

PCA Case No. 2020-21

In the matter of an arbitration under the Arbitration Rules of the United Nations
Commission on International Trade Law 1976

and

The Agreement between the Government of the Republic of India and the Republic of
Mozambique for the Reciprocal Promotion and Protection of Investment dated
19 February 2009

-between-

PATEL ENGINEERING LIMITED
(INDIA)

Claimant

-and-

THE REPUBLIC OF MOZAMBIQUE

Respondent

PROCEDURAL ORDER NO. 8

**REDACTION OF CLAIMANT'S
SUBMISSION ON COSTS**

THE ARBITRAL TRIBUNAL

Guido Santiago Tawil (Arbitrator)
Hugo Perezcano Díaz (Arbitrator)
Juan Fernández-Armesto (Presiding Arbitrator)

REGISTRY

Permanent Court of Arbitration

ADMINISTRATIVE SECRETARY

Sofia de Sampaio Jalles

27 November 2023

WHEREAS

1. In accordance with paragraph 83 of the Terms of Appointment, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration [the “**UNCITRAL Rules on Transparency**”] apply to these proceedings.
2. On 14 October 2020, the Tribunal issued Procedural Order No. 1, which provides:

“145. Pursuant to the agreement of the Parties, the arbitration shall be conducted in accordance with the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, as adopted in 2013 [...], in accordance with Art. 1(2)(a) thereof.

146. The PCA shall assume the role of the “repository” foreseen under the UNCITRAL Rules on Transparency with respect to this arbitration.

147. The PCA shall make information and documents regarding the arbitration available to the public in accordance with the UNCITRAL Rules on Transparency, except as otherwise decided by the Tribunal pursuant to the UNCITRAL Rules on Transparency.

148. Hearings shall be public except as otherwise decided by the Tribunal in accordance with the UNCITRAL Rules on Transparency.”
3. On 14 December 2020, the Tribunal issued Procedural Order No. 2, which establishes the procedure to be followed for the redaction of confidential and protected information under Art. 7 of the UNCITRAL Rules on Transparency, as follows:
 - a) Any Party may request to designate information, at the time it is submitted to the Tribunal, as confidential or protected information in accordance with the UNCITRAL Rules on Transparency and by submitting, in addition to the original version of the document, a redacted version of the document excluding the confidential or protected information. The request is subject to Party comments and a decision by the Tribunal.
 - b) Any Party may designate information contained in the Tribunal’s awards, decisions, and procedural orders as confidential or protected information in accordance with the UNCITRAL Rules on Transparency by submitting a redacted version of the award, decision, or procedural order excluding the confidential or protected information within 15 calendar days of the issuance of the award, decision, or procedural order. If more than one Party submits a redacted version of the award, decision, or procedural order, the Parties shall attempt to agree and submit a joint redacted version within 21 calendar days of the issuance of the award, decision, or procedural order.
 - c) The Tribunal shall decide any objection regarding the designation of information as confidential or protected information.
 - d) If no request to designate information as confidential or protected is made within the timeframes established in paras. 5(a) and 5(b) above, the PCA will

proceed to publish the documents in question in accordance with Arts. 2 and 3 of the UNCITRAL Rules on Transparency.”

4. On 23 December 2022, the Tribunal issued Procedural Order No. 7, providing directions regarding the submission of the Parties’ statements of costs.
5. On 18 August 2023, Claimant filed its Submission on Costs [the “**C SofC**”], together with:
 - Factual Exhibits C-408 to C-417,
 - Legal Authorities CLA-358 to CLA-369,
 - Expert Report CER-9,
 - The Indices of Factual Exhibits and Legal Authorities, and
 - Schedule of Costs.
6. Claimant marked Exhibits C-408, C-410, C-413, C-414, C-415, C-416 and Expert Report CER-9 as confidential. Claimant submitted further that the C SofC should be redacted for publication and undertook to submit proposed redactions to the Tribunal separately.
7. On 18 September 2023, Claimant submitted its proposed redactions to the SofC [the “**SofC Redacted**”], Index to Claimant’s Factual Exhibits and Schedule of Costs¹.
8. By letter dated 28 September 2023, Respondent objected to Claimant’s proposed redactions, arguing that they are untimely and improper, and reserved “all rights regarding the inappropriate new evidence submitted with [the SofC]”.²
9. By letter dated 6 October 2023, Claimant provided its written comments to Respondent’s letter of 28 September 2023, requesting the Tribunal to order the PCA to publish the redacted version of C SofC, Index to Claimant’s Factual Exhibits, and Schedule of Costs³.

