

# ARRESTO & ASOCIADOS

ÁRBITROS

28 April 2022

## A 41

**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 Patel’s communication C 50, and of Mozambique’s communication R 44, concerning Patel’s request for the Tribunal to order Mozambique to produce the Proposal of the Italian-Thai Development Company [“**ITD**”] for the Acquisition of Contested Rights to Conceive, Design, Finish, Build, Operate and Transfer the Railway Line and the Port of Macuse, dated June 2013 [the “**ITD Proposal**”], under a confidentiality agreement.

2. The Tribunal will start by explaining the procedural background to Patel’s request (**1.**), then summarize the Parties’ respective positions (**2.** and **3.**), and finally adopt its decision (**4.**).

**1. PROCEDURAL BACKGROUND**

3. During the document production phase Patel requested that Mozambique produce a series of documents relating to Mozambique’s decision to award the concession of the Project to ITD, issued between the Request for Proposals (published on 29 January 2013) and the Ministry of Transport and Communications’ announcement that ITD was the winning bidder (on 19 July 2013). Amongst these documents were<sup>1</sup>:

“The bidding documents provided by the companies that were pre-qualified on 12 April 2013 other than PGS Consortium.”

4. Mozambique objected to this request for several reasons including, *inter alia*, on grounds of confidentiality.

5. On 31 May 2021 the Tribunal decided to grant Claimant’s request because it met the necessary requirements for production [“**DPS Decision**”]. However, the Tribunal accepted that “the bidding documents provided by the companies that were pre-qualified

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<sup>1</sup> Tribunal’s Decision on Claimants’ DPS, Document Request No. 21.



on 12 April 2013 other than PGS Consortium are confidential”. And in order to protect the alleged confidentiality of the documents, the Tribunal decided that:

“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). If the confidential information cannot be adequately safeguarded by a confidentiality undertaking or through redaction, Mozambique may disclose the existence and characteristics of the responsive documents in a Privilege Log (PO No. 1, para. 58).”

6. On 14 June 2021 Mozambique produced a privilege log [**“Privilege Log”**] to Patel in which it identified the existence of the ITD Proposal and asserted that<sup>2</sup>:

“As recognized by the Tribunal’s Decision on Claimants’ DPS (Request 21), other bidders’ documents contain third-party confidential business information and are confidential under PO1. *See also RLA-3* (MZ Decree No. 15/2010 at Art. 33). Because the confidential information cannot be adequately safeguarded by a confidentiality undertaking or redaction, Mozambique is disclosing the existence and characteristics of the document herein, in accordance with the Tribunal’s Decision on Claimants’ Request 21.

More specifically, 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 Patel. *Id.*; see, e.g., *Global Telecom Holding S.A.E. v. Canada* (ICSID Case No. ARB/16/16), paras. 49-51.

The technical and commercial confidentiality objection would not be alleviated by a confidentiality undertaking because Mozambique law, as described, prohibits disclosure of a bidder’s confidential proposals, without qualification or carve-out in the case of a confidentiality undertaking with a third-party litigant. Further, the confidential information is in significant part that of a third party who is not joined to this arbitration, making a confidentiality undertaking ineffectual to safeguard their confidentiality interest (as disclosure to any entity, including Patel, violates the confidentiality obligation).

In short, third parties have an expectation that their bidding documents will not be disclosed, including not only the public at large, but also *competitors like Patel and its agents*. This is a recognized privilege and objection to production, as the Tribunal acknowledged. For example, as in *Global Telecom*, *infra*, legitimate confidentiality expectations of third parties merit protection in both domestic and international arbitration, and absent extraordinary circumstances such documents cannot be produced even if a confidentiality undertaking were to be negotiated between the parties herein.

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<sup>2</sup> Mozambique’s Privilege Log, attached to communication R 42.



Notably, 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 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.

Because 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.

Mozambique has previously produced the jurors' scoring and evaluation reports pertaining to the tender proposals, along with contemporaneous clarifications concerning the tender results. Thus, even if a balancing of interests was warranted, Patel has demonstrated little need for the confidential third-party tender proposals (as it has possession of the scoring and evaluation documents and declined to pursue a tender appeal), while the risk of disclosure of significant third-party confidential information is obvious and paramount.”

7. Thereafter, Patel filed its Reply on the Merits and Response to Objections to Jurisdiction, Mozambique filed its Rejoinder on the Merits and Reply to Objections to Jurisdiction, and Patel submitted its Rejoinder on Objections to Jurisdiction. On 23 February 2022 the Parties informed the Tribunal that they were contemplating the possibility of altering the hearing dates, *inter alia*, because Patel wished to submit an additional report concerning its claim for loss of business opportunity, and Mozambique wanted an equal opportunity to respond<sup>3</sup>.

