

# ARRESTO & ASOCIADOS

ÁRBITROS

12 April 2022

## A 39

**PATEL ENGINEERING LIMITED (INDIA) [“Patel”, “PEL” or “Claimant”]**

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Dear Mesdames, dear Sirs,

**PCA Case No. 2020-21**  
**PATEL ENGINEERING LIMITED (INDIA) V.**  
**THE REPUBLIC OF MOZAMBIQUE**

The Arbitral Tribunal acknowledges receipt of Mozambique’s communications R 39 and R 40, and of Patel’s communication C 47, concerning Mozambique’s request to stay the present arbitration until after the tribunal in the parallel case before the International Court of Arbitration of the International Chamber of Commerce [the “**ICC Tribunal**” and the “**ICC Arbitration**”] issues the final award regarding the existence, validity and scope of the Parties’ contractual rights under the Memorandum of Interest [“**MOI**”] [“**Second Stay Application**”].

**A. Respondent’s request**

2. Respondent explains that the ICC Tribunal issued a partial award on jurisdiction [“**Partial Award**”]<sup>1</sup> and requests the Tribunal to reconsider its earlier decision not to suspend the present arbitration.

3. First, Respondent argues that the ICC Tribunal has now finally adjudicated that it has jurisdiction over the Parties’ contractual dispute. The ICC Tribunal also held that it lacks jurisdiction over the Parties’ treaty dispute. It is Respondent’s position, however, that Patel’s Treaty claims are dependent on the existence of Claimant’s alleged contractual rights under the MOI. Respondent contends that the MOI’s arbitration agreement is mandatory on the Parties, with the consequence that all disputes arising out of the MOI should be referred to ICC arbitration<sup>2</sup>. Consequently, Mozambique argues that these proceedings should be suspended until the ICC Tribunal issues a final award<sup>3</sup>.

4. Second, Respondent contends that the existence of the Claimant’s Treaty claims is contingent on the prior resolution of the Parties’ contractual dispute<sup>4</sup>. Without the

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<sup>1</sup> Doc. R-92.

<sup>2</sup> Communication R 39, p. 4.

<sup>3</sup> Communication R 39, p. 1.

<sup>4</sup> Communication R 39, p. 7.



contractual rights that Patel asserts, and that Mozambique disputes, there are no local rights to protect under the BIT and Patel can have no Treaty claims. It would be premature for this Tribunal to proceed further before the ICC Tribunal adjudicates the Parties' underlying contractual dispute<sup>5</sup>.

5. Third, Respondent avers that the Partial Award is final and binding, and thus Patel is bound to arbitrate the Parties' underlying contractual dispute before the ICC pursuant to the MOI's arbitration agreement<sup>6</sup>. This means that Patel has an obligation to agree to immediately suspend this UNCITRAL proceeding (until after the adjudication by the ICC Tribunal of the Parties' underlying contractual dispute) in order to carry out the Partial Award. The Partial Award also constitutes *res judicata* as the dispute is between the same Parties<sup>7</sup>. Respondent argues that PEL has an obligation to agree to suspend the present proceedings, while the Tribunal must respect the jurisdiction of the ICC Tribunal<sup>8</sup>.

6. In sum, Mozambique considers that the Tribunal should reconsider the decision set out in Procedural Order No. 4 and requests the suspension of this proceeding until after the ICC Tribunal issues the final award on the Parties' contractual dispute<sup>9</sup>.

#### **B. Claimant's response**

7. Claimant submits that Respondent's Second Stay Application is misconceived and points to the Tribunal's decision in Procedural Order No. 4 [the "**First Stay Decision**"]<sup>10</sup>.

8. First, the Tribunal has already considered and rejected Mozambique's request to stay this arbitration. Claimant avers that nothing has changed in the five months that have passed between the First Stay Decision and the issuance of the ICC Partial Award. Likewise, Claimant contends that the Partial Award in no way alters the Tribunal's analysis and conclusions in the First Stay Decision<sup>11</sup>; and that the ICC Tribunal's jurisdiction over the MOI was already "uncontested".

9. Second, Patel argues that Mozambique must demonstrate the substantial and material change of the point at issue<sup>12</sup>. However, Claimant considers that the basis of Respondent's Second Stay Application is essentially the same as the stay application of 1 October 2021, which the Tribunal found was not warranted<sup>13</sup>. Mozambique's argument

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<sup>5</sup> Communication R 39, p. 8.

<sup>6</sup> Communication R 39, p. 5.

<sup>7</sup> Communication R 39, p. 5.

<sup>8</sup> Communication R 39, p. 5.

<sup>9</sup> Communication R 39, p. 9.

<sup>10</sup> Communication C 47, p. 1.

<sup>11</sup> Communication C 47, p. 2.

<sup>12</sup> Communication C 47, p. 3.

<sup>13</sup> Communication C 47, p. 2.

continues to be that the resolution of the local contractual dispute is necessary and constitutes a prerequisite for this arbitration to proceed<sup>14</sup>.

