaty claims; this Tribunal has jurisdiction over the Claimants' claims arising out of the MOI;

(iii) The causes of action between the two proceedings are also distinct: PEL has not asserted any contractual claims before the PCA Tribunal, and has only raised defences in these proceedings; the jurisdiction of this Tribunal is very narrow, and narrower than would be provided under the standard ICC arbitration clause, which refers to "*disputes arising out of or in connection with*" the contract;

(iv) PEL's Treaty claims could be considered as "connected with" the contract, but they are not claims "arising out of" the MOI;

(v) This Tribunal's jurisdiction over any disputes arising out of the MOI does not mean that the UNCITRAL Tribunal cannot analyse the same contractual issues as preliminary issues;

(vi) In the UNCITRAL case, anything to do with the MOI will be dealt with as an evidentiary question to determine PEL's treaty claims, or – as also put by the Respondent – as a "simple factual building block" of PEL's treaty claims, and not as a legal holding;

(vii) While some of the issues will be considered by both Tribunals, they will be considered to different ends: in this case, they will be considered to determine the Claimants' contractual claims under Mozambican law; in the UNCITRAL case they will be considered as an evidentiary matter that fits into that Tribunal's ultimate determination of PEL's claims under the Treaty;

(viii) In deciding the Treaty claims, the UNCITRAL Tribunal will look at the contractual issues not to decide whether there was a breach of Mozambican law, but rather to decide whether there was a breach of international law.

45. Also with respect to the threshold determination, the Respondent further sought to distinguish the present case from the three ICC cases relied upon by the Claimants, namely, *Cessna Finance*, *Coastal Corp.* and *Ridge C.C.*, in so far as those cases concern

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

46. The Respondent submits that the Claimants have not established that the decision in *Emmis v. Hungary* has any relevance to the threshold determination for granting an injunction, that the Bilateral Investment Treaty entered into between India and Mozambique (the "**India-Mozambique BIT**", the "**BIT**" or the "**Treaty**") contains its own definition of investment, and that "*treaty tribunals routinely interpret and apply domestic law*".[96]

47. Moreover, the Respondent submits that, even if this Tribunal were to find that the UNCITRAL Arbitration was commenced in breach of the MOI's arbitration agreement, "*the Claimants have failed to satisfy any other relevant factors (other than the fact that this Tribunal has* prima facie *jurisdiction to grant the interim measures they seek)*".[97]

48. The Respondent mentions the following "*other relevant factors*" that tribunals consider when deciding whether to issue an injunction:

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

49. According to the Respondent:

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

[94] Response, ¶ 45 (emphasis from the original); and Rejoinder, ¶ 16(2).
[95] Response, ¶¶ 46 and 47 (quotation from ¶ 47, citing REX-65, Letter from UNCITRAL Tribunal dismissing Mozambique's Application to Stay Proceedings, 12 April 2022, ¶ 17; and Rejoinder, 16(3).
[96] Response, ¶¶ 51-53. See also Response, ¶ 66.
[97] Response, ¶¶ 68. See also Response, ¶¶ 44 and ff.; and Rejoinder, ¶ 20.
[98] Response, ¶ 44. See also Rejoinder, ¶ 20, and RL-155, pp. 189, CL-141, Gaillard (above n. 37) 239, and RL-156, p. 125, with respect to each of the relevant factors (Response, fn. 58-63).

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

(ii) As to urgency, the Claimants have demonstrated none, as results from the fact that there has been no material change of circumstances since the Claimants' last application for an injunction;[100]

(iii) As to proportionality, the harm the Respondent would suffer if the injunction were to be granted, namely, the significant delay and costs associated with any adjournment of the UNCITRAL Arbitration, and denial of its access to justice, far outweighs the harm that the Claimants would suffer should the injunction be refused.[101]

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

II. THE TRIBUNAL'S ANALYSIS

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

1. Legal Basis

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

[99] Response, ¶¶ 27 and 70. This point was also mentioned at the Injunction Hearing, where the Respondent further emphasised that there is no binding precedent in international arbitration or Mozambican law and, as a result, each tribunal will conduct a *de novo* review of the issues before it, without being bound by the other tribunal's decision.
[100] Response, ¶ 71.
[101] Response, ¶ 72.
[102] RL-163, ¶ 3-1037. See also Respondent's Injunction Hearing Presentation, p. 4.

