

April 14, 2022

## **R-42**

### **VIA EMAIL**

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Re: PCA CASE NO. 2020-21 - PATEL ENGINEERING LIMITED (INDIA)  
V. THE REPUBLIC OF MOZAMBIQUE

Dear Members of the Tribunal:

1. Respondent Mozambique (“Mozambique”) objects to and opposes Claimant Patel Engineering Limited’s (“PEL”) 6 April 2022 request to have this Tribunal order Mozambique to produce the confidential Proposal of Italian-Thai Development Company (“ITD”) submitted to Mozambique as part of the public tender process in 2013 (“the ITD Proposal”). PEL’s request is improper, unsupported, untimely, and misrepresents the Orders of the Tribunal and the agreement among counsel. For the reasons set forth below, PEL’s request should be denied in its entirety.
2. As the Tribunal knows, the Parties were prepared to try the merits hearing beginning on 4 April 2022. However, Mr. Basombrio underwent a serious surgery in early February, 2022, was recuperating, and was unable to participate in an April hearing. Patel requested that, given the postponement, it would like to submit a new damages theory without increasing quantum, and in the spirit of cooperation Mozambique agreed so long as it could file a response. However, there was no discussion or agreement whatsoever between the Parties that there would be any further document exchange in connection with those damages submissions. As the Tribunal noted in its Order of 12 April 2022, the Parties agreed to a revised timetable in Annex I *nonies* on 24 February 2022, which is specifically limited to postponing the hearing and making the damages submissions, and the Tribunal will proceed according to that timetable. This agreement holds true not only for the hearing, but for all other pre-hearing activities. PEL never asked and Mozambique never consented to re-open the document exchange, to revisit the Document Production Schedule (“DPS”), to challenge any privilege log designation, or to produce any further documents. Had PEL disclosed that it intended to seek additional documents and reopen discovery issues that were concluded a year ago, Mozambique

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would have never agreed to PEL's additional damages submission. Document exchanges were already concluded, and there was no agreement between the Parties that the concluded document exchanged would be revisited. PEL's request that this Tribunal belatedly re-open and revisit the document exchange is outside of the agreement of the Parties and of this Tribunal's Order and revised calendar of 12 April 2022, is untimely and unwarranted, and must be denied.

- a. When conferring with Mr. Basombrio regarding the medical necessity to change the hearing date, Ms. Vasani asked if, given the postponement of the hearing, PEL could submit a new *theory* of damages. Mozambique agreed *only* that PEL could submit a new *theory*, but not a new *quantum* of damages. Ms. Vasani represented that the quantum of the new damages theory would be lower than PEL's current quantum assertion. As of February 2022, PEL had previously submitted two different quantum analyses and all written submissions were closed. Mozambique specifically confirmed that PEL's request was limited to simply introducing one new damages theory.<sup>1</sup>
- b. The Parties shared their joint understanding and agreement with the Tribunal, which then adopted the Annex I *nonies*, allowing PEL to submit an "additional submission on damages valuation" on 30 April 2022 and giving Mozambique an opportunity to respond on 27 June 2022.
- c. The Parties never discussed nor agreed to re-open or revisit the document exchange or the DPS, to challenge any privilege log designation, or to produce any further documents, when PEL requested Mozambique's consent to PEL submitting a third damages theory.<sup>2</sup>

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<sup>1</sup> In this regard, on 23 February 2022, Mozambique's counsel informed the Tribunal that "the parties agree, subject to the Tribunal's approval, that Claimant will submit an additional valuation submission on damages by April 30, 2022. The submission will introduce an additional damages valuation for loss of business opportunity, but will not increase the level of quantum claimed. Mozambique will submit a response submission by June 27, 2022. There will be no reply or rejoinder." **R-35**. There was no mention of or agreement to any further document exchange. Also on 23 February 2022, PEL's counsel confirmed the foregoing, again with no mention of any further document exchange. **C-43**.

