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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

Monday, 28 November 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-ARMESTO

Co-Arbitrators:

PROFESSOR GUIDO SANTIAGO TAWIL
MR HUGO PEREZCANO DIAZ

Administrative Secretary:

MS SOFIA DE SAMPAIO JALLES

Registry, Permanent Court of Arbitration:

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Legal Counsel

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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 CHAÚQUE
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)

I N D E X

(9.30 CET, Monday, 28 November 2022)

Introduction by the Tribunal

PRESIDENT: Good morning to everyone. This is the hearing in PCA number 2021 Patel Engineering (India) versus the Republic of Mozambique. In this beautiful room of the Stock Exchange of Porto, I give the welcome to you and I thank our secretaries for the organisation of this unique venue.

Before we start maybe we can quickly introduce the teams. Ms Vasani, would you like to introduce your team?

MS VASANI: Thank you very much. I am Sarah Vasani. I'm lead co-counsel on this case. I'd first like to introduce my client, Mr Kishan Daga. Mr Daga is a special director at the Claimants and he will be the first witness in this arbitration and you will hear from him tomorrow.

The other members of my team, going down the row here, is Lindsay Reimschussel at CMS. Baiju Vasani, an independent practitioner who is shortly to join 20 Essex. Edward Ho, from Brick Court Chambers. If I go behind Mr Daga we have Ricardo Saraiva, from Miranda, Sofia Martins from Miranda, and Daria Kuznetsova from CMS.

PRESIDENT: Thank you, Ms Vasani. **09:32**

MS VASANI: May I just note that our counsel from Mozambique, Antonio Veloso from Pimenta, has withdrawn from this proceeding and the ICC proceeding in light of the recent majority order by the ICC Tribunal, so he will no longer be counsel of record in either case.

PRESIDENT: Very good. Thank you very much. Very good. So we now give the floor to the Republic of Mozambique, Mr Basombrio, if you would like to introduce your team?

MR BASOMBRIO: Yes. Thank you, Mr President, and members of the Tribunal. My name is Juan Basombrio. I'm a partner with Dorsey & Whitney, and with me is my client Angelo Matusse, and that's spelled Matusse. He's the deputy attorney general for the Republic of Mozambique and he's the gentleman sitting immediately behind me.

Also here are two of my partners from Dorsey & Whitney, Theresa Bevilacqua and Daniel Brown. Thank you.

PRESIDENT: Very good. Thank you very much.

So let us start. I understand there is a point of order which the Republic of Mozambique

would like to present. Is that correct, **09:33**
Mr Basombrio?

MR BASOMBRIO: That is correct.

PRESIDENT: I give you the floor.

Point of Order by Respondent

MR BASOMBRIO: Thank you. This relates to the issuance of the ICC injunction, and, respectfully, what the Republic of Mozambique would like to do is address that before you today and thank you for the opportunity to address that point with you.

I'm going to start by making four conclusory points that we want to make. Then I'm going to talk about what it is that the ICC has done. I want to explore a little with you the partial award and the Order and what its impact is, at least from our perspective.

Then I want to talk about why we believe that it would be impossible to proceed with the merits if we're going to respect those orders from the ICC. I also want to talk about why we believe that both the partial award and the injunction Order are binding, not only on our adversaries, Patel, but also on this Tribunal.

And finally, we want to make -- we want to

present our view, I should say, as to what we think the Tribunal should do. So if you would allow me, I'm going to proceed in that order. **09:35**

So in the first place, the four sort of summary points we want to make are that we believe this UNCITRAL Tribunal -- and we should remember that this is an UNCITRAL Tribunal -- should immediately suspend this arbitration in light of the partial award and injunction order, and that suspension should last only until the ICC issues its award so that Mozambique can preserve its contractual right to litigate the contractual dispute, for lack of a better word, in the ICC, and also so that this Tribunal can have the benefit of being able to review those adjudications, the final award from the ICC, and then decide for itself what's the impact on that, on the treaty claims.

The second point is -- and we say this respectfully to them of course -- that in light of the injunction, it is Mozambique's position that Patel is in violation of the ICC injunction order by showing up here today, and also because they did not communicate to this Tribunal before the start of this hearing that they were going to abide by the injunction order.

This is perhaps needless to say, but just to have a complete record, I want to indicate that Mozambique is participating under protest without waiver of the injunction, without prejudice and reserving all rights. And, again, I say that respectfully to this Tribunal, but of course we have to make those points on the record. **09:37**

The third summary point is that we do not believe that this Tribunal should do anything that's considered, from an objective perspective, as not providing the proper amount of deference to the ICC Tribunal. The PCA Tribunal and ICC Tribunal are immensely well respected institutions, and so we recognise that here today we have a difficult situation and it has to be resolved in a prudent way and in a reasonable way, and we believe that what we have suggested is the way to proceed.

Similarly, there's the other side of the coin, which is Mozambique's perspective. We submit that by going forward we're going to injure Mozambique's rights to have the underlying contractual disputes decided in the ICC, and it puts Mozambique in an untenable position.

So having summarised our four points, let me turn, please, first to what has happened in the

ICC. **09:38**

So we have two things that operate here today. One is the partial award, which you already have. It's R-92. And the second is Procedural Order 14 with the corrigendum, and I'll just refer to those as the injunction order that was provided to you as well.

What they have adjudicated in the ICC is that the ICC has exclusive jurisdiction to determine any matters in dispute between the parties arising out of the MOI, and Patel is enjoined from pursuing a determination of such matters in this arbitration.

Now, Patel agreed to arbitrate any disputes arising out of the MOI exclusively in the ICC, and in the injunction order the ICC Tribunal has confirmed that that's the case, and I'm going to read a few portions of that injunction order because I do believe that the words that the ICC uses are very important and show the ICC Tribunal's degree of deference towards this PCA Tribunal. I think it is very clear from that order that the ICC Tribunal does not want to step on your shoes, but they also want the same level of respect afforded back to them, and I think that's what they tried to express very carefully in their Order.

So in paragraph 65 the ICC Tribunal says **09:40**
"As we have already stated in the partial award" --
now, this is a key point, because the injunction
order is not a separate order on a new issue
standing by itself. Right away the ICC Tribunal
says "we are elaborating farther on the partial
award", and this is very important, the connectivity
between the injunction order and the partial award
are very important, because undoubtedly, as we will
see, the partial award is a final binding
adjudication under ICC rules.

So the ICC Tribunal says the Respondent,
Patel -- that's Patel in that case -- never
contested that it has the obligation to submit any
disputes arising out of this memorandum, the MOI
between the parties, under ICC rules. Confronted
with the Claimant's, in that case Mozambique and the
MTC's arguments that the Arbitral Tribunal's
jurisdiction would be an exclusive one, the
Respondent has argued that this jurisdiction would
not be exclusive.

Now, what Patel went in front of the ICC
and said was you have to decide whether your
jurisdiction is exclusive or it's concurrent.
That's their main argument.

The ICC in the partial award decided it's exclusive. It is not concurrent. And this is why, in paragraph 66 of the injunction order, the ICC says "the partial award does not allow such a conclusion", that is concurrent. "On the contrary, this Tribunal stated that it is clear and undisputed that the parties have agreed that they have the right and obligation to have any dispute arising out of this memo under Mozambican law resolved in the ICC". **09:42**

In the partial award the Tribunal insisted that the parties are bound to the specific dispute settlement agreement to have their contract issues arising out of the MOI to be decided in the ICC, which the Tribunal expects them to honour.

In the next paragraph, 67, the ICC says that there is, therefore, no place for any doubt that it was, in the partial award, and still is the understanding of the ICC Tribunal that Patel did, and still does, have an obligation to refrain from proceedings before the PCA Tribunal or any other court or tribunal insofar as they concern any dispute arising out of this memorandum, the MOI.

So right away the ICC Tribunal is being very careful in how they draw the line, and they're

drawing that line around a box of disputes -- not claims, disputes arising out of the MOI -- and, as we will see, the reason why they talk about disputes is because the ICC clause talks about disputes, and disputes have a different meaning than claims. **09:43**

In the next paragraph the ICC concludes that Patel's "attempt to requalify the jurisdiction resulting from the MOI as 'concurrent' rather than exclusive is, therefore, misconceived. Not only is there nothing in the unequivocal language used in the MOI to suggest that the jurisdiction conferred to this Tribunal would be in any way concurrent, but this Tribunal has clarified in its partial award that it understands its jurisdiction to be exclusive".

So this is an important point. It's the partial award that has decided that the ICC has exclusive jurisdiction over those issues, and there's no doubt that the partial award is binding today on Patel under the ICC Rules. We don't have to go to court and convert to it a judgment, we don't have to do anything, and we will get to that in a little while.

Now, when we had the initial hearing that led to the partial award, we asked the ICC Tribunal

to enjoin Patel at that time, and the ICC Tribunal said we're not going to do that right now, we're going to reserve our rights because we want to give Patel the benefit of the doubt. We want to see if Patel is going to abide by our partial award. And that's why, in paragraph 7, the ICC -- 70, I'm sorry, the ICC Tribunal says that they did not initially enjoin Patel because it was "confident that in the light of its decision the parties will be able to coordinate and use the available jurisdictions in the reconciling spirit of such mutual respect between international arbitration tribunals for their respective jurisdictional spheres, which this Tribunal also trusts the PCA Tribunal to share". **09:45**

In other words, the ICC Tribunal -- and these are now my words -- would adjudicate --

PRESIDENT: Mr Basombrio, let me -- do we need the interpretation? Because I see the interpreters are interpreting. I'm not seeing anyone listening to the interpretation, and can I just double check with you? Do we need the interpretation?

MR BASOMBRIO: No. I don't think we do at this time.

PRESIDENT: It's not being recorded either. **09:47**

MS JALLES: Some people are connected to Zoom. I'm not sure whether they need --

PRESIDENT: Do they need Portuguese translation?

DR TOLEDO: The option is there so they have the possibility to choose a channel.

PRESIDENT: I just wanted to be sure that the interpreters are not doing their work unnecessarily. But it's good and bad news for the interpreters, your services are needed, so you will have to continue.

Sorry, Mr Basombrio, but I always like that interpreters, when they do their job, that it really has helped. Thank you for indulging my interruption.

MR BASOMBRIO: No problem at all, and being economical and efficient is in everyone's benefit. Thank you.

So let me go back to the point I was making as to why it is that the ICC Tribunal did not enjoin Patel. As I read, they basically gave them the opportunity to comply themselves.

And then the ICC Tribunal says that it

trusts the PCA is going to have a similar approach, and so in other words, from our perspective the ICC Tribunal will adjudicate disputes arising out of the MOI, and this UNCITRAL Tribunal will adjudicate the treaty claims. **09:48**

Now, we want to tell you that Mozambique has complied with this approach. In the ICC, Mozambique has amended its Statement of Claim. We sought declaratory relief not only over the underlying contract issues but we sought initially declaratory relief that there were no treaty violations. We have amended our Statement of Claim and deleted all references to any treaty claims, so when I come here today and I'm asking you to respect the injunction and suspend, I'm not saying it with empty words. We have taken that position and have withdrawn all those claims or all relief requested related to the treaty claims from the ICC.

Now, in the view of the ICC Tribunal, Patel did not respect the partial award, so this is what the ICC Tribunal says, and since this is not being recorded I'm going to refer you again to the citations. This is the injunction order at paragraph 71, and this is what the ICC says.

"This confidence [that Patel would abide]

appears to have been misplaced. Despite the clear **09:50**
invitation 'to coordinate, and use, the available
jurisdictions' in the light of the allocation of
jurisdiction decided in the partial award, the
Respondent has done nothing of that sort to respect
its obligation under the MOI. The above passage was
not as purported by the Respondent a form of
endorsement of some concurrent jurisdiction of the
two Tribunals in tandem for 'any dispute arising out
of the MOI'. Any such dispute 'shall be referred to
arbitration' under the ICC Rules and is within the
exclusive jurisdiction of this Arbitral Tribunal".

So the Tribunal concentrated on the word
"shall", S-H-A-L, in the arbitration clause. Also,
let me note as an aside here, that in the partial
award the Tribunal in the ICC specifically held that
it did not have jurisdiction over the treaty claims.
So not only have they said we have no jurisdiction
over the treaty claims, only the contract claims,
but Mozambique has abided by that ruling and
withdrawn all of its declaratory relief related to
any treaty claims.

Now, during the ICC injunction hearing,
Patel made some statements to the ICC Tribunal which
were quite aggressive, and these are some of the

reasons that tipped the ICC Tribunal into issuing the injunction, besides the fact that in their view, Patel had not abided by the partial award. **09:52**

I must say that even today, as we sit here today, Patel has not said they're going to abide by the injunction. This is what the ICC injunction order states.

In paragraph 82, Respondent reaffirmed its conclusion that there would basically be nothing left to be decided by this Tribunal once the PCA Tribunal has decided on the claims and Respondent explained that this would be by design.

The ICC Tribunal was very troubled by the fact that Patel would tell it directly, with the strategy that we have there's going to be nothing for you left to decide after the PCA decides, and this is what we, Patel, want. We want to pull the rug from under your feet.

The ICC Tribunal also quotes this statement by Patel in paragraph 82. "We really say the claims here are really nothing; that is why you are left with nothing". Then the ICC Tribunal also quoted Patel's statement during the ICC injunction hearing again that "granting the relief requested by the Claimants 'ultimately would not prevent the

UNCITRAL arbitration from proceeding in any event'". **09:54**
That's paragraph 95.

Now, to us, Patel's suggestion that even an ICC injunction would not prevent this UNCITRAL arbitration establishes Patel's premeditated intent to violate the injunction, and it is entirely presumptuous and perhaps mistaken of Patel to assume that this UNCITRAL Tribunal is going to ignore and disregard an ICC injunction before that injunction has even been issued, and to say that to the ICC Tribunal we find disrespectful.

This is why the ICC Tribunal observed, in paragraph 95 -- and this is their words. "It is remarkable that the Respondent puts forward an anticipated lack of respect for this Tribunal's order as a ground for not granting the order in the first place".

Now, finally, and this will be my last citations of the order, the ICC Tribunal addressed the issue that the treaty claims are based on alleged rights arising out of the MOI. And you know there's an issue, how do you deal with that, right? So the exclusive versus concurrent jurisdiction was one of the two major points in dispute; this is the second major point in dispute between the parties,

and this is how the ICC Tribunal resolved it. **09:55**

It said, "To the degree that the resolution of the Treaty claims depends on the adjudication of a dispute arising out of the MOI and properly before an ICC Tribunal with (exclusive) jurisdiction over 'any dispute arising out of this MOI', this Tribunal needs to insist on deciding these issues exclusively".

So that's at paragraph 84.

Then it says, "In this respect it is sufficiently clear that the dispute arising out of the MOI, even if one were to accept that that is a mere question of fact for the Respondent's claims under the treaty, needs to be resolved exclusively in accordance with the terms of the MOI".

And in paragraph 88 the Tribunal concludes, "According to the Respondent's own admission, it has requested the PCA Tribunal to adjudicate claims that, despite their non contractual causes of action, will require other tribunal to determine numerous contractual matters in dispute arising out of the MOI. This is *prima facie* a violation of the arbitration agreement in the MOI and risks rendering virtually moot the mission of the ICC, which has exclusive jurisdiction

over those matters. It follows that Patel" -- I'm **09:57**
sorry -- "Mozambique has a *prima facie* claim that they're entitled to the relief that we were seeking".

So let's turn now to the relief that was provided, and you have it already but I will read the ICC injunction order. So it says that the Respondent, Patel, is enjoined from pursuing the determination of any matters in dispute between the parties arising out of the MOI in any other forum, even if only accessorily, for the purpose of adjudication of treaty claims until this Arbitral Tribunal has taken its decision on those matters.

So we believe that that injunction order is very carefully and very narrowly tailored.

First, it's directed only at Patel. Second, it enjoins Patel from pursuing the determination, so the word "pursuing" means that Patel violates the injunction by prosecuting this arbitration, by doing what they're doing right now. It talks about determination.

A determination includes what this Tribunal is doing right now, or would be doing, I'm sorry, if you went on to the merits. But the injunction is limited to any matters in dispute

between the parties arising out of the MOI, which trails the arbitration clause, and, to remove all doubt, the injunction order specifies that Patel is enjoined from pursuing the determination of such disputes "even if only accessorily for the purpose of adjudication of treaty claims". **09:59**

Now, therefore, it is impossible for Patel to proceed with this UNCITRAL arbitration without violating the ICC injunction order, because Patel is pursuing a determination of matters in dispute between the parties arising out of the MOI. Again, we're talking about matters in dispute, and I don't have to go through all that again, but I will give you some examples.

They say they have their version of the MOI, we have our version of the MOI. They have their understanding of what it means; we have our understanding. They claim they have rights; we say they don't have rights. These are all the matters in dispute. What happened in the public tender, what's the effect of the public tender -- all of these things are matters in dispute arising out of the MOI. Without the MOI, there would be none of that. And they're asking you to consider, determine, and adjudicate all those matters. It

doesn't matter whether it's done in the context of an international claim or a local claim. Those are disputes, we think those claims, that have to be adjudicated. **10:00**

So if we went forward, the first time that they use the word "MOI", I would have to object. It's impossible to go forward. So I want to remember -- I'm sorry, I want to remind the Tribunal that we have tried to do everything possible to come to you first, and we came to you on a bifurcation motion, we came to you before and after the partial award, and we asked you to decide these issues first as preliminary matters before we got to this point where everyone's sitting here.

It was Patel who convinced you not to do that repeatedly. They told you don't decide it now. You can't. It's intertwined with the merits. You have to wait. And they convinced you to wait.

And then when we brought you the partial award, they told you still don't decide it now, the partial award has changed nothing, and they convinced you to wait again. So the reason why we are in this predicament today is because of Patel.

Now, while they were telling you that, what did they do? They went to the ICC Tribunal and

said stay this arbitration, so they voluntarily speeded up the issue at the ICC. Instead of waiting to make their arguments at the merits hearing, they said decide that right now and put an end to this while the PCA decides. That's where we went in and we said no. Not only should you not stay, but what you should do is enjoin them instead. And that's why the ICC decided, and that's why the ICC decided first. **10:02**

But I just want -- my client wanted me just to re-emphasise --

PRESIDENT: Do you have much longer to go, Mr Basombrio?

MR BASOMBRIO: I think about 15 minutes.

PRESIDENT: OK. Can I get a time check for you?

MR BASOMBRIO: A what?

PRESIDENT: A time check.

MS JALLES: Yes. It has been 29 minutes 18 seconds.

PRESIDENT: Half an hour. You have gone for half an hour.

MR BASOMBRIO: I anticipate 15 minutes. This part will go faster.

So, finally, we believe the ICC award and

the injunction are binding on Patel and this Tribunal, as I said and let me give you the seven reasons why. One is the ICC Arbitration Rules. **10:03**

If you look at the cover letter from the ICC, that's R-94, this is what the ICC said. "We remind you of your obligation under article 35.6 of the Rules which provides every award shall be binding on the parties, thus by submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such a waiver is validly made".

So under article 35.6 the partial award is binding and is binding on Patel, and the order of enforcement, the injunction order, is part and parcel and accessory to the partial award because that's what it was interpreting. So under ICC Rules this is a binding, final, res judicata issue. It removes it from the dispute in this case.

Now, we have cited the Waste Management case about res judicata. It applies in that international sphere, and so we believe the second reason why the award is binding and the injunction is binding is on the principle of res judicata, as

explained in Waste Management, RLA-160 at paragraph 39. **10:05**

Third, the third reason why the award and the injunction are binding is under Dutch law. If you look at the Civil Code, and you can look at it at dutchcivillaw.com, the article is 1075. It says that the Netherlands will follow the New York Convention, and, as you know, article 2 of the New York Convention requires signatory states to enforce arbitration clauses, and so this has been incorporated explicitly into Dutch law, courts in Holland have an obligation to enforce those arbitration clauses, and that would require also enforcement of the partial award.

To us, the fourth reason why the partial award and the injunction are binding is that -- especially the injunction -- we need to recognise the rule of law. The rule of law requires that sister tribunals respect and enforce lawful orders and judgments of other sister tribunals, and that's what we have here.

International comity would be the fifth point. I don't need to explain that. It's self-evident.

The other two reasons why this Tribunal

should suspend are important. If we proceed with **10:07**
the merits, we are risking substantial waste here. You know that under the New York Convention, article 5, an award can be vacated if jurisdiction was exceeded, and that's the problem here. We have a res judicata decision from the ICC that takes away the issues. If this Tribunal were to decide those issues, we believe, respectfully, that it would subject a final award to being vacated under the New York Convention.

When you think about it, there's really no reason why you have to proceed with the merits today, there's no valid legal reason, and what makes more sense is to wait now and see what the ICC has to say.

The last point I want to make is I want to talk about the integrity of this proceeding. You know, we asked you to suspend last Friday, and the Tribunal sent that e-mail saying we're moving forward. Now, that e-mail was sent before you ever heard anything from Patel. Patel didn't say we don't want you to go forward.

And now Patel is using that e-mail as a shield. When they sent the core bundle they said we're here, we're giving you the core bundle because

you've told us to come here, and this is going to create an issue for my client now because if I try to seek some sort of contempt order against Patel, they're going to say we were told by the UNCITRAL Tribunal to show up. **10:08**

Now, I believe that was not the intent of the Tribunal that you were basically just telling people, look, everyone is travelling, let's talk about it on Monday, and nothing more, but I say it on the record because I want to make sure I just reserve our argument for the future that that's all that this Tribunal intended, let's just talk about it all together when we're here on Monday.

So to conclude, we make four points. Number 1, it's impossible to proceed without violating the partial award and injunction. Number 2, we believe PEL is in violation. Number 3, if we proceeded onto the merits we believe our client would be prejudiced, and therefore we believe that on the basis of mutual respect, we urge this Tribunal to recognise and uphold the partial award and injunction order and suspend this arbitration until there's a final award in the ICC.

And I know I spoke for a long time, I want to thank the attorneys for Patel, Mr Daga, and the

Tribunal for giving me the opportunity to set forth our thoughts. Thank you. **10:10**

PRESIDENT: Thank you. Thank you, Mr Basombrio. Let us get a time check from the secretary.

MS JALLES: Respondent used 35 minutes, 51 seconds.

PRESIDENT: 35 minutes. Let's do the following. It's now 11.10. Let's break. How long would you need, Ms Vasani?

MS VASANI: We're happy to either proceed or break for five to ten minutes.

PRESIDENT: Five minutes? Whatever you prefer.

MS VASANI: Let's do ten minutes.

PRESIDENT: Ten minutes. Very good. So we are back at 11.20 -- no, 10.20. The computer is on Spanish time.

(Short break from 10.11 am to 10.23 am)

PRESIDENT: We now resume the hearing, and I give the floor to Claimant.

Reply by Claimant

MS VASANI: Mr President, members of the Tribunal, I'd first like to thank the Tribunal for its direction of last Friday confirming that the

hearing would take place following the receipt of the majority order. Now, Claimant was obviously shocked and disturbed by that majority order, both in relation to its content and also its timing, on the eve of the hearing when our efforts should have been focused on preparing to present PEL's treaty claims before this Tribunal. **10:23**

It was especially shocking, given that this was Respondent's sixth attempt to enjoin PEL before the ICC Tribunal from proceeding with this arbitration with all others being either ignored or rejected, and the fact that this particular application had been pending for over six months.

I will structure my comments this morning as follows.

First, I'd like to take the Tribunal through what the majority opinion actually requires. Second, I'd like to respond to some of the Mr Basombrio's comments. Third, I'd like to discuss how the majority order violates PEL's due process rights, and, fourth and finally, I'd like to invite this Tribunal to make directions in respect of this situation.

Now, despite what you've heard from Respondent, there are no grounds to stop this

hearing from proceeding. The ICC majority order specifically states that it is not attempting to enjoin or impede this treaty Tribunal from hearing all matters within its jurisdiction, and that's at paragraphs 85 and 99 of the majority decision. **10:25**

Further, Claimant's understanding is that the majority injunction does not prevent Claimant from appearing at this hearing, notwithstanding what Respondent argues. Indeed, the ICC majority specifically rejected Respondent's request to enjoin Claimant from participating in the hearing because the ICC majority saw that as going "beyond the bounds" of what was adequate, and they did that at paragraph 97 of their majority opinion.

Instead, the ICC majority has enjoined Claimant from, and I quote, "pursuing the determination of any matters in dispute between the parties arising out of the MOI in any forum, even if only accessorily for the purposes of adjudication of the treaty claims", end of quote.

And they've ordered that until they make a final determination in their proceedings. According to the majority, this is an in personam order against my client but it changes nothing as far as this arbitration is concerned.

I'd like to just quickly note a few comments about the points that Mr Basombrio made earlier. **10:26**

First, he made most of his presentation in relation to the partial award and what he purports and how his client interpreted the partial award. I would just like to draw the Tribunal's attention to the dissenting opinion at paragraphs 13 et sequence where certainly the dissent and my client were not of the view that the partial award prevented us from pursuing our treaty claims.

And I'll note at paragraph 139 of the partial award, the Tribunal found that "Any obligations arising out of the MOI -- and thus any dispute over such obligations -- appear to be, from that perspective, merely accessory and preliminary questions for determining the dispute between the parties over the alleged violations of Respondent's rights under the Treaty and thus the availability of remedies provided by that treaty under international law".

So in our perspective, the majority order is contrary to what they found in the partial award.

The other point I'd like to make is that Mozambique says it complied with the partial award

by stripping the treaty claims from its statement of case. While that's partially true, it took some of them out after two bites of the apple because it didn't do so initially, and even after doing so it has still left in a number of claims and evidence that is completely irrelevant to the contractual dispute. PEL has no affirmative claims under the ICC arbitration and yet, there are pleadings in abundance about PEL's DCF valuations, for example, in the treaty claims. **10:28**

Now, PEL didn't comply, that's the other point that I want to raise. That was the allegation made by Mr Basombrio. I will state that my client believed it was in compliance in light of the 20 years of jurisprudence that confirms the distinction between contract and treaty claims. Indeed, Mozambican law allows for a court or tribunal to consider ancillary or preliminary matters that are necessary to decide the claims before it even if another tribunal or court has jurisdiction over related matters.