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

> *CLAUSE 10*
> *(Resolution of Disputes)*
> *The present document constitutes a memorandum of interest between the parties. Any dispute arising out of this memorandum between the parties shall be referred to arbitration. The arbitration will be governed by Mozambique law and the rules of the International Chamber of Commerce shall be followed. Each party will appoint one arbitrator and both of these appointed arbitrators will in turn appoint the presiding arbitrator. The venue of the arbitration shall be at the Republic of Mozambique.*[103]

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

a. The Powers under Mozambican Law

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

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

In English:

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

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

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

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

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

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

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

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

---

[105] Response, ¶ 32.

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

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

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

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

b. The Labelling of the Requested Measure

58. Insofar as the Respondent argues that the measure requested in the present case would actually not be an "anti-suit" but an "anti-*arbitration*" injunction and would therefore fall under "*a different paradigm*",[110] it misses that that voices cautioning against such anti-arbitration injunctions refer exclusively to state courts "*enjoin*[ing] *parties from initiating or maintaining proceedings before an arbitral tribunal sitting overseas*".[111] This is not the case here. The question here is – like that of "anti-suit" injunctions – whether the Arbitral Tribunal has the power to order an interim measure of protection to address a purported breach of the arbitration agreement caused by one party by bringing and maintaining proceedings in another forum pertaining to matters covered by the arbitration agreement. It is insofar irrelevant that this other forum is also arbitral, since it still is a more general forum whose jurisdiction is being invoked potentially at the detriment of the jurisdiction of the specifically agreed forum.

59. In this respect, the Arbitral Tribunal notes that the contractual agreement to resolve "*any dispute arising out of this memorandum between the parties* (…) [in ICC] *arbitration*" has been concluded in May 2011, that is, almost two years after the India-Mozambique BIT entered into force in September 2009. By this Treaty under public international law, the two countries generally accorded investors from the respective other country the right to have disputes relating to the exercise of the host state's sovereign powers, insofar as regulated in the Treaty, resolved before an international tribunal instead of its domestic public courts. The Parties have, however, subsequently specifically agreed by contract to have "*any disputes arising out of this memorandum* (…) *referred to arbitration*" under the ICC Rules.[112] Therefore, the concerns voiced

---

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

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

[110] Response, ¶¶ 33-35.

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

[112] Ibid.

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

60. On the contrary, what is applicable are the concerns that underly the need for "anti-suit injunctions" – even if that label also does not entirely fit here: the Claimants request provisional measures against the Respondent for having invoked a more general jurisdiction to the detriment of a specifically agreed jurisdiction in breach of a contractual obligation.[115] Had the Respondent chosen not to pursue its claims under the BIT but under Mozambican law before Mozambican courts, there would certainly be no doubt as to the possibility of this Arbitral Tribunal to enjoin the Respondent for having those state courts decide "*any dispute arising out of this memorandum*". Had the Claimants brought court proceedings on these matters before a Mozambican court, it would not have been surprising to see the Respondents themselves invoke the Arbitration Agreement in the MOI and requesting an injunction. The fact that the Respondent has chosen to pursue the disputed rights before the PCA Tribunal does not change the powers of this Arbitral Tribunal relating to interim measures of protection. The decisive question is whether that pursuance of rights before the other tribunal is in breach of the MOI's Arbitration Agreement and warrants the ordering of a provisional measure.

61. In consequence, it is irrelevant how the requested measure is labelled by the Parties beyond the language of the applicable provisions. What does matter is that the requested measure is about the respect for the contracted jurisdiction and the protection of its integrity, which is, indeed, at stake here. The Arbitral Tribunal is requested to address this by the means of a provisional measure, and the Arbitral Tribunal has that power under Article 28(1) of the ICC Rules, as embedded in the *lex arbitri*, Article 33 of the Mozambican Arbitration Law.

