

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)

The Arbitral Tribunal

Prof Juan Fernández-Armesto (Presiding Arbitrator)
Prof Guido Santiago Tawil (Arbitrator)
Mr Hugo Perezcano Diaz (Arbitrator)

**ORAL HEARING
PORTO, PORTUGAL**

Tuesday, 6 December 2022

Registry
The Permanent Court of Arbitration

A P P E A R A N C E S

The Tribunal:

Presiding Arbitrator:

PROFESSOR JUAN FERNÁNDEZ-ARRESTO

Co-Arbitrators:

PROFESSOR GUIDO SANTIAGO TAWIL
MR HUGO PEREZCANO DIAZ

Administrative Secretary:

MS SOFIA DE SAMPAIO JALLES

Registry, Permanent Court of Arbitration:

DR TÚLIO DI GIACOMO TOLEDO,
Legal Counsel

Court Reporters:

MS LAURIE CARLISLE
MS DIANA BURDEN (English language)
(Diana Burden Ltd, London)

Interpreters:

MR MANUEL SANT'IAGO RIBEIRO
MR CRISTÓVÃO TOMÁS BACH ANDRESEN LEITÃO
MS LARA CRISTINA JERÓNIMO DUARTE

A P P E A R A N C E S

The Claimant:

Representative:

MR KISHAN DAGA, Patel Engineering

Counsel:

Brick Court Chambers:

MR EDWARD HO

20 Essex Chambers:

MR BAIJU VASANI

Messrs CMS Cameron McKenna Nabarro Olswang LLP:

MS SARAH VASANI
MS LINDSAY REIMSCHUSSEL
MS DARIA KUZNETSOVA

Miranda & Associados:

MS SOFIA MARTINS
MR RENATO GUERRA DE ALMEIDA
MR RICARDO SARAIVA

Fact Witnesses:

MR KISHAN DAGA, Representative
MR ASHISH PATEL (via video conference)

Expert Witnesses:

PROFESSOR RUI MEDEIROS
MR KIRAN SEQUEIRA
MR PAUL BAEZ
MR DAVID DEARMAN
MR ANDREW COMER (via video conference)
MR DAVID BAXTER (via video conference)
MR GERARD LAPORTE (via video conference)

A P P E A R A N C E S

The Respondent:

Representative:

MR ANGELO MATUSSE, The Republic of Mozambique

Counsel:

Dorsey & Whitney LLP

MR JUAN BASOMBRIO
MS THERESA BEVILACQUA
MR DANIEL BROWN

Fact Witnesses:

MR LUIS AMANDIO CHAUQUE
MR PAULO FRANCISCO ZUCULA (via video conference)

Expert Witnesses:

MS TERESA F MUENDA
MR JOSE TIAGO DE PINA PATRICIO DE MENDONCA
MR DANIEL FLORES
MR LARRY DYSERT (via video conference)
MR DAVID EHRHARDT (via video conference)
MR MARK LANTERMAN (via video conference)
MR MARK SONGER (via video conference)

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1 (9.29 am, Tuesday, 6 December 2022)

2 **PRESIDENT:** Good morning to everyone.

3 This is the last day in the hearing on the merits
4 between Patel Engineering Ltd and the Republic of
5 Mozambique.

6 Before we start, is there any point of
7 order?

8 **MS MARTINS:** Mr President, I would just
9 like to point out that yesterday --

10 **PRESIDENT:** You must speak up, Ms Martins.

11 **MS MARTINS:** Sorry. I wanted to say
12 I misled you saying the Portuguese version of the
13 BIT was not on the record. It is at CLA-4.

14 **PRESIDENT:** We don't hear. Now we hear
15 you better.

16 **MS MARTINS:** I was just saying yesterday
17 I misled the Tribunal and Ms Muenda and opposing
18 counsel saying the Portuguese version of the BIT was
19 not on the record, but it is. It's CLA-4.

20 **PRESIDENT:** Thank you.

21 Any issue from the Republic of Mozambique?

22 **MS BEVILACQUA:** No. Thank you,
23 Mr President.

24 MS TERESA MUENDA

25 **PRESIDENT:** Very good. So good morning,

1 Dr Muenda. Thank you for being here with us. May
2 I remind you that you are still under your oath of
3 saying the truth?

4 **MS MUENDA:** Indeed I am.

5 **PRESIDENT:** Ms Martins, you have the
6 floor.

7 Cross-examination by Claimant, cont'd

8 **MS MARTINS:** Thank you very much. Good
9 morning. Can everyone hear me?

10 So Ms Muenda, let's try to be as efficient
11 as possible so that we can get through everything.
12 Today I want to talk to you -- the first topic
13 I want to address with you is the
14 *direito de preferência* that we've been discussing
15 throughout these sessions.

16 Now, you say in paragraph 6 of your first
17 legal opinion, that's on page 6, that the MOI does
18 not grant the concession, and yesterday in your
19 presentation you also departed from the assumption
20 that PEL somehow sustains that the MOI and the
21 concession contract would be one and the same.

22 Now, I represent to you that PEL has never
23 argued this, so I would like you to bear it in mind
24 in all my questions and in all your replies. One
25 thing is the MOI. Another thing is the concession

1 contract, which, as undisputed in these proceedings,
2 has never been entered into.

3 You also then proceed to say that the
4 *direito de preferência* that is contained in the
5 MOI -- this is at paragraph 11(e) -- is a *direito*
6 *potestativo* in Portuguese. Can you please confirm
7 for the Tribunal's benefit that this means under
8 Mozambican law, a *direito potestativo* is a
9 unilateral right that cannot be opposed and depends
10 merely on the decision of the holder of that right
11 to exercise it if and when asked to do so?

12 **MS MUENDA:** Thank you very much. I'm not
13 quite sure I understood your question. Could you
14 please repeat it?

15 **MS MARTINS:** I think there are some sound
16 issues? May I repeat the question?

17 Ms Muenda, can you please confirm for the
18 Tribunal's benefit that a *direito potestativo*, which
19 you mention in paragraph 11(e) of the first legal
20 opinion, means under Mozambican law that it is a
21 unilateral right that cannot be opposed and depends
22 merely on the decision of the holder of that right
23 to exercise it, if and when asked to do so. This is
24 the definition of a *direito potestativo*?

25 **MS MUENDA:** Yes.

1 **PRESIDENT:** Sorry, Dr Muenda, I'm lost.

2 Paragraph 6 of Dr Muenda's first witness statement?

3 **MS MARTINS:** Yes.

4 **PRESIDENT:** Can you help us where it
5 speaks there? Paragraph 6 seems to speak of --

6 **MS MARTINS:** I'm sorry, it's probably --
7 I'm sorry, it's a mistaken reference from me. I'm
8 sorry. This is paragraph 11(e) at page 6. So it's
9 not paragraph 6, it's page 6.

10 **PRESIDENT:** OK. Page 6.

11 **MS MARTINS:** Paragraph (e). From the
12 bottom, it's 7th row from the bottom.

13 **PRESIDENT:** Thank you. Thank you for
14 that. So maybe you show it to the expert.

15 **MS MARTINS:** The expert has her witness
16 statement in front of her, and it's on the screen.

17 So you confirm the meaning of *direito*
18 *potestativo* under Mozambican law is the one
19 I explained, correct?

20 **MS MUENDA:** Yes, I do confirm it.

21 **MS MARTINS:** Thank you.

22 Then, moving to paragraph 4 of your second
23 legal opinion, you state that the
24 *direito de preferência* that is contained in clause 2
25 of the MOI refers to a period in time when there was

1 no special law referring to a *direito de preferência*
2 other than the Civil Code, notably in articles 414
3 and following, correct? You confirm this statement?

4 **MS MUENDA:** Yes, I do confirm it.

5 **MS MARTINS:** And I would like you to
6 please look at footnote 3, page 4 of your second
7 legal opinion where you refer to a definition of
8 pacto de preferência, pact of preference, put
9 forward by F Cunha Leal Carmo, a Portuguese lawyer.

10 Is it not true that pacto de preferência
11 is a specific type of contract that is precisely
12 foreseen in articles 414 and following of the
13 Civil Code?

14 **MS MUENDA:** Yes, it is true, but it's
15 worth underscoring that the preference pact, pacto
16 de preferência, as I properly underscore in my
17 opinion, is not to be mixed up with a promissory
18 contract.

19 **MS MARTINS:** Ms Muenda, we'll get to that
20 in a minute. Please follow my questions. I'm not
21 asking -- I'm just asking you is the pact of
22 preference a specific type of contract foreseen in
23 the Civil Code? Yes or no? It's a simple yes-or-no
24 question.

25 **MS MUENDA:** Yes.

1 **MS MARTINS:** And is this contract, as
2 foreseen in the Civil Code, binding?

3 **MS MUENDA:** It binds vis-á-vis regarding
4 the obligations spelled therein.

5 **MS MARTINS:** So you would agree with me,
6 I assume, Ms Muenda, that this preference means, in
7 essence, that the party that undertakes the
8 obligation, the obligor, as we call it, must, if he
9 or she wishes to conclude the envisaged transaction,
10 must do so with the beneficiary of the preference,
11 correct? Or in other words, the beneficiary has an
12 option. If the beneficiary says that he or she
13 wants to conclude the transaction, the obliger is
14 bound to conclude the transaction with the
15 beneficiary, correct?

16 **MS MUENDA:** I do not agree. The
17 beneficiary of the *direito de preferência* will sign
18 if he or she agrees with all of the requirements
19 laid down by the issuer of this *de preferência*
20 statement. That is what *pacto de preferência* means.

21 **MS MARTINS:** You agree -- this is exactly
22 what I'm saying. If I am the obliger and you are
23 the beneficiary and I tell you, Ms Muenda, I have
24 decided to go through with this transaction, here
25 are my terms, and you say yes, I am then obliged to

1 sign the contract with you, correct?

2 **MS MUENDA:** Yes, if I say so. If I say
3 that I accept the conditions that the declarant
4 imposes on me. We have to take this from the
5 general to the specific.

6 **MS MARTINS:** We're getting there, but
7 first I want to establish the legal concept. This
8 is what we're doing, Ms Muenda, so please follow my
9 lead.

10 You also agree, as you state expressly at
11 paragraph 10 of your second legal opinion, that's
12 page 4, that Mozambique did indeed grant PEL the
13 privilege and priority -- in Portuguese *privilégio e*
14 *a primazia* -- of exercising its preference through
15 its letter dated 15 June 2012. That's C-11, tab 14,
16 volume 1 for the record.

17 **MS MUENDA:** Yes. I undertake an analysis
18 against a backdrop of non existence of the PPP Law
19 and against the backdrop of an existing PPP Law, and
20 I look into the use of the *direito de preferência* in
21 general, and then I look into the same concept in
22 the light of the specific statute.

23 We cannot lose sight of the issue of
24 applying the law in its right time. When the facts
25 came to pass, were materialised, a statute, a law,

1 was already in effect, and under the rules of
2 interpretation of a law in space, should that fact
3 take place under the aegis of an effective law it
4 would be to that new law that people should refer.

5 **MS MARTINS:** Yes, but now we're talking
6 about the MOI, so let's not get ahead of ourselves.
7 Once again, I will ask you to follow my lead.

8 You confirm, as you stated in your legal
9 opinion, that the MTC did grant PEL on 15 June its
10 right, it's privilege and priority, to exercise its
11 right of preference, correct? That's a fact, and
12 you state it in your legal opinion.

13 Now, also at paragraph 11 you state, page
14 5 of your second legal opinion, that PEL did
15 exercise its option. This is C-12, a letter dated
16 18 June, tab 15 of the Core Bundle.

17 Now, as we just saw, at paragraph 4 of
18 your second legal opinion, when the MOI was entered
19 into, the only right that existed, as you correctly
20 pointed out, was the one in the Civil Code. Now, it
21 has been suggested during this hearing that this
22 would not be the case, but I would like you to look
23 at the public procurement rules. So that's Decree
24 15/2010 of 24 May, tab 114 of the Core Bundle,
25 CLA-41. For those who wish to see it in English,

1 it's CLA-65A, tab 122.

2 Can we look, please, at article 26.3 of
3 the public procurement rules?

4 So you have them before you. I will give
5 you a second to read it.

6 **MS MUENDA:** Did you say article 26? I'm
7 unsure of your reference.

8 **MS MARTINS:** Yes. National bidder.
9 Precisely. Just let me know when you've finished
10 reading the provision, please.

11 **MS MUENDA:** Thank you very much.

12 **MS MARTINS:** Thank you, Ms Muenda. Now,
13 this provision, as you correctly pointed out,
14 pertains to the public procurement procedure and has
15 a special provision for national bidders so, in
16 essence, and please correct me if I'm interpreting
17 it incorrectly, where there is a tender under this
18 statute and there are foreign and national bidders,
19 the law basically awards a margin of preference to
20 national bidders. So it's a way to stimulate or to
21 benefit, let's put it that way, national bidders
22 when competing with foreign bidders.

23 Is that not correct?

24 **MS MUENDA:** Yes, it is correct. This
25 happens under this regulation as it happens under

1 other types of procurement. If we look at other
2 laws, we also find this concept of a margin of
3 preference downstream from a *direito de preferência*,
4 thus giving a benefit to national entities. It is
5 one of the types possible.

6 **MS MARTINS:** Yes, it's a margin of
7 preference, correct?

8 **MS MUENDA:** Yes, it is a margin of
9 preference. It is quantified but it stems from a
10 preference, a *direito de preferência*, being given to
11 national bidders quantified in this case.

12 **MS MARTINS:** No, I'm sorry --

13 **MS BEVILACQUA:** Mr President, may I please
14 ask that counsel not interrupt the witness.

15 **MS MARTINS:** Ms Bevilacqua, you're
16 completely right, it's very difficult, and I have
17 been making an effort, and I will continue to do so,
18 but I would please ask you, there's no need to --
19 this has happened not only to me but to everyone
20 else in the room, so I don't think there's any need
21 to object in that fashion. I have been making an
22 effort.

23 Ms Muenda, is this margin of preference a
24 statutory right, or is it an option?

25 **MS MUENDA:** It's a statutory right, yes.

1 **MS MARTINS:** Moving on, I would ask you to
2 confirm your opinion that the *direito de preferência*
3 would have expired -- this is what you say in your
4 second legal opinion -- because PEL was not able to
5 negotiate setting up a joint venture with CFM. I
6 think this is what you say -- well, I know this is
7 what you say at paragraph 12 of your second legal
8 opinion at page 6.

9 **MS MUENDA:** Yes.

10 **MS MARTINS:** And then you say at paragraph
11 14, page 6, that even though this
12 *direito de preferência* that was afforded to PEL
13 under the MOI -- so the *direito de preferência*
14 foreseen in the Civil Code, as you stated a few
15 paragraphs before -- although this right, I was
16 saying, had expired, Mozambique decided nonetheless
17 to consider the possibility to grant PEL another
18 right stemming from the PPP Law, which was the 15
19 per cent scoring advantage within the eventual
20 tender.

21 So from your own words, Ms Muenda, and
22 these two paragraphs, you must agree that we're
23 talking about two different rights, one foreseen in
24 the MOI, which you say is a contractual right
25 foreseen in the Civil Code and that you say expired,

1 and a different right that surfaced the second
2 moment as an option from the government to award a
3 15 per cent scoring advantage, and that right is set
4 forth in the PPP Law and regulations that had
5 meanwhile been enacted.

6 This is what you wrote, is it not?

7 **MS MUENDA:** No, it wasn't. That is not my
8 understanding. What I did was to carry out, to look
9 into the *direito de preferência* without the law, and
10 then I did likewise under the effective PPP Law.
11 It's important to remind you that we have a general
12 and a specific *direito de preferência*, and at law we
13 have specific -- the specific statute, or standard
14 rule, waives the general one, and at this point in
15 time the law in effect was the PPP Law, and
16 according to interpretation rules it is the PPP Law
17 that specifically states that the
18 *direito de preferência* is 15 per cent with a margin
19 defined in the PPP Law. This is the understanding
20 that what I wrote should be given.

21 **PROFESSOR TAWIL:** Sorry, can I ask a law
22 question?

23 To understand, Professor, you say in
24 paragraph 14 that the right has disappeared,
25 "caducou". OK in it's out of the legal world. I'm

1 going to 14.

2 But you say notwithstanding so, they
3 decided to provide a new right under the new regime
4 of PPP. What is the basis for such right if it has
5 already disappeared? If it has not disappeared
6 there's the argument of the Civil Code, so I don't
7 understand the basis. If it disappeared, how was it
8 reinstated?

9 Thanks.

10 **MS MUENDA:** Governments are sovereign. In
11 other words, nevertheless the government, if it so
12 wanted from this point of view -- in any case what
13 must be understood is that I'm looking into the use
14 of this *direito de preferência* in the light of the
15 general statute and in light of the specific
16 legislation, which was the law in effect when the
17 facts took place.

18 When the contract was drawn, we did not
19 have an effective PPP Law. Therefore, when the
20 contract was executed, the system that applied to it
21 was the general one stemming from the Civil Code.
22 When the *direito de preferência* materialises, at
23 that point in time we already had in effect the law
24 on PPPs, and resulting from the proper use of
25 effective law in time, the setting up of the

1 performance of this right would take place under the
2 effectiveness of this specific law.

3 What I did, allow me to repeat once again,
4 was to consider the effectiveness of the Civil Code
5 and look at the facts that flowed in this regard.
6 That's what I did. So I say that if we look at this
7 letter and if we consider that this law was
8 materialising in the light of the Civil Code, or
9 civil law, when advising that the joint venture had
10 to be set up for the right to be able to be taken to
11 fruition, insofar as they were unable to set up this
12 company with the CFM, the government conveyed what
13 the requirements were under the general law for the
14 materialisation of its *direito de preferência*.
15 Insofar as this did not come to pass, and the law
16 stipulates an eight-day period, if it did not come
17 to pass under that period it would have expired,
18 which it did.

19 **PROFESSOR TAWIL:** My question -- I don't
20 think, Professor, that you have answered my
21 question.

22 In my understanding, if the PPP Law was
23 not there, this would have been ruled by article 414
24 of the Civil Code. That says something different
25 from the PPP.

1 You said that the right of preference
2 expired, disappeared, "caducou". So I still don't
3 understand, if it "caducou", how would the
4 government reinstate something? I'm an
5 administrative law professor. I know the powers of
6 government. I don't think they just can restate a
7 preference, because that would go against the right
8 of all the other tenderers.

9 So I need to understand your position.
10 Thanks. And just answer this question, not anything
11 else. Thanks.

12 **MS MUENDA:** I reiterate that states are
13 sovereign. They can, if they so decide, provided
14 they do not injure, they do not prejudice the
15 citizen, they can grant a second go, second chance.
16 This is a common occurrence.

17 **PROFESSOR TAWIL:** Thank you.

18 **MS MARTINS:** Thank you.

19 **PRESIDENT:** This is important. I'm sorry
20 but I think I'd rather put the questions now
21 following up the lead of Professor Tawil.

22 Can we take the contract, the MOI, and --
23 here it is.

24 **MS MARTINS:** Which version would you like
25 us --

1 **PRESIDENT:** The Portuguese version.

2 **MS MARTINS:** That's common ground, yes.

3 Let's go into 5B. That's tab 4 of the Core Bundle.

4 **PRESIDENT:** Let's go back to basics
5 because I'm slightly losing too many theories.

6 So, Dr Muenda, let's take the Portuguese
7 version, OK? And here the relevant clause is 2.2,
8 and you may read it to yourself, but it says "a PEL
9 terá o direito de preferência para a implementação
10 do projecto". OK?

11 **MS MUENDA:** Yes, president.

12 **PRESIDENT:** So there is a contractual
13 right which is granted under the MOI by the Republic
14 of Mozambique to PEL.

15 **MS MUENDA:** Indeed, sir.

16 **PRESIDENT:** And I go to -- because I have
17 read your end -- can I take you to page 6 of your
18 first witness statement, and here I will read to you
19 page 6 one phrase which to me is important and it
20 says -- why don't you read for yourself from "Longe
21 disso, a cláusula supõe", page 6, first report,
22 until "na posição de concessionária". Read that for
23 you, and I'll make you some -- I'll draw -- but
24 please read it slowly.

25 **MS MUENDA:** Am I reading it rightly?

1 **PRESIDENT:** (Reading Portuguese).

2 **MS MUENDA:** Thank you very much. I've got
3 it now.

4 **PRESIDENT:** So can I -- to me, the phrase
5 I want to draw your attention to is "Realizada a
6 escolha", that means in the tender process when
7 there is the adjudication, PEL will have a
8 potestative right, accepting the compliance with all
9 elements of the winning bid by the third party to
10 sign the concession contract in the position of the
11 concessionaire. That's what you wrote.

12 **MS MUENDA:** Yes.

13 **PRESIDENT:** So my question to you is as
14 follows.

15 When you take -- and let's go back to the
16 MOI, when we see that "a PEL terá o direito de
17 preferência para a implementação do projecto", do
18 you see it there, I understand from your position
19 that you are saying that PEL has two rights. Two.

20 The first right is the right to a margem
21 de preferência of 15 per cent in the tender process,
22 and this is consistent with the PPP Law.

23 And second, it has the right, if it is --
24 with this margin it does not win itself the bid, it
25 has the right, as you wrote, "terá o direito

1 potestativo de, aceitando o cumprimento dos
2 elementos da oferta vencedora, celebrar o contrato
3 na posição de concessionária".