Now, as far as the criticism that was cited in the majority order about PEL saying there was nothing to decide, that was completely taken out of context. The reason that PEL said there was

nothing to decide was given after we stated that the damages claims that Mozambique makes in that case are for putative and nominal damages. Putative and nominal damages do not exist under Mozambican law. PEL has been very clear about that, and Respondent has never provided any evidence to the contrary. **10:29**

Second, the other claims in the ICC case are tort claims, and we say that that Tribunal doesn't have jurisdiction over tort claims such as defamation because they do not arise out of the MOI, and in any event they'd be barred by the statute of limitations.

And finally, the remainder of the relief that is sought by Respondents in that case is declaratory, and what PEL's position is is that you're not allowed to just give advisory declarations. It has to go to a legal right. And that is the reason we said there would be nothing left to decide because one of the declarations they seek is that the MOI is not binding. If that is true and the ICC Tribunal determines that to be true, then all of their claims would be barred by the statute of limitations.

That is the context in which PEL said that there would be nothing left to decide. In fact,

there would be lots of things to decide but there would be nothing left of substance to Mozambique's claims, and that's by design, because this was an attempt to essentially bring the treaty claims to the ICC Tribunal in the first instance. **10:30**

I'd like to now move on to explain how the ICC majority order violates my client's due process rights.

Even with this supposed narrow scope I've already explained that the order actually doesn't prevent from you pursuing this hearing. It actually is an in personam or purports to be an in personam injunction against my client. But, nevertheless, the majority order is incongruous and unprecedented. It is breathtaking.

Could I ask the Tribunal whether it has had the opportunity to review the dissenting opinion which Mozambique initially did not send or mention to the Tribunal?

PRESIDENT: (Nodded)

MS VASANI: I believe we have copies of that as well as Procedural Order 14 and the corrections to Procedural Order 14 before everyone.

Claimant is in full accord with the dissenting opinion as that dissent points out, "This

type of injunction has never been issued before and it directly contravenes 20 years of settled jurisprudence". The dissenting opinion also makes clear that the injunction goes beyond the ICC Tribunal's competence as it "enjoins a party from making certain arguments before a different arbitral tribunal whose jurisdiction is based on a different instrument of consent than the one that empowers this Tribunal. By silencing a party before a different tribunal, the majority effectively strips that other tribunal of its Kompetenz-Kompetenz". **10:32**

It would seem obvious that the other tribunal should decide what a party can and cannot argue before it, not our Tribunal, and that was the dissent at paragraphs 1 and 2. The ICC majority issued its injunction at least partially based on its belief that this Tribunal would defer to the ICC Tribunal's findings on all disputed issues of fact relating to the MOI because in the majority's view, and I quote, "the dispute arising out of the MOI, even if one were to accept that this is a mere question of fact for PEL's claims under the treaty, needs to be resolved exclusively in accordance with the terms of the MOI. Further and without explanation, the majority has decided that this

presumed deference to its findings should limit this Tribunal from even hearing evidence from Patel on any issues related to the MOI". **10:33**

This was repeated by Mr Basombrio this morning when he asked you to give deference to the ICC majority. Nothing that this says will impede the ICC Tribunal, and nothing that you decide will impede the ICC Tribunal from deciding its separate contract claims. They have free rein to do that. But what they are doing here, in the words of Mr Basombrio, is stepping on your shoes.

Now, this has placed my client in an untenable position in two ways -- or at least two ways.

First, any restraint by PEL in what it argues will necessarily impede this Tribunal's jurisdiction, as due process requires this Tribunal only to rule upon arguments made before it. If PEL is silenced by the injunction, it will remove particular issues from this Tribunal's jurisdiction. This infringes PEL's due process rights under the BIT and under article 10.36, subsection 2 of the Dutch Arbitration Act to present its treaty claims before the Tribunal as scheduled.

Second, my client's due process rights are

also infringed given that the injunction seeks only to silence Claimant from pursuing the determination of issues related to the MOI, while leaving Mozambique free to make any arguments it wishes. Under the majority order Mozambique can make all of those jurisdictional arguments about a purported lack of investment, about the MOI not being binding, and PEL would be forced to simply not respond. Neither of these two due process violations is tenable as a matter of either Dutch law or international law. **10:35**

Thus, what is critical for my client is this Tribunal's position on what it wishes to hear this week and whether it will confirm its previous orders, and as a reminder of those previous orders I would turn the Tribunal to its Procedural Order No 3 where the Tribunal rejected Respondent's motion to bifurcate. It did so because it agreed with Claimant that in order to assess Respondent's objection that there's no investment, this Tribunal would have to assess issues related to the merits. Those issues included, among other things, all the rights under the MOI associated with the project.

Now, in PO4 this Tribunal found that a stay "pending a decision by another Tribunal

constituted on the basis of a different agreement is not justified", and that was for several reasons. First, Respondent's agreement to the procedural calendar in the UNCITRAL proceedings and its refusal to consolidate the ICC proceedings with the UNCITRAL proceedings. Second, the fact that a stay of the UNCITRAL proceedings would cause unreasonable delay and nothing in applicable legal standards provides for a *sine die* suspension of an ongoing arbitration, particularly when the procedural calendar has been agreed for quite some time. **10:36**

Third, "Despite the overlap between the two proceedings, a stay of these proceedings pending a decision by another Tribunal constituted on the basis of a different agreement is not justified because the respective causes of action appear to be quite different, considering not only that one proceeding is based on the treaty and another one on the MOI, but also that although the same parties are involved in both arbitrations, their corresponding rules of Claimant and Respondent are reversed".

Then, when Respondent tried once again to stay the proceeding by letter, this Tribunal reiterated the same three reasons from its first stay decision. It noted that nothing had changed,

regardless of the issuance of the ICC partial award. It further reiterated that the causes of action and instruments of consent are different in each proceedings, and there was no good reason to revisit the first stay decision and stay these proceedings particularly before the hearing on jurisdiction and merits has been held. **10:38**

And that is letter A-39, for the Tribunal's reference.

Now, further and as the dissent points out, there is functionally no difference between the majority order, which essentially is an anti arbitration order, and an anti arbitration injunction from a Mozambican court. Court order anti arbitration injunctions have been attempted in the past against treaty tribunals and they've been given short shrift. Both parties have consented to your jurisdiction and in particular your mandate to determine how your proceedings should be run and what falls under your jurisdiction.

I have been instructed by my client to present its case in full if this treaty Tribunal considers that the ICC majority order does not fetter its jurisdiction and directs that the full hearing should unfold as scheduled.

And with that, Mr Chairman, I'm happy to answer any questions from the Tribunal. **10:40**

PRESIDENT: Thank you, Ms Vasani. Is there any question for the parties?

PROFESSOR TAWIL: Not from my side, Mr President.

MR PEREZCANO: Not from me.

PRESIDENT: Very good. So we will now break for the Tribunal to deliberate, and we will come back. We'll let you know through the secretaries when we are ready to resume the hearing. Thank you.

MR BASOMBRIO: Thank you, Mr President.

(10.41 am)

(The Tribunal withdrew to confer)

(10.58 am)

Decision by the Tribunal

PRESIDENT: Thank you for waiting. We resume our hearing. The Tribunal has had the opportunity to deliberate, and we have come to the following conclusion.

There is a basic distinction in the type of disputes which can be resolved by arbitration. There can be international law disputes which derive from a treaty breach and there can be contractual

disputes which derive from breaches of contract, and as you know, and as we have said in our previous decisions, this is an international law tribunal constituted under the BIT between India and Mozambique. We are an international law tribunal, and the scope of our jurisdiction is restricted to international law disputes which imply a breach of the obligations assumed by the Republic of Mozambique under its BIT. **10:59**

The second point is that we have, as an international law tribunal constituted under the BIT and the UNCITRAL rules, we have the right and the duty to define our own jurisdiction. This is a basic principle of international arbitration.

And to make it very clear, this principle is unaffected, is unfettered by any order issued by any other arbitration tribunal.

The third point is that we reiterate what we said in our PO3 and PO4 in our previous decisions. There is nothing there which we would like to change at this stage.

Fourth, we direct that the hearing should proceed as scheduled if Claimant wishes the hearing to proceed.

And the fifth point, we will issue in due

course a reasoned written statement explaining our **11:01**
decision.

So, regarding the rest of the day, there are two other points of order which are outstanding, it's the presence of Dr Flores and the incorporation of certain documents which has been requested by Claimant. We will address these two issues at the end of the hearing today.

We acknowledge receipt of the opening statement by Claimant, we give it the number H-1, and we give Claimant the floor to start its opening presentation. Ms Vasani, you have two and a half hours. Please bear in mind that, A, you are being interpreted and, B, you are being transcribed, and you will have to make pauses and you will have to make a break in the course of your presentation. We'll see whether we can survive hunger before lunch time. If we can, it would be ideal that we finish before lunch time; if not we will break for lunch and continue after.

Mr Vasani, you have the floor.

MR VASANI: Thank you, Mr President. The floor falls to me.

PRESIDENT: Sorry, that was not intended!

MR VASANI: Not at all, sir.

Two quick points, if I may. We will **11:02**
therefore continue on the basis of the Tribunal's order, and strictly on the basis of that order. That's point number 1.

Secondly, I did hear Respondent's counsel iterate that it will object as soon as I mention the word "MOI". Perhaps rather than interrupting my opening we can note Respondent's counsel's objections and you could put that now as a sort of standing objection, and I'll cede the floor.

MR BASOMBRIO: Thank you, Mr Vasani.

Of course Respondent is going to reserve all rights, we're proceeding under protest, as I indicated earlier. We will have a standing objection so as not to interrupt your presentation, Mr Vasani, if that's OK with the Tribunal, but I do not believe that Claimants have answered the question presented by the president of the Tribunal. As I recall what the Tribunal just said was "we will proceed if that's what the Claimant [Patel] wants us to do". I believe that answer needs to be provided before we can proceed, pursuant to the ruling of this Tribunal.

PRESIDENT: Thank you. Mr Vasani, you have the floor. Please.

Claimant's Opening Statement **11:04**

MR VASANI: Thank you, sir. So good morning, members of the Tribunal. It is my distinct honour to present -- sorry, did you want me to answer the question of Respondent or continue with my opening?

PRESIDENT: Let's go to the opening statement.

MR VASANI: Thank you. Can the members of the Tribunal either see the screen or do they have hard copies in front of them?

PRESIDENT: I have it.

MR VASANI: Thank you. As I said it's my honour to be before such a distinguished Tribunal in what I would say is resplendent surroundings. We're not quite at the Peace Palace but I think very, very close -- perhaps even better.

In the time allotted by the Tribunal our opening statement will go as follows. I'm going to cover Claimant PEL's affirmative case on liability and I am then going to turn the floor over to my co-counsel, Ms Vasani, to present PEL's responses to Respondent's objections to jurisdiction and the merits, and then the floor is going to return to me to walk you through Claimant's case on quantum.

Of course I would certainly welcome, and **11:05**
my co-counsel would welcome, questions from you at any time either during the presentation or afterwards.

Now, as the Tribunal knows, I have had I would say the advantage of coming into the case somewhat late, in the sense that I have been able to read the record as it has been developed through the arguments in the written submissions, and so this morning my aim is not to repeat the record. You have read that, I have read that. Rather, what I want to do is to try and target what I think are the key issues, the key documents that I would submit to you are necessary for you to decide this case. Certainly these are the documents that jumped out to me as I read through the record for the purposes of this opening.

Now, before I do that, I do want to set the record straight on one particular aspect that I felt was particularly unfair, and that is who is PEL? Who is Patel? Who is this Claimant?

Because if one were to read Respondent's filings, you'd see PEL as this nefarious actor that commits acts of bribery and fraud and misrepresentation. You'd also see that they say

that PEL can't contract this type of project, they just don't have the expertise and experience. **11:06**

So I want to go through what is a cursory demonstration of PEL's history and accomplishments, because I think even just doing that is going to put to bed the specious and inappropriate smears that I think have no place in arbitration, and in fact certainly with no evidence to back them up.

So let's answer the question who is PEL. It is a publicly-traded company with more than 70 years of experience and expertise. It's worked across the globe in a variety of sectors including large-scale power, civil construction, and transportation projects. It has more than 5,000 personnel, including designers, planners, technicians and engineers. Its portfolio of projects demonstrates the depth of its engineering and project management experience on large scale and mega infrastructure projects, and these projects include everything from tunnel drilling to dam construction to marine works, to road and rail construction, and PEL not only constructs infrastructure projects, it owns and operates them as well. So this BOT, or BOO, as the Tribunal will be familiar, PEL does that and it does that on a

regular basis. **11:08**

And it has contracted with private entities and government entities around the world. It has received numerous awards for its work over the years. That includes best executed hydroelectric power project of the year and an award for outstanding performance and super quality construction building a railway.

So this is a reputable, historic, and leading Indian company with a long and established track record of expertise, experience and success, so I would ask the Tribunal to keep in mind who PEL is as you listen to Respondent this afternoon try to throw mud at my client's good name. When you compare the portrayal that they are trying to feed you of who PEL is versus who PEL really is, that mud just won't stick.

That can be confirmed not just by the evidence I have on the record and the slides you see in front of you, but also by Mr Daga, who is the first witness you are going to hear this week. He himself is an experienced engineer, and he has been with PEL as its director of projects since 2005, and he was of course the lead PEL representative in relation to its investment in Mozambique.

At the time PEL began conceiving of the project, the Ministry of Mineral, Resource and Energy's plans for coal export were entirely unobtainable within Mozambique's existing coal transportation infrastructure. As Mr Daga has testified, at that time the only port in the country that could handle coal was over 600 kilometres from the coal mines. This made transport of this coal out of Mozambique entirely unfeasible. The existing ports also didn't have the capacity to handle large amounts of coal. **11:10**

Now, when PEL pointed this out at the initial exploratory meetings with the government, it was told that the coal industry should come up with its own solutions without government involvement, but the incentives just were not there for each mining company to develop its own rail to port logistics solution for what was a serious problem for the government.

So, instead, PEL envisaged a massive PPP project where the government and a private partner, rather than the coal industry, would own the railway corridor and a deepwater port. This idea for a PPP rail to port logistics corridor was expressly in line with Mozambique's objectives at the time. In

fact, the World Bank said that an idea like this, a project like this, would be a game-changer. **11:11**

It's evident if you look at a map of Mozambique, and there's a small one there to the side of the slide, that a port along the Zambezia coast, that's roughly in the middle of the coast there in Mozambique, that is going to be closer to the coal mines and therefore it is going to represent axiomatically a savings on transportation costs, but Mr Daga was told at least twice that Mozambique had looked at this potential solution but had considered that that large swathe of coast line there where you see Zambezia coast, that that was unsuitable for a deepwater port. He was told this once by the former chairman of CFM, that's Mozambique's rail and port authority, a government company you're going to hear about a lot during the coming week, and he was told the same thing by Mr Zucula. Mr Zucula at the time was the Minister of Transport and Communications and he oversaw CFM's work, and we're going to cross-examine him on Wednesday.

PEL continued to describe the benefits of this plan to several governmental authorities and the possibilities of a port somewhere along that

Zambezia coast line. These meetings included **11:13**
meetings with Minister Zucula, with the head of CFM, the Minister of Planning and Development, and eventually the government took an interest in the plan but only if PEL would foot the bill for some initial research into potential port locations in Zambezia province. The Ministry of Transport and Communications, who I am going to call the MTC, that's what it's been in the pleadings, insisted on its specialists doing the work, but PEL had to pay for that study and be involved in that study.

Thanks to that Preliminary Study that PEL paid for and assisted with the potential port locations were narrowed down to four potential locations in Zambezia province, and the strongest preference was for Macuse. While further studies were needed the Preliminary Study showed several advantages in using Macuse, a location Mozambique had a previously dismissed as a deepwater port. That location, Macuse, was further up the river and it was slightly inland from the coast line, and what that meant was that it was not directly exposed to cyclones and tides, coastal currents were also more moderate there, and it was in a low seismic intensity zone.

Now, while the Preliminary Study expressed a preference for Macuse there were still navigational constraints at the proposed port location. There were shallow waters, sand bars, narrow and migratory channels, winds, and large breaking waves, but PEL was confident that it could find the engineering solutions to these potential issues and, with more study, it could prove up its concept. **11:14**

I just want to stop there at this Preliminary Study point and make the following argument. This study, which was paid for by PEL, conducted by government specialists, did not mention any existing or even previous plans to develop a port at Macuse for coal production or any existing significant port infrastructure in that area. All it said was that back in the '90s there had been a port at Macuse that was about -- I think it was something like 5 metres of draft, so that's not the big coal ships that PEL had envisaged, and back then the government had considered adding in a railway line to service imports and exports to Malawi. But any existing infrastructure or a 20-year old plan that never came to fruition was a far cry from PEL's game-changing deepwater port and railway corridor to

the rich coal mines in the Tete province. **11:16**

So our point is this. If, as Mozambique claims, it was always looking into developing Macuse for this game-changing railway port link, that it was its idea, that it had thought about this a long time ago, we would have seen that mentioned in the preliminary report. There is no such mention, and that speaks volumes.

The other document that Mozambique tries to bring to your attention over and over to suggest that this railway corridor from Tete to Macuse is its idea is the 2009 transport strategy that they say is evidence that the concept is theirs, but the Tribunal will have studied this document and have seen it doesn't discuss anything like PEL's project at all. There is a passing single paragraph reference of connecting an existing railway line to a port at Nacala that could help get some coal out by largely adding in roadways, not railways, and the document briefly mentions Macuse, among several other ports, and it's described as one port of many that may in the future potentially be made feasible, not as a decided port option.

Just to be clear, the main focus is Nacala, and Nacala is nowhere even close to Macuse,

and you can see from the map -- this map I would say is created much later, this is not contemporaneous with that 2009 document, so this was created at the time PEL put forward its PFS, but I'm using it for illustrative purposes of the 2009 document -- and you can see the Nacala corridor, which is what the 2009 document refers to, and PEL's Macuse corridor. The Nacala line is the green one at the top that runs east to west on the upper right-hand side of the map, and PEL's Macuse corridor is the blue one that makes a sort of L-shape and ends up in a port in the bottom left of the map. They're not even close. **11:17**

And even if somehow this 2009 document showed Mozambique had already envisaged a rail line from Tete to Macuse and a deepwater port there, which clearly it doesn't, Mozambique certainly wasn't making it a priority. If this was a concept, a ground-breaking, country-changing concept, you don't just give it a passing one-paragraph reference in a 2009 document.

So Respondent's notion that PEL did not develop and prove up the concept that has become the project simply doesn't stand up to scrutiny.

Let me now turn back to the narrative.

We're back on the Preliminary Study. The MTC liked **11:19**
the Preliminary Study because their specialists said to them -- presumably -- hey, listen MTC, this is the real deal, something is here we need to explore, and therefore PEL and the MTC began to negotiate a deal to further develop PEL's idea for the rail to port logistics corridor. And that culminated in the memorandum of interest, the MOI, of May 6, 2011.

Now, everyone agrees that the MOI was signed that day, and there was a Portuguese version and an English version. While it is PEL's position that the Portuguese version was signed that day, we submit that it was not the correct version of Portuguese that was meant to be signed that day, but everyone agrees that the Portuguese version that we have in the record was indeed signed that day.

What we do disagree on are three key issues largely centered on clause 2 of the MOI and whether it grants PEL the right to a direct award of concession or to implement the project, and those disagreements can be focused into three questions, and I'm going to answer those three questions sequentially for you.

Firstly, whose English version is authentic?

Second, whether the English or Portuguese version of clause 2 better reflects the parties' bargain. **11:20**

And, third, the import, if any, of the discrepancies between clause 2 in PEL's English version and that Portuguese version actually signed.

So let's turn to the first issue. Which is the English version that was signed that day on May 6, 2011? And I would submit to you, members of the Tribunal, the evidence is overwhelming that the version that was signed is PEL's English version. That is the authentic version, the authentic original that the parties signed that day, and Mozambique's English version is neither authentic nor original.

PEL's English MOI has been in its possession provably ever since it was signed. So what do you have? You have provenance and you have chain of custody, and, indeed, we have the original with us if the Tribunal would like to hold it and look at it so you can see for yourselves all the things that Mr LaPorte sees that verifies it an authentic document. You have the wetted signatures, you have PEL's wet ink company seal, and you have the government seal directly embossed into the paper

that you can feel with your own fingers. **11:22**

And you'll also see, and this is key, that it is entirely consistent with the Portuguese version that both parties agree was signed the same day. The same printer. The same ink. The same signatures. The same paper. The same seals. The same font.

But that's not all. On the 9th of May 2011, only three days after the MOI was signed, those exact originals were scanned into PEL's own document system after Mr Daga returned to India and the scans are exact copies of the hard copy documents, and both Respondent's and Claimant's experts agree that the metadata from those scans confirms that they were scanned in on May 9, 2011 and that the images and metadata have never been altered or tampered with.

Right. What do we have on the other side of the coin?

When it comes to Mozambique's English version of the MOI, it hasn't been able to provide any evidence to show authenticity at all. It hasn't been able to provide any original, despite the fact that it was required by Mozambican law to archive any original of the MOI.

It hasn't been able to produce this even **11:24**
though you, members of the Tribunal, made them do so in your document production request. They couldn't do it. And Mozambique's own experts cannot say that an electronic-only version is authentic without that key original that they either don't have or they won't give you.

And there are a number of inconsistencies between Mozambique's English MOI and the Portuguese MOI that suggest a lack of authenticity. For example, Mozambique's English MOI is in an entirely different font from the two Portuguese versions and PEL's English version. It is the odd one out. And there are also several red flags that you will see, and you will hear from the experts on Claimant's side, are within the documents itself. The font from the cover sheet is different from the font throughout the document. You'll see large gaps in the spacing. And because that scan is of such poor quality, it's impossible to verify that the signatures and the stamp were made with wet ink. In other words, we don't even know if they were originally made in wet ink or just simply some sort of computer programme or see any embossed seal on that last page, which is of course a key aspect of

authenticity of any documents. **11:25**

So between the two English versions our submission to you is it is abundantly clear there is only one deserving of reliance, and that is the original that you will have in your hands.

The second issue, whether the English or Portuguese version of clause 2.1 better reflects the parties' bargain, again, we say the evidence favours PEL's English version. The negotiating history, the circumstances of its execution, and the parties' subsequent conduct make clear that only PEL's English version represents a full meeting of the minds, and here is the evidence to make that good.

The morning of May the 6th -- and that is the day that the parties agreed that they were going to sign the MOI -- you will see an e-mail from the government to PEL saying that there is here attached a final version in Portuguese as agreed by both parties. That's the morning of the day they're going to sign the document.

And that e-mail from the government then says that the English version should be updated to match this agreed version, and that is C-204. And the Portuguese draft in there, you will see clause 2, is virtually identical to clause 2.1 in PEL's

English MOI, and you can see that in the slide in front of you, just compare that side by side, and it is identical, or if you were being strictly grammatical, it is virtually identical. **11:27**

And it also had a right of first refusal found in clause 3 of the draft, later moved to clause 2.2 in the final agreement. That morning there is evidence on record that at MTC's offices, PEL's Portuguese speaker reviewed this final draft and worked with MTC to ensure that these final drafts of English and Portuguese matched.

MTC was in charge of printing the final versions of the contract for signature. PEL came to the offices to sign. But the minister, inexplicably, was hours late. By the time Minister Zucula was ready to sign the hard copies, PEL's Portuguese speaker had left, so you are only left on PEL's side with non-Portuguese speaker.

Mr Zucula, who speaks very good English, looked through both versions. Mr Daga and Mr Patel read through the English version and agreed with it. That's Patel's English version before you. Before signing the Portuguese version, Mr Daga and Mr Patel, who are not Portuguese speakers, and with PEL's Portuguese speaker no longer being available,

asked Mr Zucula whether it reflected the changes that the parties had agreed upon that you see in C-204. Mr Zucula turned to Mr Chaúque, who is a lawyer for MTC who we will also cross-examine this week, and Mr Chaúque confirmed that the documents reflected the agreed-upon changes. **11:29**

And only then, in reliance on Mozambique's representations, and entirely unaware of the unilateral changes Mozambique had made to the Portuguese MOI, did PEL's representatives sign the MOI. So you'll see these unilateral changes in the current Portuguese version signed by both parties.

Now, here is where I'd ask the Tribunal to look at the record, because the record tells us everything, the evidence tells us everything. Neither party can explain where that language that you see in the Portuguese version of the MOI comes from, where is its provenance.

There are no previous drafts in the record in either Portuguese or English with that language. The record shows no further meetings, no e-mails, no communications between the parties between the e-mail on the morning of May the 6th and the signing that evening that could explain the changes to the Portuguese language version.

So these were changes, and Mozambique has not explained where do these changes come from? Show us. They can't, because these changes were made unilaterally unbeknownst to PEL and are not reflective of the English version that you see before you in the original. And they are not reflective of what the record shows you is the final agreed-upon Portuguese version in C-204. **11:30**

Just as importantly as the facts of the record of that day, May the 6th, is what happened after that particular day. After the MOI's signing, the parties pursued a path reflective entirely of PEL's English MOI. After the PFS was approved PEL was told to start negotiating with CFM to create a company to implement the project, and that only makes sense if the project company was going to operate the PPP concession.

Throughout the parties' dealings, clause 2.1 of PEL's English MOI was expressly referenced, cited repeatedly, without any comment or suggestion from Mozambique that PEL's English version was incorrect. In other words, you will see in the record citation of correspondence, contemporaneous correspondence, between the parties citing the English version of the MOI and never once does

Mozambique say, oh, wait, that's not what our Portuguese version says; that's not the deal we struck. Never once do they say that. **11:32**

And that includes, I would add, contemporaneous correspondence and even a letter from the Mozambican High Commissioner in India.

So we would say to you this, that between the English and Portuguese versions PEL's English version reflects what was agreed to by the parties and what was cited on record throughout their relationship, and that brings me to the third point of disagreement.

Why, after years of agreeing, as you can see in the correspondence between them, that PEL's English version of the MOI is the deal, does Respondent now claim that PEL's English version is not authentic or that the Portuguese version must now prevail as a matter of law. And that is because they are trying to read out of the MOI clause 2.1 that is in PEL's English version. You can see that language on the screen in front of you.