2. The Conditions for Provisional Measures

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

[113] Cf. Bermann (above n. 83) ¶ 42.
[114] This Tribunal is not a Mozambican court but an arbitral tribunal whose jurisdiction was created by the Parties' agreement and which is uncontested for the question at stake; see also above n. 107.
[115] See in this sense also (CL-141) Gaillard (above n. 37 and 106) 241, when addressing the criticism that it would be "*somehow improper for an arbitral tribunal to address injunctions to State courts*": "*The relevant question, therefore, is not a party's fundamental right to seek relief before national courts, but whether the arbitration agreement exists and whether the dispute is covered by such agreement, and who has jurisdiction to decide these questions*."

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

a. Jurisdiction to Decide on the Merits

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

> *149. When finding that it does not have jurisdiction over the Treaty Claims, this Tribunal does so in the clear understanding that the Respondent has accepted – both in the MOI but also in its submissions and statements in these arbitral proceedings – this Tribunal's jurisdiction over "any dispute arising from the memorandum". The Tribunal is thus confident that its jurisdiction on the issues in dispute between the Parties arising from the MOI will be respected by the Parties, i.e., they will respect their own commitment to submit to this jurisdiction for these purposes.*

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

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

[116] See Application, ¶¶ 58 and 68; Response, ¶¶ 43-44; and Reply, ¶ 39.
[117] RL-155, Vishnevskaya (above n. 106) 183.

i. Exclusive or Concurrent Jurisdiction

65. As already stated in the Partial Award on Jurisdiction, the Respondent never contested that it has the obligation to submit "[a]*ny dispute arising out of this memorandum between the parties* (…) *referred to arbitration*" under ICC Rules. Confronted with the Claimants' arguments that the Arbitral Tribunal's jurisdiction would be an exclusive one, the Respondent has, however, argued that this jurisdiction would not be exclusive. It invokes that this Tribunal did not expressly find an obligation of the Respondent to suspend the UNCITRAL Arbitration proceedings pending a final award in this arbitration but that it would have recognised that it lacks jurisdiction to decide questions concerning the other Tribunal's jurisdiction; that nothing in the MOI would prevent the Respondent from pursuing its claims in the UNCITRAL Arbitration proceedings; and that both proceedings could proceed in tandem.[118] It concludes in its Rejoinder – and reiterated this understanding at the Hearing – that this Tribunal would have explicitly recognised that its jurisdiction resulting from the MOI would be "concurrent" to that of the PCA Tribunal.[119]

66. The Partial Award, however, does not allow such a conclusion. On the contrary, this Tribunal stated there that "*it is* (…) *clear and undisputed that the Parties have agreed that they have the right and the obligation to have 'any dispute arising out of this memorandum' under Mozambican law resolved in ICC arbitration*".[120] It is only "[b]*eyond this*" obligation that "*there is not clear language* (…) *in the Arbitration Agreement in the MOI that suggests that the Respondent has also agreed to refrain from proceedings before the PCA Tribunal*".[121] The Tribunal insisted accordingly "*that the Parties are bound to the specific dispute settlement agreement to have their contractual issues arising out of the MOI to be arbitrated before this Tribunal, which the Tribunal expects them to honour.*"[122] Moreover, it stated expressly:

> *When finding that it does not have jurisdiction over the Treaty Claims, this Tribunal does so in the clear understanding that the Respondent has accepted – both in the MOI but also in its submissions and statements in these arbitral proceedings – this Tribunal's jurisdiction over "any dispute arising from the memorandum". The Tribunal is thus confident that its jurisdiction on the issues in dispute between the Parties arising from the MOI will be respected by the*

[118] See above para. 35; Response, ¶ 24; and Rejoinder, ¶ 7. See also SoD, ¶¶ 245-249.
[119] Rejoinder, ¶ 7.
[120] Partial Award, ¶ 141 (emphasis added).
[121] Ibid. (emphasis added).
[122] Ibid, ¶ 151 (emphasis added).

