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R-44 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. PEL's request must be denied for three reasons: (1) the Tribunal has already held that the ITD Proposal is confidential, Mozambique produced almost a year ago the required privilege log designating the ITD Proposal, PEL never timely challenged the privilege log designation, and the matter is now closed; (2) as PEL admits in **C-50**, ¶ 8a, in connection with the calendar amendment, the Parties never discussed the "document production" – there was no agreement to reopen the document exchange, revisit the Tribunal's 31 May 2021 DPS Order, or reargue the confidentiality of the ITD Proposal; and (3) PEL is wrong about Mozambican law – the ITD Proposal is confidential and cannot be disclosed to PEL.
2. This Tribunal has expressly concluded that the ITD Proposal (and the proposals of all non-PGS Consortium bidders) **are confidential**. (31 May 2021 Order at 53). Nothing in Annex I *nonies* grants PEL permission to re-open the document exchange, challenge the privilege log designation (which PEL never challenged before its last memorial), or revisit the 31 May 2021 Order on DPS, or contemplates the Tribunal would do so, at this stage.
3. As PEL concedes in ¶ 8a of **C-50**, the Parties never discussed the document production when they agreed to the schedule in Annex I *nonies*. As explained in detail in ¶¶ 2-6 of Mozambique's **R-42** Letter, Mozambique never consented or agreed to re-open the document production, revisit confidentiality designations or produce the ITD Proposal. PEL recognizes there was no meeting of the minds with respect to document production.
4. Because of the strict requirement of confidentiality imposed by Mozambican law, the ITD Proposal was the most hotly contested document issue in this proceeding. Ms. Vasani specifically represented to the undersigned that PEL would only submit a new damages theory with a lower quantum. Had PEL revealed to Mozambique that its intention was to again seek disclosure of the ITD Proposal, reopen the document exchange, and revisit these issues concluded a year ago, Mozambique would have never agreed that PEL may have leave to make an additional damages submission. The undersigned would have provided the Tribunal with his doctor's note that justified moving the hearing. The Tribunal must hold that the document exchange stage is concluded and will not be revisited.

Professor Juan Fernández-Armesto
Professor Guido Santiago Tawil
Mr. Hugo Perezcano Díaz
25 April 2022
Page 2

5. Even if the Tribunal were to belatedly revisit this issue, Mozambique cannot be ordered to disclose the ITD Proposal to PEL. The relevant provisions are Articles 33(3) and 140(3) of the PPR. **RLA-3** (MZ Decree No. 15/2010). According to PEL's translation, Article 33(3) states that "**bids by tenderers are confidential**," and Article 140(3) creates an **exception** to confidentiality – that "[d]uring the periods for filing a complaint, tenderers may freely consult the file of the administrative procedure of the tender." **C-50** at ¶¶ 3-4. The ITD Proposal is "confidential" because it was submitted by a tenderer. Article 33(3) prohibits disclosure of the ITD Proposal to PEL. Further, PEL **does not fall** within, and cannot invoke, the limited exception to confidentiality in Article 140(3), for three reasons.
6. First, under Article 140(3), only "**tenderers** may freely consult the file of the administrative procedure of the tender." PEL is not entitled to invoke the Article 140(3) exception because **PEL itself was not a tenderer**. Rather, **the PGS Consortium was the tenderer**, and it is not a party to this proceeding. Thus, **PEL itself never** had any right to access the ITD Proposal at any time. While the PGS Consortium may have consulted the file in the proper timeframe and for the proper purpose, PEL has no right to review a tenderer's confidential bid in the context of an international treaty claim 9 years after the complaint period expired.
7. Second, indeed, PEL cannot invoke Article 140(3) at this time. Article 140(3) allows the file to be viewed "[d]uring the periods for filing a complaint" in the PPP process. That time period expired 9 years ago. Article 140(3) does not permit disclosure of bids thereafter.
8. Third, the express and limited purpose of allowing access is to further the PPP complaint process. Access to a confidential tender 9 years later, in the context of an international arbitration where this Tribunal is vested with jurisdiction over investment treaty claims, grossly exceeds the bounds and purpose of the limited exception in Article 140(3).
9. Almost a year ago, Mozambique designated the ITD Proposal in its privilege log. PEL never challenged that designation and submitted its two expert valuation reports and two memorials on damages without the ITD Proposal. The confidentiality protocol that PEL belatedly proposes must be rejected. The ITD Proposal is confidential and PEL is not entitled to access it under Article 140(3). Nothing in Article 140(3) permits a bid to be disclosed to a non-tenderer 9 years later in the context of an investment treaty arbitration even if the non-tenderer agrees to keep it confidential. Mozambique will be prejudiced if it is ordered to reveal the ITD Proposal to PEL and violate Mozambican law. Mozambique must maintain the ITD Proposal's confidentiality and cannot reveal it to PEL, without incurring liability to ITD (the winning bidder and concessionaire). A confidentiality protocol cannot overcome the prohibition against disclosure. PEL's application must be denied.

Respectfully submitted,



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