Mozambique seems to believe that without that language, the MOI never granted PEL the right to a direct award of a concession. But each of those arguments to write out this clause 2.1 of the

English MOI is incorrect. **11:33**

First, as I've already said, their English version of the MOI is highly suspect, and I will come back to that in closing because I'd like to put that at a higher point, but I will do that only once I speak to Mr Zucula and Mr Chaúque, but for now let's just say it's highly suspect, and all the evidence shows that PEL's English MOI is, in fact, the agreement that the parties signed.

Realising this, Mozambique's next argument is to incorrectly claim that their Portuguese version trumps the English version regardless, but there is no evidence and certainly no law to support that argument. As I've already said, removing 2.1, that second part of 2.1, was a unilateral change that the record proves that PEL never agreed to, and therefore that Portuguese version that they ask you to rely on is unexplained. Absent an explanation, I don't see how this Tribunal could or should rely on a clause where you can see the evidence of what was agreed in the morning and then an unexplained change by the time the parties signed. Where is that explanation?

Additionally, it is undisputed that both contracts state that the English and Portuguese

versions have equal value, and you'll see that in all the MOIs, and both legal experts agree that Mozambican law provides for party autonomy in contractual agreement and as Professor Medeiros has explained, Mozambique's other arguments as to why that may not be applicable are inapposite. **11:35**

Now, if the Tribunal does not want to take the position or feels it cannot take a position as to the hierarchy of the English over the Portuguese, I would submit to you you don't have to do that because, in fact, they are largely harmonious, at least in intent if not specifically in objective.

They both show, the English and the Portuguese both show, that PEL was going to be the one implementing the project by a concession given by Mozambique. Both versions explicitly say that there is going to be a granting of a concession by Mozambique to PEL.

Clause 1 of both the English and the Portuguese says that the purpose of the PFS -- in other words, why we're even sitting here today, why the MOI was even agreed to in the first place, is, quote, "the granting of a concession by the government of Mozambique to PEL for the construction and operation of the project".

So even in the Portuguese version granting of a concession to PEL to implement the project is explicitly referred to as the objective of the MOI, and in clause 2.2, the right granted, whether called a right of first refusal or *direito de preferência*, is specifically tied to a right to implement the project on the basis of a concession given by Mozambique. **11:37**

And the fact that the parties intended to grant a concession to PEL is also implicit in the exclusivity clause of clause 6. Mozambique promised in both contracts, English and Portuguese, that PEL would have exclusive rights to develop the project to similar projects both during the time the PFS was under way and also during the approval process for the project, and we submit Mozambique would not agree to an exclusive relationship with PEL to implement the project via a Concession Agreement if it intended to put the project out to public tender where exclusivities would end.

So it's on PEL's English MOI that we submit the Tribunal should rely, but there is nothing, we say, in the Portuguese version that contradicts what PEL's English version MOI says.

So we get a clear picture of the bargain

the parties struck. The plain language confirms PEL was granted the right to a direct award of the project concession subject to two conditions precedent. Let's go through those conditions precedent. **11:38**

First, PEL was required to carry out the PFS at its own expense, and this is undisputed. Mozambique agrees that PEL was required to undertake the PFS and could not back out without breaching the MOI. And in exchange, in consideration for the costs and risks of undertaking the PFS, which was an endeavour that was going to take several years, or several months at least, and several millions of dollars of expenditure, PEL was promised exclusivity, it was promised confidentiality, and Mozambique promised not to grant rights to the project to anyone else and keep the information PEL shared related to the project confidential, which makes commercial sense because PEL is going to spend a lot of time and a lot of money to show that Macuse is the port for the deepwater port and how the railway line is going to get there. This is something that no one as I've shown you from the record had thought was possible before.

Most importantly in clause 2 is where the

parties placed their two conditions to the right of the direct award. **11:39**

Now when I read this, members of the Tribunal, I like to think of things in analogy terms, so here's my analogy, and I do hope its helpful. It's a picture of a door with two locks and both PEL and the MTC had a key to one of the locks each. Before the door opened and the direct award vested, each party would have to choose at its own election to unlock their respective locks. Mozambique's key was approval of the PFS. That was at its discretion.

On PEL's side the right of first refusal offered it the chance to decline the project if Mozambique approved the PFS but if PEL no longer wanted to pursue the project. Let's say it wasn't sufficiently profitable any more, it wanted to do something else with its money. But once PEL exercised the right, once Mozambique exercised the right, they put the key in the lock, they turned it, the door opens, now they're contractually committed on the path to a direct award.

And that is, no matter what legal system, a binding agreement to do that, and you can see that not only from the expert reports of the Mozambican

law experts but because of the language, the many uses of the word "shall" -- this morning Respondent's counsel emphasised the word "shall" in his dispute resolution clause. Well, I would say look at the word "shall" throughout the agreement, not just in the dispute resolution clause. If what he says is mandatory, well, it's mandatory in the rest of the agreement too. **11:41**

And the dispute resolution clause that Respondent's counsel is so fond of, well, I have not often seen agreements to agree that have arbitration provisions, and of course it is an entirely valid agreement under Mozambican law.

The MOI is an administrative contract by which the MTC binds itself to perform a future administrative act, that is the award of a concession contract, and the fact that certain rights granted in the MOI are subject to certain conditions precedent before they vest does not mean that that agreement is not binding or somehow lacked a clear object, because that object in clause 1 of the English and the Portuguese MOI tells you exactly what the MOI is meant to do. It is meant so that PEL does the PFS in order for the government to grant PEL a concession.

I want to pause a minute there because I think we've had a few strawman arguments from Mozambique and I just want to clear those up, if they really needed to be cleared up in the first place. **11:42**

PEL has never stated that the MOI is a Concession Agreement. Of course it is not. As is clear from its pleadings, the MOI granted PEL the right to a direct award of a concession once both conditions were fulfilled. In other words, once the two keys were in the lock, once they were turned the door opened, and the right to implement the project vested, then they would negotiate the Concession Agreement, the government would approve that, and phase 2 of the overall investment would proceed.

But because the MOI was not in and of itself a concession agreement it didn't have to contain all the necessary terms of a concession agreement to be legally valid and binding under Mozambican law. And for that same reason you don't need any approval besides the MTC minister. You don't need at that stage the Council of Ministers. We see that later and I will come on to that because it's critical, but you don't need at the stage of the MOI the Council of Ministers or the Ministry of

Finance or the Administrative Court or the other approvals Mozambique says you need at the time of the MOI. **11:44**

But, anyway, I would say that even if there were some aspects of domestic law that were allegedly missing, they are irrelevant as a matter of international law given Mr Zucula's signature on behalf of the government of Mozambique, and his role as the Minister of Transport and Communication at the time. They would be estopped in international law from trying to use any violation of their own law to escape liability.

And I'm also going to show you the PPP law that came into effect, but at the time that the MOI was signed the 2011 PPP law was pending. But the parties knew -- and there is testimony on both sides of this fact -- that when it came time that the PFS was going to be approved and the actual concession was going to be agreed, the concession would be governed by the new 2011 PPP law, and that law allowed for the direct award of a project concession in certain circumstances if it is approved by the government and it is duly substantiated. That's article 13(3) and I'm going to show you exactly where in the record that happens.

So stopping there, that is the first pillar of Claimant's case. The deal struck in the MOI and best reflected in PEL's English MOI was that after PEL submitted the PFS, each party had the option whether it wanted to engage further. Once Mozambique approved the PFS, once PEL exercised its right of first refusal, once the key was put into the lock and turned, the door opened and the parties contractually commit to each other that they're on the path to the direct award; they're on the path to the Concession Agreement. **11:45**

So I want to now just pause there and look at what each party did with its key -- Mozambique with its approval of the PFS and PEL with its right of first refusal.

Let's start with the PFS.

PEL dedicated considerable time, money, and effort to the PFS. It knew of course that the PFS was going to be subject to scrutiny by MTC's engineers, and remember, these are the same engineers who at the time are looking after the Beira line. That's a line I haven't showed you, but it's a line that goes through the south.

So these people know. They know their stuff. They're already looking after a railway

line. They're already looking after a coal port. So these are not ingenues who will just look at a PFS and say that looks good; they know what they are talking about. So PEL knew that if the MTC were not satisfied with the PFS, they're going to reject it, and then PEL's time would have been wasted. Their money would have been wasted. **11:47**

So they performed a serious analysis to determine the technical feasibility of the project. They made frequent visits and spent considerable time on the ground and people were there working day in and day out. They spent months looking at every aspect of the project. For example, they looked into four potential rail routes before landing on one. PEL analysed the topography along the proposed rail route. They did a field study by travelling extensively along the proposed route from Macuse to Mocuba, from Quelimane to Macuse noting all national roadways, town and village roads and railway crossings to examine and verify the exact physical features along the route, and additionally, due to a special request from Mr Zucula, PEL also analysed the entirety of the abandoned railway between Quelimane and Macuse to assess whether that could be reinstated.

For the port location, although PEL **11:48**
strongly preferred Macuse, it continued to do further studies on other potential areas to ensure that Macuse was indeed the best option for the government. It studied oceanographic and meteorological data and geological and physiographical characteristics of the Zambezia coast line and in particular of the Macuse basin; it conducted a wave modulation study; it looked at silting patterns in the Macuse basin, tidal conditions in and around the Macuse basin, and annual rainfall in the area. PEL even did further analysis on the most promising two sites before ultimately confirming that Macuse was indeed the most suitable port location.

PEL also functionally planned the port and rail facilities such as considering the number of berths needed at the port and rail facilities, the machinery, the equipment that would be needed, and analysed the railway truck design. It gave an initial overview of the rolling stock needed and sketched preliminary tonnage profiles and train operating plans.

On the financial side PEL also provided preliminary costs for both port and railway elements

of the project, and it also identified future studies required for the port and railway. **11:49**

Now, these are not just desktop studies. This is not some person sitting somewhere in India just Googling information. PEL's consultants and employees went out on the ground in Mozambique and collected the data, and just to give the Tribunal an example -- and this was really, again, something that jumped out to me when I looked at this -- to give you an example of the level of commitment and detail, PEL paid for one poor soul to sit at Macuse for an entire year just to see the weather conditions at the port of Macuse so they could understand the rainfall, the wind, et cetera. And they also spent days travelling along the projected railway route to understand the topography of the land. Again, to give you an idea of the dedication that PEL put in to making this project a reality, to making their investment a reality, when that railway route was not accessible by car, they got out of the car and they walked in the Mozambique wilderness through to where this railway line was going to go. And it didn't just look at existing conditions. With the PFS PEL analysed the proposed solutions, know-how, that would allow the Macuse location to

become the deepwater port that Mozambique desperately needed. **11:51**

In particular, PEL proposed dredging at the mouth of the Macuse River to remove sandbars, that would reduce the siltation in the approach channel and provide better navigational conditions to ships. PEL also proposed erecting a breakwater that would create a sheltered area and keep the waves from bringing in additional sand that would silt up the dredged area. And based on these solutions, based on this know-how, the PFS provided further evidence that a port near Macuse on the river was the best path to provide Mozambique with the socio economic benefits it sought for its coal industry.

Then on May the 9th, 2012, in the culmination of PEL's nearly two years of investigations and studies involving, as I've said, boots on the ground, PEL's engineering minds providing know-how to rail and port solutions and working with local people and local officials to ensure the project would work, PEL proudly gave an oral presentation about the PFS to numerous Mozambique officials and provided the PFS to the government.

That presentation to the government included the top technical and commercial personnel from throughout the government. Whoever needed to know in the government knew. That includes the MTC, the CFM, the Ministry of Planning and Development, the Ministry of External Affairs, the Ministry of Mining and the Ministry of Finance. This is a broad and collective effort by the government to scrutinise the PFS. **11:53**

And, indeed, the record shows that Minister Zucula praised the technical aspect of the report and PEL's presentation. He asked of course, as you would expect, for follow-up data. PEL provided the MTC with additional economic information a few days later. PEL also participated in a meeting with CFM shortly after presenting the PFS to address their concerns, and then Mozambique took the PFS and reviewed it internally. For example, on the 11th of May PEL had a meeting with CFM at their offices. On the 17th of May we have evidence that Mr Ruby, a government employee who was involved in the Preliminary Study in the PFS, an engineer, gave a presentation about the project to CFM's board, and further questions from the government and answers from PEL are on the record on

technical aspects of the railway. **11:54**

So now we're at a point, members of the Tribunal, where Mozambique has to decide does it put its key in the door in the lock and turn it. The PFS is done. Does Mozambique want to move forward with PEL to a direct award? And they had every right, subject to good faith, to reject the PFS or to go and say I want more information, and it knew that once it approved it, if it approved it, it's going to move forward on this contractual path to a direct award.

And on 15 June 2012, Mozambique squarely puts its key in the lock, turns the lock and approves the PFS -- and not only that, it asks Patel to put its key in the lock and commit itself by exercising there and then its right of first refusal to do the project, and that's the second pillar of PEL's case.

Mozambique, fully aware of the import, the contractual import of its actions, approves the PFS, and only three days later, after Mozambique asks it to do it, exercise your right, PEL, it says, PEL exercises its right of first refusal, and it's clear that PEL understood that at that point its obligation to implement the project had vested, and

that's the third pillar. At that point PEL had also fully committed to the project. **11:56**

So at that point both conditions precedent that I showed you in the MOI had been satisfied. In terms of my analogy, both parties had put their key in the lock, both parties had turned it, now it's time to walk through the door.

Now, three pillars were sufficient for PEL's right to vest, but there is another factor that evidences PEL was granted the right to implement the project, and that final pillar, bar one, is the parties' subsequent conduct shows that they understood that after the MTC's approval of the PFS and after PEL's exercise of the right of first refusal they were firmly on the path to a direct award, and Mozambique left no doubt that it intended to grant PEL a direct award when it approved the PFS, and ask PEL to exercise its right of first refusal.

Nothing in the documents, and I would challenge Mozambique to show us, nothing in the documents from that period even suggests a tender from 2011 and 2012. Quite the opposite. Mozambique asked PEL to negotiate a project company with CFM to implement the project, and I would ask the Tribunal

to look at that word because it's key. "Implement" the project. It would make no sense to have PEL negotiate a project company with CFM to implement the project if MTC planned to launch a public tender. **11:57**

Similarly, Mozambique asked PEL to meet with potential partners to construct the project. Why would PEL meet with partners to construct the project if it is not the one implementing the project?

So with the mutual understanding that PEL was on track for a direct award of concession, PEL reached out to MTC for assistance locating the right person at CFM. Who shall I meet with? PEL also asked specifically for an official authorisation to commence SPV negotiations with CFM, and it also asked for confirmation that CFM was Mozambique's designated partner for the intended PPP. And that, I would suggest, members of the Tribunal, is a very prudent and rational position for an investor to take and to ask of the government, but this is where things start to change.

Rather than instruct CFM to meet with PEL to start negotiations over the joint venture, MTC pretty much goes missing. Almost two months after

asking for assistance, and with no help from MTC, PEL managed to secure a meeting with CFM's chairman of its own accord, of its own back, and in this early August meeting, August 2012, CFM's chairman said this, that he has no authorisation to negotiate with PEL. And this -- I mean when I say it jumped out at me on the page, CFM's chairman says this -- he knows nothing about the project. That response, he knows nothing about the project, is so telling, because it's obviously not true. **11:59**

CFM representatives had attended the PFS presentation and site visit. PEL had already met with CFM directly on 11 May. A few days after that we know that an MTC employee had presented the project directly to CFM's board. Surely this chairman was there at the board meeting?

In any event, this is the biggest project on the African continent at the time. So that kind of feigned ignorance by the chairman of CFM tells us something behind the scenes is just not right. It's just not a reasonable response.

And when PEL told the MTC about CFM's dubious claim of ignorance about the project, Mr Zucula allegedly told the CFM chairman to negotiate with PEL. However, when the CFM chairman

met with Mr Daga again at the end of August, it was not to negotiate an SPV. Rather, the chairman flat out rejected any hope that PEL had of forming a joint venture with CFM regardless of whatever terms PEL was offering. Apparently -- and this is something I think that Mozambique accepts -- CFM were not interested in the project. **12:00**

Now, given that this meeting happened shortly after a supposed call from Mr Zucula, CFM's representations at that meeting call into question whether Mr Zucula had actually authorised CFM to negotiate with PEL. And Mr Zucula gives us the answer in his witness statement. He says he never authorized CFM to negotiate with PEL. And when PEL tried to talk to Mr Zucula about CFM's refusal to deal, how they could potentially move the SPV forward maybe with another government entity, Mr Zucula is suspiciously unavailable.

And PEL tries to send letters to move the project forward. They repeatedly ask, on record, for the MTC to send a draft of the Concession Agreement. That never appears. And since CFM was absolutely not interested, PEL even offered to pay for all of the initial capital in the SPV with no initial contribution to whichever entity MTC finally

proposed. **12:02**

And Mozambique admits MTC was absolutely not interested in this project, but MTC saw no reason to remove the roadblock that it had placed right in front of PEL.

So what you have is MTC insisting that in order to do what it had already promised to do, move on the path to a direct award, PEL needed to form a joint venture with CFM, but it continued to insist on this knowing that CFM had no interest in this project and without even authorising CFM to form the joint venture.

In fact, and again I'll come back to this in closing once we've spoken to the witnesses, I think there is enough at least at this stage for an inference that MTC told CFM not to negotiate with PEL.

I'll make that stronger than an inference in closing, I hope.

And PEL also learned at the same time Mozambique had been talking to Rio Tinto about a transportation corridor from Tete to Macuse. And in November 2012 CFM told the press that Mozambique planned to launch a joint venture -- excuse me, a public tender for PEL's project. So this is,

members of the Tribunal, the first breach of treaty, what I'm going to call the CFM stonewall orchestrated by MTC, and here's how that treaty breach grows. **12:03**

The same day that PEL sent yet another letter to move things forward with CFM and MTC, Mozambique told PEL it's decided to launch a tender, and that letter is telling because the reason Mozambique gives for the tender is none of its post hoc rationalisations that you see in this arbitration, right? We don't see PPP best practices; we don't see the tender was the preferred avenue under the PPP law; we don't see the PFS was no good; all the things that we've read, pages and pages and pages about in this arbitration, it's not there in the record.

Instead, the sole, the exclusive purported reason Mozambique decided the tender should happen is because PEL had been unable to form a joint venture with CFM, and then what was the supposed reason that PEL had been unable to launch this joint venture? Not that CFM was not interested in the project, which MTC knew. Not that MTC had failed to instruct CFM to move forward with PEL. Not that CFM even refused to meet substantively with Patel to

negotiate an equity, but that CFM somehow wanted more than 20 per cent equity participation. **12:05**

But there is no evidence on the record of CFM or MTC or anybody asking for more than 20 per cent. The only evidence you see in that 2012 period is radio silence from CFM and MTC, and on the other side PEL desperately trying to get somebody to engage with them. How can PEL negotiate with a party -- 20 per cent, 30 per cent, 40 per cent, whatever it is -- how can you engage with a party that has absolutely no interest in the project and doesn't even meet with you?

So knowingly keeping PEL on a path that contained an insurmountable roadblock that only it could remove, and then using that same roadblock as a way of depriving PEL of its right to implement the project is a classic FET breach.

So what could MTC have done, if it was acting in good faith, what a government would have done, what a government should have done? Tell the CFM that the government had designated CFM as the government's representative in the SPV. It could have facilitated negotiations. It could have facilitated an agreement. It could have formed the SPV itself if CFM was truly not interested and the

MTC didn't want to force CFM to act. **12:07**

It could have nominated another government entity to be the partner and take CFM's place. But not replying to PEL at all, especially once it knew that it had set PEL an impossible task, like Sisyphus trying to push the boulder up the hill and the boulder will always come back down, that task was never going to be completed. The government knew that, and then it used its own impossible task to then say to Patel sorry, you failed at an impossible task we set for you and now we go to tender.

Reading the record, Mozambique has essentially admitted that MTC and CFM breached the treaty. CFM is subordinate to MTC. That's on the record already. It does what the MTC wants, it acts in the government's public interest only, it would have done as it was told to do. And CFM's conduct is attributable to Mozambique. We already have MTC's conduct but I also here would like to point to CFM's conduct and attribute it to the Mozambican state, because under Mozambican law PPPs are created to provide services the state is obliged to make available to its citizens. That is article 2.2(a) of CLA-65A.

What can a state do in a PPP? It can choose to participate itself, or it can nominate one of its state-owned entities to take its place, step into its shoes, the shoes of the government. **12:08**

So here, when MTC says to Patel we've designated CFM, you go ahead and talk to CFM to create the joint venture, MTC points to CFM saying this is the entity that will take our place in the PPP and as a result, in that instance, if not otherwise, CFM is acting with governmental authority when it declined to negotiate with PEL.

And, further, Mr Zucula has essentially admitted that he lied to PEL in 2012. Back then he said he had authorized CFM to negotiate. Now he claims it wasn't his job to authorise a joint venture between CFM and PEL. But that was exactly his job. That's what the law says. CFM couldn't form a joint venture with PEL without his say-so.

Because in addition to approving CFM's joint ventures, MTC and Mozambique exert control over CFM. Mozambique appoints all of CFM's board members, Mozambique approves all its activity plans, and approves its programme contract which sets forth all the activities it will carry out. CFM would never have refused or feigned ignorance if Mr Zucula

at MTC had told CFM we, the government, has said you, CFM, are our representative in the joint venture. **12:10**

So, again, I'll make the inference, which I want to make stronger in the closing, CFM appears to have been following explicit instructions from MTC to stonewall. These actions, these obvious lies, the lies of the CFM chairman, "I don't know anything about the project", the blowing hot and cold, the insisting on a course of action known to be impossible and then using that same impossibility to frustrate PEL's rights -- textbook FET violations. That's trying to defend itself from what I would suggest is a manifest FET breach. Respondent puts a lot of emphasis on Exhibit C-19. This is a January 2013 letter from Mr Zucula to PEL.

So it's contemporaneous in the sense that it is from the Roth time period but it is not in 2010, 2011 and 2012 when all this is taking place. It comes in 2013, and purports to talk about things that happened in the past. I want to make two points about this letter.

First, this letter, as I said, in 2013 looking back is the first time we see Mozambique attempts at a post hoc rationalisation. Mozambique

claims that when the MOI talked about a right of first refusal to implement the project, what it somehow meant was a scoring advantage in the public tender. This is -- and I've looked at the record carefully -- the first time we see a public tender ever mentioned in the record in relation to PEL. It's never mentioned in the MOI, and it's never mentioned in any communication that I've seen any time before January 2013 from MTC and PEL. **12:12**

And we also see Mr Zucula claim that he discussed a tender with PEL in June 2012, but Mozambique has provided no documentary evidence to show that a tender was ever discussed with PEL before this point, let alone in June 2012. Mr Zucula also claimed he had several discussions about CFM's share percentage. Again, no evidence on the record from Mozambique of such discussions.

And Mr Daga has testified that he was never informed of a tender or never told that CFM wanted more than 20 per cent before this letter. So the MTC letter of January 2013 is not contemporaneous evidence of what occurred. It's the first time in the middle where the parties are already in dispute that Mozambique starts to re-write the history of what the MOI meant or what

the parties discussed. That just isn't recorded in the documents that you will see in 2011 and 2012. **12:14**

After this letter in January 2013 PEL is obviously devastated. It wrote back expressing its sincere disagreement with the MTC's changed position on the MOI. It tried to talk to MTC and other government officials about this sudden change, but to no avail. And then the salt in the wound comes when Mozambique published a tender notice that was evidently down to the kilometre based on PEL's hard work.

In an attempt to salvage its investment, make lemonade out of lemons, PEL agreed to participate in the tender but strictly under protest. It formed a consortium of highly experienced companies but made clear to its consortium partners and to Mozambique that PEL would continue to pursue its rights to a direct award.

And then, on the 18th of April 2013, PEL learned that two days earlier the Council of Ministers had decided to grant PEL a direct award, and I want to stop here because this document is simply the most important document in this whole case.

I took the liberty at having a look at

Respondent's opening statement this morning, the slides, and they gloss over this document, and I'm not surprised they gloss over it but please bear what I'm about to say in mind when you see them gloss over this because this is a stake in the heart of their defence. **12:15**

Let's start with who is the Council of Ministers? The Council of Ministers is the government. That's what the constitution says. It is the government. It is the highest governmental authority in Mozambique, and at that time, in addition to the President of Mozambique, you've got 28 other members of the Council.

What I want to point out is this. Several of the members of the Council were very familiar with PEL and the work of PEL in the PFS. Obviously you have Mr Zucula, who is the Minister of Transport and Communication. He was intimately familiar with the project.

But remember, as I told you and as you see in the record, PEL had several meetings and communications with the Minister of Planning and Development as well as meetings with the Prime Minister. You've got other council members involved directly in approval of the PFS. That was the

Ministry of Planning and Development, the Ministry of External Affairs, the Ministry of Mining, and the Ministry of Finance. **12:17**

So the Council at this meeting of April 2013, 16 April 2013, is very familiar in large part with the project, and it is concerned about getting this project up and running as fast as possible because it's in the national strategic interest to do so. And given PEL's familiarity with the project and the government's familiarity with PEL and its work, it makes sense that the government gave PEL a direct award that it had always been promised.

So let me say three key things that this resolution does. First, the resolution -- and we don't have the resolution; we have a letter stating the resolution. I wish we had the resolution and, had Respondent abided by its document production requests, we'd have had the resolution. We don't. But the resolution grants PEL a direct award. Directly. Following exactly the procurement steps outlined in the PPP law. And Professor Medeiros has noted that this act by the highest body in Mozambique is undeniably an act that establishes rights. It confirms and approves the rights granted

under the MOI, but it is the highest act of Mozambique, and it's added another key pillar, and I would submit to you the ultimate key pillar into our diagram, because we're no longer on the path to a direct award; we have been granted a direct award. **12:18**

Second, the resolution and letter are evidently not, as Mozambique claims and I'm sure we'll hear this afternoon, just the Council of Ministers investigating a different avenue in parallel to the tender, or merely suggesting discussions with PEL, as Mr Zucula puts it in his witness statement. The Council of Ministers, the highest collective executive body in the land, does not come together and put on its agenda the idea of discussions. It doesn't deal with that kind of low-level activity.

And it's also clear that it grants a direct award, from what PEL is asked to do in the letter. The subject of the letter starts with "negotiation of the terms of concession" and that is a legal phrase directly borrowed from the PPP law, and it also says PEL has to start those negotiations in a week. It's urgent.