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

67. There is therefore no place to doubt that it was, and still is, the understanding of the Tribunal that the Respondent did, and still does, have the obligation to refrain from proceedings before the PCA Tribunal, and/or any other court or tribunal, insofar as they concern "*any dispute arising out of this memorandum*".[124]

68. The Respondent's attempt to re-qualify the jurisdiction resulting from the MOI as "concurrent" rather than exclusive is therefore misconceived. Not only is there nothing in the unequivocal language used in the MOI to suggest that the jurisdiction conferred by the Parties to this Tribunal would in any way be concurrent with that of any other court or tribunal, but this Tribunal has clarified in its Partial Award on Jurisdiction that it understands its jurisdiction to be exclusive.

ii. The relevance of *Vivendi*

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

> *The focus on the different causes of action has led those tribunals* [*i.e.,* Vivendi and its progeny] *to affirm their jurisdiction over claims arising out of investment treaties, despite the presence of jurisdictional agreements between the Parties in favour of other courts or arbitral institution and, conversely in*

[123] Ibid, ¶ 149 (emphasis added).
[124] Insofar as the Dissent, at ¶ 19, considers that the Majority would ignore that "*nothing new had occurred during the intervening three months between the issuance of the Partial Award on 16 February 2022 and Claimants' second injunction application to us on 18 May 2022 to justify a different decision*" it misses an essential point: the Tribunal expressly invited the Parties in ¶ 152 of the Partial Award to "*to coordinate, and use, the available jurisdictions in the reconciling spirit of such mutual respect between international arbitral tribunals for their respective jurisdictional spheres*" in the light of the decided allocation of jurisdiction. The fact that after the Partial Award "*nothing new had occurred*" is precisely the problem.
[125] As already stated in the Partial Award, ¶ 144: "*this Tribunal needs not to rely on that case law either, as our jurisdiction derives from the contractual agreement between the Parties and its scope is merely a matter of contract, not a matter of treaty law that has motivated* Vivendi *and its progeny*." This includes *SGS v. Philippines*, to which the Dissent dedicates considerable attention.
[126] See above paras. 26 and 42; Application, ¶ 84, and Response, ¶ 48. See also Rejoinder, ¶ 3(2).
[127] Response, ¶¶ 49-50.

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

70. What this line of cases shows is that the dichotomy created by treaty-based tribunals of looking at the cause of action for affirming their jurisdiction for treaty-based disputes (for the purpose of shielding it against other jurisdictions), makes sense – and may claim legitimacy – only to the degree that the other side of the same coin is also true: that the jurisdiction that has been contractually created by the parties for contract-based disputes is equally respected.[129] Or, put in other terms, the *Vivendi* logic is premised on the corollary of respect for contract-based jurisdiction as equally exclusive. Without purporting to preclude any of the jurisdictional issues before the PCA Tribunal, this corollary logic of respect for the jurisdiction contractually agreed by the parties[130] had comforted this Arbitral Tribunal to be

> *confident that, in the light of its decision here, the Parties will be able to coordinate, and use, the available jurisdictions in the reconciling spirit of such mutual respect between international arbitral tribunals for their respective jurisdictional spheres, which this Tribunal also trusts the PCA Tribunal to share.*[131]

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

iii. Contract or Treaty

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

[128] Partial Award, ¶ 144 (footnotes omitted).
[129] See the cases referred the Partial Award fn. 27, which are highlighted in the Dissent, ¶ 62.
[130] See ibid, ¶ 150: "*This comfort is justified to the degree that* Vivendi *has also been accepted by treaty-based tribunals to decline their jurisdiction over contract-based disputes*".
[131] Partial Award, ¶ 152.
[132] See also above fn. 124

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

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

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

74. The Respondent has insisted at the Injunction Hearing that none of its claims before the PCA Tribunal are claims arising out of the MOI since the causes of action of its claims are exclusively rooted in the Treaty and none are rooted in Mozambican law, which frames the contractual claims.[137] It argued that the PCA Tribunal would not make any determinations on the Claimants' contractual rights under Mozambican law but would treat any questions of contract relevant for determining breaches of the Treaty provisions as a matter of fact.[138] That position is, however, flawed.

75. One may already have doubts in view of Article 12(1) of the Treaty, which provides that "*all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made*". This suggests that it would be difficult for the PCA Tribunal to avoid the application of Mozambican law in its determination of the basis for claims brought under the Treaty, notably those relating to rights arising out of the MOI. The Respondent itself has affirmed that "*a week before the hearing in this [ICC] case, [before the PCA Tribunal] each of these witnesses will*

[133] Rejoinder, ¶ 16(2).
[134] See above para. 10.
[135] See above para. 44.
[136] See above para. 49(i).
[137] See above para. 44.
[138] Ibid.