4 So there are two rights. Right one is the
5 margem of 15 per cent. Right 2 is what you called a
6 direito potestativo of accepting the terms of the
7 successful bidder, and if PEL accepts the terms of
8 the successful bidder it then obtains the
9 concession.

10 Did I interpret you correctly, Dr Muenda?

11 **MS MUENDA:** No, president. No, that is
12 not the correct understanding. The positive right,
13 direito potestativo, derives or stems from the
14 *direito de preferência* in the light of the general
15 statute. There are not two *direito de preferências*
16 as I see it deriving from the application of the
17 MOU. It is one single right, except that at the
18 time that the memorandum was signed the
19 *direito de preferência* had to be interpreted in
20 light of the general statute.

21 But, at the time of the materialisation
22 through the rules of applicability in time, it would
23 be the right that comes from, that stems from the
24 PPP Law.

25 The MOI was valid for a year, which means,

1 as I see it, that it had run its course, but there
2 is a future right that was attributed, which is the
3 right to, following approval of the prefeasibility
4 terms, exercise the right of preference,
5 *direito de preferência*.

6 **PRESIDENT:** Let me see if I can express it
7 in my words so that I completely understand your
8 position, Dr Muenda.

9 So your position is that on the day when
10 the MOI was signed, the "*direito de preferência para*
11 *a implementação do projecto*", was "*um direito*
12 *potestativo de, aceitando o cumprimento dos*
13 *elementos da oferta vencedora, celebrar o contrato*
14 *na posição de concessionária*".

15 When they signed that was the meaning of
16 *direito de preferência*, correct?

17 **MS MUENDA:** Correct, sir.

18 **PRESIDENT:** Then some months later the PPP
19 Law came into operation?

20 **MS MUENDA:** Yes.

21 **PRESIDENT:** And your position is that when
22 that new law came into operation, the
23 *direito de preferência* which we have described
24 transformed itself into a "*direito e margem de 15*
25 *por cento*". A *preferência* was restricted to a 15

1 per cent advantage in the margin during the tender
2 process, is that correct?

3 **MS MUENDA:** That is correct.

4 **PRESIDENT:** Now my next question to you is
5 imagine that there is this tender process. Imagine
6 that this margem preferência of 15 per cent is given
7 to PEL, and imagine that another bidder is the
8 winner of the bid.

9 In that case does PEL still have the
10 right -- and I will use your words -- the "direito
11 potestativo de, aceitando o cumprimento dos
12 elementos da oferta vencedora, celebrar o contrato
13 na posição de concessionária", does PEL in that case
14 which I described still have that right or not?

15 **MS MUENDA:** It does not, sir. We are
16 mixing the interpretation of *direito de preferência*
17 under the general statute and the interpretation of
18 *direito de preferência* under the specific law.

19 **PRESIDENT:** Because of the promulgation of
20 the PPP Law, that historic right of preference has
21 disappeared?

22 **MS MUENDA:** That is correct.

23 **PRESIDENT:** Thank you, Dr Muenda. Of
24 course Professor Tawil has some questions for you.

25 **PROFESSOR TAWIL:** Thank you very much, and

1 following Professor Fernando Armesto's question,
2 normally when a law changes the nature of a right,
3 there are two ways of doing that in administrative
4 law. One is with the agreement of a party, and the
5 second one is to compensate the differences that
6 such legal novation produces. It appears, please
7 confirm, Professor, that moving out from the right
8 under the Civil Code to obtain the concession to the
9 right to the 15 percentage margin is, as Professor
10 Fernandez Armesto just said, a restriction,
11 something lower than what they had. Am I right?
12 For PEL it was something worse than what they had
13 before. They had a right to the concession and now
14 they had a 15 per cent margin.

15 **MS MUENDA:** No, I don't think that is the
16 correct understanding. The understanding that they
17 had a larger right with the *direito de preferência*
18 under the general statute, because the
19 *direito de preferência* under the general statute has
20 conditions that are imposed later, at a later date.
21 It was granted a *direito de preferência*, which, if
22 we look at it under the general law, might never
23 even have materialised.

24 If the government had not approved it, it
25 would not maintain the *direito de preferência*. If

1 it did approve it, the government might have imposed
2 a set of conditions, and if PEL did not meet those
3 conditions within a given period of time, then that
4 *direito de preferência* might not have materialised.
5 They would not have reached an agreement based on
6 the requirements under the law which the government,
7 the State, has the right, has the prerogative to
8 impose. So it would have had to meet those.

9 You cannot say that the prior
10 *direito de preferência*, in the light of the general
11 statute, was somehow higher or more superior to the
12 specific right under PPP Law, and if we look at this
13 in historical terms, if we look at the PPP Law
14 historically, we immediately see that all subjects
15 of the law had this new law in mind. These parties
16 had this law in mind. It had already been discussed
17 widely. If I'm not mistaken, it had even been
18 approved by the Council of Ministers at this stage,
19 so there was only one stage left in its approval.

20 So this would be my answer.

21 **PROFESSOR TAWIL:** I'm a little bit
22 confused because you just admitted to the question
23 of the president that the right prior to the
24 approval of the law was to obtain the concession.
25 If I understand correctly, a law enters into force

1 as from the moment it is sanctioned or published in
2 the Official Gazette. Before that, it's a bill.

10:14

3 OK. So --

4 **MS MUENDA:** Yes.

5 **PROFESSOR TAWIL:** Yes, sorry. Do we agree
6 that before its approval and publication in the
7 Official Gazette, it's only a bill?

8 **MS MUENDA:** We agree on that, yes, we do.

9 **PROFESSOR TAWIL:** So, if I understand
10 correctly, the position is that in order to sort of
11 modify the right from the original general statute
12 to the specific statute, there was no need to obtain
13 the agreement of PEL, and there's no sort of
14 compensation or any type of different exchange from
15 the original concession to the 15 per cent margin.
16 It's an attribution of the government and its
17 sovereign powers.

18 Is that your position?

19 **MS MUENDA:** No, Professor.

20 I think there appears to be some confusion
21 between *direito de preferência* and *direito de*
22 *concessão*. These are two totally different legal
23 concepts.

24 The *direito de preferência*, looking at the
25 general statute, is where I define the conditions

1 under which I want to sign or execute a future
2 contract. When I grant a *direito de preferência*, it
3 is to do with the acceptance of all my future
4 conditions. The *direito de preferência* in and of
5 itself does not automatically grant you a *direito de*
6 *concessão*.

7 **PROFESSOR TAWIL:** That is subject to the
8 negotiation of the concession contract. We're not
9 discussing that. But it means that you have the
10 preference, the same preference that you have --
11 I assume that article 414 of the Civil Code is
12 referring to sale of goods, so it should be an
13 adaptation of 414 to the nature of a concession
14 contract.

15 **MS MARTINS:** 423 says precisely that,
16 Professor Tawil.

17 **PROFESSOR TAWIL:** Thanks very much. Your
18 witness. Thank you.

19 **PRESIDENT:** Thank you. Ms Martins. Sorry
20 for the interruption but it was important.

21 **MS MARTINS:** No, I totally agree, and
22 I believe the Tribunal has perfectly understood the
23 point that I was making, that there is a certain
24 inconsistency here, so I will move on to the next
25 topic.

1 Ms Muenda, changing topics, this matter
2 has been covered, in your first legal opinion at
3 paragraph 3 you state that under article 405 of the
4 Civil Code, which as we know enshrines the principle
5 of contractual freedom under Mozambican law, the
6 parties may as a rule agree a contract can be signed
7 in two different languages with equal value subject,
8 as you point out, to eventual limitations arising
9 from the law. You also said this yesterday in your
10 presentation.

11 Now, we do know that this is undisputed,
12 that clause 12 of the MOI, whatever version we
13 consider, says that PEL and Mozambique agreed that
14 both languages of the MOI had equal value, and then
15 what you say in paragraph 3 as well is that in this
16 particular case -- and you explained this yesterday
17 as well -- the principle of contractual freedom
18 would be barred by article 5 of the public
19 procurement rules. For the record, decree 15/2010,
20 CLA-41, tab 114 of the Core Bundle.

21 Now, let me ask you this. Let's imagine
22 that this Tribunal concludes that article 5 of the
23 public procurement rules does not apply to the MOI.
24 Then, according to your own legal opinions, there
25 would be no legal impediment to the applicability of

1 the freedom of contract principle set forth in
2 article 405, is that not so?

3 **MS MUENDA:** Not quite like that. What
4 I say is that article 405 gives the contractual
5 freedom to define the clauses that will determine
6 their relations, but 405 indicates what is in the
7 law, so it is a relative contractual liberty.

8 The constitution of the Republic indicates
9 that the language is the Portuguese language, as do
10 the rules that regulate public administrative law in
11 Mozambique, in particular with regards to the
12 procurement regulation which says specifically that
13 it is possible to execute contracts in other
14 languages, but in any event the language that
15 prevails is always the Portuguese language, is
16 always the document written in the Portuguese
17 language.

18 **MS MARTINS:** Ms Muenda, given that you did
19 not reply to my question, I'm going to ask it again
20 in very simple terms.

21 What you just said is what I put to you.
22 Your position, written and stated yesterday, is that
23 article 405, freedom of contract, has limitations
24 from the law, and the limitation that you elected is
25 article 5 of the public procurement rules.

1 Now I ask you to imagine, article 5 does
2 not apply, for whatever reason. Then the legal
3 limitation that you yourself have indicated ceases
4 to exist, is that correct? Yes or no?

5 **MS MUENDA:** It cannot cease to exist. The
6 legal limitation cannot cease to exist. It's in the
7 law. If it didn't exist in the law, that
8 limitation, then yes. If it didn't exist in the
9 law.

10 **MS MARTINS:** That is the question I'm
11 asking. If this limitation did not exist in the
12 law, then the principle of contractual freedom would
13 apply, correct?

14 **MS MUENDA:** If it weren't in the
15 constitution, either if it weren't in the PPP Law or
16 in the constitution, in that case, yes, if it didn't
17 exist. With regards to the issue of language, yes.
18 If this legal limitation didn't exist with regards
19 to language, then the answer is yes.

20 **MS MARTINS:** Ms Muenda, article 10 of the
21 constitution simply says that the official language
22 of Mozambique is Portuguese. Now, in Mozambique, in
23 Portugal, in Spain, in France, in Germany, every day
24 parties agree in contracts in different languages
25 other than their national languages, so article 10

1 is irrelevant here, I put to you.

2 Now let's look at Decree 15/2010, article
3 5, please, if you can project it.

4 So CLA-14, tab 114, volume 5 of the core
5 bundle, English translation at tab 124, CLA-67A.

6 Now, Ms Muenda, as we can see on the
7 screen and the document before you, what article 5,
8 number 1, says is that all documents related to
9 procurement -- emphasis -- subject to this
10 resolution must be drafted in Portuguese.

11 That's what it says, correct? So it
12 applies to the document --

13 **MS MUENDA:** Yes, it is.

14 **MS MARTINS:** OK. So now let's look at
15 article 1, please, and here we have the scope of
16 application of the statute, which says that it
17 applies to works contracts, in Portuguese
18 contratação de empreitada de obras públicas, supply
19 of goods, and provision of services, prestação de
20 serviços ao Estado.

21 Is the MOI -- and please bear in mind that
22 the MOI is not the concession contract, this is
23 something that I asked you to do at the beginning,
24 is the MOI a public works contract, a contratação de
25 empreitada?

1 **MS MUENDA:** It is not a public works
2 contract, no.

3 **MS MARTINS:** And it is not a contract for
4 the supply of goods, is it?

5 **MS MUENDA:** No, it is not.

6 **MS MARTINS:** And it is not a contract for
7 provision of services to the State, is it?

8 **MS MUENDA:** It is not.

9 **MS MARTINS:** Thank you. Let's then move
10 on to another topic.

11 In your first legal opinion you state that
12 there is no meeting of the minds, that there would
13 be a conflict of clauses when considering the
14 different versions of the MOI. You say this at
15 paragraph 11(b), page 5, and then you conclude that
16 due to this conflict, the MOI must be considered as
17 inexistent under article 232 of the Civil Code.

18 So I'm not going to bother you or the
19 Tribunal with the reference to this provision.
20 Professor Medeiros addressed this, explained that it
21 was a question of interpretation, and yesterday in
22 your presentation you also explained that this was
23 indeed a question of interpretation, so I think
24 we're over this issue.

25 Now, I put to you, is it not true that

1 when analysing all the existing versions of the MOI,
2 they are basically the same except for one
3 provision, which is clause 2.1? This is the only
4 substantial difference between the wording of all
5 the versions that are available for this Tribunal to
6 analyse, correct? Material differences, call it
7 that way. There are some minor differences in
8 translation, but the only substantial difference is
9 this clause 2.1. You agree?

10 **MS MUENDA:** Yes. This is a substantial
11 difference.

12 **MS MARTINS:** So now I would like to once
13 again confront you with the MOI, the Portuguese
14 version, which is common ground, please. That's
15 C-5B. Let's look at clause 1, Ms Muenda.

16 Does it not say in clause 1 that the scope
17 of the MOI is to define the basic terms and
18 conditions for the government to give PEL a
19 concession for the project?

20 **MS MUENDA:** Yes.

21 **MS MARTINS:** This is common ground. And
22 now let's look at clause 2.2, which is also common
23 ground. The presiding arbitrator read it to you a
24 minute ago but he ended before the last part.

25 Does it not say that this

1 *direito de preferência* is to implement the project
2 on the basis of the concession to be granted by the
3 government?

4 **MS MUENDA:** Yes. Here I think that you
5 are agreeing with me with regards to the application
6 of the PPP regulations, the PPP regulation. I heard
7 Professor Medeiros say here yesterday that it was a
8 preliminary contract, a contract preliminary or
9 prior to the concession, so I think that you're
10 agreeing with me on the application of the
11 regulation.

12 **MS MARTINS:** No, I'm not, and we'll get to
13 there in a moment. Please follow my questions.

14 I just asked you that you agree that both
15 these clauses, which are undisputed between the
16 parties, both of them refer to the granting of a
17 concession by the Government of Mozambique to Patel.
18 Is that not the case?

19 **MS BEVILACQUA:** Objection, as it misstates
20 the content of clause 2.2.

21 **MS MARTINS:** There is no reference to
22 concession in clause 2.2?

23 **MS BEVILACQUA:** Mr President, if I may?

24 **PRESIDENT:** Yes.

25 **MS BEVILACQUA:** Not to Patel, which was

1 your question.

2 **MS MARTINS:** But clause 1, you agree, says
3 to Patel, right? Thank you.

4 Now, Ms Muenda --

5 **MS MUENDA:** Apologies. I think you'd
6 asked me a question, and I didn't answer that
7 question. You asked me if I had agreed, and I think
8 you moved on before I was able to say whether
9 I agreed or did not agree.

10 **MS MARTINS:** That you had agreed that the
11 wording of these two clauses says what it says?
12 I assume that's common ground.

13 So clause 1 says that the object of MOI is
14 *inter alia* to define the basic terms and conditions
15 for the government to give Patel a concession for
16 the project, and clause 2.2, which is also common
17 ground, refers to a *direito de preferência* to
18 implement the project on the basis of the concession
19 to be granted by the government, correct?

20 **MS MUENDA:** I'm not sure I agree with your
21 interpretation because in clause 1 the object is to
22 regulate the prefeasibility study to be undertaken.
23 It says this memorandum is to regulate the
24 prefeasibility study which will be entirely borne by
25 PEL based on a partnership between the private and

1 the public sector, which is the project, and then
2 defining the basic terms and conditions for the
3 granting of a concession for the construction.

4 So here what it's talking about is a
5 prefeasibility study for a later granting of a
6 concession, as long as prerequisites are met.

7 **MS MARTINS:** That is, Ms Muenda, why
8 I said "*inter alia*". There are two parts to the
9 object of the contract. One is the PFS and, two, "e
10 a definição", "and". So there are two objects. One
11 is the PFS and the other one is to define the basic
12 conditions for the government to give PEL a
13 concession for the project.

14 **MS MUENDA:** I don't agree with your
15 interpretation. What I say is that we have the MOI
16 regulates the PFS study on the one hand. On the
17 other hand, the concession of the
18 *direito de preferência*.

19 **MS MARTINS:** Ms Muenda --

20 **MS MUENDA:** -- for implementation. We are
21 jumping over the *direito de preferência* to go to the
22 final part of number 2. You can't do that.

23 **MS MARTINS:** Ms Muenda, I am in clause 1.
24 I'm not talking about clause 2. Please read the
25 final -- well, I'm not going to bother you with

1 this. This is clear, the Tribunal understands the
2 text. It's for the Tribunal to interpret, not me or
3 you.

4 **MS MUENDA:** Thank you.

5 **MS MARTINS:** Now, as we saw a few minutes
6 ago, you agree that the *direito de preferência* means
7 an option. You also stated that the only reason why
8 this option was not followed through is because it
9 expired. I would ask you the following. Are you
10 aware that Minister Zucula --

11 **PRESIDENT:** I don't think Dr Muenda has
12 used the word "option", has she?

13 **MS MARTINS:** Yes, she did. We can go back
14 in the transcript. I asked her if the right of
15 preference was an option, and she confirmed it was.

16 **PRESIDENT:** Sorry. I missed that.

17 **MS MARTINS:** Ms Muenda, are you aware that
18 Minister Zucula said here, a few days ago, that if
19 this agreement with the CFM had been reached, PEL
20 would have been granted the concession by direct
21 award.

22 **MS MUENDA:** No, I don't know. I didn't
23 follow the meeting.

24 **MS MARTINS:** Thank you.

25 Ms Muenda, yesterday when we discussed at

1 the beginning of your testimony the principles of
2 interpretation of contracts under Mozambican law,
3 you agreed with me that the behaviour of the parties
4 is paramount to interpretation of contractual
5 provisions.

6 I would then like to put to you some facts
7 that you may, or not, be aware of. The first one is
8 the following, and I would please ask you to have a
9 look at Exhibit C-204. That's tab 57, volume 2.

10 So if you could have a look, this is an
11 e-mail dated 6 May in the morning. This was the day
12 the MOI was signed. And, as you will see, this
13 e-mail was sent by Mr Rafique Jusob, who was at the
14 time the chairman of the Commission for Promotion of
15 Investments, and it says that it is the final
16 Portuguese version and the English version shall be
17 adopted accordingly.

18 And, if you turn the pages, you will see
19 that the draft is attached to that e-mail, and if
20 you go in particular to clause 2 of that draft.

21 **MS MUENDA:** Yes.

22 **MS MARTINS:** Were you aware of the
23 existence of this document?

24 **MS MUENDA:** No, I did not. It's the first
25 time I see this document.

1 **MS MARTINS:** But you would agree that, as
2 a contemporaneous document, it's relevant for the
3 Tribunal to be able to interpret the will of the
4 parties, correct?

5 **PRESIDENT:** I wonder if Dr Muenda can
6 really help us very much with the facts? I mean,
7 she has stated the principle under Mozambican law.

8 **MS MARTINS:** Let's move on.

9 **PRESIDENT:** I don't think that this will
10 help us too much.

11 **MS MARTINS:** No, let's move on.

12 Let's look at the PPP regulations, please,
13 and so this is Decree 16/2012 of 4 June, CLA-64 in
14 the Portuguese version at tab 125, CLA-64A for the
15 English version at tab 121, volume 5 of the Core
16 Bundle.

17 So, Ms Muenda, first I would like you to
18 confirm that article 17.3 of the statute basically
19 says that the direct award procedure is the same as
20 the procedure for a tender, although duly adapted.
21 That's 17.3.

22 And it refers us to article 9 of this
23 precise statute, correct?

24 **MS MUENDA:** Give me time to read it,
25 please.

1 Can you repeat the question, please?

10:38

2 **MS MARTINS:** Well, I think there's no need
3 for confirmation. Article 17.3 says that when the
4 procedure is that of *ajuste directo*, of a direct
5 award, the procedure to be followed is the procedure
6 set out in article 9, duly adapted to the fact that
7 it is a direct award and not a tender procedure,
8 correct?

9 **MS MUENDA:** Yes, as long as article 17 is
10 complied with, because this is one way, it's an
11 exceptional way, of reaching a contract. We have
12 three levels to reach contract -- the general,
13 special, and the exceptional, and this *ajuste*
14 *directo* is exceptional. So it follows the common,
15 general law.

16 **MS MARTINS:** Ms Muenda, please listen to
17 my questions, and answer my questions. We know
18 that. Everybody knows that by now. There are
19 different procedures; everybody knows that the
20 tender is the default rule, that the direct award is
21 the exception, and that certain requirements have to
22 be met.

23 I'm talking about procedure. Let's look
24 at article 9, and let's look at what the stages of
25 the procedure are for a tender, and let's adapt them

1 to direct award. Can you please turn the page to
2 article 9? If you could blow that up, Ricardo, so
3 that everyone can see it?

4 Obviously if we look at these stages, they
5 are all there. It's a process, it's a procedure.
6 As Professor Medeiros explained yesterday, there are
7 several phases, and these are typically the phases
8 for the tender, but we just saw that article 17
9 says, well, the stages are the same, but we have to
10 adapt them.

11 Now, obviously if we look at section (d),
12 that refers to the launch of the tender, so that
13 naturally does not apply. And obviously if we look
14 at (e), which says analysis and evaluation of the
15 proposals of the bidders, we don't have bidders.
16 There's only one entity, so we have to adapt that as
17 well.