The government also wouldn't ask an investor for a $3 million bank guarantee and require

it to be valid until a contract is signed unless it intends to sign a contract. It also doesn't ask somebody to start negotiating massive offtake agreements with mining companies unless that company is the one that's getting the direct award. **12:20**

What it's doing is asking PEL to fulfil the next step in the PPP regulations, provide a bank guarantee.

And, third and finally, and this for me is the clincher, so to speak, the Council of Ministers expressly articulates the reasons PEL is to be given a direct award.

They say, as you can see in the letter, the project is needed as soon as possible, PEL has done all the work, time is of the essence, and therefore it is in the national strategic interest to give PEL a direct award. Those are duly substantiated reasons, and they meet squarely with the requirement in article 13(3) of the PPP law in effect at the time for two things to happen.

Number 1, the government has to approve it. That's what the resolution did. Number 2, the government has to duly substantiate its exceptional nature. Again, that's exactly what the resolution did.

And given that nothing changed in PEL's credentials or its work or how it conducted the PFS from the time they did it to the time of this document, it means the project was always in the national strategic interest. In fact, the only thing that's changed from the MOI and PFS to the Council of Ministers' resolution is that now the Council of Ministers has seen the work of PEL. Now they know who PEL is. Now they know that this is the company that Mozambique wants to give the direct award in the national strategic interest. **12:21**

The gravitas of the decision, then, is that it's in the national strategic interest to grant PEL a direct award, and so the government granted it. And it really cannot be understated; it doesn't come out of the blue. It's a deliberate exercise by the highest governmental body after due consideration taking into account the work done by PEL and the needs of the country at the time.

And there is no way -- no way -- that this document can be mistaken for a 15 per cent scoring advantage, or anything else, any of those other post hoc rationalisations. They die, they wither, in the face of this document. It really overrides all of the post hoc rationalisations that Mozambique has

conjured up for the purposes of this arbitration. **12:23**
And Professor Medeiros tells you that once that legal act has been established, it can't be freely revoked under Mozambican law, but that's exactly what Mozambique purported to do, which is a second breach of the treaty.

So what happened when PEL received this letter? It duly complied. A meeting was scheduled quickly for discussions over the promised draft Concession Agreement. It obtained and handed over a $3.1 million bank guarantee from the Bank of Baroda, and that's a real sign of good faith, members of the Tribunal, because you know from your experience that tying up that kind of capital from your creditors, it's a big deal, and it expressed a willingness to submit other documents requested by Mozambique as they became available. But again, things are happening behind the scenes.

Unbeknownst to PEL in the meantime the Council of Ministers performed a complete U-turn, and in violation of Mozambican law and in violation of the treaty they seek to take away the rights that they have just granted to PEL.

But I would draw your attention to the reasons that they give, the ostensible grounds that

they give. They say after hearing from unnamed stakeholders, we're having another look at the legal and regulatory framework, and now the Council of Ministers has decided we're going to go with a tender. **12:24**

As Professor Medeiros explains, that's a revocation of PEL's rights established in the April 16th resolution. It's illegal as a matter of Mozambican law.

But here is the question that I would ask the Tribunal and that Mozambique didn't answer then and can't answer now. What happened to the national strategic interest? It's absolutely disappeared without trace, without explanation. Why was it no longer in the national strategic interest to give PEL the direct award that it granted it on April the 16th?

And, besides that, who are these stakeholders? Who heard them? When did they hear them? What did they say? Why was what they said so important? And what were these regulations and laws that they looked at at that time that they didn't look at before the April 16th decision?

It's so unexplained, so insufficient to overcome their carefully studied and substantiated

decision of April the 16th. Something happened behind the scenes. I would love to tell you what that was, but I can't. **12:26**

And why can't I? Because Mozambique has failed to provide us, or you, any documents from either of these two Council of Ministers meetings, despite the fact that it's legally required to archive those documents. All these questions I've asked you I would love to have answered. But Mozambique won't let us, and they won't let you.

And so, members of the Tribunal, you must find adverse inference here that Mozambique has purposely withheld or its failure to produce means that those meeting materials have not been produced because they are helpful to PEL's case to show the substantiation in the April 16th meeting versus the damage to Mozambique claims in the later Council of Ministers meeting. It is unfathomable. I just can't believe that there would be no record of the highest executive body in the country on a matter of national strategic interest.

Those documents exist. We just don't have them.

So Mozambique first promised PEL the right to implement the project and a binding contract and,

second, finally granted PEL a direct award with the Council of Ministers' decision, and then both times Mozambique changed its mind and took that right away, first with the CFM stonewall and, second, the Council of Ministers' U-turn. And the tender that was concluded in which PEL participated under protest -- we've discussed this in our pleadings -- was highly irregular. There were incredibly short timelines, unclear evaluation processes, and a complete lack of transparency. **12:28**

However, Claimant has been unable to determine what actually happened given the lack of record evidence on the issue. Claimant requested Mozambique to produce the tender file, the bidding documents and the information about how the bids were scored, and we considered this information relevant and material to whether Mozambique conducted a fair tender proceeding and therefore met its treaty obligations.

In response, Mozambique produced a paltry few documents, nothing that actually shows it conducted its tender or evaluated PEL's scores in a manner that was compliant with Mozambican law or indeed the treaty. And Mozambique is now using its failure to produce documents related to the tender

as both a sword and a shield. It claims the tender was entirely regular and in line with PPP best practices, but it has failed to produce documents to substantiate those claims. **12:29**

This is again even though it must have those documents in its possession because the law of Mozambique requires it to have those documents, and earlier this year the Tribunal will remember that PEL renewed its request for at least the winning bidding material for assistance with its quantum case, and we would say that document is also relevant and material to the various bids and how they were evaluated and whether they were done in a fair and equitable manner. PEL's request was denied, so at this stage, members of the Tribunal, due to a lack of record evidence, I'm not going to go further into the additional breach based on the tender process this morning. However, if the Tribunal does decide to order production at the end of the hearing, and you can see that highlighted in your order, and we would at the end of this hearing urge you to do so based on the evidence we will hear, then we would like to reserve our rights based on that evidence to come back to you to pursue those arguments and pursue that further breach of the

treaty. **12:30**

Let me end, members of the Tribunal, and then I'll pass the floor to my co-counsel on this.

PEL had every right, every legitimate expectation, to expect that once Mozambique approved the PFS and once PEL exercised its right to first refusal, in other words once both parties turned their key in the lock and the door opened, that Mozambique would do its part to honour the bargain it made. Instead, PEL's rights were vitiated through Mozambique's stonewalling, post hoc attempts to re-write the MOI and the parties' relationship, and finally the Council of Ministers' U-turn and the award of this project, PEL's hard work, PEL's know-how, PEL's concept to another company set up Mozambique, and that other company will reap the benefits of my client's work. These are textbook breaches of the BIT between Mozambique and India.

So I will now yield the floor to Ms Vasani to discuss Mozambique's responses to all of this evidence, and then I will come back to you on quantum.

PRESIDENT: Thank you, Mr Vasani. Just that I have it clear, you have reserved the right at the end of the hearing to ask us to revisit our

decision in A-41? **12:32**

MR VASANI: Yes, sir, if I may. In other words, we have a claim for a treaty breach for irregularities in the tender. However, considering that the Tribunal has held over its decision on further documents on that, with the Tribunal's permission I'd like to hold that claim in abeyance until the Tribunal rules on that document request, because at this stage I really would like those further documents to continue to prove up the case and I do feel that, once you've heard the evidence from the witnesses, you will see that it is relevant and that those documents are relevant and material to the claim we would like to make to you in full.

PRESIDENT: Thank you. No, my only point is that we do not have a request on the table right now; that is something which you leave for the end of the hearing.

MR VASANI: Yes. To follow your own words, sir, you say "end of the hearing" and I understood that to mean once you've heard the witnesses, so in accordance with your ruling that's what we intend to do.

PRESIDENT: Very good. So, Ms Vasani, you are now going -- how do you prefer to be addressed?

MS VASANI: I am happy with either. **12:33**

PRESIDENT: It's Ms with a long "I"?

MS VASANI: Ms Vasani is perfect.

PRESIDENT: Is the way you prefer?

MS VASANI: Ms Vasani is perfect.

PRESIDENT: That's not helpful because the court reporter has now put Ms and I really don't know what Ms means ...

MS VASANI: That's correct.

PRESIDENT: I put -- this is off the record.

(Short discussion off the record)

My question to you is how long will it take you to finish?

MS VASANI: Sure. My section of discussing objections to jurisdiction and various post hoc rationalisations will be about 35 minutes, and Mr Vasani's section on quantum will be --

MR VASANI: About 25 minutes.

MS VASANI: So we're still about an hour out or so.

PRESIDENT: Let's see how we are doing. Maybe we can finish before lunch, which would be the preferred solution.

MS VASANI: Could I also ask for the

slides to be put up once more? Thank you very much. **12:34**

We've just heard PEL's affirmative case, it's cogent, it accords with the contemporaneous documentary evidence, and it demonstrates an investor that was lured into Mozambique for the promise of something more.

But as soon as Mozambique got its hands on the PFS, work product that was worth years of time and effort and cost millions of dollars to produce, Mozambique had what it really wanted. It then discarded my client and its valuable rights to the project. It sent Patel on a wild goose chase with the CFM to create an excuse to strip PEL of its rights before formally giving PEL a direct award with one hand and then purportedly taking it away with another in a manner that was blatantly unlawful, unfair, and contrary to the protections afforded in the BIT.

Now, in the face of this overwhelming and clear evidence, what does the Respondent say? Well, Mozambique has submitted a kitchen sink defence full of post hoc rationalisations. It repeats these post hoc rationalisations over and over again, regardless of any applicability to the facts or the pertinent legal issues in this case.

Now, Claimant has fully rebutted these accusations in its pleadings, so I won't go through them all point by point again. Rather, I'd like to spend my time this morning, or rather this afternoon, covering these points thematically. **12:36**

You'll see on the screen before you Respondent's post hoc rationalisations on the slide, and I will briefly go through them one by one.

The first issue is Respondent's jurisdictional objections. Now, as a general point and as this Tribunal has no doubt noticed, Respondent's legal arguments are convoluted and sometimes can be difficult to follow, but one thread running through all of them is fundamental misstatements of several aspects of public international law.

Now, we've covered these misstatements in our pleadings, and the references to where we address those in our latest pleading are on the slide there before you. I'll also cover a few of the factual issues that underline those objections later, such as the temporary debarment and Mozambique's unsupported corruption allegations. For now, though, the only objection I'll briefly mention is the final one, Respondent's claim that my

client didn't have an investment under the BIT, either because PEL's investment only constituted pre investment expenditures or because there's purportedly no binding agreement at all. **12:38**

Now, the starting and ending point for determining whether my client had an investment is article 1(b) of the BIT. That provision defines investment expansively as "every kind of asset established or acquired" before going on to a detailed, non exhaustive list of examples which constitute an investment, including "rights ... to any performance under a contract having financial value" in article 1(b)(iii), and "business concessions conferred by law or under contract" under article 1(b)(v).

As Claimant has demonstrated, PEL unquestionably had rights to performance under the MOI that had financial value, and the Council of Ministers itself, the highest government body of Mozambique, directly awarded PEL the right to a concession in the name of its national strategic interest.

I could stop there, but I'd like to note that the cases Mozambique cites to claim that there's no investment are entirely inapposite.

12:39

First, several of them interpret the undefined term "investment" in the ICSID Convention rather than the defined term "investment" in the BIT. But, in any event, there's no question that PEL undertook an investment here. It contributed substantial money resources -- monetary resources -- in Mozambique over the course of years, including through financing both the Preliminary Study and the PFS. And it did so at its own risk. It also transferred its know-how to develop the project concept by preparing and then submitting the PFS which Mozambique and its instrumentalities duly considered, approved, and then used as the basis for their sham tender.

Now, while it's true that PEL was only permitted to complete the first phases of its overall project, the government's intervening illegal conduct prevented it from going further. That can't negate the fact, and indeed the unity of the investment theory does not allow it to negate the fact, that indeed these critical first phases of PEL's investments were, and are, an investment for the purposes of the treaty.

Second, each and every case cited by Respondent has no agreement that created binding

obligations. Either the parties never concluded any type of contractual agreement at all, or any document that they signed expressly stated that it was not binding. Here, as Mr Vasani just explained, the MOI was binding and it conveyed real enforceable rights. **12:41**

Third, Mozambique claims that the contractual rights with conditions precedent are not an investment. But that is both incorrect --

PRESIDENT: Ms Vasani, we have a technical problem here. Something has happened to the --

(Pause)

Please.

MS VASANI: Sure.

Mozambique claims that contractual rights with conditions precedent are not an investment, but that is both incorrect and entirely irrelevant. It's incorrect because it's undisputed that Patel had confidentiality and exclusivity rights from the day the MOI was signed. Those alone constitute an investment under the BIT.

But it's also irrelevant because both parties had satisfied the two conditions precedent and PEL's MOI rights had vested long before any claim breached. So in the analogy that we described

earlier, both keys had already been locked. **12:42**

So essentially Mozambique's jurisdictional objections just don't hold water, and this Tribunal should dismiss them all.

Mozambique's next post hoc rationalisation is the impact of PEL's debarment, temporary debarment, by the National Highway Authority of India, or the NHAI as I'll describe it.

Now Mozambique has tried to make this fact applicable to everything -- jurisdiction, admissibility, and the merits -- but the problem for Mozambique is that both legally and factually, it just doesn't work. It's important to understand the facts leading to the temporary debarment. After winning a bid for a highway construction project PEL realised it had made a calculation error. Realising this, it declined the award and voluntarily forfeited a 3 million US dollar bid security. That was in line with the process set forth in the bidding documents if a bidder declined an award. NHAI went ahead and awarded the bid to another bidder shortly thereafter.

Then on May 20, 2011, which was two weeks after the MOI was signed, not before, NHAI told PEL that for 12 months it would not be permitted to bid

on NHAI projects. That's it. A client telling a contractor that it won't be permitted to bid for more contracts for a limited 12-month period. No "civil death" like Mozambique claims; just a temporary debarment from one agency in India that happened after the MOI was signed. **12:44**

Now, PEL felt this was unfair so it decided to challenge that decision in the Indian courts because it felt that by forfeiting its bid security it had already paid the price for declining the award and it should not be barred from further bids during the course of the next year. That challenge procedure was entirely civil, and it was brought by PEL, not against PEL. No criminal action or criminal court was ever involved, definitely no "conviction" like Mozambique attempts to insist. There was no allegation of any illegal or mal fide conduct. At no point did any court find that PEL acted in bad faith or maliciously. The language that Respondent loves to quote is actually the court repeating what the other party said and acknowledging that it was not illegal or irrational for the NHAI to think that. And PEL was expressly permitted to bid on other contracts with other Indian government agencies. In fact, it did just

that. It continued to contract with other Indian government entities even during the temporary debarment period to the tune of awards exceeding half a billion US dollars. So, again, no civil death. No conviction. **12:45**

And once the temporary debarment ended, NHAI itself and its parent agency happily continued to qualify PEL for contracts, and PEL in fact received awards from PEL's parent agency.

It goes without saying that, if NHAI truly considered PEL was not commercially reliable and trustworthy as Mozambique continues to assert, they wouldn't have continued to qualify PEL for so many future contracts, or award it future awards.

Factually, Mozambique has tried to make a mountain out of a molehill but, even ignoring these facts, Mozambique's arguments lack any legal support whatsoever. And now I'd like to turn to that.

First, there was no contractual duty to disclose anything prior to signing the MOI. Now, Mozambique has not pointed to a single warranty or term in the LOI that would have required PEL to disclose anything. And surely, if it cared so much about civil penalties like this, it would have required pre contractual disclosure or a warranty in

the MOI. **12:47**

Second, under Mozambican law, there was no general duty to disclose the debarment before signing the MOI. While there are duties that relate to precontractual disclosure, the MOI doesn't fall under those. And this is covered more in detail by Professor Medeiros but one key point here is that Mozambique had a duty of self information, and this information was publicly available and easy to find. Also, the timing simply doesn't work because this disclosure duty applies only to pre contractual disclosures and the MOI was signed before the temporary debarment went into effect. My client couldn't disclose what wasn't in effect.

And by the time of the tender submission, nothing in Mozambique's tender documents requested information about temporary debarments either. Nothing in the tender notice required disclosure, and the tender bidding documents only required disclosure of existing disqualifications.

Now, at the time the PGS consortium submitted its proposal in 2013, the temporary debarment had already lapsed and there were no existing disqualifications to disclose.

Finally, Mozambique has claimed post hoc

that it wished to know this information because, had it known the information, it wouldn't have dealt with PEL. But Mozambique has failed to point to any evidence whatsoever to show that a temporary debarment would have been material and relevant to its decision at that period in time. **12:48**

If it really wanted to know that information, it would have asked -- it would have asked for warranties, or it would have done its own Google search. But that's not what it did. Mozambique's complete failure to do any due diligence whatsoever shows that it actually didn't care about the information at that time.

Indeed, its own expert, Dr Ehrhardt, has acknowledged that Mozambique should have done its own due diligence and that a "cursory search"would have revealed the debarment.

From an international law standpoint, all the cases cited by Mozambique are entirely distinguishable. In each case they cite, Claimant made an intentional misrepresentation, withheld information that it was otherwise required to provide, or was involved in illegal and repugnant behaviour. That's a far cry from failing to volunteer publicly available information on a minor

matter that was never requested or legally required to be disclosed and is utterly irrelevant to the project anyway. **12:50**

Inceysa involved systematic fraud by providing false financial information and false representations. Not an act of omission but commission. Plama involved repeated misrepresentations by the Claimant as to its ownership, which was legally required to gain approval from the Bulgarian government for its purchase. Churchill Mining involved the presentation of forged documents, and Fraport involved knowingly and intentionally violating Filipino law at the time the investment was made that the Philippines could never have known about.

Further, as a matter of investment law, the Tribunal must look at the proportionality of the breach and the severity of punishment in rejecting jurisdiction or admissibility. In the words of the Kim versus Uzbekistan Tribunal, the "harsh consequence" of denying BIT protection is not proportional here, especially where the state showed no interest in having this information at the time.

Now, when you consider the factual context, Mozambique cannot convincingly show that it

wouldn't have entered into the MOI and later approved the PFS and a direct award of the concession if it had known about the temporary debarment. **12:51**

Remember, PEL had brought Mozambique a logistical solution to its stranded natural resources, a project that would be a game-changer for Mozambique's economy. To suppose that Mozambique would have refused to deal with its counterparty that it already knew and who was ready and already familiar with the project is pure and utter speculation.

It's also hypocritical.

Mozambique awarded the tender to ITD whose professional integrity record is far from impeccable. In November 1997 the governor of Bangkok debarred ITD from conducting future works for the municipality of Bangkok for six months. Doing so he accused ITD of "lacking social conscience" due to numerous safety violations and a failure to implement pollution control measures.

ITD and its CEO, Mr Karnasuta, who was also a board member of the joint venture that is implementing the project in this case, had a consistent track record of bribery and corruption

scandals. That CEO was convicted in criminal proceedings in Thailand for attempted bribery of a public official in June 2019. ITD benefited from a rigged bid as part of Thailand's largest construction project throughout the 1990s and 2000s. And ITD and its CEO were also accused of paying up to 107 million US dollars in kickbacks to Filipino politicians to facilitate a land reclamation deal in Manila Bay. ITD was also accused of violating various other Filipino laws during this scandal. **12:53**

In sum, given the context of PEL's debarment and Mozambique's subsequent choice of concessionaire, this post hoc rationalisation cannot withstand scrutiny.

The next area I'd like to discuss is Respondent's repeated references to PPP's best practices, guidelines and procurement norms.

Respondent introduced this idea to try to convince you of two things. First, PEL couldn't have understood Mozambique to be serious when it promised to grant PEL a direct award in the MOI because that's not best practice.

Second, no matter what's written in the MOI, no matter what contractual terms that the parties agreed to, because best practice is to hold

a competitive tender, that's what the parties really must have meant. Mozambique's reliance on PPP best practices fails for several reasons. **12:54**

First, PPP best practices cannot trump the plain language of the MOI. General practices cannot displace what the parties specifically agreed. The MOI accords with Mozambican law and should be interpreted as written. The word tender appears nowhere.

Second, and more importantly, there is no one global best practice. And even if there was, each state has absolute sovereign discretion to do what it wishes regardless of whatever international best practices are.

Here, the MOI is in accordance with Mozambican law, and we know that it was in strategic national interest because the Council of Ministers said it was, which also explains why a direct award was appropriate. Third, Mozambique doesn't actually follow PPP best practices that it says are so important in this arbitration.

For example, after the 2011 PPP law came into effect, Mozambique routinely provided direct awards without any tender whatsoever.

Mozambique and its experts claim that it's

best practice to have several feasibility studies performed before offers are assessed and a project is awarded. But that's not what Mozambique did with this project in this case. It awarded the project to ITD in 2013, signed a Concession Agreement five months later, but didn't actually complete the first feasibility study until significantly later, in 2015 and 2016. **12:56**

Mozambique also says that it would be a "fundamental misunderstanding" of PPP practice to give a 3 billion new build infrastructure project to an inexperienced entity without even knowing and vetting the other entities with whom the purported concessionaire intended to partner. Yet, its experts admit that it is entirely normal to award a project several years before knowing who the EPC contractor will be.

Here, the earliest that Mozambique knew who ITD's EPC contractor would be was 2016, three years after it signed the Concession Agreement with ITD. And the EPC contractor and consortium partners that ITD picked? Well, two of them, Mota Engil and Codiza, had participated in the tender and received such low scores in the technical portion that they weren't even allowed to continue.

Mozambique also ignores best practices when running the tender in this case, which was fraught with numerous irregularities. **12:57**

For example, it used PEL's PFS as the basis for a sham tender without notifying PEL or obtaining PEL's permission. It never disclosed to the other bidders that it was supposedly giving PEL an advantage or that it was pursuing a direct award option with PEL simultaneously.

And Mozambique's failure to keep and produce the tender documents is also against best practices. Tellingly, Mozambique's post hoc rationalisation that it always intended a tender but was alternatively pursuing the possibility of a direct award completely lacks consistency, transparency, predictability and clarity. Again, this contravenes PPP best practices.

It would be one thing if promising a direct award was an anomaly, but actually, if Mozambique followed best practices, that would be the anomaly.

Mozambique has also concocted a post hoc rationalisation that somehow the right of first refusal in the MOI means a 15 per cent scoring advantage in a tender. Mozambique repeats this

story over and over again in its pleadings, its expert reports, and its witness statements. **12:59**

But there are several problems with this argument. First, on a textual interpretation of the MOI, *direito de preferência* generally means a right of first refusal as described in the Mozambican Civil Code, and it is entirely incompatible with a scoring advantage.

Indeed, the word tender appears nowhere in the MOI, let alone any sort of tender scoring advantage.

Second, when you compare the wording of the Portuguese MOI with the wording of the PPP Law, it's clear that while they may have a couple of the same words, namely "direito" and "preferência", those words are found within phrases that are clearly referring to different concepts.

On the one hand, the MOI refers to a "direito de preferência para a implementação do projecto". And here, please apologise for my Portuñol because I speak Spanish but not Portuguese.

On the other hand, the PPP Law refers to "direito e margem de preferência de 15% na avaliacao das propostas tecnicas e financieras resultantes dessa licitacao".

And the PPP regulations from a year later only refer to a "margem de preferência". There's no "direito" at all. There are two main points of difference between these two concepts. **13:00**

First, the use of the word "margem" before "direito" and "preferência" shows that the reference is to a different legal concept than the standard "*direito de preferência*" used in the MOI and general contractual practice in the Portuguese speaking legal world.

Indeed, even Google Translate translates "*direito de preferência*" as a right of first refusal.

Second, the MOI ties the right to the implementation of the project, that is the execution of the final concession agreement. It is not tied to the evaluation of proposals. Implementation of the project and evaluation of the proposals are two entirely different things.

Third, the negotiation history shows that the parties in no way had a 15 per cent scoring margin in mind. It was Patel who first introduced the right of first refusal in English in the draft contract. And those drafts at that time did not even refer to Mozambican law. As Mr Daga has

explained, there was in no way a reference to a scoring bonus but, rather, a reference to PEL's ability to not implement the project if Mozambique approved the PFS but PEL didn't think the project was economically viable or worth pursuing. That was PEL's key to put in the lock, just like the ability to approve the PFS was Mozambique's key. **13:02**

Now, fourth, it's clear that Mozambique didn't think that the right of first refusal was a 15 per cent scoring bonus at the time the MOI was signed or at the time the PFS was approved. Mozambique asked PEL to exercise that right at a time when there was no discussion of a tender whatsoever. Rather, the parties were on a clear route to a direct award of the project concession.

So where does this morphing of the idea that the right of first refusal means a 15 per cent score advantage come from? Well, the first reference on the record was that January 13, 2013 letter when Mr Zucula said that he mentioned a scoring advantage half a year back in June 2012. But that doesn't make sense because, as Mr Vasani already explained, in June 2012 Mr Zucula was telling PEL to negotiate an SPV with CFM.

Indeed, Respondent at times has taken the

position that the right of first refusal means something different from a scoring advantage. You can see in Mr Zucula's repeated statements in his first witness statement that the right of first refusal was something distinct and in addition to any preferential position in the tender. **13:03**

Finally, Mozambique's change of interpretation of the MOI doesn't even make sense. PEL was entitled to a 15 per cent scoring advantage by statute. There was no reason to grant a statutory right via a contract, especially in such vague -- in such a vague way, or for PEL to exercise that right. Thus, under the principle of effectiveness, the *direito de preferência* must mean something else.

In the end, the salt in the wound is that it's not even clear that Mozambique actually gave PEL its statutorily earned scoring bonus. Mr Baxter has analysed the information provided and explained that it doesn't show a bonus was given. And let's not forget, Mozambique has refused to provide the necessary documentation that would show that it actually gave a 15 per cent scoring advantage to Patel, notwithstanding that it was legally required to preserve such documents under its own laws.

In short, the right of first refusal never meant and was never intended to mean a 15 per cent scoring advantage. **13:05**

Mozambique's next post hoc rationalisation is a series of complaints about the content of the PFS.