<sup>2</sup> As reiterated in Mozambique's counsel letter to PEL's counsel, dated 5 April 2022, "[w]hen we agreed that Patel could belatedly submit an additional damages theory, there was no agreement that Patel could reopen or revisit the past document exchange, or request any documentation or anything further in that regard. You represented that Patel would simply introduce a new damages theory without

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- d. Nothing in Annex I *nonies* grants either Party leave or permission to re-open or revisit the document exchange or the DPS, to challenge any privilege log designation, to request production of additional documents, or to request additional relief related to documents from the Tribunal.
3. In Annex I *nonie*, this Tribunal granted limited and specific leave for PEL to submit an additional valuation theory and for Mozambique to respond based on the agreement of the Parties. PEL's request to re-open document exchange and challenge Mozambique's Privilege Log two weeks before presenting its third theory of damage exceeds the scope of what Mozambique consented to and what this Tribunal ordered. It must also be viewed as what it is – a wholly improper means of gaining the confidential and proprietary information of a non-party without their consent, and in violation of this Tribunal's 31 May 2021 Order on the DPS and Mozambican law.
4. PEL couches its belated request to compel production of the ITD Proposal entirely on the theory that because the document is "relevant and material" PEL can seek to compel disclosure at any point in time. PEL's contention is wrong and disingenuous for at least three reasons.
  - a. First, PEL *never* told Mozambique or this Tribunal that it had any issue with or needed any further relief from the Tribunal's 31 May 2021 Order when the Parties negotiated and the Tribunal entered Annex I *nonie*. In 2020 and 2021, the Parties agreed to and submitted a DPS, which the Tribunal incorporated in Annex I *bis*. Pursuant to the DPS and Annex I *bis*, the Parties exchanged requests and delivered non-contested documents **more than a year ago** – in March and April 2021. PEL requested and Mozambique objected to producing the confidential proposals submitted by any other bidder, including but not limited to ITD. The Tribunal ruled on contested documents on 31 May 31, 2021. At no point before last week did PEL tell Mozambique or the Tribunal that PEL wanted or required any additional action with respect to the 31 May 2012 Order.
  - b. Second, PEL never told Mozambique or the Tribunal that it would need additional documents before it could submit its third supplemental damages valuation.

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increasing quantum. Therefore, we are not going to reopen or revisit the past document exchange, produce any further documentation, nor do anything further in regard to the past document exchange." A copy of this letter has been submitted by PEL with its instant application.

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- c. Third, PEL misrepresents the Tribunal's 31 May 2021 Order and Mozambique's 14 June 2021 Privilege Log in order to make its argument sound plausible, when in fact PEL is seeking extraordinary relief from this Tribunal that would greatly prejudice Mozambique and ITD.
5. PEL's contention that this belated request is only about obtaining a document the Tribunal has "already ruled the document is relevant and material" but only "allegedly confidential" is disingenuous on its face, and wrong. It is clear, based on PEL's telling admission in paragraph 2.g. of its 6 April 2022 request, that the only reason PEL is making this request now is because PEL wants the ITD Proposal for its belated and third expert report to add another "quantum valuation" *Id.* However, in agreeing to the hearing postponement, there was no meeting of the minds between the Parties to allow for additional document exchange or after-the-fact spurious arguments about relevance as an excuse to obtain a document patently confidential and lodged on Mozambique's Privilege Log since June 2021.
6. PEL is attempting to operate beyond the bounds of Annex I *nonie* and beyond the agreement it reached with Mozambique. The correct and most straightforward solution is to enforce Annex I *nonies* as written, which does not include any further document exchange, and deny all relief requested by PEL. If PEL insists the confidential ITD Proposal is relevant to its third supplemental valuation, then Mozambique withdraws its consent and specifically requests the Tribunal eliminate PEL's additional submission on valuation and Mozambique's response from the timetable.
7. In the alternative, if the Tribunal nonetheless desires to delve into and revisit previously concluded document exchange issues (which this Tribunal should not do), Mozambique provides the following preliminary response to PEL's arguments regarding relevance, confidentiality, the ineffectiveness of entering into a confidentiality protocol, and the adequacy of Mozambique's Privilege Log. Mozambique expressly reserves the right to fully address the substance as to why a confidentiality protocol is ineffective, inadequate, would violate Mozambican law if ordered as PEL requests, and, thus, PEL's belated proposed confidentiality protocol should be rejected.
8. The Tribunal expressly found that the ITD Proposal and the proposals of all PEL competitors are confidential. (31 May 2021 Order at 54). In Request No. 21, PEL sought disclosure of any documents "related to Mozambique's decision to award the concession in respect of the Project to ITD . . ." Request No. 21 also contained more discrete subparts including but not limited to:
  - a. (1) the complete tender file which is required to be kept under Mozambican law; and

