ICC ARBITRATION RULES IN FORCE AS FROM 1 MARCH 2017

REPUBLIC OF MOZAMBIQUE

— and —

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

(Mozambique)

Claimants

— v —

PATEL ENGINEERING LTD.
("PEL")

(India)

Respondent

(ICC Case No. 25334/JPA)

ADDITIONAL DISSENTING OPINION OF ARBITRATOR STEPHEN ANWAY

29 November 2022

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I. INTRODUCTION

1. On 24 November 2022, this Contract Tribunal[1] issued Procedural Order No. 14 (the "Order") and my Dissenting Opinion. The *dispositif* of the Order stated:

> 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.

2. As the Majority explained, its Order was based on the proposition that, by signing a contract with Mozambique containing an ICC arbitration clause, PEL waived its right to raise any contractual arguments before the Treaty Tribunal under the arbitration provision in the BIT, even insofar as relevant to establishing a breach of the BIT.[2] Nothing in the Majority's Order stated that its injunction had a temporal limitation on it and would apply only until this Contract Tribunal decides the contract-related issues (all emphasis added):

- ¶ 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'****.*"

- ¶ 83: "*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****.*"

- ¶ 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****.*"

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1 Capitalized terms used in this Additional Dissenting Opinion have the meaning ascribed to them in my Dissenting Opinion of 24 November 2022 (the "Dissenting Opinion").

2 Majority's Order, ¶ 66.

- ¶ 84: "*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***.

- ¶ 94: "*This Tribunal's jurisdiction is exclusive with respect to all maters 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***.*"*

- *¶ 95: "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."*

3. I wrote my Dissenting Opinion accordingly.

II. THE MAJORITY'S NEW *DISPOSITIF* IS A MATERIAL CHANGE TO ITS ORDER

4. One day after issuing its Order, the Majority sent to the Parties a document entitled "Corrigendum", in which the Majority stated that it needed to "*correct[]*"[3] the *dispositif* in its Order (the "New *Dispositif*"). The New *Dispositif* states (new language in italics):

> 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, *until this Arbitral Tribunal has taken its decision on those matters*.

5. Although I am unaware of the reasons that led to this change, I do not consider this to be a mere correction. Unlike the Majority's Order and original *dispositif*, the New *Dispositif* imposes a time limitation on the Majority's injunction.

III. THE NEW *DISPOSITIF* IS DIFFICULT TO RECONCILE WITH THE LANGUAGE OF THE ORDER

6. I find the Majority's New *Dispositif* difficult to reconcile with the reasoning in the Order. In the body of the Order, the Majority categorically determined that PEL should be enjoined from making contractual arguments before the Treaty Tribunal because it

[3] Corrigendum, 25 November 2022, p. 2.

waived its right to do so by signing a contract including an ICC provision.[4] The Majority never qualified that determination by stating that PEL's alleged waiver was somehow partial—*i.e.*, that PEL only waived the right to raise contractual arguments before the Treaty Tribunal *unless and until* an ICC tribunal first decides those issues.

7. For example, the body of the Majority's Order repeatedly states that the present Contract Tribunal has the "*exclusive*" jurisdiction to resolve contract-related matters. That conclusion seems incompatible with the notion that the Treaty Tribunal can decide contract-related issues, so long as it is *after* we do so (emphasis in all added):

- ¶ 68: "*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****."*

- ¶ 71: "*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****."*

- ¶ 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.*"

- ¶ 84: "*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****.*

- ¶ 94: "*This Tribunal's jurisdiction is* ***exclusive*** *with respect to all maters 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****."*

[4] Order, ¶¶ 83-86, 89, 94, 100.

- ¶ 95: "*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 that it has itself accepted as* ***exclusive***."

8. The only way to reconcile the Majority's quotations above with its New *Dispositif* is if the Majority's decisions on the contract-related issues are *binding* on the Treaty Tribunal. As explained in my Dissenting Opinion, however, Mozambique did not even attempt to argue in its pleadings—much less establish—that the Majority's findings on the contract-related issues would be binding on the Treaty Tribunal.[5] And, indeed, the Majority's Order draws no such conclusion.

IV. THE OBJECTIONS IN MY DISSENTING OPINION STILL STAND

9. Notwithstanding the disconnect between the Majority's Order and its New *Dispositif*, the New *Dispositif* does not remedy any of the concerns that I expressed in my Dissenting Opinion. As I explained therein, the Majority's Order is unprecedented in two respects: (*i*) it rejects 20 years of consistent jurisprudence established by *Vivendi* [6] and its progeny,[7] whereby investors are entitled to allege a violation of contract before a treaty tribunal insofar as relevant to establishing a breach of the BIT; [8] and (*ii*) it functionally imposes that unprecedented conclusion on a public international law tribunal, seized under a different arbitration agreement, through an unprecedented anti-arbitration injunction. These concerns, as well as the others expressed in my Dissenting Opinion, apply with equal force to the New *Dispositif*. Whether or not the Majority imposes a time limitation on its injunction, the Majority's Order still rests on the two foregoing incorrect and unprecedented propositions.

10. One final point bears mention. I devoted an entire section in my Dissenting Opinion to show that investment treaty jurisprudence has widely rejected the idea that a contractual forum must first resolve contract-related issues before an investment treaty tribunal does. In that regard, I noted that the tribunal in *SGS v. Philippines*, which adopted this proposition in principle,[9] is one of the most heavily-criticized decisions in

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5 Dissenting Opinion, ¶¶ 38-43.

6 *Id.* at ¶¶ 3, 22-34.

7 *Id.* at ¶¶ 35-36.

8 *Id.* at ¶¶ 33, 83.

9 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, ¶ 175.

investment treaty jurisprudence.[10] I did so not because I understood the Majority's Order to have imposed an injunction only until our Contract Tribunal decides the contract-related issues (in fact, I did *not* have that understanding, because nothing in the Majority's Order stated so). Instead, I devoted an entire section in my Dissenting Opinion to *SGS v. Philippines* to show that "*the international arbitration community—tribunals, commentators, and academics alike—has rejected a far less aggressive approach than the one adopted by the Majority today*."[11]

11. Accordingly, I wish to emphasize that what the Majority does in its New *Dispositif* still is markedly different from what the tribunal did in *SGS v. Philippines*. The tribunal in *SGS v. Philippines* was a public international law tribunal, and it stayed *its own action* to allow the contract forum to decide the contract-related issues first. Although that decision remains one of the most criticized awards in investment treaty jurisprudence, the tribunal in *SGS v. Philippines* still did not come close to doing what the Majority did in its Order and does in its New *Dispositif*: to enjoin a different, public international law tribunal whose jurisdiction is based on a different instrument of consent.

V. CONCLUSION

12. My Dissenting Opinion stands.

Dated this 29th day of November 2022.

Stephen Anway

Arbitrator

[10] Dissenting Opinion, Section IV.D.

[11] *Id.* at ¶ 77.