Mozambique, largely through its experts Betar and Ehrhardt, but also other witnesses, repeatedly claims that the PFS lacked all kinds of information and data that would be required in order to agree to a concession or to establish a project's feasibility. But what was or was not in the PFS is entirely irrelevant for purposes of determining whether Mozambique breached the treaty applications to PEL.

It's undisputed that the MOI did not require a bankable feasibility study or more. It only required a PFS.

Now, Mozambique could easily have asked for more in the MOI. Every item that MZ Betar now says the PFS was missing, or needed in more detail, Mozambique could have asked for when it negotiated the MOI.

And let's not forget how many people scrutinised the PFS. No less than five ministries

and CFM had representatives at the presentation. **13:06**
They reviewed the PFS in detail. They met with PEL. They had the opportunity to ask follow-up questions and indeed, they did ask follow-up questions and for follow-up information.

In addition to all of this internal scrutiny, Mozambique could have hired somebody like MZ Betar to review the PFS before approving it. It could have come back to Patel and said, hey, we don't think the PFS adequately defines the basic terms and conditions for granting a concession. Or these numbers just don't seem to work. Or we need more information about environmental impact studies, et cetera, et cetera.

But they didn't do that. Mozambique approved the PFS and that is undisputed. And by doing so, they put the key in the lock and committed themselves to the direct award route.

Now, the PFS was a starting point for PEL's right to a direct award. This Tribunal doesn't need to decide whether the PFS was good enough to sign the Concession Agreement immediately, because that wasn't its purpose. The purpose of the PFS was the government wanted a document that convinced it to give PEL a direct award. The

standard they were employing for the PFS was not an objective one. It was subjective. Did the government feel that PEL had proved its concept enough to merit a direct award. **13:08**

Really, when Mozambique says that the PFS was inadequate, what they are critiquing are their own technicians, their own professionals, ministries, and the Council of Ministers, and their own negotiation and approval process. But that is not PEL's fault and not something that has any relevance to the outcome of this arbitration.

The PFS was an inter partes contractual mechanism and it was met. Any post mortem on whether it would meet a post hoc expert review is simply inapplicable to the deal the parties struck and how they exercised their contractual rights at the relevant time.

PEL doesn't need to reprove the policy of the PFS. It was approved by MTC after due consideration and recognised in the Council of Ministers' resolution on April 16, 2013.

Nobody disputes that. All that matters is the legal consequence that flows from that approval.

Now, the penultimate post hoc rationalisation is Respondent's claim that by

participating in the tender as part of the PGS consortium and not fully pursuing all avenues to appeal the tender decision, PEL somehow waived its right to a direct award or adopted Mozambique's interpretation of the MOI and somehow has no claim before you. This is factually and legally incorrect. **13:09**

Factually, when PEL submitted its expression of interest to participate in the tender, it explicitly stated it was in no way waiving its rights to a direct award under the MOI. Essentially PEL was saying we're expressing interest but only to the extent that it doesn't interfere with our direct award rights.

It was taking reasonable steps to pursue every avenue it could to salvage the bargain struck in the MOI that PEL had followed and Mozambique had twisted. And PEL accepted this explicit -- sorry, Mozambique accepted this explicit reservation of rights. It could have said you can't participate in the tender if you seek to maintain those rights, but it didn't.

21 companies submitted expressions of interest, but only six were found to be pre qualified to move forward to the next round of the

tender process. The consortium was one of those six companies. Thus, Mozambique accepted the consortium's reservation of PEL's rights under the MOI. **13:11**

PEL also continued to reiterate its reservation of rights to Mozambique, for example, telling Mr Zucula in June 2013 before technical proposals were submitted that any submissions by the consortium was without prejudice to its rights under the MOI. As a matter of Mozambican law, there was no waiver because PEL specifically told Mozambique it was not waiving its rights. And as a matter of international law, PEL never waived its treaty rights because any waiver must be clear and unequivocal.

In short, PEL never waived its treaty rights, never abandoned its MOI rights, and accordingly this post hoc rationalisation is entirely unsubstantiated.

Now, the final post hoc rationalisation is an assertion by a convicted felon, Mr Zucula, that Mr Daga "attempted to offer" him a bribe. Now, the fact that Mozambique felt the need to raise a corruption allegation is indicative of its desperation. There is simply no evidence of

corruption. Mr Daga has vehemently denied any attempted bribe. But even if you took Mr Zucula at his own word, his evidence is insufficient to show an offer to bribe. **13:12**

Mr Zucula says that Mr Daga offered to "help" him "out" if he came to India. Where is the quid pro quo? Mr Zucula even admits that this is at best, quote, his "understanding" of an "indirect or implicit offer".

Curiously, Mr Zucula remembers the "specific words" that Mr Daga purportedly said some eight or nine years ago after the fact. It's curious also that there's no record that Mr Zucula reported Mr Daga's attempts to law enforcement or anything else. And this detailed post hoc recollection comes from somebody who has been convicted of money laundering and who somehow found his moral feet while in prison.

Even more curiously, as seen by Mr Zucula's history, as well as the selection of ITD Mozambique has a history of picking companies that are willing to engage in bribery, but PEL was not picked. Just to be clear, allegations of corruption should never be made lightly, just like allegations of fraud, blacklisting and forgery. It's one thing

to defend a case, this fact happened or the contract says that, but to bring these serious allegations on a flimsy excuse has to affect the overall credibility of the party making those spurious accusations. **13:14**

If you include unsubstantiated accessory indications as part of your kitchen sink of defences, that has to weigh down on the credibility of all of the rest of your defences.

And, with that, I will pass the floor back to Mr Vasani to cover quantum.

MR VASANI: Thank you. May I ask the secretariat for the time left? What I will do is put my iPhone with timer and I will make sure I'm within the time allotted so that we can make lunch.

MS JALLES: Claimant has used two hours and eight minutes.

MR VASANI: So 22 minutes. I'm on the clock, Mr President. Thank you. So I am putting 22 minutes on the clock right now.

I do want to spend a few minutes on quantum if I may. And the first point I want to make is this: This is not a basic case of debt collection. PEL was not hired to do a PFS and wasn't paid for the PFS. This is a case where the

PFS was simply a mechanism by which PEL would get a larger share of the pie for its overall investment. And its vested rights under the MOI and the Council of Ministers' decision gave it rights in one of the largest infrastructure projects ever on the African continent, with attendant confidentiality and exclusivity rights. **13:15**

So this is not a case of someone just not paid for a service that it had done, and I do want to make that clear.

I don't need to go through with this Tribunal Chorzow. I think I can definitely skip that. We run the counterfactual when we put PEL in the position it would have been in but for the breaches.

We have suggested three approaches, and they are hierarchical. In other words, we have a preference for DCF, loss of chance and then negotiation damages. So they are in the alternative.

DCF. I understand that this is an early stage project, so I understand that you are going to want to see absent a history of profitability. Absent a running of the project, you're going to want to see anchors. Something you could hang your

hat on to see, well, in this particular case a DCF is appropriate. OK. Let me give you what I consider to be anchors. **13:17**

Number one, in this counterfactual scenario you have a situation where both parties desperately wanted the same thing. They wanted to make this project a reality. They wanted to make the concession agreement final. As the Council of Ministers found, this project was in the national strategic interest. Mozambique was interested in making this happen and making it happen quickly. And the same is true of PEL.

And the second thing is because they both wanted to make this happen so badly and so quickly, you also have confirmation that they would have acted reasonably and in good faith, they would have found solutions to resolve any contractual differences they may have in the final concession award.

Now, in addition to those two points, which I think are very important for your consideration of a DCF in this case, there are also other facts in the record that should give you comfort that despite the fact that this is an early stage project, DCF is appropriate.

The first point is this. **13:18**

Many companies -- many companies saw this as a feasible project because they tendered for it. There is a market for this project. And you know that because 21 companies expressed interest. Six were pre-qualified, and three companies submitted bids.

And they did that all on the basis of the tender documents, which we know is based pretty much exclusively on the PFS. So you can see an interest in the market of this project.

Second, the winning bidder, ITD, signed a Concession Agreement before it conducted any of the feasibility studies that Mr Ehrhardt says are necessary before a concession contract can be signed.

Third, a bankable feasibility study was done, and that tells us that on that basis -- excuse me. A bankable feasibility study was done, and on the basis of that bankable feasibility study, funding was received. So this project was, and is, viable.

So unless you see something in the record that is an absolute show stopper, and Mozambique has not articulated one in the but-for scenario, you can

assume, because of these facts I've just given you, that the project would have happened in all probability just as it is going to happen in reality. **13:20**

There is nothing inherent in these two parties, nothing inherent in the market that says this project's not going to happen, it's not going to come to fruition. It would have come to fruition. It's going to come to fruition.

So then let's say what numbers do we ascribe to this concession. Well, here's what numbers it's not. It's not the 2012 numbers that PEL gave as part of the PFS exercise because they were prepared as a worst case scenario for an entirely different purpose, a focus on whether PEL would be able to service debt in a worst case scenario. They don't actually show how the operation would in all probability have worked.

Rather, you will hear from Secretariat formerly Versant, about the numbers used in PEL's two DCF valuations and why they are reliable. For example, the ex post DCF is based on the bankable feasibility study on which the project is actually going to run.

The ex ante DCF is based on the PFS and

other data as of 2013, and that was developed enough that ITD and other bidders were willing to sign a Concession Agreement on that information alone, even before a feasibility study was conducted. **13:21**

So in short, even though this is an early stage project, given the facts I've just articulated, DCF is appropriate. And there are numerous authorities where DCF has been used to value a non-operating asset provided there is sufficient certainty. And here I've given you that. And there is one other key fact that I do want to draw to the Tribunal's attention, and that is that this project was special. Why was it special?

Because with massive coal resources in Mozambique, both tapped and potential, there was incredible pent-up frustration in the country because there was so much coal that could be extracted from the ground but not enough transportation and export to accommodate that coal.

This project would have been the valve. It would have alleviated the pressure to take all that coal out. Any miner in the Tete province that wanted to get its coal out as efficiently, quickly, productively as possible would have used this railway line and this port to do it. Not the long

route up Nacala, not the long route down to Beira. **13:23**
It would have used this. It would have almost had a monopoly on the coal market.

So this project is the Mozambican coal market. They go absolutely hand in hand. And the fact that they go together gives you a reason to infuse certainty into the fact that a DCF is appropriate for this type of project in this unique circumstance. And that makes this similar to Crystallex, Gold Reserve, Lemire, Tethyan and others where DCF has been appropriate in early stage projects.

And for your reference the numbers -- they were -- they are now back on the screen. Let me turn to a second methodology, and that is loss of chance.

If you agree with me that a direct award of a concession would lead to loss but you are uncertain about the terms of the Concession Agreement or how it operated or some of the numbers, then let me quote to you the seminal work of Ripinsky and Williams that say this.

"A chance of making a profit is an asset with a value of its own, and that compensation for the loss of a chance is an alternative to the award

of lost profits proper in cases where the claim has failed to prove the amount of the alleged loss of profit with the required degree of certainty but where the Tribunal was satisfied that the loss in fact occurred". **13:24**

How much you reduce that is up to you. We have done it to a 10 per cent reduction, but of course that is entirely in your hands as to the percentage of variance.

Now, Respondent wants you to say, well, this is a sunk costs case, and that would be adequate recompense. But as I've said, this is not a case where we were hired to do the PFS and didn't get paid to do the PFS. PEL fronted the cost of the PFS as a first phase of its investment with further phases to come in exchange for a much bigger slice of the pie. Sunk costs would not provide an adequate proxy under Chorzow. It would not provide justice in this case. And in any event, because of PEL's record keeping of expenses as a logistical matter, sunk costs are not provable as a matter of measure of damages.

So this is, in a sense, a unique case because it is not, as I said, a debt collection for the PFS. We gave them much more. We gave them our

work. We gave them a concept, and on the back of that, they are going to make millions of dollars of royalty, millions of dollars of tax, millions of dollars of coal exports. And that is thanks to PEL. **13:26**

So we have proposed an additional method, and that is the additional method, and you saw in the submissions earlier this year. And that presumes that instead of breaching PEL's right in a counterfactual world under Chorzow, the government comes to PEL and says the following: We know we promised you a direct award under the MOI. That's what the Council of Ministers did and following the MOI. But we now want to go through a different route. We want to change tack. And what we're going to do is sit with you and negotiate a reasonable release fee so you can walk away with some recompense and we can take your work and go out to the market and now do what we want to do because we've changed our mind.

And that, we would suggest to you, is the minimum amount due to our client under the Chorzow principle.

Now, this method of damage is routinely employed in private law systems in many countries. So, for example, it's routine in intellectual

property cases around the globe to determine damages for patent or copyright infringement on the basis of hypothetical royalty that would have been agreed between the parties prior to infringing conduct. They're called reasonable royalties. They're in fact mandated by statute in the United States and the European Union. Negotiated damages are also used in other legal systems when the breach of the tangible or immovable property right, and in some legal systems such as England and Wales and Singapore, negotiated damages are awarded for breaches of contractual rights. **13:27**

Now, it's true that this may be a case of first instance before you, members of the Tribunal, in that we have not seen this methodology used in other ISDF cases. But I would say two things to that.

First of all, it is squarely within Chorzow. Chorzow Factory does not mandate a particular valuation technique, and this fits squarely within Chorzow, and indeed Respondent has not said that it does not.

And, secondly, in the unique circumstances of this particular case, it is ideal for an international law valuation of rights based on this

technique that meet squarely with Chorzow. We're still in a counterfactual where Respondent did not breach the treaty and it is compensatory in nature. But instead of looking at how much the project would have earned over time, the Tribunal is asked to determine how much, in a counterfactual scenario, Respondent would have paid to release it from its obligations to Claimant. Like an income-based approach, the goal of the hypothetical negotiation is to put the Claimant in the position it would have been absent the breach. The use of a hypothetical negotiation scenario is merely another way to measure Claimant's rights, and so it's an exercise in compensatory damages under Chorzow. **13:29**

So Respondent's only qualm seems to be, reading its response, that a 2018 Supreme Court case called Morris Garner, negotiated damages are only awarded in limited circumstances in breach of contract cases under English law. Well, two answers to that.

Number one, under English law, there are more recent cases, and I'll just refer the Tribunal to CLA-339, where in a similar case to this under English law actually negotiated damages were given in a contractual situation.

But more importantly is this, that **13:30**
focusing just on English law ignores the many other
legal systems and ways in which negotiated damages
have been used in private law systems to measure
violations of various type of rights, whether
they're intellectual property rights, tangible or
immovable property rights or contractual rights.
This is not -- and I'm not putting before you an
English law exercise. I'm putting before you an
international law exercise that is grounded in the
legal systems comparatively of many countries, of
many sectors that fits squarely in this case, in the
unique circumstances of this case, and sits squarely
within Chorzow Factory.

This is not, just to be clear, not an
equitable exercise. It's a legal exercise. In all
these countries where this exercise is done it's a
legal one, not an equitable one. You use the
hypothetical negotiation as a means to value the
right that was infringed, not as some sort of unjust
enrichment and not as some sort of exercise in
fairness.

Now, how you do that is in our pleadings.
Essentially what the Tribunal does is take the data
that the parties would have had in their mind at the

time they sat down and then find the number, based on those anchor points of what the parties would have had in their mind and decide on a final number. **13:32**

Some of the numbers are fixed in the record. They are what they are. Some of them are up for dispute. But if they are disputed and you discard them, that does not derail the whole exercise. Rather, what you do is you take what is reliable and what you find to be reasonably certain, and you use that to arrive at the compensatory amount.

So let me give you a few examples that I can see in the record which are already anchors.

PEL, we know, wanted its right under the MOI and the Council of Ministers resolution. They were valuable rights, and they were worth fighting for. And you saw all the steps that PEL took to uphold its right and fight for them even going as far as tendering without prejudice to its right. And that tells you how much PEL valued all the work that it had done over that -- over those years and said I deserve to earn money off my work.

You also know that third parties were interested in this concession, and that means that the right to the direct award was valuable in and of

itself, because those same companies that approached the tender would have been interested in coming in and stepping into the shoes of Patel to take a direct award. **13:33**

You also have in the record PEL's prior settlement offers to the government saying what they thought would be a reasonable release fee for their rights and the assistance that the PFS had provided to MTC.

You have in the record from the experts what PEL would have earned had it only been the design engineer for the construction part, obviously much smaller than what it intended, but it's still an anchor point in the record.

You have evidence of how much the work that PEL did to give Mozambique this concept, to give Mozambique the PFS without its logo, you have the evidence on record of how much that work benefited Mozambique because it was able to take that intellectual property and now tender and then go with a different company that is going to be a game-changer for the country.

You have evidence of PEL's profit margin in the time, which would have been something that PEL had had in mind when it was negotiating this

release fee as to its future profits, and you have Secretariat's understanding of the ex ante DCF, which would have been something that PEL, in fact any third party, would have come in using that information at the time and run a DCF as to what would have been the loss of profits -- excuse me. What would have been the future profits for anyone coming in in PEL's situation. **13:34**

So you have already, before we've even heard from the experts and the fact witnesses, a plethora of anchor points which you can then use to say in this negotiated damages scenario, here are some of the quantum factors that will lead us to a compensatory conclusion.

Now I will come back in the closing with a specific amount once we've heard the evidence.

I wanted at this stage and in the one minute I have left to give you the outline of how this might look. But let me be very clear. Having spent some time on this negotiated damages, it is an alternative to the DCF. We really do feel that despite the early stage project, the certainty that I've given you, the interest in this project, the fact that it's going to be a game-changer, the fact that it goes hand in hand with the coal industry of

the country, a DCF is absolutely appropriate. You have the bankable feasibility study, and you have the PFS on which so many companies tendered. **13:36**

My last point is this, members of the Tribunal.

Costs. This has been -- I haven't been involved but I've read from the record -- somewhat of a contentious case. We've had, as I've read, many different applications from the Respondent's side. Especially if you come out at the lower end of the compensatory amount, it is critical that costs follow the event, because it will make a big difference ultimately to my client that costs follow an award in this case.

And in light of the conduct, including as of this morning, repeated applications, allegations that just don't have evidence to back them up, defences that just don't square up, cost has to play an important role.

And with that, members of the Tribunal, unless you have any questions for the Claimant, we finish our presentation.

PRESIDENT: Thank you. Thank you, Mr Vasani. Let me double check with my colleagues. Any question for Claimant at this stage?

There is no question. It's now 13.37 in Porto. Shall we come back let's say 5 to 3? No. I'm sorry. I get lost with the Portuguese and Spanish time always. So we should be back say 5 to 3. Is that OK? Does that give you sufficient time? It's a bit more than an hour. It should be a little bit more than an hour. **13:37**

MS VASANI: That's fine for Claimant. Thank you.

MR BASOMBRIO: Yes, thank you, Mr President.

PRESIDENT: Is that OK?

MR BASOMBRIO: Yes.

PRESIDENT: 5 to 3. We are off the record.

(Luncheon adjournment from 1.38 to 2.59 pm)

PRESIDENT: So we resume the hearing. I acknowledge receipt of the presentation by the Republic of Mozambique, which should be H-2, and, without further ado, I give the floor to the Republic.

MS BEVILACQUA: Would you please put Respondent's PowerPoint on the screen?

PRESIDENT: You have the floor, Mr Basombrio.

MR BASOMBRIO: Thank you, Mr President, and other members of the Tribunal. We appreciate this opportunity to talk to you, and I know that the Republic of Mozambique --

(Technical interruption)

MR BASOMBRIO: First of all, I want to thank the president, the members of the Tribunal, for giving the Republic of Mozambique this opportunity to present our version of the story.

It's not just going to be our version; it's going to be actually the real story of what happened, and you're going to hear our witnesses, Mr Zucula, Mr Chaúque, and I believe you'll find them credible. They are going to tell you what they recall.

And when you hear the stories from them -- I'm just calling them stories, their testimony -- the documents are going to make sense. What happened is going to make sense. And when you hear our legal expert, Ms Muenda, who's the only admitted legal expert testifying, admitted in Mozambique, you will see that it makes sense.

And Mr Chaúque, who works at the MTC, he's also another admitted lawyer in Mozambique, and what

he tells you will make sense. And you will see that **15:05**
this is really not a treaty claim. You'll see that
this is really a dispute over performance over the
contract.

Now, I always like to give everyone the
benefit of the doubt, and so looking at this, my
conclusion, after spending a lot of time with it, as
my colleagues across the bar have, is that at the
very least there were different understandings on
both sides about how things were supposed to work.

I'm not trying to impute any kind of ill
will or ill intentions. It may well be, and it
appears to have been from our perspective that Patel
just didn't understand or have enough experience in
Mozambique to know what the law was and how the
process worked.

And something that Mr Vasani has told you
about how he personally reacted to the record, and
I want to take his lead and do the same and tell you
about how I have personally reacted to what I have
heard this morning in the opening statement.

I am very surprised that, throughout this
process, Patel never brought before you their
lawyers, SAL & Caldeira, in Mozambique. They were
the people that helped them draft the MOI. They

were the people who were advising them, they were the people that were involved in the drafting of the PPP Law in Mozambique, and all of these facts are in the record. **15:07**

Why, you must ask yourselves, did their Mozambique lawyers never submit a witness statement? Why did their Mozambique lawyers never back up what you heard this morning? The reason, you will see after my presentation, is because they would not have backed it up.

They also had consultants. They had accountants. They had other advisors. Not one of them has testified. Instead, they have had to go to Portugal to get Professor Medeiros, who is not admitted in Mozambique. There's a process to get admitted and there's a process to practise law. He's never followed it. He's not in the registry. We believe he doesn't even qualify as an expert in Mozambican law any more than I, as a US lawyer, would qualify as an expert on British law because US law derives from British law. So we're going to object to his testimony, but this is sort of a repeating theme.

Patel had lawyers in India who represented Patel all the way to the Supreme Court in the

blacklisting. They don't want to use that word. **15:08**
Well, where is their witness statement? How come they are not willing to put forward their reputations and say, no, what you are saying, what your expert -- mine, who's the Solicitor General who handled those cases for the government, why aren't they willing to come in here and say what Patel claims, that this was no big deal? Because they would not say that.

What we have here -- and I say this with all due respect to the other side -- is you have an international legal team, a good one, that has looked at the papers and has given them the spin they want to give it, and that's what you heard today, and that was presented.

And once you see the evidence and what you're going to hear the next few days, you're going to see that they are factually wrong, they are legally wrong, and what they're asking you to do is to take a last place loser in a legitimate public tender and convert him into the winner, although the MTC did not make this decision. It was made by an independent jury of seven independent industry professionals. That you cannot do. If you did that, it would turn PPP practice on its head.

So before I delve into my PowerPoint, let me just give you in a very simple way how it works in Mozambique and what happened here. I'll just give you, like they say, the elevator story so that we can keep that in the back of our mind as we go through things, and that will speed up moving through the PowerPoint. **15:10**

Under Mozambican law, it is absolutely correct that there are two options. You can get the preferred option, which is a public tender, so you can be a bidder in a public tender. That's the preferred option. Mr Vasani liked to use the analogy of a door with two keys. The proper analogy is really two doors, a very huge door, which is public tender, and the exception, a tiny door, which is direct award.

So the question is not whether you have two keys to open one door, but which key did Patel have here. They were provided the opportunity to open both doors, to go through the public tender or to go through a direct award, and both would have been allowed. But what happened?

So this is what the evidence is going to show. It is not unusual at all for someone who approaches a government to say I want to do an

unsolicited bid, and the way you do that is through some sort of initial study. And if the government has some interest, you will hear from Mr Zucula, the government says, fine, let's put in paper our general preliminary understandings of where we're going to try to go. And that's the MOI. **15:11**

Really, whether you look at the Portuguese versions or the English versions, one thing is clear. They agree, I think. It didn't grant them the concession. It didn't say they would be granted a concession. It provides a general understanding.

And that's one fundamental flaw with this case. You cannot take, in the PPP world, an MOI and convert it into a binding conditional obligation to grant you a concession. That's not done in Mozambique, and our experts are going to tell you that's not done anywhere in the world.

We believe that, when you hear the evidence, you will become convinced that the MOI or MOU, however you want to call it, is just what it is. It's a preliminary you're interested/we're interested kind of document. It's the starting point.

So under this MOI you will see that they were provided a period of time to do a PFS. 12

months. They did a PFS. We're not denying that PFS was approved. So then what happened? **15:13**

Then two things can happen. You can go to the public tender, and you get a *direito de preferência*, which if you look at the PPP Law, which they say everyone was understanding would be enacted, their lawyers were drafting it, I don't think there's any dispute here that both sides understood that's going to be the rule of the road, the PPP Law once it gets enacted.

You look at the PPP Law, it says *direito de preferência* means a 15 per cent scoring advantage. And that's quite significant, not only because of the 15 per cent, but because you have had a period of exclusivity of 12 months where you have been able to gain information and an understanding of the project that you're going to bid on that the other bidders don't have. And so the exclusivity is during that time period the government couldn't go to someone else.

So you see you're starting to see how the presentation this morning is really off mark. They think exclusivity means you couldn't have awarded it to someone else. That's not what it means. Now, *direito de preferência*, like I said, has a specific

legal meaning in Mozambique. To translate that you don't go to Google, like was suggested this morning. You have to talk to a Mozambican lawyer. **15:14**

And I guarantee you, if SAL & Caldeira was here, they would tell you that *direito de preferência* means 15 per cent. That's why they're not here, because that's what they would say. Patel has to get lawyers from London to argue the opposite because no lawyer from Mozambique in their right mind, under oath, would ever say *direito de preferência* means anything other than the 15 per cent. And that's what they got. They lost, they got the key, the *direito de preferência*, the 15 per cent, to go in through that big door, they went into that room, participated in the public tender, and lost. Now, they didn't appeal. That's it. They don't get to go to an international tribunal and say undo it.

What could the MTC have done at that point? You have a winning bidder. Someone else. According to Patel's theory, the MTC should have said we are going to, number one, we're going to override the jury. We're going to veto them, their decision. And we're going to give the project to the last place loser and ignore everyone else.

That's basically what they're asking you **15:16**
to do, to overturn the public tender, which they did not appeal, do it ten years later, and give the project to the loser and pull it away from the winner. That would be truly an absurd result.