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

76. Be it as it may, the Respondent's reliance on different causes of actions of the relevant claims does not square with the wording of the Arbitration Agreement, by which the Respondent accepted to submit "*[a]ny dispute arising out of this memorandum*" to the exclusive jurisdiction of this ICC Tribunal. At least *prima facie*, the claims before the PCA Tribunal seem to be in part based on, or at least concern, the Parties' dispute arising out of the MOI.

77. The Respondent itself very clearly stated that it has considered that the dispute between the Parties arising out of the MOI should be decided by the PCA Tribunal. Already the PCA Tribunal has understood the position of the Respondent to be that "*the only tribunal that has jurisdiction to hear both arguments under the MOI and under the BIT is this* [PCA] *Tribunal*."[140] In line with such a position, the Respondent invoked the doctrine of *lis pendens* to justify the Stay Application submitted on 10 June 2021 before this (ICC) Tribunal (the "**Stay Application**"), affirming that "*the parties and the issues are essentially identical*" and that consequently "*there is a considerable risk that* any *decision made by this* [ICC] *Tribunal would be conflicting with those made by the UNCITRAL Tribunal*."[141] The Respondent went on to affirm:

> *That this Arbitration and the UNCITRAL Arbitration cover identical issues is not in dispute between the Parties.* (…)
>
> *While the UNCITRAL Arbitration is brought under the Treaty and this claim is brought pursuant to the MOI, identical causes of action are not a requirement under the ILA Recommendations for the two arbitrations to be considered as parallel proceedings.* (…)
>
> *It follows that the two arbitrations are parallel proceedings* [and thus warrant a stay of the ICC proceedings]. *The overlap between the two arbitrations in the present case even goes beyond the requirement of the ILA Recommendations for a proceeding to be considered a parallel proceeding, which only provides*

[139] Respondent's letter of 3 August 2022, ¶ 5; see also Response, ¶ 53 (cited above, at para. 46): "*As for the fact that the UNICTRAL tribunal may be called upon to interpret and/or apply domestic law to this question, it is neither here nor there. Investment treaty tribunals routinely interpret and apply domestic law.*" See also its Stay Application as cited below para. 78.
[140] CEX-60, PCA Case No. 2020-21, Procedural Order No. 3 of 14 December 2020, ¶ 47.
[141] Stay Application, ¶ 7.

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

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

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

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

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

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

And moreover:

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

[142] Ibid., ¶¶ 85-87 (emphasis added); see also the quotation above para. 75.
[143] Ibid, ¶ 89.
[144] Respondent's letter of 3 August 2022, ¶ 1 (emphasis added).
[145] Ibid., ¶ 5 (emphasis added).
[146] Stay Application, ¶ 119 as already stated in ¶ 8.
[147] Ibid, ¶ 118.

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

Overlap caused by the Claimants

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

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

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

[148] Injunction Hearing recording, at 1:45:06.
[149] Injunction Hearing recording, at 1:43:40; see also its Rejoinder, ¶ 21: "*It is not for Claimants or this Tribunal to determine what claims or defences PEL should argue either in this or in the UNCITRAL Arbitration*."
[150] Ibid, at 1:44:45-57.

84. That does not mean, of course, that the Respondent would be deprived from bringing any of its Treaty claims in the UNCITRAL Arbitration proceedings, as this Tribunal recognised in its Partial Award on Jurisdiction. The Respondent is free to do so, but – at least from this Tribunal's contractual perspective – only to the degree that the bringing of such claims does not avoid and undermine the jurisdiction that the Parties chose in their Arbitration Agreement in the MOI. To the degree that the resolution of the Treaty claims depends on the adjudication of a dispute arising out of the MOI and properly before an ICC Tribunal with (exclusive) jurisdiction over "[a]*ny dispute arising out of this memorandum*", this Tribunal needs to insist on deciding these issues exclusively.