¹ Communication C 89.

² Communication R 68.

³ Communication C 90.

PROCEDURAL ORDER NO. 8

10. The Tribunal will briefly summarize the Parties' positions (**1.** and **2.**) before proceeding to its decision (**3.**).

1. CLAIMANT'S POSITION

11. Claimant proposes to redact the following information provided in its SofC:

- The amount of PEL's costs for counsel, expert witness and other expenses⁴;
- The amount and the terms for the payment of a success fee to its counsel and to its funder⁵; and
- The name of its funder⁶.

12. Claimant's view is that the purported redactions fall into two distinct categories of "confidential business information" under the UNCITRAL Rules on Transparency⁷.

13. First, Claimant submits that the information relating to its financial arrangements with its funder and counsel comprise confidential business information, stating that the funder specifically requested that the terms of its agreements be kept confidential. Claimant adds that Respondent appears to agree that these details are confidential business information, noting that Respondent never objected to these redactions or to the designation of these details as confidential when Claimant marked copies of the agreements and Expert Report CER-9 as confidential⁸.

14. Second, Claimant submits that the costs it has incurred in pursuing the Arbitration likewise constitute "confidential business information" as this information is not within the public domain and these costs relate to Claimant's business arrangements with its counsel, experts and other parties⁹.

15. Claimant further disputes Respondent's assertion that the proposed redactions were submitted out of time. It notes that it properly informed the Tribunal on 18 August 2023 of its intention to redact the C SofC in order to protect confidential information. Claimant also argues that para. 5(a) of Procedural Order No. 2 does not require the actual redactions to accompany the request for a confidentiality designation. Despite the delay in submitting the proposed redactions, Claimant contends that there was no prejudice to Respondent, as it always has had the full, unredacted version of the C SofC available to it¹⁰. Claimant further submits that

⁴ SofC Redacted, paras. 1, 9, 11-13.

⁵ SofC Redacted, paras. 1, 10, 14-15, 18 and 22.

⁶ SofC Redacted, paras. 14-24.

⁷ Communication C 90, para. 3.

⁸ Communication C 90, paras. 3-5.

⁹ Communication C 90, para. 7.

¹⁰ Communication C 90, para. 8.

Respondent has, in any event, waived its right to object for waiting 10 days until after the proposed redactions were submitted before objecting¹¹.

16. Furthermore, Claimant submits that Respondent's reservation of rights is meritless and untimely¹². Claimant disagrees that it attempts to introduce new damages claims, evidence and new "theories of damage", noting that it seeks to recover the "cost of legal representation and assistance", in accordance with the UNCITRAL Rules. Claimant also argues that its request for the costs of funding is not new, recalling that in every pleading in this case it has asked that it be awarded "fees associated with third party funding"¹³. It is natural, Claimant adds, that it would provide evidence of the funding terms and their reasonability in support of its request¹⁴. Finally, Claimant recalls that Respondent agreed to only one round of costs submissions and Respondent failed to request an opportunity to respond to the C SofC shortly after it was filed¹⁵.

2. **RESPONDENT'S POSITION**

17. Respondent submits that Claimant's proposed redactions are untimely and improper¹⁶.
18. First, Respondent argues that Claimant submitted the proposed redactions 30 days after the C SofC was filed. Pursuant to Procedural Order No. 2, requests to redact information should be filed together with the submission¹⁷.
19. Second, Respondent submits that Claimant has not motivated why the information sought to be redacted is confidential and should be protected from public view. Claimant has also failed to cite any treaty provision or any other law or rule requiring such treatment¹⁸.
20. Respondent further says that Claimant attempts to include information falling outside the scope of costs through the proposed redactions. It claims that Claimant, "in an effort to hide its improper double-counting positions", essentially introduces new claims, "theories of damages", and evidence without the authorization of the Tribunal, violating Procedural Order No. 7¹⁹.
21. Respondent adds that should the alleged new evidence be permitted, Respondent should have the opportunity to be "heard in full" on such evidence. It further "reserves all rights regarding the inappropriate new evidence submitted with [C SofC]"²⁰.