Now let's look at the little door. And the little door -- and I call it the little door because it's the exception, extraordinary exception, under the PPP Law they refer to it as, quote, "last resort" -- to do that you have to get a government partner. It can be CFM, it can be another company. In this case because of the nature of the project, it was CFM. So if you want to do that, you, Patel, have to cut a deal with CFM.

What does that involve? It's very -- as our experts have testified -- it's very detailed. You have to form a joint venture company. That joint venture company becomes the company that actually enters into the concession with the government. I mean, you've probably heard this before because you have experience with PPP projects.

None of that happened. Now, Patel wants to blame the MTC, saying this was a government company, but governments all over the world,

especially in developing countries, create separate companies to do commercial work, and, yes, they appoint the president, they provide the initial funding, but there's no evidence that there was any alter ego relationship or any of those things that would lead an international tribunal to, so to speak, pierce the corporate veil and say we're going to hold you, government, responsible. **15:17**

So when Patel tells you CFM, whatever they didn't do the government should be responsible for, that's another example of just completely not understanding how the real world works in Mozambique or anywhere else. That's not how direct awards are done.

So here, the MTC could not tell CFM that's what you're going to do. They had to decide for themselves. And the evidence shows that CFM didn't like the apportionment of profits that Patel was suggesting. They were too greedy, and CFM ultimately decided no.

So what did the Council of Ministers do? What's their smoking gun letter, as they call it? Patel keeps writing letters to everyone, and a letter goes up the executive branch, and so the Council of Ministers looks at it. That's why. They

didn't have to, they could have just ignored it, I guess, but they don't ignore things. **15:19**

So they looked at it, and they gave Patel -- they said if you want to try -- we know you've been trying because you're telling us you've been trying to negotiate with CFM, but we're giving you another week to talk to them and see if there's something that can be done. They tell the MTC if they can work it out with CFM, then you two can talk about the direct award option, but that just never works out.

When that doesn't work out, the Council of Ministers says, well, let's continue with the public tender that had already started, and that's important because the public tender starts, they get the *direito de preferência*, and even at that point the Council of Ministers has the good faith of saying well, let's just give them another shot, I know that we're proceeding with the public tender, but if they can get their ducks in order for a direct award, you know, I want you, MTC, to consider that too.

But they can't get their ducks in order, and, to use their analogy, they never get the key to the little door.

So that's basically what happened. And none of that is bad faith. None of that is a violation of an international treaty, and the winner won, and we're not here to recalculate what happened in the contest. We're not going to do any of that. There was no exercise of sovereign power. There was no expropriation. There was none of that. This is really a contract claim that should be decided and aired out in the ICC. **15:20**

So let me turn now to our PowerPoint.

PRESIDENT: Professor Tawil has a clarification.

PROFESSOR TAWIL: Yes, I would like to understand what you just said. You said, Mr Basombrio, that they were in the tender and then they stopped for them to -- for PEL to renegotiate with CFM and then they went back to the tender? Can you explain that? It's not clear for me.

MR BASOMBRIO: Yes. I believe the record shows that the tender had started and it was during the tender that the Council of Ministers gets contacted and they tell the MTC, well, you know, we're going to give them some time to go see if they can talk to CFM and listen to them and see what happens, but ultimately that didn't prove itself

fruitful. **15:22**

PROFESSOR TAWIL: But if they were in a tender, what was the reason for that talk if they were in a tender already?

MR BASOMBRIO: The reason for that was the continued letters that were coming from Patel.

PROFESSOR TAWIL: OK, thank you.

MR BASOMBRIO: And that's sort of an underlying criticism one could have of Patel, that it was trying to play both sides.

When Patel says we entered into that tender with reservation of rights, you know, that's a nice legal argument to make but in reality how do you do that? You really can't. If you're going to participate in a tender, that's what you have accepted. You can't undo things and go back in time.

Now I want to turn to my opening statement PowerPoint, and because we discussed much of what's stated in the first 16 pages I'm not going to burden anyone here and talk about that again, so I'll skip that.

But there is one point I do want to make, so I'll ask my colleague here to put up slide number 5. So here's the one point I want to make without

repeating all the arguments you heard from me this morning. What I was trying to do this morning was present the reasons why we don't think we should go forward, and we still don't. **15:23**

In the first two pages of the PowerPoint we've reserved our rights but that's on the record, but let's not lose track of this point. There is a jurisdictional objection by Mozambique that the contractual rights have to be decided in the ICC, so that's a *ratione materiae* jurisdictional objection.

What I want to be clear is that during this hearing, this is one of the issues that's going to have to be decided by this Tribunal, so I understand the Tribunal's explanation that they did not believe that they should suspend the arbitration based on the ICC partial award invoking the Kompetenz-Kompetenz principles. I do not agree because I think that Kompetenz-Kompetenz requires the Tribunal to consider prior awards.

For example, if I were bringing a claim as an investor on the basis of a right that has already been adjudicated by a local court that I did not have, in deciding whether there is treaty claims or treaty jurisdiction you still have to take into account those things.

So I will not repeat those arguments **15:25**
again. Just I will summarise the point that it is now in our belief res judicata, the issue that the jurisdiction for contract claims is in the ICC, for the reasons I indicated.

So let me turn now to our factual summary, which starts on page 17.

In the opening statement of Patel you have heard a lot of statements that really constitute speculation and are not reflected in the facts and are not reflected in the record.

Of all the statements, the one that jumps out to me the most is something that you heard near the end, that under this proposal by Patel it would have been game changing, that the government would have made millions and millions, that this is a successful venture that will go forward, that will be built.

None of that is true. You will hear this week none of that is true. The winning bidder never built this venture. This venture has been abandoned. Nothing like it will be built. You will hear that the only thing they're going to do is have a little port, and they're going to bring coal with trucks. That's it. You know why? Because the

price of coal has tanked in the world. The demand for coal -- and all of this is unfortunate for Mozambique -- the demand for coal has tanked. Coal is viewed as a problem from an environmental perspective, and the two other railways that have always existed, they have capacity that will never ever, ever be met. **15:27**

So this project, I don't care which of the 12 different damages theories you use, it's a loser. If we had given it to Patel, Patel would be doing exactly what they did in India. When they got blacklisted -- and that's not my word, that's the Supreme Court of India's word, blacklisted -- and if they had their lawyers that they used in that case they would tell the Tribunal, yes, we were blacklisted. That's why they're not here.

But they were blacklisted because they reneged, to use the Delhi superior court's words, on their bid, because they miscalculated, as you heard by their attorneys today. We would be having the same discussion with them today if they had got in this project. They would be telling Mozambique, this is not what we thought it would be. This is a loser. The price of coal has tanked. You cannot hold us to the multimillion investment under this

Concession Agreement, which they never got, assuming they would have received it. They would be looking for a way out. This is not the golden egg that they told you. Maybe people thought it could be but you know people are wrong, and this is not going to be a point of debate. The project is dead, it's not going to -- it's not being built, and they do not have one single witness that will tell you that the project has been built or that it will be built. It just won't. It's dead. And it makes us question why are you even bringing this claim, because even if you can show that maybe Mozambique wasn't as clear as it should have been and maybe there's some questions of the communications, the way they were done, maybe it was a matter that Mr Daga doesn't understand Portuguese. I don't know. You know, there might be some reason, but I don't need to sit here and speculate. What I do know is that at the end of the day, this is a bad project, a dead project, a nowhere project, and we're really wasting our time here. We're going to be spending a lot of money in two arbitrations, and at the end of the day you will see that there is no evidence that this is a money-maker. **15:29**

And so it was anticipated as a

3 billion-dollar project, as we say in this slide, but that's not how it worked out. **15:30**

We have a number of undisputed facts, and it's always useful to talk about what's not in dispute in an arbitration, and we lay some of them out in the next two slides, but I just want to re-emphasise that the project did not prove itself to be financially viable at the end of the day.

So turning to the merits and those facts, the problem here is that a concession cannot be awarded on the basis of a six-page MOI. That would never happen anywhere in the world.

The parties executed the MOI in 2011. An initial problem that we've got to talk about is the fact that there are four versions of the MOI, so you have three -- you have two Portuguese versions and two English versions. One Portuguese and English from each party, right?

So here's the important point to understand. We can talk about the drafts, what went back and forth, what the parties thought they were signing, but all of that is irrelevant. We're in a civil jurisdiction. What matters is what did you sign.

So here we have two Portuguese versions

that are identical. So we agree on that. Then we **15:32**
have our English version, which is identical to the Portuguese versions, and then you have their English version, which is the only thing that's different. And how is it different? It has additional language that's very convenient for them.

Now, if you look at it as a civil law judge would look, civil jurisdiction judge, he would say we have a meeting of the minds on the two Portuguese versions and the English version, and the sole outlier -- I disagree with Mr Vasani. The outlier is their English version, the only one that's different. A civil jurisdiction law judge would ignore that, and that would be the end of it.

He would say there's no way I'm going to uphold the one that contradicts the other three, and you don't need any experts to tell you that.

Now, the other reason is because under Mozambican law the English version controls. I'm sorry -- the Portuguese version controls. I misspoke.

Let's turn now to the four clauses of the MOI, or MOU, that cover the prefeasibility process. I want to go through -- obviously I'm talking about the two Portuguese versions and our English version.

I'm going to walk through them quickly and mention a few things that I believe are important to keep in mind during the next few days as you hear the witnesses. **15:34**

Clause 2.1 provides 12 months to carry out the prefeasibility study. That's the period of exclusivity again, and the PFS is then subject to government approval.

Now, clause 2.2 says in the Portuguese that if the PFS is approved, they get the *direito de preferência*, and those are the words that are used, "*direito de preferência*" in the Portuguese.

Now, clause 4 is important because Patel bears the costs of the PFS, and they get the exclusive right during the period of exclusivity. So all of this, what's right on the contract, makes sense with that summary that I gave you.

Now, *direito de preferência* in English means preference. It's important to note that this was not a new concept. It had been in the procurement law in Mozambique for 25 years, and so any Mozambican lawyer would tell you *direito de preferência* means what's in the procurement law. That scoring advantage. And the

PPP Law says *direito de preferência* means 15 per cent. **15:36**

Now, my esteemed colleagues across the room said well, it also talks about "margem". Well, "margem" just means margin so you get a right of preference or a margin of preference of 15 per cent. I don't think that really changes anything.

Now, what happens if the PFS was not approved? It ends. And then they have to look for another MOI. That starts to make the MOI conditional. So if we look at the PPP Law that was eventually enacted, it clearly provides that the standard legal framework for awarding a concession in large scale projects is bidding. It's public bidding. And I don't think I need to say much to try to convince you of that. That's the worldwide approach, including the approach recommended by the World Bank.

The direct award, here's the cite to the law, is exceptional. It's "a measure of last resort". And PEL would need to get agreement with CFM.

So clause 2 -- and this is going to become really important in a few minutes -- clause 2 provides the conditions, what it is that PEL has to

do, and then clause 7 -- and remember clause 7 -- says if this is unviable we're going to sign a new MOI for something else. **15:37**

And the last clause that's important to understand is clause 8, which says all of this is going to be governed by Mozambican law, so we really don't care about what they do in Portugal, because what matters is what you do in Mozambique.

So just to make the point, slides 29, starting with 29, that shows you Patel's Portuguese version and ours, and they're identical. In terms of all of these clauses that I've just mentioned, they're both signed, they both have the seals of Patel, they are both signed by both representatives, Mr Daga and Mr Patel, and here's a picture that we have of the signing, and they signed the versions in Portuguese, and you can see in the circle that it's the same, and then we have another picture that also shows the same.

Now, let me pause here for one second. Look at that photo that's being signed there by Mr Zucula. This is another good example of the wild conspiracy theories that you have heard this morning from Patel's international counsel.

He said to you, oh, my God, there's

another smoking gun. The piece of paper has space at the bottom, there is this blank space, and you have to conclude from that that there was something strange going on, suggesting we forged it. **15:40**

Well, look at the picture. It has the space. That's the document they signed with the space at the bottom, just like C-5B, which is their version of the MOI in Portuguese. And that's the problem with their case. It's based on wild counsel speculation.

MS VASANI: Apologies for interrupting, but we're talking about two different documents. You're talking about the Portuguese document, and we are talking about the space on the English document. Two different documents.

MR BASOMBRIO: You can make your arguments when you have your chance. I did not interrupt you, and I hope you extend the same courtesy.

PRESIDENT: Very good. Let's go on, Mr Basombrio.

MR BASOMBRIO: Yes.

The point here, the next point, is that the government contracts have to be interpreted under Mozambican law, and it requires that they be in the Portuguese language.

And this supports further the point that **15:41**
the Portuguese versions have to be the controlling versions because they are the ones not only that agree but are in the correct language.

Turning to the issue of the direct award, we have heard this morning that the letter from the Council of Ministers was a decision by the Council of Ministers, but that's also not supported in the record.

The Council of Ministers does not act through letters. They act through decrees, and that's provided in the constitution in article 142. So that letter cannot be elevated to what Patel wants to elevate it. It wasn't a resolution, to use their word; it was simply some guidance to the MTC that they should give another chance for a week to Patel to see if they could cut a deal with CFM.

If it had been an actual decree, it would have conferred the concession. There would be a decree conferring the concession, and like in all other civil jurisdictions, it would be published in the Official Gazette. And this is what their lawyers at SAL & Caldeira would tell you if they were here. That letter is just a suggestion to the MTC to see if they can open that small door.

Now, I'm going to compare the Portuguese versions with Mozambique's English version. As you can see, they are the same with respect to clause 2, the important one. **15:43**

Now, there is one problem here in the translation. *Direito de preferência* was translated to right of first refusal. Now, we're unclear as to who translated it, but that's a translator error because the PPP law before and after, and the procurement law, uses that term as a term of art to mean the 15 per cent bidding advantage.

So whoever translated this probably made a mistake, but that's de minimis.

The next slide shows you that both were signed. Ours is signed by Mr Daga, and it's also sealed.

Now, what does Mr Daga have to say about that? "I didn't understand what I was signing". Well, in a civil court, in a civil jurisdiction, no judge would accept that. No judge would accept "I did not know what I was signing".

And if Patel has won all those awards in gigantic projects around the world, and it's the experienced international company that they claim they are, they cannot come to you and say "Take the

one contract that's inconsistent with the other **15:45**
because I didn't know what I was signing", and the
speculation of their counsel trying to cast stones
on Mozambique doesn't overcome that.

So we turn to slide 43, and this shows you why the PEL English version is the only outlier, and that's clause 2. Now, PEL's English version is totally different from the Portuguese versions. Look at clause 2, section 1. It's one sentence, the Portuguese. Right?

If you look at the English version of Patel, it's very long. It's almost five lines. You don't have to understand Portuguese to know that there's a difference, so maybe Mr Daga will tell us that he also didn't read what he was signing, because this is obvious.

And if we're talking about space, there's also space at the bottom of Patel's English version, and it actually kicks the language over to the next page.

Now, what's the added language? The added language is favourable to Patel, of course, that the government of Mozambique shall issue a concession. That's not found anywhere else.

So let's focus on clause number 2. From

their English version, it says PEL will do the PFS and report to a working group. Once the terms under clause 7 are approved, the government shall issue a concession to PEL. What's different between that and all the other clauses? Many things -- excuse me, the other MOI's. None of the other versions referred to any working group. They have no references to assessments of sites, et cetera, no cross reference to clause 7, no reference to awarding a concession, so there are four substantial differences. **15:47**

So going back in the next slide to the language, and this is our smoking gun, this is the language that Patel wants you to enforce. This is how, according to them, they win. Their outlier English version says once the terms under clause 7 of this memorandum are approved, the government of Mozambique shall issue a concession of the project in favour of Patel. So let's turn to clause 7, what does it say?

"In the event that the above mentioned corridor is found techno commercially unviable for any reason whatsoever, both parties agree to sign a new memorandum to undertake another study of a similar project".

So, in other words, if the project is found to be techno commercially unviable for any reason, the government shall issue the concession of the project to Patel. That's ridiculous. I would laugh, but it's not funny because we're all here spending money because of that. **15:48**

That's the document that they're relying on. It says if clause 7 comes into play, we get the concession. Clause 7 says if the project is not viable, then you get a new MOI. It doesn't say anything about awarding the concession. It makes absolutely no logical sense.

Now, here's the problem that the Tribunal has, that you would have to rewrite their version of clause 2 and their version of clause 7 to make it make sense. You would have to rewrite clause 7 to talk about viable projects, not unviable, in order for clause 2 to make sense. Then you could argue, well, if the government determines the project to be viable, then you have to award it to Patel, but right now it doesn't say that. It makes an absurd statement: If it's not viable you award it to Patel, and then at the same time it says you award it to Patel under clause 2, and in clause 7 it says, no, they get a new MOI for another project.

This just doesn't make any sense, and none **15:50**
of their document experts are ever going to be able to make any sense out of this. This is an internal inconsistency within that document, and this is why their English version has to be rejected. As we've indicated, this Tribunal cannot rewrite clause 2.1 or replace 2.7.

Another reason why you have to side with the Portuguese versions and our English version, which are consistent and don't have any of this silly language, is that Mr Daga cannot really hide behind his lack of understanding of Portuguese. Not only because that makes no sense as an excuse in a civil jurisdiction or in international business, but because they admit that they had Mozambican counsel and a very good one at that. One of the best.

And they reviewed the drafts. They were familiar with the old procurement law. They were drafting the new PPP Law, and so you cannot say I don't know what I was signing when you have superstar local lawyers advising you, and those superstar local lawyers have never said anything different from what Mozambique says to this Tribunal, and they're not here.

Now, the 12-month exclusivity, let me

touch on that, which is one of the points that I made early on. **15:52**

The exclusivity does not mean the government cannot make the award of the concession to someone else. That's another complete misreading of the MOI. The clause is very clear that it's a 12-month exclusivity period during the time in which Patel is doing the work at their cost to submit the PFS. That's the period of exclusivity. It ends in 12 months. And after the exclusivity period, the product, the work product, is the PFS.

Now, that has to be approved, and they told you the government could have not approved it, they did in this case, but if the government had the option not to approve it, it also doesn't make any sense to talk about exclusivity spilling over onto the decision of the selection of the concessionaire. That's in the future.

You cannot be exclusive about something that's going to happen after your period of exclusivity stops.

Now, there are many reasons why we can criticise the PFS, but they are right, the government approved it, so, you know, we cannot come here and tell you with a straight face we shouldn't

have approved it. We approved it. But that's not really the point we're making. **15:54**

The point we're making is that -- and they are listed in the next slides -- the PFS did not contain enough to make the decision to award a concession. It only contained enough -- and that's the point of this slide -- it only contained enough to make a decision as to whether to approve the PFS, but the PFS is not a concession. There are a lot of terms that have to be agreed upon, and I don't think there's any dispute that none of those terms were never negotiated, they were never agreed upon.

I mean, I'll give you a big one. Price, percentages, who's going to get what. There's just nothing.

And so you start seeing the continuing conditional nature of the contract. It also lacks the legal terms for a contract. We needed additional financial information. So there was a lot of things missing.

But then it's correct, the MTC approves the PFS. We're not going to back out from that, and we don't have to.

So here's what Minister Zucula says. He says you need to exercise expressly your

direito de preferência, A -- that's option A. **15:55**
Option B, "negociar", negotiate, with CFM and form, "constitui", "uma sociedade", a society, to implement the project.

So that's exactly what I told you, that under Mozambican law, there are two options and both options, the large door and the little door, were provided to Patel. They could exercise their *direito de preferência*, and I'm sure their lawyers, SAL & Caldeira, told them that means you get a 15 per cent advantage, or they could try to negotiate the little door with CFM. But they needed to form a separate company, which would be the joint venture company, and it would be implemented through that company.

So there's nothing here that's inconsistent once you understand how it works. Like we say here, the public tender is the standard process. The other one is the option.

Now, I'm not going to get here into why it is that Patel got it right or didn't get it right. It really doesn't matter. It's what they signed. But this is something that we do know, that a right of first refusal is not the proper translation to even the words "*direito de preferência*".

Direito de preferência means right of preference, that you are going to be preferred. If you get a 15 per cent bidding advantage, you are being preferred over the other bidders. Right of first refusal, the phrase they like to use, is a common law phrase. India is a common law jurisdiction. But that's a totally different concept. **15:57**

It's like two ships passing in the dark. When you talk about right of preference and right of first refusal, it is two ships passing in the dark, and when two ships pass in the dark in the law, you have a failure of meeting of the minds.

So you have a meeting of the minds when it comes to *direito de preferência* but not when it comes to the English versions of the documents.

This is an important point. Again you see this is the record that I'm citing that supports my point that the MTC cannot force CFM to do anything, and it should not force CFM to do anything because if the MTC had forced CFM to enter into a contract, and that's what would have happened, all of the bidders in the public tender would have sued or brought claims against Mozambique, saying the MTC misused its position, told CFM what to do, CFM is an

independent company with their own juridical personality, what was the MTC doing telling them to sign with them and not allowing us to submit a public tender? We would be hearing that from all of the other bidders. That's why we didn't do it, and that's why the MTC was right in not doing it. **15:59**

And we see in the next slide that this is what they were told. This is what they were told by Mr Zucula, so now we turn to C-29.

So you heard from Mr Vasani: I am shocked that there's no mention of C-29 anywhere in the presentation. Well, we've been talking about it already and you've seen mentions, and here's another mention of C-29, and it's all consistent again with what I told you initially, which is they gave a chance to Patel to try to cut a deal with CFM, and Patel just was, unfortunately, unable to do it.

So Patel enters the public tender. It performs poorly. That cannot be debated. With respect to the 15 per cent -- this is an important point on this slide -- they actually, the MTC actually applied the 15 per cent advantage twice in favour of Patel. They applied it in the initial round, and then they applied it again in the final round.

So they got it twice. If the MTC has to **16:01**
be criticised, it's for doing it twice. They should
have only done it once.

They start an appeal, then they drop it,
they send it to the wrong person, the government
doesn't hang its hat on that, we answer anyway, but
there's a complicated process. Again, they had
lawyers, they knew what they had to do, but they
failed to provide the appeal papers by the deadline
and to file the right appeal, and so that's the end
of it. There is no evidence that would allow an
international tribunal to interfere with a
regulatory bidding scoring situation.

Normally when international tribunals
interfere is when there's concrete evidence that the
math or something was, you know, altered by
sovereign authority, that kind of thing. There's
absolutely nothing here. Arbitration tribunals on
an international basis also require that the
investor follow -- the alleged investor or bidder
follow the local process, take advantage of the
local appeals. They didn't do any of that.

So that's the factual record.

So let me walk now through the
jurisdictional arguments. Then I'm going to talk,

not too long, a little about the merits, the legal grounds, and then when I'm done with that, I'm going to turn the table over to my partner here, Dan Brown, and Dan's going to address the damages. **16:02**

PRESIDENT: Maybe after jurisdiction we make a break.

MR BASOMBRIO: Yes, we can do that then, or if you would like we can do it now. Whenever you want. Thank you.

So I'm going to go through jurisdiction. We all know that the burden is on Patel. That's standard. The major obstacle that they have is that the MOI is not an investment. They never entered into a concession, and this is a very important point I want to try to make clear, if the Tribunal would allow me.

If they had -- I hope you're OK in those fancy chairs. Is your head OK?

PRESIDENT: I'm OK.

MR BASOMBRIO: All right. Anyway, here's the point I want to make with respect to the concept of investment. If an actual concession had been granted and had been executed, we would not be arguing that there was no investment because, you know, a concession for an infrastructure project is

an investment, but it has to be granted and that's the key. You have to actually receive the concession; then you have an investment. **16:04**

All the pre investment activity, like spending money in the MOI or the PFS or whatever, all of those -- or trekking through the jungle like we heard this morning -- all of those are pre investment activities. You don't get compensated for that, and also that doesn't give you a ground. You've got to have actually received the concession. That's the investment.

So what happens if, as Patel argues, well, we should have gotten the concession and we didn't. Well, then you have a breach of contract claim, and that's why we have this ICC arbitration, and that's where Patel has to argue that. That ICC arbitration, by the way, is going forward December 12 to the 16th, this year, in Lisbon because we couldn't get this space.

So turning to this slide here [Slide 67] the MOI was not an investment and everything they did related to the MOI was not an investment. It's not an investment under the BIT, and I heard opposing counsel arguing that it was, but it's incorrect, and there's a simple reason why.

Article 1 of the BIT defines "investment" in a very broad way, and then it gives examples, right? And we know -- all of us know -- that normally international tribunals will say well, those examples are not exclusive, right? There could be others. They are just examples. **16:06**

Well, that's normally the case, unless one of the examples is exactly what you're talking about, so like if one of the examples talked about loan documents and it limited what type of loan documents, then if you're fighting over a loan document it's got to be that type of loan document because the drafters have taken the time to be very specific with respect to what category of asset, what kind it must be.

And that's what we have here, and this is something that's overlooked this morning, and it's been overlooked by Patel in this arbitration.

Article 1(b) section (v) says it has to be "business concessions conferred by law or under contract". There was no business concession conferred by law because law requires a concession agreement in Mozambique that's published in the Official Gazette, and there was no concession conferred by contract for the reasons that we

argued, and it couldn't have been because the law requires, in Mozambique, an actual decree that's published in the Official Gazette. **16:07**

So they are suing claiming that they were entitled to a business concession. The only way you have standing or jurisdiction under the treaty is if it's already been conferred. Here it was never conferred, and so that ends a jurisdictional analysis. They don't fall within the treaty.

Now, I'm also going to touch base quickly on the fact that, as we know, in addition you have to conform -- the investment has to conform with general principles of international law.

There are two major problems. One is it is clear under the case law that we have cited, like Joy Mining Machinery, that a contingent liability cannot be an investment under international law, and we see this in various of the cases that we have cited, and this is a major obstacle under international law because the MOI, as now you understand it, is contingent. Right? There are again two doors, to use their analogy, the large door, the direct award, if the government approves the PFS, they get their *direito de preferência*.

Let's set aside what that means for a

second. It's contingent. The government has to approve it. The direct award, if they cut a deal -- if they cut a deal with CFM -- they get it. It's contingent. **16:09**

So the two potential rights are contingent on things happening, so that MOI is a contingent document and, as such, not an investment. That's dead clear in international law. And they say it.