18 And now I want to -- with this article in
19 mind -- and I'd ask you please to keep that page
20 open, let's look at the facts.

21 Now, you would agree that it was PEL that
22 approached the government, I think this is
23 undisputed, and that this was an unsolicited
24 proposal, so for the purposes of article 9.1(a) and
25 10, which defines what "conception" means, this

1 stage of conception was fulfilled when PEL conceived
2 this idea and presented the project to the
3 government, correct?

4 **MS MUENDA:** I would say complied, because
5 we weren't in the stage of ajuste. If we were
6 looking to the PFS as part of the negotiation of the
7 contract, yes, but the PFS for sure did not comply
8 with this paragraph (a) of conception. It was still
9 prefeasibility study. It wasn't done yet.

10 **MS MARTINS:** We're not at the
11 prefeasibility study. Can you turn to article 10
12 and see the definition of "conception", please?

13 So basically it's just developing the idea
14 and preparing sketches of the pre project. This is
15 it. Nothing more.

16 **MS MUENDA:** That is correct.

17 **MS MARTINS:** OK. Now, the MOI, as we saw
18 in clause 1, says that its object -- so the
19 development of the PFS -- was precisely to define
20 the basic terms and conditions of the project, of
21 the concession to be granted, was it not?

22 **MS MUENDA:** To be granted.

23 **MS MARTINS:** We'll get there, Ms Muenda.
24 We'll get there. The celebration of the contract is
25 far away. Let's look at article 9 again, please.

1 We're going stage by stage. This has to be very
2 clear for everyone in the room. There are stages.
3 This is procedure. Stage 1, stage 2, stage 3. And
4 we're looking at the facts and we're looking at what
5 happened here. Article 9. Please, Ricardo, can you
6 put it on the screen?

7 So we've seen that there's a conception.
8 We've seen the MOI itself, as agreed between the
9 government and PEL and the PFS that was prepared
10 under that agreement, was precisely to define the
11 basic principles of the concession that was to be
12 granted further down the line, so we've got stage B.
13 And now -- and this is undisputed, you yourself have
14 stated in your opinions that the PFS was
15 presented -- there are documents in the record that
16 show that the government, the MTC, asked several
17 follow-up questions, there were meetings held with
18 the MTC, with the CFM, and ultimately on
19 15 June 2012 the MTC approved the prefeasibility
20 study.

21 So basically, we're at stage 3 now.
22 Studies were prepared. And we saw that (d) and (e)
23 do not -- well, (d) does not apply. (e) applies in
24 the sense that it's the evaluation of the only
25 proposal. So that letter, 15th June, we have this

1 approval of the PFS in which they analysed the
2 proposal and basically informed that they agreed
3 with the proposal.

4 Now, at this moment in time, Ms Muenda,
5 we're talking about 15 June 2012, and the timeline
6 is relevant here. No tender had yet been launched.
7 That only happened in March 2013, correct?

8 **MS MUENDA:** No, it hadn't been launched.
9 My problem is that we are going on to a stage where
10 we understand --

11 **MS MARTINS:** No, I'm not talking about a
12 concession contract. I've told you before we'll get
13 there, but I'm not there yet. We're following the
14 stages.

15 Are you aware that it was only
16 in January 2013, so several months after this letter
17 dated June 2012, that Minister Zucula himself told
18 PEL, by letter that is in the record, he said, well,
19 we were going with the direct award until now, but
20 now we have decided to go with the tender? Are you
21 aware of this letter? It's a letter
22 dated January 2013.

23 **MS BEVILACQUA:** I need to object at this
24 point, Mr President. She's misstating the record,
25 and she's testifying.

1 **PRESIDENT:** Yes, yes. I'm slightly
2 worried because Dr Muenda is not a witness. She is
3 an expert on Mozambican law. She can help us if you
4 have any doubts regarding the interpretation of
5 article 9, but what is the application of article 9
6 to the facts, that is something which is the
7 prerogative of the Tribunal on the basis of the
8 allegations of the parties.

9 **MS MARTINS:** Thank you, Mr Chairman.
10 I agree with you, and that is clear, but given that
11 Ms Muenda did refer to some of these documents in
12 her legal opinion, that was my point.

13 **PRESIDENT:** But any reference, that goes
14 again to this obiter. These are obiters in the
15 legal opinions to which no further importance should
16 be attached.

17 **MS MARTINS:** Ms Muenda, looking at article
18 9, and this was a question that I wanted to ask that
19 relates precisely to the implementation because at
20 paragraph 59 of your second legal opinion,
21 Ms Muenda, page 13, you say that the award,
22 adjudicação --

23 **PRESIDENT:** Wait until we have it.

24 **MS MARTINS:** Paragraph 59.

25 So here you say that the award occurs

1 after the negotiation, but let's go back to article
2 9, please. Is it not true that we have the award at
3 (f), and only then the negotiation?

4 **MS MUENDA:** Yes.

5 **MS MARTINS:** So it's the other way around,
6 isn't it?

7 **MS MUENDA:** Yes, from the point of view of
8 this procedure of public -- of reaching --
9 negotiating a contract.

10 **MS MARTINS:** Yes. Now let's look to
11 another letter that you mention in your legal
12 opinion, and that the Tribunal already knows very
13 well.

14 So there was, on 18th April, a
15 communication sent to Patel by Minister Zucula from
16 the MTC but signed by Minister Zucula that invited
17 PEL precisely to start negotiations. You mention
18 also this letter in your opinion.

19 So basically what we are moving on to, if
20 we look at article 9, would be the negotiation stage
21 of the procedure that is set forth in the law, would
22 you agree?

23 **MS MUENDA:** Can I see the letter once
24 again?

25 **MS MARTINS:** Yes, of course. It's C-29,

1 tab 29, volume 2.

2 **MS MUENDA:** What is your question?

3 **MS MARTINS:** Well, this letter is the
4 invitation to start negotiating the terms of the
5 concession agreement, correct? Which is the next
6 stage that we saw in article 9.

7 **MS MUENDA:** No, I don't understand it like
8 that. I believe this, in my interpretation -- my
9 interpretation is that with this letter, it's
10 already calling for the beginning of everything, so
11 it's not saying that there's a stage started
12 beforehand and we're going to follow up. This is
13 just one further step. That's how I understand or
14 interpret this letter.

15 **MS MARTINS:** We agree, it's one further
16 step. So we both agree, it's one further step.

17 **MS MUENDA:** Sorry, it's not one more step.
18 What I interpret here, it's a call to Patel to start
19 the process. I don't understand it as one more
20 step. I don't understand it as one more step to
21 follow on steps that had already been given. In the
22 different stages described in the procurement
23 regulation, I don't interpret this letter in that
24 way.

25 **MS MARTINS:** Ms Muenda, this letter says

1 in the subject, the identification of the subject,
2 "negotiation of the terms of the concession
3 agreement". It also refers to a decision taken by
4 the Council of Ministers on 16 April where the
5 Council of Ministers explained that due to the
6 national strategic interests and due to matters of
7 urgency, it had been decided to proceed with direct
8 negotiations, correct?

9 **MS MUENDA:** Yes, that's what's written in
10 this letter.

11 **MS MARTINS:** Thank you. Now let's go back
12 to article 9, please, so the stages that would
13 follow. Article 9, please, Ricardo.

14 The stages that would follow would be --
15 after negotiation of the terms of the concession
16 agreement would be the approval of the enterprise
17 and the respective project, investment project, then
18 finally the celebration of the contract. This is
19 what the law says.

20 Now, Ms Muenda, yesterday you said that,
21 under Mozambican law, the contractual terms and
22 concession agreements are approved by the Council of
23 Ministers and published in the Decree. This is at
24 the transcript at paragraph 1678.

25 I fully agree with you that when the

1 concession contract is approved, a Decree is
2 published. There's no dispute here. There's
3 absolutely no argument. But if we -- going back to
4 article 9 of the PPP regulations, it's only after
5 the negotiation stage that the enterprise and
6 respective investment project are approved and that
7 the contract is actually signed.

8 Is that not so?

9 **MS MUENDA:** Yes, that is true.

10 **MS MARTINS:** So it's only at this moment,
11 when the concession contract has been negotiated and
12 agreed upon the parties, that the Council of
13 Ministers then approves the draft, the minuta, of
14 the concession contract, and issues a Decree that is
15 published in the Official Gazette, correct?

16 **MS MUENDA:** Yes. Don't forget that this
17 letter on the date is issued, is written when
18 there's a public tender which is under way. We
19 can't lose sight of that. And if PEL -- I'm trying
20 to find the legal mechanism, but if PEL accepted to
21 participate in the public tender, we can't go back
22 again to what we're going back to because, if it
23 accepts, it means what had existed in the past can't
24 be considered.

25 So we have to consider the new stage in

1 which we are.

2 **MS MARTINS:** Ms Muenda, there has been an
3 invitation to direct negotiations and PEL, yes,
4 accepted under protest to participate in the tender,
5 so we need to get the facts straight. As the
6 Tribunal said, the facts are with the Tribunal, and
7 so please do not assume facts that are disputed in
8 these proceedings.

9 Can we have a look at Exhibit CLA-278,
10 please? This is not in the Core Bundle, it's in the
11 record, and I only refer to it because of your
12 statements made yesterday of the Decree.

13 There has been a whole issue with this
14 Decree that did not exist since the first day and
15 opening statements from Mozambique.

16 Now, can we look at this CLA-278? It's a
17 document that is in the record and, as you can see
18 at article 1, this is precisely a resolution taken
19 by the Council of Ministers under article 13(3) of
20 the PPP Law precisely to set up a JV between a
21 private partner, in this case ESSAR, CFM and other
22 national entrepreneurs that may show interest, and
23 then at article 2, the Minister of Transport is
24 authorised to set up a technical team to negotiate
25 the terms of the concession to be set up between the

1 government and this joint venture.

2 And then, moving down, at article 3 the
3 composition of this technical team with various
4 ministers, or ministries, is defined, and it's also
5 determined that this team shall present the proposal
6 for the concession contract and the respective
7 Decree. And finally to article 5 it says that these
8 two proposals, so both the contract and the Decree
9 approving the contract, are to be presented within
10 120 days.

11 Now, so this confirms the procedure that
12 we've just seen in the law. First there is
13 negotiation, there's an invitation to negotiation, a
14 technical team comprised of several ministries is
15 set up, and then finally, further down the line,
16 once the concession contract is agreed to between
17 the parties, then there is a Decree approving the
18 concession agreement, correct?

19 **MS MUENDA:** Yes, correct. These are the
20 stages, those described here, setting up the
21 technical team and the initial negotiation of the
22 conditions and terms. It's what's written in the
23 text.

24 **MS MARTINS:** Are you aware, Ms Muenda,
25 that -- I'm sorry, I began before the --

1 **PRESIDENT:** Ms Martins, at some stage when
2 it is appropriate, you have to break.

10:59

3 **MS MARTINS:** Yes, I'm nearly finished.

4 So are you aware, Ms Muenda, that in
5 this -- and if you are not, you are not, I just
6 wanted to ask you if you are aware that after this
7 letter of 18 April, there was indeed a communication
8 towards meetings with the technical interministerial
9 team that were to take place for the negotiation of
10 the terms of the concession? If you're not aware,
11 you're not aware. I'm not going to bother you with
12 the documents. I was just wondering if you were
13 aware.

14 **MS MUENDA:** No, I'm not.

15 **MS MARTINS:** But you are aware that this
16 negotiation stage was cut short because then on
17 13th May the MTC informed Patel that on
18 30th April -- so two weeks after the initial
19 decision -- there had been a new decision to reverse
20 this negotiation process, correct?

21 **MS MUENDA:** Can you please repeat? I'm
22 not sure I understood your question.

23 **MS MARTINS:** So the negotiation was set to
24 begin, an interministerial team was set up, there
25 are letters in the record showing this, but then

1 there's a new decision from the Council of Ministers
2 in the 12th Ordinary Session that was informed to
3 PEL on the 13th May and refers to a decision of the
4 Council of Ministers that was taken on 30th April.

5 You are aware of this letter, I assume?
6 You mention it in your legal opinions.

7 **MS MUENDA:** Yes, indeed.

8 **MS MARTINS:** So basically the negotiation
9 stage was interrupted. Let's put it that way.

10 **MS MUENDA:** Because I understand that
11 there was still the tender procedure under way, and
12 this was a window that the government had decided to
13 look through into the possibility of concluding an
14 ajuste directo, and at a given point in time it
15 decided that the conditions were not met for that
16 avenue to continue to be pursued, possibly because
17 they did not come to an agreement to cancel the
18 tender procedure because the government could have
19 cancelled the tender procedure if there were weighty
20 reasons to do so. That's my understanding.

21 **MS MARTINS:** We'll leave the
22 interpretation of the facts to the Tribunal, as the
23 chairman pointed out.

24 I'm turning to the final topic now. Two
25 minutes. No?

1 **PRESIDENT:** No, if you are turning --
2 let's get a time check.

3 **MS MARTINS:** It's the final topic.

4 **MS JALLES:** Claimant has used one hour and
5 one minute today.

6 **PRESIDENT:** We'll break. We have to
7 break.

8 We will break. We'll come back at 11.20.

9 Dr Muenda, you know the rules. Very good.

10 (Short break from 11.03 am to 11.21 am)

11 **PRESIDENT:** Very good. We resume the
12 hearing. Dr Muenda, we are almost there, so bear
13 with us a little bit more, and we will be through.

14 Ms Martins.

15 **MS MARTINS:** Thank you very much,
16 Mr Chairman. As I said, it's the last topic.
17 I promise. I only have 18 minutes left, and I will
18 hopefully do that without needing the 18 minutes.

19 **PRESIDENT:** Please.

20 **MS MARTINS:** So, Ms Muenda, we've gone
21 through this before and we've discussed the public
22 procurement rules and the scope of application.
23 Now, this was your first argument as to the content
24 of the MOI, but then in your second legal opinion,
25 and yesterday in your presentation, you said that

1 article 45 of the public procurement rules would
2 apply because of article 410 of the Civil Code,
3 which we will see on the screen very shortly.

4 But basically, as you stated, this article
5 applies to promissory agreements, so promissory
6 agreements are regulated in the Civil Code, as we
7 know, from articles 410 to 413, and then afterwards
8 we have the pact of preference, which is a different
9 contract that begins at article 414.

10 Now, Ms Muenda, we've already established
11 earlier today that the MOI was, or at least
12 included, a pact of preference. It's not a
13 promissory agreement, is it?

14 **MS MUENDA:** Indeed, that is my
15 understanding. The preference pact is not a
16 promissory agreement, and that's the reason why the
17 law distinguishes between both. They're not equal.

18 **MS MARTINS:** Exactly. So we both agree.
19 And in this particular case the MOI did include
20 conditions, so it was a pact of preference and not a
21 promissory agreement. I think we all agree.
22 Professor Medeiros also agreed. We all say the same
23 thing.

24 Now, if it's not a promissory agreement,
25 can you direct me to any provision in the Civil Code

1 that says that article 410, number 1, which applies
2 to promissory agreements, would also apply to pacts
3 of preference?

4 **PRESIDENT:** Can you give us the reference
5 to the Civil Code? It's RLA?

6 **MS MARTINS:** I'm sorry. RLA-132. That's
7 tab 134, volume 5 of the Core Bundle.

8 **PRESIDENT:** OK. Let us go to that.

9 **MS MUENDA:** You may have misunderstood my
10 description. What I said was not that the
11 preference pact was a promissory agreement. In no
12 way, shape or form.

13 What I said is that if we understand that
14 MOU was a contract that promised to execute a
15 concession agreement, if that is our understanding
16 then it could only be seen as a promissory
17 agreement. At no time did I say that a preference
18 pact was a promissory agreement. The reason why
19 I referred to 410 is that because, at a certain
20 point in time in Professor Medeiros' statements, we
21 were left to understand that by virtue of the MOU a
22 concession agreement had been promised to be
23 executed.

24 **MS MARTINS:** Well, I'm happy that you say
25 that because, as Professor Medeiros explained here

1 yesterday, he clarified that misconception. He does
2 not consider this to be a promissory agreement; he
3 considers it to be a pact of preference. He was
4 very clear on his explanations yesterday.

5 So then that leads me to the conclusion
6 that we all agree that article 410 of the Civil Code
7 has absolutely no bearing on the situation
8 whatsoever, correct?

9 **MS MUENDA:** Because we are saying that,
10 under the MOU, a concession agreement had been
11 promised.

12 **MS MARTINS:** Ms Muenda, can you answer my
13 question? I agree, you agree, Professor Medeiros
14 agrees, that the MOI is not a promissory agreement
15 for the purposes of articles 410 to 413 of the
16 Civil Code. So we all agree. The three of us
17 agree. Hopefully the Tribunal will agree, too.

18 So if both legal experts agree, then
19 article 410 does not apply, correct? That's a
20 simple question.

21 **MS MUENDA:** Yes, it does not apply. The
22 only right that can be extracted from MOU is a right
23 to a preferência, to preference.

24 **MS MARTINS:** Thank you, Ms Muenda. I have
25 no further questions at this moment.

1 Thank you.

2 **MS MUENDA:** Thank you very much.

3 **PRESIDENT:** Are there any further
4 questions for Dr Muenda?

5 **MS BEVILACQUA:** Yes, I do have a few,
6 Mr President. Thank you.

7 **PRESIDENT:** Of course.

8 Re-examination by Respondent

9 **MS BEVILACQUA:** Good morning, Dr Muenda.
10 I would like to start --

11 **MS MUENDA:** A very good morning to you.

12 **MS BEVILACQUA:** I would like to start by
13 taking a look at the procedures that Ms Martins
14 walked you through in the PPP regulations which can
15 be found in CLA-64 in the English and CLA-46A in the
16 Portuguese. We will display the Portuguese for you
17 on the screen, and we will be looking at article 9.
18 May I have the screen, please?

19 Ms Martins asked you questions about some
20 of these phases. I have a few follow-ups. If you
21 would look at letter (c) it talks about different
22 studies.

23 What is the last type of study referenced
24 in section (c)?

25 **MS MUENDA:** The last one is the economical

1 financial study. Section (c) refers to technical
2 feasibility study, environmental feasibility study,
3 and economical financial feasibility study.

4 **MS BEVILACQUA:** Do you know whether
5 in April of 2013 there had been any environmental
6 study or economic feasibility study completed by
7 PEL?

8 **MS MUENDA:** I have no information other
9 than that a prefeasibility study was undertaken.
10 That's the only information I have to go on.

11 **MS BEVILACQUA:** You also see section (f)
12 references adjudication?

13 **MS MUENDA:** Yes, I can see it.

14 **MS BEVILACQUA:** Have you seen anywhere in
15 the record that the Council of Ministers issued any
16 adjudication in April of 2013?

17 **MS MUENDA:** No, I have not.

18 **MS BEVILACQUA:** I would like now to visit
19 with you some of the questions the President and
20 Professor Tawil had posed to you about the common
21 law as it existed -- excuse me, the civil law as it
22 existed at the time the MOI was executed versus the
23 changes that happened with the PPP Law once it
24 became effective.

25 So do you recall the President asking you

1 questions about the *direito potestativo*?

2 **PROFESSOR TAWIL:** Potestativo.

3 **MS BEVILACQUA:** Thank you.

4 So, Ms Muenda, would you explain in what
5 context does that right exist in the civil law
6 before the PPP Law becomes effective?

7 **MS MUENDA:** Thank you very much. It
8 exists. I'm referring to this right under the aegis
9 of the *direito de preferência*, the prerogative given
10 to the beneficiary of the *direito de preferência*
11 under which it may, if it so wishes, meet the
12 requirements set out by the author of the
13 *direito de preferência*.

14 **MS BEVILACQUA:** And if you would, please,
15 look at page 6 of your first report under paragraph
16 (e).

17 **MS MUENDA:** Yes.

18 **MS BEVILACQUA:** And you recall being
19 directed to this paragraph by the President, yes?

20 **MS MUENDA:** Yes, I do remember.

21 **MS BEVILACQUA:** Thank you.

22 And the sentence that starts seven lines
23 from the bottom of the page, it -- do you have it?
24 It references the *direito potestativo*.

25 **MS MUENDA:** Potestativo.

1 **MS BEVILACQUA:** Thank you. Does that
2 arise in any context -- does that right arise in any
3 context other than a public tender?

4 **MS MUENDA:** This right that I refer to
5 here was in the context of the performance of a
6 *direito de preferência*.

7 **MS BEVILACQUA:** Yes. And as I understood
8 your explanation of that right, it was if the bidder
9 had not won, it could match or accept the winning
10 bidder's offer, is that correct?

11 **MS MUENDA:** Can you please repeat your
12 question? I'm not sure I understood it.

13 **MS BEVILACQUA:** That -- OK. Just describe
14 for me in what the *direito* -- please say it for me.
15 My Portuguese is terrible.

16 **PRESIDENT:** Call it "direito P", and
17 that's fine.

18 **MS BEVILACQUA:** The "direito P" referenced
19 here, what is that?

20 **MS MUENDA:** It is the right -- it's a
21 prerogative that somebody benefits from to accept,
22 or not, the conditions laid down, in a nutshell.

23 **MS BEVILACQUA:** And in what conditions do
24 those arise? When do those conditions arise?

25 **MS MUENDA:** If we are referring to

1 *direito de preferência*, when the *preferência*
2 declaration is issued. I'm invoking the framework
3 of the *direito de preferência*.