8. After holding a call with the Parties, on 25 February 2022 the Tribunal issued Annex I *nonies* to Procedural Order No. 1, which provides for an additional submission on damages valuation by Claimant, due on 30 April 2022, and a response to the additional submission on damages valuation by Mozambique, to be filed on 27 June 2022<sup>4</sup>.

9. Claimant now requests the production of the ITD Proposal under a confidentiality protocol.

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<sup>3</sup> Communication R 35.

<sup>4</sup> Communication A 36, Annex I *nonies* to Procedural Order No. 1.



## 2. PATEL'S REQUEST

10. Claimant requests that the Tribunal order Mozambique to produce the ITD Proposal<sup>5</sup>. Claimant explains that in the DPS Decision the Tribunal ruled that the ITD Proposal was relevant and material. The only issue here at stake is the confidentiality of this document<sup>6</sup>.

11. Claimant explains that after Mozambique identified the ITD Proposal in the Privilege Log, on 31 March 2022 Patel again requested the production of the ITD Proposal, arguing that the document was relevant and material to the additional quantum valuation being conducted by its experts<sup>7</sup>. Patel prepared and invited Mozambique to consider a protocol with measures to protect the confidentiality of the ITD Proposal [**“Confidentiality Protocol”**]. According to Patel, Mozambique declined to consider the Confidentiality Protocol under the premise that the Parties' agreement for a new valuation exercise excluded any issues related to document production<sup>8</sup>.

12. Claimant disagrees with Mozambique's response.

13. First, Patel avers that there is no relationship between the Parties' agreement that Claimant can submit a new valuation and Claimant's request for the production of the ITD Proposal<sup>9</sup>. In the Parties' discussions regarding the submission of a new valuation, no undertakings were made by either side concerning document production<sup>10</sup>. The Tribunal has not closed the record; therefore new documents will be entered into evidence with the forthcoming valuation submissions and in the hearing<sup>11</sup>.

14. Second, Patel reiterates that there is no question about the relevance and materiality of the ITD Proposal, since the Tribunal has already ruled that the ITD Proposal is relevant and material to the outcome of this case. Patel contends that at most, it has revived a pre-existing request that was also made in the document production stage<sup>12</sup>.

15. Third, Patel argues that there is considerable time left until the hearing, that it is only asking for one document (plus possibly some attachments), and that document production is a continuing obligation, particularly in a situation where the Parties never agreed that the ITD Proposal could not be produced because its confidentiality could not be adequately safeguarded<sup>13</sup>.

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<sup>5</sup> Communication C 48, para. 1.

<sup>6</sup> Communication C 48, para. 2.

<sup>7</sup> Communication C 48, para. 2.g.

<sup>8</sup> Communication C 48, paras. 2.g-2.h.

<sup>9</sup> Communication C 48, para. 3.

<sup>10</sup> Communication C 50, para. 8.a.

<sup>11</sup> Communication C 50, para. 8.

<sup>12</sup> Communication C 48, para. 3; Communication C 50, para. 8.b.

<sup>13</sup> Communication C 48, para. 3.



16. Finally, Patel argues that its request is made in good faith, and is reasonable and proportionate. The balance of equities favours ordering the production of the ITD Proposal, since Patel will suffer a prejudice if it is deprived of key evidence, while Mozambique will suffer no harm if the document is produced<sup>14</sup>.

17. Therefore, Patel requests the Tribunal to implement the Confidentiality Protocol and to order the production of the ITD Proposal<sup>15</sup>. According to Patel, the Confidentiality Protocol will adequately protect the ITD Proposal because:

- Only Claimant’s counsel and certain experts will be allowed to use the document, and solely for the purpose of the arbitration and to the extent necessary to carry out their role;
- Each individual will provide a signed undertaking to be bound by the Confidentiality Protocol; and
- The documents will be destroyed upon the termination of the arbitration.

18. If the foregoing reasons are not sufficient to safeguard the document’s confidentiality, Claimant requests that the document be produced to the Tribunal directly and unredacted; the Tribunal could then determine what redactions, if any, would adequately safeguard confidentiality before the document is produced to Claimant.

19. Patel argues that, contrary to Mozambique’s submission, Art. 33 of the Mozambican Decree No. 15/2010 [**“Public Procurement Rules”** or **“PPR”**] does not prohibit the disclosure of the ITD Proposal *vis-à-vis* Patel, since the PPR permits a losing bidder to review competing proposals and their corresponding evaluations. Mozambican law further recognises a general right to access information<sup>16</sup>.

