

**The Arbitral Tribunal**

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Dear Members of the Tribunal,

**PCA Case No. 2020-21: *Patel Engineering Ltd* (“Claimant” or “PEL”) v. *The Republic of Mozambique* (“Respondent” or “Mozambique”, together the “Parties”), C-48**

1. Claimant writes to request the Tribunal to order Respondent 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**”).
2. On 31 May 2021, the Tribunal already ruled that the ITD Proposal is relevant and material, as part of Claimant’s Document Production Schedule. The only issue is whether, given Respondent’s assertions of confidentiality, the confidential information which the document contains can be adequately safeguarded. The history of Claimant’s production request for this document is as follows:
  - a. Claimant requested Mozambique to produce the ITD Proposal in Document Request No. 21. Specifically, on 9 April 2021, Claimant requested Respondent to

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produce “[t]he bidding documents provided by the companies that were pre-qualified on 12 April 2013”.

- b. Respondent objected to production of these documents citing *inter alia* alleged confidentiality under Mozambican law.
- c. On 10 May 2021, in response to Respondent’s objections, Claimant disagreed that the tenderers’ proposals are confidential under Mozambican law and proposed to provide “an appropriate confidentiality undertaking”.<sup>1</sup>
- d. On 31 May 2021, the Tribunal granted Claimant’s request for the bidding documents (*i.e.*, including the ITD Proposal).
- e. Regarding the alleged confidentiality of the proposals, the Tribunal noted that “[t]o **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).**”<sup>2</sup> (Emphasis added)
- f. On 14 June 2021, Respondent produced a privilege log with respect to *inter alia* the ITD Proposal simply asserting that “*confidential information cannot be adequately safeguarded by a confidentiality undertaking or redaction*”.<sup>3</sup>
- g. On 31 March 2022, Claimant reiterated its request to produce the ITD Proposal. That document, which the Tribunal already determined to be relevant and material to the outcome of the case, is also relevant and material to, *inter alia*, the additional quantum valuation being conducted by Claimant’s experts. Claimant prepared and invited Respondent to consider a protocol stipulating to measures aimed at protecting the confidential information allegedly contained in the ITD Proposal (see attached). Claimant indicated that should Respondent fail to provide its comments and agree on a confidentiality protocol by 5 April 2022, Claimant would request the

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<sup>1</sup> Tribunal’s Decision on Claimant’s Document Production Schedule, p. 49, Document Request No. 21.

<sup>2</sup> Tribunal’s Decision on Claimant’s Document Production Schedule, p. 54, Document Request No. 21.

<sup>3</sup> Mozambique’s Privilege Log, p. 1. (Emphasis added).

Tribunal to implement the suggested confidentiality protocol by way of a procedural order.

- h. On 5 April 2022, Respondent declined to consider the confidentiality protocol and produce the ITD Proposal on the flawed basis that the Parties' agreement for a new valuation exercise closed off any remaining issues relating to document production (see attached enclosure).
3. Claimant disagrees with Respondent's response. There is no relationship between the Parties' agreement that Claimant can submit a new valuation and Claimant's request for this document, other than the fact that the document that the Tribunal previously ruled is relevant and material to the outcome of the case, is *also* relevant and material to Claimant's new valuation. This is not a fight about relevance and materiality. The Tribunal has already ruled on that issue. The request is not new. It was made at the document production stage, and the Tribunal ruled on it. Claimant has, at most, revived a pre-existing request in relation to which the parties had never discussed or resolved the surrounding confidentiality issues. That is not a reason why the Tribunal should not resolve the confidentiality protection point now – particularly in circumstances where considerable time is left until the hearing, Claimant is only asking for the ITD Proposal (*i.e.*, one document plus possibly some attachments), and document production is a continuing obligation, particularly in the situation here where the Parties never agreed that the ITD Proposal could not be produced because its confidentiality could not be safeguarded.
4. As a result, Claimant's argument is a red herring designed to distract from the fact that it has no good reason to withhold the ITD Proposal. As per paragraph 59 of Procedural Order No. 1, any discussion concerning a technical or commercial confidentiality concern raised by a Party will be settled by the Tribunal. Further, pursuant to Article 27(3) of the UNCITRAL Arbitration Rules, “[a]t any time during the arbitral proceedings

*the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.”<sup>4</sup>*

5. Given the foregoing, Claimant respectfully requests the Tribunal to implement the suggested confidentiality protocol by way of a procedural order and to order Respondent to produce the ITD Proposal without further delay. Claimant’s requested relief should be granted on the following basis:
  - a. The Tribunal has already determined, as part of its consideration of Document Request No. 21, that the ITD Proposal is relevant to the case and material to its outcome. The quantum experts retained by Claimant for the new valuation have indicated that the ITD Proposal is also relevant and material to their valuation model.
  - b. Respondent’s blanket rejection of any confidentiality undertaking or redaction, without any proper consideration of the form and scope of such confidentiality protection or redaction, is unilateral and unconvincing. Certainly, Respondent has provided no reasons for why the Tribunal’s proposed confidentiality agreement or redaction would not adequately protect the ITD Proposal. The attached confidentiality agreement will adequately protect any alleged confidentiality in the ITD Proposal because: only Claimant’s counsel of record and certain experts will be allowed to use the proposal solely for the purpose of this Arbitration; each individual permitted to use the proposal will provide a signed undertaking to be bound by the confidentiality protocol; the proposal will be disclosed to the permitted individuals only to the extent necessary and relevant for such individuals to carry out their role in this Arbitration; and the disclosed documents will be destroyed upon the termination of this Arbitration. Respondent has provided no explanation for why the regime which Claimant proposes will not be adequate or identified any concerns with it.

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<sup>4</sup> Pursuant to the commentaries to IBA Rules on the Taking of Evidence in International Arbitration, the Tribunal has power to implement measure to protect confidential information: “Article 9.5 also makes clear that the arbitral tribunal may make certain arrangements to protect confidential information. For example, if there are concerns that the documents may be disclosed to third parties, the arbitral tribunal may make an order prohibiting further disclosure of the evidence (a confidentiality order) or direct the parties to enter into a non-disclosure agreement. If there is a concern that a party’s legitimate interests call for non-disclosure of confidential information to the other parties to the proceeding, an arbitral tribunal may order production of documents in redacted form, or may, where permitted by the laws and rules applicable to the parties and their lawyers, order that the documents should be exchanged between counsel only (a so-called “attorneys-eyes only” production), without granting the parties access to them.”

- c. Even if, for reasons Respondent has yet to articulate, a confidentiality undertaking would not be sufficient to safeguard the document's confidentiality, Claimant would nevertheless request that the document be produced to the Tribunal directly and unredacted. At that stage, the Tribunal could then determine what redactions, if any, would adequately safeguard confidentiality before the document is produced to Claimant.

Yours faithfully,



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**Enclosures:**

1. Letter from Claimant to Respondent regarding the disclosure of the ITD Proposal, dated 31 March 2022;
2. Confidentiality protocol submitted with Claimant's letter dated 31 March 2022; and
3. Letter from Respondent to Claimants regarding the disclosure of the ITD Proposal dated 5 April 2022.

**cc: Permanent Court of Arbitration**

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