Look at slide 75. They admit that it was subject to conditions, and their lead negotiator, Mr Daga, says the MTC would have discretion to approve the PFS or not. Then he says again in his witness statements, PEL would have a right of first refusal of the concession, which means we could walk away if we were no longer interested.

So either side, according to Mr Daga, could walk away. That's conditional, and that kills them on jurisdiction. Now, Mr Daga also uses the word option. Again, we disagree. It's *direito de preferência*, it's not a right of first refusal option, but let's assume that we went with their English version for a moment. Well, the option also kills them, because an option to walk away is also not an investment, and that's equally established in the international law. An option is

not an investment in the jurisdiction. **16:11**

PROFESSOR TAWIL: Mr Basombrio, can I ask you a clarification again?

MR BASOMBRIO: Yes.

PROFESSOR TAWIL: In slide 73 you say the MOI also allowed PEL to pursue a direct award through CFM but PEL was never able to reach agreement with CFM.

Can you explain how would the first refusal work there?

MR BASOMBRIO: The MOI allowed PEL to pursue a direct award through CFM, but PEL was never able to reach agreement. And your question is what, Mr Tawil?

PROFESSOR TAWIL: Yes. The issue of the first refusal, because you have seen the first refusal is related to a tender, so I would like to understand --

MR BASOMBRIO: OK. Yes, let me try to address that.

So we're saying there is no right of first refusal. We're saying that's a common law concept that exists in India, and they were looking through those glasses at the MOI. The MOI says *direito de preferência*. *Direito de preferência*

means what it says, right of preference, or *margem de preferência*, margin of preference. **16:12**

Under Mozambican law that means a scoring advantage. 5 to 15 per cent. They're talking about something totally different.

PROFESSOR TAWIL: I understand, and I must say that in general terms I agree, that that's how it works on PPP. The issue is how do you put this with the issue of the direct award to CFM?

MR BASOMBRIO: OK. Let me try to answer.

What I've said is that there's that large door, to use their analogy, and the small door. The exception, the small door, would be a direct award, so in order to get that key they need to cut a deal with CFM, and as I cited from Mr Zucula's letter, they would have to reach agreement, form a joint venture company, and then that joint venture company puts in the proposal, it's accepted by the government, and then the Council of Ministers, through a formal decree, would have to approve it.

So there's a very complicated process, but there is no such thing as option on their side. They don't get to make that decision themselves. They can say we can try to go down that road, but then they've got to meet conditions.

PROFESSOR TAWIL: I understand. But *direito de preferência* in that case would not be a scoring advantage? **16:13**

MR BASOMBRIO: *Direito de preferência* doesn't apply when you have a direct award. When you have a direct award -- let me explain why.

A *direito de preferência* gives you a scoring advantage because you have other bidders that you're competing against. It only applies when you have a public tender. It doesn't apply when you have a direct award.

PROFESSOR TAWIL: OK, thank you.

PRESIDENT: So now this opens an avenue of questions.

So your position is there were like two possible outcomes. One would be a direct awarding of the contract but to a joint venture which was to be created with the national railway company and would be then a public-private company and there would be no tender, first route.

Second route, there would be a tender, and in that tender there would be a *direito de preferência* which you say is a 15 per cent advantage in the calculation of the points you deserve.

Did I understand that correctly? **16:15**

MR BASOMBRIO: It's all stated correctly with one exception, if I may correct.

PRESIDENT: Of course.

MR BASOMBRIO: Reverse the order.

PRESIDENT: OK.

MR BASOMBRIO: Right? The public tender is the hugely preferred option, and the direct award is the exception.

Going back to the idea of whether there was an investment, Patel also refers to all their pre investment activities and expenditures. I told you in my introduction that that doesn't qualify as an investment, and that is also very clear in the law. The Mihaly v Sri Lanka case that I cite here is on point. It says that pre investment activities are typical of modern day commercial activity in large projects and this is something that's borne by the investor. This is something that's not recovered, and here is the important point of Mihaly at the bottom of slide 82.

Whatever recourse the Claimant may have at its disposal to pursue its claim arising out of a commercial, financial, or other type of dispute, that's what they have to pursue.

And so that's what Mihaly confirms, how it confirms what I said earlier on, which is if their claim is under the MOI we should have gotten the concession, then that's a commercial claim. That's not an investment claim. And that's what happened in Mihaly. The Claimant did not succeed. **16:16**

And there's another case that we have cited, Zhinvali against Georgia, which holds exactly the same, and this one's right on point and that's why I'm citing it, because it's talking about expenditures that were made during the exclusivity period were not an investment.

So everything that you have heard, all the heavy detail this morning about everything they were doing in Mozambique allegedly, none of that is an investment because it was all done during the exclusivity period.

So there's a lack of jurisdiction for all those reasons. I'm going to go very fast here but it's important to know we're not even close to satisfying Salini. There was no contribution of money or anything else to the government of Mozambique. If you understand that the PFS was their responsibility and that's how it's done and they got to pay for it, you can't at the same time

say well, that counts as an investment, as a contribution. **16:17**

The duration temporal time limit doesn't exist. There was none. Investment risk is completely absent. In a concession the investment risk is you think you're going to make a profit, you don't, your costs are higher, maybe the price of coal tanks like it did -- that's the type of investment risk. You don't have any. And Nova Scotia tells you that when you prepare a PFS and do that kind of work, that's a commercial risk. That's not an investment risk.

All economic activity includes that type of risk. There was no contribution to development because, unlike Salini, in that case Salini constructed something and then the government said stop. Here, they constructed nothing and the investment was not in accordance with the PPP Law.

We'll talk about bona fides later, but you can't talk about bona fides if you never made an investment. I guess you never get that.

The last key point about PSEG Global and Mihaly is that they recognise -- when you're talking about concessions, if the concession was not actually awarded, there's no investment, and PEL was

not an investor because it never made an investment. **16:19**

Now, this is a very important point that I do want to slow down on and address.

You've heard today in the opening statement that PEL spent all these assets, you heard it, allegedly in doing all this, and that's their investment.

Well, we sent three very specific requests for documents where we tried to get at the point of whether an actual alleged investment, how they see it, was ever really made.

Request number 10, we asked for documents that show all costs incurred by PEL with respect to the Preliminary Study, the one before the MOI, including time cards, invoices, any records.

Their response was we have nothing. So then we asked them, in Request No 38, OK, well, give us the time cards, your cost records, information about personnel involved, expenses related -- that were actually incurred by PEL in preparing the PFS, the prefeasibility study. Their response was we have nothing.

So then we said OK if you don't have any of that, give us all of the documents that show what you spent or what you contributed to the PGS

consortium in preparing the public tender submission and they said we have nothing. **16:21**

Now, sitting across the aisle I was dodging a lot of bullets this morning regarding Mr Vasani's accusations or suggestions of impropriety about documents missing. Well, where are these documents? Where are their evidence -- this is their evidence of the alleged investment. Where is it? They knew they were going to bring these claims because they've been threatening them for ever. You could draw an inference, and you should, that there's a spoliation of evidence problem here. They don't have any record of any expenditure at all, and you cannot establish an investment without any record.

And I will tell you, Mr Vasani likes to speculate so I will speculate this one time. You know why they didn't produce anything? Because it would show a de minimis effort. It would show a de minimis expenditure. And that's not me saying it. That's our expert Betar saying it. Betar said there's no way they could have spent any real money on any of this when you look at the PFS. It's just not.

You know, to people who are not engineers

like the members of the Tribunal, to me, you know, you read all the jargon in the PFS and you say oh, wow, I'm impressed, and you heard a lot of that jargon today, but an engineer tells you, no, this was just mostly lifted unfortunately from the internet, from existing documents, there's no way they spent any real money, and this is why you have never heard what they spent. They don't want to tell you, because it was probably about a million and a half at most, even assuming it was that, and it would make -- the reason why these documents have disappeared, it would make their $150 million claim completely absurd. That's why they have not given these documents to their experts, their multiple damages experts; that's why they didn't give them to us; and that's why their answer is it's all missing. We lost -- we don't have anything. **16:23**

But in any event, and this is the last point on who's the investor, the real party in interest is not Patel. The real party in interest, if you're going to say that the tender should be scored in a different way, it's the PGS consortium, and this is extremely clear. And I'm citing just one of the cases, ACP Axos.

It holds if you participate in a

consortium, it's the consortium that has the right. It held Axos alone cannot avail itself of the rights, if any, belonging to the consortium formed by Axos and Najafi in that case. They lack standing, they cannot be an investor, they cannot pull it away from the consortium. **16:24**

Now, why isn't the consortium here? There's a very simple reason. Because one of the consortium members, SPI, is a Mozambican national. This is not disputed, and so it would destroy their ability to pursue a claim under the BIT because that nationality of a partnership, a consortium, is assessed by looking at the nationality of all of its members, and one of the members was Mozambican. And I would be arguing in front of you there's no jurisdiction because of that.

Well, you cannot avoid that argument and that situation by suing only on behalf of the foreign consortium member. That's an abuse of the arbitration process and another reason why there's no jurisdiction.

I'm not going to spend a lot of time on *ratione materiae*. We've already talked about why the MOI is not an investment. But I do want to touch briefly on the issue of sovereign power. It

is very clear that breaches, like the Tribunal said in the Abaclat case, "breaches obligations arising by the sole virtue of such contract" are not an investment treaty violation. When you look here, that's all we have. The government was acting as a commercial actor, and let me explain that, if I may. **16:26**

Let's talk about something all of us in this room are very familiar with, which is when we get hired as attorneys, a client can put out an RFP and ask different law firms to submit bids. That's like a public tender. A client also can go to their long time counsel, avoid an RFP and have direct negotiations to hire that law firm, so these two mechanisms exist in the commercial world. They're just called public tender and direct award in the government world, but the exercise of those mechanisms and the decisions by the government within those mechanisms are not sovereign decisions. They are commercial decisions. Just like a client can decide to waive the RFP and hire a lawyer directly, a government can decide to do that, and conversely the same is true.

And so when we talk about well, the Council of Ministers made this decision or not, we can dispute what was said in C-29, et cetera, but

that doesn't change the nature of that decision, which was a mere commercial decision, and that lack of sovereign act kills their case. **16:28**

A sovereign act would be if the government took an action that changed the equilibrium of the MOI. For example, if the government changed the law and said we will no longer provide *direito de preferência*, that's a sovereign act that changed the equilibrium of the MOI. There's absolutely nothing like that, and so you have to end up in slide 101 what Toto Construzioni tells us: "Mere non-performance of a contract obligation does not by itself fall within the scope of the State's undertakings under the Treaty".

There's one point that I don't want to lose in the many arguments that the Tribunal is going to have to review which is the sunset clause in the BIT. It is interesting that India, not Mozambique, India decided to terminate the treaty. As you may know, India has exited from most of its treaties.

Now, this is substantial because Patel is an Indian company. This means the Indian government has made the decision that it doesn't care whether its nationals, like Patel, have protection or not

under international law, and they repudiated their contracts, including with Mozambique. **16:29**

Now, India said this becomes effective 21 March 2020. There's a sunset clause, though, that says that it applies in respect of investments made or acquired before the date of termination, so it's very specific, the sunset clause. Again, like article 1, consistent with the definition of an investment, it says the investment has to be made or acquired.

So that confirms that the only concession that works is one that's actually made or acquired. That didn't happen here, and because it didn't happen before the sunset clause expired, that's your easy answer. There's no treaty any more.

Now, let me talk about blacklisting here. Blacklisting obviously is a problem under the international concept that you have to act in good faith, and, as a tribunal, your job is to decide, well, how important was the blacklisting, and does that convince me that it's enough to say, you know, I'm just going to dismiss it -- I'm not here -- as inadmissible, which is extraordinary relief. We agree.

So what do we have here, and I'm going to

re-emphasise what I said in my summary introduction. **16:31**

You have -- and I don't have to go through it again -- you have the India Supreme Court issuing a judgment that says that PEL is not commercially reliable and trustworthy, that PEL has been engaged in a dereliction and unwholesome practices and upholding their blacklisting -- and the word "blacklisting" is used multiple times so that's not me making that term up -- and they affirm -- you have a second judgment, they're affirming the judgment of the Delhi High Court and it says Patel "had no qualms in ditching the project at the 9th hour. They withdrew at the last minute" and the High Court says Patel's conduct "was, to say the least, unbusinessmanlike. Any prudent businessman would naturally have taken the decision taken by the NHAI to blacklist Patel".

So you have two courts, including the Supreme Court, not of some far away jurisdiction, the Supreme Court of their own country where they're based.

Now, if Patel is the large company, prominent contractor that Mr Vasani indicated this morning, that makes this even more significant. That would be like the United States Supreme Court

saying that Coca-Cola or Honeywell or Boeing or Ford Motor Company is not commercially reliable or trustworthy. **16:33**

Imagine what it would take for the US Supreme Court to say that. They never have. And I could not find any example where any Supreme Court has said anything like this about any of their own national companies. So you can not belittle this. It's important. And the reason, the lynchpin, why it is important and why it renders their claim inadmissible is because of the nature of what happened.

It was an infrastructure project, a transportation project in India. We have the same in Mozambique. They put in a bid. They won. Then they backed out of it and they refused to accept it. That would be of great concern to the Mozambican government. And you've been told unequivocally that if they had known, that would be the end of it. That was concealed.

So what do they say? They don't dispute any of that. What they really say is the timeline, so let me spend a minute here on the timeline. This is what happens.

PEL submits its Preliminary Study. That's

before the MOI. The MOI is signed on 6 May 2011 **16:34**
with one-year exclusivity. PEL is notified of the
blacklisting by NHAI on May 20, 14 days later,
within the period of exclusivity. The blacklisting
goes into effect on May 20, 2011 to May 19, 2012.

Delhi High Court issues its judgment
on August 2nd. All of this happens before PEL
submits the PFS to the MTC on May 2nd, and so it is
within the relevant time period. The MTC had not
yet made its decision to accept the prefeasibility
study, and by that time not only has Patel been
blacklisted, but they have gone to court and they
have lost, and there's a judgment of the Delhi High
Court condemning them and upholding the
blacklisting.

So what happens then? The PFS is
submitted on May 2nd. On May 11, nine days later,
the Supreme Court of India issues its judgment.
Patel still doesn't disclose anything. And then the
MTC approves the PFS over a month later.

So everything happens. The blacklisting,
the lower court decision, the Supreme Court
decision -- it all happens within the period of
exclusivity before the MTC makes its decision. That
is why this is important. That is why this renders

this claim inadmissible. **16:37**

You know, we all know the cases, and far less things have rendered claims inadmissible. Sometimes people in control of companies will move assets, and that changes, you know, the risk ratios and that's held to be inadmissible. Sometimes companies try to create jurisdiction by changing their location. That's held to be inadmissible.

This is bad faith. We've been accused of levying accusations lightly. There's nothing lightly about this. An MOI was signed. It requires transparency not only from the government but from the potential investor. It requires good faith not only from the government but from the potential investor. And while in your period of exclusivity, before the government makes a decision to approve your PFS, all of these things happen and you say nothing? That requires that their claim be rendered inadmissible.

And you have heard what happened from Mr Banerji, our Indian law legal expert who was the prosecutor on the case. He was the additional Solicitor General in India.

So keep in mind, please, that's not just a legal opinion. It's also a factual statement

because he's telling you what happened there. Now, if Patel disputed what happened and disputed what Mr Banerji says, they could have gotten, like I said, their lawyers who represented them to present their own witness statement, and I would get to cross-examine that lawyer over here in the next few days. But you know why that chair is empty? The same reason why that chair is empty with respect to their Mozambican lawyer, because both of them would say what we're telling you and would damn their case. That's why they're not here. **16:38**

Clearly this was material. It continues. It continues all the way through the public tender. They sent a letter on 5 October 2012 telling the MTC you should give us a direct award because we are trustworthy, when the Supreme Court has just said in a judgment, no, you're not.

I want to talk a second about laches, because I think this is an important point. You've heard from both sides that there are some documents that cannot be found any more. This is the typical case where you would invoke laches. This claim could have been brought before if they wanted to bring it. They didn't bring it. There are proof issues, for example we have been unable to find our

English version. All of their evidence of cost and damages is gone. This is something that has to be considered. **16:40**

So the final point on the merits would be related to the fact that PEL has no right to a direct award to a concession to protect under the treaty, and I don't have to reiterate this, we've already talked about it, and how what they actually got was the *direito de preferência*.

So let's turn quickly here to the treaty claims.

PRESIDENT: Once you are --

MR BASOMBRIO: We can take the break.

PRESIDENT: Can I put two questions to you before?

MR BASOMBRIO: Yes.

PRESIDENT: One refers to the *direito de preferência*, and I think you referred to the 2010 regulation approved by Mozambique for state contracts, which is RLA-3. Can we have a look at that, if I understood you correctly?

That is in your presentation, I made a note, page 24. In page 24 there is this cross reference to the 2010 procurement law. Do you see that?

MR BASOMBRIO: One second. **16:42**

Yes.

PRESIDENT: Yes.

MR BASOMBRIO: Yes.

PRESIDENT: Can I kindly ask you to go to RLA-3? And you are referring to article 26.

MR BASOMBRIO: Yes, clause 3.

PRESIDENT: This is, if I'm not mistaken, and you correct me, this is the general regulation for State contracts which was in force when the MOI was signed.

MR BASOMBRIO: Yes.

PRESIDENT: That is.

Can I take you, because I was slightly puzzled by your cross reference to 26.

MR BASOMBRIO: OK.

PRESIDENT: Because 26, I have it in Portuguese but I think it must be in English somewhere. It's headed Domestic Competitors. I hope the translation is -- I would translate it as Domestic Competitors.

And your cross reference was to paragraph 4 -- no, sorry, 3. Article 26, paragraph 3. You see it? You have it in page 24 of your presentation.

MR BASOMBRIO: One minute. We're pulling it up. **16:44**

PRESIDENT: Of course. I wonder if we can get it on the screen?

MR BASOMBRIO: Yes.

PRESIDENT: Maybe if I'm making too complicated questions now, we leave them for the Mozambican law experts, because I was just puzzled that the cross reference was here to the preference which domestic entities have in public tenders.

And for construction contracts it seemed to be 10 per cent, not 15 per cent. I don't know if you have an explanation or --

MR BASOMBRIO: I think that is a question for the experts, but you may be correct, yes.

PRESIDENT: OK. So --

MR BASOMBRIO: But the point is that that's how -- it was in existence. The concept existed, and then it got refined with the subsequent PPP Law.

PRESIDENT: Yes. But the subsequent PPP Law, if I am not mistaken, is enacted after the MOI. Isn't that correct?

MR BASOMBRIO: Yes, it's enacted after, but what we have noted is that, as opposing counsel

indicated this morning, both sides understood that, once it would be enacted, those would be the rules of the game. **16:46**

PRESIDENT: Very good.

And then I have a second question which I promise has nothing to do with Mozambican law. It's really only on the facts.

I would like you to confirm to me certain dates, and if I understand correctly from this morning, the 8th of March 2013 was the deadline for tender, for presentation of bids in the tender, and I derived that from C-234. Do you agree with me? Because it's important. I'm not making -- because that is like a couple of weeks before C-29, the document you referred to, which is the 10th decision of the Council of Ministers, which is then apparently two weeks before the 12th session of the Council of Ministers, which is C-34.

Do you remember that? I wanted to get clear in my mind how that timeline developed, what was first, what came afterwards, because I'm slightly lost there, and maybe I can get your help.

MR BASOMBRIO: And I appreciate the question but what I would like to do is I would like to confirm my understanding before I give you an

answer, because you consider it to be important. **16:48**

PRESIDENT: Yes. Why don't we -- maybe Claimants can also give it -- could we get the timeline between March and April 2013, what was exactly happening with the public tender, when it was announced, when you had to present the bids, when PEL presented its bid, when the 10th and the 12th session of the Council of Ministers, which seemed to happen -- each session seems to happen each week, is what I derived.

If we could get a little bit of clarification tomorrow, that would be helpful.

MR BASOMBRIO: Yes, of course. You want that tomorrow?

PRESIDENT: Yes, because today it will be -- tomorrow, yes. Before we start with the witnesses would be helpful.

MR BASOMBRIO: Mr President, would it be possible for me to get an indication of how much time we have left?

PRESIDENT: Yes, because some time is of course on the Tribunal.

MR BASOMBRIO: Right, for the questions.

PRESIDENT: And we will now break. Do we have a time check?

MS JALLES: Yes. You have used 1 hour and 32 based on the assumption that the Tribunal's question and the answers to those questions counts on Tribunal time as per paragraph 18 of Procedural Order No 5. **16:49**

MR BASOMBRIO: So we have how much time left, please?

MS JALLES: So you have a little less than one hour. 58 minutes.

PRESIDENT: So we now have to break. Yes? Of course, Ms Vasani?

MS VASANI: Just one point of clarification on that. At C-380 there's a chronology that sets out every document and the timeline, so that might be useful.

PRESIDENT: Give me one second. I have to look at this.

MS VASANI: Sure.

PRESIDENT: And let's see if that helps to finalise my doubts.

MS VASANI: It's on page 16 of that document.

PRESIDENT: OK. Thank you. Thank you for -- yes, so it's probably -- could you have a look at it tomorrow, and tomorrow you tell me if you

agree with this timeline, which is very helpful. **16:51**
Thank you very much. It seems to be very detailed, and I think it helps to understand my worries.

So maybe on the basis of that, you just double check that.

MR BASOMBRIO: We'll double check. We're happy to.

PRESIDENT: And if that's correct, then you just say "We agree with C-380".

Very good. So we have to break now. It's 16.52. Shall we come back at 18 -- no 17.05. You will have to get used that I confuse the time.

MR BASOMBRIO: Could we do 17.10? Is that OK?

PRESIDENT: Of course. Ten past.

(Short break from 4.53 pm to 5.13 pm)

PRESIDENT: We resume the hearing, and the Republic of Mozambique has the floor.

MS BEVILACQUA: Could you bring the Respondent's PowerPoint up on the screen, please?

(Pause)

MR BASOMBRIO: We're ready, if everyone is.

What I would like to do is I would like to discuss each of the substantive treaty claims, the

law in light of the evidence, and then after that my colleague is going to discuss damages. **17:16**

We're going to start with slide 116 on the table.

So the first claim by Patel, they claim that there was an expropriation. Here the law is clear that in the facts that you have heard, there could have been no expropriation.

I'm going to read from Waste Management, the decision, the language in that decision which I believe is dispositive of the expropriation claim, whether it be direct or indirect expropriation. That's in this slide. Waste Management said, "The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non compliance by a government with its contractual obligations is not the same as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum".

That's the law. And Waste Management said it, and a lot of other tribunals have repeated it, so let's break it down.

Non-compliance with the contract is not

enough. It doesn't matter if the non-compliance was by the MTC, by the Council of Ministers, by the President of Mozambique -- it doesn't matter. It's not the actor, it's the act, and the act is non-compliance. **17:18**

And the only thing you have heard today from Patel's opening statement is that there was an alleged non-compliance according to their reading of the MOI and their version. Even if you take all that to be true, it's just a non-compliance with contract. That's not an expropriation.

The second question is are they free to pursue their contractual rights somewhere else, and do they still have those rights to pursue?

Well, I don't think they're going to tell you that they don't have those rights to pursue because they would have no case, and you heard today that they believe they have those rights to pursue.

So the third issue is, third factor, is there a contractually chosen forum to pursue those rights? Yes, the ICC again. There's no debate about Waste Management, that decision; there are no tribunals that really take any serious issue with what was said. This is just not an expropriation case.

So I think you could very easily get rid **17:19**
of that claim. Oxus Gold PLC puts the final nail on that coffin. "A right to formal negotiations cannot be subject to expropriation". That's all they claimed to have, that they had a right to negotiate a concession. That can also not be expropriated. Why? Because that means that you would have to guarantee a particular result.

To do something to a certain standard, like that Tribunal said, would be converting an obligation to negotiate into an obligation to achieve a particular result. That's their entire case.

I'm going to repeat it. That's their entire case. They're saying under the MOI the government had an obligation to achieve a particular result. That is not an expropriation, that's a contract claim, and so the fundamental flaw is just that, and this has been reiterated also by Impregilo versus Argentina. "Only measures taken by Pakistan in the exercise of its sovereign power and not decisions taken in the implementation or performance of the Contracts, may be considered as measures having an effect equivalent to expropriation".

So there was no expropriation here. I

think we can move from that. **17:21**

The real issue is the fair and equitable standard. You know, is this an FET case or not. I want to know first that it's a very high standard. So if a claimant says, well, you know, the government could have been better to me, they could have been clearer, you know, maybe they changed their mind, none of those things amounts to an FET violation. It has to be something substantial.

Saying the government had a contractual obligation, they told us they were going to do something, they agreed and then they flipped their mind, they decided to do something else, that's not a violation of an FET standard. That's a breach of contract. And that's all you have. Their stated silver bullet is the decision, according to them. We say it's not a decision, it was just guidance.

The letter, whatever you want to call it, from the Council of Ministers, even if everything they say is true, that the Council of Ministers said give them the direct award and then changed its mind, that is not an FET violation. That is a contractual issue. Because that decision on its own means nothing. It only becomes arguable if you tie it to the MOI.

There's nothing wrong in the Council of Ministers saying let's go with A and, no -- oh, we changed our mind, let's go with B. **17:23**

That's their story. There's nothing wrong with that. The only way that becomes in their theory arguendo wrongful is if you tie it to the MOI, and that makes it necessarily a contractual choice and a commercial choice, so the FET standard doesn't even begin to apply, especially when you take into account the high measure of deference that's provided to governments, and that is confirmed in the Myers v Canada case.

In terms of the FET you have to always identify what's the legitimate expectation, because you don't want to frustrate a legitimate expectation, and we would submit here, as I have explained, and you will hear from Mr Zucula and from Mr Chaúque, that Patel was just mistaken with respect to their expectations.

They conflate together *direito de preferência* with direct award. I hope by now I've been able to explain that they are two really different things. If you get a direct award, you're not going to get a bidding advantage because there's no one to bid against. You're not going to

get a right of preference as it's understood in Mozambican law; you're just going to negotiate a direct award. **17:24**

So if their expectation was that you get a direct award by getting the *direito de preferência*, it was wrong. It doesn't matter that before the new PPP Law it was 10 per cent, then it became 15 per cent, that before it was generally given to local bidders and then it got expanded to local and international bidders -- those are things that don't really change the bottom line, which is it has a specific meaning in Mozambican law, and it's clear they didn't understand it. They were thinking of the common law right of first refusal, which is something totally different, and so you can't establish the first factor required in an FET analysis of the legitimacy of the expectation under local law.