20. Furthermore, Patel argues that given the passage of time and subsequent events (including the award of the concession to ITD), there is no risk of Patel competing with ITD in relation to the contents of a proposal that has been superseded by a concession agreement and revised plans for the Project’s implementation. Moreover, any information concerning ITD itself would by now be over a decade old and thus inherently stale<sup>17</sup>.

21. In these circumstances, the disclosure of the ITD Proposal containing complete information related to the Project would not undermine any rights of ITD. Patel submits that Mozambique has not indicated the type of information in the ITD Proposal that is confidential, why the Confidentiality Protocol (which is for attorneys’ and experts’ eyes

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<sup>14</sup> Communication C 50, para. 8.d.

<sup>15</sup> Communication C 48, para. 5; Communication C 50, para. 8

<sup>16</sup> Communication C 50, paras. 3-5.

<sup>17</sup> Communication C 50, para. 7.



only) would be ineffectual, or why redactions to any truly confidential information could not accommodate any confidentiality concerns<sup>18</sup>.

### **3. MOZAMBIQUE'S RESPONSE**

22. Mozambique objects to the production of the ITD Proposal. Mozambique considers that Claimant's request misrepresents the orders of the Tribunal and the Parties' agreement, and must be denied for several reasons<sup>19</sup>.

23. First, the Parties exchanged requests and delivered non-contested documents more than a year ago; never until now did Patel ask the Tribunal or Mozambique for any additional action with respect to the Tribunal's DPS Decision<sup>20</sup>. The Tribunal held that the ITD Proposal is confidential, Mozambique produced the Privilege Log designating the ITD Proposal almost a year ago and Patel never timely challenged the Privilege Log designation. The matter is now closed<sup>21</sup>. Patel had access to the Privilege Log for ten months and only now decided to claim it is insufficient. Accordingly, this is a matter that the Tribunal would have to decide for the first time and Mozambique would need a meaningful opportunity to fully address the Privilege Log<sup>22</sup>.

24. Second, Patel never informed Mozambique or the Tribunal that it would need additional documents for its supplemental damages valuation<sup>23</sup>. The Parties' agreement for a further submission on valuation granted limited leave for Patel to present an additional valuation theory and for Mozambique to respond. Mozambique never consented to re-open the document exchange, to revisit the Document Production Schedule [**"DPS"**], to challenge any Privilege Log designations, to reargue the confidentiality of the ITD Proposal or to produce any further documents<sup>24</sup>.

25. If Patel insists that the ITD Proposal is relevant to its supplemental valuation, then Mozambique withdraws its consent and requests the Tribunal to eliminate Patel's additional submission and Mozambique's response thereto from the calendar<sup>25</sup>. If the Tribunal decides to delve into and revisit previously concluded document exchange issues, Mozambique expressly reserves the right to fully address the substance as to why the Confidentiality Protocol is ineffective and should be rejected<sup>26</sup>.

26. Third, in the DPS Decision the Tribunal decided that the ITD Proposal was strictly confidential. In the Privilege Log Mozambique explained in detail why the confidential

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<sup>18</sup> Communication C 50, para. 7.

<sup>19</sup> Communication R 42, para. 1; Communication R 44, para. 1.

<sup>20</sup> Communication R 42, para. 4.

<sup>21</sup> Communication R 44, para. 1.

<sup>22</sup> Communication R 42, para. 15.

<sup>23</sup> Communication R 42, para. 4.

<sup>24</sup> Communication R 42, paras. 2-3; Communication R 44, para. 1.

<sup>25</sup> Communication R 42, para. 6.

<sup>26</sup> Communication R 42, para. 7.



information could not be adequately protected either by a confidentiality undertaking or through redactions<sup>27</sup>.

27. Under Art. 140(3) of the PPR, only “tenderers may freely consult the file of the administrative procedure of the tender”. Patel is not entitled to invoke the Art. 140(3) exception because Patel itself was not a tenderer. Rather, the PGS Consortium was the tenderer, and it is not a party to this proceeding<sup>28</sup>. In any case, Patel cannot invoke Art. 140(3) at this time, since said provision allows the file to be viewed “[d]uring the periods for filing a complaint”. That time period expired nine years ago<sup>29</sup>. Allowing access to a confidential tender nine years later, in the context of an international arbitration where the Tribunal is vested with jurisdiction over investment treaty claims, exceeds the purpose of Art. 140(3), which aims at allowing tenderers to file a complaint regarding the PPP process<sup>30</sup>.

28. Lastly, Contrary to Patel’s statement, Mozambique avers that the Tribunal did not find that the ITD Proposal was relevant and material in its DPS Decision. 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”<sup>31</sup>.