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- b. (2) “the bidding documents provided by the companies that were pre-qualified on 12 April 2013 other than PGS Consortium”.
        - c. With respect to subpart 2 – the bidding documents provided by other companies competing in the public tender process – Mozambique objected on the grounds that the proposals are confidential under Mozambican law and they contain confidential information of third-parties.
9. Contrary to PEL’s 6 April 2022 request, this Tribunal did not find the ITD Proposal was relevant or material. The Tribunal stated: “[a]t this stage of the procedure, the requested documents **could** be relevant and material. The Tribunal **reserves the possibility to revisit** this decision.” 31 May 2021 Order at 52 (emphasis added).<sup>3</sup>
10. With respect to technical or commercial confidentiality of the proposal submitted by PEL’s competitors in the public tender process, the Tribunal was clear: proposals submitted by PEL’s competitors are confidential. The Tribunal “**accepts that the bidding documents** by the companies that were pre-qualified on 12 April 2013 other than the PGS Consortium **are confidential.**” *Id.* at 53.
11. After expressly finding the bidding documents of PEL’s competitors (including the ITD Proposal) are confidential, the Tribunal gave Mozambique two options.
  - a. The first option allowed for a confidentiality agreement and, “to the extent that the confidentiality of the responsive documents cannot be adequately protected through a confidentiality agreement, Respondent may deliver the documents with the appropriate redactions (PO No. 1, para. 57).
  - b. Second, the Tribunal expressly contemplated that a confidentiality agreement and redactions may not be sufficient and held: “If the confidential information cannot be adequately safeguarded by a confidentiality undertaking or through redaction, Mozambique may

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<sup>3</sup> At the very least, Mozambique would request the Tribunal revisit whether the confidential ITD Proposal is relevant and material. As noted in the 31 May Order at 48-54, Mozambique produced the tender file, scoring sheets, the RFP itself and any updates thereto, and other documents in its possession related to evaluating and scoring the proposals received by other bidders. Given the fact that Mozambique was able to submit 2 expert quantum valuations, its rejoinder on the merits and its final memorial, and was ready to try the case as scheduled on 4 April without asking for any relief from the Tribunal, now would be an appropriate time to revisit the relevance and materiality of the ITD Proposal. Any such an analysis would require substantive briefing and a further delay in the schedule. This letter exchange is not sufficient to address such complex issues, considering particularly that the confidentiality rights of a non-party (ITD) are concerned, as discussed below.

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disclose the existence and characteristics of the responsive documents in a Privilege Log (PO No. 1, para. 58).”

12. PO No. 1, para. 58 requires a Privilege Log, “drafted in accordance with Annex III,
- identifying the date, the issuer, the recipient of the Document,
  - providing a summary description of the Document, plus
  - an explanation of the reasons which justify that the Document be withheld in full.

Paragraph 59 of Procedural Order 1 states that any discussion will be settled by the Tribunal.