4 **MS BEVILACQUA:** And once the PPP Law is
5 passed, the *direito de preferência* arises in the
6 context of a public tender, correct?

7 **MS MUENDA:** Correct.

8 **MS BEVILACQUA:** And do you recall that the
9 parties contemplated the PPP Law would come into
10 existence and be effective when they negotiated the
11 MOI?

12 **MS MUENDA:** In light of the circumstances
13 then prevailing regarding the proposal, I think so.
14 The proposal -- I mean, the draft law had been
15 widely discussed and made public, so yes.

16 **MS BEVILACQUA:** And do you recall reading
17 Mr Daga's direct testimony, his witness statement,
18 at paragraph 36 of his first witness statement?

19 **MS MUENDA:** Not really, no. Not verbatim.

20 **MS BEVILACQUA:** This is paragraph 36 of
21 Mr Daga's first witness statement.

22 "Sal & Caldeira are well renowned lawyers
23 in Mozambique and they had recently assisted in
24 drafting the Public-Private Partnerships Law (the
25 'PPP Law') which was not yet in effect when we

1 negotiated and signed the MOI, but was expected to
2 be approved at some time in the near future. Sal &
3 Caldeira provided us with Mozambican legal advice,
4 and reviewed the MOI to ensure its compliance with
5 Mozambican law".

6 **MS MUENDA:** Yes, I do remember this.

7 **MS BEVILACQUA:** I have no further
8 questions.

9 **PRESIDENT:** Very good. Any recross?

10 **MS MARTINS:** Just two minor questions.

11 Further cross-examination by Claimant

12 **MS MARTINS:** Could we have a look at
13 article 9 again? I know we're all fed up with
14 article 9, but it is a relevant provision, article 9
15 of Decree 16/2012 for the record, sorry. CLA-64 and
16 64A in the English version.

17 So, Ms Muenda, can you read number 2 to
18 yourself, please? Tab 114, for the record.

19 **PRESIDENT:** Yes. We all have it. What is
20 the question, Ms Martins?

21 **MS MARTINS:** I just wanted Ms Muenda to
22 first read the article.

23 So you confirm that under this provision
24 the contracting entity is allowed, if it considers
25 it's satisfied with all the information that it

1 already has, to dispense with the stages of
2 conception, definition of basic orienting
3 principles, and preparation of technical,
4 environmental and economic financial studies,
5 correct?

6 **MS MUENDA:** Yes, if it decides in this
7 manner. It is a prerogative that is awarded to the
8 contracting party, to the procuring party.

9 **MS MARTINS:** If we could go back to C-29,
10 please, that's the April 18th letter, and we can
11 look at the second paragraph, please, can you see
12 the justification that the Council of Ministers
13 apparently made at the time includes, among other
14 reasons, national strategic interests, available
15 time, and the fact that the proponent carried out
16 all the feasibility and engineering studies,
17 correct? ... (No English Interpretation)...

18 **THE INTERPRETER:** Do you want me to repeat
19 what the witness said, or do you want me to ask the
20 witness to repeat?

21 **MS MUENDA:** I was saying that I cannot
22 vouch for the exact content of the letter, nor for
23 the grounds on which the Council of Ministers
24 decided as it did. I can only assess the facts
25 based on the information I've got, ie, that not all

1 feasibility studies had been made. Why this
2 decision was made is above my pay grade. I don't
3 know why.

4 **MS MARTINS:** Thank you so much, Ms Muenda,
5 it's above all your pay grade and unfortunately we
6 were not able to access the minutes of this meeting,
7 so we'll never know. Thank you very much. That's
8 all my questions.

9 **PRESIDENT:** Very good.

10 **MS MUENDA:** Thank you very much.

11 **PRESIDENT:** Dr Perezcano, you had some
12 questions for the expert?

13 Questions by the Arbitral Tribunal

14 **MR PEREZCANO:** Yes, thank you, Chair.

15 Dr Muenda, you were here yesterday.

16 I asked Professor Medeiros certain questions that
17 I would like to get your opinion on as well on those
18 questions.

19 Professor Medeiros explained to us
20 yesterday that "ajuste" on its own, the word
21 "ajuste" on its own is not used in procurement
22 procedures, that the expression that is used is
23 "ajuste directo", and that it is a term of art, if
24 you will.

25 Do you agree with that description that

1 Professor Medeiros gave us?

2 **MS MUENDA:** Not necessarily, because
3 "ajuste" at least --

4 **MR PEREZCANO:** Let me -- I apologise for
5 interrupting.

6 I'm talking about "ajuste" or "ajuste
7 directo" in the context of the procurement law or
8 laws, whether it was the prior procurement law or
9 the PPP Law, so not in other contexts of law but
10 specifically the context of public procurement.

11 **MS MUENDA:** Thank you very much.

12 What we have in public procurement is
13 "ajuste directo", direct award, which is seen as
14 direct contracting without going through a public
15 tender. Negotiation and direct contracting,
16 another -- a certain entity. That is the
17 understanding.

18 **MR PEREZCANO:** And Professor Medeiros
19 further explained that the "ajuste directo" is a
20 procedure, a procurement procedure, as opposed to
21 the concurso which is a different procurement
22 procedure, both of which are regulated under the
23 procurement law, and that either one will lead to
24 the adjudicação, which would be, therefore, a
25 subsequent stage to one procedure or the other.

1 Do you agree with that?

2 **MS MUENDA:** Yes, the "ajuste directo"
3 covers several stages, and after negotiation, or,
4 rather, you have adjudication which comes after
5 several prior stages, and ultimately comes the
6 execution of the contract.

7 **MR PEREZCANO:** Now, I also asked Professor
8 Medeiros a question about the legal requirements for
9 each procedure to take place. He referred to
10 article 9 of the regulations to the PPP Law that you
11 have referred to extensively today, so I think that
12 question that I had yesterday has been clarified.

13 But I do have some confusion, and I would
14 like to take you back to article 9 again because
15 I have some confusion arising from the questions
16 this morning. So if we could put up article 9 of
17 CLA-64, and, if you will, the Portuguese version for
18 Ms Muenda's benefit.

19 So I have some confusion because
20 Dr Martins, when she was going through the different
21 stages, referred to subparagraph (a) -- so paragraph
22 1, subparagraph A, the Concepção, and then she took
23 you to article 10 which defines "Concepção" which
24 refers to "esboços do anteprojecto", and
25 I understood that to be the prefeasibility study,

1 which is the only study that has been done -- well,
2 there is a Preliminary Study. I'm not sure if you
3 are aware that there is a Preliminary Study and a
4 prefeasibility study, and if you are aware of those
5 I would like to ask you whether either/or both of
6 them fall into or would fall into article 10 in
7 terms of the Concepção project?

8 **MS MUENDA:** I don't think so, because here
9 the stage spelled out in the MOU for a
10 prefeasibility study was a stage prior to the
11 ensuing stage wherein the *direito de preferência*
12 would be exercised, and there would have started the
13 preparations, the stage of so-called conception as
14 listed under article 9. That's my understanding.

15 **MR PEREZCANO:** If we go to subparagraph
16 (b) it talks about the Definição dos princípios
17 básicos orientadores, and the MOI contains some
18 language which is somewhat similar to this. The
19 MOI, as you know, led to the prefeasibility study,
20 and I understand that the prefeasibility study under
21 the MOI would fall under (b), but I think there was
22 some confusion between (b) and (c). The basic
23 principles, the basic guiding principles as outlined
24 or developed in the prefeasibility study, are they
25 different from the technical feasibility study? And

1 then, of course, there is the environmental and
2 economic and financial study, so at least I was
3 confused between the interplay between (b) and (c)
4 in terms of the prefeasibility study that is before
5 us in this proceeding and other studies that would
6 have to be developed, and I would like to hear your
7 opinion on that, if you can clarify the confusion
8 for me.

9 **MS MUENDA:** Thank you very much.

10 If I understood correctly your question,
11 it focuses on the relationship between these guiding
12 principles and those referenced in the MOI. If
13 I understood you properly, basic principles
14 mentioned in the MOI are to guide the relationship
15 under the MOI, and it's a different kettle of fish
16 altogether vis-á-vis these guiding principles which
17 apply to the development of the undertaking under
18 article 9.

19 If I may continue?

20 Focusing on section (c), the technical
21 feasibility study, the environmental study, and the
22 economic study do not come under the prefeasibility
23 study.

24 **MR PEREZCANO:** Thank you. Now going back
25 to the questions that I asked Professor Medeiros,

1 I asked him as well how is each decision -- and I'm
2 referring to the decision to pursue an ajuste
3 directo proceeding and the decision on the
4 adjudicação -- how are each of these decisions
5 communicated to the interested party or parties if
6 we are in a concurso and to the public at large?
7 So, in other words, what are the notification
8 requirements to the parties and the transparency
9 requirements to the public at large as regards these
10 two what I'll call acts, the decision to pursue an
11 ajuste directo and the decision concerning the
12 adjudicação?

13 **MS MUENDA:** The ajuste directo is a
14 decision to be taken by the competent authority, in
15 this case by the Council of Ministers, and decisions
16 taken by the Council of Ministers are issued through
17 either a decree or a resolution, and both of them
18 are published.

19 But should there be an adjudication, an
20 award, the adjudicação in Mozambique is published in
21 a widely read newspaper, other than being the object
22 of a notification to all parties, plural, if it is a
23 tender procedure and, like I said, in a newspaper as
24 well.

25 **MR PEREZCANO:** Let me see if I get this

1 straight, because I've looked at the PPP Law, and it
2 requires that the principal or the main terms of the
3 contract after the contract has been negotiated and
4 agreed to, I believe the law requires that the main
5 terms of the concession be published in the
6 Official Gazette, and I think that's clear in the
7 law.

8 But my question is with respect to the
9 adjudicação, which is the stage prior to that, even
10 prior to the negotiation of the contract, so I'm
11 referring specifically to the adjudicação and if
12 there are such transparency requirements, maybe
13 they're not. That's my question.

14 **MS MUENDA:** Yes, such requirements are
15 there, at least in our reality, because, firstly,
16 the opening of the bids when the tender is launched
17 is open to all bidders at a public session and,
18 other than that, the results are notified not just
19 to the parties but also are published in a
20 newspaper.

21 **MR PEREZCANO:** Is there a legal provision
22 that establishes that obligation to publish the
23 results? And, if so, where would we find it? In
24 what law or regulations would we find it?

25 **MS MUENDA:** I'm afraid I can't quote

1 whether there is a legal duty to do so other than
2 the general principles of transparency and legality.

3 **MR PEREZCANO:** I wanted to go back to the
4 President's question or questions. Now, you
5 explained that the *direito de preferência* in the MOI
6 was to be interpreted under the general rules, and
7 those are the rules of the Civil Code, the
8 provisions of the Civil Code, because at the time
9 that the MOI was entered into, the preference, the
10 *direito e margem de preferência* of 15 per cent was
11 not in existence yet.

12 Did I understand you correctly in that
13 regard?

14 **MS MUENDA:** Yes.

15 **MR PEREZCANO:** Now, if I understood you
16 correctly -- or actually, tell me if my
17 understanding is correct. I understood you to say
18 that, once the PPP Law went into force, that
19 *direito de preferência* in the MOI was transformed
20 from the one contemplated in the Civil Code to the
21 one now regulated specifically in the PPP law. Did
22 I understand you correctly in that regard?

23 **MS MUENDA:** Yes, that is what I said.

24 **MR PEREZCANO:** So, if that is the case,
25 I would generally think that if a contract is signed

1 under a particular law, if there is one applicable
2 law that governs the contract, that law would
3 continue to govern the contract even if a new law is
4 enacted. What I don't understand is how legally one
5 right under one law gets automatically transformed
6 into a different right provided in a different law.

7 That, I don't understand. Can you explain
8 that for me?

9 **MS MUENDA:** Yes. Firstly, as I was
10 saying, there is a historical context to consider in
11 the execution of this MOI, and then, when the new
12 law is enacted, it coincides with the
13 materialisation of this future right obtained via
14 the MOI which allows them to exercise the
15 *direito de preferência*.

16 That right is materialised when another
17 law is in force, a special law, defining the way in
18 which the *direito de preferência* is treated in the
19 light of public procurement, and there were no
20 doubts when the parties -- they knew which law was
21 to be applied.

22 **MR PEREZCANO:** But, I mean, if the parties
23 have an agreement as to what will apply, that
24 I understand. The parties are free to agree pretty
25 much to whatever they want to. What I don't

1 understand is how automatically a right that is
2 governed under one law and where the parties enter
3 into an agreement under one law, then sometime in
4 the future their rights get automatically
5 transformed into a different right to the one that
6 they agreed.

7 **MS MUENDA:** The right is materialised at
8 the time in which the new law is in force. The
9 materialisation of the right occurs when the new law
10 is in force.

11 **MR PEREZCANO:** Thank you, I have no
12 further questions.

13 **PRESIDENT:** No further questions?

14 Dr Muenda, I have a last line of
15 questions, and then we are finalised.

16 Do you know if there is any regulation
17 under Mozambican law regarding the functioning of
18 the Council of Ministers?

19 **MS MUENDA:** Yes, there is.

20 **PRESIDENT:** Can you tell us what -- where
21 we could find it? Is it a law, is it a decree?

22 **MS MUENDA:** I can't tell you exactly what
23 type of legal instrument it is, but there are rules
24 governing the functioning of the Council of
25 Ministers.

1 **PRESIDENT:** And my recollection, I do not
2 think you mention it in your expert report, but do
3 you know what this legal instrument says with regard
4 to minutes, resolutions, adoption of agreement of
5 decisions and so on?

6 **MS MUENDA:** What I remember is that there
7 are minutes -- I think there are minutes that have
8 to be drawn up, and then with regard to the
9 decisions taken that are not just administrative
10 matters, those have to be put into a resolution or a
11 decree. They have to be transcribed into a decree
12 or resolution. That's what I remember. Thank you.

13 **PRESIDENT:** So with that --

14 **PROFESSOR TAWIL:** Sorry, can I --

15 **PRESIDENT:** Of course. You were rejoicing
16 too early. Professor Tawil has one last question.

17 **MS MUENDA:** That's true.

18 **PROFESSOR TAWIL:** Professor, I was just
19 reading the transcript. If I understand correctly,
20 you say that the PPP Law applies because the right
21 is materialised at the time that the PPP Law was
22 already functioning.

23 Are there any rules in the Mozambican law
24 concerning rights in the sense of vested rights, no
25 vested right? What happens with someone that

1 acquired a right and, as you say, it's exercised
2 afterwards and there's a new law? Is it always
3 applicable? What's the issue with retroactivity of
4 the law? Vested rights? How does that work under
5 Mozambican law, please? And I would appreciate your
6 references to the statute. I don't know if that's
7 civil law or what. Thanks.

8 **MS MUENDA:** I'm looking, for example, at
9 article 12. That's the general principle of the
10 application of the law in time in the Civil Code --

11 **MS MARTINS:** I'm sorry to interrupt.
12 I just realised that that provision -- so Respondent
13 submitted the Civil Code but for some reason it goes
14 from article 10 to 220, so this specific provision
15 is not on the record.

16 **PROFESSOR TAWIL:** Well, it's included in
17 the record through the questions of the Tribunal
18 then.

19 **MS MARTINS:** I mean physically or
20 digitally it's not on the record, but obviously the
21 parties can submit it to you at a later stage if you
22 agree.

23 **PROFESSOR TAWIL:** I would like to
24 understand the function. What does article 12 of
25 the Civil Code say and how does that work with

1 temporal application of law, with vested rights,
2 retroactivity? I would like to understand how does
3 that work in order to see if it differs with what we
4 normally know.

5 If that is not your field, Professor, of
6 course you can say I don't know. That will be fine
7 for us.

8 **MS MUENDA:** I'm just trying to have a look
9 to try and find how the law frames this, but I would
10 say then, when the new law comes into force, prior
11 rights remain in place, or rather the effects that
12 had already been produced stand.

13 **PRESIDENT:** Following up on Professor
14 Tawil's question, could I take you to CLA-19,
15 article 136, which I think may have something
16 relevant.

17 CLA-19. That is the general law of public
18 administration, I think, and if you go to article
19 136(b) -- maybe this law has some relevance for
20 these principles for the question which Professor
21 Tawil was saying.

22 **PROFESSOR TAWIL:** I would think it would,
23 but probably there's even a general principle before
24 that. That's what we need to understand, and if we
25 are not able to understand it now, we will need to

1 understand it from the parties.

2 **PRESIDENT:** Yes. So I was just throwing
3 in this additional rule, but if you do not have
4 already an answer, I understand it is outside the
5 scope of your expert opinion, we'll at some stage
6 revert to the parties with that, if necessary.

7 **PROFESSOR TAWIL:** I have no further
8 questions, Mr President.

9 **PRESIDENT:** Very good.

10 **MS MUENDA:** No, none.

11 **PRESIDENT:** Now it really is the end.
12 Thank you very much. You have come all the way from
13 Mozambique to be with us here?

14 **MS MUENDA:** Yes, Mr President.

15 **PRESIDENT:** I wish you a safe trip back
16 home and all the good for the coming festivities.

17 **MS MUENDA:** Thank you very much for the
18 opportunity granted to me. This has also been a
19 huge learning curve for me. Thank you to you all.
20 I wish you all happy new year and a merry Christmas.
21 Thank you very much for this opportunity.

22 **PRESIDENT:** Thank you very much.

23 And with this, we now close the hearing,
24 and we come back at 2 pm.

25 **MS BEVILACQUA:** I'm hearing Ms Vasani say

1 maybe 2.30, which we would not object to. It's a
2 question for you, Mr President.

3 **PRESIDENT:** We are in your hands.

4 **MS VASANI:** Thank you, Mr President. I
5 think we would appreciate until 2.30, given that
6 we've run quite late.

7 **PRESIDENT:** Very good. Thank you. 2.30.

8 (Short break from 12.13 pm to 2.30 pm)

9 **PRESIDENT:** We resume the hearing. We go
10 in order to give the floor to Claimant for its final
11 presentation, and we have received a document which
12 is a power slide, and it's number H-17.

13 **MR VASANI:** Thank you, Mr President.

14 **PRESIDENT:** Mr Vasani.

15 Claimant's Closing Statement
16 by Mr Vasani

17 **MR VASANI:** Thank you, sir. Good
18 afternoon, Mr President, members of the Tribunal.

19 It has been an intensive eight days, but
20 through intensity comes clarity, and it's on that
21 clarity in relation to Claimant's case that we want
22 to spend the next hour.

23 You asked us in your Procedural Order to
24 summarise the key takeaways from the evidence, and
25 that's what we intend to do without prejudice to a

1 potential post-hearing brief which deep-dives into
2 the evidence in more depth.

3 I will address liability, Mr Ho will
4 address quantum, and then we will give the floor for
5 the final few minutes to our lead counsel to close
6 our presentation.

7 The first issue on which I want to leave
8 you with a key takeaway is that PEL brought this
9 concept to Mozambique. Now, we heard from the fact
10 witnesses that there may have been, 40 or 50 years
11 ago, a coconut port in Macuse, there may have been
12 some idea of doing something good on the Zambezia
13 coast, and then maybe with some road infrastructure
14 they could make Macuse, among other ports, feasible,
15 but I think it's abundantly clear that there was no
16 intention, at least none shown by Mozambique on the
17 record, that Macuse was going to be a deep water
18 port of any type, that there was going to be a rail
19 corridor running from Tete to that deep water port,
20 and at best, right before PEL started talking to the
21 government in 2010, there was only that 2009
22 strategy report, which you saw doesn't talk about
23 either a rail corridor or a deep water port.

24 PEL, we know, paid for the Preliminary
25 Study, so it, along with the government, were able

1 to show that Macuse could become a deep water port,
2 and it's on that basis and on that basis alone that
3 the parties entered into the MOI. Now, we've heard
4 a lot this week about the MOI versions, and I'm
5 going to start with PEL's original.

6 There you have evidence of a chain of
7 custody from the time of the signing to Mr Daga
8 asking for it to be scanned into PEL's systems. You
9 felt for yourselves the embossed seals. You have
10 heard from Mr LaPorte, and he's the only expert that
11 has looked at the originals, tell you that in his
12 opinion scientifically they are almost virtually
13 certain -- I think he used the words "highly
14 probable" but means virtually certain to be
15 authentic. Despite the fact that these were offered
16 to Respondent's experts, they chose for whatever
17 reason not to look at them.

18 All the others you saw largely rely on the
19 fact that our English version doesn't match the
20 Portuguese version. That's really what they all
21 largely fall back on. You heard Mr Zucula himself
22 hold that original and confirm that that wet ink
23 signature was indeed his own.

24 So our position is that that document is
25 one on which this Tribunal can fully and comfortably

1 rely as part of its decision making process.

2 So then let's talk about Mozambique's
3 English version of the MOI. And you heard Mr Zucula
4 say that if there was an original, that would have
5 been in their archive, but Mozambique can't seem to
6 find this original. Mr Chaúque said, in response to
7 Dr Tawil, that he had launched an investigation a
8 couple of years ago, I think he said. Apparently it
9 is still ongoing, and the best explanation certainly
10 that I heard was that, because of some sort of
11 refurbishment, maybe that's why they couldn't find
12 the original.