29. In sum, Mozambique argues that if Patel 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 Patel’s prior document productions) in order to have a process that is fair to both sides. Mozambique avers that this would require significant time, resources, and another extension of the hearing date<sup>32</sup>.

#### **4. ARBITRAL TRIBUNAL’S DECISION**

30. The Tribunal must decide whether to order Mozambique to produce the ITD Proposal, identified in Mozambique’s Privilege Log, under a Confidentiality Protocol.

31. The Tribunal (by majority of two of its members) rejects Patel’s request for several motives.

32. First, Patel failed to submit its request on the first opportunity it had. Pursuant to paras. 57-58 of Procedural Order No. 1, if the requested Party makes an objection on grounds of technical or commercial confidentiality, and said objection is upheld by the Tribunal, the requested Party may request a reasonable confidentiality undertaking from the the requesting Party, to protect the confidentiality of the documents. Absent such

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<sup>27</sup> Communication R 42, paras. 10-13.

<sup>28</sup> Communication R 44, para. 6.

<sup>29</sup> Communication R 44, para. 7.

<sup>30</sup> Communication R 44, para. 8.

<sup>31</sup> Communication R 42, para. 9.

<sup>32</sup> Communication R 42, para. 16.

agreement, the requested Party shall deliver the documents with the confidential information redacted. In those cases in which the confidential information cannot be adequately safeguarded by a confidentiality undertaking or through redaction, the requested Party, instead of delivery, may choose to disclose the existence and characteristics of the document in a Privilege Log. Para. 59 provides that “[a]ny discussion will be settled by the Tribunal”.

33. In response to Claimant’s Document Request No. 21, Mozambique raised an objection of commercial confidentiality, which the Tribunal upheld. Mozambique then disclosed the existence of the ITD Proposal in its Privilege Log dated 14 June 2021, *i.e.*, almost a year ago. When doing so, Mozambique explained the reasons why it considered that the confidentiality of the ITD Proposal could not be adequately safeguarded through a confidentiality undertaking or through redactions (see para. 6 *supra*).

34. At the time, Patel did not challenge the identification of the ITD Proposal in the Privilege Log. If Patel was of the opinion that the request for confidentiality was without merit, Patel could (and should) have opposed Mozambique’s decision to identify the ITD Proposal in the Privilege Log when it first received said document, rather than wait for almost a year to challenge its appropriateness.

35. Second, the Tribunal, by majority, is not entirely convinced about the relevance and materiality of the ITD Proposal to Patel’s additional valuation submission. After receiving Mozambique’s Privilege Log, Patel went on to submit a written submission on damages (the Reply on the Merits), together with an additional expert report on valuation, without ever arguing the need to obtain the ITD Proposal. It was only on 6 April 2022 – *i.e.*, more than a month after the Parties’ agreement on additional valuation submissions and three weeks before Patel’s additional valuation report was due – that Patel decided to raise the issue with the Tribunal. This calls into question the relevance and materiality of the ITD Proposal to Claimant’s additional valuation report.

36. Third, Patel’s request does not find support in the Parties’ agreement. Indeed, on 24 February 2022, after filing their main pleadings and while discussing pre-hearing arrangements, the Parties jointly informed the Tribunal that<sup>33</sup>:

“Claimant wishes to submit an additional report concerning PEL’s claim for loss of business opportunity, and Mozambique would want an equal opportunity to respond. [...]

[...] 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

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<sup>33</sup> Communication R 35.



will submit a response submission by June 27, 2022. There will be no reply or rejoinder.”

37. The Parties did not inform the Tribunal about their wish to re-open discussions on the document production exchanges.

38. On 25 February 2022 the Tribunal issued an updated procedural timetable, “which reflects the agreement between the Parties and the Tribunal”. A re-opening of the document production exchanges at this stage was certainly not contemplated in the Parties’ agreed updated procedural timetable.

39. Furthermore, in order to grant the relief that Patel is seeking, the Tribunal would have to open a procedural incident regarding the extent and appropriateness of the Privilege Log filed by Mozambique. This is not something that the Tribunal, by majority, is prepared to do at this stage, as it would severely disrupt the calendar mutually agreed by the Parties in their joint submission of 24 February 2022.

40. In view of the above, the Tribunal, by majority, decides to reject Patel’s request. The Tribunal nevertheless reserves the right to revisit this decision after the hearing, should it determine that the ITD Proposal is necessary for its determination of the outcome of the case.

On behalf of the Arbitral Tribunal

Juan Fernández-Armesto  
President of the Arbitral Tribunal