85. The Respondent's position at the Injunction Hearing that Mozambique agreed to the Most-Favoured Nation ("MFN") clause when it signed the Treaty does not change the analysis. If one accepts that an umbrella clause can be imported on such basis, one may understand the MFN clause to constitute Mozambique's acceptance of an investor bringing claims for breaches of contractual obligations before an investment tribunal. This does not, however, mean that the Respondent is free to ignore its own more specific and posterior jurisdictional agreement for the contractual claim in question.[151] As stated in the Partial Award, this Tribunal has nothing to say about the PCA Tribunal's jurisdiction under the Treaty. This Tribunal does, however, everything to say about the Respondent's obligation arising out of the MOI. And in this respect, it is sufficiently clear that the dispute arising out of the MOI, even if one were to accept that that is a mere question of fact for the Respondent's claims under the Treaty, needs to be resolved exclusively in accordance with the terms of the MOI. This means that nothing prevents the Respondent from bringing its umbrella clause claim under the Treaty before the PCA Tribunal – so long as the Respondent accepts (as it has) that the underlying contractual questions are resolved exclusively and thus preliminarily in the agreed ICC arbitration. But requesting the very same issues to be decided by a different tribunal in parallel constitutes *prima facie* a violation of the Arbitration Agreement. Indeed, the respect for party autonomy under the case law deriving from *Vivendi* suggests that the appreciation would probably not be different from a treaty-based perspective.[152]

86. The Respondent's affirmation that this Tribunal's determination of the matters in dispute arising out of the MOI would not bind the PCA Tribunal and thus make any kind of sequencing of decisions pointless[153] is again beside the point. The crucial point

[151] See also above para. 59.
[152] See above paras. 69-70.
[153] Injunction Hearing recording at 00:58:00 *et seq*.

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

87. One may add that there are no reasons to believe that the PCA Tribunal, should it decide after this Tribunal has decided, would be indifferent to the determinations made by this ICC Tribunal on matters in dispute arising out of the MOI. After all, it is possible that the PCA Tribunal accepts – as the Respondent has – that this ICC Tribunal is the one that the Parties have expressly and exclusively chosen to make these determinations. Even if the PCA Tribunal were to consider the matters in dispute arising out of the MOI to be mere matters of fact, the disputed question is of what these disputed facts are. And that is precisely – according to the Parties' own express will – what this ICC Tribunal is tasked to decide. There is no reason to assume that the PCA Tribunal would ignore this expression of freedom of contract and (procedural) party autonomy.[155]

88. Against this background, the claims before this Tribunal – and thus its jurisdiction – cannot really be seen as a mere attempt to derail the UNCITRAL Arbitration. The Respondent has unequivocally accepted that "[a]*ny dispute arising out of this memorandum between the parties shall be referred to arbitration*" under the ICC Rules.

---

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

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

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

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

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

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

90. Once it is *prima facie* clear that the applicant has a right that warrants protection, it is also necessary that there be urgency in ordering the measures required to protect the right at stake and that, without the measure being ordered, the applicant would risk suffering irreparable harm or, at least, a substantial prejudice, *i.e.*, harm not adequately reparable by an award on damages in a future award on the merits.[156]

91. The Respondent's own insistence that "*once the UNCITRAL tribunal has decided PEL's Treaty claims, there will be very few (if any) residual issues for this Tribunal to determine*"[157] makes it sufficiently clear that if the Respondent continues to pursue the adjudication of the contract law issues before the PCA Tribunal, the Claimants' right

[156] In this sense also ¶ 3-1037 of the Secretariat's Guide to ICC Arbitration (RL-163).
[157] Above para. 80.

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

92. It is therefore clear that, if the Respondent were to be allowed to continue to press forward with the determination of the contractual issues between the Parties by the PCA Tribunal, even if only as preliminary, factual or evidential questions, this Tribunal's jurisdiction, *i.e.*, its mandate to *ius dicere*: to make the exclusive legal determination of matters in dispute arising out of the MOI, would be largely reduced – in the Respondent's own words – to "*really nothing*". As the PCA Tribunal's hearing on also these matters is scheduled to take place in the week before this Tribunal's Hearing, there is, indeed, also urgency in protecting the Claimants' *prima facie* right to have the matters arising out of the MOI decided by the chosen jurisdiction.