13 You also heard him say, and this was
14 something that we all learned for the first time,
15 that he went into the minister's office and he found
16 a copy, and then it was that copy that was scanned
17 into Mozambique's system during the pendency of this
18 arbitration, but, remarkably, that copy was never
19 provided either to Mr LaPorte or to any of
20 Respondent's experts, even though Mr Songer
21 confirmed that that would have been likely to be a
22 less degraded copy than the scans provided by
23 Mozambique to their experts.

24 You also heard Mr Songer confirm to you
25 that there is no way to confirm that Mozambique's

1 copy of the English MOI has the embossed seal.
2 There's no way to tell off that copy whether that
3 document was embossed. The seal doesn't show up on
4 the scans, even though, I should add, it showed up
5 on the scan that Mr LaPorte made of PEL's English
6 MOI.

7 So I'm not saying that, had there been a
8 stamping, it would have shown up, but the fact that
9 it's not there must, at least, raise questions.

10 Mr LaPorte told you about the spacing
11 issue, the font issue, and the fact that the
12 Portuguese MOI is of such poor quality that he can't
13 make the analysis as to whether that was used for
14 any sort of tampering.

15 You also heard Mr Daga say that he never
16 signed -- he never signed -- that MOI in English
17 that Mozambique says is an original version.

18 Now, in the face of that I did hear some
19 movement towards the question that this was -- the
20 explanation is that it was a mistake. The idea is
21 you ended up with two originals because there were
22 two documents signed, that maybe we signed PEL's
23 original and maybe there was an original that then
24 ended up as Mozambique's copy in R-2, for which we
25 have no original, and I thought about that over the

1 course of this week, and I have to say I find it
2 implausible, and here is why I find it implausible.

3 You'd have to believe that, for that to be
4 true, the MTC would have printed two different files
5 for signature. Rather than hitting "Print", either
6 "Print, Print" with "1" in the number or press "2"
7 and hit "Print", those are the two ways that I could
8 imagine it could happen, they hit "Print", opened
9 another document and hit "Print". I have to say
10 I find that implausible.

11 And considering the differences between
12 the two versions, the idea that Mr Chaúque didn't
13 notice that he's -- or his secretary didn't notice
14 that they were opening two different versions again
15 I find rather implausible.

16 I also find implausible the idea that, at
17 the signing ceremony, each signer didn't notice that
18 the English MOI had a different number of pages,
19 different font, different spacing, and all of them
20 were not cognisant of the fact that they were
21 signing different documents. I also find that
22 rather implausible.

23 It was pointed out to us that the
24 Portuguese version is slightly different, too,
25 because you have this one return carriage space.

1 Well, that one I can understand. That's plausible.
2 Because if you were using the keyboard to hit print,
3 the return button is the one you'd press for OK.
4 "OK, print". That's the return button that you
5 press for OK if you were not using a mouse, so I can
6 understand why you could press that by accident and,
7 wherever you were on the cursor, it would move it
8 down one and you'd say oh, wow, I wasn't on "Print"
9 and then you'd hit "Print". That's a plausible
10 explanation. But the idea that this was
11 accidentally two files, I just can't follow that
12 logic.

13 I also find it implausible that PEL
14 happened to be the one that walked away with the
15 version that -- so if there were two versions that
16 it happened to be, out of 50-50 probability, walked
17 away with the one that happened to be the one that
18 it believed it agreed to.

19 And then you also have the implausibility
20 of the fact that PEL repeatedly cited in the
21 documents I showed Mr Zucula of its version of the
22 MOI, and no one -- no lawyer, no minister, no one --
23 said what is this language that you're talking
24 about? We've looked at our MOI, and this language
25 doesn't appear.

1 So, in the absence of the original, I am
2 not buying the mistake theory. I don't think that
3 at this stage we are asking this Tribunal to find
4 that Mozambique's version is a fraud. Not at all.
5 What we are saying, I think it is perfectly
6 legitimate for this Tribunal to say that in the
7 absence of an original that must have existed, that
8 must exist, that you will place reliance on PEL's
9 English MOI because as a sort of mild adverse
10 inference, in the absence of the original, it would
11 be imprudent or unwise for you to rely on a document
12 that has so many questions without Mozambique
13 providing you with the original.

14 So that, then, takes you to differences
15 between the English and the Portuguese. We know
16 that C-204 was the last document that you have on
17 record. You see in the chain of e-mails the
18 minister's confirmation -- and I think that's
19 important, that it's part of the chain. That the
20 minister says these are -- essentially someone says
21 on behalf of the minister these are his changes, and
22 then you have the chain moving on, and you know that
23 Mr Jusob is the head of an agency, the head of the
24 Centre for the Promotion of Investment, and that is
25 the last known, undisputed Portuguese version as

1 agreed between the parties.

2 You saw when I examined the two documents
3 side by side, this C-204 with PEL's original, and
4 there were four minor changes. There was Mozambique
5 law instead of English law, there was a formatting
6 change from clause 3 moving into clause 2.2, there
7 was a change to the head of clause 7, and there was
8 a removal of one recital that didn't have any longer
9 any meaning.

10 And you have, from Mr Daga's witness
11 statement, confirmation of when those changes took
12 place between Mr Prabhu and Mr Jusob. That is in
13 his witness statement, at 32 of his second witness
14 statement, where he says those changes, he
15 understood, were made on the morning of May 6th at
16 the MTC offices.

17 Why, then, do we have this change in the
18 Portuguese version? Again, I don't wish to
19 speculate, members of the Tribunal. You have
20 Mr Daga's answer to Professor Tawil at page 413 of
21 the transcript. But I think it's clear to say that,
22 at least in terms of the record, the last meeting of
23 the minds in terms of the Portuguese version is
24 certainly at C-204, and that is as close to PEL's
25 English version as you can possibly get.

1 Three important issues, if I may, on the
2 clauses of the MOI. The first is clause 1. I think
3 this is a critical point. Critical point.

4 Mr Zucula said that he approved the MOI
5 not in a vacuum. He approved it within the prism of
6 article 1, and article 1 is universal among all the
7 MOI provisions. It's identical, and it says the
8 goal of the MOI is for PEL to undertake a PFS in
9 exchange for granting a concession by Mozambique to
10 PEL, and that is really important.

11 And we heard a lot of criticism about the
12 PFS. You heard MZ Betar. But remember, and I think
13 this question was put to him, it was approved.
14 Everything that Respondent wanted it could have had,
15 and it approved it comfortably at its wish in
16 accordance with the vision, with the quid pro quo of
17 article 1.

18 The second issue I want to touch on is
19 this apparent absurdity or pathological clause of 2
20 and 7. Mr Daga explained, and I think it's very
21 clear reading it myself, this apparent contradiction
22 between 2 and 7. If the PFS is approved, 7 becomes
23 inapplicable, and if the PFS is not approved 7 kicks
24 in, and PEL gets another chance to prove up a
25 different investment concept.

1 And I would say not only is that not
2 absurd, but it also shows what the parties intended.
3 It shows that they understood that by approving the
4 PFS, PEL was going to get the right to implement the
5 project along a direct award path.

6 Because otherwise it wouldn't make sense
7 that you would give up the right in 7 once the PFS
8 is approved, because otherwise you wouldn't get the
9 actual project.

10 And as Mr Daga told you, a tender is not a
11 guarantee. Some you win, some you lose. So I don't
12 think that his view certainly was that an approval
13 of the PFS was simply moving on to pulling the arm
14 of the slot, so to speak, on the tender.

15 So, once that PFS is approved, what does
16 the government do? It tells Patel that it must --
17 and there was the emphasis on the word "deve" -- it
18 must exercise its right of preference and negotiate
19 with CFM. We looked at the fact that there was no
20 "or" and I would submit to you that neither
21 Mr Zucula or Mr Chaúque could fairly explain to you
22 how the letter could be read by anybody, let alone
23 Patel, in suggesting that this was parallel tracks.
24 In fact, you heard Mr Baxter say that this concept
25 of parallel tracks was not only not best practices,

1 but he had not encountered that in his entire
2 career.

3 And then I want to go to the third point,
4 and that is more of what we heard this morning.
5 It's this inconsistent and constantly moving post
6 hoc rationalisations about this meaning of the right
7 of first refusal, or *direito de preferência*, in the
8 MOI.

9 And that story is not consistent, and it
10 has never been consistent from Mozambique. If it
11 really was a reference to simply a scoring bonus in
12 a tender, no one could explain to us -- Mr Chaúque
13 couldn't, Mr Zucula couldn't -- as to why PEL must
14 exercise that, why it must do that and it must
15 exercise that in that document in June 2012, when
16 there was no tender process even envisaged. What's
17 the connection? There is none.

18 We looked together, you remember, with
19 Mr Zucula at his first witness statement, where he
20 said that there was both a scoring bonus and a right
21 of first refusal, and the right of first refusal
22 didn't kick in until PEL prevailed in the tender.
23 And all he could say was, well, maybe I shouldn't
24 have said prevailed, but he couldn't explain why he
25 said that in his first witness statement.

1 This morning we heard from Ms Muenda, and
2 I would say her statements, with all due respect,
3 were entirely inconsistent with her prior written
4 statement. They were internally inconsistent and
5 inconsistent with the general principles of
6 application of law at the time.

7 She said either the right disappeared and
8 came back in a different form, or it was a taking
9 without compensation, or it expired and a new and
10 different right came into being, or something
11 entirely different.

12 All that is because -- I would suggest all
13 that obfuscation is because it hides from the
14 reality. The reality is the right of first refusal
15 is what PEL said it was, but what appears to have
16 happened is that in January 2013 -- and I think the
17 Tribunal asked this question of the witness -- MTC's
18 interpretation of the direito morphed. It changed
19 at that time in January 2013 into this parallel
20 track argument, into both a right of first refusal
21 and potentially a scoring advantage in the tender.

22 And then going back to C-11, that's the
23 negotiation with CFM, PEL was directed to negotiate
24 with CFM, and that was, as I've said in my opening,
25 critical. As Mr Zucula said, when the State

1 designates an SOE to form a PPP, it acts on behalf
2 of the government, it steps into the shoes of the
3 government. He said yes to my question "Is that
4 what it does?".

5 And we know what CFM did with that
6 designated government authority when it stepped into
7 the shoes. They claim not to know anything about
8 the project, and we know that that was not true and
9 Mr Zucula confirmed that that was not true, and it
10 stonewalled PEL's attempt to negotiate.

11 Mr Zucula confirmed that for strategically
12 important projects, CFM doesn't have the option to
13 refuse, and Mr Chaúque confirmed in response to a
14 question from the Tribunal that CFM has to have
15 MTC's authorisation to take a stake in a joint
16 venture. But Mr Zucula told you he never even
17 called CFM. He didn't even make one phone call.

18 And, yet, the CFM stonewall is the exact
19 reason that Mozambique decided to go for tender, and
20 you heard from Mr Zucula -- and I think this is one
21 of the most important statements made in this
22 arbitration from a witness. He said, in response to
23 a question from the president, so it wasn't even in
24 cross-examination -- he said had PEL offered a
25 higher equity stake, CFM would have formed the SPV

1 and PEL would have received the direct award, and Mr
2 President, you said: The PPP would have been
3 successful had they offered more? "Yes" was his
4 answer. No tender? Direct award? Yes, it would
5 have been successful.

6 We know from the record CFM was not
7 interested in any percentage negotiation, and it was
8 never instructed to even negotiate with PEL, and we
9 know that this percentage idea was just a notion
10 through which they could take this direct award away
11 from PEL and try and put it to tender.

12 Let me talk about the Council of
13 Ministers, and then I'm going to pass the floor.

14 We now know a lot about this Council of
15 Ministers situation, but we don't know the full
16 picture, and I'm going to come on to that.

17 We know the following. That Mr Zucula
18 told us that there are written minutes. We know
19 that there is an independent secretariat that
20 documented what happened. Ms Muenda was unable to
21 provide the references for the statutes regulating
22 those meetings, and I would direct the Tribunal's
23 attention to CLA-273 and 274.

24 We also know that Minister Zucula was the
25 one who put the project onto the Council of

1 Ministers' agenda at least three times, at the
2 initial tender decision, the decision to grant PEL a
3 direct award in mid April, and then the sudden
4 reversal at the end of April.

5 Now, again, a very, very critical
6 confirmation by a witness. Mr Chaúque told us that
7 the issue on the agenda for the 16th of April
8 meeting was whether to cancel the tender and give
9 PEL a direct award or to continue the tender. He
10 said "It therefore had to be put to this entity
11 whether to uphold or revoke or cancel the
12 competition".

13 So there was not a parallel decision that
14 while the tender was in holding pattern, to use an
15 aviation phrase, there would be this side
16 negotiation. But he told us -- I think he slipped
17 by telling us that it was a decision not just for
18 that but also whether to cancel the tender, and
19 I would put to you that that is the reason we don't
20 see the Council of Ministers' minutes, because we
21 will see a decision also to cancel the tender, and
22 that is fatal to Mozambique's case.

23 And he also admitted that the 18 April
24 letter had several items that tracked the PPP Law,
25 such as asking for negotiations, setting up this

1 technical committee, and the bank guarantee, and, as
2 Professor Medeiros confirmed, this April 18th letter
3 has duly substantiated reasons that mirror article
4 13 as to why this is an exceptional reason for a
5 direct award, and the sequencing of the act mandated
6 in article 9.

7 Mr Chaúque told us that after
8 the April 18th letter he started to schedule
9 meetings for the concession agreement terms. He
10 started working on the draft concession agreement,
11 promised it to PEL, and he clearly did not see it as
12 simply an invitation to participate in the tender or
13 a side meeting. This idea that the tender will
14 continue and you have these sort of hazy side
15 meetings with the investor that maybe will give you
16 a direct award but we're kind of thinking about it
17 but we're not quite sure and we can change our mind.
18 He saw it as a clear direction that he was to enter
19 into a direct negotiation process per article 9 of
20 the PPP Law with this investor following the Council
21 of Ministers' decision to award PEL the direct award
22 and, as Ms Muenda agreed, after the terms of the
23 concession are finalised, and only then is a decree
24 issued and published. But PEL's situation never got
25 to that stage, so this idea that there had to be

1 publication, there would have been publication. Had
2 there not been this abrupt U-turn, there would have
3 been publication.

4 But the absence of publication is
5 explained by the fact that there was an abrupt
6 U-turn, so what we can't have is Respondent saying,
7 members of the Tribunal, there was no publication.
8 Well, obviously there was no publication because you
9 did an abrupt U-turn, so you can't hold up the lack
10 of publication as some sort of notion that the
11 Council of Ministers didn't make a decision, when
12 they never let it get that far.

13 Had they let it get that far, we would
14 have the publication.

15 MZ Betar told you that the most important
16 projects go to the Council of Ministers meetings.
17 Now, here is where I think adverse inferences are
18 key. We don't know, beyond what we've been told,
19 what happened at the Council of Ministers meeting,
20 and in particular, this goes to Dr Tawil's question,
21 we don't know who are these unnamed stakeholders to
22 convinced the Council to change its mind only
23 two weeks after they were convinced in the national
24 strategic interest -- you remember from my opening,
25 in the national strategic interest -- to award this

1 to PEL. Who did they talk to on the Council? Was
2 it the whole Council? Did they appear before the
3 Council? Was it one party? Was it one ministry?
4 And who did they talk to to make this illegal
5 revocation? And we don't know, we haven't had an
6 explanation from Mozambique, why are you not
7 providing us with the Council of Ministers meeting
8 minutes that we know by law exist? Mr Zucula told
9 us that they exist. They were required to be
10 archived.

11 You put, members of the Tribunal, in your
12 document production schedule that you could ask for
13 adverse inferences. We would ask that you say that
14 there are adverse inferences because I believe, in
15 light of Mr Chaúque's response, that you will see a
16 cancellation of the tender on the same date that the
17 Council of Ministers decided, decidiu, that there
18 will be an award to PEL.

19 And at that moment -- and this is the
20 image, members of the Tribunal, I want to leave you
21 with -- in that two-week period, here are the two
22 parties. You have PEL ready and willing to move
23 forward, excited to invest further, scheduling
24 meetings, awaiting a promised draft concession on
25 April 24th, providing a large bank guarantee and

1 ready to negotiate offtake agreements. That's PEL's
2 side. You saw that in that two-week period.
3 They're ready. Happy.

4 Mozambique tells PEL, yes, let's have a
5 meeting. Absolutely. They promised PEL we're going
6 to give you a concession agreement. April the 24th
7 we'll give you a concession agreement, don't worry.
8 Give us a bank guarantee. They take the bank
9 guarantee.

10 At the same time that they are doing that
11 vis-à-vis the investor, behind the investor's back
12 some unnamed stakeholder that we don't know is
13 pressuring someone in the government to give this
14 project to someone else. At the same time as they
15 are telling the investor "Here is what we're going
16 to do", in the background they are doing something
17 else.

18 That, members of the Tribunal, is a
19 classic textbook treaty breach, and for that there
20 must be compensation, and with that, unless there
21 are questions from the Tribunal, I'm going to pass
22 the floor to Mr Ho.

23 **PRESIDENT:** Mr Ho.

24 by Mr Ho

25 **MR HO:** Members of the Tribunal, in the

1 time that I have to discuss quantum with you, I'd
2 like to look at each of our damages cases in turn,
3 starting with DCF, then looking briefly at loss of a
4 chance, before concluding with negotiating damages
5 and some comments on interest.

6 Before I get into the detail, there are
7 four fundamental points which set the scene for the
8 debate about quantum that I want to emphasise.

9 Point number 1. PEL conceived of the
10 project, and PEL's concept was valuable. Now,
11 Mr Vasani has already addressed you on this, but
12 I just want to reiterate that it was PEL who came up
13 with the game-changing concept of a deep water port
14 at Macuse that was connected to a rail corridor that
15 could efficiently and commercially exploit the
16 coal-rich Tete province.

17 That was a valuable and important concept
18 which PEL presented to the government and which led
19 to the successful preliminary study and the
20 conclusion of the MOI.

21 My second point is the MOI contains
22 valuable rights which protect PEL's valuable
23 concept, so having proved with the Preliminary Study
24 that PEL's valuable concept had legs, the MOI gave
25 PEL rights which protected and enabled PEL to

1 develop that concept, and we've set those out on the
2 slide.

3 So PEL not only had its valuable concept,
4 but that concept was secured by the contractual
5 rights in the MOI, and that leads me on to the third
6 fundamental point. Mozambique, by its actions,
7 following the conclusion of the MOI, conferred yet
8 further valuable rights on PEL. Mozambique did that
9 in two ways.

10 First of all, on the 15th of June 2012, it
11 approved the PFS, and that approval meant that under
12 the MOI, PEL was afforded a right of first refusal
13 to implement the project which PEL immediately
14 exercised, thereby gaining the right to proceed with
15 the government to a direct award.

16 Second, on 18 April 2013 the Council of
17 Ministers actually granted PEL a direct award of the
18 project. The highest body of government in
19 Mozambique put PEL in the same position as the
20 winner of any public tender would have been in and
21 gave PEL an irrevocable right to proceed with
22 concluding a concession agreement with Mozambique.

23 Pausing there, the reason why it's
24 important to have those three fundamental points in
25 mind when looking at quantum is because they

1 identify what PEL has lost by Mozambique's conduct.
2 Mozambique's actions have, number one, robbed PEL of
3 its valuable concept. Number 2, denuded PEL's
4 valuable rights under the MOI of all value, and,
5 number 3, destroyed PEL's rights to proceed with a
6 direct award granted under the MOI and, critically,
7 its right to a direct award of the project granted
8 by the Council of Ministers.

9 The fourth fundamental point is that there
10 is no question that PEL's right to a direct award
11 and its MOI rights were valuable. The
12 contemporaneous evidence shows that not just PEL but
13 everyone at the time thought PEL's rights were
14 valuable. First, the Government of Mozambique
15 thought PEL's rights were valuable. If the
16 government thought otherwise, it's impossible to
17 understand why they acted as they did. If
18 Mozambique believed the project or PEL's rights had
19 no value, they could simply have awarded PEL the
20 project, received an upfront commission fee, and
21 watched PEL and the project fail. The whole reason
22 for the CFM stonewall, the public tender, and the
23 Council of Ministers U-turn was because Mozambique
24 was fully aware of how valuable PEL's rights were.

25 Second, and perhaps most significantly,

1 the Tribunal has evidence of what third parties
2 thought at the time, and can I give you just two
3 examples of that? First, the Tribunal knows from Mr
4 Chaúque's 13th of May 2013 letter, which is C-34,
5 that the Council of Ministers heard from several
6 stakeholders about PEL's project, and after it heard
7 from them it did its U-turn. During Mr Chaúque's
8 cross-examination Professor Tawil asked who these
9 stakeholders were, and Mr Chaúque said: "This
10 refers to different public-private entities
11 interested in the project. One of the public
12 entities would have been CFM that already knew about
13 this project, but also the private sector".

14 So both public and private sector entities
15 were lobbying the Council of Ministers about the
16 project and the direct award of it, and the only
17 sensible explanation for why they were doing that is
18 because they recognised that the project and the
19 direct award had a great deal of value.

20 The second example of third parties who
21 thought PEL's rights were valuable are all of the
22 third parties who engaged in the public tender. 21
23 companies wanted to be considered for the award.
24 There is simply no reason why large international
25 companies like Rio Tinto, which was one of the 21,

1 would have done that unless they thought the project
2 and the right to the award of it had value.

3 Mozambique has tried to avoid the
4 conclusion that all the contemporaneous evidence
5 shows the project had value by pointing to the
6 financial model which PEL submitted to Minister
7 Zucula on the 15th of May 2012, and that's C-8.