¹¹ Communication C 90, para. 9.

¹² Communication C 90, para. 12.

¹³ Communication C 90, paras. 14-15.

¹⁴ Communication C 90, para. 15.

¹⁵ Communication C 90, para. 16.

¹⁶ Communication R 68, p. 1.

¹⁷ Communication R 68, p. 1.

¹⁸ Communication R 68, p. 1.

¹⁹ Communication R 68, p. 2, referring to para. 17 of Procedural Order No. 7.

²⁰ Communication R 68, p. 2.

3. THE TRIBUNAL'S DECISION

22. Procedural Order No. 1 provides that the PCA shall make information and documents regarding the arbitration available to the public in accordance with the UNCITRAL Rules on Transparency, except if otherwise decided by the Tribunal pursuant to such Rules²¹.
23. This same rule is consigned in Arts. 3(1) and 7 of the UNCITRAL Rules on Transparency. Art. 3(1) of the UNCITRAL Rules on Transparency establishes the general rule that written statements and submissions of the Parties shall be made available to the public, while Art. 7 of the UNCITRAL Rules on Transparency provides an exception to transparency: “confidential or protected information” shall not be published. Art. 7(2) provides that “confidential or protected information consists of”:
- “(a) Confidential business information;
- [...]
- (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information [...].”
24. The Tribunal established the procedure for designating information as confidential or protected under Art. 7 in Procedural Order No. 2²²:
- “a) Any Party may request to designate information, at the time it is submitted to the Tribunal, as confidential or protected information in accordance with the UNCITRAL Rules on Transparency and by submitting, in addition to the original version of the document, a redacted version of the document excluding the confidential or protected information. The request is subject to Party comments and a decision by the Tribunal.”
25. The Tribunal notes that Claimant complied with this provision when it filed its C SofC, by marking certain exhibits as confidential and announcing that it would submit redactions separately. Assuming, *arguendo*, that Procedural Order No. 2 required Claimant to submit the redactions at the same time it filed its C SofC, Respondent has not demonstrated how Claimant’s failure to do so caused it any prejudice. It was clear at the outset that Claimant wished to designate certain information as confidential or protected.
26. The question is whether the information that Claimant seeks to redact can actually be designated as confidential or protected under Art. 7(2) of the UNCITRAL Rules on Transparency.

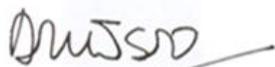
²¹ Procedural Order No. 1, para. 147.

²² Procedural Order No. 2, para 5(a).

27. The Tribunal finds that the answer is positive.
28. Claimant seeks to redact the amount of PEL's costs for counsel, expert witness and other expenses²³, the amount and the terms for the payment of a success fee to its counsel and to its funder²⁴, and the name of its funder²⁵. The Tribunal finds that this information constitutes confidential business information between Claimant, its counsel, its expert witness and its third-party funder.
29. There is no reason for the public in general to have access to the amounts arranged between PEL and its counsel, including any success fee. As to the fee arrangements between a party and its funder, the Tribunal is convinced that they should only be the object of broad disclosure if there is a reasonable benefit deriving from such information being made available to the public.
30. Balancing the interests at stake – *i.e.*, the public interest of transparency in treaty-based investor-State arbitration vs. Claimant's interest in having information which is clearly sensitive protected from broad disclosure – the Tribunal decides to adopt a conservative approach and to protect the information.
31. In this case, Respondent is privy to this information by being a party to this arbitration and that seems sufficient for the present purposes. The Tribunal sees no reason for this confidential information to be disclosed to the wider public. Ultimately, Respondent has failed to adduce sufficiently compelling reasons to object to PEL's request to designate the information as confidential or protected.
32. For the above reasons, the Tribunal decides to grant Claimant's request and hereby orders the PCA to publish the redacted versions of the C SofC, Index to Claimant's Factual Exhibits, and Schedule of Costs, as submitted by Claimant. The Tribunal further notes Respondent's reservation of rights and considers that no actions are presently requested from it in this respect.

Place of arbitration: The Hague, Netherlands

Date: 27 November 2023



Juán Fernández-Armesto
President of the Arbitral Tribunal

²³ SofC Redacted, paras. 1, 9, 11-13.

²⁴ SofC Redacted, paras. 1, 10, 14-15, 18 and 22.

²⁵ SofC Redacted, paras. 14-24.