And of course you have to look at what was specifically undertaken and if you look at the Portuguese versions of the MOI, what was specifically undertaken in article 2 was to provide the *direito de preferência*.

If you look at their version, their English version, what was undertaken was to hand

them an unviable project. **17:26**

Good faith is also another factor to think about. I don't think that based on what you have heard, and you will hear it confirmed from our fact witnesses, the Tribunal could conclude that the MTC did not reasonably construe Mozambican law.

You also need to have some sort of sovereign act. Like we've stated, there was no impairment of their rights. They are here still trying to assert those rights, and they could assert them before the ICC.

This is an interesting case, and that's why I cited it here. It's the F-W Oil Interests case. It's very analogous. In that case the Claimant was the winning bidder in a public tender and was "awarded the tender 'subject to the negotiation and execution of a mutually agreeable operating agreement'".

So they were ahead of Patel. They won, and they were told you're going to get the tender, but the Tribunal observed that "a contract to negotiate, even when supported by consideration, is not regarded as a contract known to law -- it is too uncertain to have any binding force; and no court can estimate the damages for breach of such an

agreement". **17:27**

And that's also a major problem with FET here. Even if the Tribunal at the end of the day on an FET basis could have some criticism about the way Mozambique did things, which you shouldn't but if you did, this would be one of those cases where maybe argue -- the Tribunal will hold arguendo things could have been done a little clearer, but there are no damages that can be proven because it's just an agreement to agree, and this case is the law on that.

So in sum, on the FET, a concession can only be granted by a duly executed concession agreement in accordance with Mozambican law. Any other holding by this Tribunal would turn public concession practice on its head and would open up a Pandora's box that would allow every disappointed bidder, like Patel, or any interested party that has signed an MOU, LOI or MOI, to flood the gates of investment treaty arbitration with baseless claims like this one, about what could have been if a concession had been granted that never was. This would create devastating uncertainty in public procurement, and that's a very important point that the Tribunal should keep in mind as we go through

the witnesses and experts this week, and it would discourage governments from utilising preliminary agreements like MOUs, LOIs, and MOIs. **17:29**

The last claim is the most favoured nations clause. We've presented our arguments in the papers as to why you cannot incorporate those provisions of the Netherlands-Mozambique BIT. I'm not going to repeat that here. I will just close my portion of this presentation by saying that, even if it was incorporated, Mozambique did not breach its obligations under the MOI and acted reasonably, and so that would fail as well.

With that, I'm going to turn it to Mr Dan Brown to talk about damages, if that's OK with the Panel.

PRESIDENT: Mr Brown, you have the floor.

MR BROWN: Thank you, Mr President. It seems it falls to me at the end of the day to talk about numbers, so I do want to just make clear a couple of things first, that we are talking in that area here where we would only be assuming that the MOI actually would require a concession or a negotiation of a concession in an instance in which the MOI does not require that or is not enforceable. Of course a not legally binding contract, that value

is obviously zero. **17:31**

The other thing I will say is in fact the *direito de preferência* was already received by Patel, and so there is no effort by Patel to value sort of a missing 15 per cent scoring advantage either.

And then to follow up on Mr Basombrio's point a moment ago, obviously an investor cannot recover damages for an expropriation right it never had, so that would be zero as well. What we're really focusing on here is that, if there was something to the damages claims, let's focus on whether or not those are properly brought here.

If we ignore the fact that the MOI is not a concession, the damages claims here are still baseless, and that's fundamentally true for several reasons. I'm going to focus first on the 2012 financials that were actually discussed briefly today. I know that there was some discussion about those 2012 financials, and I want to make sure we set the stage just a little bit more for those.

In the PFS that Patel provided to Mozambique Patel estimated that the rail and port project would cost $3.1 billion, but in the PFS Patel did not provide any numbers about the revenues

that would support spending on such a project. **17:32**
Mozambique asked Patel for financials, and they were provided on May 15th of 2012. Those financials are at Exhibit C-8 in the record.

When those financials were provided, they were provided on two pages of an Excel spreadsheet, and that's it. Those finances were used by Patel to make a very important statement here, and we've put it on this slide here. It's part of C-8 on pages 1 and 2. It's the cover letter to that.

It says at the bottom of that page, "This model is based on certain assumptions and considering these assumptions it gives a clear idea that even in the worst case scenario also it is financially viable" -- meaning that the project is financially viable -- "even without considering the multiple growths".

I know Patel has focused on the words "worst case scenario", and I'll get to that in a moment but the real concern --

Am I going too fast? I'm so sorry. Thank you for letting me know.

The statement that's of most importance on this page is the fact that Patel claimed that the project was financially viable, and this was before

the PFS was approved by Mozambique. The problem, however, as our Dr Flores will explain, is that Patel's own projections in that C-8 document show that the project was not viable. **17:33**

In order to see why that is so, I want to take a few moments with C-8. C-8 had several assumptions in it, one of which was that the rail length would be 516 kilometres, that there would be a tonnage capacity of 25 million tons per year, and then importantly, that the port and rail efficiency of the project was assumed in the document to be 100 percent, meaning that the annual tonnage would be 25 million tons.

There were also assumptions about how much debt percentage would be had at 80 per cent, about the equity required at $623 million, the debt rate at 7 per cent, and the project debt at $2.492 billion. Patel had proposed that CFM would have a 20 per cent equity in the project, and the project, it was assumed, would take six years to build.

So if you'll bear with me for just a moment, the first page of the financials then looks like this. That document is fairly inscrutable as we sit here looking at it, but let's break out just

a few other things. **17:35**

In this document it demonstrates that the opening cash balance would be $623 million, that's in year one, and that's the equity contribution. By the end of year two, the equity contribution is all spent.

Meanwhile, the capex, the spend on building the project, is going to take place over years one through six until that $2.492 billion is being spent. Meanwhile, you'll see that the revenue lines that are also on this page do not have any revenues in them.

You'll see that the tonnage that was to be handled in Patel's 2012 projections ramped up in year 7 through 11, so that by year 11 there is that 25 million tons per annual.

And the result of all of this, the fact that the spend was early on, the fact that the revenues would not come in right away, would be that the debt balance was also calculated by Patel, and the debt balance, that closing balance in year 10, was $3.8 billion. The easiest way to look at this, frankly, is the fact that the debt pay-down period that Patel reported on these 2012 financials for the project was 22 years.

17:37

The problem that is ignored entirely by Patel's May 2012 financials is the risk and time created on this project. When you spend $623 million in year one and year two, and then you incur debt of $2.4 billion and take 22 years to pay it back, the question is is that financially viable.

And Patel, instead of a worst case scenario, was doing those calculations assuming if the port was built on time, if there were no cost overruns, if the coal companies massively increased production over what was currently there, if the rail and ports were utilised 100 percent, and if debt only cost 7 per cent.

Dr Flores will explain that these numbers actually demonstrate that the project has no value. As he says, Patel should have used projected cash flows to calculate the net present value of the project. That is a necessary analysis for assessing the financial viability of the multi-year infrastructure project.

You'll be grateful to know I'm not going to go into anything about discount rates today, other than to say that Dr Flores calculated that any discount rate higher than 7 per cent applied to Patel's 2012 financials would create a zero value.

Versant's or Secretariat's discount rate **17:38**
applied in its projections is actually 19.56
per cent at the start of the project, well above
7 per cent, meaning that if you apply Secretariat's
discount rate to Patel's 2012 financials, the
project has no value as it was projected in 2012.

Patel only offers excuses. They do say it
was worst case but, as we just looked at, certainly
you can't characterise all of the numbers in these
financials as worst case. 100 percent utilisation
is not worst case. 25 million tons of coal is not
worst case. There's no concession fee at all in
these financials, there's no taxes at all in these
financials, and there is no cost overruns projected
in these financials.

The other thing that Patel claims is that,
frankly, this was an early document. That in 2012
the economics wouldn't have been entirely known yet.
We pointed out the problems with the 2012 financials
and in Patel's reply in this matter it said "given
that there was no concession agreement available at
the time this preliminary projection was prepared,
the terms of the concession were also unknown".

And then importantly they said, "A
detailed financial evaluation would be required as

part of a bankable feasibility study to demonstrate the project's potential economic viability". **17:40**

So here's what happened. In May of 2012 Patel said that the project is financially viable. In August of 2021 Patel said we need another study to know whether there was potential economic viability. It's this blatant contradiction that makes it so relevant that the blacklisting had been occurring at just this same time.

I won't go back into too much detail on that, but I will say that rather than labelling, blacklisting or debarring, one of the things that was said about the actions of Patel in that instance were that Patel itself had expressed its inability to confirm its acceptance on the ground that its bid was found not commercially viable on second look.

And, members of the Tribunal, that looks very familiar, because in this case, in these financials, Patel presented a loose PFS with unsupported financials, and then, when they're now being looked at those, they wind up saying actually you can't rely on those early financials, even though Patel itself said the project was financially viable, in order to get the approval of the PFS.

The 2012 financials are telling for

another reason, too. You've heard it a couple of times today, but TML, the winning bidder on this project, has not undertaken any project remotely resembling what Patel had proposed. The project had been fundamentally reduced to small ports that load products onto trucks. **17:42**

If there were millions of dollars of profit to be made on TML's project, TML would be there to build it. If there were millions of dollars of tax revenue to be gained by Mozambique to build this project, Mozambique would be there to build it. The project is not being built, and that's the best proof that the project is not viable.

That should be the end of the story on our damages, but it's not. There are no less than eight sets of damages numbers that exist in the record of this case from Patel, and I'm going to hazard a guess that my time will not permit me to necessarily talk about each and every one of them, but let me try to take some issues on at a high level, if I may.

First of all, the damages theories themselves range from $15.6 million to $156 million, perhaps by coincidence, a factor of 10. It is

Patel's burden to demonstrate its damages in a non speculative manner, and I would submit to this Tribunal that a damage range amongst two experts of $15.6 million to $156 million is demonstrating the speculation involved in their damages all by itself. **17:43**

Versant, now Secretariat, had five opportunities to state the damages, and they used a DCF analysis for all of them. We've talked about it a little bit before, but the DCF analysis is impermissible in a case such as this one where the project was never operative and there was no concession. If future profits were merely possible and not probable, an award on future profits cannot be made. But they started with a DCF analysis that was at $115.3 million, and, as I said, I will not go through each and every detail but I can show you here pretty easily that Dr Flores did look at the DCF analysis, at the discounted cash flow analysis, and he looked at the variables, the assumptions that were being made, and determined that multiple assumptions in that DCF analysis reduced Patel's damages to zero, and also that other assumptions reduced Patel's damages by 50, 25, 31, 58 per cent. Lots of variability, which demonstrates the speculation involved.

Dr Flores concluded, "The severity of the impact that reasonable corrections produce on Versant's analysis unambiguously shows that Versant's DCF valuation cannot be reasonably relied upon to quantify damages in this case and should be rejected". **17:45**

Even more problematically, Versant's original ex post valuation ignored that critical information. The project had not been built. But, undeterred, Versant looked for another DCF analysis. They actually increased their DCF analysis to 156 million, and that's the only number that you've heard today.

Versant purports to redo its DCF analysis based upon what you've heard about briefly as the 2017 TML feasibility study. The feasibility study is wrong on which to base a DCF analysis for several reasons.

There are substantial differences between the TML project as it was proposed and the Patel project as it was proposed that mean that the TML study would be incomparable in all events.

However, and perhaps easier and more importantly, the TML study was in 2017, five years ago, and the idea as it was speculated today that

any investor would be picking up the 2017 feasibility study to make an investment today is inaccurate. **17:46**

In addition to all of that, it still remains the case that TML put a feasibility study together, and then in fact has not done the project, which calls into question the feasibility study in the first place.

I'm going to skip slide 162 in the interests of time, but those are the differences between the two projects. In fact, I think we will skip ahead then to one other comment that Dr Flores makes on slide 164.

He does want to address, and he will address, the fact that when you have a feasibility study, the purpose of that study is to offer rosy prospects toward the financiers of that project, and often financiers will do their own studies. But to suggest that a feasibility study from 2017 that was designed to present a rosy picture should be relied upon is certainly not true.

And just like the first ex post DCF damages analysis, Dr Flores analysed Versant's second DCF ex post analysis and saw many of the same flaws in the assumptions and inputs into that

evaluation, and identified those for you. **17:48**

Patel also indicated that they wanted an ex ante analysis. Ex ante of course -- you may well be familiar with it but just to set the stage for a moment -- ex post of course looking at today's information; ex ante looking at information as it existed immediately before the breach, or the alleged breach.

Patel actually put together an ex ante damages analysis at $78 million, about half of which was interest. There's already something upside down about the ex ante analysis compared to the ex post analysis because we know the project is not being built and, yet, the ex post analysis is three times as much as the ex ante analysis.

In any event, the ex ante analysis ignores the fact that there were already 2012 financial projections, and those 2012 financial projections had already demonstrated a non viable project. That, in fact, would have been the best information of an ex ante analysis at the time.

There are other things that were improper as well, but in the interest of time I will skip over slide 169. Some of the -- I will just say just very briefly that some of the things that were

assumed in the ex ante analysis that were unreasonable were tariff prices, were cost of operation assumptions that were different from what Patel had put together in its own 2012 financials, and that it did not account for those cost overruns. **17:49**

Perhaps realising the weakness of those DCF analyses, you heard this morning about the idea of a loss of chance theory. Patel actually presented two numbers in that regard but, frankly, both those numbers are simply multiplying 90 per cent times DCF analyses.

And, as Dr Flores says, "Any probability adjustment applied to Versant's speculative and incorrect damages calculations would result in an incorrect and speculative assessment of damages".

To say it a little more differently here, but simply, if you use a made-up 90 per cent number and you multiply it times a speculative DCF analysis, you have a made-up speculative damages analysis.

Then we turn for a moment to Patel's 6th -- and frankly it ends up being their 7th and 8th damages analyses as well.

For whatever reason, as the panel may recall, after the five efforts that Versant had at

the crack here, then Patel actually hired a different damages analyst from Ankura. And Ankura, for reasons that are not entirely clear, actually expressly acknowledged that he had not reviewed the expert reports prepared by Versant underpinning their assessments and adopting the cash flow analysis. **17:50**

Ankura does, instead, what Patel has referred to as a negotiation damages, and I know there was some discussion about UK law and whether the concern was UK law or whether the concern was law of other jurisdictions.

The concern, in fact, is none of those things specifically. It is what the UK courts, though, have said about trying to use negotiation damages, and the Morris-Garner case says it as well as any could. "Difficulties [in proof of damages] do not justify the abandonment of any attempt to measure loss ... it is also necessary to recognise that the assessment of a hypothetical release fee is itself a difficult and uncertain exercise ... Such imaginary negotiations have become increasingly elaborate, and a host of questions can emerge as to the basis on which they should be hypothesised ...The artificiality of the exercise can be a

further problem". **17:52**

Now, when the court described that there would be complexity in the negotiations, you may recall this morning a slide actually from the opening from Patel in which there were just all sorts of factors that were listed in terms of what they referred to as data points or information that would be considered as part of a negotiation damages. Well, to be clear for a moment, Mr Dearman, the gentleman from Ankura, has got this theory. He himself concedes it's not possible to attribute a specific monetary value to these data points that he has, and it would depend, as he agrees, on the negotiating position of each of Patel and Mozambique. But he attempts to create some data points based upon things like corporate profits, and something he calls derisking, and something he refers to as an engineering consultancy fee.

I'm going to focus for a moment before trying to get into any of the detail, because I know I will run out of time if I do all of the detail, I'm going to focus on some of the really big problems with the negotiation damages issue in the first place.

Number one, it doesn't match Patel's

theory of the case at all. Patel's theory, as wrong as we believe it to be, is that Patel claims it was supposed to have been awarded or negotiated an MOI -- or sorry, a concession under the MOI. **17:53**

Well, Patel does not allege that it was guaranteed corporate profits from MOI, but even so, Ankura, Mr Dearman, goes and takes a look at financials from Patel, slices them up about six ways, and then decides that the corporate profits from projects in India and other places -- but none in Mozambique -- which just roll up into the corporate profits of Patel would somehow be relevant to not just Patel's negotiating but even Mozambique's negotiating as to why they would agree to a certain release fee. It's all speculation.

Even Patel does not allege it was guaranteed an engineering consultancy fee, but in fact Patel and its expert Ankura try to describe a flat rate engineering consultancy fee, and our expert from Betar will tell you that in Mozambique it's unheard of. They don't use flat rate engineering consultancy fees in Mozambique. So to suggest that there would be a flat rate engineering consultancy fee in Mozambique would again be sheer speculation.

Engineers can be paid on any of many different ways of remuneration and to pick one over the other simply for the simplicity of a calculation is completely inappropriate. **17:55**

In all events, the flaws only further highlight Patel's inaccuracies and speculation.

On slide 179, just by way of a quick highlight for the benefit of everyone, you can see that by the time Ankura is done with the analysis of what he refers to as corporate profits, there are six more data points on the damages theory.

Then Mr Dearman goes into a derisking analysis, and the derisking analysis actually is -- frankly it's sort of complicated to explain, but let me try to say it this way for a moment.

If we turn to slide 181 for just a moment, the theory goes something like this, that there are certain engineering documents that refer to how far along progressed an engineering project is. Either Class 5, which would be infancy, or Class 4 which would be a little more. OK? It actually goes from 5 at the infancy and then 1 when it's essentially complete.

And the guidelines that Mr Dearman had relied upon, with the help of a gentleman by the

name of Comer, had claimed that not only could Mr Comer identify that the project here because of the PFS had actually been moved along that scale toward a more mature project, but that he could use those same guidelines to actually attribute specific ranges of derisking to that. **17:57**

What I mean by that is when you see the PFS you see a project with a cost of $3.1 billion. Mr Comer has suggested that when you move from a Class 5 project to a Class 4 project, you might be able to assume -- incorrectly, by the way, because that is not the way the guidelines work, but that you might be able to assume that the project might have cost overruns at a Class 5 basis that would make the project potentially worth as much as $6.2 billion of costs, whereas at a Class 4 project you'd have a project that's only worth something like, you know, $4.6 billion, and that the answer is that, because that range of costs had narrowed, Mr Dearman hypothesises that there's somehow benefit to that.

To be very perfectly clear, Mr Larry Dysert, our expert, was actually one of the authors of the guidelines that Mr Comer relies upon. Mr Dysert actually looks at what Mr Comer does with

those analyses -- we're on page 184 of the slides now, thank you -- and he says, look, you're not actually allowed to use them that way, and the very guidelines that we're talking about demonstrate that, and I'm going to skip two more because the easiest -- there's a lot of text here and I apologise, but the easiest one is on 187. **17:58**

It says that under the guidelines that Mr Comer was relying upon "It is worth repeating that accuracy range does not determine the class, nor does the class determine the accuracy. Accuracy can only be determined through a quantitative risk analysis".

Now, in the PFS, which we'll get a chance to look at this week, there is no risk register. There is no specific quantitative risk analysis because we're not there yet, but for Mr Comer and Mr Dearman to suggest that they can quantify risk in an outrageous amount of risk that's been derisked in the form of $1.5 billion because of an alleged move in a class is completely incorrect.

In addition, if we go to slide 189 for a moment, in fact if one analyses what the PFS actually says, the project does not move at all based upon the PFS. What happens is Mr Comer takes

a look at the PFS, and he's got a beautiful grid that he puts into his report that tries to analyse at various points in the PFS, some of the things that are supposed to be in the report, did they get into the report yet. And if you have a Class 5 report you'll have some things in your report, and if you have a Class 4 report you'll have some things in your report. **18:00**

What happens here is that he gives credit for some of those things because they're mentioned, not because they're done, and he ignores others that should be done that are not done but, most importantly, Mr Dysert will tell you that in fact that these classes are not meant to be used as a continuum. A project will either be a Class 5 project, or if all of the things were done that were supposed to be done to make the project a Class 4 project, then the project would be a Class 4 project.

What Mr Comer does is try to suggest that the project has moved from Class 5 to the lower end of Class 4, as he puts it, and that's not actually an assessment that's made using the guidelines that are there. Mr Dysert, who wrote the guidelines, can help make very clear what it is those guidelines are

allowed to do. **18:01**

But, most importantly, the answer is the guidelines were never meant to try to quantify damages. Having said that, what Mr Dearman does with Mr Comer's analysis is create still more data points by multiplying some of this derisking analysis times a variety of -- frankly literally he just stepped up the ladder -- 5 per cent, 10 per cent, 15 per cent, 20 per cent, just to give more data points to consider as part of the analysis. It is completely inappropriate, it is entirely speculative, and we will demonstrate through the course of the week.

The only thing -- we're on slide 191 and I appreciate everyone's willingness as I try to go through these a bit -- the only thing that this derisking analysis does is it actually disproves Patel's theory of the case.

Patel claims that its award of the concession was a virtual certainty, even though everyone would agree there were still negotiations that hadn't happened with CFM, and no one knows what that concession would have looked like by the time we were done.

If Comer is to be believed, however, about

how these guidelines work, then even after the PFS, even after the PFS had been submitted to Mozambique, this $3.1 billion project was still subject to cost overruns of as much as 50 per cent or another $1.5 billion going forward. **18:03**

Dr Flores had calculated earlier in the ex ante analysis that any cost overrun greater than 12 per cent reduces Patel's ex ante damages to zero under a DCF analysis, and any cost overrun greater than 22 per cent on Patel's ex post damages reduces those damages to zero. Both of those are all by themselves, meaning that if Comer is to be believed, and it's still reasonably statistically likely that there will be cost overruns of as much as 50 per cent, there are no damages, and, indeed, that's what makes a DCF analysis speculative in the first place when a project has no operating history and, in fact, it hasn't got off the drawing board yet.

At the time of the PFS, quite simply, even Comer's analysis helps demonstrate the same thing that the 2012 financials demonstrated, that the project was not yet viable, it was not remotely put together in a detailed enough fashion to be viable, and when you ran the actual net present value on the cash flows of that project, it was not viable.

There's one more set of data points in **18:05**
this imaginary negotiation. I mentioned it briefly
so I won't stay on it long. But Mr Dearman supposes
that there could be an engineering consultancy with
a flat fee. He uses South African guidelines that
are not applicable in Mozambique to do that, and
that is not appropriate.

In addition, frankly the idea that there
was an engineering consultancy is completely the
opposite of what the actual agreement that Patel
claims existed was. If Patel claims, albeit
wrongly, to be entitled to a direct award of
concession, then the value of that right depends on
building a concession, doing it successfully,
realising the profits, and then being paid back in
22 years. Instead, what Mr Comer and Mr Dearman
have done is create just a right to a percentage fee
based upon costs and an engineering consultancy that
never existed as any part of this case.

In all events, at the end of those things
after the 8th damages theory, this is what our array
of damages looks like.

It is, to borrow a word from this morning,
a plethora, but, more importantly, Claimants have
the burden of proof of the merits of their claims,

including the alleged damages. Putting 20 possibilities as damage claims or data points on a paper and then saying pick one is not satisfying the burden of proof. **18:06**

The only non speculative damages, if any damages were to be awarded, I will say would have been sunk costs. What I heard this morning said that sunk costs are not provable in this case. That means there isn't a damage for this Tribunal to award.

Patel refused or failed to submit any evidence about those costs so that, if there had been any breach, if this Tribunal were to find any breach, there would still be no damages to be awarded.

So quite respectfully, and I appreciate your time and attention at the end of the day here on what is sort of a dense thicket here, the relief that Mozambique seeks in these proceedings based upon the foregoing, dismissing Patel's claims as inadmissible or alternatively declining jurisdiction, sustaining Mozambique's objections to jurisdiction, in the alternative dismissing Patel's case on the merits and, as I've just mentioned, awarding no damages, ordering Patel and its

litigation funder to pay Mozambique's attorneys' fees and all costs and expenses, and granting Mozambique such further or other relief as the Tribunal shall deem appropriate. **18:08**

On behalf of the Republic of Mozambique, we appreciate your time.

PRESIDENT: Thank you. Thank you, Mr Brown.

Does this finalise your presentation?

MR BROWN: It does, yes. Thank you.

PRESIDENT: Very good. Can we get a time check from the secretary?

MS JALLES: Respondent used two hours and 25 minutes.

PRESIDENT: Thank you. Very good.

So we have two further issues to discuss now. One is Dr Flores and the other are some documents. Let's try to be as quick as possible. Dr Flores cannot come on Friday?

MS BEVILACQUA: That is correct, Mr President. Dr Flores is not available on Friday.

PRESIDENT: But he is available on Saturday in the morning?

MS BEVILACQUA: Yes, he is, and he will be able to be here in person on Saturday.

PRESIDENT: In the morning? **18:10**

MS BEVILACQUA: In the morning.

PRESIDENT: Very good. Can we get an e-mail from him confirming that he's not available on Friday?

MS BEVILACQUA: Yes, certainly.

PRESIDENT: And let's do the following. I mean, to simplify things it would be better if he was here on Friday but he is not here, and these things happen and we must all be flexible, and it can happen to all of us.

So we have been deliberating on this and will do the following. Namely, we'll probably end Friday rather early because -- except if we have some slide in hours but let's assume that we finalise with the quantum expert from Claimant, and then at that very moment, so when we close, Dr Flores should send his presentation to the secretary. Only to the secretary.

And then next day he should then stick to his presentation so that we set off the perceived or real advantage of having some more time between the presentation of one expert and the other, and we sort it that way because, yes, we have to be flexible, and it may happen to other witnesses in

these days. **18:11**

The second point is there was a huge list -- I look at it and it's very long -- a very long list of documents which you want to submit, and that's really very, very, very, very late. I mean, we cannot go -- it's too many documents in a file which is extremely extensive already.

We could only see -- so there is no way we can now go through the list of four pages of documents. Is there really -- because I -- this is now off the record, Diana.

I think we can close the record for the day. It has been a very long day for our court reporters. Let's close -- if you agree let's close the court reporters, and I think we can also close the interpretation. Thank you very much for our interpreters, it must have been a very long day, and also for our court reporters.

(The hearing was adjourned at 6.12 pm)