8 Now, doubtless the Tribunal remembers this
9 document. Certainly I do from the cross-examination
10 of Mr Ehrhardt. This was the document that
11 Mr Ehrhardt displayed a surprising unfamiliarity
12 with for someone who had analysed it in his report
13 and who was here to give evidence about what was in
14 his report.

15 You will recall that the model assumes
16 that all earnings for the first 23 years of the
17 project's operation are used for just two things,
18 repayment of interest on debt and the paying down of
19 debt. That the model assumes that is self-evident
20 from even a cursory examination of it, and it is
21 blindingly obvious when, as Mr Ehrhardt did, you
22 calculate that the debt service coverage ratio is
23 one every year until the debt is repaid.

24 But instead of thinking as any sensible
25 independent expert would well, hang on, if the DSCR

1 is one every year, what is this model actually
2 showing, Mr Ehrhardt just jumped to the conclusion
3 that oh, this must prove the project is financially
4 not viable, and we say that's totally incorrect.

5 As Mr Patel explained in
6 cross-examination, what this model did was "to model
7 out whether the debt could be serviced. If you
8 borrowed money to do this, could you pay the debt
9 down?" And that's all that this was about.

10 So we say nothing in C-8 proves the
11 project was not financially viable. The model was
12 all about whether, using conservative assumptions,
13 the project could service its debt and, if so, by
14 when, and that is why PEL explained in the covering
15 letter to Mr Zucula that even in a worst case
16 scenario, ie where the only thing being done with
17 earnings is paying down debt, the project was
18 viable.

19 In short, despite everything Mozambique
20 now contends, we say that actually the position was
21 clear, everyone thought the project and the right to
22 the direct award of it had value. The only question
23 is what is the precise value of PEL's loss given
24 Mozambique's destruction of PEL's rights, and our
25 damages cases provide the answer.

1 So, with that, can I turn to look at our
2 ex post DCF case, which is our primary case on
3 quantum, and there are three points I'd like to make
4 about that.

5 First of all, Mozambique's attacks on the
6 ex post DCF model in large part amount to saying
7 that if certain adjustments are made, even to just
8 one part of the model, then the project is
9 valueless. That attack is fundamentally flawed
10 because it leaves unanswered the basic question why
11 does the model need adjusting in the first place.

12 If the ex post model is a realistic and
13 conservative one, as we say it is, then Dr Flores'
14 further sensitivity adjustments are irrelevant, and
15 that basic point only becomes clearer the closer one
16 gets to the detail. I'd like to look at just three
17 examples.

18 First, operating and maintenance costs.
19 Secretariat's model takes the O&M costs from the TML
20 feasibility study and then adds a further
21 30 per cent to ensure a conservative approach is
22 being taken. Dr Flores then says, oh, well, if you
23 increase the O&M costs still further, the project
24 becomes valueless, but what is the basis for
25 increasing them further? Dr Flores has no expertise

1 that would enable him to gainsay the
2 project-specific estimates prepared by the leading
3 Chinese engineering companies who worked on the PFS.
4 He has no engineering or construction background and
5 quite clearly had no idea who China Railway
6 Construction Corporation group were, despite the
7 fact they've built two-thirds of all the railways in
8 China.

9 And when I put to Dr Flores that he would
10 have to accept that China Railway Construction had
11 far more knowledge than him about the likely O&M
12 costs, his only answer was to claim he didn't know
13 how to answer the question.

14 Next, let's look at capex. Secretariat
15 have taken the capex figure from the TML feasibility
16 study, which includes a 10 per cent contingency for
17 cost overruns. Dr Flores says, oh, well, if costs
18 overrun by 22 per cent, the project will be
19 valueless. But, again, why will there be such
20 overruns? Dr Flores has no relevant expertise, and
21 Mr Mendonça (Mozambique's expert civil engineer)
22 says nothing about cost overruns. That leaves
23 Professor Flyvbjerg's data which Dr Flores pointed
24 to as showing an average 44.7 per cent cost overrun
25 in 58 rail projects.

1 But in cross-examination Dr Flores denied
2 he was relying on that data to prove a particular
3 figure for cost overruns. He just said, oh, it
4 proves a general trend in favour of overruns. Now,
5 we don't accept the data shows even that because
6 it's not focused on private conventional port or
7 rail projects in Africa.

8 But even if it does, so what? The
9 Secretariat model assumes a 10 per cent cost
10 overrun, so what is the basis for assuming any
11 greater overrun? There simply is none.

12 The final example is discount rate, and
13 Dr Flores has consistently tried to jack up the
14 discount rate in a bid to show the project has no
15 value, and his approach is entirely unjustified.
16 And, again, let me just give two examples.

17 First of all, Dr Flores says we should
18 ignore the results from Professor Fernandez's study,
19 which would lower the country risk premium Dr Flores
20 has calculated.

21 Now, what's the basis for doing that?
22 Well, despite recognising that Professor Fernandez
23 has far more experience than him performing market
24 surveys to determine country risk premiums,
25 Dr Flores, without any supporting evidence, claimed

1 that Professor Fernandez's sample size was too small
2 for Mozambique.

15:14

3 And when I started exploring in
4 cross-examination whether there was any proper basis
5 for Dr Flores ignoring this survey, the Tribunal
6 will recall that he started wildly speculating that
7 the Mozambique data could have been manipulated.

8 Now, rather than accepting the obvious,
9 Dr Flores tried to dodge a concession unhelpful to
10 Mozambique's case by postulating an unrealistic
11 theoretical scenario, which even he ultimately
12 admitted he had no evidence for.

13 Second, on discount rate, Dr Flores
14 applies a premium to reflect, in whole or in part,
15 small cap size and illiquidity, and the Tribunal
16 will remember that we went through in
17 cross-examination Professor Damodaran's article
18 which explains precisely why there was no good
19 reason to do that.

20 Dr Flores had no answer to any of those
21 substantive criticisms. His only response was to
22 say, well, my approach reflects market practice.
23 But first of all there's no evidence actually that
24 that's true, as at today, and anyway it's simply not
25 to his credit, as an independent expert, that

1 despite having no answer to the substantive
2 criticisms made by Professor Damodaran, he insisted
3 that we apply the premium anyway.

4 So that's the first point I wanted to make
5 on ex post DCF. Mozambique's attempts to attack and
6 adjust the model should be rejected.

7 The second point is related to the first.
8 Dr Flores stressed that not every feasibility study
9 is accepted by investors or bankers and that many
10 fail to secure financing, so how can the feasibility
11 study be a reliable basis for a DCF? And there are
12 two answers to that.

13 First of all, the feasibility study cost
14 in the tens of millions to produce and was prepared
15 in co-operation with leading Chinese rail and port
16 companies. It has all the hallmarks of a reliable
17 and accurate study.

18 Second, and critically, in these
19 proceedings Mozambique has subjected Secretariat's
20 ex post model to as searching an inquiry as any
21 financier would, and, as I've explained, Mozambique
22 has failed to justify why any adjustments to the
23 model are required. They failed because our model
24 is a conservative and reliable one which would
25 secure funding and which the Tribunal can rely on.

1 The third and final point on ex post DCF
2 is Mozambique's contention that the project is dead
3 and will not happen, and I've just three things to
4 say about that.

5 First, the people who know best what is
6 happening with the project are the TML consortium,
7 and as the Tribunal will recall from C-405, which is
8 the video we played to Dr Flores, the statements
9 made by Mr Fonseca, a member of TML's executive
10 committee, indicated that the plan was to develop
11 the rail as well as the port elements of the
12 project, and we know from the press report at C-343
13 that Ethos Asset Management will invest \$400 million
14 in order to construct a deep water port at Macuse,
15 which the press report notes was an idea, and
16 I quote, conceived in 2013 as part of the
17 Moatize-Macuse rail and port project.

18 So by the construction of the deep water
19 port at Macuse, which it is common ground is
20 happening, the government continues to benefit from
21 what is publicly recognised to be PEL's valuable
22 concept concerning the port.

23 Second, it's important for the Tribunal to
24 remember that CFM is a member of the TML consortium.
25 If Mozambique had wanted to lead evidence,

1 documentary or factual, about what has gone on or is
2 going on at the project, they could have done so.
3 The fact that they have not speaks volumes and we
4 say means you should be very sceptical, either of
5 claims that the project will not happen or that the
6 same delays would have occurred with PEL in charge.

7 Third, and finally, the project's
8 viability is tied to the global coal market.
9 Dr Flores was unsurprisingly pessimistic about the
10 long-term prospects of that market, but yet again he
11 has no expertise that enables him to express
12 reliable views on the matter. He has never traded
13 coal, never worked at an energy consultancy like
14 Wood Mackenzie, and never acted as a consultant
15 providing advice on demand or trends in the global
16 or Mozambique coal markets.

17 The Russian invasion of Ukraine has
18 fundamentally altered energy markets, causing coal
19 prices to spike and demand to increase, including
20 for Mozambique coal. That environment is highly
21 conducive for financing and building the Macuse rail
22 corridor, in particular since it's far more cost
23 effective than the existing Beira and Nacala rail
24 corridors in exporting coal from the Tete region.

25 So that's everything I wanted to say on

1 ex post. If the Tribunal disagrees with our ex post
2 case, then we seek damages on an ex ante DCF basis,
3 and just two points on that.

4 First, we rely, by way of background, on
5 all the contemporaneous evidence I mentioned at the
6 start of my submissions as proof that the project
7 was as at the date of breach valuable. If it
8 wasn't, then what on earth were all those
9 stakeholders doing lobbying the Council of
10 Ministers, and why did 21 different companies
11 express interest in the public tender?

12 Second, the ex ante model is one which the
13 Tribunal can have confidence in. We accept that as
14 at the date of breach, the project was not as
15 developed as at the time of the feasibility study,
16 but that doesn't mean that we haven't produced a
17 reasonable conservative and reliable model which
18 calculates, at a minimum, what the project was
19 worth.

20 So that's DCF. If you're not with us on
21 DCF, then our first fallback is loss of a chance.
22 That will be material if you are with us in
23 principle on awarding DCF damages but, for example,
24 you believe there's only a chance that we would have
25 concluded the concession agreement. We of course

1 say we've proved all we need to on DCF, but if you
2 feel we fall short in certain respects, you can
3 reflect that with a loss of chance award of damages.

4 That leaves negotiating damages. This is
5 the area of our damages case which affords the
6 Tribunal a chance to break new ground. Negotiating
7 damages have not been awarded in public
8 international law before, although they are common
9 in many domestic legal systems.

10 Awarding negotiating damages in this case
11 would be a precedent setting development, and we say
12 that for two main reasons the Tribunal should have
13 no hesitancy setting that precedent and pushing the
14 law forward.

15 First, as I explained at the start of my
16 submissions, PEL has unquestionably suffered loss.
17 As the Tribunal in Southern Pacific properties v
18 Egypt said, "it is well settled that the fact that
19 damages cannot be settled with certainty is no
20 reason not to award damages when a loss has been
21 incurred".

22 That reflects a basic principle, common to
23 international and domestic law alike, that where a
24 tribunal is satisfied that loss has been suffered,
25 the tribunal will, number one, seek if at all

1 possible to award damages to compensate for that
2 loss, and, number two, be tolerant of imprecision
3 where the loss is incapable of precise measurement.
4 PEL has suffered loss and the Tribunal should be
5 open to using negotiating damages to compensate for
6 that loss.

7 The second reason is that negotiating
8 damages are entirely consistent with and are simply
9 a tool that would fall under general and long
10 established principles of public international law.
11 The starting point is that Chorzow Factory
12 establishes that damages in international law aren't
13 compensatory, and there is no question that
14 negotiating damages are compensatory in nature.

15 The UK Supreme Court says they are. The
16 Singapore Court of Appeal says they are, and
17 Mozambique has not even attempted to contend
18 otherwise.

19 So if you're with us in principle that
20 negotiating damages are an appropriate and available
21 tool to use to value PEL's loss in this case, how
22 should such damages be assessed? We've set out the
23 principles in paragraph 29 of our additional
24 submissions on quantum. Can I simply emphasise now
25 that ultimately damages are to be assessed liberally

1 with the object to compensate the claimant and not
2 to punish the defendant. Where damages are
3 difficult to assess with precision, the Tribunal
4 should make the best estimate it can, having regard
5 to all the circumstances of the case and dealing
6 with the matter broadly, with common sense and
7 fairness.

8 So, against that background, what
9 negotiating damages should the Tribunal award in
10 this case? The best possible evidence of the right
11 figure for negotiating damages is the
12 contemporaneous evidence of what PEL actually asked
13 for following Mozambique's breaches.

14 On the 20th of December 2013, PEL wrote to
15 the MTC seeking compensation, and we can see what
16 they asked for on the slide and that's from C-219,
17 page 2.

18 We say the settlement amount which PEL
19 proposed amounted to a lump sum payment of
20 25.175 million US dollars, and that figure comprised
21 the following.

22 First, the US \$4 million mentioned in the
23 letter.

24 Second, the royalties of 0.5 per cent
25 which the letter mentions, totalling 15.575 million

1 US dollars, and to calculate that figure, Mr Dearman
2 has taken 0.5 per cent of the capex projected in the
3 PFS, as that is the proposed investment in the
4 project which PEL would have made.

5 Third, the other related costs which PEL
6 said in its letter it claimed and, as I'll explain
7 in more detail in a moment, the engineering work PEL
8 had done to that point would have been roughly 5
9 per cent of the total engineering costs and would
10 therefore amount to 5.6 million US dollars.

11 Now, we of course recognise that the
12 25.175 million was PEL's opening position. It would
13 have been subject to negotiation. Tellingly,
14 though, Mr Daga was not cross-examined about this
15 letter. It was not put to him that PEL's offer was
16 unreasonable, contrived or a highball offer. That
17 was not suggested to Mr Daga doubtless because
18 Mozambique know the offer was a fair and realistic
19 one.

20 In those circumstances any negotiation
21 down of the \$25.175 million figure would have been
22 limited. Adopting a rough and ready approach, we
23 suggest that Mozambique might at best have
24 negotiated PEL down by a little more than 25
25 per cent to a final round figure of \$18.75 million,

1 and that's what we suggest the Tribunal award as
2 negotiating damages in this case.

3 That figure is corroborated by
4 Mr Dearman's calculation of what an engineering
5 consultant who had contracted to provide the
6 engineering work for the project would have demanded
7 if their project had been cancelled, and you'll see
8 at slide 17 of Mr Dearman's direct presentation how
9 he has calculated the \$16.9 million figure that he
10 suggests would be the cancellation figure.

11 Now, why is that relevant? We say that in
12 a hypothetical negotiation, PEL would have argued
13 that, as the owner/operator of the project, it would
14 have made at least what an engineering consultant on
15 the project would have made. If the project was to
16 be cancelled, PEL would say it should be in no worse
17 position than an engineering consultant would be,
18 not least given all the work PEL had actually done
19 on the PFS. Now, of course this is an approximation
20 for PEL's true position, but any negotiation would
21 have involved approximations, and this approach
22 provides a rough and ready figure which PEL could
23 sensibly have pointed to, not least because it does
24 down PEL's actual position. It doesn't recognise
25 that PEL came up with the valuable concept or that

1 PEL would actually own and operate the project.

2 Finally, on negotiating damages, we
3 maintain that the other data points we've identified
4 corroborate our \$18.75 million figure. I'm not
5 going to go through them orally now; we will address
6 them in writing as needed.

7 Finally that leaves me interest. We claim
8 pre-award interest at US prime plus 2 per cent on
9 our ex ante DCF case, on our loss of a chance
10 damages based on the ex ante DCF, and on negotiating
11 damages, because in all three cases, damages are
12 assessed at the date of breach.

13 Mozambique's contention that we should be
14 awarded a risk-free rate should be rejected. For
15 one, that is not common or usual practice. The vast
16 majority of tribunals in the last five years have
17 awarded interest using a benchmark rate like prime
18 or LIBOR plus a premium. Only a fringe minority
19 have awarded a risk-free rate.

20 Second, Dr Flores claimed in his second
21 report that large businesses like PEL can borrow at
22 rates below US prime, so it's wrong to award PEL
23 interest at US prime plus 2 per cent. The only
24 evidence Dr Flores produced in support of that claim
25 was the home.loans consumer finance web page which

1 we looked at in cross-examination, and which even
2 Dr Flores had to concede said nothing about the
3 costs at which companies like PEL can borrow.

4 Finally, the Tribunal raised during the
5 hearing the question of post-award interest. While
6 we've claimed for that consistently in our
7 submissions, no one has addressed the Tribunal in
8 any detail on that. We suggest the parties deal
9 with that and costs, the recovery of which are very
10 important to PEL, when your award is published and
11 it's clear who has won and therefore what the
12 precise issues are.

13 And, with that, I'll hand over to
14 Ms Vasani to close.

15 **PROFESSOR TAWIL:** Sorry, could you explain
16 that a little bit? Once it's published we're going
17 to?

18 **MR HO:** Once we're aware, either published
19 in draft to us of what the position will be, then
20 the suggestion is we can argue then more sensibly
21 about how costs should be dealt with and what should
22 happen with post-award interest. So if, for
23 example, we lose, it seems a bit wasteful for us to
24 incur the costs of arguing about that.

25 **PROFESSOR TAWIL:** But why should we give

1 you the draft award?

2 **MR HO:** I'm sorry, Professor Tawil, I
3 didn't hear that.

4 **PROFESSOR TAWIL:** I don't understand.
5 I mean, from what I understood, it appears as if you
6 would know our position prior to the award?

7 **MR HO:** No. No, no, no.
8 What I'm suggesting is once we know what
9 your position is in the award, then it would
10 sensible to argue about those issues because we will
11 know.

12 **PROFESSOR TAWIL:** But that means we will
13 need to render two awards?

14 **MR HO:** Yes.

15 **PROFESSOR TAWIL:** Or a supplementary
16 decision?

17 **MR HO:** Yes. That's the suggestion that
18 we're putting to you. If the Tribunal, of course,
19 rejects that, then we say US prime plus 2 per cent
20 or the cost of borrowing of Mozambique, as you heard
21 from Mr Sequeira when you discussed that with him.

22 **PROFESSOR TAWIL:** Noted, thanks.

23 by Ms Vasani

24 **MS VASANI:** Members of the Tribunal, my
25 client has asked me to convey its sincere gratitude

1 to the Tribunal for their time and attention over
2 this past week, and on behalf of my team, I'd like
3 to do the same, as well as extend a thank you to
4 opposing counsel for their collegiality this past
5 week.

6 I'd like to end Claimant's presentation
7 with a process set out in clauses 2 and 7 of the MOI
8 where PEL tries again for another project if its PFS
9 isn't accepted by the MTC.

10 As Mr Daga explained to the Tribunal, the
11 point of clause 7 was that he was ready to invest
12 again if he couldn't prove up his initial concept.
13 He was ready and willing to work with Mozambique, he
14 wanted to work with Mozambique, and he wanted to
15 conclude this project so much that he insisted on a
16 contractual mechanism that would give PEL the
17 opportunity to do another project if the PFS wasn't
18 approved.

19 That tells you about the spirit with which
20 PEL approached Mozambique and its steadfast
21 commitment to invest in Mozambique over the long
22 run.

23 Now, members of the Tribunal, you've read
24 through PEL's submissions, you've seen the many
25 letters that Mr Daga authored over the years, and

1 you've heard Mr Daga himself explain to you, through
2 his hoarse voice, the exact dates and the exact
3 words from so many years ago.

4 Now, this is telling. It's important.
5 Mr Daga's detailed knowledge of the facts reflects
6 his commitment to this project. He described the
7 project as his dream, his baby, his passion. He
8 cared so much about this project that he spent over
9 two years of his life in Mozambique so that he could
10 devote the maximum time to it, and that devotion
11 clearly showed through in his testimony last week.

12 As my entire team and I can attest to,
13 whenever we speak with Mr Daga about this project a
14 little twinkle goes up in his eye and he is
15 extremely happy and excited to tell us everything he
16 possibly could about both the port and the rail line
17 that he personally walked.

18 Now, contrary to what you've read over the
19 last two years in Respondent's pleadings, neither
20 Mr Zucula nor Mr Chaúque had a bad word to say about
21 Mr Daga or PEL. Quite the opposite.

22 You heard both of them talk about how
23 committed the MTC was to working with PEL. They
24 cultivated and nurtured the relationship, and they
25 never doubted PEL's technical capabilities or

1 competence. Not once.

2 Members of the Tribunal, this is exactly
3 the type of investor that ISDS is designed to
4 protect, the investor that comes into a country with
5 good intentions, wanting to contribute to the host
6 state for the long term, who put their heart and
7 their soul into the investment that they made.

8 Thank you, members of the Tribunal. This
9 concludes Claimant's presentation.

10 **PRESIDENT:** Very good. Thank you,
11 Ms Vasani. We said we would now break for a quarter
12 of an hour, so it's now 15.35. Shall we come back
13 at 15.50? Very good.

14 **MR BASOMBRIO:** Yes, thank you.

15 (Short break from 3.35 pm to 3.50 pm)

16 **PRESIDENT:** We resume the hearing, and we
17 give the floor to the Republic of Mozambique.
18 Respondent's Closing Statement
19 by Mr Basombrio

20 **MR BASOMBRIO:** Good afternoon,
21 Mr President, and members of the Tribunal. I will
22 wait until the secretary does whatever he's doing.