13. Mozambique made the determination that the confidential information could not be adequately protected either by a confidentiality undertaking or through redaction, and disclosed the existence and characteristics of the ITD Proposal on its 14 June 2021 Privilege Log (courtesy copy attached). Mozambique provided a Privilege Log in the form required by Annex III and virtually identical to the form used by PEL for its Privilege Log. Mozambique further provided *seven paragraphs* of reasons and characteristics of the ITD Proposal on its Privilege Log explaining the reasons which justify withholding the ITD proposal in full.
- a. In its Privilege Log, Mozambique noted a confidentiality undertaking would not be sufficient for three primary reasons: (1) Mozambican law prohibits disclosure of a bidder’s confidential proposal and does not contain any exception nor carve out for disclosure subject to a confidentiality undertaking, *see RLA-3* (MZ Decree No. 15/2010 at Art. 33); (2) other bidders have an expectation that their confidential proposals will not be disclosed—to the public at large, and (perhaps especially) to potential competitors like PEL; and (3) the confidential information is confidential to a third party, not subject to or joined in this arbitration, and an undertaking that allowed a third-party’s confidential information to be handed over to co competitor is ineffectual, *see, e.g., Global Telecom Holding S.A.E. v. Canada* (ICSID Case No. ARB/16/16), paras. 49- 51.
  - b. Mozambique further explained that PPP tender proposals “contain, among other things, significant and non-public financial information about the bidder, business practices, technical means and methods, and potentially commercially sensitive and ongoing information about

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business relationships, trade secrets, and proprietary methodologies. This information was submitted to MTC by bidders with the understanding that tender bidding documents would remain confidential. It would vitiate Mozambican law and legitimate third-party expectations to disclose such information, especially to a purported competitor in the international PPP marketplace.”

- c. Mozambique also explained that “confidential business information of the type referenced above exists throughout the proposal documents, and because the proposal itself is explicitly made confidential under Mozambique law and its disclosure prohibited, redaction of the proposal likewise will not alleviate the confidentiality objection.”
14. Despite having Mozambique’s Privilege Log for 10 months, PEL never once told Mozambique or this Tribunal that any further discussion on Privilege Logs was necessary. More important, PEL had already finalized and submitted its Reply on the Merits and Response to Objections to Jurisdiction on 9 August 2021, its second theory and quantum of damages in a second expert report by Versant on 9 August 2021, its Rejoinder on Objections to Jurisdiction on 24 January 2022.
- a. PEL issued all of these submittals on time, pursuant to the deadlines in the Tribunal’s operative Annex I and *never* questioned Mozambique’s Privilege Log entry for the ITD Proposal before the DPS and written submissions timetable concluded.
  - b. PEL never requested to re-open the document exchange phase of this arbitration. And PEL never requested any action from the Tribunal with respect to the ITD Proposal before submitting its second expert report, its rejoinder and its final memorial, all of which were drafted and completed after receiving Mozambique’s Privilege Log and without access to the ITD Proposal.
  - c. PEL did not reserve any rights to supplement or change its final submissions and failed to take any action to challenge Mozambique’s Privilege Log entry for the ITD proposal.
  - d. At no point before 6 April 2022, did PEL attempt to compel production of the ITD Proposal. The document exchange phase of the case is closed, and PEL cannot re-open it now without causing significant prejudice and further delay to Mozambique.



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15. PEL's statement in Paragraph 2.f. of its 6 April 2022 request that Mozambique "simply assert[ed] that 'confidential information cannot be adequately safeguarded by a confidentiality undertaking or redaction'" is a blatant, false misrepresentation of the detail and rationale that accompanied the next *six paragraphs* of information in Mozambique's Privilege Log.
16. If PEL is now claiming Mozambique's Privilege Log is insufficient, that would be an issue that the Tribunal must decide for the first time, but it is too late to do so at this point. PO No. 1, para. 59. In order to make such a decision, Mozambique would need a meaningful opportunity to fully address the Privilege Log and to fully oppose PEL's requested relief on the merits. Adequately opposing and responding to PEL's request that this Tribunal order Mozambique to do something expressly contrary to Mozambican law *and* violate the confidentiality rights of non-party ITD in the process would require, at the very least, the opportunity for full briefing and an expert report on the legal application and effect of Mozambican law. Similarly, if PEL is permitted to re-open the document exchange and seek additional documents from Mozambique, then Mozambique must be afforded the same opportunity (to request additional documents and challenge PEL's prior document productions) in order to have a process that is fair to both sides. Building a schedule to allow for adequate due and fair process for Mozambique under either form of PEL's requested relief would require significant time, resources, and another extension of the hearing date, and is completely unwarranted.
17. For all of these reasons, Mozambique respectfully requests the Tribunal summarily deny PEL's request in its entirety.

Respectfully submitted,





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