93. Conversely, without an injunction, the Claimants would incur further substantial costs in parallel proceedings to defend their position regarding matters, the determination of which they are entitled to have in the agreed forum and in no other forum. Moreover, contrary to the exclusivity of their Arbitration Agreement with the Respondent in the MOI, the Claimants also face the risk of contradicting determinations of these contractual matters in dispute arising out of the MOI. This, in turn, may give rise to a liability under the Treaty that could be different had the Respondent respected the exclusive jurisdiction of this Tribunal and thus the sequencing of the proceedings. There is therefore also evidence of imminent substantial prejudice. This means that the Claimants' right resulting from the Arbitration Agreement in the MOI, as well as this Tribunal's jurisdiction and the integrity of these ICC proceedings, warrant ordering the Respondent to take measures to prevent this prejudice from materialising.

d. The Balance of Equities

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

[158] Ibid.

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

95. Secondly, during the Injunction Hearing, the Respondent argued that granting the relief requested by the Claimants "*ultimately would not prevent the UNCITRAL arbitration from proceeding in any event*", since, as publicly traded company, the Respondent owed a duty under Indian law to its shareholders to "*pursue the UNCITRAL arbitration as it is entitled to*".[160] It is remarkable that the Respondent puts forward an anticipated lack of respect for this Tribunal's order as a ground for not granting the order in the first place. Surely, as a matter of principle, *nemo auditur propriam turpitudinem (futuram) allegans*. As explained before, the Respondent is not "*entitled to*" seek determination of matters in disputes arising out of the MOI in another forum than the one it has itself accepted as exclusive. It is difficult to imagine that the Respondent under Indian law could have an obligation to its shareholders to breach its freely assumed contractual obligations to which it is, by its own admission, bound.

96. Accordingly, on the balance of equities, it does not appear that any particular circumstances militate against ordering a provisional measure to address the *prima facie* current breach of the Arbitration Agreement by the Respondent.

3. The Adequate Measure to Order

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

[159] Response, ¶ 72. See also above para. 49(iii).
[160] Injunction Hearing recording at 00:42:13 *et seq*. and 01:01:55; already at 00:30:20: "*No injunction from this tribunal has the power to stop the UNCITRAL Tribunal from conducting its scheduled hearing and issuing its decision, adjudicating PEL's treaty claims.*"

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

98. As stated before, the Respondent's pursuance of claims arising out of the Treaty does not in itself violate the Arbitration Agreement. It is the Respondent's attempts to have matters in dispute arising out of the MOI determined in parallel proceedings before by the PCA Tribunal that, at least *prima facie*, violate the Arbitration Agreement and thus this Tribunal's jurisdiction. This Tribunal's mandate is to exercise its jurisdiction, to protect the integrity of these proceedings and thus to ensure that it gets effectively to decide "*any matter arising out of this memorandum*" with a real and binding effect between the Parties. That defines the scope of the required measure.

99. The Claimants have insisted that any order short of enjoining the Respondent entirely from taking any action, including participating in the hearing before the PCA Tribunal would be ineffective. However, the mutual respect between tribunals (as invoked also in the Partial award) and comity requires this Tribunal not to interfere unduly with the UNCITRAL Arbitration. It is for the Respondent to do what is necessary to bring itself back in line with its obligations resulting from the Arbitration Agreement in the MOI. And it is for the PCA Tribunal to decide what the consequences of the Respondent's choices are for its own proceedings.[161]

100. Accordingly, what this Tribunal can and must do is to enjoin the Respondent from pursuing the determination of matters in dispute arising out of the MOI in any other forum, even if only accessorily for the purpose of the adjudication of its Treaty Claims.

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

III. DECISION

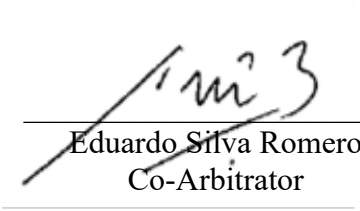
101. Based on the foregoing, the Tribunal decides:

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

b) All other requests are rejected.

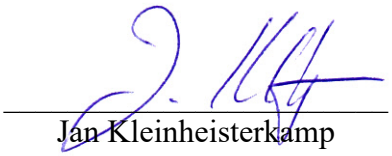
c) The costs relating to this decision will be decided in a future award.

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



Eduardo Silva Romero
Co-Arbitrator

Stephen P. Anway
Co-Arbitrator
(dissenting)



Jan Kleinheisterkamp
Presiding Arbitrator