23 **PRESIDENT:** In the meantime, we have
24 received your slides, and it is H-18.

25 **MR BASOMBRIO:** Good afternoon,

1 Mr President, and members of the Tribunal. This
2 will be Respondent Mozambique's closing statement.

3 After this hearing, one thing is very
4 clear. This dispute is about the MOI, the MOI, and
5 the MOI.

6 Now, the Tribunal can exercise its own
7 jurisdiction and consider it and their
8 kompetenz-kompetenz, but that's not a blank cheque.
9 It's not carte blanche. You have to consider prior
10 judgments, and we have a binding ICC arbitration
11 award that holds they have exclusive jurisdiction
12 under the ICC arbitration clause.

13 Even if you did not pay comity to that, if
14 you read the ICC arbitration clause yourselves, it's
15 clear that this dispute over the MOI has to be
16 adjudicated in the ICC; that's what the parties
17 agreed to. Clearly the dispute, the rights, the
18 obligations under the MOI under whatever effect,
19 what the Council of Ministers said, all of these are
20 predicates to there being any treaty claims. If the
21 ICC holds that they have no rights under the MOI,
22 then there would be nothing to protect under the
23 Treaty.

24 So let me urge the Tribunal to consider a
25 reasonable approach. You have come for the hearing,

1 we were all here, now we have all the evidence, but
2 we submit that the reasonable and prudent approach
3 that will avoid potential litigation by either side
4 in the future would be for the Tribunal to hold the
5 ultimate rendition of a final award in abeyance
6 until you hear also what the ICC has to say.

7 In terms of jurisdiction, I want to note
8 that you have not heard a single word about
9 jurisdiction from the opposing side in their
10 closing, you haven't heard any challenge to any
11 jurisdictional facts, so I'm not going to spend a
12 lot of time but, to make the record clear, I want to
13 highlight a few points.

14 Now, jurisdiction, the fact that we
15 haven't talked about it much doesn't mean that's an
16 issue that has gone away, because you indicated to
17 us when we moved to bifurcate, that in your view it
18 was intertwined with the merits. Well, now we've
19 heard the merits, so let's see what we have.

20 Number 1. It is clear that the MOI is not
21 an investment under the BIT, and this is simple
22 because concessions have to be established or
23 acquired under the BIT, and that did not happen.
24 That's undisputed.

25 The MOI is also not an investment under

1 international law because the MOI is a conditional
2 contract. This is also undisputed. We all know
3 there were conditions that had to be met in order
4 for the parties to have any rights, including Patel.
5 A conditional contract is not an investment under
6 Joy Mining and the other cases.

7 Even Professor Medeiros told you the MOI
8 has no other goal than being a preliminary contract.
9 This is consistent with what our expert, Ehrhardt,
10 says. It is consistent with what Patel says in its
11 Reply, it's subject to conditions. It is consistent
12 with what Mr Daga has said, that they could walk
13 away from it, and the government could also walk
14 away if they didn't approve. It's all conditional.
15 A conditional agreement is not an investment. No
16 international tribunal has ever held that it is.

17 So what does that leave behind? Pre
18 investment activities.

19 Pre investment activities are also not an
20 investment. Under Mihaly and the Zhinvali cases.

21 And beyond that, I'm not going to get into
22 the Salini factors, but I indicated, and I explained
23 it in my opening, nothing has changed. None of them
24 are met.

25 Now, the next point is extremely critical.

1 PEL was not an investor under the facts. We heard
2 Mr Ho, PEL spent millions of dollars. Well, there's
3 no proof of that on the record. You already know
4 that we asked PEL to give us the documents that
5 support their Preliminary Study expenditures, their
6 PFS expenditures, their PGS consortium public tender
7 expenditures, and, to all the requests the answers
8 were PEL has conducted a search in respect of the
9 documents and has not identified any responsive
10 documents. They have no evidence of anything that
11 they spent. There was zero investment.

12 Mr Daga says I don't remember, I have no
13 clue what money we spent.

14 There's nothing. You cannot possibly find
15 jurisdiction if there's not one single shred of
16 evidence of what Patel spent.

17 And let me talk about the Council of
18 Ministers here for a second. Even if you looked at
19 that, as they claim it to be their lynchpin, well,
20 there was no investment there either. Why? And
21 we'll talk about that in more detail in a second
22 because, yeah, they got the guarantee, but they
23 could not comply with the second requirement, and
24 then the guarantee was released. There was no
25 expenditure of funds in connection with the offer,

1 whatever it may be, from the Council of Ministers.

2 So whether you look at the MOI or whether
3 you look at what happened in front of the Council of
4 Ministers, they cannot escape their responsibility
5 to show an expenditure, and on the record there is
6 none. That's the end of this case. We don't need
7 to talk about anything else.

8 But let's move on to the merits on the
9 alternative.

10 We all know you have two Portuguese
11 versions that are identical. The Portuguese
12 versions of the MOI control. Why? Portuguese is
13 the official language in Mozambique.

14 Article 5 of the Procurement Law does
15 apply under their theory of the case. Their theory
16 until this hearing was we were entitled to get the
17 concession. If that's the case, then article 5 of
18 the Procurement Law applies. There's something
19 about the two Portuguese versions that you don't
20 have in the two English versions.

21 You have a meeting of the minds.
22 Mr Vasani referred to meeting of the minds. The
23 only meeting of the minds is between the two
24 Portuguese versions, which are identical except for
25 one very irrelevant formatting change.

1 They want you to go with the outlier.

2 Imagine if you were civil jurisdiction
3 judges and they came and made the argument to you,
4 yes, we have two Portuguese versions signed in a
5 country where the official language is Portuguese,
6 but, judge, we want you to ignore them and we want
7 you to go with one English version that doesn't
8 match anything else.

9 I submit to you that any reasonable judge
10 would say no, and that would be the end of it. A
11 civil jurisdiction judge would be guided -- and we
12 all know this -- by the final signed agreement.
13 They would not care about ambiguous prior exchanges
14 and negotiations, which is all we have here. They
15 would not care at all about Mr Daga's "I did not
16 understand" excuse or any of that. They look at the
17 document, and they decide on the basis of the
18 document.

19 And I submit to you that any civil
20 jurisdiction judge would first say: Where was this
21 document signed and, if a country is involved, what
22 country is that? And if you said Mozambique, they
23 would say the Portuguese version applies. And that
24 would be the end of it. And they cannot escape the
25 Portuguese version, and that's why they don't like

1 to discuss the Portuguese version.

2 Now let's look quickly at the law, at the
3 PPP Law. Now, I understand the questions that have
4 been presented by the Tribunal. Look, the PPP Law
5 was not in effect when the MOI was signed, did the
6 parties mean something else? These are very
7 legitimate questions, and how did that change?

8 Well, there's an answer that both parties
9 have provided to the Tribunal, which is the same
10 answer, and it's the same answer which the experts
11 have provided to the Tribunal. The PPP Law was
12 known by everyone. It had been in the works. It
13 had received certain levels of approval. Everyone's
14 telling this Tribunal this is what we thought would
15 guide the MOI. There's no dispute on that between
16 fact witnesses or experts, and so you should be
17 perfectly comfortable concluding that that's what
18 the parties intended, and that's what they did,
19 because that's what they did, and that's what the
20 experts say.

21 That's one issue where there's unanimity.
22 Everyone knows the PPP Law would apply.

23 So then, if we look at the PPP Law,
24 I walked Professor Medeiros through the law, and I'm
25 not going to do it here again in detail but just

1 quickly, so it's article 13 that's what matters.
2 That's the general legal framework. And there's no
3 doubt that the preferred general approach is public
4 tender. It's not what Patel has argued all along.
5 They've been arguing public tender as an exception
6 to direct award. It's the other way around, and
7 that's clear.

8 Article 2 explains how you can do a public
9 tender. Article 3 talks about *ajuste directo*, which
10 is a limited exception to public tender.

11 Now, article 4, if there's no bidder or if
12 a winner withdraws, then you could also have *ajuste*
13 *direito*.

14 So then we get to article 5, which is what
15 really matters here, because the Portuguese versions
16 refer to *direito de preferência*, so as a Tribunal
17 you've got to ask yourself, well, is that a term of
18 art? Is that defined in Mozambican law? And it is.
19 Right here. *Direito de preferência* means the 15
20 per cent scoring advantage, and if you go back to
21 slide 17 that English that translates it to right
22 and margin of preference, that's Patel's own
23 translation. That's not our translation, so that
24 means that they, their counsel, translated in the
25 same way as we do.

1 Now, if you go to the next slide,
2 Professor Medeiros also translates it with his team
3 at his law firm -- bilingual team -- in the same
4 way, right of preference. No one translates it as a
5 right of first refusal, and here is the problem.
6 That is a common law term. Professor Medeiros said
7 we do not use that term in the Portuguese-speaking
8 world, so I'll submit to you what happened.

9 What happened was that Patel was operating
10 in the common law tradition, and they did not
11 understand, and that's why Mr Daga said repeatedly
12 "I thought I had a right of first refusal", and
13 that's why the English version that they propose
14 refers to that, and it's mistaken, because you have
15 heard from everyone that's not the term of art in
16 Mozambique. And even Professor Medeiros has said
17 I cannot even talk about that because I am not an
18 English lawyer. That term has no place, and that is
19 why you have not heard one single word about right
20 of first refusal in the closing statement of Patel.

21 So let's throw that aside and not worry
22 about it because what we're talking about here is a
23 *direito de preferência*, and *direito de preferência*
24 means the 15 per cent, and if you go to slide number
25 19, this is what I asked Professor Medeiros.

1 "The only way you can provide a
2 15 per cent scoring advantage to one bidder is if
3 there are other bidders, right? If there's a tender
4 process".

5 And Professor Medeiros said yes, "Indeed".

6 And so when you look at the Portuguese
7 version and it refers to *direito de preferência*,
8 it's assuming that there's going to be, it's telling
9 you that there's going to be a tender process. Even
10 before the PPP Law, that's how you're preferred.
11 You got to have somebody to be measured against
12 other bidders, and after the PPP Law, that is dead
13 clear in article 13.5.

14 And so what we have here is that
15 unfortunately, Patel was looking at this transaction
16 through the glasses of the common law, which is what
17 they have in India. They just misunderstood the law
18 of Mozambique. And this is also evident in C-51,
19 the legal opinion from Sal & Caldeira, that tells
20 them exactly that, and like Professor Medeiros
21 agrees, refers again to this provision.

22 So at best, under the MOI what PEL would
23 get would be a *direito de preferência*. But let's
24 talk about what the MOI does, the Portuguese
25 version, because it's important.

1 It provides PEL with the opportunity to
2 submit a PFS. Then it provides the government with
3 the opportunity to approve or reject it. Then, if
4 it's approved, PEL gets the *direito de preferência*.
5 If it's not approved, they get a new MOI.

6 So this is the important point. The sole
7 object and purpose of the MOI is for PEL to prepare
8 a PFS and for the MTC to approve it or reject it,
9 and if it is approved, PEL gets a 15 per cent
10 scoring advantage in the public tender. That's it.
11 There's nothing else in the MOI.

12 Now, importantly, the Portuguese version
13 of the MOI is internally consistent, and a holistic
14 review clearly demonstrates that it is centered and
15 focused on the preparation of the PFS.

16 If you look, and I'll go through this
17 quickly, the MOI just talks about the interests of
18 the parties. Clause 1 talks about the objective,
19 which is to undertake the PFS at the cost of PEL.
20 Clause 2 talks about how long it's going to take and
21 that they get the *direito de preferência*, and every
22 other clause relates again to the PFS. Here it is
23 in front of you. It deals with the PFS. And that's
24 the problem with the English version that PEL has.
25 It injects into clause 2 the concept in English of

1 providing a direct award which doesn't fit anywhere
2 else in that document. It's not internally
3 consistent, and it is not consistent with the
4 Portuguese that they signed.

16:12

5 Professor Medeiros told you the Portuguese
6 version of the MOI only uses the term
7 *direito de preferência*. Importantly, he told you it
8 does not use the term *ajuste directo*. If the
9 parties intended to do an *ajuste directo*, they would
10 have said they gained the right to do an *ajuste*
11 *directo* if the PFS is approved.

12 I asked Professor Medeiros, "Does this
13 document [the Portuguese MOI]" -- which is the
14 document that he reviewed, that's the one, as a
15 Portuguese-speaking lawyer that he looked at because
16 he knows that's the only one that matters -- what
17 did he say when I said "Does this document [the
18 Portuguese MOI] refer anywhere to the term *ajuste*
19 *directo*?" He said "No".

20 Then I asked him: "Clause 2 does not say
21 that if the feasibility is approved, PEL will have
22 an '*ajuste directo*', correct?"

23 In other words, I wanted his opinion,
24 reading it as a Portuguese speaking lawyer, that if
25 the feasibility study is approved, isn't it true

1 that it does not say, clause 2, that PEL will have
2 an ajuste directo. He said: "Correct. I've
3 already told you that".

4 And Minister Zucula interprets it the same
5 way. So what does that mean? The MOI terminates or
6 ends upon two alternatives. If it is approved, PEL
7 gets *direito de preferência*, you move on to a
8 tender. If it is rejected, the PFS, the parties
9 negotiate an MOI. It's very important for the
10 Tribunal to understand that the MOI has an ending
11 place. In the civil jurisdiction we may refer to it
12 as, you know, *caducidade*. It caducated when one of
13 those two things happened.

14 Now, I've already said the Mozambique
15 version is the same except for the translation
16 problem. Let's turn quickly to clause 2 in PEL's
17 English version. That language doesn't fit, it
18 doesn't make sense, it introduces concepts that are
19 not found anywhere else, and they are not in the
20 Portuguese versions.

21 Now let's talk about clause 7 and clause
22 2.1.

23 If you read them, it says that if the
24 project is not commercially or technologically
25 viable, then PEL must be awarded the project.

1 That's the interpretation of 2.1 because it says
2 once the terms under clause 7 are approved, the
3 government shall issue a concession of the project
4 to PEL. And clause 7 says that -- only says -- in
5 the event that the project is unviable, the parties
6 execute a new MOI, so the condition that's approved
7 is that if it becomes unviable, they get another
8 MOI. They don't get the concession. It's absurd.
9 Why is it absurd? Because this was inserted or not
10 deducted. Something happened. It is totally out of
11 place.

12 And Mr Daga can tell us all he wants about
13 what he wanted it to say, but that's not what it
14 says. You cannot award, a civil court judge would
15 not award what they are asking on the basis of this
16 language. A civil court judge would say that
17 language is screwed up, and I'm not going to rewrite
18 it to fix it for you.

19 So then what does Mr Zucula say when he
20 approves the PFS? And the reason why we challenge
21 the quality of the PFS was because Patel used to
22 argue that they were entitled to the concession
23 under the MOI, and so we were saying you cannot be
24 entitled to the concession under the MOI because the
25 PFS doesn't even approximate the studies that you

1 need to perform in order to be awarded a concession.
2 So that's why we said it. Now, they've walked away
3 from that, but what does Mr Zucula say?
4 He gives them two options. He says you
5 can exercise your *direito de preferência* and/or you
6 can negotiate with CMS. Yes, he didn't put an "or"
7 or an "and" in between the two. I don't even know
8 how many letters he signed that day, but here's the
9 bottom line and what matters. It's not whether it
10 says "and" or whether it says "or". What matters is
11 that PEL got both chances. They got the chance to
12 try to do both. And I'm going to submit to you,
13 despite what Mr Baxter said, it was in PEL's
14 interest for the MTC to give them the opportunity to
15 do both. The MTC was saying we're going to give you
16 the 15 per cent advantage in a public tender, but
17 we're also going to give you the opportunity to go
18 talk to CFM. That is reasonable; that is fair and
19 equitable treatment; that is much better than the
20 government folding their arms and choosing one and
21 saying no, we're not even going to consider the
22 other. That's what basically PEL is telling you
23 that's what the government should have done. That's
24 not flexible; that's not how the real world works;
25 they were trying to give them both opportunities.

1 And, in response, Mr Daga says we will
2 exercise our right of preference. He doesn't say we
3 will exercise our right of first refusal; he uses
4 the terms "right of preference".

5 So what happens? PEL tries to negotiate
6 with CFM, they fail, they cannot agree. Two
7 important points. One is the joint venture would
8 have been the party to the concession agreement.
9 Never would it have been PEL. So even if there was
10 ajuste directo, it would have been with the joint
11 venture, a party that does not exist. And so PEL
12 cannot even claim a right to ajuste directo to grant
13 an award of concession because it would not have
14 been the party that received a concession. This is
15 undisputed.

16 The 20 per cent -- I'll let the Tribunal
17 read article 33. That is not a limit on what
18 participation CFM can have. The 20 per cent refers
19 to the maximum that can be provided for the public
20 to invest in the joint venture in the stock market,
21 but you can read it yourselves.

22 It is clear that the MTC cannot order CFM
23 around. I am confident this Tribunal knows that
24 governments, and it's commonplace, incorporate
25 entities with their own separate juridical

1 personalities to carry out commercial transactions,
2 like CFM, and always the government appoints the
3 president, the CEO, the main administrative players;
4 it gives them the initial funding.

5 But, like Mr Zucula said, these entities
6 have administrative autonomy, and he said CFM had
7 administrative autonomy. That's why I could not
8 order them around. And there is absolutely no
9 evidence on the record of any alter ego between CFM
10 and the MTC. I submit to you that the evidence, as
11 Mr Daga has recounted it, is the opposite.

12 CFM didn't want to listen to the MTC.
13 This would be the first time in history that a
14 Tribunal would find an alter ego relationship where
15 the supposed agent, CFM, is not listening to the
16 principal. That tells you there was no alter ego
17 relationship. That tells you that Minister Zucula
18 is right. They were autonomous.

19 And so they could not be blamed, the MTC,
20 and if the MTC had done what Patel urges and had
21 told them and had said, even though somebody else
22 won the tender, we're going to veto it, we're going
23 to use our governmental power, we're going to veto
24 the independent jury's adjudication of the winner
25 and, instead, we're going to tell the MTC, which has

1 a separate juridical body, you go and sign it with
2 Patel, then you would have a real treaty claim by
3 that winning bidder against Mozambique. This is not
4 a real treaty claim.

5 So what does the MTC do? They go through
6 the tender process. I don't need to elaborate on
7 that; we know what happened.

8 Let's talk about the Council of Ministers,
9 because that seems to be important to the Tribunal.

10 We have to consider what's happening.
11 Patel is repeatedly insisting that they should get a
12 direct award through this whole time period. That's
13 the backdrop of all of this. They do not understand
14 what *direito de preferência* means. They are not
15 listening to what Sal & Caldeira has told them.
16 They are looking at it through the glasses of Indian
17 common law, so they won't stop pushing everywhere
18 they can with all of their experts.

19 Again, you have heard it from Ms Vasani.
20 The MTC is not their enemy. The MTC, you heard
21 Mr Zucula: We were trying to do all we could for
22 them. I explained to them what the law is.
23 I explained to them the tender process. I explained
24 to them *direito de preferência*. I even went to the
25 Council of Ministers, because he's a minister, three

1 times and said, look, let's give these guys a
2 chance, and that's what the Council of Ministers
3 says. They give them a chance to go negotiate with
4 CFM.

5 But this is not something new. It's not
6 like we start a new right or a new alleged right.
7 They've been negotiating for nine months with CFM,
8 so this is not a situation where the Council of
9 Ministers jumps in and says we're now changing the
10 rules of the game. No. They've already been trying
11 to negotiate and negotiating with CFM. Not
12 successfully, but they have.

13 And the Council of Ministers says, all
14 right, try it again. Even though the tender process
15 is going, we're going to give them some more time to
16 try it again. And so what do they say? What's
17 communicated to PEL? They're told: You got to
18 obtain a bank guarantee and some sort of agreement
19 from a mining company offtaker. So those are the
20 two conditions.

21 They initially provide the guarantee, but
22 they cannot get a mining company offtake, so this
23 has nothing to do with the MTC. We're talking about
24 a mining company, a third party. They are unable to
25 get agreement with a third party, just like they

1 were unable to get agreement with CFM, and so that's
2 where it dies.

3 But here I have bolded and highlighted in
4 my slide my previous point, that there was no
5 investment at this time. And the Council of
6 Ministers' statements can be interpreted as guidance
7 to continue to explore ajuste directo. That is
8 reasonable, and you want governments to be flexible
9 in that way.

10 These are the facts about what happened at
11 the Council of Ministers. PEL's conspiracy theory
12 utterly fails because PEL was provided the same
13 opportunity as all 21 bidders to participate in the
14 public tender except with the advantage of the 15
15 per cent scoring.

16 And who won? The winner was another
17 foreign company, and we'll get to that. But please
18 remember that. There's no discrimination. This is
19 not a situation where the foreign company loses and
20 claims, well, a local company won. That's not what
21 happened.

22 So going quickly now through the actual
23 treaty claims. There was no expropriation. Like
24 Waste Management says, non-compliance by a
25 government with contractual obligations is not the

1 same thing as, or equivalent or tantamount to, an
2 expropriation. A right to formal negotiations, says
3 Oxus Gold, cannot be subject to expropriation.

4 There was no expropriation here of any
5 concession. There was no expropriation of a right
6 of first refusal because there's no such right in
7 the MOI, and there was no expropriation of their
8 *direito de preferência* because they were provided
9 the 15 per cent scoring advantage and they
10 participated in the tender. There's just no
11 expropriation of any kind, so the only thing we have
12 left is really the FET standard.