10. Third, Claimant notes that both this and the ICC Tribunal concur that the causes of action and instruments of consent are different in each of the proceedings<sup>15</sup>. Furthermore, Patel argues that Mozambique misconstrues the Partial Award and that the ICC Tribunal never concluded that this Tribunal has any obligation to suspend the present proceedings pending a final award in the ICC Arbitration<sup>16</sup>. On the contrary, Claimant avers that Respondent's arguments do not withstand scrutiny since<sup>17</sup>:

- The Partial Award specifically states that nothing in the MOI prevents Patel from pursuing its Treaty claims in this UNCITRAL proceeding;
- The ICC Tribunal considers that both proceedings can continue in tandem harmoniously.

11. In sum, Patel requests that this Tribunal reject the Second Stay Application. Two arguments further support this request<sup>18</sup>:

- The Partial Award confirms the lack of jurisdiction of the ICC Tribunal over Patel's Treaty claims;
- Patel's Treaty claims are only before this Tribunal, while Mozambique's contract claims are only before the ICC Tribunal.

### **C. Arbitral Tribunal's decision**

12. In the ICC Arbitration (where Mozambique and the Ministry of Transport and Communications ["MTC"] act as claimants, and Patel as respondent), Mozambique argued that the ICC Tribunal had jurisdiction to decide on the entirety of the relief requested by Mozambique and the MTC, including all declaratory relief relating to the alleged violations of the BIT that are the basis of Patel's claims in the present arbitration<sup>19</sup>. In turn, Patel recognized the ICC Tribunal's jurisdiction over "certain contract law claims arising out of the MOI" but rejected that the arbitration agreement in the MOI could confer jurisdiction to the ICC Tribunal over any Treaty claims<sup>20</sup>.

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<sup>14</sup> Communication C 47, p. 2.

<sup>15</sup> Communication C 47, p. 4.

<sup>16</sup> Communication C 47, p. 6.

<sup>17</sup> Communication C 47, p. 6.

<sup>18</sup> Communication C 47, p. 8.

<sup>19</sup> Partial Award, para. 113.

<sup>20</sup> Partial Award, para. 122.

13. The ICC Tribunal upheld that it had jurisdiction to decide on any “dispute arising out of the MOI” but concluded that its jurisdiction did not extend to the Treaty claims<sup>21</sup>. In particular, the ICC Tribunal found that<sup>22</sup>:

“[...] it can, and should, interpret the Arbitration Agreement in a manner that harmoniously respects the jurisdictional realms of both international tribunals, the jurisdiction of which is, respectively based on two separate legal instruments (the MOI and the Treaty) to which the Republic of Mozambique has *prima facie* consented. The Tribunal prefers this approach to one that would expand the jurisdiction of this Tribunal to disputes that are not properly “arising out of” the MOI, potentially at the exclusion of, or in collision with, the jurisdiction of the PCA Tribunal. Accordingly, this Tribunal has unquestioned jurisdiction for deciding on any disputes arising out the MOI but no jurisdiction for deciding any disputes arising out of the Treaty.”

14. Despite this outcome, Mozambique argues in the present arbitration that the Tribunal should reconsider its First Stay Decision and suspend these proceedings until the ICC Tribunal has issued its final award. It is Mozambique’s position that Patel’s Treaty claims are contingent upon the existence of Claimant’s alleged contractual rights under the MOI, and for this reason this Tribunal should wait for the ICC Tribunal’s final award.

15. In its First Stay Decision the Tribunal decided that Mozambique’s request for a suspension was not warranted for several reasons:

- First, the Parties consciously chose to proceed with two parallel arbitrations; the Parties agreed on a procedural calendar in the present arbitration and there had been no change of circumstances which could warrant a modification of the agreed calendar<sup>23</sup>;
- Second, the stay suggested by Mozambique was equivalent to a *sine die* suspension of the proceedings, given the uncertainty as to the date in which the ICC Tribunal would issue the final award; this would lead to an unreasonable delay in the present proceedings<sup>24</sup>;
- Third, a stay of the proceedings pending a decision by another tribunal, constituted on the basis of a different agreement, was not justified<sup>25</sup>.

16. The Tribunal finds that the circumstances have not changed since the First Stay Decision, regardless of the issuance of the ICC Partial Award.

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<sup>21</sup> Partial Award, paras. 133 and 154(a).

<sup>22</sup> Partial Award, para. 142.

<sup>23</sup> First Stay Decision, para. 55.

<sup>24</sup> First Stay Decision, para. 56.

<sup>25</sup> First Stay Decision, para. 57.



17. As expected, the ICC Tribunal upheld jurisdiction over the Parties' contractual claims and declined to exercise jurisdiction over the Treaty claims<sup>26</sup>. This is because both the ICC Tribunal and this Tribunal concur that the causes of action and instruments of consent are different in each of the proceedings<sup>27</sup>.

18. Considering that there has not been a change of circumstances, the Tribunal sees no good cause to revisit its First Stay Decision and stay these proceedings, particularly before the hearing on jurisdiction and merits has been held.

19. The arbitration shall proceed, with the consequence that Mozambique's Second Stay Application is dismissed.

On behalf of the Arbitral Tribunal

A handwritten signature in dark ink, appearing to read 'JUAN FERNANDEZ ARMESTO', written over a horizontal line.

Juan Fernández-Armesto  
President of the Arbitral Tribunal

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<sup>26</sup> Partial Award, paras. 142 and 154.

<sup>27</sup> Partial Award, para. 142; First Stay Decision, para. 57. See also Doc. R-59.