13 But here, that's a tough one. There's a
14 high, very high standard, and the law says that
15 there's a high degree of deference provided to the
16 governments on how they carry out their PPPs, and
17 that's also what Baxter told you several times.
18 There was no unjust and arbitrary treatment because
19 they get the 15 per cent. Even the Council of
20 Ministers says go try it again. Go talk to CFM and
21 then also go talk to mining companies.

22 There was no sovereign act in pairing the
23 *direito de preferência*. They got the
24 *direito de preferência*. What we really have here,
25 and this is how I want to close, you have a party

1 that's complaining because they did not get a
2 specific result. They wanted to win the concession
3 whether by direct award or by a public tender, but
4 the law is clear. International law does not
5 guarantee a specific result to a party, and that's
6 what they're asking you to do.

7 They're asking you to essentially overturn
8 the decision, not of the MTC, but of an independent
9 jury and say never mind the winner; Mozambique, you
10 should have given it and ignored the decision of the
11 jury, you should have given to it PEL.

12 Now, if you were to issue that kind of
13 award, what kind of message are you sending out
14 there? The wrong one. And imagine the amount of
15 instability that you would create in the PPP
16 process.

17 And so on these grounds, we submit that
18 the claims should be dismissed.

19 Maybe we do have those two ships passing
20 in the dark that I had mentioned. There's no need
21 to put blame on either side, but here you just don't
22 have the elements that you usually require to find a
23 treaty violation.

24 With that, I'm going to turn it to my
25 partner, Dan, to address damages. Thank you.

1 by Mr Brown

2 **MR BROWN:** Good afternoon, members of the
3 Tribunal.

4 As we said at the outset of these
5 proceedings, PEL's damages claims are baseless and
6 that's true for several reasons.

7 I am going to step through for a couple of
8 minutes first the 2012 financials and the fact that
9 those financials demonstrate that the project was
10 non viable. I'm also going to talk a bit about this
11 TML project and how it compares to the PEL project
12 and the fact that it will not be built.

13 Then I will talk for a couple of minutes
14 about the DCF cash flows and the fact that they are
15 impermissible and speculative, before bouncing off
16 of that loss of chance issue, and then talking for a
17 few moments at the end about the negotiation damages
18 issue.

19 Dr Flores testified about the 2012
20 financials that PEL had produced as part of its
21 approval process for the PFS in this matter. In the
22 transcript at page 1288 he said very clearly that
23 the project is not worth pursuing because even
24 Versant, now Secretariat's, discount rate was over 7
25 per cent and because the free cash flow was under 7

1 per cent, that should be the end of the story. Back
2 then the project was not profitable.

3 The 2012 financials cannot be dismissed as
4 a worst case scenario. Dr Flores testified that's
5 simply not true. It's not the worst possible way
6 you could model cash flows. The assumptions were
7 not worst case assumptions. A zero per cent tax
8 rate for ever is not a worst case assumption.

9 100 percent efficiency on the rail line is
10 not worst case assumption. No concession fee,
11 maximum tons, and no cost overruns -- none of those
12 are worst case assumptions, and we did hear a bit
13 about whether or not the debt service ratios were,
14 shall we say, realistic debt service ratios, and
15 I would submit to the Tribunal that perhaps what
16 that would mean is that the way those debt service
17 ratios were geared, perhaps it was a best case
18 scenario for the lenders and a worst case scenario
19 for the equity holders, but that doesn't do anything
20 about whether or not the cash flow was there to make
21 the entire project profitable.

22 There are, however, two problems with the
23 2012 financials even if for some reason they were
24 assumed to be worst case, and the first of them is,
25 very critically, that PEL used those financials

1 submitted to Mozambique to obtain the approval of
2 the PFS. When asked directly for financials
3 regarding the project, they wrote a letter saying
4 that the project was financially viable on the basis
5 of those financials.

6 What we know, however, is that both the
7 Reply brief of PEL in this matter and PEL's own
8 quantum expert, Mr Sequeira, agree that one would
9 not use those 2012 financials without an NPV
10 analysis in order to determine that the project was
11 economically viable or financially viable.

12 Members of the Tribunal, it's an important
13 point. PEL obtained approval of the PFS on the
14 basis of a false and baseless claim that the project
15 was demonstrated to be financially viable, and we've
16 heard a little bit about the fact that the MOI was
17 contingent, and without taking anything away from
18 what my partner, Mr Basombrio, has said as well,
19 I will emphasise this point that whatever else one
20 would say about the contingencies, when the PFS was
21 approved on the basis of an incorrect statement
22 about the financial viability of the project, there
23 was no valid approval, the contingency still exists,
24 and there is no investment.

25 The other problem with the 2012

1 financials, even if one were to assume that they
2 were the worst case, is frankly, they still are the
3 only financials that PEL has ever proposed regarding
4 its own project. The other financials that we've
5 looked at, and we'll look at them a little bit
6 again, are TML financials regarding a TML project
7 with a longer rail line with more tons being planned
8 and different tariffs, a lot of different
9 assumptions. The key fact here is that if we are
10 valuing what PEL proposed, the 2012 financials are
11 the only financials that do that.

12 The economics do not justify the coal rail
13 project even at this point. TML -- and I'll pause
14 for a moment here, if I can, Tribunal, to mention
15 that there's a little bit of, shall we say,
16 inconsistency or incongruity in PEL's position here.

17 When PEL likes TML, they're happy to adopt
18 TML. There was a concession, and they assumed that
19 PEL would have done the concession exactly the same
20 way. There was a feasibility study and they think
21 that that would have happened as well. But then,
22 when the real world experience of TML has been that
23 this project has not been built, that one they
24 simply ignore.

25 But, in fact, the financial disclosures of

1 ITD, the majority 60 per cent partner in TML, still
2 disclose that the project is now in phases and that
3 neither the railway nor the deep sea port have been
4 built, and the port that's being built right now is
5 not a deep water port, and Ethos, which invested
6 \$400 million in half of that port, is not buying a
7 deep water port; they're buying a general cargo
8 port.

9 It continues to be the case that the ITD
10 financials indicate that the economics of the
11 project cannot be justified in the fact that they
12 say that phase 2 will only start when the project
13 can be justified.

14 And I think it's clear here, I want to
15 emphasise what Dr Flores said. In his opinion
16 testifying before you, based upon everything, he
17 says "I do believe that will not happen. The
18 economics are no longer there" to do the project.

19 But we have heard, members of the
20 Tribunal, about a video that exists, and perhaps one
21 is arguing suggests maybe the project is still
22 ongoing, but I want to emphasise -- and members of
23 the Tribunal, if you get a chance to watch it again
24 later, I've got some still shots in here, these
25 captions on this particular video were placed there

1 by PEL's counsel, and at about 2 minutes and 5
2 seconds into that video and it goes on until about 2
3 minutes and 40 seconds when the following is said:
4 "With no timetable for the start of construction" --
5 and they're talking about the deep water port and
6 the rail now -- "we are in a process of sensitising
7 mining companies to embrace this project" -- a
8 process to sensitise mining companies.

9 Respectfully I think that's a bit of
10 optimistic speak about well, we don't have it yet.
11 And I would submit that if one looks, for instance,
12 at in fact the PFS study itself, the one that PEL
13 submitted back in 2012, that PEL itself identified
14 that preferably some kind of understanding with
15 mining companies and form of offtake letters signed
16 would be appropriate, and it didn't happen, and it
17 hasn't happened.

18 And then even when we look at C-29, which
19 Mr Basombrio talked about, and one of the conditions
20 was the company must also present a statement,
21 agreement or take or pay memorandum with mining
22 companies in order to make the project in question
23 feasible, everybody knew then what the issue was,
24 that without buy-in of the mining companies, the
25 project would not happen.

1 So what's been happening with the mining
2 companies? Jindal's 2012 plan to ramp up capacity
3 has not happened. Rio Tinto bought into Benga for
4 \$3.9 billion and sold it for \$50 million, one of the
5 most disastrous acquisitions in the miner's history,
6 and I pause on that one for a moment to mention that
7 Mr Ho suggested that there was no reason that
8 Rio Tinto would have submitted its name to the
9 public tender in this matter unless they thought
10 that this project had value. Well, I'm quite
11 certain that Rio Tinto thought that its investment
12 into the Benga mine for \$3.9 billion had value. It
13 just turned out that did it not.

14 Then in January of 2012 Mitsui announce
15 that had it was selling its stake in the Nacala
16 corridor for \$1. There is no reason to guess or
17 suppose that Mozambique's coal mine's economic
18 issues would suddenly and certainly be solved by a
19 \$3.15 billion investment into rail and deep sea
20 ports.

21 Before I move off this issue, I will
22 mention one more thing. This slide happens to be
23 out of Dr Flores' presentation, and it's a chart
24 that both experts dealt with, both of them looking
25 at a comparison of the price of exports from

1 Mozambique versus other countries, and I want to
2 direct the Tribunal's attention to the lower bullet
3 point in the left that Dr Flores had said, that at a
4 cost for land transportation and port of US \$12 per
5 ton, Australia offers a cheaper alternative to the
6 US \$35 per ton tariff assumed by TML's own
7 feasibility study for Mozambican metallurgical coal.

8 What that means is that even assuming the
9 TML study were correct, they are not demonstrating
10 themselves to be competitive against better
11 exporters like Australia.

12 The underlying difficulty, of course, with
13 all five of Versant's damages numbers is that they
14 rely on a DCF analysis, and the DCF analysis is
15 impermissible. Where future profits are merely
16 possible and not probable, an award based on future
17 profits cannot be made.

18 I'm going to step through them very
19 briefly, with the Tribunal's indulgence here, and
20 I'm going to start with the ex ante valuation this
21 time around.

22 That is the one that, by concept, would
23 value based upon the information just ahead of the
24 breach, and what I want to focus there is that,
25 first of all, PEL does not use its own financials to

1 create an ex ante approach but, more importantly and
2 as one easy example of a problem, PEL ignores the
3 fact that in 2012, in 2013, the only information
4 about the cost of the project was a PFS at
5 \$3.1 billion, and their own expert, Mr Comer,
6 identified it at the stage of PFS, the feasibility
7 study stage, that the order of magnitude of error in
8 that cost estimate could be 25 to 40 per cent.

9 If one looks, members of the Tribunal, at
10 the next slide, and this is a sensitivities analysis
11 for the ex ante approach from Dr Flores that he had
12 in his presentation, I've identified in particular
13 the cost overrun line there, and that cost overrun
14 line has no assumption for Versant, and then if one
15 adjusts it to a 12 per cent cost overrun, the
16 ex ante analysis yields no damages. Never mind 25
17 per cent or 40 per cent, there are no damages.

18 I just want to note for just a moment here
19 that -- well, let me skip that one and just move on
20 for a moment because we can talk about the ex post
21 analysis as well.

22 This is the one that PEL most cares for,
23 and I want to emphasise here for a moment just how
24 much of the TML feasibility study PEL's expert has
25 engrafted, has used for its own. I wonder if we can

1 just blow up that last column there for a moment.

16:44

2 The source of the information that Versant
3 used, that Secretariat used, is almost entirely the
4 TML feasibility study. The problem of course is
5 that the feasibility study is not a reliable
6 indicator, as multiple documents had discussed in
7 our cross examinations, and, frankly, members of the
8 Tribunal, it's not simply because the articles and
9 intellectuals say that the feasibility study is
10 somewhat subject to concern; it's also because the
11 feasibility study has been sitting there for five
12 years, and the project isn't built. If the
13 feasibility study was so reliable that it could
14 simply be engrafted into a damages claim, you would
15 think something else would be happening other than
16 the project was sitting there not being built the
17 way it was projected.

18 I'm going to skip just a couple of slides
19 in the interests of time and focus for a moment on
20 what is slide 62, because I don't want the Tribunal
21 to come away with the idea that there are a couple
22 of problems, a couple of sensitivities with the DCF
23 analysis and the ex ante or the ex post, and on that
24 basis conclude that if one made one strong
25 assumption, you could actually find damages under

1 those.

2 The first bullet of Dr Flores' slides
3 solves that right now. It says the severity of the
4 impact that necessary and reasonable corrections
5 produce on Versant's analysis shows that Versant's
6 DCF valuation cannot be relied upon to quantify
7 damages in this case.

8 And if you turn to the next slide, there
9 is a whole series of those sensitivities, and it's
10 not just that you can find zeros, members of the
11 Tribunal, it's that reasonable adjustments create
12 those zeros.

13 I'll give you one example that Mr Ho
14 mentioned a while ago. Mr Ho described a concern
15 about the O&M costs, the operating and maintenance
16 costs that Dr Flores had looked at from a
17 sensitivity basis and said, look, Dr Flores hasn't
18 explained why it is you would adjust that because
19 Mr Sequeira made an adjustment, so why wasn't that
20 enough of an adjustment.

21 And Dr Flores' line item here -- and you
22 can see it on the O&M costs, percentage of revenues,
23 Versant's assumption is 34 per cent, and I'm going
24 to identify here that the reason for the correction
25 is supplied to the Tribunal as Patel's May 2012

1 financial projections. That is that the O&M costs
2 that Patel projected in 2012, if the Tribunal
3 remember, were based upon CFM having provided input
4 into those costs in Mozambique, and if one simply
5 uses a reasonable indication like that for the costs
6 instead of what TML had used, the answer is the
7 damages claim goes to zero.

8 There are other issues as well. I'm not
9 actually going to spend a lot of extra time dwelling
10 on those. I would submit the sensitivity tables and
11 Dr Flores' very thorough analyses of those for the
12 Tribunal's consideration.

13 I do want to talk for a moment about the
14 other alternative damages claims.

15 The first of those is a loss of chance
16 claim, and I asked Mr Sequeira while he was here
17 what that was that's literally just multiplying
18 90 per cent times the numbers that are immediately
19 above, that is the DCF analysis, and he said that is
20 correct. And his 90 per cent comes only from the
21 fact that counsel informed him that it was a virtual
22 certainty that the contract would be awarded, and
23 that is correct. And the Tribunal has heard no
24 other evidence of why 90 per cent would be a
25 rational number other than counsel assuming that

1 might be the case.

2 At their core, all of these theories are
3 based upon attempting to estimate lost profits for a
4 concession that never happened and a discounted cash
5 flow analysis is inappropriate for a project that
6 was never operative and the award based upon those
7 future profits would be wholly speculative.

8 In my last couple of minutes, members of
9 the Tribunal, I want to focus for just a moment on
10 the negotiation damages. We talked a bit in our
11 opening about the fact that negotiation damages were
12 imaginary negotiations, that they were difficult and
13 uncertain, that there's an artificiality to the
14 exercise, and I think we heard a lot about that
15 here.

16 Candidly, it's not entirely clear what PEL
17 ever hoped to show with its negotiation damages.
18 First of all, Mr Dearman had conceded before we ever
19 got started that it is not possible to attribute a
20 specific monetary value to each of these individual
21 supposed data points. It would have depended on the
22 negotiating position of each of PEL and Mozambique.
23 And, as the Tribunal may have heard, Mr Comer
24 attempted to testify establishing some consultancy
25 fee rates, but based upon South African guidelines

1 that do not apply and are not required to be applied
2 anyway, Mr Comer had a de-risking analysis that
3 Mr Larry Dysert, who authored the AACE materials
4 came in and said you may not use those materials for
5 that purpose, and those sorts of inputs into this
6 are not valid inputs. Those issues do not survive
7 scrutiny.

8 And then in our closing we saw that the
9 suggestion was perhaps a unilateral settlement
10 demand by PEL would be considered a negotiation
11 damage, and if you may pardon me saying it this way,
12 members of the Tribunal, that's a neat trick.

13 You make a submission to the other side
14 for what you'd like to get, and then you suggest
15 that that's evidence that you should get it. That
16 is not an appropriate measure of damages. But most
17 fundamentally here the difficulties are these.

18 I asked Mr Dearman: "In our hypothetical
19 negotiation at the point at which you're describing
20 a release fee at the time of the public tender, you
21 understand the profits would not be guaranteed on
22 the project that PEL proposed, correct?" And then
23 he went on to say "I'm assessing a hypothetical
24 negotiation. I haven't considered, and obviously
25 it's outside my expertise, to consider the various

1 issues that are before you legally and factually".

2 The negotiation damages are not a useful
3 point of information. But most fundamentally,
4 members of the Tribunal, damages like the entirety
5 of PEL's case, the burden of proof rests with the
6 Claimants. All of the times that the Claimants have
7 accused Mozambique of not bringing evidence, the
8 burden is on them, and throwing out all these
9 possible data points does not satisfy that burden.

10 As we've said more than once today, if PEL
11 had had an investment, if PEL had had proof of what
12 they'd spent on the PFS or the Preliminary Study or
13 even the bid, there might be something to talk about
14 here, but there is no non speculative damages
15 amount.

16 Members of the Tribunal, let me wrap up by
17 saying that, based on all of the foregoing that we
18 have presented throughout this week and a few days
19 of hearing, that we've presented today as well, and
20 in all of the written submissions, Mozambique is
21 entitled to and seeks an award as follows:

22 Dismissing PEL's claims as inadmissible
23 and alternatively declining jurisdiction.

24 Sustaining Mozambique's objection to
25 jurisdiction.

1 In the alternative dismissing PEL's claims
2 on the merits.

3 Awarding PEL no damages.

4 Ordering that PEL and its litigation
5 funder pay Mozambique's attorneys' fees and all
6 costs and expenses and, respectfully,

7 Granting Respondent Mozambique such other
8 and further relief as the Tribunal shall deem just
9 and appropriate.

10 On behalf of the Republic of Mozambique,
11 I appreciate the Tribunal's time this week. I do
12 appreciate opposing counsel's time and courtesy this
13 week and, with that, we respectfully conclude our
14 remarks.

15 Post-hearing issues

16 **PRESIDENT:** Thank you. Thank you very
17 much, Mr Brown.

18 Is there any follow-up question from any
19 of my colleagues? Dr Perezcano, no. And Dr Tawil
20 also not.

21 I think with this we now finalise the
22 hearing. I understand -- we spoke some time before
23 the break -- that parties will confer and that they
24 will come back to us in due course with some
25 proposals as regarding the development of the

1 post-hearing phase. Is that correct?

2 Ms Vasani?

3 **MS VASANI:** That is correct. We had
4 discussed the details of that. I'm not sure if
5 we've got confirmation on it yet from your side?

6 **MS BEVILACQUA:** Yes. Yes, we did discuss
7 the details. I think it's probably easiest for us
8 to submit it in writing, a joint proposal. I don't
9 think we have disagreement.

10 **PRESIDENT:** Very good. So you will in due
11 course, let's say -- because I think you have
12 another hearing somewhere?

13 **MS BEVILACQUA:** Yes.

14 **PRESIDENT:** You will in due course send us
15 your common position.

16 Very good. In the meantime, we have
17 tomorrow reserved for a preliminary deliberation.
18 We will take into consideration all the arguments
19 and all the evidence which we have heard during this
20 week. Now that we have it fresh I think it's a good
21 moment to review and think about it, and it is
22 possible, it is even likely that we will send you
23 some questions, which you then can take into
24 consideration also in your post-hearing submissions.
25 You may wish to have a submission only on the

1 questions or on the questions with a wider scope.

16:55

2 We leave that in your hands.

3 Please also give some thought to the
4 transcript. I was told by our secretary, and I had
5 forgotten, that I had given you bad advice and that
6 this transcript will be published, so since it will
7 be published and of course it involves a listed
8 company and a sovereign Republic, you may wish to
9 have a look at what will be published, especially as
10 we have had a minister of Mozambique deposing. I
11 think you will have to review it, I'm sorry for
12 that, but it is unavoidable that you will have to
13 review it. I had overlooked this element of
14 publication.

15 So you may also wish to establish some
16 rules among yourselves how you want to do that, and
17 how and when you want to publish the transcript.

18 OK. Very good.

19 So let me now double-check with our
20 secretaries, is there any further point we should
21 raise at this stage? No, no further point. And my
22 colleagues?

23 So I think we must start with thanks to
24 our team of interpreters. They are there, and what
25 I have followed has been an excellent interpretation

1 of really difficult technical statements and legal
2 statements, and we appreciate all the effort during
3 these days.

4 Then I would like to thank our court
5 reporters, who are here seated on their two thrones
6 here on the left and right. Thank you very much.
7 These have been long days, and we appreciate all
8 your efforts.

9 And, like always, my thanks especially to
10 the more junior members of your teams, who are
11 probably those who have worked hardest during these
12 days. It is always the young lawyers who work hard
13 so that the more senior colleagues can shine, and
14 evidently you have shone and you have done very good
15 work in supporting your seniors because this has
16 been a week with very, very high level of advocacy,
17 some very interesting exchanges between experts,
18 witnesses, and counsel. It's always a pleasure when
19 one sees a high level of advocacy, and it is also
20 pleasant to see that it is done with a strong
21 defence of the merits and of the rights of the
22 parties but that it is done with respect to each
23 other and with a collegial spirit.

24 So, with that, I close the procedure. You
25 still have some work to do before you get into

1 Christmas mood, but I wish you, after you have
2 worked hard in Lisbon, which is also a very nice
3 city, we wish that you relax during the holiday
4 season and postpone everything until after -- don't
5 do any further submissions before the holiday
6 season. I am sure that you deserve a good rest
7 after all this effort.

8 Thank you very much.

9 (The hearing was concluded at 4.59 pm)

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